The Supreme Court Civil Procedure Rules, 2022

PRACTICE GUIDE

January 2024

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FOREWORD TO THE REVISED PRACTICE GUIDE, 2024

The Supreme Court Civil Procedure Rules, 2022 (‘CPR 2022’) came into effect on March 1, 2023. At that time, it was predicted that the new regime would introduce significant change to civil litigation practice in The Bahamas. It was also foreseen that there would likely be a need for periodic review of the new rules as they were engaged and evolved in order to better achieve the “overriding objective”. That overriding objective is “to enable the Court to deal with cases justly and at proportionate cost”. Since the inception of the rules, there have been the promulgation of two sets of amendments as well as the introduction of new Practice Directions. That activity reflects the commitment, agility and responsiveness of bench and bar to a regime designed to enhance the administration of justice. This revised Practice Guide, January 2024, captures those amendments and new Practice Directions. It also, impressively, reflects some of the local jurisprudence emanating from matters adjudicated under the new regime.

The caveats issued with the initial Practice Guide remain true for this Revised Practice Guide. The notes herein do not restrict the exercise of a judicial officer’s discretion nor do they constitute a substitute for counsel’s own research. This publication is not an official rendition of the CPR 2022, as amended. The value of this revised guide lies in its insight and assistance in understanding the general application of the rules and in highlighting local jurisprudence since the enactment of the rules.

I acknowledge and thank Johnathan Deal, Attorney-at-law and Judicial Research Counsel, for his stellar contribution and work in capturing the necessary revisions to allow for the timely execution of a January 2024 publication. I thank Hon. Madam Justice Camille Darville-Gomez and Hon. Madam Justice Carla Card-Stubbs, vice presidents of The Bahamas Judicial Education Institute (‘BJEI’), for their assistance in the production of this revised Practice Guide. The Bahamas Judicial Education Institute (‘BJEI’) is committed to providing tools relevant to the education and professional training of judicial officers.

The rules are still in fledgling stage but it is apparent that the reform has ushered in a refreshing commitment to a goal of the fair, just, cost-effective, expeditious and proportionate resolution of disputes. This 2024 Guide may be seen as a tool that ought to assist stakeholders in navigating their way to attaining that goal.

Sir Ian R. Winder
Chief Justice
January 31, 2024

FOREWORD TO PRACTICE GUIDE, 2023

The Supreme Court Civil Procedure Rules, 2022 ('CPR 2022') come into effect on March 1, 2023. These rules will significantly change the procedural landscape of civil litigation practice in The Bahamas. Part 1 of the new rules provide for an "overriding objective", namely, "to enable the Court to deal with cases justly and at proportionate cost." The new regime is designed to enhance the administration of justice by dealing with cases before the court in a manner that is responsive, fair, just, cost-effective, expeditious and proportionate. This overriding objective may be said to encapsulate the spirit of the reform occasioned by these rules.

The coming into force of the CPR 2022 not only ushers in significant changes to the rules of civil procedure in this jurisdiction, it also heralds a major shift in approach to the resolution of disputes brought before the courts – a shift which will benefit from the cooperation of bench and bar. With this in mind, it was thought useful to craft guidance notes to aid in the transition to the new rules. This Practice Guide should prove useful to both Bench and Bar as litigants navigate the new landscape. However, there are several caveats. This guide is not meant to be exhaustive but it does serve as a context for the rules together with some insight as to how the rules are meant to be applied. It should serve to create some certainty and consistency in approach in the initial stages. Guidance notes serve merely as a guide and do not supplant a judicial officer's jurisdiction nor can it restrain or restrict the exercise of that officer's discretion. The guidance notes cannot replace counsel's own research or displace his/her submissions. Importantly, while this guide aims to accurately capture the CPR 2022, it does not purport to be an official rendition of the CPR 2022. Much of the learning in the guidance notes has been drawn from other jurisdictions which have already implemented similar rules. No doubt, there will be areas where locally-appropriate practices will develop over time, together with the local jurisprudence. The usefulness and value of this guide (and upcoming editions) will be to offer context, insight and assistance in understanding the general application of the rules. Local practice and jurisprudence will develop. Therefore, it is

anticipated that the guide will be edited and updated from time to time. Members of the Bench and Bar should endeavor to rely on updated guidance notes when available.

The rules will be supplemented by Practice Directions. The first set of Practice Directions that pertain specifically to the CPR 2022 (Practice Directions 1 – 8 of 2023) were issued on February 27, 2023. Amendments to the CPR 2022 are forecasted to take place to capture lacunae and to provide for desired clarity or processes and procedures that further the overriding objective. This is a dynamic process in the spirit of reform, to truly capture a system responsive to enhancing the administration and delivery of justice. Therefore, for counsel and his/her client, it will be paramount that they stay abreast of the latest developments which would include Practice Directions and updates to the guide.

I thank the Contributors and the Editorial Committee for their work in making this guide a reality. I thank Hon. Madam Justice Camille Darville-Gomez and Hon. Madam Justice Carla Card-Stubbs for coordinating much of the work gone into producing this Initial edition of the Practice Guide.

The Bahamas Judicial Education Institute ('BJEI'), chartered in October, 2019, is mandated to deliver relevant ongoing education and professional training to judicial officers in order to enhance the delivery of justice. Given its aim, it is prudent that the BJEI will, from time to time, facilitate training opportunities and undertake activities for members of the Bar and other stakeholders involved in the administration of justice. In anticipation of the implementation of the rules, both the Bench and Bar undertook (and continue to undertake) training sessions separately and together in preparation for the new procedural requirements. Some of the training sessions of the Bar have been, and are being, facilitated by the BJEI. The publication of this Practice Guide, a collaborative venture, is yet another activity undertaken to educate both Bench and Bar and which is designed to enhance the delivery of justice in this jurisdiction.

Sir Ian R. Winder
Chief Justice
March 1, 2023

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This project was a tremendous undertaking which was made possible because of the dedication and commitment of several members of the bench and bar. Each person undertook to review, research and write on specific parts of the new rules.

The BJEI acknowledges those persons who contributed to this initial practice guide - both the members of the bench and the members of the bar. Without their cooperation and collaboration, these notes could not have been compiled in time for release on March 1, 2023 – the date when the new rules come into effect.

The BJEI is grateful to the following members of the bench and bar, who together with their teams, undertook research and submitted guidance notes:

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PRELIMINARY

1. Citation and commencement.

(1) These Rules may be cited as the Supreme Court Civil Procedure Rules, 2022.
(2) These Rules shall come into operation on such date to be appointed by the Rules Committee by notice published in the Gazette.

2. Application of Rules

(1) Subject to paragraph (4), these Rules shall —
- (a) apply to all civil proceedings commenced in the Court on or after the date of commencement of these Rules;
- (b) not apply to civil proceedings commenced in the Court prior to the date of commencement of these Rules except where —
  - (i) a trial date has not been fixed for those proceedings; or
  - (ii) a trial date has been fixed for those proceedings and that trial date has been adjourned.

(2) In the case of civil proceedings —
- (a) referred to in paragraph (1)(b)(i), the claimant must fix a date, time and place for a case management conference under Part 27 after a defence has been filed and give all parties at least twenty-eight days' notice of the conference; and
- (b) referred to in paragraph (1)(b)(ii), an application to adjourn a trial date is to be treated as a pre-trial review and these Rules apply from the date that such application is heard;

(3) Where in proceedings commenced before the date of commencement of the Rules, the Court has to exercise its discretion, it may take into account the principles set out in these Rules and, in particular Part 1 and Part 25.
(4) These Rules shall not apply to —
- (a) bankruptcy and insolvency proceedings, including winding up of companies;
- (b) family proceedings except proceedings under the Child Protection Act (Ch. 132);
- (c) probate proceedings except contentious probate proceedings as provided for in Part 63;
- (d) proceedings in which the Court is acting as a Prize Court;
- (e) any other proceedings in the Court instituted under any enactment, in so far as rules made under that enactment regulate those proceedings.

3. Revocation
The Rules of the Supreme Court (S.I. No. 48 of 1978) are hereby revoked.

4. Savings and transitional.
Notwithstanding rule 3, proceedings commenced in the Court prior to the commencement of these Rules, to which these Rules in accordance with rule 2(1)(b) do not apply, shall continue under the Rules of the Supreme Court (S.I. 48 of 1978).

Notes:
The CPR came into operation on 1 March 2023 pursuant to the *Supreme Court Civil Procedure Rules, 2022 (Appointed Day) Notice, 2023* and have since been amended by the *Supreme Court Civil Procedure (Amendment) Rules, 2023* and the *Supreme Court Civil Procedure (Amendment) (No.2) Rules, 2023*.

The CPR are, like equivalent regimes in other jurisdictions, intended to serve as a "new procedural code".

The CPR apply to litigants in person and legally represented parties equally.

The CPR are supplemented by the Court's inherent jurisdiction as a superior court of law, which is a residual source of powers which the Court may draw upon as necessary. The inherent jurisdiction cannot be exercised in such a way as to lay down a procedure that is inconsistent with the CPR (*Texan Management v Pacific Electric Wire and Cable Co Ltd [2009] UKPC 46*) or to circumvent the CPR (*Belgravia International Bank & Trust Company Limited v Sigma SCCivApp No. 75 of 2021*).

The preliminary provisions of the CPR ("preliminary rules") define how the CPR may be cited, stipulate the commencement date of the CPR, outline the application of the CPR, revoke the Rules of the Supreme Court (S.I. No. 48 of 1978) ("RSC") and provide for the continued application of the RSC to proceedings which (i) are not excluded by preliminary rule 2(4) and (ii) to which the CPR do not apply in accordance with preliminary rule 2(1)(b).

The CPR apply to all civil proceedings commenced in the Supreme Court on or after 1 March 2023 unless the proceedings (i) are bankruptcy and insolvency proceedings, including winding up of companies; (ii) family proceedings except proceedings under the *Child Protection Act*; (iii) probate proceedings except contentious probate proceedings as provided for in Part 63; (iv) proceedings in which the Court is acting as a Prize Court; or (v) any other proceedings in the Supreme Court instituted under any enactment, in so far as rules made under that enactment regulate those proceedings (for example, the *Rules of Court (Reciprocal Enforcement of Judgments) 1952* promulgated under the *Reciprocal Enforcement of Judgments Act*).

The CPR apply to civil proceedings commenced in the Supreme Court prior to 1 March 2023 where (i) a trial date has not been fixed for those proceedings; or (ii) a trial date has been fixed for those proceedings and that trial date has been adjourned; provided that, in either case, the proceedings are not proceedings which fall within preliminary rule 2(4), i.e., bankruptcy and insolvency proceedings etc.

Practice Direction No. 9 of 2023 clarifies that, where the CPR applies to proceedings commenced prior to the commencement date of the CPR:

(a) any new interlocutory application which has to be made or any new document which has to be filed, including a defence, must comply with the CPR; and
(b) where the CPR applies to an application which has been filed prior to the commencement date of the CPR but which has not been heard by the Court, the parties are not required to file a new application. The Court may proceed to determine the application on the documents already filed with the Court. However, the Court may permit the parties to file any additional material which may be required for the application to be properly considered under the CPR.

Practice Direction No. 9 of 2023 also provides that a party may apply to a judge by notice of application prior to the convening of a case management conference for directions in respect of any proceedings commenced prior to the commencement date of the CPR where a trial date has not been fixed for those proceedings.

Neither the CPR nor Practice Direction No.9 of 2023 specifies what approach should be taken where a judge proposes to deliver judgment on an application which was heard before the commencement date of the CPR and the CPR now apply to the proceedings. The main approach has been to apply the RSC to the application, presumably on the basis that that is the footing on which the application was argued (see, e.g., *AML Foods Limited v Dennis Williams et al 2018/CLE/gen/00169* (3 April 2023); *Pearce Holdings Limited v First Caribbean (International) Bank (Bahamas) Limited 2012/CLE/gen/01592* (26 April 2023); *Sheila L.*

Gomez v Trevor Rolle (Executor of the Estate of Mark Johnson) 2017/CLE/gen/00695 (5 September 2023); and *WDC Maria Daxon v W/Insp Donell Brown et al 2018/PUB/con/00022* (30 November 2023)).

The CPR are secondary legislation made by the Rules Committee constituted under section 75 of the *Supreme Court Act* pursuant to the authority conferred by section 76 of the same Act. The CPR are rules of procedure which govern how litigation is to be conducted and, accordingly, as a form of procedural law, do not extend the jurisdiction of the Court from that which the law provides and do not take away or add to any substantive rights belonging to the parties.

Cases:

Andrew Smith and Sophia Smith v First Caribbean International Bank (Bahamas) Limited and Insurance Management (Bahamas) Limited 2020/CLE/gen/00662 (9 August 2023) (Where a trial date is vacated in proceedings which were commenced prior to the commencement date of the CPR, the CPR will apply to the proceedings pursuant to preliminary rule 2(1)(b). The intention behind preliminary rule 2(1)(b) and preliminary rule 4 is to permit civil proceedings commenced prior to the commencement date of the CPR to proceed to trial under the RSC without being disturbed by the introduction of the CPR, but only if and for so long as the trial dates fixed before the commencement date of the CPR are to be kept. An application for relief from sanctions which was made respecting sanctions imposed prior to the introduction of the CPR was decided on the basis of the CPR because the trial date set before the commencement date of the CPR had been vacated.)

Hartlyn M. Roberts et al v Steve McKinney 2023/CLE/gen/0053 (September 2023) (The CPR were applied to an application to set aside a conditional appearance filed on 30 March 2023 in proceedings commenced on 24 January 2023 where no defence or appearance had been entered. It was held that a notice of conditional appearance was not relevant under the CPR and the defendant needed to file an acknowledgment of service or defence.)

Deskennie Ltd v Springfield Investments Ltd 2015/CLE/gen/FP/00422 (The provisions of the CPR relating to the extension of time to serve a claim form were applied in relation to an application filed on 19 July 2023 to extend the validity of an originating summons filed on 14 December 2015 and to authorize substituted service.)

The Committee to Restore Nymox Shareholder Value, Inc (CRNSV) et al v Paul Averback et al (3 November 2023) (This was a straightforward application of the CPR to an application made in proceedings commenced by claim form and statement of claim filed on 3 October 2023.)

*MS Amlin Corporate Member Limited v Buckeye Bahamas Hub Limited 2020/COM/adm/00016 (*4 December 2023) (The CPR were applied to an application to amend the claimant's statement of claim as the action and the application were governed by the CPR notwithstanding the proceedings were commenced prior to the commencement date of the CPR.)

The Attorney-General v Securities and Exchange Commission and others 2023/CLE/gen/00125 (6 December 2023) (The CPR were held to apply to the examination of a witness pursuant to a letter of request issued under the *Evidence (Proceedings in Other Jurisdictions) Act* where the order for examination was made after the commencement date of the CPR and an application to vary that order.)

Robert Forbes v Ministry of Tourism and Attorney General of the Commonwealth of The Bahamas 2021/COM/lab/00038 (7 December 2023) (The CPR were held to apply to the issue of costs where a trial date which had been set before the commencement date of the CPR had been vacated and the trial was held after the commencement date of the CPR.)

Dale Peterson v Rocky Griffith 2019/CLE/gen/00596 (14 December 2023) (The CPR were applied to an application for summary judgment to enforce a foreign judgment made before a trial date was set in the proceedings, which had been commenced before the commencement date of the CPR.)

Dorothy Bain v Royal Bank of Canada (Bahamas) limited 2014/CLE/gen/00283 (29 December 2023*)* (The CPR were applied to an application to amend and a cross-application to strike out or for summary judgment in a banking action commenced on 25 August 2014.)

Jaffray v Society of Lloyd's [2007] EWCA Civ 586 (The English CPR, being rules of court, cannot extend the jurisdiction of the court from that which the law provides, but can only give directions as to how the existing jurisdiction should be exercised.)

Abid v Nata Lee Ltd [2014] EWCA Civ 1652 (The English CPR do not make specific or separate provision for litigants in person. The fact that a party is not professionally represented is not of itself a reason for the disapplication of rules, orders and directions, or for the disapplication of that part of the overriding objective of the English CPR which places great value on the requirement that rules, orders and directions be obeyed by litigants. There may be cases in which the fact that a party is a litigant in person has some consequence in the determination of applications for relief from sanctions, but this is likely to operate at the margins.)

Jones v Longley [2015] EWHC 3362 (Ch) (Under the English CPR there are not two sets of rules, one for lawyers and one for laymen. If a layman embarks on litigation without a lawyer, he cannot expect to be judged by rules different from those which apply to litigants legally represented.)

Barton v Wright Hassall LLP [2018] UKSC 12 (Under the English CPR, a litigant's lack of representation will often justify making allowances in making case management decisions and in conducting hearings but fundamentally the CPR applies equally to represented and unrepresented litigants. Unrepresented litigants are not entitled to any greater indulgence in complying with the CPR than represented litigants.)

PART 1 - OVERRIDING OBJECTIVE OF RULES

1.1 The Overriding Objective.

(1) The overriding objective of these Rules is to enable the Court to deal with cases justly and at proportionate cost.

(2) Dealing justly with a case includes, so far as is practicable:

- (a) ensuring that the parties are on an equal footing;
- (b) saving expense;
- (c) dealing with the case in ways which are proportionate to —
  - (i) the amount of money involved;
  - (ii) the importance of the case;
  - (iii) the complexity of the issues; and
  - (iv) the financial position of each party;
- (d) ensuring that it is dealt with expeditiously and fairly;
- (e) allotting to it an appropriate share of the Court's resources, while taking into account the need to allot resources to other cases; and
- (f) enforcing compliance with rules, practice directions and orders.

Notes:

The overriding objective of the CPR is to enable the Court to deal with cases justly and at proportionate cost. It requires an objective and even-handed approach (*Al-Zahra (PVT) Hospital v DDM [2019] EWCA Civ 1103.)* Appellate courts have and can lay down binding principles regarding what justice requires in the context of litigation (such as the principle of finality) and this informs the proper approach to the interpretation and application of the overriding objective (*Sainsbury's Supermarkets Ltd v Visa Europe Services LLC et al [2020] UKSC 24*).

It has long been established that the purpose of procedural rules is to facilitate the achievement of substantive justice and that the proper relation of procedure to justice is that of handmaid and not mistress (see, e.g., *Coles v Ravenshear [1907] 1 KB 1*.) The fact that the Court is mandated by the CPR to deal with cases justly means that there will be considerably less tolerance for arid squabbles about insubstantial technicalities than in the past. The Court must ensure that justice is done at proportionate cost in accordance with the overriding objective without being diverted by technicalities.

This overriding objective is patented almost verbatim from the English CPR. It has been described as "a statement of the overall purpose of the civil justice system".[1] Prominence is given to the overriding objective to compensate for the fact that these rules are not designed to deal with every question which may arise in litigation.[2] In creating the overriding objective, Lord Woolf, in his *Access to Justice - Final Report*, described it as "a compass to guide courts and litigants and legal advisors as to their general course". As a "compass", the overriding objective does not in and of itself empower the Court to do anything or grant to the Court any particular discretion. Rather, it is a statement of the philosophy that underpins the CPR.

CPR 1.1(2) provides an non-exhaustive list of factors that are included in dealing justly with a case. The factors are not exhaustive and the factors listed do not always point in the same direction. It is for the judge managing the case to balance the factors identified in CPR 1.1(2). Because CPR 1.1(2) does not purport

[1] *A Practical Approach to Civil Procedure*, 21st ed, Stuart Sime, page 32.

[2] *Commonwealth Caribbean Civil Procedure*, 4th ed, G. Kodilinye and V. Kodilinye page 5.

to be exhaustive, a judge may take into account other relevant factors which bear upon dealing with the case justly.

When dealing with an application, it is not incumbent on the Court to refer in terms to CPR Part 1. Nor is it incumbent on the Court to work through each element in CPR 1.1(2) like a checklist before coming to a decision on the application. There is only overriding objective, which is to deal with cases justly and at proportionate cost, and it is ultimately the overriding objective which the Court must seek to give effect to.

Cases:

CPR 1.1 (1) THE OVERRIDING OBJECTIVE

Andrew Smith and Sophia Smith v First Caribbean International Bank (Bahamas) Limited and Insurance Management (Bahamas) Limited 2020/CLE/gen/00662 (9 August 2023) (The Court considered an application for directions and relief from sanctions which was made by summons and not by notice of application and which referred to the provisions of Order 31A of the RSC rather than the correct provisions of the CPR. It was held that the use by a party of a defective form should not be fatal to proceedings in the absence of genuine prejudice in light of the overriding objective. The Court also cited *Charmaine Bernard v Ramesh Seebalack*, *infra*, with approval.)

Glenard Evans v Airport Authority 2022/CLE/gen/01521 (23 November 2023) (It was held that, under the CPR, the Court is not to be pre-occupied with bald technicalities but is to deal with a case justly and at proportionate cost. Dealing with a case justly includes saving expense and ensuring that the case is dealt with expeditiously and fairly and using no more than proportionate resources on a case.)

The Attorney-General v Securities and Exchange Commission and others 2023/CLE/gen/00125 (6 December 2023) (It was held that the overriding objective requires a court to take into account relevant circumstances. A court is required to make arrangements for a hearing that is fair and that does not place one party at a disadvantage. A fair hearing includes giving a party a reasonable opportunity to present its case. The Court has a discretion whether to dispose of applications in the absence of an applicant. The Court will have regard to the overriding objective in exercising its discretion to do so.)

Brown v Central Bank of Belize & Provident Bank & Trust Belize BZ 2007 CA Civil Appeal no. 6 of 20075 (The Belizean Court of Appeal held that a judge had been wrong to dismiss an application for permission to bring judicial review proceedings on the basis that the application had not been verified by evidence on affidavit, as required by Belize CPR 56.(4), because the affidavit in support of the application said it was sworn to in Belize City before a US notary. The Belizean Court of Appeal held that the overriding objective is the overarching principle which governs Belize's CPR, under which technicalities have given way to the overriding objective which is "to enable the court to deal with cases justly".)

Charmaine Bernard v Ramesh Seebalack [2010] UKPC 15 (The JCPC held in an appeal from a decision of the Trinidad and Tobago Court of Appeal that, under Trinidad & Tobago's CPR (the "T&T CPR"), it is no longer right to say that the court's function is to do substantive justice on the merits and no more. The overriding objective adds the imperatives of deciding cases expeditiously and using no more than proportionate resources. It is therefore not correct to submit that, as a rule, if an amendment can be made without causing any prejudice to the defendant, justice requires that it be allowed.)

Crick v Kurt Brown [2020] UKPC 32 (The JCPC held in an appeal from a decision of the Trinidad and Tobago Court of Appeal that the overriding objective is central to case management under the T&T CPR. The JCPC held it is not incumbent on the court to refer in terms to T&T CPR Part 1. Nor is it incumbent on the court to work through each element in the definition of the overriding objective in T&T CPR Part 1 before coming to a decision on an application. The court is entitled to focus on the most important features of the case which in its view indicate the just disposition of the application before the court. Simple case-management decisions do not call for elaborate reasons which would involve the court working through the factors set out in T&T CPR Part 1 as aspects of the overriding objective as if they were a checklist.)

Her Worship Magistrate Marcia Ayers-Caesar v BS (by his kin and next friend Karen Mohammed) Civil Appeal P 252 of 2015 (The Trinidad and Tobago Court of Appeal held that furthering the overriding objective as provided for in T&T CPR 1.1 requires both active judicial case management and case flow management, not only of the actual case itself, but also of all cases in the judge's docket. The principles of equal footing, saving expense, proportionality, expedition and appropriate allotment of court resources, read in the context of the objectives of case management (Part 25) and the powers of the court in managing a case (Part 26), demonstrate that while litigation is initiated by parties, the ultimate power and control over how that litigation is managed and shaped, including deciding what issues arise for determination and the order of their determination, reside with the judge. The role of the judge under the T&T CPR is significantly different from what previously obtained.)

Redland Aggregates Ltd v Shephard Hill Civil Engineering Ltd [1999] Lexis Citation 4696 (The English Court of Appeal held that the court should be alert to avoid the risk of selective use of the different ingredients of the overriding objective and of subjecting them to over-elaborate analysis. There is only one overriding objective. The weight and role given to the various individual ingredients of that objective will inevitably vary according to the circumstances of the case.)

Holmes v SGB Services Plc [2001] EWCA Civ 354 (The English Court of Appeal held that, in making a decision under the overriding objective of the English CPR, the court has to balance all those considerations that are set out under that heading without giving any one of them undue weight. It is essentially a matter for the judge's management.)

Treasure Island Company v Audubon Holdings Limited BVI Civil Appeal No. 22 of 2003 (The Eastern Caribbean Court of Appeal held that it must not be assumed that a litigant can intentionally flout the rules in the EC CPR and then ask for the court's mercy by invoking the overriding objective. The overriding objective does not in or of itself empower the court to do anything or grant to the court any discretion. It is a statement of the principle to which the court must seek to give effect when it interprets any provision or when it exercises any discretion specifically granted by the rules. Any discretion exercised by the court must be found not in the overriding objective but in the specific provision itself.)

Wendell Steele v Lennox Petroleum Services Limited CV 2009-04689 (Trinidad and Tobago) (A second personal injury action was commenced under the T&T CPR after an earlier personal injury action between the same parties on the same facts and issues was discontinued by the claimant after it reached the pre-trial review stage because the claimant failed to file and serve witness statements on quantum. The action was struck out as an abuse of process after taking into consideration the overriding objective in the absence of any special reason for the re-litigation of the same points between the same parties.)

AIC Ltd v Federal Airports Authority of Nigeria [2022] UKSC 16 (The UKSC held that the question of whether a judge should reconsider an order made but not sealed under the English CPR is to be decided by the judge doing justice in accordance with the overriding objective. The overriding objective implicitly affirms the principle of finality. Litigation cannot be conducted at proportionate cost, with expedition, with an appropriate share of the court's resources and with due regard to the rules of procedure unless it is undertaken on the basis that a party brings his whole and best case to bear at the trial or other hearing when a matter in dispute is finally to be decided subject only to appeal. This means that, on receipt of an application by a party to reconsider a final judgment and/or order before the order has been sealed, a judge should not start from anything like neutrality or evenly-balanced scales. The finality principle will always be a weighty matter in the balance against making a different order but the weight to be given to it will inevitably vary, depending in particular upon the nature of the order already made, the type of hearing at the end of which it was made and the type of proceedings in which it was made.)

CPR 1.1(2)- OVERRIDING OBJECTIVE "INCLUDES"

C O Williams Construction St. Lucia Limited v Inter-Island Dredging Co. Ltd HCVAP 2011/017 (The Eastern Caribbean Court of Appeal held that the word "includes" in EC CPR 1.1(2) suggests that the matters listed in EC CPR 1.1(2) are not exhaustive of the matters to be taken into account when the court strives to deal

justly with cases and the court may take into account common law principles decided under old rules of court. However, in applying such principles the court's discretion by its very nature should be guided and not fettered by the principles, bearing in mind the significant changes heralded by the EC CPR. The court should be cautious in applying the common law principles under the old rules which may not necessarily reflect the transformation under the new regime.)

Roland James v The Attorney General of Trinidad and Tobago Civ App No P044 of 2014 (The Trinidad & Tobago Court of Appeal held that the list of factors in T&T CPR 1.1(2) is not intended to be exhaustive and in each case where the Court is asked to exercise its discretion having regard to the overriding objective, it must take into account all relevant circumstances.)

Claudette Edwards v Quest Security Services Limited Claim No. HCV 1124 of 2005 (By being non-exhaustive, JAM CPR 1.1(2) recognizes that other considerations are important in dealing with cases justly. One of the unarticulated considerations must be the right of access to the courts guaranteed by the Constitution. The CPR cannot have been intended to emasculate that right. The consequence is that a litigant should not be barred from litigation unless he has committed some "egregious sin".)

CPR 1.1(2)(a)- ENSURING PARTIES ARE ON EQUAL FOOTING

Maltez v Lewis (1999) The Times, May 4, 1999 (The English High Court held that the concept of "ensuring parties are on an equal footing" in English CPR 1.1(2) does not affect a party's fundamental right to be represented by counsel of their choice and refused to make an order debarring the defendants from instructing leading and/or senior counsel in circumstances where the claimant was only represented by junior counsel.)

McPhilemy v Times Newspapers Ltd [1999] EWCA Civ 1464 (The English Court of Appeal held that, if a party, because of his or her personal circumstances, wishes the court to restrain the activities of another party with the object of achieving greater equality between them, then that party must behave in a way which makes it clear that he or she is conducting the proceedings in a manner which demonstrates a desire to limit the expense of the proceedings as far as practical.)

Rowland v Block [2002] EWHC 692 (QBD) (A claimant was permitted by the English High Court to give evidence via video link rather than in court as he was subject to a request for extradition to the United States. If the claimant was required to attend court to give evidence he would be liable to arrest and, if he did not attend, the only alternative would be for his witness statement to be read pursuant to the Civil Evidence Act notice. Accordingly, the parties would not be on equal footing if an order were made requiring him to give evidence in court.)

Kirkman v EuroExide Corporation (CMP Batteries Ltd) [2007] EWCA Civ 66 (The English Court of Appeal held that "ensuring parties are on equal footing" in English CPR 1.1(2) means that it is desirable for each party to have permission to deploy similar resources. Each party will, in general, be limited to instructing the same number of experts; the number will depend upon what is proportionate, bearing in mind the importance and complexities of the issues in the case. However, the desirability for equality of arms does not mean there is an absolute rule that, in every case, the parties must be limited to calling the same number of experts.)

Premier Exports London Ltd v Bhogadi [2021] EWHC 3500 (Ch) (The English High Court held that "ensuring parties are on equal footing" militated against varying a disclosure order to permit the only party with knowledge of the particular transactions to go through documents and extract what they considered relevant as opposed to providing the full documents.)

CPR 1.1(2)(b)- SAVING EXPENSE

Brown v Central Bank of Belize & Provident Bank & Trust Belize BZ 2007 CA Civil Appeal no. 6 of 20075 (The Belizean Court of Appeal held that application for extension of time ought to have been granted to amend a minor defect in an affidavit in circumstances where it would save expense.)

Pastouna v Black [2005] EWCA Civ 1389 (The English Court of Appeal held that it is incumbent on those advising parties appearing before the court to take all the steps they can in accordance with English CPR 1.1 and 1.3 to reduce the cost of the proceedings. This includes taking advantage of such cost-saving facilities as video-conferencing whenever they are available and it is appropriate to use them.)

Swain v Hillman *[1999] EWCA Civ 1503* (The English Court of Appeal held that, under the English CPR, active case management is to be implemented with a view to saving expense.)

CPR 1.1(2)(c) – PROPORTIONALITY

Cable v Liverpool Victoria Insurance Co Ltd [2020] EWCA Civ 1015 (The English Court of Appeal held that the court has power to strike out a prima facie valid claim where there is abuse of process. However there has to be an abuse, and striking out has to be supportive of the overriding objective and proportionate to the abusive conduct. The correct approach to an application to strike out for abuse of process is first to determine whether the claimant's conduct was an abuse of process. If it is established the claimant's conduct was an abuse of process, the court then has to exercise its discretion as to whether or not to strike out the claim. At that second stage, the proportionality of the sanction is very much in issue.)

Jameel (Youseff) v Dow Jones & Co Inc [2005] EWCA Civ 75 (The English Court of Appeal held that it is no longer the role of the court simply to provide a level playing-field and to referee whatever game the parties choose to play upon it. The court is concerned to ensure that judicial and court resources are appropriately and proportionately used in accordance with the requirements of justice. Having regard to the overriding objective and principles of proportionality, a claim might therefore properly be struck out as an abuse of process where "the game is no longer worth the candle".)

McPhilemy v Times Newspapers Ltd [1999] EWCA Civ 1464 (The English Court of Appeal held that, under the English CPR, the court will consider the issue of proportionality in determining whether to permit an amendment.)

Lownds v Home Office [2002] EWCA Civ 365 (The English Court of Appeal held that, under the English CPR, the requirement of proportionality now applies to decisions as to whether an order for costs should be made and to the assessment of the costs which should be paid when an order has been made.)

CPR 1.1(2)(d) – EXPEDITION AND FAIRNESS

Cobbold v London Borough of Greenwich [1999] EWCA Civ 2074 (The English Court of Appeal held that the overriding objective of the English CPR is that the court should deal with cases justly. That includes, so far as is practicable, ensuring that each case is dealt with not only expeditiously but also fairly. Amendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon provided that any prejudice to the other party or parties caused by the amendment can be compensated in costs, and the public interest in the efficient administration of justice is not significantly harmed.)

Henderson v Dorset Healthcare University Foundation NHS Trust [2016] EWHC 3032 (QB) (The English High Court held that the court no longer approaches the exercise of the discretion to permit amenmdents on the basis that the court's task is merely to adjudicate between the rival parties, without regard to other considerations. The overriding objective requires a host of additional considerations to be brought into play. Moreover, when considering fairness between the parties the court takes a more searching look than it once did at the prejudice that a party will suffer, and whether that can truly be compensated in costs.)

CPR 1.1(2)(e) – ALLOTTING AN APPROPRIATE SHARE OF THE COURT'S RESOURCES

(SBJ) Stephenson Limited v Mandy (1999) The Times, 12 July 1999 (The English High Court found that it would not be a good use of the court's resources to explore the merits of an appeal against an interlocutory injunction when the trial date was less than a month away.)

Albon (trading as NA Carriage Co) v Naza Motor Trading Sdn Bh (no 5) [2007] EWHC 2613 (Ch) (The English High Court held that the exercise of the court's discretion whether to grant an adjournment is governed by the terms of the English CPR and in particular the overriding objective. The considerations held critical in pre-CPR authorities are relevant, but are not decisive. The need to allot an appropriate share, and no more than the appropriate share, of the court's resources is one of the considerations that will weigh against the grant of an adjournment.)

Andrew Smith and Sophia Smith v First Caribbean International Bank (Bahamas) Limited and Insurance Management (Bahamas) Limited 2020/CLE/gen/00662 (9 August 2023) (It was held that it would not be a good use of the court's resources to examine extensively whether an unless order had been served in circumstances where it made no difference to the outcome of the application.)

Norwich Union Linked Life Assurance Ltd v Mercantile Credit Co Ltd [2003] EWHC 3064 (Ch) (The English High Court held that, where a claimant introduced a substantial amount of evidence and raised a number of legal arguments on a question which could be fully answered only once the facts were found and, even if the application had succeeded those facts would still need to be investigated, the court was entitled to conclude summarily that it was not a suitable application and to decline to go into the detail of the arguments.)

1.2 Application of overriding objective by the Court.

(1) The Court must seek to give effect to the overriding objective when —

(a) exercising any powers under these Rules;

(b) exercising any discretion given to it by the Rules; or

(c) interpreting these Rules.

(2) These Rules shall be liberally construed to give effect to the overriding objective and, in particular, to secure the just, most expeditious and least expensive determination of every cause or matter on its merits.

Notes:
CPR 1.2 requires the court to seek to give effect to the overriding objective in applying the CPR. The overriding objective is not only a statement of the components which the Court must consider in applying the CPR, it is also a major aid to the interpretation of the rules themselves.[3] Resort to the overriding objective must, however, give way to plain language circumscribing any power or discretion conferred by the rules. Cases decided pre-CPR remain relevant where the provisions being considered by the Court are the same or substantially the same. Additionally, where pre-CPR authorities deal with procedural principles which have been retained in the CPR, such authorities continue to add value to the Court's considerations.

[3] The Caribbean Civil Court Practice 2011 page 62

Cases:
CPR 1.2 – APPLICATION OF THE OVERIDING OBJECTIVE

Andrew Smith and Sophia Smith v First Caribbean International Bank (Bahamas) Limited and Insurance Management (Bahamas) Limited 2020/CLE/gen/00662 (9 August 2023) (Winder CJ held that pre-CPR authorities require caution of the user. The CPR are intended to herald a major shift in approach to the resolution of disputes. Pre-CPR authorities can, however, continue to have persuasive force in appropriate circumstances, as where the new rule under the CPR follows the same form and appears to have the same underlying intention as the old rule governing a particular subject matter. In transitional cases, the fact that the parties were previously operating under the RSC is a relevant factor for the court to take into consideration when making procedural decisions, in particular, those which may lead to the imposition of a sanction.)

Glenard Evans v Airport Authority 2022/CLE/gen/01521 (23 November 2023) (Case law decided in relation to Order 18, rule 19 of the RSC was considered in relation to an application to strike out made under CPR 26.3.)

Dorothy Bain v Royal Bank of Canada (Bahamas) limited 2014/CLE/gen/00283 (29 December 2023*)* (Case law decided in relation to Order 18, rule 19 of the RSC was considered in relation to an application to strike out made under CPR 26.3.)

Vinos v Marks & Spencer plc [2001] All 3 ER 784 (The English Court of Appeal held in relation to the English CPR that interpretation to achieve the overriding objective does not enable the court to say that provisions that are quite plain mean what they do not mean, nor that the plain meaning should be ignored. Accordingly, the discretion conferred by English CPR 7.6(3) could not be exercised unless the conditions stipulated in the rule as a precondition to the exercise of discretion were met, and the Court had no power to do otherwise.)

Attorney General v Keron Matthews [2011] UKPC 38 (The JCPC held that the if language of the T&T CPR admitted of only one interpretation, it had to be given effect. T&T CPR 13.3 set out the conditions that a defendant must satisfy if he wishes to have a default judgment set aside and if it was desired to impose the T&T CPR 26.7(3) conditions as additional requirements for setting aside a default judgment, that needed to be done by express amendment and not by the doctrine of "implied sanction".)

Anderton v Clwyd County Council [2002] EWCA Civ 933 (The English Court of Appeal held that appealing to proportionality, to justice and to the overriding objective of enabling the court to deal with cases justly cannot override the clear irrebuttable deeming provisions relating to service contained in the English CPR. Justice and proportionality require that there are firm procedural rules which should be observed, not that general rules should be construed to create exceptions and excuses whenever those, who could easily have complied with the rules, have slipped up and mistakenly failed to do so.)

Brathwaite & Henderson v Potter & Potter Civil Appeal No 18 of 2002 (Grenada) (The Eastern Caribbean Court of Appeal held that a court has no discretion, where there are specific rules, to apply general rules. The overriding objective cannot override a specific rule in the CPR. Accordingly, the first instance judge was wrong to have applied Part 1 of the EC CPR instead of applying the specific requirements of EC CPR 10.7(3) and 20.1(3).)

Boyea & Williams v East Caribbean Flour Ltd. Civil Appeal No. 3 of 2004 (St Vincent) (The Eastern Caribbean Court of Appeal held that the discretion to permit changes to the statement of case after the first case management conference has to be considered with reference to the specific rule governing changes to statement of case, i.e., EC CPR 20.1(3). The overriding objective cannot be used to widen or enlarge what the specific section forbids. Accordingly, the first instance judge had been wrong to permit amendments when it had not been established the changes were necessary because of some change in the circumstances which became known after the date of that case management conference.)

Lennox Offshore Services v Haliburton Trinidad Ltd. ***Claim No. CV2010-00536*** (Trinidad and Tobago) (The Trinidad & Tobago High Court held that the overriding objective of the T&T CPR could not be used to create avenues to proceed in litigation where none exists, especially when the effect of such creation is to circumvent the clear law or rules of procedure. It was held that the overriding objective could not be used to justify the consolidation of one action in which the claimant was claimant with an earlier action in which the claimant was a defendant in circumstances where the claimant had failed to file an ancillary claim [an additional claim under the BAH CPR] within the time limited for doing so.

1.3 Duty of parties.

(1) It is the duty of the parties to help the Court to further the overriding objective.
(2) In applying the Rules to give effect to the overriding objective the Court may take into account a party's failure keep his duty under paragraph (1).

Notes:
CPR 1.3 imposes a positive duty on the parties (and, by extension, their legal representatives) to help the Court to further the overriding objective. In broad terms, the parties must participate in civil proceedings in a way that facilitates the Court achieving the just, speedy and economical disposition of the matter. CPR 1.3 reinforces the duty owed by counsel as officers of the court.

The duty to help the Court to further the overriding objective requires the parties to, among other things, seek to agree procedural matters, including reasonable extensions of time which do not imperil future hearing dates or otherwise disrupt the conduct of the litigation; make applications promptly and at an appropriate stage of the proceedings; give adequate warning about the procedural objections they wish to take; refrain from pursuing patently unmeritorious applications or tangential or irrelevant issues; refrain from acting unreasonably and opportunistically; and promptly inform the Court of developments which may imperil hearing dates. However, CPR 1.3 does not require counsel to act contrary to their client's interests and it is doubtful that CPR 1.3 imposes a duty on a party to point out their opponent's mistakes where they were not contributed to by the party.

A failure by a party to adhere to the obligation to help the Court to further the overriding objective may be taken into account when the Court has to exercise a discretion as to costs or as to the amount of costs.

Cases:
CPR 1.3 – DUTY OF THE PARTIES
Andrew Smith and Sophia Smith v First Caribbean International Bank (Bahamas) Limited and Insurance Management (Bahamas) Limited 2020/CLE/gen/00662 (9 August 2023 (The duty of the parties to help the Court to further the overriding objective in CPR 1.3 may require the parties not to unreasonably refuse consent to an application for relief from sanctions.)

The Attorney-General v Securities and Exchange Commission and others 2023/CLE/gen/00125 (6 December 2023) (A party is under a duty to further the overriding objective and, by extension, so is their legal representative. Counsel should cooperate with each other on procedural matters leading to a hearing. This includes cooperation in the fixing of hearing dates and in the advancement of the hearing once fixed. The duty to further the overriding objective reflects the duty of counsel as an officer of the court.)

Khilili v Bennett [2000] Lexis Citation 3822 (The English Court of Appeal held that, in light of English CPR 1.3, it may no longer always be appropriate for defendants to sit back and wait for the claimant to do nothing and to then seek to strike out for want of prosecution when there are steps that they themselves can take to have the matter disposed of.)

Hannigan v Hannigan [2000] 2 FCR 650 (The English Court of Appeal held that the overriding objective is not furthered by arid squabbles about technicalities and criticized the fact that objection was made by the

defendants when the claimant's solicitors did not use practice form N208 (the part 8 claim form) to start the claim contrary to an English practice direction and made other technical mistakes, none of which prevented the defendants from understanding what the claimant was seeking from the court and why she was seeking it.)

HFC Bank plc v HSBC Bank plc (formerly Midland Bank plc) [2000] Lexis Citation 2645 (The English Court of Appeal held that, in a case where judgment has been reserved, it is the duty of the parties and their professional advisers to inform the Court immediately when they become aware of any development, such as the possibility of settlement, which may make it unnecessary for judgment to be delivered.)

Morris v Bank of America National Trust [2000] 1 All ER 954 (The English Court of Appeal held that, in complex cases, the advocates who are expected to be instructed to appear at the trial should attend case management conferences or pre-trial reviews before the judge so that they can discuss with him in a collaborative manner the ways in which the conduct of the trial might be made less burdensome if issues are handled in a particular way.)

Dunnett v Railtrack plc (in railway administration) [2002] EWCA Civ 303 (The English Court of Appeal held that the duty of the parties to help the Court to further the overriding objective means that parties may face uncomfortable costs consequences if they turn down out of hand the chance of alternative dispute resolution when suggested by the Court.)

Tasyurdu v Immigration Appeal Tribunal [2003] EWCA Civ 447 (The English Court of Appeal held that the obligation to help the Court to further the overriding objective in English CPR 1.3 requires that parties must inform the Court immediately when it is known that a fixture may not proceed.)

Geveran Trading Co Ltd v Skjevesland [2003] 1 All ER 1 (The English Court of Appeal held that the duty of the parties to help the Court to further the overriding objective means that if there are reasonable grounds for an objection to a party's advocate continuing to act but the advocate proposes to continue to act, the other party should be informed of the relevant facts as soon as practicable so as to prevent the possibility that a substantive hearing will have to be aborted.)

Hertsmere Primary Care Trust and others v Administrators of Balasubramanium's Estate [2005] EWHC 320 (Ch) (The claimants made an offer to settle with the intention that it take effect as a Part 36 offer under the English CPR but the offer failed to comply with the requirements of Part 36 because it did not provide that after twenty-one days the offer could only be accepted if the parties agree liability for costs or the court gives permission. The defendants told the claimants that the letter had not complied with the CPR, but declined to elaborate how when requested to do so by the claimants. The English High Court was critical of the defendants' counsel withholding information with regard to the non-compliance and seeking to take advantage of the non-compliance and held that the defendants could not argue that the offer did not accord with Part 36 in the circumstances.)

Financial Institutions Services Limited v Peter Croswell et al Suit No. Cl. 1997/C256 (Jamaica) (The Jamaican Supreme Court held that, where there is a failure to comply with timetables ordered by the court, by virtue of JAM CPR 1.3, the innocent party should, as a first step, write to the defaulting party to request that the breach be remedied within a reasonable time. The innocent party cannot let sleeping dogs lie. Any delay in applying for sanctions may be a factor in determining whether to grant sanctions. The duty to ensure the achievement of the overriding objective is a shared duty that rests on each party with equal weight.)

Woolley v Essex County Council [2006] EWCA Civ 753 (The English Court of Appeal held that, where a report by a single joint expert contains manifest ambiguity or error, by virtue of their duty to help the Court further the overriding objective, parties will usually be expected to ask one or more suitable questions of the expert pursuant to English CPR 32.8(1). Otherwise there will be a risk that the report will be of little value to the Court and/or give rise to argument and expense.)

Khudados v Hayden et al [2007] EWCA Civ 1316 (The English Court of Appeal held that ensuring that the parties are on an equal footing requires the court to ensure that each party is afforded a reasonable opportunity to present his case under conditions which do not place him at a substantial disadvantage vis à vis his opponent. However, fairness does not require counsel to place his own client at a substantial disadvantage by acting contrary to his interests. Whatever may be the requirement to help the court under English CPR 1.3, it cannot extend so far as to impose upon counsel a duty in conflict with his proper duty to his client. It was therefore held that CPR 1.3 did not require counsel to disclose evidence favourable to the other side to the Court. It did not matter that the other side was a litigant in person.)

*JSC BTA Bank v Ablyazov and others (No 9) [2012] EWCA Civ 1551 (*The English Court of Appeal held that a litigant who wishes to object to a trial going ahead on a fixed date on the basis of bias has a positive duty to speak. It is contrary to the parties' duty to help the court to further the overriding objective to allow the Court and the other parties to waste time and resources in preparing for a trial which, if the judge of trial has to be replaced, could not start on the fixed date, but would have to be adjourned.)

Chanan Mahabir and Another v Sandra Mahabir (Trinidad) TT 2012 HC 132 (The Trinidad & Tobago High Court held that an attorney instructing client not to answer a question put by the trial judge at trial with a view to determining whether a possible solution to the dispute existed was contrary to the duty of the parties to help the Court to further the overriding objective. It was held hat the fact that a matter has reached trial does not prevent a judge from continuing to take any steps to further the overriding objective, especially with a view to ensuring that court resources are not expended unnecessarily.)

*Hallam Estates Ltd v Baker [2014] EWCA Civ 661 (*The English Court of Appeal held that the overriding objective includes allotting an appropriate share of the court's resources to an individual case. Therefore legal representatives are not in breach of any duty to their client, when they agree to a reasonable extension of time which neither imperils future hearing dates nor otherwise disrupts the conduct of the litigation. On the contrary, by avoiding the need for a contested application they are furthering the overriding objective and also saving costs for the benefit of their own client.)

Gotch v Enelco Ltd [2015] EWHC 1802 (TCC) (The English High Court held that under the English CPR, parties and their lawyers can no longer conduct litigation in a manner which does not keep the proportionality of the costs being incurred at the forefront of their minds at all times. It is no longer acceptable for parties to pursue issues or applications that have no real impact on the issues that are central to the dispute. Further, it is no longer acceptable to carry on a war of attrition by correspondence, whether instructed to do so or not. Whilst civil proceedings are an adversarial process, that goes to the issues in the case, not to every aspect of the procedure. Parties to litigation are expected to conduct that litigation in the manner that is most expeditious and economical. Bringing the right issues to trial in the most economical fashion, and taking steps to ensure that the costs are kept at a level that is proportionate to what is at stake, is to be at the heart of the process. Unreasonableness, intransigence and the taking of every point must now be regarded as unacceptable, because conducting litigation in that way flies in the face of the overriding objective as it is now formulated.)

Buddie Miller and Another v Michael Perez (Trinidad) Civ App No P131 of 2016 (The Trinidad & Tobago Court of Appeal held that an attorney's acts failing to respond to multiple pieces of correspondence enquiring whether their client intended to appeal was inconsistent with the overriding objective.)

Bergan v Evans [2019] UKPC 33 (The JCPC held that objections to the deployment of evidence taken at the outset of trial which are in the nature of an ambush are not consistent with a party's duty to assist the Court in furthering the overriding objective and may be taken into account when dealing with costs. In addition, the JCPC held that if a claimant in a personal injury action declined to co-operate in submitting to an early medical examination by the defendant's expert, then it may easily be supposed that the Court would be generous in affording the defendant an extension of time to serve a defence. There is nothing to stop a defendant threatened with a personal injuries claim from seeking a medical examination of the claimant before the issue of proceedings, and any lack of co-operation in that regard by the claimant may easily justify the Court in giving a defendant generous extra time to prepare and serve a properly particularised defence.)

Woodward v Phoenix Healthcare Distribution Ltd [2019] EWCA Civ 985 (The English Court of Appeal held that reliance on non-compliant service is not one of the instances of opportunism deprecated by the courts. There is no duty to warn of ineffective service of the claim form resulting from the claimant's own efforts even in circumstances where the claim form is served very near the end of the limitation period.)

R v O Supreme Court Action No. 96 of 2022 (Bermuda) (The Bermudian Supreme Court ordered the parties to bear their own costs after the parties agreed to a consent order at trial because the issues in the case could have been resolved via consent order without the need of coming before the Court.)

Wright and others v Chappell and others [2023] EWHC 2873 (Ch) (The English High Court held that a litigant who wishes to object to a trial or heavy application going ahead once a date has been fixed for it has a positive duty to speak. Any application should be made as soon as the litigant is aware of the grounds for the application.)

Juliette Wright v Alfred Palmer et al [2021] JMCA Civ 32 It is the duty of a litigant under the CPR to ensure that timetables are met, and if there is a danger of time elapsing where the hearing date set by the registry is outside of the limitation period, it is the duty of the litigant to file an affidavit of urgency and to request an emergency hearing.

PART 2 - ADMINISTRATION AND INTERPRETATION OF RULES

2.1 Definitions.

In these Rules, unless otherwise provided for or the context otherwise requires —

"ADR procedure" means any procedure for alternative dispute resolution including, in particular, mediation;

"additional claim" has the meaning given in rule 18.2(2);

"additional claimant" means a person who makes an additional claim;

"additional defendant" has the meaning given in rule 18.2;

"applicant" has the meaning given in rule 11.2; "application" has the meaning given in rule 11.1;

"attorney" means a counsel and attorney as defined in section 2 of the Legal Professions Act (Ch. 64);

"body corporate" means a company or other body corporate wherever or however incorporated, other than a corporation sole, and includes a limited company unless a rule otherwise provides;

"Chief Justice" means the Chief Justice of The Bahamas and includes, in relation to any period in which the office of Chief Justice is vacant, the person for the time being performing the functions of the Chief Justice or any other Judge authorised to act as Chief Justice;

"Civil Procedure Rules" means the Supreme Court Civil Procedure Rules, 2022;

"claim" is to be construed in accordance with Part 8;

"claim form" is to be construed in accordance with Part 8;

"claim for a specified sum of money" means –

(a) a claim for a sum of money that is ascertained or capable of being ascertained as a matter of arithmetic and is recoverable under a contract ; and

(b) for the purposes of Parts 12 and 14, a claim for —

(i) the cost of repairs executed to a vehicle;

(ii) the cost of repairs executed to any property in, on or abutting a road; or

(iii) any other actual financial loss other than loss of wages or other income,

claimed as a result of damage which is alleged to have been caused in an accident as a result of the defendant's negligence where the amount of each item in the claim is specified and copies of receipted bills for the amounts claimed are attached to the claim form or statement of claim;

"claim for personal injuries" means proceedings in which there is a claim for damages in respect of personal injuries to the claimant or any other person or in respect of a person's death;

“claimant” means a person who makes a claim and, in relation to any proceedings commenced before these Rules came into force, includes a claimant in an action or the petitioner or applicant in any proceedings commenced by petition, originating summons or motion;
“Court” means the Supreme Court of The Bahamas;
“court office” refers to —

(a) the place where documents are to be filed, etc. and includes a Registry; and

(b) members of the court staff who carry out work of a formal or administrative nature under rule 2.3(1);

“defendant” means a person against whom a claim is made and, in relation to proceedings commenced before these Rules came into force, includes a respondent to any petition, originating summons or motion;
“external company” means any incorporated or unincorporated body formed under the laws of a State other than The Bahamas except such an incorporated body which has been either continued or registered in The Bahamas.
“filing” is to be construed in accordance with rule 3.4;
“fixed date claim form” is a claim form in Form G4 upon which there is stated a date, time and place for the first hearing of the claim;
“Hague Convention” means the Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters signed at The Hague on November 15, 1965;
“judge” — (a) includes the Chief Justice and any justice appointed under Article 94 or 95 of the Constitution;
(b) does not include a registrar unless the context otherwise requires; “judgment creditor” has the meaning given in rule 43.1(2);
“judgment debtor” has the meaning given in rule 43.1(2);
“jurisdiction” means the jurisdiction of the Court as extending throughout The Bahamas and any part of its territorial waters;
“limited company” means a body corporate that is incorporated or continued under the relevant legislation relating to companies in The Commonwealth of the Bahamas; “litigation guardian” —

(a) means —

(i) a person who is authorised by or under an enactment to conduct proceedings in the name of, or on behalf of, an incapacitated person or a minor but only in a proceeding to which the authority extends; or

(ii) a person who is appointed under rule 23.8 to conduct a proceeding; and

(b) has the same meaning as the expression “guardian ad litem”; “minor” means a person who has not attained the age of majority;

“money lending action” has the meaning assigned to it by Part 62, Section II;

"month" means a calendar month; "Northern Region" means the Family Islands of Abaco Bimini and Grand Bahama;
"order" includes an award, declaration, decree, direction or judgment;
"overriding objective" means the objective set out in rule 1.1;
"party" means any person who is a claimant, defendant or a person added to a proceeding; "patient" means a person who by reason of mental disorder is incapable of managing his or her own affairs;
"period for filing a defence" has the meaning given by rule 10.3;
"personal injuries" includes any disease and any impairment of a person's physical or mental condition; "Registry" means a Registry of the Supreme Court;
"stamped" in relation to the stamp of the Court may be effected manually or electronically;
"statement of case" means —

(a) a claim form, statement of claim, defence, counterclaim, additional claim form or defence and a reply; and

(b) any further information given in relation to any statement of case under Part 34 either voluntarily or by order of the Court;

"statutory rate of interest" means the rate of interest on judgment debts that may be prescribed for the time being;
"videoconference" means a remote hearing where the hearing is by video-link, live television link, internet link or any other means that will allow the Court and the parties to engage in simultaneous visual and oral communication facilitated through the use of technology by the Court.

Notes:
CPR 2.1 is a rule of general application. It contains a list of words and phrases used in the CPR for which the drafters considered it necessary or helpful to provide specific meanings. Some Parts in the CPR may have of their own interpretation provisions which are peculiar to that Part.

It should be noted that CPR 2.1 expressly defines the word "attorney" to mean "a counsel and attorney as defined in section 2 of the Legal Professions Act (Ch. 64)". Generally, the word "attorney" used in the context of the CPR does not include an individual who is not qualified to practise law under the *Legal Profession Act* acting under a power of attorney. Such a person has no power or *locus standi* to represent others in legal proceedings before the Court: *Rev. James Sands et al v Rev. Vernal Hanna et al Claim No. 1995/CLE/gen/0029* (3 August 2023); *Julian Romer v Edith Peggy Romer 2022/CLE/gen/00988* (24 October 2023) (a case which referred to the RSC).

2.2 Who may exercise the powers of the Court.

(1) Except where any enactment, rule or practice direction provides otherwise, the functions of the Supreme Court may be exercised by the Chief Justice, any judge or registrar of that court in accordance with these Rules or any practice direction made by the Chief Justice.

(2) Where (a) a trial has been commenced but not completed by a judge; (b) any enactment or rule requires an application to be made to, or jurisdiction to be exercised by, the judge by whom a claim was tried then if the judge dies or is incapacitated, or ceases to be a judge of the Court, or if for any other reason it is impossible or inconvenient for the judge to act in the matter; or (c) a trial or the hearing of an application has been completed by a judge and the judge has completed the judgment but has not delivered it prior to ceasing to be a judge, the Chief Justice may assign some other judge to retry or complete the trial of the claim or to hear any application or exercise the jurisdiction or to deliver the judgment.

(3) The Chief Justice may by practice direction allocate the work of the Court between judges and registrars.

Notes:

CPR 2.2 clarifies who may exercise the powers of the Court. The word "Court" has been defined in CPR 2.1 to mean the Supreme Court of The Bahamas. Under the former RSC this terms meant either a judge or a registrar. CPR 2.2 (1) removes the blanket reference and requires a reference to the specific rule or a practice direction by the Chief Justice. CPR 2.2(2) empowers the Chief Justice to deal with a claim which has not been completed by the judge who was seised of it. CPR 2.2(3) empowers the Chief Justice to allocate the work of the Court between judges and registrars.

Practice Direction No. 8 of 2023 issued by the Chief Justice under CPR 2.2(3) provides that:

(a) injunctions and interim remedies (other than interim payments) may only be granted by a judge;
(b) summary judgment applications may only be made to a judge; and
(c) in addition to matters specifically identified as within the remit of a registrar by virtue of the CPR, any enactment, or any practice direction, registrars may also hear applications for default judgment, judgment on admissions, assessments of damages, interim payments, permission to make additional claims, addition and substitution of parties, changes to statements of case, orders in proceedings involving minors and patients (except applications under CPR 23.12 and CPR 23.13) and security for costs.

Practice Direction No. 10 of 2023 issued by the Chief Justice provides that a registrar may also hear applications arising under CPR Part 13 and under CPR 62.7.

Cases:

Richard Anthony Hayward et al v Striker Trustees Limited et al 2010/CLE/gen/1137 (13 October 2023) (The Court refused to accede to a preliminary objection to its jurisdiction to hear a wasted costs application filed on 21 February 2023 after Winder CJ recused himself based on certain information he became privy to during the course of the proceedings on the basis that Winder CJ had transferred the matter to the Court pursuant to CPR 2.2(2)(b).)

2.3 Court staff.

(1) Where these Rules refer to an act being done by the court office or require or permit the performance of an act of a formal or administrative character, that act may be performed by a member of the court staff authorised generally or individually in writing by the Chief Justice.
(2) Where these Rules expressly so provide, any other functions of the Court may be carried out by a member of the court staff authorised in writing by the Chief Justice.
(3) If a step may be taken by a member of the court staff —

(a) that person may consult a judge or registrar before taking the step; and

(b) that step may be taken by a judge or registrar instead of a member of the court staff.

Notes:
CPR 2.3 outlines the authority of the Court's Staff. A formal written direction of the Chief Justice is required to perform the functions identified in the CPR to be done by the court office or Court Staff.

Cases:
CPR 2.3 –COURT STAFF
Quinland v. Governor of Swaleside Prison *[2002] EWCA Civ 174* (The English Court of Appeal held that, although Her Majesty's Courts and Tribunals Service is an agency of the executive branch of government, it exists, in part if not in whole, to facilitate and implement the workings of the judiciary. There are some of its activities "over which the judiciary and not the executive must have the ultimate control" (e.g. the putting into effect of the orders or directions of the court) as there is little point in having an independent judiciary "if the executive, through the Courts and Tribunals Service, is free to pick and choose which of its orders to implement".)

2.4 Court's discretion as to where, when and how it deals with cases.

(1) Claims and petitions shall be heard in open court and applications shall be heard in chambers except that —

(a) an originating application under section II of Part 8 may be held in chambers;

(b) any hearing except the trial of an action may be conducted in chambers if the Court so directs, and the Court shall in each case decide whether the application is a proper one to be made in open court or by application in chambers, and may at or before the hearing, if it shall think fit, remove the same into open court or into chambers, as the case may be; and

(c) a judge may direct that any proceedings be heard in private with the consent of the parties.

(2) An order made in chambers shall have the same force and effect as an order made in open court, and the Court sitting in chambers shall have the same power to enforce, vary, or deal with any such order, as if sitting in open court.
(3) The Court may order that any —

(i) hearing be conducted in whole or in part by means of a telephone call, videoconference or any other form of electronic communication; or

(ii) trial be conducted in whole or in part by means of videoconferencing or any other form of electronic communication.

(4) The Court may give directions to facilitate the conduct of a hearing by videoconference or the use of any other electronic or digital means of communication or storage or retrieval of information, or any other technology it considers appropriate.

Notes:
CPR 2.4 deals with the Court's discretion as to where, when and how it deals with cases. Generally, the rules themselves are clear and require no further explanation beyond that which they contain within themselves.

PART 3 - TIME, DOCUMENTS, ETC.

3.1 Court to state calendar date.

When making any judgment, order or direction which imposes a time limit for doing any act the Court must, wherever practicable, state —

(a) the calendar date; and

(b) the time of day, by which the act must be done.

Notes:
CPR 3.1 requires the Court to, where practicable, identify a specific calendar date and time of day when imposing a time limit for doing any act in any judgment order or direction.

3.2 Computation of time.

(1) This rule shall apply to the calculation of any period of time for doing any act which is fixed by —

(a) a judgment or order of the Court;

(b) a practice direction; or

(c) these Rules.

(2) All periods of time expressed as a number of days are to be computed as clear days.

(3) In this rule, "clear days" means that in computing the number of days, the day on which the period begins, and the day on which the period ends are not included.

Examples

(a) Document served by post are deemed to be served 14 days after posting: A Document posted on 1st September is deemed to be served on 16th September.

(b) Document must be filed at least 3 days before the hearing: Application is to be heard on Friday 20th October. The last date for filing the document is Monday 16th October.

(4) When the specified period —

(a) is seven days or less; and

(b) includes —

(i) a Saturday or Sunday; or

(ii) any other day on which the court office is closed, that day does not count.

Example

Notice of application must be given not less than seven days before a hearing: Hearing on Friday 20th October. Notice must be given not later than Tuesday 10th October.

(5) If the period specified for doing any act at the court office ends on a day on which the Court is closed, the act is in time if done before close of business on the next day on which the Court is open.

(6) If the period specified for doing any act which does not need to be done at Court ends on —

(a) a Saturday or Sunday; or

(b) any public holiday, the act must be done before 4:00 p.m. on the next business day.

Notes:
CPR 3.2 deals with computation of time. The rules themselves are clear and require no further explanation beyond that which they contain within themselves.

3.3 Documents.

(1) Unless otherwise prescribed by practice direction issued by the Chief Justice, every document, so far as is practicable, prepared for use in the Supreme Court must be on "letter size" paper and in a form to be prescribed by Practice Direction issued by the Chief Justice.

(2) The Chief Justice may by practice direction —

(a) require any document filed or to be used in Court to be in the format that the Chief Justice prescribes to facilitate electronic recording or filing of that document; and

(b) prescribe the conditions under which documents may be served or filed electronically.

(3) Every document to be filed at the Court must —

(a) be headed with the —

(i) full title of the proceedings; and

(ii) title of the document;

(b) state, in relation to the person filing it, the —

(i) name;

(ii) business address;

(iii) reference if any;

(iv) telephone number; and

(v) email address, if any;

(c) contain its date;

(d) except in the case of an affidavit, be signed by the person filing it; and

(e) state the name of the party on whose behalf it is filed.

(4) If a document is signed, the full name of the signatory must be set out legibly below the signature.

Notes:
CPR 3.3 details with court documents and the required contents. A practice direction to determine the form and format of the documents to be filed and also to determine how documents may filed and served electronically.

Practice Direction No. 1 of 2023 was issued to clarify the position as stated in CPR 3.3 with regard to all court documents which are filed. It restates the requirements of CPR 3.3(3) and CPR 3.3(4) and explains, with examples, how documents should be headed. It also clarifies that all court documents drafted by an attorney should bear his/her signature and his/her name and firm and prescribes that the information required in CPR 3.3(3)(b) should be contained in every court document filed and should be placed at the foot of the last page of the document filed.

Practice Direction No. 2 of 2023 addresses the service of claim forms by electronic means and is discussed elsewhere in this practice guide.

3.4 Filing of documents.

(1) A document may be filed by —

(a) delivering it; or

(b) submitting it by the method of electronic filing or by any other electronic means approved by or under the Rules in accordance with a practice direction issued by the Chief Justice, to the court office where the claim is proceeding or intended to proceed.

(2) A document is filed on the day when it is stamped, manually or electronically, by or on behalf of the court office.

(3) If a fee is to be paid, a document is not to be treated as filed until — (a) the fee is paid; or (b) an undertaking to pay the fee acceptable to the Registrar is received.

Notes:
CPR 3.4 details with how court documents are to be filed.

The *Supreme Court (Electronic Filing) Rules 2023* (S.I. No. 62 of 2023) make provision for the electronic filing of documents in proceedings before the Court.

The *Supreme Court (Civil Procedure Fees) Rules, 2023* prescribe the fees of the Court which are payable at the commencement of any cause, matter or proceeding.

3.5 Sealing of documents issued by the Court.

(1) The Court must seal the following documents on issue —

(a) a claim form;

(b) a notices of appeal; and

(c) a judgment, except a default judgment, order or directions of the Court.

(2) The Court may place the seal on any document by — (a) hand; or (b) printing a facsimile of the seal on the document electronically or by any other electronic means.

(3) Subject to paragraph (4), all judgments, except default judgments, and orders and directions of the Court must be signed or initialed by the judge or registrar who made the order or judgment or given the directions.

(4) If that judge or registrar has demitted office or is otherwise not available to sign or initial the order or judgment or directions another judge may do so.

(5) A document purporting to bear the Court's seal is admissible in evidence without further proof.

Notes:
CPR 3.5(1) identifies the documents which require the seal of the Court on issuance. CPR 3.5(2) deals with the manner in which the seal may be placed on the document, inclusive of the use of technology. CPR 3.5(3) requires the signature or initial of the judicial officer who made the order, judgment or direction.

3.6 Forms.

(1) The forms in the First Schedule and where appropriate, practice forms must be used in the cases to which they apply.
(2) A form may be varied if the variation is required by the circumstances of a particular case.
(3) A form must not be varied so as to leave out any information or guidance which the form in the First Schedule or practice form gives to the intended recipient of the form.
(4) If these Rules require a party to send a blank form to any other party, the party must send it to the other party without variation except the insertion of the title of the case and the Court's address to which that document is to be returned.
(5) A form marked with the word "Seal" must bear the seal of the Court.
(6) A reference in the First Schedule to the CPR is a reference to these Rules.

Notes:
CPR 3.6 deals with the use of forms and requires the forms to be used in cases where they apply. The First Schedule does not contain a comprehensive list of practice forms: see, for example, Practice Direction No. 10 of 2023 (form of Request for the Entry of Judgment in Default) and Practice Direction No. 11 of 2023 (form of Praecipe for the Issue of a Witness Summons). The question of whether a form must be used is different from the question of whether its contents may be varied. Whilst the forms in the First Schedule may, if required, be varied to suit the circumstances of a particular case, the forms cannot be so varied to exclude any information or guidance contained on the form. If a defective or irregular form is used, it will be necessary to consider CPR 26.9.

3.7 Address for service.

(1) Every statement of case must contain an address, including a street address, within the jurisdiction at which the party filing the statement of case will accept service of documents.
(2) The address for service must also state —

> (a) if given by an attorney the name or reference of the person who is dealing with the matter; and (b) the telephone number and the email address of the attorney filing the document or if filed by one of the parties the telephone number and email address, if any, of that party.

(3) A party must notify the Court and all other parties immediately if the address for service is changed and any document sent to the original address before notice of such change is received by the party serving the document is regarded as validly served.

Notes:
CPR 3.7 requires each statement of case (formerly, a "pleading") to contain an address in The Bahamas where the person filing the statement of case will accept service of documents. A "statement of case" is defined in CPR 2.1 as (i) "a claim form, statement of claim, defence, counterclaim, additional claim form or defence and a reply" and (ii) "any further information given in relation to any statement of case under Part 34 either voluntarily or by order of the Court".

3.8 Statement of truth.

(1) Every statement of case must be verified by a statement of truth.
(2) The statement of truth should be signed by the party personally.
(3) If it is impracticable for the party personally to sign the statement required by paragraph (1), it may be given by that person's attorney.
(4) A statement of truth given by the attorney must also certify —

(a) that the statement is given on the party's instructions; and

(b) the reasons why it is impractical for the party to give the statement personally.

(5) If a statement of case is amended under Part 20, the amended statement of case must be verified by a statement of truth.
(6) Information given under Part 34 must be verified by a statement of truth.
(7) A statement of truth given by a party personally must be in the following form — "I [name] certify that I believe that the facts stated in this [name document] are true."
(8) A statement given by the attorney for a party must be in the following form — "I [name of the individual attorney giving the certificate] certify that —

(a) the [claimant or party on whose behalf the attorney signs] believes that the facts stated in this [name document] are true; and

(b) this statement is given on the [claimant's or party on whose behalf the attorney signs] instructions. The [claimant or party on whose behalf the attorney signs] cannot give the certificate because [state reason]"

Notes:
CPR 3.8 requires every statement of case (formerly, a "pleading") to be verified by a statement of truth which must be signed by the party personally or by that person's attorney where their signing personally is impracticable. CPR 3.8(7) and CPR 3.8(8) provide the form for the personal statement of truth and the statement of truth given by an attorney.

If a statement of case is amended under CPR Part 20, the amended statement of case must be verified by a statement of truth. The Court is given no jurisdiction in CPR 3.8(5) to dispense with the requirement to verify the amended statement of case, unlike in the English counterpart rule, English CPR 22.1(2). Nevertheless, it is to be noted that, under CPR 26.1(6), in special circumstances, on the application of a party, the Court may dispense with compliance with any of the rules.

Failure to sign a statement of truth may lead to the statement of case being struck out under CPR 3.9. In addition, making false statements in a statement of case verified by a statement of truth may, depending on the circumstances, lead to liability for contempt of court.

Cases:
CPR 3.8 – STATEMENT OF TRUTH
Malgar Ltd v RE Leach (Engineering) Ltd [2000] FSR 393 (The English High Court held that a statement of case not accompanied by a statement of truth is not per se invalid but it is liable to possibly be struck out.)

Clarke v Marlborough Fine Art (London) Ltd (No. 2) [2002] 1 WLR 1731 (The English High Court held that the purpose of the requirement for a certificate/statement of truth is to eliminate claims in which a party had no honest belief and to discourage the pleading of cases unsupported by evidence which were put forward in the hope that something might turn up on disclosure or at trial. Where an amendment would result in a unified claim which in turn would result in the claimant making inconsistent statements of truth, permission would not be given to amend.)

Clair Carimbocas v Carrie Davidson Claim No. CV2015-04011 (Trinidad and Tobago) (An attorney signed a claim form and statement of case containing a certificate of truth on behalf of three claimants. It was stated that due to the urgency of the matter the claimants were not available to sign a certificate of truth in time for filing. The claim form was subsequently amended to remove the then-third claimant who did not give his permission to be part of the proceedings. The amended claim form included a certificate of truth signed by all three claimants. The Trinidad and Tobago High Court held that the defect in the certificate of truth could be rectified under CPR 20.1 and the claim form and statement of case should not be struck out in circumstances where the claimants acted as soon as possible to correct the error and the first case management conference had not yet occurred.)

Suez Fortune Investments Ltd v Talbot Underwriting Ltd [2019] EWHC 2599 (Comm) (The English High Court stated that, the purpose of the requirement for a statement of belief in the truth of allegations made in a pleading is to prevent allegations being made in the truth of which there is no belief. The purpose of a statement of truth is not to prevent a party from pleading an allegation which is supported by evidence but which may only be established at trial. In that sense the required "belief" under the English CPR need not amount to "knowledge".)

Louisa Rebecca Watson v Ernie Parchment [2015] JMCA Civ 28 (Permission to amend was refused by the Jamaican Cout of Appeal where the defendant sought to advance a defence inconsistent with her initially pleaded defence which had been verified by a certificate of truth signed by her.)

3.9 Failure to give statement of truth.

(1) The Court may strike out any statement of case which has not been verified by a statement of truth.
(2) Any party may apply for an order under paragraph (1).

Notes:
CPR 3.9 (1) empowers the Court to strike out any statement of case (formerly, a pleading) which does not contain a statement of truth.

Cases:
CPR 3.9 – FAILURE TO GIVE STATEMENT OF TRUTH
Komodo Holdings Ltd v VP Bank (BVI) Ltd Civil Suit No. 72 of 2002 (BVI) (The BVI High Court made an unless order requiring the claimant to file and serve a certificate of truth after the defendant applied to strike out their statement of claim for failure to include a certificate of truth.)

Smith v Salmon ***SCCA No 67/2004*** (The Jamaican Court of Appeal held that JAM CPR 3.13(1) (which empowers the court to strike out the statement of case for non-verification by a certificate of truth) confers a discretion on the judge. The purpose of the certificate of truth is to verify the statement of case so as to bind a party to confine himself to a honest belief (applying and approving *Clarke v Marlborough Fine Art (London) Ltd (No 2)* [2002] 1 WLR 1731). A court must always give effect to the overriding objective to deal justly with the case. This includes the expeditious disposal and fairness to all parties. Although striking out of the defence is permissible under JAM CPR 13.13(1), in some circumstances it may be too extreme. The Jamaican Court of Appeal held that the judge could not be faulted to hold, in the circumstances, that the defendant's failure to verify the defence was not fatal and this was not a fit case to strike out the defence for failure to include a certificate of truth.)

Anju Dhar v Glenford David Claim No. BVIHCV2009/0384 (The BVI High Court refused to strike out or order the re-service of an amended claim form which had been specifically amended to include a certificate of truth where there the facts referred to and the relief claimed in the original claim form and the amended claim form were identical.)

Republic Bank (Barbados) Limited v A.A.G. Investments Inc. No. 1724 of 2012 (The Barbados High Court held that a certificate of truth is a mandatory requirement under the Barbados CPR but the absence of such a certificate can be rectified by order of the Court. Exercising its case management powers under Barb CPR Part 26, the court directed that the defendant amend their application to include the certificate of truth required by the Barb CPR and ordered that the application continue as if so corrected.)

3.10 Right to inspect, etc. certain documents filed in court office.

(1) On payment of the prescribed fee, any person is entitled, during office hours, to search for, inspect and take a copy of any of the following documents filed in the court office with redactions, if any, deemed necessary by a registrar namely — (a) a claim form; (b) a defence; (c) a reply; (d) a notice of appeal; (e) a judgment or order given or made in Court; and (f) with the leave of the Court, which may be granted on an application made without notice, any other document.
(2) Nothing in paragraph (1) prevents a party in any proceedings from searching for, inspecting asking for a copy of any affidavit or other document filed in the court office in those proceedings or filed before the commencement of those proceedings but with a view to its commencement.
(3) Notwithstanding paragraph (1) the Chief Justice may by practice direction restrict access to certain specified documents filed in the court office having regard to the content and subject matter of the document or the case.
(4) Any document filed in or in the custody of a Registry must not be taken out of the Registry without the leave of the Court unless the document is to be sent to another Registry or to a judge or registrar.

Notes:
CPR 3.10 outlines the terms by which and by whom persons may search and take copies of documents filed in the court office. In ***Federal Republic of Nigeria et al v Nerine Trust Co (BVI) Ltd et al Claim No. BVIHC (Com) 2021/0068***, the BVI High Court took into consideration the limited access non-parties have to the court file under the EC CPR when considering an application to seal the court file.

PART 4 - PRACTICE DIRECTIONS AND GUIDES

4.1 Who may issue practice directions.

Practice directions may be issued only by the Chief Justice.

4.2 Scope of practice directions.

(1) A practice direction may be issued in any case where provision for such a direction is made by these Rules.
(2) Where there is no express provision in these Rules for such a direction, the Chief justice may give directions as to the practice and procedure to be followed in the Court.

4.3 Publication of practice directions.

Practice directions and guides must forthwith be posted on the website of the Judiciary or made available in such other manner as the Chief Justice may direct.

4.4 Compliance with practice directions.

(1) A party must comply with any relevant practice direction unless there is good reason for not doing so.
(2) The Court may make an order, pursuant to rules 26.7 or Part 71, against a party who fails to comply with a practice direction.

4.5 Practice guides.

(1) The Chief Justice may issue practice guides (hereinafter referred to as "guides") to assist parties in the conduct of litigation.
(2) Parties must have regard to any relevant practice guide.
(3) The Court may take into account the failure of any party to comply with any practice guide when deciding whether or not to make an order under rules 26.7 or Part 71.

4.6 Date from which practice directions and guides take effect.

A practice direction or guide takes effect from the date specified in the direction or guide.

Notes:
Part 4 concerns practice directions and practice guides. The rules themselves are clear and require no further explanation beyond that which they contain within themselves. The inherent jurisdiction of the Court cannot be used by a judge to vary or alter any practice direction issued under the CPR: compare *Bovale Ltd v Secretary of State for Communities and Local Government and another [2009] 3 All ER 340*.

PART 5 – SERVICE OF CLAIM FORM WITHIN JURISDICTION

5.1 Service of claim form – normal method.

(1) A claim form must be served personally on each defendant.

(2) Notwithstanding any other provisions of this Part, the Chief Justice may by practice direction, authorise the use of electronic means of communication, including e-mail, for service of a claim form under this Part.

Notes:
The general rule is that the claim form must be personally served on each defendant unless any other provisions or practice direction authorizes the use of electronic means for service.

Personal service is defined in CPR 5.3.

Practice Direction No. 2 of 2023 authorises the use of electronic means of communication for service of a claim form. "Electronic means" means CD ROMs, memory sticks, e-mail or other means of electronic communication of the contents of documents. The practice direction prescribes that –

(a) where a party intends to serve a claim form by electronic means that party must first ask the party who is to be served whether there are any limitations to the recipient's agreement to accept service by such means (for example, the format in which documents are to be sent and the maximum size of attachments that may be received).

(b) the party who is to be served or the attorney acting for that party must previously have indicated in writing to the party serving that the party to be served or the attorney is willing to accept service by electronic means and the e-mail address or electronic identification to which the documents must be sent. E-mail addresses set out in the party's attorney's letterhead or a statement of case or response to a claim filed with the court are deemed to be e-mail addresses to which documents may be sent.

(c) where a document is served by electronic means, the party serving the document shall, upon request by the party being served send or deliver a hardcopy.

(d) where a document is served by electronic means and any of the CPR or any practice direction requires that document to be signed, that requirement shall be satisfied if the signature is printed by computer or other mechanical means.

(e) CPR 5.12 applies as it relates to proof of service where service is by electronic means.

CPR 5.1(2) should be read in conjunction with CPR 8.2 and 8.9. See also section 17 of the *Electronic Communications and Transactions Act*.

Cases:

Hoddinott v Persimmon Homes (Wessex) Ltd [2007] EWCA Civ 1203 (The English Court of Appeal held that service of the claim form serves three purposes. The first is to notify the defendant that the claimant has embarked on a formal process of litigation and to inform him of the nature of the claim. The second is to enable the defendant to participate in the process and have some say in the way in which the claim is prosecuted: until he has been served, the defendant may know that proceedings are likely to be issued, but he does not know for certain and he can do nothing to move things along. The third is to enable the court to control the litigation process; until the claim form is served, the court has no part to play in the proceedings.)

Mahadeo v Ramsundar TT 2007 HC 242 (vlex citation) (The Trinidad and Tobago High Court explained that Part 5 of the T&T CPR provides that the general rule is that a claim form must be served personally [Part 5.1]. However a party may choose an alternative method by which to effect service [Part 5.13], which may or may not be endorsed by the court [Part 5.13(3)], and in the latter instance the court will consider giving directions for service by a specified method [Part 5.14]. Further, a party may apply for an order "for service by a specified method", that is, for an order for substituted service. Such an application though made without notice, must be supported by evidence: a) specifying the method of service proposed; and b) showing that the method of service is likely to enable the person to be served to ascertain the contents of the claim form and statement of case [Part 5.14(2)].)

Rachel Graham v Erica Graham and another [2021] JMCA Civ 51 (The Jamaican Court of Appeal explained that Part 5 of the JAM CPR deals with the service of a claim form. It does not apply to the service of other documents, including other statements of case, except where JAM CPR 5.2 applies. Part 5 sets out the framework for service of claim forms and other related documents on defendants within the jurisdiction. Therefore, it does not apply to service outside the jurisdiction. It explains the rules which determine whether the claim can be served with or without the court's approval and the procedure for effecting service under the different regimes that apply.)

5.2 Statement of claim to be served with claim form.

(1) The general rule is that the claimant's statement of claim must be served with the claim form.

(2) The claim form may be served without the statement of claim in accordance with rule 8.2.

(3) In this Part reference to service of the claim form requires that —

(a) unless dispensed with under paragraph (2) above, the statement of claim; or

(b) if these Rules so require, an affidavit or other document;

(c) a copy of any order that may have been made; and

(d) a copy of any order or application made under rule 8.2;

must be served with the claim form unless the statement of claim is contained in the claim form.

Notes:
The claim form, if not fully endorsed with a statement of claim ought to be served with the statement of claim unless the Court dispenses with service of the same and makes an Order that the documents be served separately. This rule further outlines the documents which ought to be served with the claim form, namely, the statement of claim, if the CPR require, an affidavit or other document, a copy of any order that may have been made, and/or a copy of any order or application dispensing with the statement of claim.

Cases:

Grenada Building and Loan Association v Grenada Cooperative Bank Limited Claim No. GDAHCV2009/0155 (Grenada) (The Grenadian High Court held that under the EC CPR it is permissible for the statement of claim to be included in the claim form and for there to be a single certificate of truth. There is no requirement for the claim form and statement of claim to be in in separate, independent documents each with its own certificate of truth.)

5.3 Method of personal service.

A claim form is served personally on an individual by handing it to or leaving it with the person to be served.

Notes:
The definition of personal service contained in CPR 5.3 is akin to Order 61, r 2 of the RSC.

Whether or not there has been personal service in any given case is a question of fact.

As a preliminary matter, the process server should ensure that he has found the right person. The precise manner by which the person served was identified must be included in the affidavit of service: CPR 5.5(1). If the person served was identified by another person or a photograph, then the requirements of CPR 5.5(2) and CPR 5.5(3) should be taken into consideration.

The essential requirements for personal service are (i) the process server and person to be served must at the relevant time be in close physical proximity; and (ii) the process server should have the claim form and requisite accompanying documents with him and should offer them to the person to be served; if the person to be served takes them into his possession, and the nature of the documents are readily apparent on their face, they have been "handed over"; if the person to be served refuses to take them, then the process server should tell the person what the documents contain and leave them as nearly in the person to be served's possession or control as he can, e.g., by leaving them on the floor at his feet or on a nearby table.

Cases:

Christmas v Eicke sub nom Christmas v Gickle (1848) 6 Dow & L 156 (The process server made several calls to the defendant to effect personal service. On the last occasion, and having received an unclear answer on whether the defendant was present, he waited and saw the defendant running up the stairs. The defendant went into a room and fastened the door before the writ could be served. The process server called out to the defendant stating that he had a writ against him at the suit of plaintiff, and put a copy of it through the door. It was held by the English court that the defendant had not been personally served.)

Goggs v Lord Huntingtower (1844) 1 Dow & L 599 (Despite attempts at personal service at the defendant's residence, when advised by a female servant that the defendant was not home and that she would give the document to the defendant, the process server overheard a voice saying "give it back". The process server saw the female servant the next day who confirmed that she provided the defendant with the document. It was held that there was no personal service of the document.)

Banque Russe et Francaise v Clarke [1894] WN 203 (The English Court of Appeal held that the handing to a defendant of a writ enclosed in an envelope, whether sealed up or not, without informing the defendant of its contents and the defendant having no knowledge that an action has been or is about to be commenced against him, is not good personal service.)

Kenneth Allison Ltd v A.E. Limehouse [1992] 2 AC 105 (A personal assistant employed by the defendant partnership at its principal place of business acting on the instructions of one of the partners who was in another part of the premises agreed to accept service of the plaintiff's writ and signed the appropriate form

to acknowledge service. The Appellate Committee of the House of Lords held that personal service requires that the document be handed to the person to be served or, if he will not accept it, that he be told what the document contains and that the document be left with or near him On the facts, personal service on a partner had not been effected.)

Walters v Whitelock [1994] Lexis Citation 1619 (The English Court of Appeal held that there had been personal service of documents relating to a committal application where the process server had told the defendant that he had documents for him and left the documents in the pocket of the jacket he was wearing, which the defendant then threw down. Hoffmann LJ held that it is sufficient if it is brought to the person to be served's attention that the documents left with him are legal documents which require his attention in connection with proceedings. The purpose of the requirement that the person to be served be told the nature of the document is that he should not be able to say that he ignored the document on the grounds that it was simply junk mail or something which did not necessarily require his attention at all. On the facts, the appellant was familiar with the process server from previous occasions on which he had been served in the proceedings and therefore must have known the documents related to the litigation and required his attention.)

*Nottingham Building Society v Better Bennett and Co. (a Firm) 1997 The Times, 26 February (*A solicitor took a writ he was handed by a process server, looked it over and handed it back. The English Court of Appeal held that a writ is deemed to have been served if there has been even the briefest of possession of it by a defendant seeing the nature of the document. There will be good personal service where the intended recipient, having knowledge of the nature of the document, exercises dominion over it, however briefly.)

*Kenny D Anthony v Richard Frederick SLUHCV2006/0*696 (Saint Lucia) (A process server confronted the defendant in the parking lot of a television studio where the defendant conducted a talk show and informed him that he had a claim form, statement of claim, and prescribed forms to serve him. The defendant said he had no time as he was late for his show and did not look over or take the documents. The process server accessed the defendant's vehicle using the defendant's keys, which he retrieved without the knowledge of the defendant, and left the claim form, statement of claim and prescribed forms on the driver's seat of the defendant's car. The Saint Lucia High Court held that this was not effective personal service. There was no obligation on the defendant to observe or accept the presence of the documents placed in his parked vehicle without his knowledge. Personal service under EC CPR 5.3 requires that the document be handed to the person to be served or, if he will not accept it, that he be told what the document contains and the document be left with or near him. If the person served will not take the documents, the process server should tell him what it contains and leave it as nearly in his possession or control as he can. The document must be left with and not merely shown to the person to be served, even though he refuses to take it.)

Tseitline v Mikhelson & Ors [2015] EWHC 3065 (Comm) (The English High Court held that personal service cannot be effected without the nature of the document being readily apparent or known to the recipient or otherwise explained to him so that he can be taken to know its nature. A document is not to be regarded as having been "accepted" by a person if its nature is not apparent when it is handed to him. If leaving a document with the intended recipient is resorted to, the process of leaving a document with the intended recipient must result in them acquiring knowledge that it is a legal document which requires their attention in connection with proceedings. Whilst this is expressed as requiring that the intended recipient be "told" the nature of the document, the focus is on the knowledge of the recipient, not the process by which it is acquired. Whilst in most cases knowledge of the nature of the document will be found to have been imparted by a simple explanation, it is clear that it can be also readily be inferred from pre-existing knowledge, prior dealings or from conduct at the time of or after service, including conduct in evading service.)

5.4 Permitted place of service.

Except as permitted by Part 7, a claim form must be served at a place within the jurisdiction.

5.5 Proof of personal service.

(1) Personal service of the claim form is proved by an affidavit sworn by the server stating —

> (a) the date and time of service;
>
> (b) the precise place or address at which it was served;
>
> (c) the precise manner by which the person on whom the claim form was served was identified; and
>
> (d) precisely how the claim form was served.

(2) If the person served was identified by another person, there must also be filed where practicable an affidavit by that person —

> (a) proving the identification of the person served; and
>
> (b) stating how the maker of the affidavit was able to identify the person served.

(3) If the server identified the person to be served by means of a photograph or description there must also be filed an affidavit by a person -

(a) verifying the description or photograph as being of the person intended to be served; and

(b) stating how the maker of the affidavit is able to verify the description or photograph as being of the person intended to be served.

Notes:
The onus is on the claimant to satisfy the Court that the claim form and all other requisite documents were served personally. An affidavit of service setting out the full particulars of service in accordance with CPR 5.5 is required to be filed.

Cases:

Amerada Hess v Rome 2000 The Times 15 March 2000 (The claimants had served proceedings on an agent who did not have authority to accept such service. They sought, out of time, leave to re-serve correctly, and also to add an additional cause of action which, whilst now outside the limitation period, arose out of the same facts. The English High Court held that service was not properly effected.)

Smith v Probyn and PGA European Tower Ltd [2000] EWHC (QB) 136 (*S*ervice of process was made on a solicitor without ensuring that there was requisite authority to accept service. The English High Court held

that proper service was not effected. The claimant made an application for extension of time for service of the claim form but this was refused on ground that the limitation period had expired.)

Gate Gourmet Luxembourg iv SARL et al v Gary Kenneth Morby [2015] EWHC 1203 (Ch) (The evidence of the petitioners was that a bankruptcy petition had been handed to the respondent. The respondent said that the process server gave the petition to a friend of his who he nominated to receive the petition on his behalf in his presence. The English High Court held that if facts are in dispute, absent special situations, it would be unsafe to reach a conclusion on written evidence alone without cross-examination. It was held on the respondent's case that there had been good service of the petition.)

Georgia Kouda v Dimitrious Adampolous SLUHCV2017/0635 (Saint Lucia) (The St. Lucian High Court held that where a defendant lodges evidence denying that he was personally served and there is an affidavit of service on the court's file, the court cannot resolve the conflicting written evidence without cross-examination.)

5.6 Service on attorney.

The claim form must be served on an attorney where that attorney —

(a) is authorised to accept service of the claim form on behalf of a party; and

(b) has notified the claimant in writing that he is so authorised.

Notes:
The claim form shall be served on an attorney only in circumstances where the attorney is authorized to accept service of the claim form on behalf of a party and that the attorney has notified the claimant in writing that he is authorized to accept service. CPR 5.6 is nearly identical to Part 6 of the English CPR, which deals with service of the claim form on a solicitor.

Cases:

Smith v Probyn and PGA European Tower Ltd [2000] EWHC (QB) 136 (The English High Court held that a solicitor does not generally have implied authority to accept service of a claim form on behalf of a client. If he does so, he is in breach of his professional duty to his client in the absence of express authority. The solicitor must be expressly authorised to accept service of proceedings. Service of a solicitor without the requisite authority is not effective service under CPR 5.6.)

Collier v Williams [2006] EWCA Civ 20 (The English Court of Appeal held under the English CPR that where a solicitor is authorised to accept service of the claim form on behalf of a party and has notified the claimant in writing that he is so authorised, service must take place on the solicitor and personal service of the claim form on that party will not be regular service.)

5.7 Service on limited company.

Service of the claim form on a limited company may be effected —

(a) by leaving the claim form at the registered office of the company;

(b) by serving the claim form personally on an officer or manager of the company at any place of business of the company which has a real connection with the claim; or

(c) by serving the claim form personally on any director, officer, receiver, receiver-manager or liquidator of the company;

(d) in any other way allowed by any enactment.

Notes:
This provision outlines how service may be effected on a limited company, namely, by leaving the claim form at the registered office of the company, serving the claim form personally on an offer or manager of the company at any place of business of the company which has a real connection with the claim, serving the claim form personally on any director, officer, receiver-manager or liquidator of the company; in any other way allowed by any enactment (see section 23 of the *Companies Act*).

These provisions are akin to English CPR 6.9(2) and takes into account the exceptions on personal service and manner of service on non-individuals such as limited liability companies. A departure from CPR 5.7 may be capable of being rectified under CPR 26.9.

Cases:

Cranfield v Bridgegrove Ltd and other appeals [2003] EWCA Civ 656 (The English Court of Appeal held that a claimant may serve a claim form on a defendant company either by one of the methods permitted by the *Companies Act* or by serving it in accordance with one of the methods permitted by the CPR.)

Barbara Angela Reid v Melroc Investments Limited t/a Access Cambio [2019] JMSC 244 (The Jamaican Supreme Court held that JAM CPR 5.7 set out options only. The word "may" as opposed to "must" is used. This suggests that a claimant who wishes to serve a corporate defendant is able to use any method which would get the documents to the attention of the defendant. The Jamaican Supreme Court held that the claim form and particulars of claim were properly served on the defendant company by leaving them at the principal place of business of the defendant. Having left the documents at the principal place of business of the defendant, it is very likely that the documents would have come to the attention of the principals of the defendant.)

Guy Eardley Joseph v McDowell Broadcasting Corporation (MBC) Limited SLUHCVAP 2022/0008 (The Eastern Caribbean Court of Appeal after citing *Barbara Angela Reid*, *supra*, held that the wording of EC CPR 5.7 is not mandatory and therefore the service by the appellant of the claim form on the receptionist at the respondent's place of business, an employee, and not an officer of the respondent contemplated by EC CPR 5.7(c), was an irregularity and not a nullity, which could be cured under EC CPR 26.9.)

5.8 Service on firm or partnership.

(1) Service of the claim form on a firm or partnership may be effected —

(a) by serving the claim form personally on a manager of the firm at any place of business of the firm or partnership which has a real connection with the claim;

(b) by serving the claim form personally on any partner of the firm; or

(c) in any other way allowed by any enactment.

(2) If the claimant knows that a partnership has been dissolved when the claim is issued, the claim form must be served personally on every person within the jurisdiction whom the claimant seeks to make liable.

Notes:
This provision outlines how service may be effected on a firm or partnership namely, by serving the claim form personally on a manager of the firm at any place of business of the firm which has a real connection with the claim, serving the claim form personally on any partner of the firm, or in any other way allowed by any enactment. In the event of a dissolution of a partnership known to the claimant, the claim form shall be personally served on every person within the jurisdiction whom the claimant seeks to make liable.

5.9 Service on body corporate.

(1) Service of the claim form on a body corporate, other than a limited company, may be effected —

(a) by leaving the claim form at the principal office of the body corporate;

(b) by serving the claim form personally on any principal officer of the body corporate; or

(c) in any other way allowed by any enactment.

(2) In this rule, “principal officer” means the chairman or president of the body, or the chief executive officer, secretary, treasurer or other similar officer of the body.

Notes:
This provision outlines how service is effected on a body corporate other than a limited company namely by leaving the claim form at the principal office of the body corporate; serving the claim form personally on any principal officer (chairman or president of the body, the chief executive officer, secretary, treasurer or similar officer of the body) of the body or in any way allowed by any enactment.

5.10 Service on minors and patients.

(1) Paragraphs (2) to (5) specify the persons on whom a claim form must be served if it would otherwise be served on a minor or patient.

(2) A claim form which would otherwise be served on a minor who is not also a patient must be served on —

(a) one of the minor’s parents or guardians; or

(b) the person with whom the minor resides or in whose care the minor is, if there is no parent or guardian.

(3) If a person is authorised under any relevant enactment to conduct proceedings in the name of the patient or on the patient’s behalf, a claim form must be served on that person.

(4) If there is no person authorised under paragraph (3), a claim form must be served on the person with whom the patient resides or in whose care the patient is.

(5) The Court may make an order permitting the claim form to be served on the minor or patient, or on some person other than the person specified in paragraphs (2) to (4).

(6) The Court may order that, although paragraphs (2) to (4) have not been complied with, the claim form is to be treated as properly served.

(7) An application for an order under paragraph (5) or (6) may be made without notice but must be supported by evidence on affidavit.

Notes:
This provision outlines how service of the claim form is effected on a person who is under the age of majority or who may be deemed a patient. Part 23 of the CPR defines who is a minor and a patient. This was formerly defined by Order 70, rule 12(2) of the RSC. Provision for service remains nearly identical. See also the provisions of sections 12, 34 and 36 of the *Mental Health Act*, sections 14, 16, 21 *Child Protection Act* and section 20 (A) *Child Protection (Amendment) Act*.

5.11 Proof of postal service.

(1) Service by post should be proved by an affidavit of service by the person responsible for posting the claim form to the person to be served.

(2) The affidavit must exhibit a copy of the claim form served and state —

(a) the date and time of posting; and

(b) the address written on the relevant envelope or package.

Notes:
If service is effected by postal service, an affidavit of service is required to be deposed by the person posting the claim form exhibiting a copy of the claim form and stating the date and time of posting and the address written on the parcel. Order 61, rule (5)(1)(b) and 61, rule (5)(2)(a) of the RSC previously allowed for documents to be served by postal service. This new provision requires an affidavit of service verifying that the claim form has been sent to any defendant via post. See also the provisions of CPR 5.13 and CPR 5.14.

5.12 Proof of service by electronic means.

(1) Service by electronic means of a claim form is proved by an affidavit of service by the person responsible for transmitting the claim form to the person to be served.

(2) The affidavit must exhibit a copy of —

(a) the document served;

(b) any cover sheet or email to that document;

(c) the transmission record; and

(d) proof of electronic service of the document, and must state the —

(i) electronic means by which the document was served;

(ii) e-mail address to which the document was transmitted; and

(iii) date and time of the transmission.

(3) Electronic confirmation of delivery may be treated as proof of service for a document that is served electronically and may include a written e-mail response or a read receipt.

Notes:
This provision outlines the requirements to prove service by electronic means, namely, by an affidavit of service by the person responsible for transmitting the claim form to the person to be served exhibiting a copy of the document served, any cover sheet of that document, the transmission record and the electronic means by which the document was served, the e-mail address to which the document was transmitted and the date and time of the transmission. Confirmation of delivery of the document may be deemed as proof of service that a document was served electronically and may include a written email response or a read receipt. See CPR 5.1 (2) and sections 15 and 17 *Electronic Communications and Transactions Act.*

5.13 Alternative methods of service.

(1) A party may choose an alternative method of service after taking reasonable steps to personally serve the claim form.

(2) Where a party —

(a) chooses an alternative method of service; and

(b) the Court is asked to take any step, including the filing of a default judgment, on the basis that the claim form has been served, the party who served the claim form must file evidence on affidavit proving that it was impracticable to personally serve the defendant and that the method of service was sufficient to enable the defendant to ascertain the contents of the claim form.

(3) An affidavit under paragraph (2) must —

(a) exhibit a copy of the documents served;

(b) give details of the attempts made to personally serve the defendant;

(c) give details of the alternative method of service used;

(d) show that —

(i) the person intended to be served was able to ascertain the contents of the documents; or

(ii) it is likely that he would have been able to do so; and

(e) state the time when the person served was or was likely to have been in a position to ascertain the contents of the documents.

(4) The attorney for the claimant must immediately refer any affidavit filed under paragraph (2) to the Listing Office for a hearing on the papers before a judge or registrar who must —

(a) consider the evidence; and

(b) endorse on the affidavit whether it satisfactorily proves service.

(5) If the Court is not satisfied that it was impracticable to personally serve the defendant or that the method of service chosen was sufficient to enable the defendant to ascertain the contents of the claim form, the court office must fix a date, time and place to consider making an order under rule 5.14 and give at least seven days' notice to the claimant or the claimant's attorney.

Notes:
This provision outlines the procedure relating to alternative methods of service if personal service of the claim form cannot be effected or it is impracticable to effect personal service (formerly known as "substituted service", with applications made pursuant to Order 61, rule 4 of the RSC).

The general rule is that where a document requires personal service, no order for substituted service can be made unless it is demonstrated that it is impracticable to personally serve the claim form. This rule allows for alternative service to be made, in the absence of a court order, with the method of alternate service supported by affidavit.

CPR 5.13 (1): The claimant should take all reasonable steps to personally file the claim form. If unable to effect personal service, the claimant may serve the claim form by an alternative method without leave of the court.

CPR 5.13 (2): The claimant who choses an alternative method of service and who makes application to the court for a step to be taken in the action, inclusive of filing a default judgment on the basis that the claim form has been served must file evidence in affidavit form outlining the details and attempts taken to personally serve the claim form to show that it was impracticable to personally serve the claim form and that the alternative method was sufficient to enable the defendant of notice of the contents of the claim form. Details of the alternative method of service must also be stated in the affidavit.

CPR 5.13 (4): The attorney for the claimant must make application to a registrar or a judge for a hearing on the papers to consider the evidence and endorse on the affidavit whether there has been satisfactory service.

CPR 5.13 (5): If the court is not satisfied that it was impracticable to personally serve the claim form or that the alternative method of was not sufficient to enable the defendant to ascertain the contents of the claim form, the Court may affix a date to consider another alternative method of service as good service and make an Order thereon.

Cases:

[Kilraj Kamita v Zahida Khanpradie CV No. 2014-00674] (Trinidad and Tobago) (The Trinidad & Tobago High Court held that an application to deem purported service as satisfactorily proven service pursuant to T&T CPR 5.13 made prior to the court office being asked to take any step on the basis that the claim form had been served was "unusual and premature". The application was refused on the basis that the court was not satisfied there had been proper service on the defendant and the application contained no information as to whether there were any challenges that prevented personal service. The Trinidad & Tobago High Court felt that attempts had to be made to effect personal service upon the defendant.)

Jermaine Edwards v Owen Marquesse et al [2020] JMSC Civ 7 (The Jamaican Supreme Court held that JAM CPR 5.13 does not permit dispensing with service of the claim form altogether, but instead, it allows for service by a method other than personal service on a defendant. The wording of JAM CPR 5.13 is clear that there remains a need for the claim form to be served.)

ICWI v Allen (Shelton) et al [2011] JMCA Civ 33 (The Jamaican Court of Appeal held that the plethora of references in JAM CPR 5.13 to the need for evidence of the likelihood of the claim form coming to the attention of the defendant by the claimant's choice of an alternative method of service indicated that the framers of the rule intended to subject the option to serve the claim form by alternative means to the tightest possible control. To rely on JAM CPR 5.13, the claimant must clearly show by affidavit evidence, and the court must be satisfied that, the claim form is likely to reach the defendant or to come to his knowledge by the method of service adopted by the claimant. The Jamaican Court of Appeal noted that JAM CPR 5.13 permits a claimant to adopt an alternative method of service without a prior application to the court for permission and it is only if the court is not satisfied that the method of alternative service is adequate that an application to is necessary under JAM CPR 5.14.)

Orville Spence v First Global Bank Limited [2019] JMCA Civ 21 (The Jamaican Court of Appeal held that a failure by the registrar to physically endorse on the affidavit filed by the claimant under JAM CPR 5.13 that the affidavit satisfactorily proved service, a purely technical requirement for administrative purposes, did not render the service or steps taken upon it invalid. It is the grant of the request made to the registrar which actually signifies her satisfaction that service is satisfactorily proven and not the technicality of manually writing or even stamping on the affidavit.)

Rachel Graham v Erica Graham and another [2021] JMCA Civ 51 (The Jamaican Court of Appeal held that when confronted by difficulties in effecting personal service of the claim form on a defendant, within the jurisdiction, the claimant may choose an alternative method of service pursuant to JAM CPR 5.13 or apply for an order for service by a specified method pursuant to JAM CPR 5.14. However, JAM CPR 5.13 and 5.14 do not permit alternative service of a claim form on an attorney-at-law – such service is permitted only by JAM CPR 5.6.)

5.14 Power of Court to deem alternative method of service to be good service.

(1) The Court may direct that a claim form served by a method specified in the court's order be deemed to be good service.

(2) An application for an order to serve by a specified method may be made without notice but must be supported by evidence on affidavit —

(a) showing that it is impracticable to personally serve the defendant;

(b) specifying the method of service proposed; and

(c) showing that that method of service is likely to enable the person to be served to ascertain the contents of the claim form and statement of claim.

Notes:

The Court retains the power to direct that a claim form be served by an alternate method of service as deemed in its order to be good service. This application is made without notice and is supported by evidence on affidavit showing that it is impracticable to serve the defendant, the method of service proposed and evidence that the method of service is likely to enable the person to be served to ascertain the contents of the claim form.

The Court reserves its right to pronounce an Order for alternative means of service or substituted service of the claim form if it is not satisfied that the alternate method of service undertaken by a claimant in accordance with CPR 5.13 was sufficient. The same may be made by way of advertisement, or service upon a person who may bring the same to the defendant's attention.

Cases:

Star Investments Cayman II Inc v Ou Wen Lin et al Claim No. BVIHC (Com) 2018/0225 (BVI) (The BVI High Court held that EC CPR 5.13 deals with alternative service, which is an ex post facto authorisation of a form of service chosen by the claimant whereas EC CPR 5.14 deals with service by a specified method, which more closely resembles the English order for alternative service (English CPR 16.5) in that the order is made before service is attempted. Under EC CPR 5.14, the Court determines the method by which service is to be effected. The BVI High Court held that service on a registered agent of a company might possibly be ordered as a means of alternative service on a shareholder of the company, if the registered agent is able to pass on the documents as a result of its "know your customer" duties.

Elmes v Hygrade Food Products PLC [2001] EWCA Civ 121 (The English Court of Appeal held that English CPR 6.8, the rule in the English CPR which provided for service by an alternative method, was prospective in its operation and could not be applied retrospectively.)

Curtis Gordon by his lawful attorney Quinta Charles v Peter Bramble Claim No. ANUHCV2018/0527 (The Antiguan High Court held that EC CPR 7.8A is a section that should have been engaged by the claimant prior to the service being effected. The section refers to service that is to be effected not a situation where it already has been effected and a litigant is trying to justify service.)

Rachel Graham v Erica Graham and another [2021] JMCA Civ 51 (The Jamaican Court of Appeal held that under JAM CPR 5.14(1) the court is empowered to retrospectively validate steps already taken by a claimant to enable the contents of the claim form to be ascertained by the defendant, by an alternative method. Additionally, pursuant to JAM CPR 5.14(2), on a party's direct application to the court, the court may make an order prospectively permitting service by a specified method. Such an order, if granted, also enables a claimant to effect service on a defendant by an alternative method. Orders made pursuant to both JAM CPR 5.14(1) and JAM CPR 5.14(2) are orders that an alternative method of service specified in a court order be deemed to be good service. In the case of an application for alternative service, The onus is on the claimant to persuade the court that there is good reason for the order. The question is whether there is good reason for the court to validate the mode of service elected, not whether the claimant had good reasons to choose that mode of service. What amounts to good reason will involve considering all the circumstances and relevant factors will include, but is not limited to, any previous efforts made by the claimant to effect personal service, whether service within the jurisdiction is feasible and the claimant's knowledge of a defendant's whereabouts. The court should give directions under JAM CPR 5.14 which do not involve one of the other prescribed methods of service already dealt with by JAM CPR 5.3 through 5.10.)

British Caribbean Insurance Company Ltd v Barrett and Others [2014] JMCA App 5 (An insurer applied to set aside an order made under JAM CPR 5.14 on the basis that it had made all reasonable efforts,

without success, to contact its insured and, as a result, since it was unable to bring the claim to the attention of its insured, service on it would not be effective service on the insured. The evidence showed that the insurer and its agents had done no more than send letters to addresses on file and attempt to telephone phone numbers on file for the insured. The Jamaican Court of Appeal upheld a refusal by a master to set aside the order on the basis that it had not been shown that, despite reasonable efforts, the insurer could not bring the claim to the insured's attention.)

Damion Welch v Roxneil Thompson et al [2018] JMSC Civ 59 (The Jamaican Supreme Court refused an application by an insurer to set aside an order made under JAM CPR 5.14 authorizing service of its insured via service on it as the Court was not satisfied that the insurer had taken all reasonable steps to find the insured and the insurer had been guilty of delay in applying and in pursuing the application.)

Hopetown Brown v Raymond Hall et al [2022] JMSC Civ 88 (The Jamaican Supreme Court refused an application by an insurer to set aside an order made under JAM CPR 5.14 authorizing service of one Benjamin James via service on it where it had insured James' vehicle at the time of the accident giving rise to the proceedings. The Court was not satisfied that the insurer had taken all reasonable steps to find the insured (the insurer had simply made occasional telephone calls) and had been guilty of inordinate delay in pursuing the application.)

Naser Taher v Mex Clearing Limited BVIHCMAP2022/0030 (the Eastern Caribbean Court of Appeal held, in an appeal relating to EC CPR 7.8A, that evidence of prior unsuccessful attempts at service through the conventional methods of service under EC CPR 7.8(1) is not a necessary pre-requisite to establishing "impracticality" under EC CPR 7.8A(1). It is but one method by which, evidentially, an applicant can demonstrate that service by conventional methods is "impracticable". "Impracticable" does not mean impossible, it means, taking all relevant considerations, it is "not practically possible" in the circumstances of the particular case. When considering EC CPR 7.8A and whether it is impractical to serve the defendant out of the jurisdiction through any of the conventional methods for service out, the court must consider and apply the overriding objective but the overriding objective cannot be used to impose a lower threshold than impracticability.)

5.15 Proof of service by specified method.

Service is proved by an affidavit made by the person who served the document showing that the terms of the order have been carried out.

Notes:
The Claimant must file an Affidavit with attachments outlining that the terms of an Order for alternate method of service were complied with.

The Court requires an Affidavit of Service outlining compliance of the means of service as proof of service as Ordered in accordance with CPR 5.15.

5.16 Service of claim form by contractually agreed method.

(1) This rule applies where a contract contains a term specifying how any proceedings under the contract should be served.

(2) A claim form containing a claim in respect of a contract may be served by any method permitted by that contract.

(3) If the claim form is served within the jurisdiction in accordance with the contract, it is to be treated as having been served on the defendant.

(4) If the claim form is served out of the jurisdiction in accordance with the contract, it is not to be treated as having been served on the defendant unless service out of the jurisdiction is permitted under Part 7.

Notes:
This provision outlines the rule which is applicable when a contract between the parties specifies how any proceedings under the contract should be served. A claim form containing a claim with respect to a contract may be served within this jurisdiction by any method permitted in the contract.

This provision is akin to the former Order 10 Rule 3 RSC provision and to Part 6 (11) of the UK CPR.

5.17 Service of claim form on agent of principal who is out of jurisdiction.

(1) Where the conditions specified in paragraph (2) are satisfied, the Court may permit a claim form relating to a contract to be served on a defendant's agent.

(2) The Court may not make an order under this rule unless it is satisfied that-

(a) at the time of the application —

(i) the agent's authority had not been terminated; or

(ii) the agent is still in business relations with the defendant;

(b) the contract to which the claim relates was entered into within the jurisdiction with or through the defendant's agent; and

(c) the defendant cannot be served within the jurisdiction.

(3) An application may be made without notice but must be supported by evidence on affidavit.

(4) An order under this rule must state the periods within which the defendant must file —

(a) an acknowledgement of service; and

(b) a defence.

(5) When the Court makes an order under this rule, the claimant must serve the agent with —

(a) the claim form;

(b) the order; and

(c) subject to rule 5.2(2) above, the statement of claim,

and at the same time send to the defendant at the defendant's address out of the jurisdiction a copy of each document.

Notes:

CPR 5.17 This provision is akin to the former Order 10 R 2 RSC provision and is akin to Part 6 (12) of the UK CPR.

This provision allows the court to make an order for service of Claim form on an Agent or Principal who is out of the jurisdiction by application without notice supported by evidence on Affidavit. The Court must be satisfied that at the time of the application, the agent's authority was not terminated or that the agent was still in business relations with the Defendant, that the contract to which the claim relates was entered into within the jurisdiction with or through the Defendant's agent and that the Defendant cannot be served within the jurisdiction. The Court shall provide specified periods to which the Defendant must file an acknowledgement of service and defence. The Claimant is mandated under this provision to serve the agent with the claim form, the order and the statement of claim (where applicable)[4].

5.18 Service of claim form for possession of vacant land.

(1) Paragraphs (2) to (3) deal with the service of a claim form for possession of land where —

(a) there is no person in occupation of the land; and

(b) service cannot otherwise be effected on the defendant.

(2) The Court may direct that a claim form and statement of claim be served by affixing a copy of the claim form to some conspicuous part of the land and by publishing a notice of the claim at least once in one or more newspapers of general circulation in the island in which the land is situated.

(3) An application for an order under this rule —

(a) may be made without notice; but

(b) must be supported by evidence on affidavit that there is no —

(i) other method of serving the defendant; and

(ii) person in possession of the land.

Notes:

CPR 5.18 This provision is akin to the former Order 10 Rule 4 RSC provision.

This provision enables the court to make an Order for service of a Claim form for possession of vacant land where there is no person in occupation of the land and service cannot be effected on the Defendant. The

[4] 5.2 (2)

court upon application without notice and supported by Affidavit evidence that there is no other method to serve the defendant and that there is no person in possession of the land may make an Order on how the claim form and statement of claim are to be served to give notice to a Defendant, namely by affixing a copy of the claim form on a conspicuous part of the land and by advertisement of notice of the claim on at least one or more in newspapers of general circulation on the island where the land is situated.

5.19 Deemed date of service.

(1) A claim form that has been served within the jurisdiction by an alternative method of service is deemed to be served, unless the contrary is shown, on the day shown in the table in rule 6.6.

(2) If a claim is sent to the attorney of a party who certifies that he accepts service on behalf of the defendant, the claim is deemed to have been served on the date on which the attorney certifies that he accepts service.

(3) If an acknowledgement of service is filed, whether or not the claim form has been duly served, the claimant may treat —

(a) the date of filing the acknowledgement of service; or

(b) if earlier, the date shown on the acknowledgement of service for receipt of the claim form; as the date of service.

(4) A claimant may file evidence on affidavit to prove that service was in fact effected on a date earlier than the date on which it is deemed to be effected.

Notes:

This provision outlines the deemed dates of service of process. If the claim form was served on the attorney who certifies that he accepts service on behalf of a defendant, service is deemed to be made on the date which the attorney confirmed acceptance of service. The claimant may, if an acknowledgement of service is filed whether or not the claim form has been duly served treat the date of filing of an acknowledgement of service or if earlier, the date shown on the acknowledgement of service for receipt of the claim form as acknowledgement of service.

This provision specifically provides timelines for the deemed date of service of the claim form. This provision is read in conjunction with CPR 6.6. In addition, where a defendant files an appearance/ acknowledgement without service of the claim form being effected, the date of acknowledgement is deemed to be the date of service. The Defendant is deemed to have submitted to the jurisdiction and to have notice of the claim form.

Cases:

Pike v Nairn 1960 Ch 533 *(*A claimant, a tenant entered originating process against a landlord for an extension of a tenancy agreement which was not served on the defendant. The originating summons was not served and the tenants never applied to restore the summons. On 24 February 1960, the landlords took out a summons asking that the tenants' originating summons be dismissed for want of prosecution. On a contention by the tenants that the landlords, not having been served with the originating summons, had no *locus stand*i and could not be heard unless and until the tenants chose to serve it on them, the Court held that the defendants or respondents to an originating summons, which was analogous to a writ, could waive

service of the summons on themselves and enter an appearance to it, and the landlords could, if they chose, claim to be heard on the summons.)

The Gniezno; Owners of The Motor Vessel Popi v Owners of Steamship or Vessel Gniezno [1967] 2 All ER 738 (The defendant to a writ which had not been served entered an appearance voluntarily to the writ although the same was not valid for service. It was held that, based on the entry of the appearance, that service was waived and an appearance was voluntarily entered and was valid.)

Warshaw v Drew 1990 30 WIR *(*The appellants issued a writ of summons which was served and accepted by their counsel. The appellants failed to serve the statement of claim in the timeframe allotted by the Master of Rolls on an application by the defendants. The claim was dismissed by the Master of Rolls and the appellants appealed. The Court of Appeal held that if a defendant has not been served with a writ, he can waive service by voluntarily taking a step in the action, such as by issuing and prosecuting a summons to strike out the action for want of prosecution.)

Shade Construction Company Ltd v The Cepep Company Ltd Claim No.CV2017-03282 (The Trinidad & Tobago High Court stated *obiter* in the context of T&T CPR 5.19 that "a deemed date is a date that is an accepted date for a thing to have taken place when an actual date cannot be proven. It is a fiction that is treated as a fact in the absence of a provable fact." The question arose whether a judgment in default of appearance was premature on the ground that the application for judgment was made before the time for acknowledging service based on the deemed date of service of the claim form had expired. The claimant showed that the actual date of service of the claim form and particulars of claim preceded the deemed date of service. The T&T High Court held that the claimant could rely on the actual date of service as "[a] provable fact trumps a fiction" and found that the judgment in default was therefore validly made.)

Linton Watson v Gilon Sewell Civil Appeal No 123/2010 (The Jamaican Court of Appeal held that the use of the words "unless the contrary is shown" in JAM CPR 5.19(1) suggest that the claimant or the defendant can produce evidence to show when actual receipt of the claim form and accompanying documents occurred to dispel the fiction of deemed service on another day or that service occurred at all.)

Andrey Titarenko v Appleby (BVI) Limited Claim No. BVIHCM 2021/0057) (The BVI High Court noted that one other way, apart from through actual service, by which a claimant can establish that a claim form should be treated as having been served, is through the application of EC CPR 5.19(3). The rule deems service of a claim form to have occurred on the date an acknowledgment of service has been filed, whether or not a claim form has duly been served. It is impossible for a party to derogate from the effect of EC CPR 5.19(3).)

Tanzania Tobing Tanzil v Lindsay F.P. Grant et al Claim No. SKBHCV2017/0391 (The St. Christopher and Nevis High Court noted that, under CPR 5.19(3), the deemed date of service focuses upon the actions of the defendant–his or her filing of the acknowledgement of service, and the date that he or she includes in that acknowledgement.)

Frederick Finlay v Raymond Prime et al Claim No. GDAHCV2023/0061 (Illustration of CPR 5.19(3) applied to the calculation of the time limit for filing a defence.)

CPR PART 6 – SERVICE OF OTHER DOCUMENTS

6.1 Who is to serve documents other than the claim form.

(1) Every order must be served by the party obtaining the order unless the Court orders otherwise.

(2) Any other document must be served by the party who filed it unless —

(a) a rule or practice direction otherwise provides; or

(b) the Court orders otherwise.

Notes:
CPR Part 6 outlines the procedure for service of all documents other than a claim form and statement of claim within the jurisdiction of The Bahamas. This provision is not applicable to civil proceedings as against the Crown (Office of the Attorney General): CPR 65.3(1).

CPR 42.6 provides that, unless the Court otherwise directs, every judgment or order must be served on — (a) every party to the proceedings in which the judgment or order is made; and (b) any other person on whom the court orders it to be served.

6.2 Method of Service.

If these Rules require a document other than a claim form to be served on any person it may be served by any of the following methods —

(a) any means of service in accordance with Part 5;

(b) leaving it at any address for service in accordance with rule 6.3(1); or

(c) other means of electronic communication if this is permitted by a relevant practice direction;

unless a rule otherwise provides or the Court orders otherwise.

Notes:
Documents other than the claim form may be served on any person by any of the following methods —

(a) in accordance with CPR Part 5 (personal service or otherwise made in accordance with the provisions of CPR Part 5);

(b) leaving it at any address for service in accordance with CPR 6.3(1); or

(c) electronic means if permitted by the relevant practice direction (see also section 17 of the *Electronic Communications and Transactions Act*).

In the absence of an express provision for personal service, ordinary service such as by registered post, facsimile or electronic transmission, or any other method may be deemed sufficient under this Part.

6.3 Address for Service.

(1) Documents must be delivered or, if allowed, sent by electronic communication or posted to a party at any address for service within the jurisdiction given by that party.

(2) If a party to be served has not given an address within the jurisdiction at which documents for that party may be served, documents must be served at the address indicated in rule 6.4.

Notes:
Documents must be delivered or posted to a party at any address for service within the jurisdiction given by that party, or if allowed transmitted by electronic means. If a party to be served has not specified an address for service, documents may be served in accordance with CPR 6.4.

Cases:

Attorney General of Saint Vincent and the Grenadines v Randolph Trueman Touissant Civil Appeal No. 1 of 2004; [2004] ECSC J1217-1 (vLex citation) (The appellant appealed against an order for costs relating to the adjournment of an interlocutory application. The respondent's instructing attorneys received a letter giving notice of the intention of the appellant to seek an adjournment but the respondent's leading counsel was out of the jurisdiction. The Eastern Caribbean Court of Appeal noted that, as the respondent had given their instructing attorney's address as their address for service, the letter giving notice of the appellant's intention to seek an adjournment had been properly served in accordance with EC CPR 6.3 and the appellant could not be held responsible for the fact that the respondent's leading counsel was not in Trinidad at the time. It was further held that there was no obligation on the appellant's leading counsel to communicate directly with the respondent's leading counsel about the intention to seek an adjournment.)

Firstcaribbean International Bank (Barbados Limited v Sunset Village Inc et al Claim No. SLUHCV2009/0949 (The St. Lucian High Court held that a case management bundle and order were validly served on a litigant who gave his address for service as the chambers of his legal practitioner of record through service on his legal practitioner at his business address, as the legal practitioner's business address was given in the litigant's acknowledgment of service, the legal practitioner remained attorney of record and he continued to appear for the litigant. The St. Lucian High Court made that finding notwithstanding the legal practitioner maintained that (i) he had an application to be removed from the record which he could not serve on the litigant as he had not had contact with the litigant for the past 7 years and (ii) he continued to appear only as a courtesy to the Court.)

Winston Charles v Victoria Mutual Building Society [2019] JMCA Civ 40 (The claimant acted in person after his attorneys removed their names from the record. The Jamaican Court of Appeal noted that JAM CPR 6.3 and 6.4, as they apply to individual litigants, allow documents, other than claim forms, to be served on them, by posting the documents to, or leaving them at, the address given by the relevant party. If, however, that party does not stipulate an address for service, then the documents may be posted to, or left at, the individual's usual residence, or last known place of residence. Service in accordance with these provisions is deemed to be service and the documents are deemed served the day after they are left at the relevant address. The documents at issue were left at the address stipulated by the claimant on his particulars of claim but it was patent that the claimant would have been unlikely to have received the documents as the property appeared to be unoccupied. The documents also not left at his usual or last known place of residence as the documents were left at the wrong house number on the same road.)

6.4 Serving documents where no address for service is given.

(1) If no address is given for service the document may be served by leaving it — (a) in the case of a firm or partnership, either —

(i) at the principal or last known address of the firm or partnership or any place where the firm or partnership carries on business and which has a real connection with the claim; or

(ii) the usual or last known place of residence of one of the partners;

(b) in the case of an individual – that person's usual or last known place of residence;

(c) in the case of a proprietor of a business, that person's —

(i) usual or last known place of residence; or

(ii) place of business or last known place of business; or

(d) the business address of any attorney who purports to act for the party in the proceedings.

(2) Part 5 may be applied to such a document as if it were a claim form.

Notes:

In the event that no address for service has been given by a party, service of the document may be effected by leaving it:

1) In the case of a firm or partnership either:
    a) At its principal or last known address of the firm or partnership or any place where the firm or partnership carries on business and which has a real connection with the claim; or
    b) The usual or last known place of residence of the partners.
2) If an individual: that person's usual or last known place of residence
3) In the case of a proprietor of a business:
    a) That person's usual or last known place of residence; or
    b) Place of business or last known place of business; or
    c) The business address of any attorney (see CPR Part 70) who purports to act for the party for the proceedings

In this case, CPR Part 5 may be applied to such a document as if it were a claim form.

6.5 Service of documents on person who is not a party.

If the Court or a party is to serve documents on a person who is not a party, such documents must be served by one of the methods specified in Part 5 or as the Court shall otherwise direct.

Notes:

If the Court or a party is to serve a document on a person who is not a party, the document must be served by one of the methods outlined in Part 5 or as the Court shall direct. See also CPR 42.12.

6.6. Deemed date of service.

(1) A document which is served within the jurisdiction in accordance with these Rules is deemed to be served on the day shown in the following table —

Method of Service	Deemed date of service
Post	28 days after posting;
Registered Post	21 days after the date indicated on the Post Office or courier receipt;
Leaving document at a permitted Address	The day after leaving the document
Other electronic method of service	4:00 p.m. on the same day of transmission or if transmission is after 4:00 p.m. the following business day at 9:00 a.m.

(2) Any document served after 4 p.m. on a business day or at any time on a day other than a business day is treated as having been served on the next business day.

(3) In this rule, "business day" means any —

(a) day other than a Saturday, Sunday or public holiday; or

(b) other day on which the court office is closed.

Notes:

This provision outlines the deemed date of service of process for documents other than the claim form.

A document which is served within the jurisdiction in accordance with the CPR rules is deemed to be served on the day shown in the following table.

Method of Service	Deemed date of service
Post	28 days after posting;
Registered Post	21 days after the date indicated on the Post Office or courier receipt;

Leaving document at a permitted Address	The day after leaving the document
Other electronic method of service	4:00 p.m. on the same day of transmission or if transmission is after 4:00 p.m. the following business day at 9:00 a.m.

Any document served after 4 p.m. on a business day or at any time on a day other than a business day is treated as having been served on the next business day. Business day is defined as a day other than a Saturday, Sunday or public holiday; or any other day on which the court office is closed.

Cases:

Godwin v Swindon Borough Council [2001] EWCA Civ 1478 (The claimant sustained a bank injury and the claim form was issued on 17 February 2000 shortly before the expiry of the statutory period of limitation. The claim form was required to be served within four months. The time for service was extended to 8 September 2000. The claimant served the claim form by first class post on 7 September 2000 and the defendant received it on 8 September 2000. However, pursuant to English CPR 6.7(1), the deemed date of service, if the method of service used was first class post, was on 9 September 2000. The English Court of Appeal held that, although dictionaries may give various meanings for the word "deem" in other circumstances, in the context of the English CPR, the provision in English CPR 6.7(1) that "a document … shall be deemed to be served on the day shown in the following table" and the heading to the second column in the table "deemed day of service" clearly mean that, for each of the methods of service listed, the day to be derived from the second column is to be treated as the day on which the document is served and you do not look to the day on which the document actually arrived, be it earlier or later than the date to be derived from the table.)

Linton Watson v Gilon Sewell Civil Appeal No 123/2010 (The Jamaican Court of Appeal observed that there is no provision in JAM CPR 6.6, once the method of service has been selected, to avoid being subject to the deemed date of service set out in the rule. There are no words inviting evidence for the contrary to be shown. The presumption of service is therefore not readily rebuttable.)

6.7 Proof of service.

If proof of service of any document is required it may be proved by any method of proving service set out in Part 5.

6.8 Power of the Court to dispense with service.

(1) The Court may dispense with service of a document if it is appropriate to do so.

(2) An application for an order to dispense with service may be made without notice but must be supported by evidence on affidavit.

Notes:

The court may dispense with the service of a document if it deems it appropriate to do so. The application to dispense with service is made ex parte by notice of application with the supporting affidavit outlining the circumstances by virtue of which leave ought to be granted to dispense with service (e.g. impracticable or impossible to effect service personally or ordinarily). In the absence of any particular criteria for when service may be dispensed with (other than "appropriateness"), the discretion of the Court is to be exercised in accordance with the overriding objective.

Cases:

Gomez v Nunez Civil Appeal No. P123 of 2016 (The Trinidad & Tobago Court of Appeal held that T&T CPR 6.8 does not empower the court to dispense with service of the claim form.)

6.9 Service of notices, etc. on Attorney-General

(1) This rule applies where any document has to be served on the Attorney General in connection with any proceedings of which notice has to be given to the Attorney-General and where express provision as to service is not made by any enactment or rule.

(2) Any such document must be served in accordance with rule 65.3.

Notes:

Where a document must be served on the Attorney General such document must be served by leaving it at the office of the Attorney General unless otherwise specified (see CPR 65.3(2)) .

PART 7 - SERVICE OF COURT PROCESS OUT OF JURISDICTION

7.1.1 SCOPE OF THIS PART.

(1) This Part contains provisions about the
- (a) circumstances in which court process may be served out of the jurisdiction; and
- (b) procedure for serving court process out of the jurisdiction, when under these Rules it is required to serve a party but such service cannot be served in The Bahamas.

(2) In this Part references to "service" or "filing copies of the claim form" include
- (a) the statement of claim, unless contained in the claim form; or
- (b) an affidavit in support of the claim, if these Rules so require; and
- (c) if permission has been given under rule 8.2(2) to serve the claim form without the statement of claim, a copy of the order giving permission.

7.2 WHEN SERVICE ALLOWED WITHOUT LEAVE.

A claim form may be served out of The Bahamas without leave in the following cases –
- (a) when a claim is founded on a tort, fraud or breach of duty whether statutory at law or in equity and –
  - i. any act or omission in respect of which damage sustained was done or occurred in The Bahamas; or
  - ii. the damage was sustained in The Bahamas;
- (b) when a contract sought to be enforced or rescinded, dissolved, annulled, cancelled, otherwise affected or interpreted in any proceeding, or for the breach of which damages or other relief is demanded in the proceeding
  - i. was made or entered into in The Bahamas; or
  - ii. was made by or through an agent trading or residing within The Bahamas; or
  - iii. was to be wholly or in part performed in The Bahamas; or
  - iv. was by its terms or by implication to be governed by the law of The Bahamas;
- (c) there has been a breach in The Bahamas of any contract, wherever made;
- (d) when the claim is for a permanent injunction to compel or restrain the performance of any act in The Bahamas;
- (e) when the subject matter of the proceeding is land or other property situated in The Bahamas, or any act, deed, will, instrument, or thing

affecting such land or property;

(f) when the proceeding relates to the carrying out or discharge of the trusts of any written instrument of which the person to be served is a trustee or beneficiary or protector and which ought to be carried out or discharged according to the laws of The Bahamas;

(g) when any relief is sought against any person domiciled or ordinarily resident in The Bahamas;

(h) when any person out of the jurisdiction is
   i. a necessary or proper party to proceedings properly brought against another defendant served or to be served, whether within The Bahamas or outside The Bahamas under any other provision of these rules, and there is a real issue between the claimant and that defendant that the Court ought to try; or
   ii. a defendant to a claim for contribution or indemnity in respect of a liability enforceable by proceedings in the Court;

(i) when the proceeding is for the administration of the estate of any deceased person who at the time of his or her death was domiciled in The Bahamas;

(j) when the claim arises under an enactment and either –
   i. any act or omission to which the claim relates was done or occurred in The Bahamas; or
   ii. any loss or damage to which the claim relates was sustained in The Bahamas; or
   iii. the enactment applies expressly or by implication to an act or omission that was done or occurred outside The Bahamas in the circumstances alleged;

(k) if the claim is one in respect of which an enactment expressly confers jurisdiction on the Court over persons outside The Bahamas, in which case any requirements of the enactment relating to service must be complied with;

(l) when the person to be served has submitted to the jurisdiction of the Court

(m) when it is sought to enforce any judgment or arbitral award;

(n) when a claim is made for restitution or for the remedy of a constructive trust and the defendant's alleged liability arises out of acts committed within the jurisdiction or out of acts which, wherever committed, were to the detriment of a person domiciled or ordinarily resident within the jurisdiction;

(o) when a claim is made under an enactment which confers

jurisdiction on the Court and the proceedings are not covered by any of the other grounds referred to in this rule;

(p) when the subject matter of a claim relates to the constitution, administration, management or conduct of the affairs or the ownership or control of a company incorporated, continued or registered within the jurisdiction;

(q) when a claim is made for interim relief in support of judicial or arbitral proceedings commenced or to be commenced outside the jurisdiction;

(r) when the claim is brought for any relief or remedy in respect of any trust, whether express, implied or constructive, that is governed by or ought to be executed according to the laws of The Bahamas or in respect of the status, rights or duties of any trustee thereof in relation thereto; or

(s) when the claim is brought against a person who is or was a director, officer or member of a company incorporated or registered within the jurisdiction or who is or was a partner of a partnership, whether general or limited, which is governed by the laws of The Bahamas and the subject matter of the claim relates in any way to such company or partnership or to the status, rights or duties of such director, officer, member or partner in relation thereto.

Notes:
This rule lists the circumstances in which a proceeding may be served out The Bahamas without leave. They generally relate to where the cause of action arose or the damage was sustained in The Bahamas, where the Bahamian courts have particular jurisdiction, or where there has been submission to the jurisdiction.[5]

Cases
CPR7.2(a) Service without leave is allowed where any act or omission causing damage claimed occurred in The Bahamas, or where the damage itself was sustained in The Bahamas. In a claim in tort, only part of the cause of action need to have arisen in The Bahamas; the tortious act itself could have occurred overseas. See ***Longbeach Holdings Ltd v Bhanabhai & Co Ltd [1994] 2 NZLR 28; Diamond v Bank of London &m Montreal Ltd [1979] 1 ALL ER 561 (CA); Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc. [1990] 1 Q.B. 391, CA.*** In the context of Negligent or Fraudulent misstatement, the place where the harmful event giving rise to the damage has occurred is where the misstatement was made rather that where it was received**:** ***Newsat Holdings Ltd v Zani [2006] EWHC 342 (Comm); [2006] 1 Lloyd's Rep. 707.***

Commented [cc1]: General suggestion for this Part 7 is to remove the colons where the cases cited are not in fact cases dealing with this jurisdiction. The current language may suggest otherwise. I haven't changed the other occurrences – pending CJ's direction – although this formulation is used in in the notes in 7.2(k) and beyond.

CPR 7.2(b) A claimant may serve a claim form out of the jurisdiction under this rule where the claim is made in respect of a contract, being a contract satisfying any one of the following conditions:

CPR 7.2(b)(i) The contract was made or entered into in The Bahamas – A claimant may

serve claim form out of the jurisdiction without leave, where a claim is made in respect of a contract where the contract was made in The Bahamas. The connecting factor is that the contract was made in The Bahamas.

A contract made by telex, fax, etc. is made when the offeror receives communication of acceptance: ***Entores Ltd v Miles Far East Corp [1955] 2 All ER 493 (CA****).* On the other hand, where a contract is concluded by partial communications passing from one country to another, the contract is made where the letter or cable or acceptance is posted or dispatched: ***Brinkibon Ltd v Stahag Stahl and StahlwarenhandelGesellschaft GmbH [1983] 2 AC 34, [1982] 1 All ER 293***

CPR 7.2(b)(ii) The contract was made by or through an agent trading or residing within The Bahamas – The connecting factor is that, when the contract was made, the principal had an agent trading or residing within The Bahamas by or through whom the contract was made. A contract is made by or through an agent when it is negotiated by the agent in The Bahamas and concluded by his principal abroad: ***National Mortgage and Agency Co of New Zealand Ltd v Gosselin (1922) 38 TLR 832, CA****. In* ***Union International Insurance Co Ltd*** *v* ***Jubilee Insurance*** *Co* ***Ltd*** *[****1991****] 1* ***WLR 415***, it was held that in order to give sensible construction to the rule as it then stood, "principal" was to be construed as referring to a foreign defendant who had entered into a contract through an agent acting on his behalf within the jurisdiction and not a plaintiff foreign principal.

CPR 7.2(b)(iii) – The contract was wholly or in part performed in The Bahamas ***– Carter Holt Harvey Timbers Ltd v Pacifico Timber Importers Pty Ltd (1993) 7 PRNZ 7*****:** A contract for the sale of timber in Australia was held to come within sub clause (2)(b)(iii) of the New Zealand High Court Rules 2016 ("wholly or in part performed in New Zealand"), as the contract required the timber to be shipped from New Zealand and for the insurance and shipping to be arranged in New Zealand.

CPR 7.2(b)(iii) – The contract was by its terms or by implication to be governed by the law of The Bahamas - The fact that the dispute may involve the Court granting a remedy under Bahamian statute does not necessarily make The Bahamas the most convenient forum. Unless the remedy is excluded expressly or by implication, or unless it is inconsistent with remedies recognized by the *lex fori*, a foreign court of simil.ar standing may apply the remedy provided by the Bahamian statue[6]: ***Rimini Ltd v Manning Management and Marketing Pty Ltd [2003] 3 NZLR 22***

CPR 7.2(c) Breach of Contract - A common breach of contract within the jurisdiction is the failure to pay money due to a creditor who resides or carries on business within the jurisdiction is the failure to pay money due to a creditor who resides or carries on business within the jurisdiction, since the general rule is, subject to an express or implied provision in the contract as to the place of payment, that it is the duty of the debtor to seek out the creditor at his residence or place of business and there to pay him the debt due: ***Mlik v Narodini Banka, Ceskoslovenska [1946] 2 ALL ER 663, CA*** (payment of salary in Czechoslovakia); ***International Corp Ltd v Besser Manufacturing Co [1950] 1 KB 488, [1950] 1 All ER 355, CA*** (commission payable to English Agent by foreign principal). Where however there is no obligation which has to be performed within the jurisdiction, there can be no breach within the jurisdiction for the purposes of this rule: ***Cuban Atlantic Sugar Sales Corpn v Campania de Vapores San Elefterio Ltda [1960] 1QB 187, [1960] 1 All ER 141, CA***.[7]

CPR 7.2(d) Permanent Injunction to compel or restrain the performance of any act in The Bahamas. The claim for the injunction must be bona fide as a genuine part of the relief sought,

[6] Annotated High Court Rules, 4 Edition, page 221
[7] The Caribbean Civil Court Practice 2008, page 99

and not merely as a device to bring the claim within the court's jurisdiction or as merely incidental to the relief sought[8]: ***Rosler v Hilbery [1925] Ch 250 at 261, [1924] All ER Rep 821 at 832, CA.***

CPR 7.2(e) Subject matter of the proceeding is land or other property situated in The Bahamas, or any act, deed, will, instrument, or thing affecting such land or property – It is not sufficient that the proceeding merely relates to property in The Bahamas, such as a claim for breach of contract. The claim must directly affect the property[9]: ***William Cable & Co Ltd v Teagle Smith & Sons Ltd [1929] NZLR 743; Banca Carige SpA Casa Di Risparmio Di Genova e Imperia v Banco Nacional De Cuba [2001] 3 All ER 923.***

CPR 7.2(f) Proceeding relates to the carrying out or discharge of the trusts of any written instrument – This aspect of CPR 7.2 reflects similar wording to that found in the 1998 ENG CPR 6.20(11). This rule is concerned with express trusts only. The effect of CPR 6.20(11) as implemented in the United Kingdom, is that the relevant connecting factor for the purposes of jurisdiction in the case of CPR 6.20(11), is the law according to which the trusts ought to be executed, which must be English law. The applicable date for determining whether English law is the applicable law and whether the defendant is a trustee (and in the case of the Bahamian CPR 7.2(f) a beneficiary or protector) is the date when the court is seized of the proceedings: ***Chellaram and another v Chellaram and others (No 2) - [2002] 3 All ER 17***

CPR 7.2(g) Person domiciled or ordinarily resident in The Bahamas – For discussion on domicile see: ***Halsbury's Laws (4th edn reissue) Conflict of Laws***.

CPR 7.2(h) Necessary or Proper Party – In ***Massey v Heynes (1880) 21 Q.B.D. 330, CA***, Lord Esher MR said (at 330) that whether D2 is a proper party to a claim against D1 depends on the question: "supposing both parties had both bee within the jurisdiction, would they both have been proper parties to the action?" In this case, Lindley LJ stated at page 338, that where the liability of several persons "depends upon one investigation", they are all proper parties to the same action. **See:** ***Petroleo Brasiliero SA v Mellitus Shipping Inc (The "Baltic Flame") [2001] EWCA Civ 418.*** A party may be joined if he is either necessary or proper, the description is not conjunctive: **See:** ***Iiyama (UK) Ltd v Samsung Electronics Co Ltd [2018] EWCA Civ 220***. The claim against the person must be "properly brought", that is in good faith, and there must be a real issue to be tried between the plaintiff and the overseas defendant[10]. The requirement that there must be a "real issue" that the court ought to try will not be fulfilled where the court is able to find that the claim against the original defendant must plainly fail: ***Tyne Improvement Comrs v Armement Anversois SA, The Brabo [1949] AC 326; AK Investment CJSC v Kyrgz Mobil Tel Ltd [2011] UKPC 7.***

CPR 7.2(i) Administration of Estate – This gateway is based on the connecting factor that the domicile of the deceased person, whose estate is under administration, is The Bahamas[11].

CPR 7.2(j) Claims under an enactment:

i. Act or omission done or occurred in The Bahamas – See*:* ***Wing Hun Printing Co Limited v Saito Offshore Pty Ltd [2010] NZCA 502, [2011] 1 NZLR 75; Chief Executive of the Department of Internal Affairs v Mansfield [2013] NZHC 2064***

ii. Loss or damage sustained in The Bahamas **- See:** ***Johnstone v CBL Insurance Europe DAC (Ireland) (under administration) [2019] NZHC 2101 (26 August 2019)***

iii. The enactment applies expressly or by implication to an act or omission that was done or occurred outside The Bahamas See: ***Johnstone v CBL Insurance Europe DAC***

[8] The Caribbean Civil Court Practice 2008, page 97
[9] Annotated High Court Rules, 4 Edition, page 222
[10] Annotated High Court Rules, 4 Edition, page 222
[11] English Civil Procedure Rules 1998 Practice Direction 6B paragraph 6HJ.28

(Ireland) (under administration) [2019] NZHC 2101 (26 August 2019)

CPR 7.2(k) Enactment expressly confers jurisdiction on the Court over person outside The Bahamas - This rule derives from RSC Ord.11 r.1(2), which referred to a claim which by virtue of an enactment, the court had power to determine notwithstanding that neither the defendant nor the relevant conduct were within the jurisdiction; See - ***Orexim Trading Ltd v Mahavir Port and Terminal Private Ltd [2018] EWCA Civ 1660; [2018] 1 W.L.R. 4847; Re Harrods (Buenos Aires) Ltd [1992] Ch. 72, CA.***

CPR 7.2(l) Submitted to the jurisdiction - A jurisdiction clause in an agreement which nominates the courts of The Bahamas as a venue for litigation (whether exclusively or not) is regarded as a submission to the jurisdiction; therefore, such a clause facilitates service out of the jurisdiction on a foreign defendant; **Dicey and Morris The Conflict of Laws (12th ed 1993) at 311** – In order to establish that the defendant has, by his conduct in the proceedings, submitted or waived his objection to the jurisdiction, it must be shown that he has taken some step which is only necessary or only used if the objection has been waived or never been entertained at all.

CPR 7.2(m) Enforce any judgement or arbitral award – This aspect of CPR 7.2 reflects similar wording to that found in the 1998 ENG CPR PRACTICE DIRECTION 6B – SERVICE OUT OF THE JURISDICTION Paragraph 3.1(10)[12]. Although this provision refers to service out with permission of the Court, the cases that consider Paragraph 3.1(10) are nonetheless applicable in considering CPR 7.2(m). See: ***Tasarruf Mevduati Sigorta Fonu v Demirel [2007] EWCA Civ 799; [2007] 1 W.L.R. 2508, CA**,* where the Court held that para. 3.1(10) of practice Direction 6B (then r.6.20(9)) should be given its ordinary and natural meaning, with the result that the foreign judgement or award is itself a sufficient ground for the grant of permission and rejected the submission that there should be implied in this provision a requirement that there must be assets in the jurisdiction.

Conversely, in Hebei Huaneng Industrial Development Co Limited v Shi [2020] NZHC 2992 (12 November 2020), in considering the New Zealand equivalent of this rule (New Zealand High Court Rules 2016 Rule 6.27(m)), at Paragraph 11 (referencing Robert Osborne and others McGechan on Procedure (looseleaf ed, Thomson Brookers, updated to 9 December 2019) at [HR 6.27.22), the court accepted that this rule is most likely to be pressed into service where a plaintiff is seeking to enforce a foreign judgment or arbitral award against an overseas defendant where that defendant has assets in New Zealand that could be used to meet the judgment or award. Agreeing with this position, Associate Judge R M Bell stated at paragraph 12 that "The rule was introduced to cater for cases such as this one where a judgment creditor, relying on a judgment of a foreign court, wishes to enforce that judgment in New Zealand against New Zealand assets of a judgment debtor outside New Zealand."

CPR 7.2(n) Claim made for restitution or for the remedy of a constructive trust and the defendant's alleged liability arises out of acts committed within the jurisdiction or out of acts which, wherever committed, were to the detriment of a person domiciled or ordinarily resident within the jurisdiction – See: ***Nabb Bros Ltd v Lloyds Bank International (Guernsey) Ltd [2005] EWHC 405 (Ch).***

CPR 7.2(o) Claim made under an enactment which confers jurisdiction on the Court and the proceedings are not covered by any of the other grounds referred to in this rule – In ***Orexim Trading Ltd v Mahavir Port and Terminal Pte Ltd [2018] EWCA Civ 1660; [2018] W.L.R. 4847, CA***, the Court of Appeal explained that the enactment under which the claim is made must be an enactment that expressly contemplates proceedings against persons who are not within the jurisdiction (at [33] per Lewison LJ); Proceedings in this rule is not confirmed to

[12] Practice Direction 6B Part 6 Paragraph 3.1(10): "The claimant may serve a claim form out of the jurisdiction with the permission of the court under rule 6.36 where a claim is made to enforce any judgment or arbitral award."

proceedings in which a claim form has been issued and may include proceedings in the form of an application for pre-action disclosure. See: ***ED&F Man Capital Markets LLP v Obex Securities LLC [2017] EWHC 2965 (Ch); [2018] 1 W.L.R. 1708***.

CPR 7.2(q) Interim relief in support of judicial or arbitral proceedings commenced or to be commenced outside the jurisdiction – The interim relief under this rule is in support of overseas proceedings even where there is no substantive claim within the jurisdiction.

CPR 7.2(r) When the claim is brought for any relief or remedy in respect of any trust governed by or ought to be executed according to the laws of The Bahamas - See: ***Ahmad Hamad Algosaibi And Brothers Company V. Saad Investments Company Limited and Forty Three Others [2010 (2) CILR 289]; Merrill Lynch Bank And Trust Company (Cayman) Limited V. Demirel, Demirel, Tasarruf Mevduati Sigorta Fonu And Attorney General [2010 (2) CILR 75]***

CPR 7.2(s) when the claim is brought against a person who is or was a director officer or member of a company incorporated or registered within the jurisdiction or who is or was a partner of a partnership, whether general or limited, which is governed by the laws of The Bahamas – See*:* ***Torchlight GP Limited V. Millinium Asset Services Pty Limited And Eight Others [2018 (1) CILR 244]***

7.3 WHEN SERVICE IS ALLOWED WITH LEAVE

(1) In any proceeding when service is not allowed under rule 7.2, a claim form may be served outside of The Bahamas with the leave of the Court.

(2) An application for leave under this rule must be made on notice to every party other than the party intended to be served.

(3) A sealed copy of every order made under this rule must be served with the document to which it relates.

(4) An application for leave under this rule must be supported by an affidavit stating any facts or matters related to the desirability of the Court assuming jurisdiction under rule 7.4, including the grounds on which the application is made, the place or country in which the person to be served is or possibly may be found, whether or not the person to be served is a citizen of The Bahamas and a statement that in the deponents belief there is a serious issue to be tried on the merits.

(5) The Court may grant an application for leave if the applicant establishes:
(a) that the claim has a real and substantial connection with The Bahamas; and
(b) that there is a serious issue to be tried on the merits; and
(c) that The Bahamas is the appropriate forum for the trial; and
(d) any other relevant circumstances to support an assumption of jurisdiction.

Notes:
The provisions under this rule address the content of the application for permission and the decision of the Court whether or not to grant permission.

Cases:
7.3(1)(2)(3) Summary - Leave is required to serve documents overseas other than as provided under r

7.2. Application is to be on notice to all parties other than the overseas party and must be supported by an affidavit detailing the whereabouts of that person. This rule covers circumstances not covered by r 7.2 and should also be used in cases of uncertainty.[13]

7.3(4) Application for leave – The application for leave is made on notice to the other parties to the proceeding except the party to be served. So far as that party is concerned it is an ex parte application and the requirement of full disclosure applies.[14] See: ***ABCI v Banque Franco-Tunisienne [1996] 1 Lloyd's Rep 485*** **(Waller J);** A failure to refer to arguments on the merits which the defendant may seek to raise in answer to the claimant's claim at the trial should not generally be characterized as a failure to make full and frank disclosure, unless they are of such weight that their omission may mislead the court in dealing with the application See**: *BP exploration Co (Libya) Ltd v Hunt [1976] 1 W.L.R. 788 (Kerr J), at 798*;** Where an order is made on an ex parte application under this rule, and it is subsequently established that the applicant deliberately misled the court or deliberately withheld information which he or she knew would, or might, be material, the order will ordinarily be set aside See: ***Congentra AG v Sixteen Thirteen Marine SA [2008] EWHC 1615 (Comm)****;* See also ***Kuwait Oil Co (KSC) v Idemitsu Tankers KK (The Hida Maru) [1981] 2 Lloyd's Rep. 510, CA*** – Notwithstanding material non-disclosure, if the full facts were before the judge permission would have still been granted, permission would not be set aside.

7.3(5) Principles to be considered on granting leave – This rule sets out the matters which the court must take into account when deciding whether to grant leave:

(a) **The claim has a real and substantial connection with The Bahamas**: This will usually be established if the plaintiff can show the claim falls within one or more of the matters set out in r 7.2.

(b) **There is a serious issue to be tried on the merits**: The claimant must satisfy the court that there is a serious issue to be tried on the merits of the claim, that is, a substantial question of fact or law or both; that means that there has to be a real, as opposed to a fanciful, prospect of success on the claim. See: ***Altimo Holding and Investment Ltd v Kyrgyz Mobile Tel Ltd [2011] UKPC 7; VTB Capital Plc v Nutritek International Corp [2013] UKSC 5; Seaconsar Far East Ltd v Bank Markazi Jomhuri Islam Iran [1994] 1 A.C. 438.***

(c) **The Bahamas is the appropriate forum:** The fundamental principle applying to both the grant of leave under this rule and objections to jurisdiction applications to set aside or stay under rule 7.4, is that the court should determine the appropriate forum in which the interests of all parties and the ends of justice can be best served. Lord Goff, in his speech in ***Spiliada Maritime Corp v Cansulex Ltd; The Spiliada [1986] 3 ALL ER 843 (HL)***, gave guidance for the determination of the appropriate forum in service out cases, at paragraphs 478E to 482A, which may be summarized as follows:

   a. The burden is on the claimant, not merely to persuade the court that The Bahamas is the appropriate forum, but "to show that this is clearly so" (The Spiliada op cit at 481).
   b. The Fundamental principle is that the court has to identify in which forum the case could most suitably be tried for the interest of all the parties and for the ends of justice (The Spiliada, op cit, at 474A).
   c. The determination of the appropriate forum in a given case requires the proper application of relevant private international law rules on the doctrine of *forum conveniens* as derived from extensive case law. It is not a simple exercise of discretion. The court is required to reach an evaluative judgment upon whether, in light of the relevant considerations, The Bahamas is clearly the more appropriate forum See*:* ***VTB Capital Plc v Nutritek Capital Holdings Ltd [2013] UKSC 5; [2013] 2 A.C. 337, SC*****,** at [97] per Lord Neuberger, and at [156] per Lord Wilson.
   d. Each case depends on its own particular facts; See: ***Jong v HSBC Private Bank (Monaco) SA [2015] EWCA Civ 1057.***

[13] Annotated High Court Rules, 4 Edition, page 223
[14] IBID 9

Factors for the court to consider in determining the appropriate forum, although not exhaustive, include:

- The amount at issue. A foreign defendant ought not to be put to the annoyance off contesting a trifling claim in a Bahamian court without good reason.[15]
- Whether the court in the foreign country is competent to hear the dispute and if so whether that court can provide more effective relief that the Bahamian Court: See ***The Hollandia [1982] 3 All ER 1141 (HL).***
- The degree of connection of the proceedings with the foreign country, such as the relevant law to be applied. See: ***VTB Capital Plc v Nutritek International Corp [2013] UKSC 5***.
- Whether the Bahamian court has subject matter jurisdiction as well as jurisdiction in personam; See: **Ludgater Holdings Ltd v Gerling Australia Insurance Co Pty Ltd [210] NZSC 49**
- The comparative cost and convenience for all parties. This involves considerations of the location of the parties, witnesses, and documents, as well as litigation costs and delay. However, as noted in ***Ditto Ltd v Drive-Thru Records LLC [2021] EWHC 2035*** **(Ch at [83**], given the increase in witness examination by video link, as a consequence of the COVID-19 pandemic, the fact that witnesses were outside the jurisdiction carried, at best, little weight in determining the forum with which the dispute had the most real and substantial connection.
- If proceedings have already been issued in the other country; **See:** ***The Abidin Daver [1984] 1 All ER 470 (HL*****)**.

(d) **Any other relevant circumstances to support an assumption of jurisdiction**: The assumption of jurisdiction ultimately involves an evaluation of a range of considerations which are very much fact dependent: See ***Wing Hung Printing Co Ltd v Saito Offshore Pty Ltd [2011] 1 NZLR 754.***

7.4 COURT'S DISCRETION WHETHER TO ASSUME JURISDICTION.

(1) If service of process has been effected out of The Bahamas without leave, and the Court's jurisdiction is protested under rule 9.7, the Court must dismiss the proceeding unless the party effecting service establishes —

(1) that —

i. there is a good arguable case that the claim falls wholly within one or more of the paragraphs of rule 7.2; and

ii. the Court should assume jurisdiction by reason of the matters set out in rule 7.3(5)(b) to (d); or

(2) that, had the party applied for leave under rule 7.3 —

i. leave would have been granted; and

ii. it is in the interests of justice that the failure to apply for leave should be excused.

(2) If service of process has been effected outside of The Bahamas under rule 7.3, and the Court's jurisdiction is protested under rule 9.7, and it is claimed that leave was wrongly granted under rule 7.3, the Court must dismiss the proceeding unless the party effecting service establishes that in the light of the evidence now before the Court leave was correctly granted.

(3) When service of process has been validly effected out of The Bahamas, but The Bahamas is not the appropriate forum for trial of the action, the defendant may

[15] Annotated High Court Rules, 4 Edition, page 224

apply for a stay, or for a dismissal of the proceeding under rule 9.8 or under the Court's inherent jurisdiction to stay proceedings.

Notes:
Where a party served abroad protests jurisdiction, the party serving must establish that the court has, or should assume, jurisdiction. This rule sets out what the court should consider in determining whether to assume jurisdiction.

Cases:
CPR7.4(1) Protest to Jurisdiction – Where a party served abroad protest's the court's jurisdiction, the party serving must establish that the court has, or should assume, jurisdiction.

CPR 7.4(1)(a) - In ***Wing Hung Printing Co Ltd v Saito Offshore Pty Ltd [2011] 1 NZLR 754***, the Court of Appeal explained the two stage approach to the question of whether the party effecting service has established the requirements of r 6.29(1)(a) Of the New Zealand High Court Rules 2016, which are in identical terms to CPR 7.4(1)(a). The Court of Appeal observed that where r 6.29(1)(a) is relied upon, there is a two-stage inquiry.

(i) The party effecting service must first establish that there is a good arguable case that the claim falls wholly within one or more of the gateways for which service overseas may be effected without leave (*this is equivalent to the gateway provisions set out at CPR 7.2*). The good arguable case test required at this stage does not relate to the merits of the case, but to whether the claim falls within one or more of the circumstances under CPR 7.2 in which service overseas may be effected without leave. This is a largely factual question to be assessed on the basis of the pleadings and the affidavit or other evidence before the Court; See: ***Canada Trust v Stoelzenberg (No.2) [1998] 1 W.L.R. 547, CA***, - Waller LF explained (at 555E) that a "good arguable case" reflects "that onside has a much better argument on the material available". (This test was approved by Lord Steyn in the ***Canda Trust case [2002] 1 A.C. 1***, HL AT 13, and endorsed by the Privy Council in ***Bols Distilleries BV v Superior Yacht Services [2006] UKPC 45***).

(ii) The second requirement involves the application of the factors in CPR 7.3(5): The court must consider whether it should assume jurisdiction taking into account; (b) whether there is a serious issue to be tried on the merits; (c) whether The Bahamas is the appropriate forum for trial; and (d) any other relevant circumstances. See: Commentary for CPR 7.3(5) above.

CPR 7.4(1)(b) – A party may rely on rule 7.4(1)(b), to the extent that it has not satisfied rule 7.4(1)(a) if it can establish that, had the party applied for leave under rule 7.3 (i) leave would have been granted; and (ii) it is in the interest of justice that the failure to apply for eave should be excused – See: ***Zhang v Yu [2019] NZHC 29 (29 January 2019).***

CPR 7.4(2) Service effected outside The Bahamas under rule 7.3, and the Court's jurisdiction is protested under rule 9.7 – The onus remains on the Plaintiff to establish that service abroad was proper and that the court should assume jurisdiction, even if service was pursuant to leave granted under rule 7.3[16].

CPR 7.4(3) Service of process validly effected out of The Bahamas, but The Bahamas is not the appropriate forum for the trial of the action – See: ***Spiliada Maritime Corp v Consulex Ltd (The Spiliada) [1987] AC 460 HL***, Lord Goff at 478 E to 482A.

7.5 SERVICE OF OTHER DOCUMENTS OUTSIDE THE BAHAMAS

[16] Annotated High Court Rules, 4 Edition, page 226

Any document other than a claim form required by any rule to be served personally may be served abroad with the leave of the Court, upon an application without notice and supported by an affidavit, which may be given with any directions that the Court thinks just.

Notes:
Part 8 describes a claim form as a method of starting proceedings. This rule applies to any document other than a claim form.

Cases:
CPR 7.5 Service of other documents outside The Bahamas – Personal service of documents other than the originating document is likely to be limited. There are no criteria in the rule as to how an application for leave is to be dealt with[17].

7.6 ACKNOWLEDGEMENT OF SERVICE AND DEFENCE WHERE CLAIM FORM SERVED OUT OF THE JURISDICTION.

A claim form to be served out of the jurisdiction must be amended to state the period within which the acknowledgement of service and defence must be filed.

Notes: See commentary at CPR 7.11.

7.7 NOTICE TO DEFENDANT SERVED OUTSIDE THE BAHAMAS

If a defendant is to be served out of The Bahamas with a claim form, the Claimant must attach a notice to the claim form, which may be in Form G7 informing the defendant of —

(a) the scope of the jurisdiction of the Court in respect of claims against persons who are not resident in The Bahamas; and
(b) the grounds alleged by the claimant in relying on that jurisdiction; and
(c) the defendant's right to enter an acknowledgement of service and objection to the jurisdiction of the Court under Part 9.

Notes:
Where a defendant is served abroad, the memorandum accompanying the notice of proceeding shall include information concerning the scope of the court's jurisdiction, the grounds by which the plaintiff invokes that jurisdiction, and the defendant's right of protest to jurisdiction.[18]

Cases:
CPR 7.7 Notice to Defendant – Form G7 requires that the defendant be informed of the grounds relied in to invoke the jurisdiction of the court. See: ***McConnell Dowell Contractors Ltd v Lloyd's Syndicate 396 [1988] 2 NZLR 257*** – in this case the plaintiff was allowed to raise an additional ground not stated

[17] Annotated High Court Rules, 4 Edition, page 227

[18] Annotated High Court Rules, 4 Edition, page 227

in form, where there was no prejudice to the defendant.

7.8 SERVICE OUTSIDE THE BAHAMAS

(1) Subject to paragraph (3) and (4), a claim form permitted under these rules to be served outside The Bahamas may be served by a method —

(a) specified in Part 5; or

(b) permitted by the law of the country in which it is to be served; or

(c) provided for in rules 7.9 and 7.10.

(2) When a convention relating to service of process is in force between The Bahamas and the country where service is to be effected, service must be effected in accordance with a method provided for, or permitted by, that convention.

(3) No service outside The Bahamas is valid if effected contrary to the law of the country where service is effected

Notes:
Service of a claim form outside of The Bahamas cannot be contrary to the law of the country concerned, and if a convention country, must be in accordance with the convention. Otherwise, service can be by the usual methods permitted under Part 5, as permitted by the law of the country, or in accordance with rules 7.9 and 7.10.

Cases:
CPR 7.8 Service outside The Bahamas – The usual rule is for service abroad to be in accordance with the requirement of the country in which service is effected. A plaintiff serving overseas must ensure that the mode of service satisfies this rule, to be valid in The Bahamas, but also that the mode of service is acceptable in the foreign country: See – ***Ashbury v Ellis [1893] AC 339.***

7.9 SERVICE THROUGH OFFICIAL CHANNELS

(1) When a party seeks service outside The Bahamas through official channels, the request must be sent by the Registrar to the Attorney General for further transmission to the appropriate authorities in the foreign country.

(2) Proof of service must be returned to the Registrar through the same channels.

(3) In respect of each person to be served, the request for service must be accompanied by —

(a) the document to be served; and

(b) a copy of the document to be exhibited to the evidence verifying service; and

(c) when the language of the person to be served is not English, -

i. a translation of the document into the language, verified as correct to the satisfaction of the Registrar, of the person to be served for service with the document; and

ii. a copy of that translation, which must be exhibited to the evidence

verifying service.

(4) A certificate establishing the fact and date of service and given by the competent authority of the country concerned, or by The Bahamas consular officer, is sufficient proof of that fact and date.

(5) This rule is subject to any relevant convention that requires or permits any other method of service through official channels.

Notes:

This rule deals with the particular requirements of service where the party wishes (or is required) to effect service through official channels and set out the procedure for service of official documents through the Registrar. It is subject to any convention relating to service.

Cases:

CPR 7.9 Service through official channels – See: *Chare v Fairclough [2003] EWHC 180 (QB)* (Treacy J) – it was held that where service was effected through the Foreign and Commonwealth Office, service was not effected by the court but by the claimant through the medium of the Foreign and Commonwealth Office. Where service is effected through such modes, the onus was on the claimant to show that they had taken all reasonable steps to effect service*;* ***Olafssom v Gissurarson [2008] EWCA Civ 152; [2008] 1 All E.R. (Comm) 1106* –** the Court of Appeal found that although service had been effected through British consular authorities in Iceland, based on request for service, and although there was no dispute that the defendant had received the papers, the Consular Officer serving the papers had failed to obtain from the defendant a signed receipt for the papers being served. The failure to obtain the receipt rendered service ineffective under Icelandic Law. The Consular Authority provided a certificate of personal service o9n the basis of which interlocutory judgement was entered. While the court had sympathy in this case with the claimant's solicitors who believed that the process had been validly served, the Master of the Rolls expressed the view that "the experience of this case should lead claimants' solicitors in the future to ensure that the service is in fact valid by the relevant law".

7.10 SERVICE IN CONVENTION COUNTRIES.

(1) This rule applies when —

(a) a convention is in force between The Bahamas and any other country relating to the service of documents in proceedings in the courts of the respective countries; and

(b) a party to a proceeding in The Bahamas desires to take advantage of any provision made in the convention for service in that other country by official means

(2) When this rule applies, the party seeking service may file a request in Form G8 stating the official means of service desired and containing the undertaking set out in that form covering the payment of expenses.

(3) Paragraph (2) is subject to the provisions of the convention.

(4) In respect of each person to be served, the request for service must be accompanied by —

(a) the document to be served; and

(b) a copy of it exhibited to the evidence verifying service; and

(c) when the language of the person to be served is not English —

i. a translation of the document into his or her language, verified as correct to the satisfaction of the Registrar, for

service with the document; and

ii. a copy of that translation to be exhibited to the evidence verifying service.

(5) The document and translation to be served must be sealed by the Registrar with the seal of the Court and the documents required to accompany the request for service forwarded by the Registrar to the Attorney-General for transmission through the appropriate channels to the country concerned for service in accordance with the request for service.

(6) A certificate establishing the fact and date of service and given by the competent authority of the country concerned, or by a Bahamas consular officer, and transmitted by the Attorney-General to the Registrar is sufficient proof of that service.

(7) A certificate filed by the Registrar is equivalent to an affidavit of service of the documents referred to in the certificate.

Notes:

Rule 7.8(2) makes it obligatory, when serving a claim form outside The Bahamas in a convention country, for service to be in accordance with a method provided for or permitted by the convention.

Cases:

CPR 7.10 Service in Convention Countries – The most well-known convention on service is the Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters signed at the Hague on 15 November 1965 (Hague Service Convention). The Bahamas is not a member of the HCCH, however it is a contracting party to the Hague Convention. On 24 February 1965, the Convention had been extended to The Bahamas by the United Kingdom of Great Britain and Northern Ireland. The Bahamas declared on 30 April 1976 that it considers itself bound by the Convention. The date of entry into force is the date of independence of The Bahamas[19].

The following is a list of countries that are members of the Hague Convention Organization who have acceded to the Hague Convention and also those countries that are non-members (marked with an asterisk) who have acceded to the Convention or regard themselves as bound by earlier accession by their former colonial government.

Albania
Andorra
Antigua and Barbuda*
Argentina
Armenia
Australia
Austria
Bahamas*
Barbados*
Belarus
Belgium
Belize*
Bosnia and Herzegovina
Botswana*
Brazil
Bulgaria

[19] https://www.hcch.net/en/instruments/conventions/status-table/notifications/?csid=358&disp=type

Canada
China, People's Republic of
Colombia*
Costa Rica
Croatia
Cyprus
Czech Republic
Denmark
Egypt
Estonia
Finland
France (besides Metropolitan France and the Overseas Departments (French Guyana, Guadeloupe, Reunion, Martinique), the Convention applies to all of the other French overseas territories)
Georgia
Germany
Greece
Hungary
Iceland
India
Ireland
Israel
Italy
Japan
Kazakhstan
Korea, Republic of
Kuwait*
Latvia
Lithuania
Luxembourg
Malawi*
Malta
Marshall Islands*
Mexico
Monaco
Montenegro
Morocco
Netherlands
Nicaragua*
Norway
Pakistan*
Philippines
Poland
Portugal
Republic of Moldova
Republic of North Macedonia
Romania
Russian Federation
Saint Vincent and the Grenadines*
San Marino*
Serbia
Seychelles*
Slovakia
Slovenia
Spain
Sri Lanka

Sweden
Switzerland
Tunisia
Turkey
Ukraine
United Kingdom
United States of America (includes Guam, Puerto Rico and the Virgin Islands)
Venezuela
Vietnam

7.11 TIME FOR FILING DEFENCE.

Except when the Court otherwise orders, a defendant who has been served out of The Bahamas must file a statement of defence or acknowledgment of service within 30 working days from the date of service.

Notes:
This rule extends the time for filing the documents referred to beyond those that would normally apply. This is done in recognition of the fact that it is reasonable to give a defendant served out of the jurisdiction, additional time in which to comply.

7.12 MODE OF SERVICE – ALTERNATIVE METHOD.

(1) Where service on the defendant under rule 7.8 is impracticable, the claimant may apply for an order under this rule that the claim form be served by a method specified by the Court.
(2) An order made under this rule shall specify the date on which service of the claim form shall be deemed to have been effected.
(3) Where an order is made under this rule, service by the method specified in the court's order shall be deemed to be good service.
(4) An application for an order under this rule may be made without notice but must be supported by evidence on affidavit —
   (a) specifying the method of service proposed;
   (b) providing full details as to why service under rule 7.7 is impracticable;
   (c) showing that such method of service is likely to enable the person to be served to ascertain the contents of the claim form and statement of claim; and
   (d) certifying that the method of service proposed is not contrary to the law of the country in which the claim form is to be served.
(5) Where any method of service specified in an order made under this rule is subsequently shown to be contrary to the law of the country in which the claim was purportedly served, such service shall be invalid.

Notes:
This rule allows the court to make an order for alternative service, i.e., by a method or at a place not otherwise permitted by rule 7.8.

Cases:

7.12 CPR Service by Alternative Methods – See: ***Abela v Baadarani [2013] UKSC 44*** - The Supreme Court held that an order for service by an alternative method can be made only where none of the methods provided in r.6.40(3) (similar wording to The Bahamas CPR 7.8(1)) has been successfully adopted, including of course service by a method permitted by the law of the country in which the claim form or document is to be served. The only bar to the exercise of the court's discretion to make such order is that, by r.6.40(4) (similar to The Bahamas CPR 7.12(5)), nothing in a court order must authorize any person to do anything which is contrary to the law of the country where the claim form is to be served. Thus, the proposed method of service may not be permitted by the law of that country; the bar applies only where such method is positively contrary to the law of that country. The evidence required would therefore seem to be that the proposed method of service (or, in retrospective cases, the method that has been used): (1) is not permitted under Pt 6; and (2) will not be or was not contrary to the law of the country where the claim form or other document is to be served.

Abela v Baadarani, op cit, Lord Clarke noted that that was not a case in which the Hague Service Convention or any bilateral service convention or treaty applied as between the UK and the country in which service was to take place (Lebanon). For cases that considered when an order may be granted for service out of the jurisdiction by alternative means, where the Hague Convention applies See: ***Marashen Ltd v Kenvett Ltd [2017] EWHC 1706 (Ch); [2018] 1 W.L.R. 288 (David Foxton QC); Flota Petrolera Ecuatoriana v Petroleos De Venezuala SA [2017] EWHC 3630 (Comm); [2017] 2 C.L.C. 759; Celgard LLC v Shenzhen Senior Technology Material Co Ltd [2020] EWHC 2072 (Ch) [2020] F.S.R. 37 (Trower J); GHS Global Hospitality Ltd v Beale [2021] EWHC 488 (Ch) (Mr Ian Karet sitting as a deputy High Court judge)***

For the approach of the Eastern Caribbean courts see ***Alexander Katunin v JSC VTB Bank BVIHCMAP2015/0004 and 2015/007*** and ***Naser Taher v Mex Clearing Limited BVIHCMAP2022/0030***.

7.13 POWER OF COURT TO DISPENSE WITH SERVICE OF THE CLAIM FORM

(1) The Court may dispense with service of a claim form in exceptional circumstances.
(2) An application for an order to dispense with service may be made without notice at any time and must be supported by evidence on affidavit.

Notes:
This rule gives the court power on application to dispense with service of a claim form. The application may be made without notice but must be supported by affidavit evidence.

Cases:
CPR 7.13(1) Dispense with service – See: ***Godwin v Swindon BC [2001] EWCA Civ* 1478** – the discretionary power of the court to dispense with service should not be used as a means of circumventing and rendering nugatory the statutory limitation provisions; See: ***Anderton v Clwyd CC (No.2) [2002] EWCA Civ 933*** – Considering Goldwin, the Court of Appeal held that the power to dispense with service could be exercised, retrospectively as well as prospectively; See: ***In Olafsson v Gissurarson (No.2) [2008] EWCA Civ 152; [2008] 1 W.L.R. 2016***, CA, where the claimant made an ineffective attempt within the relevant time limits to serve a claim form out of the jurisdiction by a method allowed by the service rules, the Court of Appeal held (1) the court's power to dispense with service retrospectively should be limited to truly exceptional cases, (2)

there is no reason why the general principles identified in the domestic law cases on that rule should not be applied to the exercise of the courts discretion to dispense with service, whether the purported service is invalid in England or elsewhere; See: In ***Lonestar Communications Corp LLC v Kaye [2019] EWHC 3008 (Comm) (Teare J)*** the court was prepared to find exceptional circumstances. Attempts to serve a defendant in Israel under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965 had failed. Thereafter the claimant had made numerous other attempts to inform the defendant of the proceedings via the defendant's former solicitors and various social media and web sites connected with him. The court was prepared to conclude that the defendant was attempting to avoid service and that there would be no prejudice to him in making the order.

For the approach of the Eastern Caribbean courts see ***Flavio Maluf v Durant International Corp et al BVIHCMAP2021/0025*** and ***Curtis Gordon by his lawful attorney Quinta Charles v Peter Bramble Claim No. ANUHCV2018/0527***.

7.14 SERVICE OF CLAIM FORM ON A STATE WHERE COURT PERMITS SERVICE OUT OF JURISDICTION

(1) This rule applies where a claimant wishes to serve a claim form on a State.
(2) If the State has agreed to a method of service other than a method permitted by this Part, the claim form may be served either by the method agreed or in accordance with the other rules in this Part.
(3) The claimant must file at the court office —
  (a) a copy of the claim form;
  (b) any translation required by virtue of rule; and
  (c) a request for service to be arranged by the Attorney-General.
(4) The court office must send documents filed under this rule to the Attorney-General with a request that the Attorney-General arrange for the claim form to be served.
(5) If a State has under any enactment relating to state immunity agreed to a method of service the claim form may be served either by the method agreed or in accordance with this rule.
(6) An official certificate by the minister with responsibility for foreign affairs stating that a claim form has been duly served on a specified date in accordance with a request made under this rule is evidence of that fact.
(7) A document purporting to be such a certificate is to be treated as such a certificate, unless it is proved not to be.

Notes:
This rule deals with the procedure for serving documents on a state.

Cases:
CPR7.14 Service of claim form on a State: See - ***General Dynamics United Kingdom Ltd v Libya [2021] UKSC 22; [2021] 3 W.L.R. 231***

7.15 SERVICE OF COURT PROCESS OTHER THAN CLAIM FORM

(1) An application, order or notice made or given in any proceedings may be served out of the jurisdiction without the court's permission if it is served in proceedings in which permission has been given to serve the claim form out of the jurisdiction.

(2) The procedure by which a document specified in paragraph (1) is to be served is the same as that applicable to the service of a claim form and accordingly the rules under Part 5 shall apply

Notes:
This rule applies to service of any court process, other than a claim form.

Cases:
CPR7.15 Service of court process - See: ***C Inc Plc v L [2001] 2 All E.R. (Comm)446, Atkens J; Vitol AS v Capro Marine Ltd [2008] EWHC 378 (Comm) Tomlinson J; Masri v Consolidated Contractors International Co SAL (No.4) [2009] UKHL 43.***

PART 8 – HOW TO START PROCEEDINGS
SECTION I - GENERAL PROVISIONS

8.1 How to start proceedings.

(1) Depending upon the nature of the proceedings and the provisions of any statutory provision or rule or practice direction, there are three methods by which a claimant may start proceedings namely, by --
  (a) Standard claim form in Form G3;
  (b) Fixed date claim form in Form G4; or
  (c) Originating application form using Form G5 or Form G6.

(2) A claimant starts proceedings by filing in the court office the original and not less than two copies of --
  (a) The claim form; and
  (b) Subject to rule 8.2, the statement of claim, or
  (c) An affidavit or other document, where any rule or practice direction so required.

(3) A claim form is issued on the date when it is stamped by or on behalf of the court office.

(4) For the purpose of any enactment relating to limitation periods, an action is brought on the day on which the claim form is stamped as received in by or on behalf of the court office.

(5) A standard claim form is to be used except where --
  (a) Rule 8.1(6) requires that the claim must be started using a fixed date claim form; or
  (b) Where an originating application form under this Part is the more appropriate method of starting and thereafter conducting the claim.

(6) A fixed date claim form must be used --
  (a) In claims arising out of hire-purchase or credit sale agreements;
  (b) In money lending actions under Part 62;
  (c) In proceedings for possession of land; and
  (d) Whenever its use is required by a rule or practice direction.

(7) A person who seeks a remedy --
  (a) Before proceedings have been started; or
  (b) In relation to proceedings which are taking place, or will take place, in another jurisdiction must seek that remedy by an application under Part 11.

Notes

A claimant wishing to start proceedings in the Supreme Court must follow the procedure laid out in Rule 8.1. Every claim form has an expiration date as prescribed by the rules. This period starts on the date that the claim is issued.

The former originating documents have been replaced by the "claim form". The former writ of summons, originating summons, originating motion, petition are now referred to as the "originating application". The terminology has also changed from 'plaintiff' to "claimant". The title 'defendant" has remained. The

procedure for commencing an action has been simplified and the action must now be commenced by utilizing one of three prescribed forms; the standard claim form, the fixed date claim form or the originating application form.
The standard claim form is to be used to commence the proceedings except where rules provide that a fixed date form to be used or it is appropriate to use an originating application.
Practice Direction No 3 of 2023 clarifies that the first hearing of a fixed date claim form will take place in open court unless all parties agree otherwise or the Court directs otherwise on its own initiative or on application.
For purposes of any limitation period the date that the claim is brought is the date of receipt stamped by the court office (The Registry).
Applicants seeking relief in proceedings involving matters outside of the jurisdiction must apply under Part 11.
The generally endorsed writ of summons have been abolished and the claimant must now file along with his claim form a statement of claim or an affidavit or any other document pursuant to any requirement under any rule or practice direction.

Cases
Capital Bank v David Holukoff et al HCVAP 2008/007 *(When are proceedings properly commenced.)*
Island IFS S.A v Hamilton Trust Co. Limited Claim No. NEVHCV2013/0018 *(starting proceedings ex-parte)*
Jermaine Browne v The Attorney General of St. Kitts and Nevis et al CLAIM NO. SKBHCV2016/0074 *(failure to attach claim form with a statement of claim)*

8.2 Statement of claim, etc. to be issued and served with claim form

(1) A claim form may be issued and served without the statement of claim, affidavit or other document required by rule 8.1 (2) (b) or (c) only if the –

(a) claimant has included in the claim form all the information required by rules 8.6. 8.7, 8.8 and 8.9; or

(b) the Court gives permission.

(2) In a case of emergency when it is not practicable to include in the claim form all the information required by rules 8.6, 8.7, 8.8 and 8.9 or first to obtain the permission of the court a claimant may issue and serve the claim form without a statement of claim or affidavit or other document required by rule 8.1(1) (b) or (c) provided that the claimant –

(a) certifies in writing that the issue and service of the claim form is a matter of emergency, stating why; and

(b) serves a copy of the –

i. certificate; and
ii. application for permission; with the claim form.

(3) If a claim form is issued under paragraph (2), unless the Court otherwise orders, pending the granting of permission by the Court, the claimant may take no further steps except to serve the claim form, together with the certificate and application for permission, and to take such steps as are necessary to pursue the application for permission.

(4) The court may give permission under paragraph (1) (b) only if it is satisfied that –

(a) a relevant limitation period is about to expire, and the claimant has obtained legal advice relating to the claim for the first time within the twenty-eight days prior to the date that the claimant wishes to file the claim; or

(b) the claim form must be issued as a matter of urgency and it is not practicable for the claimant to prepare a statement of claim or affidavit.

(5) An application for permission may be made without notice but must be supported by evidence on affidavit.

(6) Any order giving permission for the claim form to be served without a statement of claim or affidavit or other document required by rule 8.2 (1) (b) or (c) must state a date by which the statement of claim or other document must be filed and served.

(7) Such date must in no case be more than twenty-eight days from the date of the order giving permission.

(8) A copy of the order or the certificate and application under paragraph (2), must be served with the claim form.

(9) The claimant must file a copy of the statement of claim, or affidavit or other document required by rule 8.1(1) (b) or (c), served in accordance with paragraph (6), endorsed with a certificate stating the date of service and the address at which and the manner in which it was served.

Notes

A claim form is to be accompanied by other documents listed in the rules. The claim form is to include sufficient details as to allow the other party to know the nature of the matter, the wrongdoing alleged, and the remedy sought. The use of an incorrect form is not unusual. The Courts generally have been sympathetic where the defendant has not been misled and have not struck out the claim.

This rule provides for circumstances when the statement of claim or affidavit is not filed with the claim form such as when the claim form includes the requirements for the claim as listed in Sections 6 – 9 in this Part of these Rules, or with permission of the court. However, when this is not the case the claim form may not be served without the permission of the court. The rule sets out the procedure for obtaining the court's permission. If the statement of claim is not served with the claim form, then the claimant may take no further action in the proceedings until the statement of claim has been served.

Practice Direction No. 3 of 2023 provides that in proceedings begun by fixed date claim form a judge may direct that an affidavit or a statement of claim be filed and served in addition to the claim form.

Cases

Hannigan v Hannigan [2000] 2 F.C.R. 650, CA *(It is disproportionate and unjust to strike out a claim made on the wrong form when the defendant had been given all the information required to understand what the claimant was seeking).*

Niguel Streete v Caricom Management Services et al Claim No. AXA HCV 20090014 *(penalty for filing a claim form without a statement of claim or an affidavit or other document as required by Rule 8.1) | (judge's permission for a claim form to be filed without the required documents must be done by an Order or an assurance by Counsel)*

Fidel Rampersad et al v Medical Professional Association of Trinidad and Tobago Claim No. CV 2014-01330 (*failure to serve a statement of claim with the claim form without the court's permission treated as an irregularity under T&T CPR 26.8 which ought to be cured in the circumstances of the case*.)

Matthew Thomas v Dr. Ralph Gonsalves SVGHCVAP2014/0009 *(judge's discretion to put matters right if a party proceeds with an incorrect form)*

Rule 8.2.4 (a) - Forbes v. The BVI Health Services Authority BVIHCV2020/0047 *(the limitation period is clarified as twenty-eight days after a claimant obtains legal advice for the first time)*

Rule 8.2.4 (b) Rawleigh Forbes v The BVI Health Services Authority BVIHCV2020/0047 *(what is practicable must be determined by the reference to the specific circumstances of the individual claimant, including the physical and mental capacity) (the mere existence of some urgency cannot necessarily justify an applicant not abiding by the rules. If a deviation is to be permitted, the extent will depend on the circumstances of the case)*

8.3 Where to start proceedings

(1) This rule identifies the court office at which a claim form maybe issued.

(2) Where proceedings relate to land in the Northern Region, they shall be commenced in the court office of Grand Bahama.

(3) In all other cases relating to land, the court proceedings shall be commenced in the court office in New Providence.

(4) In the case of any other proceedings where —

- (a) either the cause of action arose or the defendant resides or carries on business in the Northern Region, they shall be commenced in the court office in Grand Bahama; or
- (b) the cause of action arose or the defendant resides or carries on business in any place outside the Northern Region, they shall be commenced in the court office in New Providence.

(5) In any case the court can, either on its own motion or on an application without notice supported by an affidavit, order that the proceedings are to be commenced in or transferred to any court office which it deems appropriate.

(6) In the case of an application under paragraph (4) above, the affidavit shall set out the grounds of the application and all circumstances relevant thereto.

Notes

In an effort to give effect to the overriding objective, This Rule separates matters in the Commonwealth of The Bahamas by geographical location. A claim form may be issued in the court office on one of two

Islands, Grand Bahama for those islands that make up the Northern Region of The Bahamas and New Providence for all the other islands.

8.4 Right to make claim which includes two or more claims

A claimant may use a single claim form to include all or any other claims which can be conveniently disposed of in the same proceedings.

8.5 Claim not to fail by adding or failing to add parties

(1) The general rule is that a claim will not fail because a person –

a. who should have been made a party was not made a party to the proceedings; or
b. was added as a party to proceedings who should not have been added.

(2) Notwithstanding paragraph (1) —

a. where a claimant claims a remedy to which some other person is jointly entitled, all persons jointly entitled to the remedy must be parties to the proceedings, unless the Court orders otherwise; and
b. if any such person does not agree to be a claimant, that person must be made a defendant, unless the Court orders otherwise.

(3) This rule does not apply in probate or administration proceedings.

Notes
Under this rule, unlike the former rule (Order 15) on joinder of parties, the claimant no long requires the permission of the court to join two or more parties to the action.

Cases
Jodephat Small (Trading as Recycle It inc.) v Thomas Ambrose Claim No. SLUHCV2008/1173 *(whether a misnomer can result in the matter being set aside)*

8.5.2(a) - **The Landing Proprietors Unit Plan No. 2/2007 v Two Seas Holdings Limited SLUHCV2018/0263** *(all Claimants entitled to a remedy must be joined to the action)*

8. 6 What must be included in claim form

(1) The claimant must in the claim form –

(a) include a short description of the nature of the claim;

(b) specify any remedy that the claimant seeks; and

(c) give an address for service in accordance with rule 3.7.

(2) Notwithstanding paragraph (1) (b) the court may grant any other remedy to which the claimant may be entitled.

(3) A claimant who seeks aggravated damages or exemplary damages must say so in the claim form.

(4) A claimant who is seeking interest must –

(a) say so expressly in the claim form; and

(b) include, in the claim form or statement of claim, details of the –

i. basis of entitlement;

ii. rate; and

iii. period for which it is claimed.

(5) If the claim is for a specified sum of money, the total amount of interest claimed to the date of the claim and the daily rate at which interest will accrue after the date of the claim must be expressly stated in the claim form.

(6) A claimant who claims in a representative capacity under Part 21 must state what that capacity is.

(7) A claimant suing a defendant in a representative capacity under Part 21 must state what that capacity is.

Notes

This rule replaces the former specially endorsed writ of summons. The claimant is now required to provide particulars of his claim when he commences proceedings. If a claimant is seeking interest, then he must expressly ask for it in the claim form.

Cases

Grenada Building and Loan Association v Grenada Cooperative Bank Ltd Claim No. GDAHCV2009/0155 *(a claim forms issued with some defect will not automatically be struck out where it can be found that the defendant had been given all the information required to understand what the claimant was seeking)*

Wakeem Quishard v. The Attorney General of the Virgin Islands BVIHCVAP2018/0006 *(the provisions of Rule 8.6 (4) are in mandatory terms)*

Rule 8.6.4 Bhisham Soondarsingh v Anthony Wilson and Others Civ App No 226 of 2015 *(Failure to plead interest)*

8.7 Claimant's duty to set out case

(1) The claimant must include in the claim form or in the statement of claim a statement of all the facts on which the claimant relies.

(2) The statement must be as short as practicable.

(3) The claim form or the statement of claim must identify any document which the claimant considers to be necessary to his or her case.

(4) If the claimant seeks recovery of any property, the claimant's estimate of the value of that property must be stated.

(5) The statement of claim must include a statement of truth in accordance with rule 3.8.

Notes
The onus is on a claimant to set out all the facts which he wishes to rely upon to prove his case. The purpose of Rule 8.7 is to ensure that the Claimant pleads the factual matrix of the case in the statement of claim so as to make the Defendant aware of what he is to defend himself against. A claimant at trial will be restricted to the allegations and facts as pleaded and would not be allowed to rely on any other allegation or fact not pleaded, except with the leave of the court or by consent of the parties (**See: Ralph Gooding (In his capacity as Widower, Heir-at-Law an Administrator of the Estate of Coral Gooding, Deceased) v. National Workers Co-Operative Credit Union Ltd. 2020/CLE/gen/00272).**

Cases

Patricia Anne Huggins v Lloyd Browne SVGHC2018/0001 (*duty on claimant to set out all the relevant facts)*

First Citizens Bank Limited v Shepboys Limited and Another Civ App No P231 of 2011 *(Claimant's duty to set out case)*

Shankiell Myland v Commissioner of Police et al *(Result of Claimant ignoring the requirements set out in Rule 8.7)*

Eastern Caribbean Flour Mills Limited v Ormiston Ken Boyea Civil Appeal No. 2006 (Eastern Caribbean Court of Appeal)

Bernard v Seebalack [2010] UKPC 15

First Caribbean International Bank (Barbados) Limited v The Roserie Company Ltd LC 2019 HC 15 (vlex citation)

Real Time Systems Ltd v Renraw Investments Ltd and Others[2014] UKPC 6

Cedar Valley Springs Homeowners Association Incorporated v Pestaina ANUHCVAP2016/000 and ANUHCVAP2016/0010

Carl Webster v Historic Beacon Point Anguilla Ltd et al AXAHCVAP2020/0020

National Lotteries Authority v Jerome De Roche GDAHCVAP2021/0025

8.8 Permission to rely on allegation or factual argument

The claimant may not rely on any allegation or factual argument which is not set out in the claim, but which could have been set out there, unless the court gives permission or the parties agree.

8.9 Special requirements applying to claims for personal injuries

(1) This rule sets out additional requirements with which a claimant making a claim for personal injuries must comply.
(2) The claimant's date of birth or age must be stated in the claim form or statement of claim.

(3) If the claimant intends to rely at trial on the evidence of a medical practitioner, the claimant must attach to the claim form a report from the medical practitioner on the personal injuries alleged in the claim.
(4) Paragraph (3) does not restrict the right of the claimant to call other or additional medical evidence at the trial of the claim.
(5) The claimant must include in or attach to the claim form or statement of claim a schedule of any special damages claimed.

Notes
A claim for special damages must be specifically pleaded. Not only must the Claimant attach all the facts on which he relies in the claim form or the Statement of Claim (Rule 8.7 (1)), Rule 8.9 places a further duty on the Claimant to attach all medical evidence he wishes to rely on.
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Cases
Steadroy Matthews v Garna Oneal BVIHCVAP2015/0019 *(in light of the failure of a party to claim special damages it is not open to the Court to make an award for special damages).*

8.10 Relator claims

A person's name may not be used in any claim as a relator unless that person has given written authority to that effect and the authority is filed at the court office before the claim is issued.

8.11 Service of claim form

After the claim form has been issued it may be served on the defendant in accordance with Part 5 or Part 7.

Notes
Service of proceedings is fundamental to the litigation process. The Service of the Claim Form alerts the parties involved that there is a matter against them in the Supreme Court. The requirements of service of the claim form in Part 5 (service inside the jurisdiction) and Part 7 (service outside the jurisdiction) must be complied with.

Cases

Riad Marketing Limited v Eckler Chemicals Limited CV 2015–00670 (Purpose of Service)

8.12 Time within which claim form may be served

(1) The general rule is that a claim form must be served within six months after the date when the claim was issued.
(2) The period for –
(a) service of a claim form out of the jurisdiction; or
(b) service of an Admiralty claim form in rem; is six months.

Notes
This rule replaces the former Rule and shortens the period of service of the claim from one year to six months.

Cases

Kenneth Williams v Leslie Chang et al Claim No.NEVHCV2010/0153 *(The need for placing these time limits on service of the claim form is dictated by the need for finality to litigation and by the existence of limitation periods. The period allowed for service seeks to ensure that the uncertainty of litigation is not unreasonably extended. These rules also reflect the recognition that the objective of limitation rules would be thwarted if, having issued proceedings, claimants could indefinitely put off service and thereby keep their claim alive infinitely into the future.)*

8.13 Extension of time for serving a claim form

(1) The claimant may apply for an order extending the period within which a claim form may be served.
(2) The period by which the time for serving a claim form is extended may not be longer than six months on any one application.
(3) An application under paragraph (1) –
(a) must be made within the period –
i. for serving a claim form specified by rule 8.12; or
ii. of any subsequent extension permitted by the court; and
(b) may be made without notice but must be supported by evidence on affidavit.

(4) The court may make an order under paragraph (1) only if it is satisfied that –

(a) the claimant has taken all reasonable steps to –

i. trace the defendant; and

ii. serve the claim form;

(b) there is some other special reason for extending the period.

(5) If an order is made extending the validity of the claim form for the purposes of service –

(a) the claim form must be marked with an official stamp or endorsement by the court office showing the period for which its validity has been extended; and

(b) a sealed copy of any order made must be served with the claim form.

(6) No more than one extension maybe allowed unless the court is satisfied that –

(a) the defendant is deliberately avoiding service; or

(b) there is some other compelling reason for so doing.

Notes
Rule 8.13 makes provision for the Court to extend the time for service of a claim form. The application for extending the time to serve the claim form must be made during the relevant period and the court will only extend the time if the conditions in 8.13(4) are complied with.

Cases

Deskennie Ltd v Springfield Investments Ltd 2015/CLE/gen/FP/00422 (The claimant applied for substituted service and an extension of time to serve the originating summons filed in the proceedings prior to the commencement date pursuant to CPR 5.13, 5.14 and 8.13. The claimant's position was that personal service could not be effected on the director of the defendant as he was avoiding service. Two attempts were made to serve him at his residence in 2018 but no attempts were made after 2018. The Court refused to extend the time for service on the basis that she was not satisfied that the claimant had taken all reasonable steps to trace and serve the defendant. The Court also noted that, under the CPR, the period by which the time for serving a claim form is extended had been reduced from 12 months to 6 months.)

Kenneth Williams v Leslie Chang et al Claim No:NEVHCV2010/0153 *(the question whether the claimant has taken all reasonable steps must be judged by reference to the entire period of service) (instances of a party not taking reasonable steps) (Extending the validity of a claim is seeking assistance for genuine problems encountered in executing service not to seek relief from the consequences of your own neglect)(Expiration of the limitation period does not amount to special reasons for extending the period)*

Robert Allen Standford International Bank Limited et al ANUHCVAP2014/0013 *(the provisions of Rule 8.12 and Rule 8.13 are unambiguous. When read conjointly, the rules provide a procedure and timeframe which must be followed by a litigant who is desirous of instituting proceedings against a person who resides outside of the jurisdiction of the court.)*

Andrew Samuel and others v BG Trinidad Central Block Limited and Another CV 2012-00367 *(the Court retains a discretion to grant an extension of time)*

Dana Daniel and Another v Ghanny Mohammed CV 2006–03578 *(what are reasonable steps)*

F.G. Hawkes (Western) Ltd. V Beli Shipping Co Ltd [2009] EWHC 1740 *(the better the reason for not having served in time the more likely that an extension would be granted; incompetence or oversight by the claimant or waiting some other development in the case might not amount to a good reason.)*

American Leisure Group Ltd. V Garrard and others [2014] EWHC 2101 (Ch), June 26m 2014 unrep *(an extension applied for after the requisite period for service had expired was refused where the claimants had put an address for service for the defendant both in and out of the jurisdiction on the claim form but had failed to take elementary steps to discover that he had in fact been residing in the jurisdiction for three years)*

Drury v BBC & Carnegie [2007] EWCA Civ 497 *(In determining whether a claimant has taken "all reasonable steps to serve the claim form" the court is limited to considering steps taken during the period allowed for by Rule 8.12, and steps taken after that time are irrelevant)*

Juliette Wright v Alfred Palmer [2021] JMCA Civ 32 (*The Jamaican Court of Appeal held that under the similar provisions of the JAM CPR, an applicant who wishes to have the life of a claim form extended must make an application for extension during the validity of the claim form. The court may grant the extension but can only do so for six months in the first instance, and on any one application. The judge or master, in deciding whether to grant the request for an extension, must consider whether the application is good, that is, it was made in accordance with the rules, and must be satisfied that the applicant has taken all reasonable steps to trace and serve the defendant but was unable to do so. Otherwise, the judge or master must be satisfied that there is some other special reason for extending the period. If the application to extend the validity of the claim form is fixed for hearing too late by the registry, it is the duty of the applicant*

to file an affidavit of urgency seeking an emergency hearing. It is the duty of the party seeking the application, and knowing the urgency of the matter, to take the necessary steps to move it along.)

8.14 Defence form, etc. must be served with claim form

(1) When a claim form is served on a defendant, it must be accompanied by –

a. a copy of any order made under rule 8.2 or 8.13;
b. a defence form in Form G10;
c. a form of acknowledgment of service in Form G8;
d. if the claim is for money – an application to pay by installments in Form G13; and; and
e. the prescribed notes for defendants .

(2) There must be inserted on each form the –

a. The address of the court office to which the defendant is to return the forms;
b. reference number of the claim; and
c. title of the claim.

(3) If there is a standard defence form appropriate to the particular case set out in a practice guide, the form sent to the defendant must be in a standard form of that type.

Notes
The claimant is required to serve the defendant with a several documents when serving the claim form; any Order made pursuant to this Rule, a prescribed defence form (Form G) and an acknowledgement of service form. There is no longer the requirement to file former Memorandum of Appearance. The claimant must also provide the defendant with details of the court office and the reference number and title of the claim.

Cases

James H. Herbert v Nelisa Spencer and Anselm v Balthazar and Balthazar Master Glasgow cited Asia Pacific (HK) Ltd & Ors v Hanjin Shipping Co Ltd ANUHCV 2014/0391 (a claim will not fail for the failure to serve the accompanying court documents or to amend the timelines for filing an acknowledgment of service or a defence except where the consequence of failure to comply has been so specified. It is a procedural irregularity and does not go to the substance of the claim.)

SECTION II - ALTERNATIVE PROCEDURE FOR CLAIMS – ORIGINATING FORM

8.15 Alternative procedure of an originating application form.

The alternative procedure of an originating application form for commencing proceedings under this Part instead of by standard claim form or a fixed date claim form is intended for use where —

(1) the Court's decision is sought on a question which is unlikely to involve a substantial dispute of fact: or

(2) a statute, rule or practice direction requires or permits the use of this procedure for commencing proceedings of a specified type.

Notes
This rule replaces the former originating summons.

8.16 Approval of settlement.

An originating application form under this Part must be used where there is a claim by or against a child, protected party or a patient which has been settled before the commencement of proceedings and the sole purpose of the claim is to obtain the approval of the Court to the settlement.

Notes

This rule replaces the former originating summons.

8.17 Claim Form.

An originating application brought under this Part —
(a) must be in Form G5; or
(b) if in relation to an International Request for Assistance, must be in Form G6.

8.18 No default judgment.

Where the claimant uses an originating application form under this Part, he may not obtain default judgment under Part 12.

Notes
This Rule prohibits the claimant obtaining default judgment when the method commencing the action is by an originating application.

8.19 The general procedure in a claim using an originating application form.

(1) The Court may at any stage, either on application or on its own initiative, order a claim commenced by originating application form to continue as if the proceedings had been commenced using a standard claim form and where the Court takes this course it will give such directions as it considers appropriate.
(2) The Court may give directions either on its own initiative or on the application of a party immediately after the originating application form is issued and such directions may include fixing a hearing date where the Court will give directions for the disposal of the claim as soon as practicable after the defendant has acknowledged service.
(3) A rule or practice direction may, in relation to a specified type of proceedings —

(a)require or permit the use of an originating application form; and
(b) disapply or modify any of the rules set out in this Part as they apply to those proceedings.

Notes
This rule is the former Order 28 Rule 8 of the Rules of the Supreme Court.

8.20 Contents of the originating application form.

(1) Where the claimant uses an originating application form it must state —
(a) that this Part applies;
(b) the question which the claimant wants the Court to decide or the remedy which the claimant is seeking and the legal basis for the claim to that remedy;
(c) if the claim is being made under an enactment, what that enactment is;
(d) if the claimant is claiming in a representative capacity, what that capacity is; and
(e) if the defendant is sued in a representative capacity, what that capacity is.
(2) Every originating application form must be verified by a certificate of truth in compliance with Rule 3.8 as amended to apply to such a form.

8.21 Issue of claim form without naming defendants.

(1) A practice direction may set out the circumstances in which an originating application form may be issued under this Part without naming a defendant.
(2) The practice direction may set out those cases in which an application for permission must be made by application notice before the claim form is issued.
(3) The application notice for permission —
(a) need not be served on any other person; and
(b) must be accompanied by a copy of the claim form that the applicant proposes to issue.
(4) Where the Court gives permission it will give directions for the future management of the claim.

Notes
This Rule provides for the claimant to issue a claim without naming a defendant, however, the permission of the court is required. The procedure is by an application notice; however the notice need not be served on anyone.

8.22 Acknowledgement of service

(1) The defendant must—

(a) file an acknowledgement of service in the relevant practice form not more than fourteen days after service of the claim form; and

(b) serve the acknowledgement of service on the claimant and any other party.

(2) The acknowledgement of service must state—

(a) whether the defendant contests the claim; and

(b) if the defendant seeks a different remedy from that set out in the claim form, what that remedy is.

8.23 Consequence of not filing an acknowledgement of service

(1) This rule applies where —

(a) the defendant has failed to file an acknowledgement of service; and

(b) the time period for doing so has expired.

(2) The defendant may attend the hearing of the claim but may not take part in the hearing unless the Court gives permission.

8.24 Filing and serving written evidence.

(1) The claimant must file any written evidence on which he intends to rely when he files his claim form.

(2) The claimant's evidence must be served on the defendant with the claim form.

(3) A defendant who wishes to rely on written evidence must file it when he files his acknowledgement of service unless otherwise ordered by the Court on an application without notice.

(4) If a defendant files written evidence he must forthwith serve a copy of his evidence on the other parties.

(5) Any evidence filed at the time of filing his acknowledgement of service must be served when the acknowledgement of service is served on the claimant and any other party.

(6) The claimant may, within fourteen days of service of the defendant's evidence on him, file further written evidence in reply.

(7) If he does so, he must also, within the same time limit, serve a copy of his evidence on the other parties.

(8) The claimant may rely on the matters set out in his claim form as evidence under this rule if the claim form is verified by a statement of truth.

8.25 Evidence – general

(1) No written evidence may be relied on at the hearing of the claim unless—
(a) it has been served in accordance with rule 8.24; or
(b) the Court gives permission.

(2) The Court may require or permit a party to give oral evidence at the hearing.

(3) The Court may give directions requiring the attendance for cross-examination of a witness who has given written evidence.

8.26 Additional claims.

Where the procedure under this Section is used, Part 18 applies except that party may not without the Court's permission make an additional claim against a person who is not already a party to the proceedings.

8.27 Procedure where defendant objects to use of the Part 8 procedure

(1) Where the defendant contends that the procedure under this Section should not be used because—
(a) there is a substantial dispute of fact; and
(b) the use of this procedure is not required or permitted by a rule or practice direction, he must state his reasons when he files his acknowledgement of service.

(2) When the Court receives the acknowledgement of service and any written evidence it will give directions as to the future management of the case.

PART 9 – ACKNOWLEDGEMENT OF SERVICE AND NOTICE OF INTENTION TO DEFEND

9.1 Scope of this Part.
(1) This Part deals with the procedure to be used by a defendant who wishes to contest proceedings and avoid a default judgment being entered.
(2) The defendant does so —
  (a) by filing —
    (i) a defence in accordance with Part 10; and
    (ii) an acknowledgement of service in Form G9 containing a notice of intention to defend within the time limit under rule 9.3;. or
  (b) by filing a defence in accordance with Part 10 within the time limit under rule 9.3 or
  (c) where applicable, by filing an acknowledgement of service in accordance with rule 8.2(2).
(3) The filing of an acknowledgement of service is to be treated as the entry of an appearance for the purpose of any enactment referring to the entry of such an appearance.

Notes:
When a claim form is served on a defendant who wishes to contest proceedings, the defendant generally has two options:

i) he can file an acknowledgment of service containing a notice of intention to defend within the time limit under rule 9.3 (usually 14 days from the date of service of the claim) followed by the filing of a defence in accordance with Part 10; or
ii) he may file his defence within the time specified in 9.3 and dispense with filing an acknowledgment of service.

A third option arises when a claimant has proceeded under rule 8.2(2). In such instances, the defendant may delay filing an acknowledgment of service in accordance with rule 8.2(2).

Cases
Hartlyn M. Roberts et al v Steve McKinney 2023/CLE/gen/0053 (September 2023) (The Court refused to set aside an unfiled Notice of Conditional Appearance on an application by the claimants, noting that, under the provisions of CPR 9.1 and 9.2, an acknowledgment of service or defence must be filed and until then there was nothing for the claimants to answer.)

9.2 Filing acknowledgement of service and consequence of not doing so.
(1) A defendant who wishes to —
(a) dispute the claim; or
(b) dispute the Court's jurisdiction, must file at the Court office at which the claim form was issued an acknowledgement of service in Form G9 containing a notice of intention to defend.
(2) A defendant files an acknowledgement of service by completing the form of acknowledgement of service and handing it in at or electronic filing to the court office.
(3) An acknowledgement of service has no effect until it is filed at the court office.

(4) A defendant need not file an acknowledgement of service if a defence is filed within the period specified in rule 9.3.
(5) If a defendant fails to file an acknowledgement of service or a defence, judgment may be entered if Part 12 allows it.

9.3 The period for filing acknowledgement of service.
(1) The period for filing an acknowledgement of service is the period of 14 days after the date of service of the claim form.
(2) If permission has been given under rule 8.2 for a claim form to be served without a statement of claim, the period for filing an acknowledgement of service is to be calculated from the date when the statement of claim is served.
(3) A defendant may file an acknowledgement of service at any time before a default judgment is filed at the court office out of which the claim form was issued.
(4) Paragraph (1) does not apply where the claim is served —
(a) outside the jurisdiction in accordance with Part 7; or
(b) on an agent of an overseas principal under rule 5.17.

9.4 Notice to claimant of filing of acknowledgement of service.
(1) The defendant must forthwith notify the claimant in writing that an acknowledgement of service has been filed.
(2) A copy of the acknowledgement of service must be annexed to the notice.

9.5 Contents of acknowledgement of service.
(1) A defendant acknowledging service —
(a) may state in the acknowledgement of service that all or part of the claim is admitted;
(b) must state in the acknowledgement of service the date on which the defendant received the claim form;
(c) who admits all or part of a claim for a specified sum of money may file with the acknowledgement of service —
(i) details of the defendant's financial circumstances;
(ii) proposals for payment of any sums admitted; and
(d) who admits part of the claim under paragraph (a), must state the amount admitted.
(2) A defendant who admits part of the claim must also file a defence as to the disputed part of the claim within the time for filing a defence.
(3) The defendant or the defendant's attorney must sign the acknowledgement of service.
(4) The defendant must include in the acknowledgement of service an address for service within the jurisdiction to which documents may be sent.

9.6 Right to dispute jurisdiction of Court not taken away by acknowledgement of service.
A defendant who files an acknowledgement of service does not by doing so lose any right to dispute the Court's jurisdiction.

9.7 Procedure for disputing Court's jurisdiction etc.
(1) A defendant who disputes the Court's jurisdiction to try the claim may apply to the Court for a declaration to that effect.

(2) A defendant who wishes to make an application under paragraph (1) must first file an acknowledgement of service.
(3) An application under paragraph (1), must be made within the period for filing a defence; the period for making an application under this rule includes any period by which the time for filing a defence has been extended where the Court has made an order, or the parties have agreed, to extend the time for filing a defence.
(4) An application under this rule must be supported by evidence on affidavit.
(5) A defendant who —
(a) files an acknowledgement of service; and
(b) does not make an application under this rule within the period for filing a defence, is treated as having accepted that the Court has jurisdiction to try the claim.
(6) An order under this rule may also —
(a) discharge an order made before the claim was commenced or the claim form served;
(b) set aside service of the claim form; and
(c) strike out a statement of claim.
(7) If on application under this rule the Court does not make a declaration, it
—
(a) may —
(i) fix a date for a case management conference; or
(ii) treat the hearing of the application as a case management
conference; and
(b) must make an order as to the period for filing a defence.
(8) Where a defendant makes an application under this rule, the period for filing a defence is extended until the time specified by the Court under paragraph (7)(b) and such period may be extended only by an order of the Court.

Notes:

Practice Direction No. 4 of 2023 stipulates that where a defendant is unable to file all the evidence on which he wishes to rely to support his application under rule 9.7(4) he must (a) file with his application an affidavit which sets out the general nature of the grounds on which he proposes to contest the jurisdiction of the Court, (b) indicate when the additional evidence will be available and apply for case management directions for the future conduct of the application and, in particular, the timetable which will apply.

9.8 Procedure for applying for a stay etc.

(1) A defendant who contends that the Court should not exercise its jurisdiction in respect of any proceedings may apply to the Court for a stay and a declaration to that effect.
(2) A defendant who wishes to make an application under paragraph (1) must first file an acknowledgement of service if he has not previously done so.
(3) An application under paragraph (1) of this rule may be made at any time.
(4) An application under this rule must be supported by evidence on affidavit.
(5) If on application under this rule the Court does not make a declaration, it
—
(a) may —
(i) fix a date for a case management conference; or
(ii) treat the hearing of the application as a case management conference; and
(b) must make an order as to the period for filing a defence if none has yet been filed.

(6) Where a defendant makes an application under this rule, the period for filing a defence, where none has yet been filed, is extended until the time specified by the Court under paragraph (5)(b) and such period may be extended only by an order of the Court.

PART 10 - DEFENCE

10.1 Scope of this Part.

The Rules in this Part set out the procedure for disputing the whole or part of a claim.

Notes:
This Part is concerned exclusively with the rules for disputing a claim, entirely or partly. See Part 14 and 18 for guidance in respect of the rules concerning admitting a claim, in whole or part, and advancing a counterclaim or other additional claim, respectively. This Part has no application whatsoever to the alternative procedure for commencing claims, as set out in Part 8.

10.2 The defendant - filing defence and the consequences of not doing so.

(1) A defendant who wishes to defend all or part of a claim must file a defence which may be in Form G10.

(2) If —

(a) a claim is commenced by a fixed date claim form in Form G4 and there is served with that claim form an affidavit instead of a statement of claim; or

(b) any rule requires the service of an affidavit,

the defendant may file an affidavit in answer instead of a defence.

(3) In this Part the expression "defence" includes an affidavit filed under paragraph (2).

(4) A defendant who admits liability and wishes to be heard on the issue of quantum must file and serve a defence dealing with that issue.

(5) If a defendant fails to file a defence within the period for filing a defence, judgment for failure to defend may be entered if Part 12 allows it

Notes:
This rule underscores the critical importance for a party to enter a defence to a claim to avoid a default judgment. The purpose of the rule is particularly important given that the Court of Appeal signalled a departure from the general rule that a party is entitled to have an irregular judgement set aside. Equally as important are the principles which govern applications to set aside a regularly entered judgment, which in contrast to the aforesaid general rule, is not as of right. The onus therefore falls on a party to enter a defence promptly, if it wishes to contest any aspect of the claim, as opposed to ignoring claims on the basis of any irregularities, or perceived lack of merits. See r. 10.5 as to the required particulars of the defence.

Cases:
Hanna and another v Lausten *[2018] 1 BHS J. No. 172* - The Bahamian Court of Appeal decision establishing that the general rule that a litigant is entitled *ex debito justitiae* to have an irregular judgment set aside is not absolute. Their Lordships held that the principle has always been subject to the power of the court in an appropriate case, to vary a default judgment so as to correct an irregularity.
Analby v. Praetorious [1888] 20 Q.B.D. 764 – A defendant is entitled ex debito justitiae to have an irregularly entered judgment set aside
Alpine Bulk Transport Company Inc. v. Saudi Eagle Shipping Company Ltd [1986] 2 Lloyd's Report 221, per Sir Roger Omerod at page 223 for his recognition of the four key factors the Court should consider in weighing whether to set aside a regularly entered judgment.

10.3 The period for filing defence.

(1) The general rule is that the period for filing a defence is the period of twenty-eight days after the date of service of the claim form.

(2) If permission has been given under rule 8.2 for a claim form to be served without a statement of claim, the period for filing a defence is the period of twenty-eight days after the service of the statement of claim.

(3) If the defendant within the period set out in paragraph (1) or (2) makes an application under any relevant legislation relating to arbitration to stay the claim on the grounds that there is a binding agreement to arbitrate, the period for filing a defence is extended to fourteen days after the determination of that application.

(4) The parties may agree to extend the period for filing a defence specified in paragraph (1), (2) or (3).

(5) The parties may not make more than two agreements under paragraph (4).

(6) The maximum total extension of time that may be agreed is fifty-six days.

(7) The defendant must file details of an agreement made pursuant to this rule.

(8) A defendant may apply for an order extending the time for filing a defence.

(9) The general rule referred to in paragraph (1) is subject to —

(a) rule 5.17(4);

(b) rule 7.6;

(c) rule 9.7; and

(d) rule 65.2.

Notes:

Part 10.3 - Period for filing a defence

The time period for filing a defence is 28 days after service of the statement of claim, whether served with the claim form, or separately pursuant to rule 8.2. This enlarges the previous period of 14 days provided under the Rules of the Supreme Court 1978. A longer time period for filing of a defence may be permitted in instances where:

a) An application has been made seeking a stay on the basis that dispute is governed by a binding arbitral clause;
b) The Court makes an Order for service of the claim form out of the jurisdiction, either on the principal or their agent;
c) An application challenging the Court's jurisdiction has been made (after the claim form has been acknowledged);
d) In civil proceedings commenced against the Crown, an application has been made for a further and better statement of the particulars of the statement of claim (due prior to the expiry of the time limited for filing an acknowledgement of service).

Part 10.3(4) - Extensions of the time period for filing a defence

This rule now allows parties to agree an additional 56 days for filing of a defence, without the necessity of an application to the Court to approve or regularize a late filing. While the agreement itself does not have to be in writing, a defendant is obliged to file the details of the same with the Court. Although not specified by the rules, there should be precise details as to the date, time, means of the agreement, and specific identities of the persons agreeing to the terms of the same (and their authorization to do so if not apparent). The limit on the parties' ability to agree an extension beyond the additional 56 day is deliberate. It maintains the Court's ability to drive the matter to a determination, as opposed to allowing its progress (and processes) to be subject to the whims of the parties. While there may be forces completely external to and/or outside of the control of the parties that would offer some justification for a further agreement after the maximum 56 days' extension, it should not be taken for granted that the Court would accede to any such agreement.

Part 10.3(4) - Applications to the Court
Outside of an agreement with a plaintiff, a defendant can still apply to the Court for an extension of time to file a defence. As this rule has facilitated an extension by agreement without the need for an application, the onus would appear to rest squarely on a defendant to demonstrate that he has exhausted this route, prior to lodging an application. While a plaintiff is not obligated to agree an extension, supporting evidence demonstrating that there was a refusal of, or failure to acknowledge or respond to, a reasonable request for an extension will be relevant to the Court in an application for an extension, and possibly the issue of the costs of the same.
The Court's express power pursuant to r. 26.1(2)(k) to grant an extension even after the expiry of the relevant deadline is subject to the overriding objective of the Civil Procedure Rules. Accordingly, the onus is on the applicant to seek the extension promptly, as soon as the need for the same is apparent. This obligation can be discerned from the Court's approach to extension applications made both "in time" and "out of time".
In cases of the former, the Courts have signaled that the key consideration is the overriding objective, rather than treating the application as one for a relief from sanction. By contrast, instances of the latter are to be approached strictly as a relief from sanction, even where a sanction had not been stipulated. In either event, the relevant factors the Court would consider include: (1) the prejudice to the parties, (2) the merits of the claims, and (3) the circumstances of the case.

Cases:
Robert v Momentum Services [2003] EWCA Civ 299, [2003] 2 All ER 74
Hallam Estates v Baker [2014] EWCA Civ 661
Jalla v Shell International Trading and Shipping Co Ltd; [2021] EWCA Civ 1559
Denton v White; Decadent Vapours v Bevan Utilise; TDS v Cranstoun Davies [2014] EWCA Civ 906, [2014] All ER (D) 53 (Jul);
Kaneria v Kaneria [2014] EWHC 1165 (Ch);
Mitchell v NGN [2013] EWCA Civ 1537
Billington v Davies & Soane Capital [2013] EWCA Civ 1537 and *R (On the application of Hysaj) v Secretary of State for the Home Department [2014] EWCA Civ* (ongoing without prejudice negotiations, and claims of lack of funds did not justify an extension).
Captain Joseph J. Moxey v Bahamasair Holdings Limited and Bahamas Airline Pilots Association (10 October 2023) (the Court will not extend time where it would be unjust and an abuse of the Court's process; an extension of time may be granted where the applicant can demonstrate it can set up a bona fide defence to the claim on the merits or a difficult point of law is involved or there is dispute as to facts which ought to be tried or there ought for some other reason to be a trial on the claim; it is necessary to consider the overriding objective; the injustice or prejudice that would be caused to the respondent is relevant; the extent of the delay in applying and the merits of the intended defence are also relevant, and important, considerations; an application for an extension of time to file a defence may be made to regularize a defence that is belatedly filed).

10.4 Service of copy of defence.

On filing a defence, the defendant must also serve a copy on every other party.

Notes:
This rule discourages the practice of parties simply filing but neither serving a copy of the defence nor advising the other side of the filing of the same. As a matter of practice a defence should be served upon filing, or the claimant advised as to its filing, where service is impractical. The failure to serve a defence does not entitle a claimant to proceed with entering or applying for a default judgment (see rules 12.4 and 12.5 for the restrictions on the entry of a default judgment where a defence has been filed). Instead, a claimant ought either to obtain a copy of the defence from the Registry, or demand the same from the defendant together with a notice that a conditional order would be sought from the Court in accordance with r. 26.1 (3) for the defence to be struck out if not served within a stipulated time.

10.5 Defendant’s duty to set out case.

(1) The defence must set out all the facts on which the defendant relies to dispute the claim.

(2) The statement of facts referred to in paragraph (1) must be as short as practicable.

(3) In the defence the defendant must say which, if any, allegations in the claim form or statement of claim —

(a) are admitted;

(b) are denied; and

(c) are neither admitted nor denied, because the defendant does not know whether they are true;

(d) the defendant wishes the claimant to prove.

(4) If the defendant denies any of the allegations in the claim form or statement of claim —

(a) the defendant must state the reasons for doing so; and

(b) if the defendant intends to prove a different version of events from that given by the claimant, the defendant’s own version must be set out in the defence.

(5) If, in relation to any allegation in the claim form or statement of claim, the defendant does not —

(a) admit it; or

(b) deny it and put forward a different version of events, the defendant must state the reasons for resisting the allegation.

(6) The defendant must identify in or annex to the defence any document known to the defendant which is considered to be necessary to the defence.

(7) A defendant who defends in a representative capacity, must say —

(a) what that capacity is; and

(b) whom the defendant represents.

(8) The defendant must verify the facts set out in the defence by a certificate of truth in accordance with rule 3.8.

Notes:

This rule focuses on the contents of the defence, which must:

a) provide a full response to the claims as particularized in the clam form;
b) identify all documents supporting the grounds of defence being advanced;
c) state any representative capacity in which a defendant is acting, and the name(s) of the represented parties.

Part 10.5 - Duty to set out the case.

A concise but comprehensive response must be made to each allegation in the statement of claim so that the defendant unequivocally states which aspects of the pleaded case are admitted, denied, or the claimant is required to prove. This requires stating all facts and, at a minimum, specifically identifying any documents which are material to the defence. Facts which are admitted cease to be a live issue in dispute between the parties. Given the certificate of truth required to be endorsed on the defence, a party may be unable to withdraw an admission by amendment, leading in turn to their being precluded from advancing any argument or evidence at trial on the conceded issue.

As concerns denials of any of the particulars of claim, a defendant must not only specifically set out all of the reasons denying any of the particulars but is under a positive duty to identify any version of the events inconsistent with those claimed by the plaintiff that it intends to prove at trial (r.10.4(4) and (5)). It is difficult to formulate any more specific statement as to what will suffice for this purpose as it will depend on the nature of the claims. For example, in a personal injury claim there should be an assertion in the defence of facts: (i) disputing a plaintiff's account of the accident; (ii) supporting any claims of contributory negligence (itself a defence which should be specifically pleaded); and (iii)setting out the details of any independent medical examination of the plaintiff, the conclusions of which refute the plaintiff's claims as to the nature and/or extent of their injury. Such details would obviate the need for the defence to assert fraud or dishonesty on the part of the plaintiff with respect to any claimed injuries or damages (see *Kearsley v Klarfeld* [2005] EWCA Civ 1510, paras 45 and 48).

Conversely, where a defendant facing other types of claims wishes to raise an allegation that the same are wholly or partly predicated on fraud, the facts to be relied upon as proof of the fraud must be expressly stated in the defence. The aim should therefore be to ensure that the defence has clearly identified the case that has to be met at trial rather than merely setting out a bare denial or holding defence. However, a strike out of a defence that is bare, vague, or otherwise fails to comply with this rule is not automatic (See the Privy Council decision in *Real Time Systems Limited v Renraw Investments Limited and others* [2014] UKPC 6 as to the appropriate exercise of the Court's discretion on an application to strike out a statement of case).

In regard to non-admissions in the defence, there is no prerequisite for the defendant to conduct an inquiry of any kind, including of third parties. The duty to set out all of the material facts relates to matters readily available to a defendant, either from their own direct knowledge, or documents in his control, power, or possession (see *SPI North Ltd v Swiss Post International (UK) Ltd (Rev 1)* [2019] EWCA Civ 7.

Notwithstanding rule 10.5 (3), the failure of a defence to issue an express statement that an allegation is admitted, denied, non-admitted, or required to be proved an allegation does not automatically mean that the defendant has admitted the allegation. The defence may set out the nature of the defence to be advanced on that particular allegation so that it is sufficiently clear that the issue is in dispute. If however, the nature of the defence lacks clarity, a plaintiff has the option of seeking further information (r. 34.1). Alternatively, a plaintiff can seek to have the defence, or the offending part(s) thereof, struck out pursuant to r. 26.3 (or the Court may do so on its own volition in accordance with r. 26.2(1)).

Part 10.5(8) Certificate of truth.

The facts alleged in the defence must be verified by a certificate of truth provided either by the defendant directly, or their legal representative. This requirement is intended to prevent a party from advancing factual allegations which are false, unsupported by any evidence, and/or advanced for the purposes of offering a holding defence, or engaging in a fishing exercise. It also limits the scope for a litigant to allege that an allegation was settled by their counsel, without or contrary to their instructions.

The certificate of truth should not be ignored as it can be used in cross-examining a party. Equally, the Court has a discretion to strike out a defence which has not been verified by a statement of truth.

10.6 Special requirements applying to claims for personal injuries.

(1) This rule sets out additional requirements with which a defendant to a claim for personal injuries must comply.

(2) If the claimant has attached to the claim form or statement of claim a report from a medical practitioner on the personal injuries which the claimant is alleged to have suffered, the defendant must state in the defence —

(a) whether all or any part of the medical report is agreed; and

(b) if any part of the medical report is disputed, the nature of the dispute.

(3) If the defendant intends to rely on a report from a medical practitioner to dispute any part of the claimant's claim for personal injuries and the defendant has obtained such a report, the defendant must attach that report to the defence.

Notes:
This rule does not operate to require a defendant in a personal injury claim to obtain a medical report prior to filing a defence. The inability to identify or engage a suitable medical expert and/or obtain a medical report will therefore not provide any excuse for failing to file a defence within the stipulated time period. A defendant wishing to have the benefit of a medical report should proceed promptly with engaging an expert, and seek an extension under r.10.3(4) or (8) as needed. The special requirements for a defence to personal injury claims do not warrant consideration of any additional factors by the Court in weighing the exercise of its discretion to allow an extension for obtaining a medical report. The overriding objective would still remain the primary concern and in that regard, the Court should be receptive to an extension that is likely to result in agreed medical evidence at an early stage, a narrowing of the issues in dispute at trial, and/or an amicable settlement of the claims.

10.7 Consequences of not setting out defence.

The defendant may not rely on any allegation or factual argument which is not set out in the defence, but which could have been set out there, unless the Court gives permission or the parties agree

Notes:
This rule underscores the importance of setting out all of the material matters in the defence. Failure to do so will preclude a defendant from relying upon, and advancing any evidence in support of, an allegation or factual argument that has not been pleaded, without either an agreement with the other side, or leave of the Court. A defendant is at liberty to cure such a defect by a one-time amendment, without leave of the Court, prior to the first case management conference. Thereafter, regardless of whether the applicable limitation period has expired, a defendant should seek the leave of the Court pursuant to r. 20.1(2) for a further amendment. Prior to the expiry of the relevant limitation period, the key considerations for the Court on such an application would be: (1) the promptness of the application, (2) the prejudice suffered to either party on the determination of the application, (3) the ability of a party being compensated in costs and interest for any prejudice, (4) the effect on any fixed or likely trial date, and (5) the administration of justice. After the expiry of the relevant limitation period, the Court only has a limited jurisdiction to amend a defence (see r. 20.2)

10.8 Defence of tender.

(1) The defence of tender is not available unless the defendant pays into —

(a) an interest bearing account with the agreement of the claimant or the permission of the Court, an interest bearing account; or

(b) Court,

the amount alleged to have been tendered within the period for filing a defence.

(2) If the claimant does not give notice accepting the payment into Court within twenty-eight days of service of the defence, the defendant may apply for payment out of the monies.

Notes
Effect of rule.

The rule gives effect to the common law defence of tender before action, applicable to recovery of a liquidated amount. The defence cannot be invoked where a claim seeks unliquidated damages as the defendant must be able to show that the tender is sufficient to satisfy the claim. No reliance can be placed upon the defence of tender until and unless the amount tendered has been paid into Court or an interest-bearing account, prior to the expiry of the period for entering a defence. In addition to notifying a claimant that a payment in was made upon filing of the defence, the defendant must also state in the defence that a pre-action tender was made. This is a marked distinction from payments in made pursuant to r. 36. Whereas the latter are not to be brought to the attention of the Court while it is still considering issues of liability and quantum, the former is expressly to be brought to the Court's attention via the defence to demonstrate that a sum was offered to satisfy the claims entirely.

The form of the tender, upon which the defence will be predicated, is critical to pleading the defence properly and adequately. The tender should be in writing so that the defendant can exhibit the same to the defence, and attest therein to details as to the date, medium, and amount of the tender. Reference should also be made in the tender to the prior correspondence and/or negotiations in which the liquidated amount was specifically claimed. This will limit the scope for any dispute as to the basis of the amount being tendered, or there being any unliquidated sums, or sums subject to assessment, forming a part of the claims. There is no additional burden on the defendant to provide proof of his means to pay the amount tendered but the tender must be unconditional and not tied to a further act such as execution of a deed of release. Assuming a defendant properly pleads and succeeds on a defence of tender, the action should be dismissed with costs, leaving the plaintiff to recover the sum paid in by the defendant.

Cases:

Davys v Richardson(1888) 21 QBD 202 A defence of tender is not available in response to claims for unliquidated damages.

Laing (John) Construction Ltd v Dastur [1987] 3 All ER 247 A defence of tender is ineffective where the amount tendered is in respect of a claim for a liquidated sum only but does not include interest which the debt attracts at contract or via statute. It is effective where the tendered amount excludes interest that is wholly recoverable in the discretion of the Court as there is plainly no, and may never be any, entitlement to the same.

10.9 Reply to defence.

(1) A claimant may file and serve a reply to a defence —

(a) fourteen days after the date of service of the defence; or

(b) at any time with the permission of the Court.

(2) Where the defence contains a counterclaim, Part 18 shall apply.

Notes:

The filing of a reply is completely optional as it is presumed that a claimant does not admit any part of the defence. However, to the extent that a claimant wishes to respond to the defence by pleading factual matters not set out in the statement of claim, a reply can be used to do so. This is subject to the caveat that the reply is not to be used to raise a new claim.

If issued, a reply is defined by these rules as a statement of case, and so must be verified by a statement of truth (r.3.8). This places the onus on a party to ensure that the reply is consistent with any earlier statement of case. Where a counterclaim is endorsed on the defence, a plaintiff must issue a defence in accordance with r.18, not a reply pursuant to this rule.

Cases:

Sumitomo Mitsuitrust (UK) Ltd v Spectrum Galaxy Fund Ltd Claim No. BVIHC (Com) 172 of 2018

PART 11 – GENERAL RULES ABOUT APPLICATION FOR COURT ORDERS

11.1 Scope of this Part.

This Part deals with interlocutory applications for court orders being applications made before, during or after the course of proceedings.

11.2 Applicants and respondents.

In this Part —

"applicant" means a person who seeks a court order by making an application;

"respondent" means —

(a) the person against whom the order is sought and any other person on whom the applicant considers it just to serve the application; and

(b) any other person whom the Court directs is to be served with the application.

11.3 Applications to be dealt with at case management conference.

(1) So far as is practicable all applications relating to pending proceedings must be listed for hearing at a case management conference or pre-trial review.

(2) Where an application is made which could have been dealt with at a case management conference or pre-trial review the Court must order the applicant to pay the costs of the application unless there are special circumstances.

11.4 Time when application is made.

If an application must be made within a specified period, it is so made if it is filed at the court office or, where allowed under rule 11.6(2), if made orally to the court within that period.

11.5 Where to make application.

(1) The general rule is that an application must be made to the court office where the claim was filed.

(2) If the claim has been transferred to another court office the application must be made to that court office.

(3) An application made before a claim has been filed must be made to the court office where it is likely that the claim to which the application relates will be made.

11.6 Application to be in writing.

(1) Subject to paragraph (2), an application must be in writing in Form G14.

(2) An application may be made orally if —

(a) the Court dispenses with the requirement for the application to be made in writing; or

(b) this is permitted by a rule or practice direction.

11.7 What application must include.

(1) An application must state —

(a) briefly, the grounds on which the applicant is seeking the order; and

(b) what order the applicant is seeking.

(2) The applicant must file with the application not less than three days before the hearing of the application a draft of the order sought and serve a copy on all respondents to whom notice is given.

(3) If the application is made without notice, the draft order must be attached to the application when it is filed.

11.8 Notice of application and evidence in support.

(1) The general rule is that the applicant must give notice of the application to each respondent.
(2) An applicant may make an application without giving notice if this is permitted by —

(a) a practice direction or

(b) a rule.

(3) The applicant need not give evidence in support of an application unless it is required by a —

(a) court order;

(b) practice direction; or

(c) rule.

(4) Notice of the application must be included in the form used to make the application.

11.9 Evidence in support of application.

Evidence in support of an application must be contained in an affidavit unless otherwise provide by —

(a) court order;

(b) a practice direction; or

(c) rule.21

11.10 Contents of notice of applicant.

(1) The notice must state the date, time and place when the application is to be heard.

(2) If there is not going to be a hearing but notice of the application is required, the notice must state how the Court will be asked to deal with the application.22

11.11 Service of notice of application.

(1) The general rule is that a notice of an application must be served —

(a) as soon as practicable after the day on which it is issued; and

(b) at least seven days before the Court is to deal with the application.

(2) The period in paragraph (1)(b) does not apply if any rule or practice direction specifies some other period for service.

(3) If —

(a) notice of an application has been given; and

(b) the period of notice is shorter than the period required, the Court may nevertheless direct that, in all the circumstances of the case, sufficient notice has been given and may accordingly deal with the application.

(4) The notice must be accompanied by —

(a) a copy of any draft order which the applicant has attached to the application; and

(b) any evidence in support.

(5) The notice must be served in accordance with Part 6 unless any respondent is not a party, in which case the notice must be served in accordance with Part 5 or Part 7, as the case may be.

11.12 Evidence on application.

(1) The respondent must file and serve on the applicant any evidence in opposition to the application at least three days before the Court is to deal with the application.

(2) If any such evidence is filed and served within a shorter period than required, the Court may nevertheless, in all the circumstances of the case, proceed to deal with the application.

11.13 Powers of Court in relation to the conduct of application.

(1) The Court may of its own motion or on application by any party require a party to produce any document or documents or things at any hearing or on some specified date prior to any hearing.

(2) The Court in an exceptional case and where circumstances require such a step so that justice may be done —

(a) issue a witness summons requiring a party or other person to attend the Court on the hearing of the application;

(b) examine any party or witness at such a hearing whether by putting written questions to the witness and asking the witness to give written answers or orally.

(3) Any party may then cross examine the witness.

(4) The Court may exercise any power which it might exercise at a case management conference.

(5) A party asking for an order under this rule must give the Court and the respondent as much notice as possible of his application for the order.

11.14 Consequence of not asking for order in application.

An applicant may not ask at any hearing for an order which was not sought in the application unless the Court gives permission.

11.15 Applications which may be dealt with without an oral hearing.

The Court may deal with an application without an oral hearing if —

(a) no notice of the application is required;

(b) the Court does not consider that an oral hearing would be appropriate;

(c) the parties agree; or

(d) the parties have agreed to the terms of an order —

(i) which does not come within rule 27.8(1); and

(ii) the application, or a copy of the application, is signed by the attorney for all parties to the application.

11.16 Hearing by telephone, etc.

The Court may, if it deems just, deal with the application over the telephone or by any other means of communication.

11.17 Service of application where order made on application made without notice.

(1) After the Court has disposed of an application made without notice, a copy of the application and any evidence in support, together with a copy of any order made, must be served by the applicant on all other parties.

(2) Where an urgent application is made without notice and the applicant undertakes to file evidence after the hearing he must also serve copies of the evidence on all other parties affected by the order.

11.18 Application to set aside and vary order made on an application made without notice.

(1) A respondent to whom notice of an application was not given may apply to the Court for any order made on the application to be set aside or varied and for the application to be dealt with again.

(2) A respondent must make such an application not more than fourteen days after the date on which the order was served on the respondent.

(3) An order made on an application of which notice was not given must contain a statement telling the respondent of the right to make an application under this rule, and the time within which it must be made.

11.19 Power of Court to proceed in absence of party.

If the applicant or any person on whom the notice of application has been served fails to attend the hearing of the application, the Court may proceed in the absence of that party.

11.20 Application to set aside order made in the absence of a party.

(1) A party who was not present when an order was made may apply to set aside or vary the order.

(2) The application must be made not more than fourteen days after the date on which the order was served on the applicant.

(3) The application to set aside the order must be supported by evidence on affidavit showing —

(a) a good reason for failing to attend the hearing; and

(b) that it is likely that had the applicant attended some other order might have been made.

Notes:

This Practice Note provides guidance on informal applications which may be made without filing an application notice. It discusses applications made in correspondence and oral applications made at hearings.

This Part applies to applications for court orders made before, during, or after the course of proceedings (CPR 11.1).

See the definitions of an applicant and a respondent (CPR 11.2)

11.3 Applications To Be Dealt With At Case Management Conference. It must be noted that this Part is closely aligned to the overall objective of the rules which include enabling the court to deal with cases justly and at a proportionate costs. This is inclusive of saving expense. If a party makes an application other than at a case management hearing conference or pre-trial review and that application was suitable to be heard at a case management conference or pre -trial review, that applicant even if successful would be condemn in costs.

11.4 Time When Application Is Made It has been held in the Eastern Caribbean Court of Appeal that where a rule, court order, or practice direction require that evidence be filed with the application notice then the evidence which the rule requires to be served must be filed and served with the application in the time prescribed by the rule, if it is not, then there is no application made within the time[20]: **Pacific Electric Wire & Cable Co. Ltd v Texan Management Ltd (BVI Civil Appeal No 19 of 2006, 15 October 2007** as per Rawlins JA: *'[23] ….When rule 9.7 (4) required that an application disputing jurisdiction must be supported by evidence, it means, in my view, that the statutory requirement is not satisfied unless there is affidavit evidence that accompanies the notice of application. In effect, there is no application disputing the jurisdiction of the court if the evidence is not filed contemporaneously with the notice of application'*. However, the Eastern Caribbean Court of Appeal's view of EC CPR rule 9.7(4) was not shared on appeal to the JCPC in *Texan Management Ltd v Pacific Electric Wire & Cable Company [2009] UKPC 46*. The Board said at [78]-[79]: "*The application must be supported by evidence on affidavit: EC CPR r.9.7(4). There is nothing in r.9.7 which deals with the time at which the evidence must be filed or served. It is r.11.11 which deals with service. When the notice of application is served it must be accompanied by any evidence in*

[20] The Caribbean Civil Court Practice page 126

support: EC CPR r.11.11(4). The notice of application must be served at least 7 days before the hearing, but the court has power to direct that sufficient notice has been given: EC CPR r 11(1)(b), (3). An affidavit must be filed before it is used in proceedings: EC CPR r.30.1(6). There is nothing in EC CPR Part 11 which requires evidence in support of an application to be filed when the application is made. Nor is there anything in ECR CPR 9.7 or Part 11 which makes the validity of an application dependant on service or filing of evidence in support at the time the application is filed or served. There is consequently no basis for PEWC's contention, which was accepted by the Court of Appeal, that a failure to serve evidence with the application means that the application is not made or is a nullity. The evidence of Texan and All Dragon was served on September 23, 2005, which was less than 7 clear days before the court was due to deal with the application on September 29, 2005, but no objection was taken. In any event the High Court had a discretion to treat the notice as sufficient (EC CPR r 11.11(3)) and a discretion to put matters right if there had been a failure to comply with a rule: EC CPR r 26.9(3). …"

11.6 Application To Be In Writing It should be noted that applications are generally made in writing, but the court has the power to dispense with this requirement and allow an oral application. In **Vanroy Romney v Sheridan Smith AXAHCVAP2015/0002** the Eastern Caribbean Court of Appeal suggested that an application of an adjournment could be made by letter if the letter "*complies with, or at the very least, does not conflict with the requirements of Part 11*".

11.7 What Application Must Include There are strict requirements in relation to what an application must include[21]. The practice of failing to set out the grounds of the application attracted severe criticism in the Eastern Caribbean Court of Appeal in **Beach Properties Barbuda Ltd v Laurus Master Fund Ltd.** The Court of Appeal noted that[22]: *'[18] The application for the injunction in the court below followed the unfortunate practice of failing to state the grounds of the application. The prescribed form for making applications expressly requires the grounds to be stated in the form by providing a section beginning "the grounds of the application are- ". The lawyers for the appellants thought it satisfactory to complete the section by inserting "as set forth in the affidavits [filed in support]" This is a completely unacceptable practice. It is an abuse of the process of the court that should attract condign consequences.* The Trinidadian Court of Appeal took a similar position in **Transport and Industrial Workers' Union v Ansa Polymer Ltd Civil Appeal No. P194 of 2016** where the Court noted that: "*The requirement that the applicant state why an application is being made or commonly referred to as "the grounds" of the application is not meant to be "window dressing" nor a pedantic requirement. The provision is clearly consistent with the underlying ethos of the CPR to make litigation more efficient, simple, less adversarial and conform to the basic principle of fairness…. While Part 11 CPR requires that these applications are in the most part to be supported by evidence, filing evidence by affidavit does not dispense with the important requirement of stating why the application is being made. This irregularity in failing to state the reasons for the application must not be condoned. The Court nor opposing parties must not be left fishing through the evidence to understand or ascertain the reasons why an application is being made*. …"

11.8 Notice Of Application And Evidence In Support Applicants in certain circumstances may be permitted by the court to make an application without notice.

Cases:

Connolly v Harrington (17 May 2002, unreported) At a hearing of an application for summary judgment, the master allowed the defendant to make an oral application without notice and assented to make an order that certain items on the defendant's schedule be submitted for detailed assessment. The claimant

[21] The Caribbean Civil Court Practice page 125
[22] The Caribbean Civil Court Practice page 126

appealed. HELD, ON APPEAL: A master has authority to dispense with written notice of an application under CPR 23.3(2)(b), and dispense with service under CPR 23.4(2)(c)
Interoute Telecommunications v Fashion Gossip Ltd (1999) Times, 10 November HELD: It is the duty of counsel and solicitors on a without notice application to make a full note of the hearing where possible or at least to prepare a full note as soon as the hearing is over, and to provide a copy of that note to all par ties affected.

Network Telecom (Europe) Ltd v Telephone Systems International Inc [2003] EWHC 2890 (QB) [2004] 1 All ER (Comm) 418, [2003] All ER (D) 350 (Oct) HELD: On a without notice application, the duty of full and fair disclosure on the part of the applicant is not a duty which applies only at the time of the order but is a continuing duty. Where facts arise after the date of the original order which are relevant, the applicant must return to court to obtain clarification whether the original order may stand.

Raymond Clough et al ***v Winston Spaulding [2013] JMCA Civ 7*** The Jamaican Court of Appeal noted that while, under JAM CPR 11.9(1), an applicant need not give evidence in support of an application unless it is required by a court order, practice direction or rule, there is "great force" in the submission that the word "required" means "needed for the purpose" of satisfying the rule, practice direction or court order. The Jamaican Court of Appeal suggested that where there is delay and an extension of time is sought, there must be material on which the court can act, and, at least in some cases, a court can only exercise its discretion to grant an extension of time if it has before it evidence furnished by the applicant explaining the delay.

11.13 Powers of Court in relation to the conduct of application: It must be noted that via section 11.13 the court can exercise any power which may be exercised at a case management conference.

11.14 Consequence of not asking for order in application: Unless the Court gives permission, which usually should be express, an applicant cannot ask for an order which they did not indicate they were seeking in their notice of application.

Cases:

Claudette Joseph v Dr. Keith C Mitchell GDAHCVAP2021/0006 (The Eastern Caribbean Court of Appeal held that an application under EC CPR 34.2(1) could not be inferred from the appellant's application as the appellant's application did not include a request for an order compelling the respondent to produce the information the appellant requested. By virtue of EC CPR 11.7(1) and EC CPR 11.13, in the absence of any permission given by the court, an applicant may not ask the court for an order which does not feature in their application.)

Joy Aitken Phillips v Donovan Phillips [2015] JMSC Civ 20 (The Jamaican Supreme Court held that the effect of JAM CPR 11.13 is that *"such further and/or other relief as may be just"* is not relief that can be included in an interim application because, otherwise, an applicant could always, on an interim application, simply seek *"such further or other relief"* and thereby pursue any order which they wished.)

Selnor Developments Ltd v Boswell [2017] JMSC Civ 23 (The Jamaican Supreme Court held that the wording "such further and other order as this Honourable Court deems just and fit" added nothing to an applicant's interim application because JAM CPR 11.7(1) required the applicant to state what order they were seeking, and compliance with that rule could only be waived by the Court and, furthermore, JAM CPR 11.13 provided that an applicant may not ask for an order which was not sought in their application without the Court's permission. [2020] JMCA Civ 59 did not address this point.]

Michael Wilson & Partners Ltd v The BVI Registrar of Corporate Affairs Claim No. BVIHCV 2020/0250 (The BVI High Court held that, in the absence of permission from the court, the words "any further relief" contained in an application notice were ineffective to expand the relief the applicant could seek beyond the specific relief sought in their application notice because EC CPR 11.7(1)(b) stated that an application must

state what order the applicant is seeking and EC CPR 11.13 further stated that an applicant may not ask at any hearing for an order which was sought in the application unless the court gives permission.)

11.15 Applications which may be dealt with without an oral hearing: The Court in certain situations may dispose of an application without holding an oral hearing.There is a danger in dealing with important applications on the papers.

Cases:

Khanhai v Cyrus (Prison Officer) v The Attorney General Civil Appeal No. 158 of 2009 (Trinidad and Tobago) The Trinidad & Tobago Court of Appeal held that the Court has the jurisdiction to deal with an application under the CPR without a hearing under T&T CPR 11.13. In addition to when the parties may agree to such a course being taken, a Court has a general discretion to deal with any application without a hearing. The guiding principle is appropriateness. An appellate court will not interfere with an unwise decision to deal with an application without a hearing if the decision does not rise to the level of being plainly wrong.

Collier v Williams [2006] EWCA Civ 20 (The English Court of Appeal noted there is "a danger in dealing with important applications on paper.")

R (Compton) v Wiltshire Primary Care Trust (Practice Note) [2008] EWCA Civ 749 (The English Court of Appeal noted that if the parties are to be taken to have agreed the Court may deal with an application without a hearing the agreement needs to be clear and binding on both parties.)

Vernon v Spoudeas [2010] EWCA Civ 666 (The English Court of Appeal noted that to strike out a claim without a hearing is a bold step which should not ordinarily be taken.)

Church v MGN Ltd [2012] EWHC 693 (QB) (Disposing of a hearing without an oral hearing does not mean that the court does not hear any submissions from the parties. When dealing with a matter on paper the court may receive such submissions, or it may not. The court may give directions for the filing of evidence where appropriate, and for the filing of written submissions, under its general case management powers. Given the general rule is that there should be an oral hearing in public, a high threshold must be passed before the court can consider that a hearing would not be appropriate.)

Michelle Foran v Secret Surgery Ltd [2016] EWHC 1029 (QB) (An application for an extension of time for service of the claim form is "potentially of critical importance" and should not be dealt with on the papers, especially where the application is made near the end of the validity of the claim form and where the cause of action has become time barred. Where time limits are running out or have run out, the application should normally be dealt with by an urgent hearing, on the telephone if necessary, at which the appropriateness of granting relief should be carefully considered.)

Peter Elias v Joseph Elias et Al Claim No. CV2013-01623 (Trinidad and Tobago) – Example of an application disposed of without an oral hearing

Eneau v Attorney General TT 2010 HC 95 (vlex citation) (Trinidad and Tobago) – Example of an application disposed of without an oral hearing

11.18 Applications to set aside or vary an order made on an application without notice

Cases*:*

Sarayiah v Suren [2004] EWHC 1981 (QB) [2004] All ER (D) 62 (Sep) The claimant failed to comply with CPR 23.9 by failing to inform the defendant of his right (under CPR 23.10) ***(11.18 Bah)*** to apply to set aside an order made in a without notice application within seven days and failing to provide copies of the application notice and evidence in support. HELD: This was reason enough to allow the defendant to apply under CPR 23.10 outside the seven-day time limit, despite delay in bringing the application.

Hashtroodi v Hancock [2004] EWCA Civ 652 (The English Court of Appeal held that, in an English CPR r.23.10 case ["A person who was not served with a copy of the application notice before an order was made under rule 23.9, may apply to have the order set aside or varied."], the court hearing an application to set the order vary/aside etc., is to conduct a rehearing rather than a review of the impugned order.)

11.19 Power Of A Court To Proceed In Absence Of Party.

Notes:
Generally, it is wrong to make an application without giving prior notice to the respondent. There are, however, three classes of exceptions. (1) First, there are cases where the giving of notice might frustrate the order (e.g., a search order) or where there is such urgency that there has not been time to give notice. Even in an urgent case, however, the applicant should notify the respondent informally of the application, if possible, unless secrecy is essential. (2) Second, there are some procedural applications normally made without notice relating to such matters as service out of the jurisdiction, service, extension of the validity of claim forms, permission to issue writs of possession etc. All of these are properly made without notice, but the rules usually expressly provide that the absent party will be entitled to apply to set aside or vary any order provided that application is so made within a given number of days of service of the order. (3) Third, there are cases in which the respondent can only be identified by description and not by name. An application made without giving notice which does not fall within the classes of cases where absence of notice is justified may be dismissed or adjourned until proper notice has been given.

Cases:
Riverpath Properties Ltd v Brammall (2000) Times, 16 February, [2001] All ER (D) 281 (Mar) where it was held that CPR 23.11(2) ***(11.18 Bah)*** gave the court an unfettered discretion in relation to setting aside an order and ordering a re-hearing in respect of an order made in the absence of a party. However, the court would be unlikely to exercise this power where there was no real prospect of a different order being made than the order originally made. There might be circumstances in which it was more unjust to set aside the order than to refuse to do so, such as a situation in which the original order had been acted upon.

Fox v Graham Group Ltd (2001) Times, 3 August where a litigant in person did not attend his own application, at the last minute contacting the court and requesting an adjournment. The court was faced with a choice between causing unfairness to the respondent who had attended by adjourning or causing unfairness to the applicant litigant in person by dismissing the application, even if it was considered that there was only a faint chance of success. HELD: Where a litigant in person was requesting an adjournment for the first time, the court should be very careful before concluding that it would be appropriate to proceed without him or her – unless the court was satisfied that it ought to grant the applicant the relief sought on the basis of the papers before it, or that the application was bound to fail.

Malcolm v The Attorney General et al High Court Civil Claim No. 104 of 2006 The St. Vincent and Grenadines High Court set aside an order made against the Attorney General awarding costs in the amount of $2,500 under EC CPR 11.18 [BAH CPR 11.20] where the order had been made against the Attorney General at a hearing at which there was no appearance on their behalf. The High Court found that the Attorney General's failure to appear was not contemptuous as the Attorney General's office had been given an incorrect hearing date from the Court Administrator who confused the matter with a similar matter in which the Attorney General was involved.)

Michael Wilson & Partners Ltd v Temujin International Ltd et al Claim No. BVIHCV 2006/0307 (BVI) The BVI High Court refused a litigant relief under EC CPR 11.18 [BAH CPR 11.20] where there was no

good reason for their failure to attend the hearing and it was not likely that, had the litigant attended, some other might have been made. The BVI High Court treated the requirements as cumulative and found that the litigant had not taken reasonable steps which might have enabled them to have attended the hearing and, had they attended the hearing, the Court would have granted the application in any event.

RBC Royal Bank of Canada v Lionel Nedwell ANUHCVAP 2017/0008 (Antigua and Barbuda) The claimant filed a claim seeking various declarations and an account. The defendant did not file a defence in a timely manner and a default judgment was entered against it. The defendant successfully applied to set aside the default judgment but neither the claimant nor his attorneys attended the hearing as proper notice of the hearing was not given by the court office. The claimant sought to challenge the order on the basis of their absence from the hearing. The Eastern Caribbean Court of Appeal held that the default judgment was irregular and needed to be set aside *ex debito justitiae* pursuant to EC CPR 13.2 because it was for a specific amount when no such amount was claimed, and also because the claim was for an account which was not susceptible to the default judgment procedure. The Eastern Caribbean Court of Appeal noted that the effect of setting aside an order due to the party's lack of notice and absence at the hearing under CPR EC CPR 11.18 [BAH CPR 11.20] is to restore the application to be heard afresh on its merits.

Marily Jeffers Nee Weste v The Personal Representatives of the Estate of Wyndham Weste ANUHCVAP2017/0029 (Antigua and Barbuda) The appellant obtained a paternity order declaring that Wyndham Weste was her father under section 10 of the Antiguan and Barbudan *Status of Children Act*. The respondent filed an application for leave pursuant to the Act to set aside the paternity order and for directions. The application was served on the appellant's legal practitioners but it did not have a return date for the hearing of the application. A judge made an order setting aside the paternity order on the date fixed for the hearing, in the absence of the appellant. The appellant applied to set aside that order on the grounds that it was made in her absence, her absence was not contumelious, the application was made promptly, the appellant had a good defence to the claim and, had the appellant been present at the hearing, it is likely that another order would have been made. A judge refused the application to set aside the order made in the appellant's absence. The Eastern Caribbean Court of Appeal held that if EC CPR 11.10 was breached by the notice of application not stating the return date, the order made in the absence of the respondent to the application should be set aside and the application should be reheard, unless the applicant was entitled to the relief granted *ex debito justitiae* and a fresh hearing would not place the respondent, even with notice or on being heard, in any better position. The Eastern Caribbean Court of Appeal further held that the judge had been wrong to find that the appellant did not have good reasons for not attending the hearing at which she was absent (as she had not been served with notice of the hearing) and, had she attended, there is a real possibility that a different order would have been made. Thus, the criteria in EC CPR 11.18 [BAH CPR 11.20] had been satisfied and the appellant was entitled to an order setting aside the order made in her absence, and a rehearing of the application to set aside the paternity order.

Richard Johnson v Hon. Michael Pintard MP (sued on his own behalf and in his representative capacity as Leader of the Free National Movement) et al 2022/CLE/gen/01633 The claimant, the Vice Chairman of the Free National Movement, obtained an *ex parte* interim injunction against the defendants restraining them from interfering with the claimant's duties as Vice Chairman of the FNM and preventing the claimant's attendance and participation in meetings of the Executive Committee and Central Council pending trial or further order. The injunction also temporarily restrained certain individuals from participating in any Tribunal convened or to be convened to hear and determine a Statement of Charges promulgated by the FNM's leadership against the claimant by reason of their actual/apparent bias against the claimant. The defendants filed an application to have the injunction set aside. The Court held that it derived its power to set aside or vary the injunction from CPR 11.18 and 11.20 and its inherent jurisdiction and concluded that there had been culpable material non-disclosure on the part of the claimant, as he had failed to disclose the extent and severity of his purported behaviour on his *ex parte* application, which behaviour appeared to have precipitated those decisions of the FNM leadership which were adverse to him. The Court also concluded that the balance of convenience favoured the defendants, as the injunction as originally granted could very well stifle further business and management of the FNM; that damages would be an adequate remedy as

the claimant pleaded damages in his writ of summons; and that there were no special factors. In the circumstances, the Court varied the injunction to also restrain the claimant's substantive participation in FNM meetings pending trial.)

Captain Joseph J Moxey v Bahamasair Holdings Limited et al 2023/COM/lab/00010 (31 May 2023) The claimant obtained an *ex parte* interim injunction restraining the defendants from breaching the Civil Aviation Authority Act 2021 and Regulation LIC070(b) and restraining the first defendant from breaching sections 4 and 6 of the Employment Act. The first defendant applied to discharge the injunction. The Court held that it derived its power to set aside or vary the injunction from CPR 11.18 and 11.20 and its inherent jurisdiction. The Court discharged the injunction. It held that there had been material non-disclosure on the part of the claimant, as he had failed to disclose that the first defendant's decision to place him on vacation leave did not impact his salary. The Court also noted that, while there were real issues to be tried, no undertaking in damages had been given by the claimant; damages would have been more than adequate in the circumstances; and the balance of convenience favoured the first defendant, as to allow the injunction to continue could have significantly impacted the first defendant's employment contracts with other employees and cause issues with retirement packages/benefits contrary to the first defendant's existing policies.)

The Attorney-General v Securities and Exchange Commission et al 2023/CLE/gen/00125 (6 December 2023). A witness subject to an order made for the taking of evidence pursuant to a letter of request under the *Evidence (Proceedings in Other Jurisdictions) Act* applied by notice of application to vary the order to exclude cross-examination after the witness, by their attorney, objected to being cross-examined during the deposition proceedings conducted pursuant to the order. The Court listed the application on 21 November 2023 but vacated the date when the applicant's attorney indicated the date was inconvenient. No further date was solicited by the applicant's attorney and counsel for the rest of the parties agreed the dates 27 November 2023 and 28 November 2023. The applicant's attorney indicated that they were available on 4 December 2023 but there was a US discovery deadline of 30 November 2023. On 24 November 2023, the Court listed the application on 28 November 2023 and heard it in the absence of the applicant's attorney after no application for an adjournment was made and no good reason for an adjournment (such as an appearance before another court or sudden ill health) was demonstrated. The Court noted that while courts may, for practical purposes, attempt to set convenient dates for the hearing of matters before it, a Court cannot be constrained or hamstrung by any one party's diary. To allow such a state of affairs would be disruptive to the justice system and could be abused and, on the facts, would have been prejudicial to the other parties as the deposition was undertaken in the context of other proceedings pending elsewhere and the deposition had been stayed pending the application. The Court noted that the application was not a complex one and had been filed on 1 November 2023; the applicant's attorney could have had another counsel hold brief for them; the application was heard remotely, which permitted the applicant's attorney to appear from a location of her choosing; and the applicant's attorney did not lodge submissions. The Court held that there is no reason why the Court could not, in a just case, proceed with the calling of a matter in the absence of the applicant. The Court noted that, in such an eventuality, the Court could dismiss the application for want of prosecution. Alternatively, the Court could proceed with the consideration of the application in the absence of the applicant. CPR 11.19 and CPR 26.1 explicitly vest the Court with the power to deal with an application in the absence of a party. The Court held that, on the facts, it would proceed with the substance of the application as the application questioned the nature of the proceedings before the Deputy Registrar and a dismissal of the application without a consideration on its merits would not provide further direction as to the process before the Deputy Registrar.

PART 12 – DEFAULT JUDGMENTS

12.1 Scope of this part.

(1) This Part contains provisions under which a claimant may obtain judgment without trial where the defendant has failed to file —

(a) a defence in accordance with Part 10; or

(b) an acknowledgement of service giving notice of intention to defend in accordance with Part 9.

(2) A judgment referred to in paragraph (1) is called a "default judgment".

12.2 Claims in which default judgment may not be obtained.

A claimant may not obtain default judgment if the claim is —

(a) a claim in probate proceedings;

(b) a fixed date claim;

(c) a claim under Section II of Part 8; or

(d) an admiralty claim in rem.

12.3 Cases in which permission required.

(1) A claimant who wishes to obtain a default judgment on any claim which is —

(a) a claim against a minor or patient as defined in rule 2.3; or

(b) a claim against a State as defined in any relevant enactment relating to state immunity, must obtain the Court's permission.

(2) A claimant who wishes to obtain judgment in default of acknowledgement of service against a diplomatic agent who enjoys immunity from civil jurisdiction by virtue of any relevant enactment relating to diplomatic privileges must obtain the Court's permission.

(3) An application under paragraph (1) or (2) must be supported by evidence on affidavit.

12.4 Conditions to be satisfied – judgment for failure to file acknowledgement of service.

The claimant may enter judgment for failure to file an acknowledgement of service if —

(a) evidence has been filed proving service of the claim form and statement of claim on the defendant;

(b) the defendant has not filed —

(i) an acknowledgement of service; or

(ii) a defence to the claim or any part of it;

(c) the defendant has not satisfied in full the claim on which the claimant seeks judgment;

(d) where the only claim is for a specified sum of money, apart from costs and interest, and the defendant has not filed an admission of liability to pay all of the money claimed together with a request for time to pay it;

(e) the period for filing an acknowledgement of service under rule 9.3 has expired; and

(f) where necessary the claimant has the permission of the Court to enter judgment.

12.5 Conditions to be satisfied – judgment for failure to defend.

The claimant may enter judgment for failure to defend if —

(a) the claimant proves service of the claim form and statement of claim or an acknowledgement of service has been filed by the defendant against whom judgment is sought;

(b) the period for filing a defence and any extension agreed by the parties or ordered by the Court has expired;

(c) the defendant has not —

(i) filed a defence to the claim or any part of it, or the defence has been struck out or is deemed to have been struck out under rule 22.1(6);

(ii) if the only claim is for a specified sum of money, filed or served on the claimant an admission of liability to pay all of the money claimed, together with a request for time to pay it; or

(iii) satisfied the claim on which the claimant seeks judgment; and

(d) where necessary, the claimant has the permission of the Court to enter judgment.

12.6 Admission of part – request for time to pay.

(1) This rule deals with the situation where the —

(a) defendant is an individual who has admitted liability to pay either —

(i) a specified sum towards a claim for an unspecified sum of money; or

(ii) part only of a claim for a specified sum;

(b) defendant has not filed a defence; and

(c) claimant does not accept the sum admitted.

(2) Subject to any restriction imposed by this Part, the claimant may apply for judgment to be entered for —

(a) the whole amount of the claim for a specified sum together with interest and fixed costs under Part 71.

(b) if the claim is for an unspecified sum, the payment of an amount to be decided by the Court.

(3) If the defendant has requested time to pay, that request must be dealt with if the claim is for —

(a) a specified sum in accordance with rules 14.9 and 14.10 or 14.11; or

(b) an unspecified sum, when damages are assessed in accordance with rule 16.3.

12.7 Claim for a specified sum of money.

(1) The fact that the claimant also claims costs and interest at a specified rate does not prevent a claim from being a claim for a specified sum of money.

(2) A claimant who claims a specified sum of money together with interest at an unspecified rate may apply to have judgment entered for either the sum of money claimed —

(a) and for interest to be assessed; or

(b) together with interest at the statutory rate from the date of the claim to the date of entering judgment.

(3) If a claim is partly for a specified sum and partly for an unspecified sum the claimant may abandon the claim for the unspecified sum and enter default judgment for the specified sum.

12.8 Claim against more than one defendant.

(1) A claimant may apply for default judgment on a claim for money or a claim for delivery of goods against one of two or more defendants and proceed with the claim against the other defendants.

(2) If a claimant applies for a default judgment against one of two or more defendants then if the claim —

(a) can be dealt with separately from the claim against the other defendants —

(i) the Court may enter judgment against that defendant; and

(ii) the claimant may continue the proceedings against the other defendants; or

(b) cannot be dealt with separately from the claim against the other defendants, the Court —

(i) may not enter judgment against that defendant; and

(ii) must deal with the application at the same time as it disposes of the claim against the other defendants.

(3) If a claim for delivery of goods is made against more than one defendant, with or without any other claim, the claimant may not enforce any judgment for delivery entered under this Part against a defendant unless —

(a) the claimant has obtained a judgment for delivery against all the defendants to the claim; or

(b) the court gives permission.

12.9 Nature of the default judgment.

(1) Default judgment on a claim for —

(a) a specified sum of money, must be judgment for payment of that amount or, if a part has been paid, the amount certified by the claimant as outstanding —

(i) if the defendant has applied for time to pay under Part 14, at the time and rate ordered by the Court; or

(ii) in all other cases, at the time and rate specified in the request for judgment;29

(b) an unspecified sum of money, must be judgment for the payment of an amount to be decided by the Court;30

(c) goods, must be —

(i) judgment requiring the defendant either to deliver the goods or pay their value as assessed by the Court;

(ii) judgment requiring the defendant to pay the value of the goods as assessed by the Court; or

(iii) if the Court gives permission, a judgment requiring the defendant to deliver the goods without giving the defendant the alternative of paying their assessed value.

(2) An application for permission to enter a default judgment under paragraph (1)(c)(iii) must be supported by evidence on affidavit.

(3) A copy of the application and the evidence under paragraph (2) must be served on the defendant against whom judgment has been sought even though that defendant has failed to file an acknowledgement of service or a defence.

(4) Default judgment where the claim is for some other remedy shall be in such form as the Court considers the claimant to be entitled to on the statement of claim.

(5) An application for the Court to determine the terms of the judgment under paragraph (4) need not be on notice but must be supported by evidence on affidavit and rule 11.15 does not apply.

12.10 Interest.

(1) A default judgment must include judgment for interest to the date it is filed if the —

(a) claim form includes a claim for interest; and

(b) claim form or statement of claim includes the details required by rule 8.6(4).

(2) If the claim form includes any other claim for interest, then unless such claim for interest is abandoned by the claimant, the default judgment must include judgment for an amount of interest to be decided by the Court.

12.11 Costs.

(1) A default judgment must include fixed costs under rule 71 unless the Court assesses the costs.

(2) An application to assess costs must be on notice to the defendant.

12.12 Defendants rights following default judgment.

Unless the defendant applies for and obtains an order for the judgment to be set aside, the only matters on which a defendant against whom a default judgment has been entered may be heard are —

(a) an application under rule 12.10(2);

(b) costs;

(c) enforcement of the judgment; and

(d) the time of payment of any judgment debt**.**

Notes:

12.1 Meaning of "Default Judgment" A default judgment is a judgment without trial and is generally obtained by procuring an administrative act rather than by judicial decision. A default judgment is a judgment entered without trial where a defendant has failed to respond to a claim. It is an administrative procedure which means judgment is entered without consideration of the merits of the claim. A defendant who fails to file an acknowledgment of service or a defence or, having filed an acknowledgment of service, then fails to file a defence, is liable to have a default judgment entered against him save in those specific cases where it is prohibited. . A defence includes any document purporting to be a defence. A default judgment may be obtained in respect of: a failure to file an acknowledgment of service and or a failure to file a defence. 12.1 lays down the only two situations where a default judgment can be obtained. The period for filing an acknowledgment of service is prescribed by r.9.3 (14 days after service of the claim form)[23]. The period for filing a defence is prescribed by r.10.3 (28 days after date of service of claim form). If the defendant fails to do either of these things, the claimant may, subject to the rules in Pt 12, enter a default judgment. The default is with respect of the defendant having failed to file either: 1) an acknowledgement of service or ii) a defence.

Where the conditions are satisfied, the claimant can apply for a default judgment to be entered. The application can either be by way of simple request or by formal application by notice of application. Practice Direction No. 10 of 2023 supplements Part 12 of the CPR and should be consulted before requesting or applying for default judgment. The Practice Direction has no application to default judgments entered prior to 19 December 2023. Where there remains uncertainty as to the application of any of the provisions of the

[23] The Supreme Court Practice 1999 page 354

CPR relating to the grant of default judgments, the matter should be referred to either a Registrar or a Judge.

A claimant may not obtain default judgment without the permission of the Court if –

(i) the claim is against a minor or a patient;
(ii) the claim is against a State as defined in any relevant enactment relating to state immunity;
(iii) the claimant wishes to obtain judgment in default of service against a diplomatic agent who enjoys immunity from civil jurisdiction by virtue of any relevant enactment relating to diplomatic privileges;
(iv) the claimant makes a claim for goods and the claimant seeks a judgment requiring the defendant to deliver the goods without giving the defendant the alternative of paying their assessed value; or
(v) default judgment is sought against the Crown.

A claimant may obtain default judgment by filing a request in the form of Annex A to Practice Direction No. 10 of 2023 where the claim is for:

(i) a specified sum of money;
(ii) an amount of money to be decided by the Court;
(iii) delivery of goods where the claim form gives the defendant the option of paying the value of the goods; or
(iv) any combination of such remedies.

If a claimant claims any other remedies, a default judgment cannot be obtained by request unless the claim to those other remedies is abandoned.

Examples of claims requiring an application are given in paragraph 3.3 of Practice Direction No. 10 of 2023. Any evidence relied on by a claimant in support of an application for default judgment need not be served on a party who has failed to file an acknowledgment of service. Where the claimant makes an application for default judgment, the Court shall give such default judgment as the claimant is entitled to on their statement of case in such form as the Court may think fit.

The form of default judgment obtained by request is prescribed by Practice Direction No. 10 of 2023. A default judgment sought by request should be in form of Annex B with such modification as the circumstances of the case may require.

A default judgment must include fixed costs unless the Court assesses the costs. An application to assess costs must be on notice to the defendant.

Cases:

Lux Locations Ltd v Yida Zhang [2023] UKPC 3 Where an application is made for default judgment to be entered and the defendant has not disputed the claimant's allegations, the Court may normally proceed on the basis of the claimant's unchallenged statement of claim without the need for evidence on the merits or for findings of fact to be made. However, even where the defendant has not put forward any positive defence to the claim, the approach of treating the allegations pleaded in the statement of claim as valid without examining their factual or legal merits cannot be regarded as an inflexible rule. The Court may consider that the claimant is not entitled to any judgment on the statement of claim. Where this is so, the Court should decline to enter judgment. The same applies where it appears to the Court that the statement of claim is one that ought to be struck out, for example because it is incoherent, does not disclose a legally recognisable claim or is obviously ill-founded. The aim of the default judgment procedure is to provide a speedy, inexpensive and efficient way of dealing with claims which are uncontested and to prevent a defendant from frustrating the grant of a remedy by not responding to a claim. Those objectives do not justify a court in giving judgment on a claim which is manifestly bad or an abuse of the court's process, even if the defendant has failed to take the requisite procedural steps to defend it.

Southwest Regional Health Authority v Rukhim Balgobin 9 Civil Appeal 115 of 2008)[24] Where a claimant enters a default judgment against one of several defendants sued in the alternative, the entering of such judgment does not necessarily constitute an election such that the trial judge is precluded from making a finding against another defendant.

St. Kitts Nevis Anguilla National Bank Ltd v Caribbean 6/49 Ltd Civil Appeal No. 6 of 2002 An application for default judgment should not be disposed of before an application to strike out by the defendant.

12.2. Claims in Which Default Judgment May Not Be Obtained It should be recognized that default judgment is not available in every case. There are some claims where the permission of court is required before a default judgment may be obtained

12.3 Cases in Which Permission Is Required These are where the Defendant is: (1) A State; (2) Patient/Minor; and (3) Diplomatic Agent.

12.4 Conditions to be satisfied – judgment for failure to file acknowledgement of service.

12.5 Conditions to Be Satisfied – Judgment for Failure to Defend.

Notes:

It should be recognized that proof of service is integral, along with the requisite period having been expired before judgment in default is entered. Where the request for default judgment is administratively done or made in court, the following requirements must be satisfied[25]: (a) The claimant must prove service of the claim form and particulars of claim on the defendant (**see E J Cato & Sons Ltd v Attorney General (2012) HC No. 384 of 2009 [Carilaw VC HC 31]** (b) The period for filing an acknowledgment of service or defence, as the case may be has expired; *(If no acknowledgment of service (or defence) is filed within 14 days after the date of service as required by the CPR, then a defence filed within 42 days of the date of service of the claim does not prevent the entry of judgment in default of acknowledgment of service of the claim form)* ***(RBC Royal Bank (Jamaica) Ltd v Howell (2013) Supreme Court Jamaica, No 94 of 2012 [Carilaw JM 2013 SC 21***; (c) The defendant has not satisfied the claim in full; and (d) Where the claim is for a specified sum of money, the defendant has not filed an admission of liability together with a request for time to pay it.

Procedure: In claims seeking to recover money and or the delivery of goods (provided the defendant has the alternative of paying the value of the goods) which are by far the most common types of cases, default judgments are available by simply drafting and filing with the registry the judgment in default. There is no hearing. Judgment would not be entered in the registry if an affidavit of service has not been filed previously showing that the claim was served. In cases where leave is required, the requisite application must be made to court supported by affidavit evidence.

Practice Direction No. 5 of 2023 prescribes that in circumstances where a claimant has not entered judgment and 42 days have elapsed since the last date for filing a defence without a defence being filed or a defence is filed after the claimant has made a request under rule 12.4, the Court will fix a status hearing and notify the parties of the date of that hearing. At the status hearing the court will give case management directions for the future conduct of the claim and the timetable which will apply.

A judgment which is entered in default of acknowledgment of service, or a defence is confined to the matters which are set out in the claimant's statement of case. If the claim is for a specified amount of money, judgment may be entered for the sum claimed, but in other cases it will be necessary for the court to determine what amount the claimant is entitled to.

Where the claim is for some remedy other than damages, such as a claim for a declaration or an injunction or for the delivery of goods simpliciter, a formal application to the court supported by evidence on affidavit

[24] The Caribbean Civil Court (2011) Practice page 134

[25] Commonwealth Caribbean Civil Procedure 3rd Edition page 58

will be required. **(E J Cato & Sons Ltd v Attorney General (2012) HC No. 384 of 2009 [Carilaw VC HC 31])**

Practice Direction No. 5 of 2023 requires that parties refer matters to a registrar or judge immediately where there is uncertainty as to the application of any of the rules relating to the grant of default judgments.

Cases:

Glenford Rolle v Stephen Lander DOMHCVAP2013/0025A (In relation to rule 12.5, the critical question is whether at the time the request for judgment in default was made, a defence had been filed. Similarly, under rule 12.4, the critical question would be whether at the time when the request for default judgment was made, an acknowledgment of service had been filed.)

Lux Locations Ltd v Yida Zhang [2023] UKPC 3 (If a defendant contests an application for default judgment and there is material before the Court showing that the conditions for setting aside default judgment under CPR 13.3 would be satisfied it is a waste of resources, and wrong in principle, for the Court to enter a judgment which proper grounds have already been shown for setting aside. The just and expedient course in such a case is to exercise the court's discretion to decline to enter judgment in the first place. If there is no such material, the court should proceed to determine what remedy (if any) the claimant is entitled to on the statement of claim. For this purpose, the court will treat the allegations made in the statement of claim as true and legally valid unless (and to the extent that) it appears to the court that the statement of claim does not disclose any reasonable ground for bringing the claim or is an abuse of the process of the court. An appeal lies to the Court of Appeal from the court's decision on the application in the ordinary way.)

PART 13 – SETTING ASIDE OR VARYING DEFAULT JUDGMENT

13.1 Scope of this part.

The Rules in this Part set out the procedure for setting aside or varying a default judgment entered under Part 12.33

13.2 Cases where Court must set aside default judgment.

(1) The Court must set aside a judgment entered under Part 12 if judgment was wrongly entered because, in the case of —

(a) a failure to file an acknowledgement of service, any of the conditions in rule 12.4 was not satisfied; or

(b) judgment for failure to defend, any of the conditions in rule 12.5 was not satisfied.

(2) The Court may set aside a judgment under this rule on or without an application.

Notes:

13.2 Cases where Court must set aside default judgment. In order to obtain a default judgment under the CPR, the Part 12 requirements are strict. The court must set aside a judgment entered under the CPR if judgment was wrongly entered because any of the conditions in the rule relating to the entry of the default judgment was not satisfied[26] (whether default of filing acknowledgment or default of filing defence). If a default judgment has been obtained by the claimant, the defendant can apply to have that judgment set aside. The entering of a default judgment is in most cases an administrative process without any investigation of the merits of the claim, and this could potentially cause injustice. Accordingly, the court retains wide powers on such terms it thinks just, to set aside or vary any such judgment.[27] In certain circumstances the court must set aside the default judgment (e.g., where the court is satisfied that the defendant was not served with the claim form) whereas, in other circumstances, the court has a discretion whether to set the default judgment aside (e.g., where the defendant has a real prospect of defending the claim). The documents required to make the application and the procedure to follow are set out in the CPR. When commencing an application, it is critical to be aware of the need to be in compliance with two requirements: (1) that you make the application promptly and (2) that you have a reasonable prospect of success.

It is also possible to ensure a successful application if you are able to show some other good reason for the court to set aside the default judgment. If the court sets aside the default judgment, it may impose conditions when doing so, e.g., a payment into court by the defendant. For conditions to be satisfied see Part 9.3 (acknowledgment of service) and 10.3. (filing defence). Rule 13.2 refers to judgment being "wrongly entered", i.e., the judgment is irregular. The court must set aside the wrongly entered judgment in the situations specified in the rule.

Cases

A default judgment must be set aside irrespective of the defendant's lack of prospects of success if the claim has not been served **(Credit Agricole Jndosuez v Unicof Ltd [2003.J EWHC 77 (Comm); [2003] All E.R.,** and **Shiblaq v Sadikogiu (Application to Set Aside) (No.2) [2004] EWHC 1890) (Comm.)** ("In

[26] The Caribbean Civil Practice 2011 Page 137

[27] Commonwealth Caribbean Civil Procedure Page 60

the absence of proof of valid service, a claimant was not entitled to judgment in default under CPR ·12.3")). But see **Akram v Adam [2004] EWCA Civ .1601.**

13.3 Cases were Court may set aside or vary default judgment.

(1) If rule 13.2 does not apply, the Court may set aside a judgment entered under Part 12 only if the defendant —

(a) applies to the Court as soon as reasonably practicable after finding out that judgment had been entered;

(b) gives a good explanation for the failure to file an acknowledgement of service or a defence as the case may be; and

(c) has a real prospect of successfully defending the claim.

(2) In any event the Court may set aside a judgment entered under Part 12 if the defendant satisfies the Court that there are exceptional circumstances.

(3) Where this rule gives the Court power to set aside a judgment, the Court may instead vary it.

Notes:

13.3 Cases Where Court May Set Aside Or Vary Default Judgment. Rule deals with· the setting aside of a regular judgment (contrast r.13.2---:-cases where the court must set aside). The Rule provides that in a case where the court may (as opposed to must) set aside a default judgment (or vary the judgment), then the court may only set aside if the defendant: (1) Applies to the court as soon as reasonably practicable after finding out that judgment had been entered; (2) Gives a good explanation for the failure to file an acknowledgement of service or defence, and (3) Has a real prospect of successfully defending the claim[28]. These 3 conditions are conjunctive. Each must be satisfied before the court may set aside. (see **Kenrick Thomas v RBTT Bank Caribbean Ltd (Formerly Caribbean Baning Ltd) (Saint Vincent and The Grenadines) (Civil Appeal NO 3 of 2005) 913 October 2005) also Hyman v Matthews (Jamaica) (Applications 72 and 80 of 2006) (SCCA 64/2003)**.

Rule 13.3. deals with· the setting aside of a regular judgment (contrast r.13.2 cases where the court must set aside). The use of the word "may" shows that the court has a discretion but acts in accordance with Part I (the Overriding Objectives). The defendant applying to set aside the judgment must come within r.13.3(l)(a')" or (b). It is not enough to show an "arguable defence; the defendant must show that he has "a real prospect of successfully defending the claim". It is essentially the same test as applied to summary judgment applications. See **Swain v Hillman [2001] I All E.R. 91, CA. In ED&F Man Liquid Products Ltd v Patel-'[2003] 'EWCA Civ 472; '[2003] All E.R. (0)75; [2003] C.P.Rep:'5**, Potter L.J. explained the distinction between the tests: " .. the only significant difference between the ·provisions of CPR 24.2 (15.2 Bah) and 13.3(1), is that under the former the overall burden of proof rests upon the claimant to establish that there are grounds for his belief that' the respondent has no real prospect of success whereas, under the latter, the burden rests upon the defendant to satisfy the court that there is a good reason why a judgment regularly -obtained should be set aside[29].

The need to comply with time limits and generally to act promptly is a feature of the CPR. In applying to set aside, the court has always considered delay and ·the reasons for it **(Evans v Bartlam [1937 A.C.**

[28] The Caribbean Civil Practice 2011 Page 138
[29] The Supreme Court Practice (1999) Volume 1 Page 372

473). But see also **Manolakaki v Constantmides (2003] EWHC 401; (2003] All E.R. (D) 95**: even if the application was not made 'promptly',within the meaning of the Rule, if the defendant made it in sufficient time for it to be just that judgment should be set aside it should be set aside; provided the test set out in r.13.3(l)(a) was met[30]

13.4 Applications to vary or set aside judgment – procedure.

(1) An application may be made by any person who is directly affected by the entry of judgment.

(2) The application must be supported by evidence on affidavit.

(3) The affidavit must exhibit a draft of the proposed defence

13.5 Court to impose condition as to the filing of the defence.

If judgment is set aside under rule 13.3, the general rule is that the order must be conditional upon the defendant filing and serving a defence by a specified date.

13.6 Hearing to be treated as case management conference.

(1) If judgment is set aside under rule 13.3 the Court must treat the hearing as a case management conference unless it is not possible to deal with the matter justly at that time.

(2) If it is not possible to deal with the matter justly at that time, the Court office must fix a date, time and place for a case management conference and give notice to the parties.

13.7 Abandoned claims to be restored if judgment set aside.

If the claimant has abandoned any remedy sought in the claim form in order to enter a default judgment, the abandoned claim is restored if judgment is set aside.

Notes

A default judgment is invariably obtained by an administrative act (see Pt 12). This puts default judgments in a different category from a summary judgment (see Pt 24) or a judgment following a trial. These latter judgments cannot be "set aside"; but they may be reviewed on appeal. In contrast, a default judgment will not usually have been subject to judicial scrutiny, and there is no provision to apply for leave to appeal. Hence, the need for a procedure to apply to set aside or vary a default judgment[31]. Part 13 is limited in scope to the setting aside (or varying) of a default judgment. Part 13 is not a comprehensive code for setting aside judgments generally but is confined to the setting aside of a default judgment which has been obtained pursuant to Pt 12[32].

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[30] Supra
[31] The Supreme Court Practice (1999) Volume 1 Page 370
[32] Supra

Under this part, there are two situations where the court: (1) must set aside a default judgement or (2) may set aside a judgment.

The rule also makes provisions for setting aside or varying upon conditions and treating the hearing as a case management hearing.

The Court will then give such judgment as the court considers the claimant to be entitled to.

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PART 14 – JUDGMENT ON ADMISSIONS

14.1 Making on admission.

(1) A party may admit the truth of the whole or any part of any other party's case.

(2) A party may do this by giving notice in writing, such as in a statement of case or by letter, before or after the issue of proceedings.

(3) A defendant may admit the whole or part of a claim for money by filing an acknowledgement of service containing the admission.

(4) The defendant may do this in accordance with the following rules —

(a) rule 14.6;

(b) rule 14.7; or

(c) rule 14.8.

(5) A defendant may file an admission under paragraph (4) at any time before a default judgment is entered, but the claimant may apply for assessed costs if the admission is filed after the time for filing an acknowledgement of service has expired.36

14.2 Satisfaction.

(1) If the defendant pays the claimant the sum claimed together with interest at the statutory rate, if claimed, and the fixed costs as set out on the claim form within the period for filing an acknowledgement of service under rule 9.3 the —

(a) claim is stayed; and

(b) claimant must forthwith file and serve a notice of discontinuance in Form G15.

(2) Rule 37.6 does not apply to a notice of discontinuance served under this rule.

(3) If the claimant does not file and serve a notice of discontinuance in accordance with paragraph (1) within seven days of payment, the defendant may file and serve a notice in the form specified in Form G16 to request that the claim be recorded as satisfied.

(4) If there is no dispute the court office must record that the claim has been satisfied.

(5) If the claimant disputes satisfaction, the court office must fix a hearing to consider the application by the defendant and the defendant must give not less than seven days' notice of the hearing to the claimant.

14.3 Admissions by a minor or patient.

Judgment may not be entered on an admission if the —

(a) defendant is a minor or patient; or

(b) claimant is a minor or patient and the admission is made under rule 14.7 or 14.8.37

14.4 Admission by notice in writing – application for judgment.

(1) Where a party makes an admission under rule 14.1(2), any other party may apply for judgment on the admission.

(2) The terms of the judgment must be such as it appears to the Court that the applicant is entitled to on the admission.

14.5 Admission in whole or in part of money claim.

On making an admission of the whole or part of a claim for money under rule 14.1(3), the defendant must send a copy of the admission and any request for time to pay under rule 14.9 to the claimant.

14.6 Admission of claim for specified sum of money.

(1) This rule applies where the —

(a) defendant admits the whole of the claim in the acknowledgement of service;

(b) defendant has not requested time to pay; and

(c) only remedy which the claimant is seeking is payment of a specified sum of money.

(2) The claimant may file judgment in Form G17 for the amount claimed, interest and fixed costs under Part 71 and may specify the —

(a) date on which the judgment debt is to be paid; or

(b) time and rate at which it is to be paid if by instalments.

14.7 Admission of part of claim for money only.

(1) This rule applies where —

(a) the only remedy which the claimant is seeking is the payment of money;

(b) the defendant admits a specified —

(i) sum of money; or

(ii) proportion of a claim for an unspecified sum of money, in the acknowledgement of service or defence; and

(c) defendant has filed a defence as to the amount not admitted.

(2) If the defendant does not file a defence the claimant will be entitled to default judgment in accordance with rule 12.5.

(3) The claimant must serve a notice on the defendant stating that —

(a) the amount or proportion admitted in satisfaction of the claim is accepted; or

(b) the claimant intends to continue the claim.

(4) The claimant must —

(a) file the notice under paragraph (3); and

(b) serve a copy on the defendant,

within fourteen days after service of the defendant's acknowledgement of service or defence, as the case may be.

(5) If the claimant does not file the notice within fourteen days after service of the defendant's acknowledgement of service or defence —

(a) the claim is stayed until the notice is filed; and

(b) any party may apply for the stay to be lifted.

(6) If the defendant has not requested time to pay under rule 14.9, the claimant may file judgment in Form G17 for the amount admitted, interest and fixed costs and may specify —

(a) the date on which the judgment debt is to be paid; or

(b) the time and rate at which it is to be paid by instalments.

(7) If the claimant gives notice that he accepts the defendant's admission of a specified proportion of a claim for an unspecified sum of money, the claimant may file judgment for that proportion of an amount to be decided by the Court and costs.

(8) If the claimant files notice under paragraph (3)(b) the court office must fix a date, time and place for a case management conference.

14.8 Admission of liability to pay whole of claim for unspecified sum of money.

(1) This rule applies where the —

(a) amount of the claim is not specified;

(b) defendant admits liability in the acknowledgement of service to pay the whole of the claim and does not offer to pay a specified sum of money or proportion of the claim in satisfaction of the claim;

(c) defendant has not requested time to pay under rule 14.9; and

(d) only remedy the claimant seeks is the payment of money.

(2) The claimant may file judgment in Form G17.

(3) Judgment will be for an amount to be decided by the Court and costs.

14.9 Request for time to pay.

(1) A defendant who —

(a) makes an admission under rules 14.6, 14.7 or 14.8; and

(b) is an individual, may make a request for time to pay.

(2) A request for time to pay is a proposal —

(a) about the date of payment; or

(b) to pay by instalments at a rate specified in the request.

(3) The defendant's request for time to pay must be —

(a) accompanied by a statement of his or her financial position in the appropriate practice form; and

(b) filed with the admission.

(4) The statement under paragraph (3)(a) must be certified by the defendant as being correct and may be used as evidence of the defendant's financial position at the date it was signed in any subsequent proceedings with regard to enforcement of the judgment.

(5) If the —

(a) request for time to pay relates to a claim for an unspecified sum of money; and

(b) Court must assess damages under rule 14.8(3);

the Court must deal with the request for time to pay when it assesses damages.

14.10 Request for time to pay – procedure with time and rate agreed.

(1) This rule applies where the —

(a) only remedy which the claimant seeks is the payment of a sum of money together with interest and costs;

(b) defendant —

(i) admits the whole of a claim for a specified sum of money; or

(ii) offers to pay a specified sum; and

(iii) requests time to pay or makes an offer to pay by instalments; and

(c) claimant accepts the defendant's offer as to the amount, time and rate of payment.

(2) If this rule applies, the claimant can file judgment on the admission for the specified sum of money admitted, less any payments made, interest and fixed costs under Part 71 to be paid at the agreed time and rate.

14.11 Request for time to pay – procedure with time and rate not agreed.

(1) This rule applies where —

(a) the only remedy which the claimant seeks is the payment of a sum of money together with interest and costs;

(b) the defendant —

(i) admits the whole of a claim for a specified sum of money; or

(ii) offers to pay a specified sum; and

(iii) requests time to pay or makes an offer to pay by instalments; and

(c) the claimant accepts the sum admitted but does not accept the defendant's offer as to the amount, time and rate of payment.

(2) If this rule applies, the claimant must apply by notice to the registrar for judgment in Form G17 supported by an affidavit stating the reasons for objecting to the defendant's proposals as to payment.

(3) The Court must consider the defendant's request and the claimant's objections and enter judgment for the amount of the claim, interest and fixed costs under Part 71 on such terms as it sees fit.

(4) The general rule is that the Court should enter judgment under paragraph

(3) without a hearing.

(5) If the Court decides to deal with the matter at a hearing, it must fix a date and the claimant must give the parties at least seven days' notice of the hearing.

(6) If there is a hearing, the Court must determine whether to make an order for the costs of the application, by whom the costs should be paid and assess such costs under Part 72.41

14.12 Right of re-determination.

(1) If the Court has determined the time and rate of payment under rule 14.11 without a hearing, either party may apply for the decision to be redetermined by the Court at a hearing.

(2) An application for re-determination must be made within fourteen days after service of the judgment on the applicant.

(3) At the hearing the Court may confirm the judgment or make such other order as to the time and rate of payments as it considers just.

(4) The Court must determine whether to make an order for costs, and by whom the costs should be paid and assess such costs under rule Part 72.

14.13 Variation of order.

Either a claimant or a defendant may apply to vary an order made under this Part.

Notes: General

Part 14 of the CPR provides a wide variety of different circumstances in which admissions may be made and a similarly wide variety of different consequences. It should be noted that the Bahamian Part 14 is slightly different from the UK version. For instance, the UK Part 14 provides explicitly for the withdrawal of an admission, while the Part 14 of the Bahamas is silent as to a withdrawal of admission.

The two main factors of consequence in relation to the procedure for making an admission and the consequences that follow are: (1) Whether the admission is in relation to a claim for a specified or unspecified sum and, (2) Whether the admission is in respect of the whole or part of the claim (whether for a specified or unspecified sum).

There are further provisions in respect of an admission: (1) In which the defendant is seeking time to pay, (2) Where a rate and time for payment are agreed (3) Where a rate and time for payment are not agreed and (4) Right of re-determination.

14.1 Making An Admission In various ways, for the purposes of reducing costs and delay and of narrowing the issues in dispute, the CPR encourages parties, where it is appropriate to make admissions of fact and to concede claims or parts of claim[33]s.

A party may make an admission (the rules use the phrase 'admit the truth of the whole or part of any other party's case): (1) By giving notice in writing (such as in a statement of case or in a letter), (2) He may do so before or after proceedings, and (3) In relation to a claim for money, he may admit the whole or part of the claim by filing an acknowledgement of service containing the admission[34]. Rule 14.1 (2) does not require the admission to be in a particular form, merely that it be in writing. If it is not in writing, it may still be admissible in evidence, but it is not a formal admission for the purposes of Part 14. **It could be in a statement of case (typically the defence), by letter, or any written form as long as it is clear.**

Cases:

Claude Benbow v AG of Trinidad and Tobago (CV 2005-00740) (28 January 2008) "The admission must speak to facts pertinent to the claim between the parties to a cause or matter. The admission must be clear. There must be an admission to all the constituent parts of the claim made" (as per Madam Justice Pemberton)[35].

Greater Manchester Fire and Rescue Service v Veevers [2020] EWHC 2550 (Comm) HHJ Pearce emphasises the point that a party can make a formal pre-action admission. A party who tries an alternative "non-formal" admission may well not get the benefits of saving in costs that an open admission would give rise to.

[33] The Supreme Court Practice (1999) Volume 1 Page 378
[34] The Caribbean Civil Court Practice (2011) Page 129
[35] Supra

Effect of the Rule By admitting a fact, a party can save costs by obviating the need to call evidence to prove that fact. Part 14 enables the court to give his opponent such judgment that he is entitled to without waiting for the determination of any other questions between the parties.

14.4 Admission By Notice In Writing – Application For [Judgment] Where an admission is made pursuant to r.14.1(2) an application to the court for judgment is necessary. Judgment can include interest.

Amend or Withdraw an admission The Bahamian Part 14 does not speak to the amendment or withdrawal of an admission. However, historically before the advent of modern CPR, the courts did not permit the withdrawal of an admission consciously made but by mistake without the imposition of conditions ***(see Hollis v Burton [1892] 3 Ch.D.226.***)

In ***Gale v Superdrug Stores Plc [1996] 1 W.L.R. 1089*** the Court of Appeal had accepted that a party needed the permission of the court to withdraw an admission, whether it had been made before or after the commencement of the proceedings. In exercising its discretion, the court will consider all the circumstances of the case and seek to give effect to the overriding objective. Amongst the matters to be considered will be[36]: (1) The balance of prejudice to the parties; (2) The reason why the party wants to withdraw or amend the admission; (3) Whether there was a good reason for the party to resile from its admission; and (4) The entire circumstance had to be taken into account.

14.8 Admission Of Liability To Pay Whole Of Claim For Unspecified Sum Of Money If the defendant in a damages action admits the claim, the claimant can obtain judgment for "an amount to be decided by the court (one reason for doing so is to enable the claimant to obtain an order for interim payment). The Court giving judgment will give case management directions for the assessment of damages. In negligent actions for the claimant to obtain judgment, the defendant must have admitted that he was negligent, and that the claimant thereby suffered damages. An admission of negligence only is not sufficient.[37] ***(Blundell v Rimmer [1971] 1 W.L.R. 123 and Parrot v Jackson [1996] P.I.Q.R. P394)***

14.9 Request For Time To Pay A request by the Defendant for time to pay an admitted claim is a very common occurrence in practice. Rule 14.9 applies to three distinct situations which all have the common feature of a defendant's request for time to pay, namely under rule 14.6 admission for a whole claim for a specified amount of money; Under rule 14. 7 admission of part of claim for money only. Under rule 14.8 admission of liability to pay whole of claim for an unspecified sum of money. A "request for time to pay" is defined in rule 14.9 (2)[38].

14.11 Request For Time To Pay – Procedure With Time And Rate Not Agreed. This rule applies where the claimant is not agreeing to the terms of the payment of the defendant. The defendant has requested for time to pay in the terms offered. The only issue for determination by the court is the time and rate for payment by the Defendant. Rule 14.11 (3) directs that the Court can enter judgment for the amount claimed as it sees fit. The Court will then determine the time and rate of payment.

14.12 Right Of Re-Determination Where the claimant has not accepted the defendant's proposal for payment, determination of the time and rate of payment is carried out by the court, and in the vast majority of cases, this is done as a paper exercise without a court hearing. Where the time and rate of payment have been determined without a hearing, either party can apply for a re-determination at a hearing. Rule 14.12 only applies to non-hearing determinations.

Cases:

In the Chancery Division case of **SL Claimants v Tesco [2019] EWHC 3312 (Ch)**, the defendant had made a 'carefully considered' admission of liability in their pleadings. No new evidence had come to light – the defendant had simply reappraised the evidence and decided that in fact it did not support the admission

[36] The Supreme Court Practice (1999) Volume 1 Page 379
[37] The Supreme Court Practice (1999) Volume 1 Page 383
[38] The Supreme Court Practice (1999) Volume 1 Page 389

previously made. This reappraisal had occurred almost three years after the pleadings were originally filed. The court denied the defendant's application.

Wood v Days Healthcare UK Limited [2017] EWCA Civ 2097 shows that 'new evidence' is not limited to liability issues. The claimant's solicitors initially indicated that they considered the claim to be a fast-track case. The first defendant's claim handlers admitted liability in full. The claimant's solicitors later advised the first defendant that it was becoming clear that the value of the claim was much higher than initially anticipated and, when court proceedings were issued, the statement of value in the particulars referred to the claim being 'in excess of £300,000'. Shortly after the commencement of proceedings, the first defendant applied to resile from its admission of liability.

By contrast, see **Royal Automobile Club Ltd v Catherine Wright [2019] EWHC913 (QB)**, in which the claimant fell downstairs while at work. On receiving the letter of claim, the defendant alleged that it should have been brought through the Claims Portal, but the claimant's solicitors replied that the claim was certainly in excess of £25,000. The defendant admitted liability. The claimant later served a schedule valuing the case at over £1m. Shortly after the commencement of proceedings, the defendant applied to withdraw its admission. The defendant's application was refused. The court said it was clear from the outset that this was a complex case, and there was no reasonable basis for the defendant to decide that it was a low- value claim.

PART 15 – SUMMARY JUDGMENT

15.1 Scope of this Part.

This Part sets out a procedure by which the Court may decide a claim or a particular issue without a trial.

15.2 Grounds for summary judgment.

The Court may give summary judgment on the claim or on a particular issue if it considers that the —

(a) claimant has no real prospect of succeeding on the claim or the issue; or

(b) defendant has no real prospect of successfully defending the claim or the issue.42

15.3 Types of proceedings for which summary judgment is not available.

The Court may give summary judgment in any type of proceedings except —

(a) admiralty proceedings in rem;
(b) probate proceedings;

(c) proceedings by way of a fixed date claim;

(d) proceedings for —

(i) claims against the Crown;

(ii) defamation;

(iii) false imprisonment;

(iv) malicious imprisonment; and

(v) redress under the Constitution.

15.4 Procedure.

(1) Notice of an application for summary judgment must be served not less than fourteen days before the date fixed for hearing the application.

(2) The notice under paragraph (1) must identify the issues which it is proposed that the Court should deal with at the hearing.

(3) The Court may exercise its powers without such notice at any case management conference.43

15.5 Evidence for the purpose of summary judgment hearing.

(1) The applicant must —

(a) file affidavit evidence in support with the application; and

(b) serve copies of the application and the affidavit evidence on each party against whom summary judgment is sought, at less than fourteen days before the date fixed for hearing the application.

(2) A respondent who wishes to rely on evidence must —

(a) file affidavit evidence; and

(b) serve copies on the applicant and any other respondent to the application;

at least seven days before the summary judgment hearing.

15.6 Powers of Court on application for summary judgment.

(1) The Court may give summary judgment on any issue of fact or law whether or not the judgment will bring the proceedings to an end.

(2) Where the proceedings are not brought to an end the Court must also treat the hearing as a case management conference.

Notes:

15.2 Grounds For Summary Judgment The rules in this Part provide a procedure by which the court may carry out part of its duty of active case management, the summary disposal of issues that do not need full investigation and trial. The issues disposed of may arise in claims, counterclaims, third-party proceedings or similar proceedings.

The rules in this Part permit summary disposal in three types of cases which under the previous Rules of the Supreme Court rules were dealt with by separate provisions; summary judgment, summary disposal of a case on a point of law (RSC 0.14), and striking out pleadings (RSC 0.18 r.19).

Part 15 also permits the court to summarily dispose of cases and issues in three additional types of cases: (1) allowing summary judgment against a claimant where, on all the facts, the claim has no reasonable prospect of success; (2) allowing summary disposal of preliminary issues where the court is satisfied that those issues do not need full investigation and trial; and (3) allowing the court to fix summary judgment hearings of its own initiative[39].

There is a substantial overlap between Part 15 and Part 26r.3. As with Pt 15, the court's powers under Part 26.3 may be exercised on the application of a party or on the court's own initiative. Part 26.3 cover the strike out of claims or defences which are unreasonably vague, incoherent, vexatious, scurrilous, or obviously ill-founded and other cases that do not amount to a legally recognisable claim or defence

Part 15.2 provides that: (1) not only a claimant may apply for summary judgment against a defendant, but a defendant may apply for a summary judgment against the claimant for the claim or any issue in the claim against him to be dismissed on the basis of the evidence as opposed to striking out on technical grounds under the court's case management powers under Part 26. (2) where the application is made by the claimant the test to be applied is whether the defendant has 'no real prospect of successfully defending the claim or issue'; (3) where the application is made by the defendant the test is whether the claimant has 'no real prospect of succeeding on the claim or issue'[40].

In an appropriate case, an application- for summary judgment may be combined with an application to strike out under Part 26. Conversely, the court may treat a defendant's application to strike out as if it were an application for summary judgment: **Taylor v Midland Bank Trust Co Ltd 21 July 1999, BLD 230799916, [1999] All ER (D) 831.**

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[39] The Supreme Court Practice Volume 1 (1999) Page 594

[40] The Caribbean Civil Court Practice (2011) Page 143

Similarly, where the defence merely contains bare denials, the court may equally make an order for summary judgment under Part 15 on the basis that the defence stands no real prospect of success: ***Ed Jacob v Millennium Development Corporation Ltd* (IT: CV 2007-1668) (3 April 2008)[41].**

15.3 Types Of Proceedings For Which Summary Judgment Is Not Available. A legitimate application for summary judgment can be advanced in any type of proceedings save for those mentioned in Part 15.3. Unless the specific rule in any jurisdiction otherwise provides, an application may be made under this Part for any form of relief including: (1) an injunction;(2) an order for possession of land (but see separate the rules relating to mortgage claims; (3) a declaration; (4) specific performance; (5) rescission of an agreement relating to land; (6) forfeiture or return of a deposit under an agreement relating to land; and (7) an account. Including a claim for a specified sum or for damages to be assessed.

Cases:

***Swain v Hillman* [2001] 1 All ER 91, CA**-The court should interpret 'real' as the opposite of fanciful and should not conduct a mini-trial in order to establish whether a summary disposal was appropriate[42]:

***Royal Brampton Hospital NHS Trust v Hammond (No 5)* [2001] EWCA Civ 550, [2001] BLR 297**-The test under Part 15 is whether there is a real prospect of success in the sense that the prospect of success is realistic rather than fanciful; when undertaking this exercise, the court should consider the evidence which can reasonably be expected to be available at the trial - or the lack of it; it is not appropriate for the court to undertake an examination of the evidence (without a trial) and adopt the standard applicable to a trial (namely, the balance of probabilities).

***Three Rivers District Council v Bank of England (No 3)* [2001] UKHL 16, [2001] 2 All ER 513 (Lord Hope at paras 95 and 158)-**The rule ' ... is designed to deal with cases which are not fit for trial at all'; the test of 'no real prospect of succeeding' requires the judge to undertake an exercise of judgment; he must decide whether to exercise the power to decide the case without a trial and give summary judgment; it is a discretionary power; he must then carry out the necessary exercise of assessing the prospects of success of the relevant party; the judge is making an assessment not conducting a trial or a fact-finding exercise; it is the assessment of the case as a whole which must be looked at; accordingly, 'the criterion which the judge has to apply under CPR Pt 24 is not one of probability; it is the absence of reality.'

***Speed Investments Ltd v Formula One Holdings Ltd* [2004] EWHC 1772 (Ch), [2005] 1 WLR 1233, (2094) Times, 10** September, Lewison J (Ch) (upheld in the Court of Appeal [200;'1-] EWCA Civ 1512, [2004] All ER (D) 213 (Nov))[43]. Although the court had the power under the Civil Procedure Rules to permit an application for summary judgment to be made before an outstanding challenge to the jurisdiction had been determined, it would be a very rare case in which the court would exercise that power.

***Smikle v Nunes* (CL 1999/ S 243) Judgment 9 March 2007).[44]** Where there is no admissible evidence to support pleaded case then this is a most significant factor for the judge to take into account.

Easyair Ltd (t/a Openair) v Opal Telecom Ltd [2009] EWHC 339 (Ch) Lewison J accepted that the court must be careful before giving summary judgment on a claim and that the correct approach on applications by defendants is as follows:

i)The court must consider whether the claimant has a “realistic” as opposed to a “fanciful” prospect of success: Swain v Hillman [2001] 2 All ER 91;

ii)A “realistic” claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8]

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[41] Supra Page 144

[42] The Caribbean Civil Court Practice (2011) Page 144

[43] Supra

[44] Supra

iii)In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman

iv)This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10]

v)However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;

vi)Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63;

vii)On the other hand it is not uncommon for an application to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725.

Local Boy'Z Ltd v Malu NV [2021] EWHC 2439 (Comm) David Edwards KC (sitting as an English High Court judge) confirmed that the principles summarized by Lewison J in Easyair apply equally, but with obvious modification, to applications for summary judgment made by a claimant: the question in that context is whether the defendant has a "realistic" as opposed to a "fanciful" prospect of success in relation to its defence.

Dale Peterson v Rocky Griffith 2019/CLE/gen/00596 *(14 December 2023)* The claimant, who entered into an alleged partnership with the defendants for the ownership of a house and its furnishing situated in Abaco, sought, among other things, (i) an order recognizing an order made in the Circuit County Court for the County of Okaloosa, Florida, purporting to dissolve the partnership and make directions for the sale and transfer of ownership of the property, (ii) an order removing the defendants' names from the "title deed" for the property and (iii) a declaration that the claimant was the rightful owner of the property. It was alleged by the claimant that, pursuant to the order, the special master appointed by the Florida court had executed a certificate of sale and granted a certificate of title to the claimant after the claimant purchased the property for $50,000. The Court granted recognition and enforcement of the Florida order to the extent that it dissolved the partnership between the claimant and defendants and made provision for the division of its assets. However the Court refused to grant summary judgment pursuant to CPR 15.2 as the Florida order attempted to adjudicate on proprietary rights to the property. The Court ordered that the aspects of the Florida order relating to advertisement and sale of the property were incapable of enforcement in The Bahamas, ordered that any transfer of proprietary rights in pursuance of the Florida order was null and void and ordered the sale of the property and the division of its proceeds among the parties.

Dorothy Bain v Royal Bank of Canada (Bahamas) limited 2014/CLE/gen/00283 (29 December 2023*)*
(The Court held that the Court can grant summary judgment against a claimant in three types of cases: (i) where, on all the facts, the claimant has no reasonable prospects of success; (ii) summarily disposing of preliminary issues where the Court is satisfied those issues do not need a full investigation and trial; and (iii) where the Court fixes a summary judgment hearing of its own initiative. The Court noted there was a substantial overlap between Part 15 and CPR 26.3 and that an application to strike out could be combined with an application to strike out under Part 26. The Court alluded to paragraph 158 of Lord Hope's speech in *Three District Rivers Council v Bank of England (No. 3)* [2001] UKHL 16 where Lord Hope said of English CPR 24.2:

"The important words are "no real prospect of succeeding". It requires the judge to undertake an exercise of judgment. He must decide whether to exercise the power to decide the case without a trial and give a summary judgment. It is a 'discretionary' power, *ie* one where the choice whether to exercise the power lies within the jurisdiction of the judge. Secondly, he must carry out the necessary exercise of assessing the prospects of success of the relevant party. If he concludes that there is "no real prospect", he may decide the case accordingly. I stress this aspect because in the course of argument counsel referred to the relevant judgment of Clarke J as if he had made "findings" of fact. He did not do so. Under RSC O.14 as under CPR Part 24, the judge is making an assessment not conducting a trial or fact-finding exercise. Whilst it must be remembered that the wood is composed of trees some of which may need to be looked at individually, it is the assessment of the whole that is called for. A measure of analysis may be necessary but the 'bottom line' is what ultimately matters…The criterion which the judge has to apply under Part 24 is not one of probability; it is absence of reality. "

The Court held, citing *ED & F Man Liquid Products Ltd v Patel* [2003] EWCA Civ 472, that the burden of proof rests on the applicant to demonstrate grounds to believe that the respondent has no real prospect of success and there is no other reason for trial. The Court held that the claimant had no reasonable prospect of success and the Court ought not to engage in a full trial to make that determination.

Defending the Summary Judgment Application In order to defeat the application for summary judgment, it is sufficient for the respondent, to show some "prospect", i.e., some chance of success. That prospect must be "real", i.e., the court will disregard prospects which are false, fanciful. or imaginary.

International Finance Corp v Utexafrica Sprl [200l] C.L.C. 1361 and ED&F Man Liquid Products Ltd Ud v Patel [2003] EWCA Civ 472.-The inclusion of the word "real" means that the respondent has to have a case which is better than merely arguable. The respondent is not required to show that his case will probably succeed at trial. A case may be held to have a "real prospect" of success even if it is improbable.

Swain v Hillman [2001] 1 All E.R. 91-The hearing of an application for summary judgment is not a summary trial. The court at the summary judgment application will consider the merits of the respondent's case only to the extent necessary to determine whether it has sufficient merit to proceed to trial. The proper disposal of an issue under Part 15 does not involve the court conducting a mini-trial. See also Three Rivers DC v Bank of England (No.3) (2001] 2 All E.R. 5 13, HL (a summary judgment application; see especially, the speech of Lord Hope of Craighead at paras 94 and 95}. and ED&F Man Liquid Products Ltd v Patel [20.03] EWCA Civ 4.72 (a set aside application; see especially paras 9, 10, 1 1, 52 and 53 in the judgment of Poitier L.J.).

Where a summary judgment application gives rise to a short point of 'law or construction, the court should decide that point if it has before it all the evidence necessary for a proper determination and it is satisfied that the parties have had. an adequate opportunity to address the point in argument. The court should not allow a case to go forward to trial simply because there is a possibility of some further evidence arising as in **CJ Chemicals ·& Polymers Ltd v ITE Training Ltd [2007] EWCA Civ 725:** "if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better" (per Moore-Bick L.J.). Conversely, an application for summary judgment is not appropriate to resolve a complex question of law and fact the determination of which necessitates a trial of the issue having regard to all of the evidence. See **Apvodedo NV v Collins [2008] EWHC 775 (Ch**) contrast

with **Joseph B. Elkin v The Private Trust Corporation Ltd. and John J. Bennett JR. and Richard J. Cahan SC (Bahamas) 2010 CLE/gen 00158.**[45]

Burdens of Proof In **ED&F Man Liquid Products Ltd v Patel [2003] EWCA Civ 472**, it was said that under the rule the overall burden of proof rests on the applicant to establish that there are grounds to believe that the respondent has no real prospect of success and that there is no other reason for a trial. The existence of this burden as indicated by para:2(3) of the Practice Direction (UK) supplementing the rule; the applicant must (a) identify concisely any point of law or provision in a document on which he relies, and/or; (b) state that the application is made because the applicant believes that on the evidence the respondent has no real prospect of succeeding on the claim or (as the case may be) of successfully defending the claim or issue to which the application relates, and in either case state that the applicant knows of no other reason why the disposal of the claim or issue should await trial.

The essential ingredient is the applicant's belief that the respondent has no real prospect of success and that there· no other reason for a trial. If the applicant for summary judgment adduces credible evidence in support of application, the respondent becomes subject to an evidential burden of proving some real prospect of success or some other reason for a trial. The standard of proof required of the respondent is not high. It suffices merely to rebut the applicant's statement of belief. The language of the rule ("no real prospect)., indicates that, in determining the question, the court must apply a negative test.[46]

Summary Judgment At Trial And 'No Case To Answer' It has been held in England, that despite the objectives of the new Civil Procedure Code and the broad powers of court management which it contains, the general observation made by the Court of Appeal in **Alexander v Rayson [1936] 1 KB 169** at 178 remains in force, namely, that it is not right that the judge of fact should be asked to express any *opinion* upon the evidence until the evidence is completed; there may be some cases, probably rare, in which nothing in the defendant's evidence could affect the view taken about the claimant's evidence or case but care would be required in identifying them: **Benham Ltd v Kythira Investments Ltd [2003] EWCA Civ 1794, [2004] NLJR 21**, Simon Brown LJ. Where such is the case, however, then the trial judge may of his own initiative make an order for summary judgment using the powers under ENG CPR 24.2(a)(ii): ***James v Evans*** **[2000] 3 EGLR 1, [2000] 42 EG 173, CA** (a case where the trial judge gave summary judgment on the first day of a trial listed for three days)

The question to be asked in relation to a submission of no case to answer in a case where the defendants' witnesses had material evidence to give on the critical issue in the action could be reformulated variously as follows: have the claimants advanced a prima facie case, a case to answer, a scintilla of evidence to support the inference for which they contended, sufficient evidence to call for an explanation from the defendants. That it might be a weak case and unlikely to succeed unless assisted, rather than contradicted, by the defendants' evidence, or by adverse inferences to be drawn from the defendants not calling any evidence, would not allow it to be dismissed on a submission of no case to answer: ***Benham Ltd v Kythira Investments Ltd*** **[2003] EWCA Civ 1794, [2004] NLJR 21**, Simon Brown LJ. See also: ***Wisniewski v Central Manchester Health Authority*** **[1998] Lloyd's Rep Med 223.**

15.4 Procedure It appears that the only restriction on a summary judgment application is that the defendant must be given 14 days before the date of the hearing. Any notice filed must identify the issues upon which the court is expected to treat with.

If a defendant fails to file neither an acknowledgment of service nor a defence it is the usual practice to enter a judgment in default. It must be noted however that there appears to be nothing in Part 15 preventing a defendant from applying for summary judgment on the claimant's claim before he has filed an acknowledgment of service. Such an application would stay the action until the hearing of the application. It follows that the claimant would not be able to enter the default judgment until after the summary judgment application is heard.

[45] The Supreme Court Practice Volume 1 (1999) Page 596
[46] Supra

It is important to note that the court may raise the issue of summary judgment without any prompt from any party.

15.5 Evidence For The Purpose of Summary Judgment Hearing. It appears from the rules the applicant is unable to rely upon oral evidence as part 15 speaks to affidavit evidence that must be filed. The affidavit evidence must be filed and served on the other side with 14 days' notice. The respondent likewise must give the applicant at least 7 days' notice.

15.6 Powers Of Court On Application For Summary Judgment. The orders which the court may make on an application …..include: (a) judgment on the claim or on an issue therein; (b) the striking out or dismissal of the claim; (c) the dismissal of the application; (d) a conditional order; and (e) an order dealing with cost[47]. The judgment given may be the grant of remedies sought, an order for damages to be assessed or an order amounting to declaratory relief finally determining a preliminary issue in the proceedings in favour of the claimant or defendant.[48]

[47] The Supreme Court Practice Volume 1 (1999) Page 606
[48] The Supreme Court Practice Volume 1 (1999) Page 607

PART 16 – ASSESSMENT OF DAMAGES

16.1 Scope of this part.

This Part deals with the procedure by which a hearing to assess damages is fixed.

Notes:

Part 16 of the CPR sets out the three procedural mechanisms for fixing a hearing for the assessment of damages. The three mechanisms are determined by the nature of the judgment giving rise to the necessity of an assessment. They are for assessments:

- i) after default judgment;
- ii) after admission of liability on claim for unspecified sum on money;
- iii) after a direction for the trial of the issue of quantum.

16.2 Assessment of damages after default judgment.

(1) An application for a default judgment to be entered under rule 12.9(1)(b), must state —

(a) whether the claimant is in a position to prove the amount of the damages; and, if so

(b) the claimant's estimate of the time required to deal with the assessment; or

(c) that the claimant is not yet in a position to prove the amount of the damages.

(2) Unless the application states that the claimant is not in a position to prove the amount of damages, the court office must fix a date for the assessment of damages and inform the claimant at least fourteen days prior to that date of the date time and place fixed for the hearing.

(3) A claimant who is not in a position to prove damages must state the period of time that will elapse before this can be done.

(4) The court office must then fix a period within which the assessment of damages will take place.

16.3 Assessment of damages after admission of liability and claim for unspecified sum of money.

(1) This rule applies where the defendant has admitted liability for the whole or a specified proportion of a claim for an unspecified sum of money.

(2) An application for judgment to be entered for damages to be assessed on an admission under Part 14 must —

(a) state whether the claimant is in a position to prove the amount of damages and if so give an estimate of the time required to deal with the assessment; or

(b) state that the claimant is not yet in a position to prove the amount of damages.

(3) Unless the application states that the claimant is not in a position to prove the amount of damages, the court office must fix a date for the assessment of damages and the court office must give the parties at least fourteen days' notice of the date time and place fixed for the hearing.

(4) A claimant who is not in a position to prove damages must state the period of time that will elapse before this can be done.

(5) The court office must then fix either —

(a) a case management conference; or
(b) a period within which the assessment of damages will take place.

(6) The defendant is entitled to cross examine any witness called on behalf of the claimant and to make submissions to the Court but is not entitled to call any evidence unless the defendant has filed a defence setting out the facts the defendant seeks to prove.

(7) The Court must also deal with any request under Part 14 for time to pay.

16.4 Assessment of damage after direction for trial of issue of quantum.

(1) This rule applies where the Court makes a direction for the trial of an issue of quantum.

(2) The direction may be given at —
(a) a case management conference;
(b) the hearing of an application for summary judgment; or
(c) the trial of the claim or of an issue, including the issue of liability.

(3) On making such a direction the Court must exercise the powers of a case management conference and in particular may give directions about —
(a) disclosure under Part 28;
(b) service of witness statements under Part 29; and
(c) service of expert reports under Part 32.

(4) The Court must also fix a period within which the assessment of damages is to commence.

Notes:

CPR Part 16 reproduces almost verbatim the corresponding provisions of the Eastern Caribbean Supreme Court Civil Procedure Rules dealing with the Assessment of Damages (EC CPR 16).

Cases

CPR 16.4 (3) – Court required to exercise the powers of a Case Management Conference

Dominica Agricultural and Industrial Development Bank Ltd v Mavis Williams (No 2) (Civil Appeal No 20 of 2005)(judgment 29 January 2007) (When making an order fixing a hearing for the assessment of damages after a split trial the court is required to exercise the powers of a case management conference. This serves to control the evidence to be used at the hearing.)

PART 17 – INTERIM REMEDIES
SECTION I - INTERIM REMEDIES: GENERAL PROVISIONS

Note: Part 17 adopts verbiage which (i) is almost verbatim to the provisions of the Eastern Caribbean CPR Rule 17 (Interim Remedies) - Part 17 - Interim Remedies - Eastern Caribbean Supreme Court (eccourts.org) and (ii) is comparable to (and therefore usefully aided by) the provisions of the English CPR.

17.1 Orders for interim remedies: relief which may be granted.

(1) The Court may grant interim remedies including —
  (a) an interim declaration;
  (b) an interim injunction;
  (c) an order authorising a person to enter any land or building in the possession of a party to the proceedings for the purposes of carrying out an order under subparagraph (h);
  (d) an order directing a party to prepare and file accounts relating to the dispute;
  (e) an order directing a party to provide information about the location of relevant property or assets or to provide information about relevant property or assets which are or may be the subject of an application for a freezing order;
  (f) an order for a specified fund to be paid into Court or otherwise secured where there is a dispute over a party’s right to the fund;
  (g) an order for interim costs;
  (h) an order for the —
    (i) carrying out of an experiment on or with relevant property;
    (ii) detention, custody or preservation of relevant property;
    (iii) inspection of relevant property;
    (iv) payment of income from relevant property until a claim is decided;
    (v) sale of relevant property, including land, which is of a perishable nature or which for any other good reason it is desirable to sell quickly;
    (vi) taking of a sample of relevant property;
  (i) an order permitting a party seeking to recover personal property to pay a specified sum of money into court pending the outcome of the proceedings and directing that, if the party does so, the property must be given up to the party;
  (j) a “freezing order”, restraining a party from —
    (i) dealing with any asset whether located within the jurisdiction or not;
    (ii) removing from the jurisdiction assets located there;
  (k) an order to deliver up goods;
  (l) a “search order” requiring a party to admit another party to premises for the purpose, among other things, of preserving evidence;

(m) an "order for interim payment" under rules 17.14 and 17.15 for payment by a defendant on account of any damages, debt or other sum which the Court may find the defendant liable to pay.

(2) In paragraph (1)(e) and (h), **"relevant property"** means property which is the subject of a claim or in relation to which any question may arise on a claim.

(3) The fact that a particular type of interim remedy is not listed in paragraph (1) does not affect any power that the Court may have to grant that remedy.

(4) The Court may grant an interim remedy whether or not there has been a claim for a final remedy of that kind.

(5) The Chief Justice may issue a practice direction in respect of the procedure for applying for an interim order including, in particular, interim injunctions, search orders and freezing orders.

Cases:

CPR 17.1 Orders for interim remedies: relief which may be granted.

Whilst r. 17.1(1) is comprehensive, it is not and does not purport to be exhaustive given that r. 17.1(3) states that "[t]he fact that a particular type of interim remedy is not listed in paragraph (1) does not affect any power that the Court may have to grant that remedy."
It should also be noted that despite being described as "interim" r. 17.3(1) expressly provides that "[a]n order for an interim remedy may be made at any time, including (a) after judgment has been given." Accordingly, the power to grant a "freezing order" post judgment subsists.

CPR 17.1(1)(a) - Interim declarations
Bank of Scotland v A [2001] EWCA Civ 52 *http://www.bailii.org/ew/cases/EWCA/Civ/2001/52.html* – Lord Woolf LCJ considered in detail the availability and appropriateness of the making of an interim declaration.
ABC v. CDE [2010] EWCA Civ 533 *http://www.bailii.org/ew/cases/EWCA/Civ/2010/533.html* – An interim declaration was granted serving to confirm that a particular transaction would not constitute a breach of the terms of an extant freezing order.
N v S [2015] EWHC 3248 *http://www.bailii.org/ew/cases/EWHC/Comm/2015/3248.html* An injunction was granted in conjunction with an interim declaration confirming that a bank, by complying with such injunction would be committing no offence (under the prevailing money laundering legislation) and that the bank was relieved of disclosure obligations in respect of certain transactions.

Tyson Strachan v Anthony Simon et al 2021/CLE/gen/00863 (11 October 2023) The claimant claimed to be the true owner of land in respect of which the first defendant had a conveyance dated 16 March 2020 from the second defendant. The third defendant, First Caribbean International Bank (Bahamas) Limited entered into a mortgage over the first defendant's property. The claimant brought an action alleging negligence in the unlawful/wrongful transfer of the property as well as nuisance. The claimant applied for interim reliefs mirroring the substantive reliefs sought in his writ of summons. The Court held that the Court's powers to grant interim orders are outlined under Part 17 of the CPR.

In relation to the application for an interim declaration, the Court held that the interim declaration is a novel form of relief for this jurisdiction. The Court held that CPR 17.1(1)(a) empowers the Court to grant interim

declarations. The Court relied on Bank of Scotland v A Ltd [2001] EWCA Civ 52, Ralph Williams and others v Commissioner of Lands and another [2012] JMSC Civ 118, Milebush Properties Ltd v Tameside Metropolitan Borough Council [2011] EWCA Civ 270 and N v Royal Bank Scotland plc [2017] for the principles governing the grant of interim declarations. The Court held that:

(i) an interim declaration is a form of declaratory relief where the Court makes a declaration in relation to an issue, which would assist the parties in determining rights as between them in the interim until final determination on the matter. If, after considering the substantive merits of the case, it is determined that the interim declaration ought not to have been granted, then the interim declaration will be set aside, a final declaration would then be made and an appropriate costs order would be granted.

(ii) in relation to the relevant factors that ought to be considered when granting an interim declaration, the authorities suggest that the court should bear in mind factors for granting an interim injunction and consider the following: (a) whether the parties have a legitimate interest in obtaining the relief sought? (b) whether to grant relief by way of declaration would serve any practical purpose? (c) whether to do so would prejudice the interests of parties who are not before the court (i.e. where does the balance of convenience lay)?

On the facts, the Court refused to grant an interim declaration because the claimant's ownership of the property was not disputed and there were tenants in the property who could be prejudiced if a declaration was made in their absence without them being heard.

CPR 17.1(1)(b) – interim injunctions:
The purpose of an interim injunction is to improve the chances of the Court being able to do justice after a determination of the merits at the trial. National Commercial Bank Jamaica Limited v Olint Corporation Limited (Practice Note) [2009] UKPC 16 *http://www.bailii.org/uk/cases/UKPC/2009/16.html*

The approach to be adopted by the court in hearing applications for interim injunctions and the principles to be applied are derived from American Cyanamid Co v Ethicon Ltd [1975] A.C. 396 (H.L.): Tara Estates Ltd v Arthurs (Milton).pdf (courtofappeal.gov.jm) [2019] JMCA Civ 10; JIPFA Investments Ltd v The Ministry of Physical Planning et al - Eastern Caribbean Supreme Court (eccourts.org).

Examples of cases involving a consideration of whether an interim injunction should be granted include the following:

Romona A. Farquharson v The Bahamas Bar Association 2023/CLE/gen/00495 (29 June 2023) The claimant, an attorney-at-law that intended to seek election to the office of President of the Bahamas Bar Association, applied for an interim injunction restraining the Bahamas Bar Association's election scheduled for 30 January 2023 until a list of financial members was provided to the claimant and the claimant had a reasonable amount of time to utilize the list. The Court refused to grant an interim injunction as the Court was not satisfied there was any right to the requested list, the claimant had no legitimate expectation that such a list would be provided and the defendant would suffer loss if an injunction was granted as there were financial costs associated with holding a General Meeting.)

Maurice Clive Russell v Mark E. Munnings (in his capacity as Judicial Trustee of the assets of the late Stanford Gustavus Outten) et al 2023/CLE/gen/00345 (28 July 2023) The claimant sought the extension of an interim injunction and further interim orders pursuant to Part 17 of the CPR. The claimant claimed to be the true owner of two trucks located on the late Stanford Gustavus Outten's property which the Judicial Trustees of his assets proposed to sell. Information gathered by the Judicial Trustees from the Government of The Bahamas suggested the late Outten owned the trucks. The Court applied the principles in *American Cyanamid v Ethicon Ltd [1975] AC 396* to the grant of an interim injunction and, applying those principles, refused to extend the interim injunction. The Court found that the issue of the ownership of the trucks was a serious issue to be tried, damages would be an adequate remedy for the claimant as the claimant intended to seek damage and the balance of convenience favoured the Judicial Trustees because the Judicial Trustees wished for the ownership of the trucks to be determined and were prepared to provide an undertaking not to sell the trucks until trial. The Court considered CPR 17.1(e) (orders directing the provision of information) and held that as the claimant had credible material supporting his claim to ownership of the

trucks, and he was in business was the late Outten, he should be provided information about the current location and condition of the trucks. The Court also considered CPR 17.1(h)(ii) and (iii) but no detailed analysis was required as the Judicial Trustees were prepared to permit the inspection of the trucks as the claimant's expense.

Patrick Mcfall & Others v Ishmael Lightbourne (in his capacity as Vice President and Moderator of Bethel Baptist Church) 2023/CLE/gen/00208 (3 August 2023) The claimant was granted an *ex parte* interim injunction to restrain impeding elections for a new pastor. On review, the Court discharged the injunction for material non- disclosure and for not giving notice to the defendant. A fresh interim injunction was granted by the Court pursuant to section 21 of the Supreme Court Act and CPR 17.1(1)(b). The Court applied the principles in *American Cyanamid v Ethicon Ltd [1975] AC 396*. The Court was satisfied that there were serious issues to be tried, damages would be an inadequate remedy (because the damage apprehended was non-pecuniary) and the balance of convenience favoured an injunction.

Tyson Strachan v Anthony Simon et al 2021/CLE/gen/00863 (11 October 2023) The claimant claimed to be the true owner of land in respect of which the first defendant had a conveyance dated 16 March 2020 from the second defendant. The third defendant, First Caribbean International Bank (Bahamas) Limited entered into a mortgage over the first defendant's property. The claimant brought an action alleging negligence in the unlawful/wrongful transfer of the property as well as nuisance. The claimant applied for interim reliefs mirroring the substantive reliefs sought in his writ of summons. The Court held that the Court's powers to grant interim orders are outlined under Part 17 of the CPR.

In relation to the application for an interim injunction, the Court held that CPR 17.1(1)(b) empowers the Court to grant an interim injunction. The principles emanating from American Cyanamid Co v Ethicon Ltd [1975] UKHL 1 remain the benchmark in determining whether or not an interim injunction ought to be granted. The factors to be considered are (i) whether there is a real issue to be tried? (ii) whether damages would be an adequate remedy? (iii) whether the claimant is wiling to provide an undertaking in damages if it is determined that the injunction ought not to be granted? (iv) whether the balance of convenience lays in favour of the applicant? (v) whether there are any special factors to consider? On the facts, an interim injunction was granted subject to the claimant providing an undertaking in damages.

(However, the American Cyanamid criteria do not apply in certain exceptional cases, e.g., in an action for defamation a court will not impose a prior restraint on publication unless it is clear that no defence will succeed at the trial: Bonnard v Perryman [1891] 2 Ch. 269).

CPR 17.1(1)(e) – orders directing the provision of information

In Emmerson International Corporation et al v Viktor Vekselberg (eccourts.org) – Claim No. BVIHCM2013/0160 Wallbank J (at para. [60]) observed that CPR 17.1(1)(e) is in materially identical terms to r.25.1(1)(g) of the English CPR and subsequently adopted the analysis applied by the English Court of Appeal in JSC Mezhdunarodniy Promyshlenniy Bank v. Pugachev [2015] EWCA Civ 139 ***http://www.bailii.org/ew/cases/EWCA/Civ/2015/139.html*** which held that consideration of an application for disclosure under the rules involves two stages, *viz.*: First, a jurisdictional threshold needs to be satisfied, namely, whether there is 'some credible material' on which an application might be based. Secondly, the court effects a general exercise of discretion aimed at deciding whether it is just and convenient, in all the circumstances, to make the order sought.

Wallbank J stated further that: "The scope of CPR 17.1(1)(e) is wide, but not boundless. It first enables the Court to order a party to provide information about the location of relevant property as so defined. This part of the rule can be used to assist a party who claims a proprietary remedy, as well as one who brings personal claims. The second part is distinct from the first. It enables information to be disclosed about relevant property which is or may be the subject of an application for a freezing order. Freezing orders apply only to personal claims. The information that may be provided under this second part includes but is not limited to location of relevant property. The provision contains no express guidance as to the type and extent of information that can be disclosed under the second part. That does not mean any and all information should necessarily be disclosed. The overriding objective of the CPR provides necessary guidance. The type and extent of information to be disclosed depends upon what is proportionate in the circumstances of each case, for its just and fair disposition.[82]Where an application for information is made in respect of property that may be the subject of a freezing order application, it is

axiomatic that the property can still be frozen…the Court cannot order provision of information concerning property the respondents have already disposed of."

CPR 17.1(1)(f) – order for a specified fund to be paid into court
In Stella Patricia Francis v The Estate Of Atiana Madeliine Francis (Deceased) (eccourts.org) Claim No. SKBHCV2019/0064 Ward J. in considering the meaning of "specified fund" cited with approval Myers v Design Inc (International) Ltd. [2003] EWHC 103 (Ch) (31 January 2003) (bailii.org) wherein Lightman J stated that "The provisions of the Rule require as conditions for exercise of the jurisdiction to make the order that at the date of the order (1) the person against whom the order is to be made has legal title to or is in possession or control of an actual identifiable fund, colloquially the fund must be in his hands; (2) there is a dispute as to a party's proprietary entitlement to or interest in the fund; (3) the circumstances are such that the fund should be secured by payment into court or in some other way. The requirement that the person against whom the order is to be made should be the legal owner or in possession or control of the specified fund is implicit in the form of relief: the mandatory order could not be made unless it could be complied with. The reference in the Rule to the party's right to the fund connotes the existence of a proprietary right or interest in the fund."
CPR 17.1(1)(g) – orders for interim costs
Oscar Trustee Limited v MBS Software Solutions Limited – Claim No. BVIHC (COM) 2021/022 Eastern Caribbean Supreme Court Search (eccourts.org) Jack, J (AG) cited the decision of the English Court of Appeal in Crystal Decision (UK) Ltd v Vedatech Corp [2008] EWCA Civ 848 wherein it was stated that "…the court's ability to make interlocutory costs orders... is a sanction which is available to it in order to encourage responsible litigation. The court marks what it regards as an irresponsible application by an immediate order for the payment of costs. That is intended to bring home to a party —when considering whether to make an application —that an unsuccessful application may carry a price which will have to be paid at once."

Farrell et al v Colonial Life insurance Company (Trinidad) Ltd et al – TT 2012 HC 131 (18 April 2012) (vlex citation) In proceedings raising the constitutionality of Trinidad & Tobago's Central Bank (Amendment) Act No. 19 of 2011 and the Purchase of Certain Rights and Validation Act No. 17 of 2011, Rampersad J held that an order for interim costs might be ordered where (i) the party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial; (ii) the claim to be adjudicated is prima facie meritorious; and (iii) the issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.

CPR 17.1(1)(h) - order for the detention, custody, preservation, sale etc of relevant property
Sports Network Ltd v Calzaghe CBE [2008] EWHC 2566 (QB) Coulson J held that on an application under English CPR 25.1(1)(c) [BAH CPR 17.1(1)(h)] or English CPR 25.1(1)(l) [BAH CPR 17.1(1)(f)] the test in *American Cyanamid v Ethicon* applies, requiring the applicant to identify both a serious issue to be tried and a balance of convenience favouring the making of the order sought.

UTB llc v Sheffield United Ltd [2018] EWHC 1663 (Ch) Fancourt J held that English CPR 25.1(1)(c) [BAH CPR 17.1(1)(h)] is not limited to tangible property. Intangible property such as shares or intellectual property can be the subject of an order made under the section. Even if that is wrong and intangible property is not within English CPR 25.1(1)©, the rule does not limit the power of the court to grant an interim injunction or cut down the broad equitable power to grant appropriate injunctive relief pending trial.

LLC Eurochem North-West-2 v Société Générale SA et al [2023] EWHC 2720 (Comm) Butcher J held that English CPR 25.1(1)(c) [BAH CPR 17.1(1)(h)] does not apply to money which is not in any way segregated and in respect of which there is no claim to beneficial ownership but which is simply a sum claimed by way of debt or damages from one party by the other. The definition of "relevant property" envisages that the property shall be in some way identifiable and distinctive, such that that particular property can be said to be the "subject of the claim" or that a question may arise in relation to it. Furthermore, English CPR 25.1(1)(c) envisages that relevant property shall be capable of detention, custody, preservation, inspection, sampling, experimentation, sale, or may yield an 'income'. None of those naturally applies to a sum of money claimed by way of debt or damages.

M3 Property Ltd v Zedhomes Ltd [2012] EWHC 780 (TCC) Akenhead J held that English CPR 25.1 enables the Court to grant injunctions or orders "for the inspection of relevant property" or for the "preservation of relevant property" but the order sought must be both necessary and proportionate.

McLennan Architects Ltd v Jones [2014] EWHC 2604 (TCC) Akenhead J considered an application permitting the inspection of a laptop used by the defendant and held that it is primarily to the overriding objective to which one must look as to the basis on which to exercise the discretion to make the type of order sought. Factors the court could take into account include:
(a) The scope of the investigation must be proportionate.
(b) The scope of the investigation must be limited to what is reasonably necessary in the context of the case.
(c) Regard should be had to the likely contents (in general) of the device to be sought so that any search authorised should exclude any possible disclosure of privileged documents and also of confidential documents which have nothing to do with a case in question.
(d) Regard should also be had to the human rights of people whose information is on the device and, in particular, where such information has nothing or little to do with the case in question.
(e) It would be a rare case in which it would be appropriate for there to be access allowed by way of taking a complete copy of the hard drive of a computer which is not dedicated to the contract or project to which the particular case relates.
(f) Usually, if an application such as this is allowed, it will be desirable for the Court to require confidentiality undertakings from any expert or other person who is given access.

West Indies Petroleum Limited v Scanbox Ltd et al [2022] JMCA App 28 https://www.courtofappeal.gov.jm/sites/default/files/judgments/West%20Indies%20Petroleum%20Ltd%20v%20Scanbox%20Ltd%20et%20al.pdf The appellant sought preservation orders pending appeal, against the respondents, in respect of data or information said to be in the possession of the respondents, to assist in proving allegations of a data breach by the respondents on the applicant's servers. The Jamaican Court of Appeal held that preservation orders under JAM CPR 17.1(1)(c) [BAH CPR 17.1(1)(h)] could extend to documents and information stored on electronic devices but that, in an appropriate case, when making an application for a preservation order, the applicant may be required to demonstrate, in addition to the necessity and proportionality of the proposed order, that there is a compelling case or a *strong prima facie* case.

Dainford Navigation Inc. v PDVSA Petroleo S.A. "Moscow Stars" [2017] EWHC 2150 (Comm) https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Comm/2017/2150.html Males J made an interim order for the sale of about 38,000 gross metric tons of Santa Barbara crude oil and 12,000 gross metric tons of Anaco crude oil on board a ship after the cargo had already been on board the ship for over nine months and would remain there for many months to come at the expense of the claimant in the absence of an order.

CPR 17.1(1)(j) – "freezing orders"

In NATIONAL INSURANCE CORPORATION v ROCHAMEL DEVELOPMENT COMPANY LIMITED - Eastern Caribbean Supreme Court (eccourts.org) Saint Lucia Claim No. SLUHCV2006/0638 Edwards J held that a freezing order is not an ordinary interim injunction which must satisfy "the serious question to the tried" test. The freezing order requires more than that, it requires a good arguable case against [the Defendant], and a reasonable apprehension that [the Defendant] is in the process of dissipating its assets which will prevent [the Plaintiff] from enforcing its judgment…[T]he freezing order remedy, is designed not to preserve the status quo, but to prevent, a judgment for debt from becoming worthless and to prevent frustration of the Court's process. The evidence need not be direct evidence to prove dissipation of assets. The authorities show that the Court is entitled to assume a risk of dissipation of assets from any dishonest or discreditable conduct of [the Defendant's] directors/incorporators."
Patricia Yorkston v Tamarind Village Inc - Eastern Caribbean Supreme Court (eccourts.org) applied National Insurance Corporation (ibid)

Kazakhstan Kagazy plc v. Arip [2014] EWCA Civ 381 *http://www.bailii.org/ew/cases/EWCA/Civ/2014/381.html*: Good arguable case (no need to show more than 50% chance of success).
There are "grounds for belief" that there are assets on which the judgment will bite: Ras Al Khaimah Investment Authority v. Bestfort Development LLP [2017] EWCA Civ 1014 *http://www.bailii.org/ew/cases/EWCA/Civ/2017/1014.html*.
Real risk (supported by evidence) of dissipation of assets: see e.g. Holyoak v. Candy [2017] EWCA Civ 92 *http://www.bailii.org/ew/cases/EWCA/Civ/2017/92.html* and Lakatamia Shipping Company Limited v Morimoto [2019] EWCA Civ 2203.

There is no need for a claimant to have a pre-existing cause of action against the defendant in order to support a freezing injunction: Broad Idea international Ltd v Convoy Collateral Ltd [2021] UKPC 24 (*https://www.bailii.org/uk/cases/UKPC/2021/24.html*).

A pre-action application for a freezing order under CPR 17.1(j) was considered by the Court in Jennifer Newman et al v Silver Airways LLC.

17.2 Interim injunctions and similar orders including search orders and freezing orders.

(1) This rule deals with applications for —

(a) an interim injunction under rule 17.1(1)(b);
(b) a search order under rule 17.1(1)(l);
(c) a freezing order under rule 17.1(1)(j);
(d) an order authorising a person to enter any land or building for the purpose of carrying out an order under rule 17.1(1)(h); and
(e) an order for the detention, custody or preservation of relevant property under rule 17.1(1)(h)(ii).

(2) Unless the Court otherwise directs, a party applying for an interim order under this rule must undertake to abide by any order as to damages caused by the granting or extension of the order.

(3) An application for an interim order under this rule may in the first instance be made on three days' notice to the respondent.

(4) The Court may grant an interim order under this rule on an application made without notice for a period of not more than twenty-eight days, unless any of these Rules permits a longer period, if it is satisfied that —

(a) in a case of urgency no notice is possible; or
(b) that to give notice would defeat the purpose of the application.

(5) On granting an order under paragraph (4) the Court must —

(a) fix a date for further consideration of the application; and

(b) fix a date, which may be later than the date under subparagraph (a),

on which the interim order will terminate unless a further order is made on the further consideration of the application.

(6) When an order is made under paragraph (4), the applicant must, not less than seven days before the date fixed for further consideration of the application, serve the respondent personally with —

(a) the application for an interim order;
(b) the evidence in support of the application;
(c) a copy of the transcript of the hearing, if any, or if there is no such transcript a copy of attorney's note of the hearing;
(d) a copy of any written submissions or skeleton arguments used at the hearing;
(e) any interim order made without notice; and
(f) notice of the date and time on which the Court will further consider the application under paragraph (5).

(7) An application to extend an interim order under this rule must be made on notice to the respondent unless the Court otherwise orders.

Cases:

17.2 Interim injunctions and similar orders including search orders and freezing orders.

National Commercial Bank Jamaica Ltd v. Olint Corp Ltd (Jamaica) [2009] UKPC 16 (28 April 2009) URL: *http://www.bailii.org/uk/cases/UKPC/2009/16.html* The Judicial Board of the Privy Council held, inter alia, that: (at para 13) "…Although the matter is in the end one for the discretion of the judge, *audi alterem partem* is a salutary and important principle. Their Lordships therefore consider that a judge should not entertain an application of which no notice has been given unless *either* giving notice would enable the defendant to take steps to defeat the purpose of the injunction (as in the case of a *Mareva* or *Anton Piller* order) *or* there has been literally no time to give notice before the injunction is required to prevent the threatened wrongful act. These two alternative conditions are reflected in rule [17.2(4)] of the Civil Procedure Rules [2022]. Their Lordships would expect cases in the latter category to be rare, because even in cases in which there was no time to give the period of notice required by the rules, there will usually be no reason why the applicant should not have given shorter notice or even made a telephone call. Any notice is better than none."

In Birmingham City Council v Afsar & Ors [2019] EWHC 1560 (QB) Mr. Justice Warby whilst considering "the question of applications without notice" stated that:- "A series of authorities has emphasised how exceptional it is for the Court to grant an injunction or other order against an absent party, who has not had notice of the application and a chance to dispute it. The principle that the Court should hear both sides of the argument is an "elementary" rule of justice and "[a]s a matter of principle no order should be made in civil or family proceedings without notice to the other side unless there is very good reason for departing

from the general rule that notice should be given": *Moat Housing Group South Ltd v Harris* [2005] EWCA Civ 287 [2006] QB 606 [63], [71-72] (a case of alleged anti-social behaviour by a tenant).

17.3 Time when an order for interim remedy may be made.

(1) An order for an interim remedy may be made at any time, including —
- (a) after judgment has been given; and
- (b) before a claim has been filed.

(2) Paragraph (1) is subject to any rule which provides otherwise.

(3) The Court may grant an interim remedy before a claim has been made only if —
- (a) the matter is urgent; or
- (b) it is otherwise necessary to do so in the interests of justice.

(4) Unless the Court otherwise orders, a defendant may not apply for any of the orders listed in rule 17.1(1) before filing an acknowledgement of service under Part 9.

(5) If the Court grants an interim remedy before a claim has been filed, it must require an undertaking from the claimant to file and serve a claim form by a specified date.

(6) If no claim has been filed the application must be made in accordance with the general rules about applications contained in Part 11.

Cases:

17.3 Time when an order for interim remedy may be made.

In Tara Mahalia-Smith v GRAND CASS MANAGEMENT et al - No. CV 1746 of 2018 CV1746-of-2018-Tara-Smith-v-Grande-Cass-Management-Barbados-Limited-.pdf (barbadoslawcourts.gov.bb) Justice Olson DeC. Alleyne held that the CPR does not contemplate the making of an application for an interim payment before the commencement of proceedings.

17.4 How to apply for interim remedy.

(1) An application for an interim remedy must be supported by evidence on affidavit unless the Court otherwise orders.

(2) Where, in support of any application under this rule, it is not practicable to produce evidence on affidavit then the application may be heard on the basis of either —
- (i) information given orally to the Court with an undertaking to file an affidavit within a specified date setting out the oral information; or

(ii) evidence given by witness statement and, in such event, the Court may at any time give such directions as it thinks fit in relation to the filing, in due course, of evidence by affidavit.

(3) The Court may grant an interim remedy on an application made without notice if it appears to the Court that there are good reasons for not giving notice.

(4) The evidence in support of an application made without giving notice must state the reasons why notice has not been given.

17.5 Costs.

(1) The Court may make any order as to costs that it considers just in relation to any order made under this Part.

(2) Without limiting the generality of paragraph (1), an order as to costs includes an order as to the costs of any person affected by a search order or freezing order.

SECTION II – SEARCH ORDERS: ADDITIONAL PROVISIONS

17.6 Interpretation.
In this Section, unless the context otherwise requires —
"applicant" means an applicant for a search order;
"described" includes described generally, whether by reference to a class or otherwise;
"premises" includes a vehicle or vessel of any kind;
"record" includes a document, copy, photograph, film, or sample;
"respondent" means a person against whom a search order is sought or made;
"search order" means an order made under rule 17.7.

17.7 Search order: evidence, notice and form of order.

(1) This rule applies only if the evidence is, or may be, relevant to an issue in the proceeding or anticipated proceeding.

(2) The Court may make a search order in a proceeding or before a proceeding commences, with or without notice to the respondent, to —
(a) secure or preserve evidence; and

(b) require a respondent to permit persons to enter premises for the purpose of securing the preservation of evidence.

(3) Form G18 must be used but may be varied as the circumstances require.

(4) A search order must be served on the respondent.

17.8 Requirement for grant of search order.

The Court may make a search order under rule 17.7 only if the Court is satisfied that —

- (a) an applicant seeking the order has a strong *prima facie* case on an accrued cause of action; and
- (b) the potential or actual loss or damage to the applicant will be serious if the search order is not made; and
- (c) there is sufficient evidence in relation to a respondent that—
  - (i) the respondent possesses relevant evidentiary material; and
  - (ii) there is a real possibility that the respondent might destroy such material or cause it to be unavailable for use in evidence in a proceeding or anticipated proceeding before the Court.

17.8 Requirement for grant of search order.
In Centraus Limited V Orlando Aloang Barcena Et Al [2017] NZEmpC 122 EMPC 285/2017 2017-NZEmpC-122-Centraus-Ltd-v-Barcena-and-Others.pdf (justice.govt.nz) Judge J C Holden (when considering the text of provisions identical to those contained in the Bahamian CPR rule 17.8) stated inter alia that: "The cumulative requirements that the Court must be satisfied about reflect the intrusive nature of search orders. It must be established that there would be potential or actual serious loss or damage to the applicant if the search order is not made… [26] If there is no clear evidence of possession of evidence and an intention to destroy or conceal such evidence the application must fail. It is at the heart of the search jurisdiction....[29] In considering applications for search orders there is a well-recognised need for judicial caution. A search order should not be lightly granted.3 [30] There must be some proportionality between the perceived threat to the applicant's rights and the remedy granted. The consequences of a search order may be severe. I also have to consider whether the applicant's concerns can be adequately addressed by some lesser process."

17.9 Restriction on entrants.

(1) The permitted persons identified under rule 17.11(1)(a) must not include the applicant in person, or, if the applicant is not a natural person, any director, officer, employee, partner, or other person associated with the applicant, other than the applicant's attorney.

(2) The number of those permitted persons must be as small as is reasonably practicable in the circumstances.

17.10 Applicant's undertaking and duty.

(1) As a condition of the making of the order, the applicant must undertake to the Court to pay the reasonable costs and disbursements of any independent attorney appointed under rule 17.12.

(2) The Court must require the applicant for a search order to give appropriate undertakings, including an undertaking as to damages.

(3) If the applicant has, or may later have, insufficient assets within the jurisdiction to discharge the obligation created by an undertaking as to damages, the Court may require the applicant to provide security for that obligation in a form and in an amount fixed by a judge or, if the judge so directs, the Registrar.

(4) An applicant for a search order without notice to a respondent must fully and frankly disclose to the Court all material facts, including —

(a) any possible defences known to the applicant; and

(b) information casting doubt on the applicant's ability to discharge the obligation created by the undertaking as to damages.

Cases:

17.10 Applicant's undertaking and duty.

In Patricia Yorkston v Tamarind Village Inc - Eastern Caribbean Supreme Court (eccourts.org) Wilkinson J. stated (at Para. 29) 'that: "The Caribbean Civil Court Practice NOTE 14.33 is instructive on the duty of the Claimant to make full and frank disclosure when making her application for interim relief such as the freezing order. Note 14.33 states: "The obligation to make full and frank disclosure is of long standing .... The primary duty is to make full and frank disclosure of the material fact ..... The principles were revisited and restated by the Court of Appeal in Brinks's Mat Ltd. v. Elcombe [1988] 1 WLR 1350 ....: "(1) The duty of the applicant is to make "a full and fair disclosure of all the material facts":see R. v. Kensington Income Tax General Comrs, ex p. Princess de Polignac [1917]1 KB 486, 515 PER Scrutton LJ. (2) The material facts are those which it is material for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers: see R. v. Kensington Income Tax General Comrs General, ex p. Princess de Polignac, per Lord Cozens-Hardy MR, at p. 504, citing Dalgliesh v. Jarvie (1859) 2 Marc & G 231, 238 and Browne-Wilkinson J in Thermax v. Schott Industrial Glass Ltd. [1981] FSR 289,295. (3) The applicant must make proper inquiries before making the application: see Bank Mellat v. Nikpour [1985] FSR 87. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries."'

17.11 Terms of search order.

(1) A search order may direct a named or described person —

(a) to permit, or arrange to permit, another or other named or described person or persons specified —

(i) to enter specified premises;
(ii) to take other steps including searching for, inspecting, or removing a listed or described thing and making or obtaining a record of it or information contained in it; and

(b) to provide, or arrange to provide, named or described persons with any described information, thing, or service;
(c) to allow other named or described persons, including computer specialists not associated with either the applicant or the respondent, to take and retain in their custody, or copy, any described thing or information;
(d) not to disclose any information about the order, for up to three working days after the date on which the order was served, except for the purposes of obtaining legal advice or legal representation; and
(e) to do or refrain from doing any specified act.

(2) A search order may contain whatever other incidental provisions the Court considers just.

17.12 Independent attorneys.

(1) If the Court makes a search order, the Court must appoint one or more attorneys, each of whom is independent (hereinafter "the independent attorneys"), to supervise the execution of the order, and to do whatever things in relation to the order the Court considers appropriate.

(2) The Court may appoint an independent attorney to supervise the carrying out of the order at any one or more premises, and a different independent attorney or attorneys to supervise execution of the order at other premises, with each independent attorney having power to do whatever things in relation to the order the Court considers appropriate.
(3) Service of a search order, or of any other document ordered to be served on a respondent, on a person appearing to an independent attorney to be responsible and in charge of premises, is to be treated as service on the respondent.

(4) A search order must fix a date on which the Court will consider a report on the search from the independent attorneys, and any applications related to the matters in rule 17.13.

17.13 Review of search.

(1) On the date fixed under rule 17.12(4) the applicant and the respondent and the independent attorneys are entitled to appear, and the Court may make any order it considers just.

(2) In making an order under paragraph (1), the Court must consider the following —

(a) what is to happen to any goods removed from the premises or to any documents or copies that have been made;

(b) how the confidentiality to which the respondent is entitled is to be maintained;

(c) any claim to privilege;

(d) any application by a party;

(e) any issue raised by an independent attorney.

SECTION III – INTERIM PAYMENTS

17.14 Interim payments - general procedure.

(1) The claimant may not apply for an order for an interim payment before the end of the period for entering an acknowledgement of service applicable to the defendant against whom the application is made.

(2) The claimant may make more than one application for an order for an interim payment even though an earlier application has been refused.

(3) Notice of an application for an order must be —

(a) served at least fourteen days before the hearing of the application; and

(b) supported by evidence on affidavit.

(4) The affidavit must —

(a) exhibit any documentary evidence relied on by the claimant to support of the application;

(b) state the claimant's assessment of the amount of damages or other monetary judgment that are likely to be awarded; and

(c) if the claim is made under any relevant enactment in respect of injury resulting in death, contain full particulars of the —

(i) nature of the claim in respect of which the damages are sought to be recovered; and

(ii) person or persons for whom and on whose behalf the claim is brought.

(5) If the respondent to an application for an interim payment wishes to rely on evidence or the claimant wishes to rely on evidence in reply, that party must —

(a) file the evidence on affidavit; and

(b) serve copies on every other party to the application, at least seven days before the hearing of the application.

(6) The Court may order an interim payment to be made in one sum or by instalments.

Notes

Under these provisions applications for interim payments are not limited to personal injury actions as was the case under the former RSC (Ord 29).

Awards of interim payments have been described as being intended to "tide over plaintiffs who have lost earnings and incurred medical and other expenses while the slow process of litigation unwinds"[49]. It affords a claimant some relief where it is clear that he is likely to recover damages at the completion of the trial. It is often defined as payment on account by one party for the benefit of another party in an action for damages. An application for an interim payment can only be made after the period for filing an acknowledgement of service has expired.

Cases

Cristal Roberts and Another v Dr Samantha Bhagan CV 2010–01117 *(conditions to be satisfied) Defendant must have admitted liability in relation to the claim; claimant obtained judgment against the defendant for damages to be assessed; -) (personal injuries)*

Caryn Sobers v Pricesmart Trinidad Limited and Another Civ App No 55 of 2012 *(general procedures for interim payments)*

25.7.6 of The White Book, 2001, Civil Procedure, Volume 1, London Sweet & Maxwell *(whether or not an order is made is a matter of discretion)*

17.15 Interim payments - conditions to be satisfied and matters to be taken into account.

(1) The Court may make an order for an interim payment only if —

(a) the defendant against whom the order is sought has admitted liability to pay damages or some other sum of money to the claimant;

(b) the claimant has obtained an order for an account to be taken as between the claimant and the defendant and for judgment for any amount certified due on taking the account;

(c) the claimant has obtained judgment against that defendant for damages to be assessed or for a sum of money, including costs, to be assessed;

(d) except where paragraph (3) applies, it is satisfied that, if the claim went to trial, the claimant would obtain judgment against the defendant from whom an order for interim payment is sought for a substantial amount of money or for costs; or

(e) the following conditions are satisfied —

(i) the claimant is seeking an order for possession of land, whether or not any other order is also being sought; and

(ii)the Court is satisfied that, if the case went to trial, the defendant would be held liable, even if the claim for possession fails, to pay the claimant a sum of money for rent or for the defendant's use and occupation of the land while the claim for possession was pending.

(2) In a claim for personal injuries the Court may make an order for the interim payment of damages only if the defendant is —

[49] McGregor on Damages 16th ed para 1527

(a) a person whose means and resources are such as to enable that person to make the interim payment;

(b) insured in respect of the claim; or

(c)a public authority.

(3) In a claim for damages for personal injuries where there are two or more defendants, the Court may make an order for the interim payment of damages against any defendant if —

(a) it is satisfied that, if the claim went to trial, the claimant would obtain judgment for substantial damages against at least one of the defendants, even if the Court has not yet determined which of them is liable; and

(b) paragraph (2) is satisfied in relation to each defendant.

(4) The Court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment.

(5) The Court must take into account —

(a) contributory negligence, where applicable; and

(b) any relevant set-off or counterclaim.

Notes

Rule 17.15 (1) identifies the conditions to be satisfied before the Court may grant an order for interim payment.

Cases

Cristal Roberts and Another v Dr Samantha Bhagan CV 2010–01117 *(conditions to be satisfied) (personal injuries) (admission of liability) (reasonable proportion of the likely amount of the final judgment)*

Rule 17.15.1 (a) - Cristal Roberts and Another v Dr Samantha Bhagan CV 2010–01117 *(admission of liability)*

***Rule 17.15.1(d)* – Antigua Commercial Bank v Denise Armstrong ANULTAP2016/0002**

Rule 17.15.1.2 - Cristal Roberts and Another v Dr Samantha Bhagan CV 2010–01117 *(means and resources of parties)*

Caryn Sobers v Pricesmart Trinidad Limited and Another Civ App No 55 of 2012 *(substantial amount to be recovered)*

Phyllis Anderson v Windell Rankine Claim No. 2006HCV05105 *(Interpretation and Application of Rule 17.15 (1) (d) & (2))*

Southern Exploration & Production Limited v National Maintenance Training and Security Company Limited et al- Claim No. CV2020-02303 (17.5 1 (d)))

Schott Kern Ltd v Bentley and Others [1991] 1 QB 61, 74B *(Court to be cautious when determining a reasonable proportion of damages)*

British and Commonwealth Holdings plc v Quadrex Holdings Inc [1989] QB 842 *(Burden of proof)*

Blackstone's Civil Practice, 2008 (at page 454, para. 36.9) *(necessary standard of proof)*

***Rule 17.15(4)* – Eerles v Cobham Hire Services Ltd [2010] 1 WLR 409** (the Court has no power to order an interim payment for more than a reasonable proportion of the likely amount of final judgment)

***Rule 17.15(4)* – Tyrell Oneal Mccollin v Sheradon Holder and Derrie Hoyte No. 972 of 2015**

***Rule 17.15(4)* – Brathwaite v Atkins (2019) 96 WIR 86** (the condition that the Court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment limits the discretion of the Court and makes the evidence contemplated by CPR 17.14(4) essential).

Patrice Knowles v Island Hotel Company Limited (t/a Atlantis Paradise Island) 2022/CLE/gen/00382 (19 June 2023) (the grant of an interim payment is a matter of discretion. The Court's discretion is extremely wide. Factors relevant to the exercise of the Court's discretion include whether the claimant is not getting on with the claim and putting the day of trial off by repeated applications for interim payments,

the means and resources of the parties, the length of time before the claim will likely be tried or settled, and whether the interim payment may prejudice the trial or pre-judge an issue to be determined at trial. There is no requirement for a claimant to demonstrate a need for any particular sum over and above the need a claimant has to be paid their damages. Evidence of need strengthens an application, however. In exercising the discretion whether to order an interim payment or not, the Court must take into consideration and seek to further the overriding objective. It will usually be appropriate and just to make an order for an interim payment where it is clear there will be some delay until the final disposal of the claim. Interim payment procedures are not suitable where factual issues are complicated or where difficult points of law arise. As an application for an order for an interim payment is an application for interim relief, the Court must not conduct a mini-trial or seek to finally determine matters which are properly left to the trial judge. Application for an interim payment refused on the facts.)

17.16 Powers of Court where it has made order for interim payment.

(1) Where a defendant has been ordered to make an interim payment, or has in fact voluntarily made an interim payment, the Court may make an order to adjust the interim payment.

(2) The Court may in particular —

(a) order a defendant to reimburse, either in whole or in part, another defendant who has made an interim payment;

(b) order all or part of the interim payment to be repaid; or

(c) vary or discharge the order for interim payment.

(3) The Court may make an order under this rule —

(a) on an application by a party made at any time; or

(b) without an application by a party if it makes the order when it disposes of the claim or any part of it.

Notes

Rule 17.16 allows for the adjustment of interim payment orders by variation or discharge. The decision to adjust the order is determined after considering various circumstances which would have occurred after the initial order was granted.

Cases

Rule 17.16 (2) (a) - Cristal Roberts and Another v Dr Samantha Bhagan CV 2010–01117 *(liability of multiple defendants) (means and resources of each defendant)*

Berry v Ashtead Plant Hire Co Ltd [2011] EWCA Civ 1304 *(liability of multiple defendants)*

17.17 Power of Court to order early trial, etc.

On hearing any application under this Part, the Court may exercise any of its case management powers under Parts 26 and 27 and may, in particular, give directions for an early trial of the claim or any part of the claim.

Notes

In keeping with the overriding objective, the court may under its case management powers order an early trial of the matter.

Cases

***Patrice Knowles v Island Hotel Company Limited (t/a Atlantis Paradise Island) 2022/CLE/gen/00382* (19 June 2023)** – Early trial ordered in a personal injury action following the refusal of an application for an additional interim payment, because the accident had taken place four years before the hearing of the application, the claimant had been in a precarious financial position ever since, the claimant's financial needs were continuing and increasing, the defendant was a well-resourced litigant that would be minimally prejudiced by an early trial and, given the characteristics of the case, expedition would not interfere with the sound administration of justice.

PART 18 – Counterclaims and Additional Claims

18.1 Purpose of this Part.

The purpose of this Part is to enable counterclaims and other additional claims to be managed in the most convenient and effective manner.

Note:

Most convenient and effective manner.

This rule calls on litigants and the Court to be equally mindful of the overriding objective and the application of the same to counterclaims and additional claims, as to the claims made by the claimant against the defendant.

18.2 Scope and interpretation.

(1) This Part applies to—

(a) a counterclaim by a defendant against the claimant or against the claimant and some other person;

(b) an additional claim by a defendant against any person, whether or not already a party, for contribution or indemnity or some other remedy; and

(c) where an additional claim has been made against a person who is not already a party, any additional claim made by that person against any other person, whether or not already a party.

(2) In these Rules —

(a) "additional claim" means any claim other than the claim by the claimant against the defendant or a claim for a set off contained in a defence; and

(b) unless the context requires otherwise, references to a claimant or defendant include a party bringing or defending an additional claim.

Notes:

Additional Claims This key emphasis of this rule is the identification of an "additional claim" as a collective term for any claim other than the claim made by the claimant against the defendant, regardless of whether the person against whom the claim is made is an existing party to the proceedings. The term includes but is not limited to a counterclaim brought by the defendant against the claimant or another party, and claims for a contribution or an indemnity. It is crucially important for litigants not only to identify and plead such claims properly but also to advance them in the extant proceedings as opposed to bringing separate proceedings which would require more of the Court's resources. The failure to bring an additional claim does not necessarily give rise to an argument for an abuse of process if the additional claim is subsequently pursued, especially if the relevant limitation period is unexpired. However, application of the overriding objective may provide grounds upon which a Court could refuse to exercise any discretionary powers in favor of a party who subsequently commences and pursues a claim which could have been commenced and advanced as an additional claim.

Equally as important is ensuring that an additional party is named in the proper capacity, and the title of the proceedings changed accordingly. Where there are multiple additional parties, the title to the proceedings must reflect the order in which they are joined to the proceedings, and the capacity in which they were

joined. Accordingly, additional parties should be identified as 'Third Party', 'Fourth Party', or 'Fifth Party' etc….

Practice Direction No 6 of 2023 provides guidance at paragraphs 5.1 to 5.11 on the title of proceedings where there are additional claims.

Practice Direction No. 6 of 2023 stipulates that where an application is made for permission to make an additional claim the application should be filed together with a copy of the proposed additional claim.

The application for permission to make an additional claim must be supported by evidence stating:

(a) the stage which the proceedings have reached;
(b) the nature of the additional claim to be made or details of the question or issue which needs to be decided;
(c) a summary of the facts on which the additional claim is based and
(d) the name and address of any proposed additional party.

Where delay has been a factor contributing to the need to apply for permission to make an additional claim an explanation of the delay should be given in evidence. Where possible, the applicant should provide a timetable of the proceedings to date. CPR 18.5(2) and 18.7(5) allow applications to be made to the Court without notice unless the Court directs otherwise.

Cases:
Wolseley UK Ltd v Fiat Chrysler Automobiles NV [2019] CAT 12 – Rejection of an argument by an additional party, joined to proceedings by the defendant seeking an indemnity or contribution, that declarations sought against the claimant (without leave from the Court) were a counterclaim.

18.3 Application of these Rules to additional claims.

(1) An additional claim shall be treated as if it were a claim for the purposes of these Rules, except as provided by this Part.
(2) Rule 8.12 time does not apply to an additional claim.
(3) Part 12 applies to a counterclaim but not to other additional claims.
(4) Part 14 applies to a counterclaim, but only —
(a) rules 14.1(1); and
(b) rule 14.4, apply to other additional claims.

Notes:

Treatment of an additional claim.
Each additional claim, and the parties thereto, are subject to the same rules and have the same rights and obligations applicable to a claim form. This is made clear in Practice Direction No. 6 of 2023, which provides that the CPR apply generally to additional claims as if they were claims. The party in the position of a claimant must attend to due service of the additional claim, and a party so served must enter a defence if they wish to respond to and be heard on any arguments opposing the claims; the provisions of the CPR relating to failure to respond to a claim will apply to the additional claim. The following are the only exceptions to the general proposition that each additional claim, and the parties thereto, are subject to the same rules and have the same rights and obligations applicable to a claim form:

(a) Additional claims are not subject to the six month period for service prescribed in rule 8.12

(b) The ordinary rules as to default judgments are only available in respect of counterclaims. For other additional claims, save for claims for a contribution or an indemnity, any failure to acknowledge or defend the same is deemed to be an admission of the claim (see r. 18.11).
(c) The entirety of the Part 14 rules on Judgment on admissions apply wholly to counterclaims but only to other additional claims in respect of making admissions, and seeking judgment on the same.

Practice Direction No. 6 of 2023 confirms that additional claims should be verified by a statement of truth.

18.4 Defendant's counterclaim against the claimant.

(1) A defendant may make a counterclaim against a claimant by filing particulars of the counterclaim in Form G11.
(2) A defendant may make a counterclaim against a claimant—
(a) without the Court's permission if he files it with his defence; or
(b) at any other time with the Court's permission.
(3) Part 9 does not apply to a claimant who wishes to defend a counterclaim

Notes:
Time for making a counterclaim The counterclaim against a claimant should normally be advanced together with the defence, at which point no permission from the Court is required. Permission is needed however, to make a counterclaim against a claimant at any other time, including via an amended defence. The express reference in this rule to filing with "*his*" defence, as opposed to "*a*" defence links the time for filing the counterclaim without permission to the original defence only (whether filed within the specified time period or any during the course of any extension) rather than any subsequently filed amended defence.

An application for permission to file a counterclaim should address matters such as the nature of the counterclaim, the reason for the delay in making the same, and the stage of the proceedings. Although the rules do not prescribe these, or any other factors for the Court's consideration, they would plainly be relevant to consideration of and/or furthering the overriding objective.

Form of counterclaim Practice Direction No. 6 of 2023 provides that where a defendant serves a counterclaim, the defence and counterclaim should normally form one document with the counterclaim following on from the defence.

Form of reply and defence to counterclaim Practice Direction No. 6 of 2023 provides that where a defendant serves a reply and defence to counterclaim, the reply and defence to counterclaim should normally form one document with the defence to counterclaim following on form the reply.

Cases:
International Trading Holding Co. Ltd v Med Trading Company Limited BVIHCM 2019/0061 – While permission for filing a counterclaim is not automatic, the same should normally be granted given the disparate time the claimant had to prepare its case prior to filing, versus the time permitted for the defendant to respond. Other relevant factors are permission being sought before the first case management conference, and furthering the overriding objective (paragraph 88).
Rahman v Sterling Credit Ltd [2001] 1 WLR 496– Permission to file a counterclaim could be given where there was an unenforced judgment for a possession order.

18.5 Counterclaim against a person other than the claimant.

(1) A defendant who wishes to counterclaim against a person other than the claimant must apply to the Court for an order that that person be added as an additional party.
(2) An application for an order under paragraph (1) may be made without notice unless the Court directs otherwise.
(3) Where the Court makes an order under paragraph (1), it will give directions as to the management of the case.

Notes
The application should include a copy of the proposed counterclaim, and attest to the following matters which would be material to the Court's exercise of its discretion:
(a) the name and address of the additional party;
(b) a summary of the nature of the claim and the underlying facts;
(c) the status of the action; and
(d) the reasons for any delay in making the counterclaim, addressing any reason(s) why the same was not filed together with the defence (as permitted by r. 18.7).

18.6 Defendant's additional claim for contribution or indemnity from another party.
(1) A defendant who has filed an acknowledgement of service or a defence may make an additional claim for contribution or indemnity against a person who is already a party to the proceedings by —
(a) filing a notice in Form G12 containing a statement of the nature and grounds of his additional claim; and
(b) serving the notice on that party.
(2) A defendant may file and serve a notice under this rule —
(a) without the court's permission, if he files and serves it —
(i) with his defence; or
(ii) if his additional claim for contribution or indemnity is against a party added to the claim later, within twenty-eight days after that party files his defence; or
(b) at any other time with the Court's permission.

Notes.
Potential abuses of action are limited by the operation of this rule, which prevents a defendant from seeking a contribution or indemnity from persons who are not parties to the action, without prior leave from the Court to commence such claims. Instead, the defendant is only able to pursue a contribution or indemnity without any leave from the Court where they do so against parties to the action, against whom claims have already been made in the action.

18.7 Procedure for making any other additional claim.
(1) This rule applies to any additional claim except —
(a) a counterclaim only against an existing party; and
(b) a claim for contribution or indemnity made in accordance with rule 18.6.
(2) An additional claim is made when Form G12 is filed in the court office.

(3) A defendant may make an additional claim —
(a) without the court's permission if the additional claim is issued before or at the same time as he files his defence;
(b) at any other time with the court's permission.
(4) Particulars of an additional claim must be contained in or served with the additional claim.
(5) An application for permission to make an additional claim may be made without notice, unless the Court directs otherwise.

Notes.
The purpose of this rule is to encourage parties to consider any additional claims comprehensively so that all necessary parties are joined, and particulars pleaded, from the earliest opportunity. Defendants in particular should avail themselves of the opportunity to make an additional claim without leave, obtaining extensions pursuant to r. 10.3 where necessary. However, this should not be used as an opportunity to advance frivolous and unmeritorious claims without the scrutiny of a leave application, as the Court can still strike out such claims under r.26.3.

18.8 Service of claim form.
(1) Where an additional claim may be made without the Court's permission, any claim form must— (a) in the case of a counterclaim against an existing party only, be served on every other party when a copy of the defence is served;
(b) in the case of any other additional claim, be served on the person against whom it is made within fourteen days after the date on which the additional claim is issued by the Court.
(2) Paragraph (1) does not apply to a claim for contribution or indemnity made in accordance with rule 18.6.
(3) Where the Court gives permission to make an additional claim it will at the same time give directions as to its service.

Notes.
See Parts 5, 6, and 7 as to the rules for the methods of service generally, and service in and out of the jurisdiction. In all instances where the permission of the Court is needed for making an additional claim, the applicant should seek any leave needed under Parts 5, 6, and 7 so that the Court can incorporate the same in the directions it makes on any permitted additional claims.

18.9 Matters relevant to question of whether an additional claim should be separate from the claim.
(1) This rule applies where the Court is considering whether to—
(a) permit an additional claim to be made;
(b) dismiss an additional claim; or
(c) require an additional claim to be dealt with separately from the claim by the claimant against the defendant.

(2) The matters to which the Court may have regard include —
(a) the connection between the additional claim and the claim made by the claimant against the defendant;
(b) whether the additional claimant is seeking substantially the same remedy which some other party is claiming from him; and
(c) whether the additional claimant wants the Court to decide any question connected with the subject matter of the proceedings —
(i) not only between existing parties but also between existing parties and a person not already a party; or
(ii) against an existing party not only in a capacity in which he is already a party but also in some further capacity.

Notes
These factors are self-explanatory as to the factors that the Court should consider in weighing whether to permit an additional claim. These should be construed together with the Court's duty to case manage all of the claims together as required by r. 18.13

18.10 Effect of service of an additional claim.
(1) A person on whom an additional claim is served becomes a party to the proceedings if he is not a party already.
(2) When an additional claim is served on an existing party for the purpose of requiring the Court to decide a question against that party in a further capacity, that party also becomes a party in the further capacity specified in the additional claim.

Notes
See the notes under r.18.2

18.11 Special provisions relating to default judgment on an additional claim other than a counterclaim or a contribution or indemnity notice.
(1) This rule applies if —
(a) the additional claim is not —
(i) a counterclaim; or
(ii) a claim by a defendant for contribution or indemnity against another defendant under rule 18.6; and
(b) the party against whom an additional claim is made fails to file an acknowledgement of service or defence in respect of the additional claim.
(2) The party against whom the additional claim is made —
(a) is deemed to admit the additional claim, and is bound by any judgment or decision in the proceedings in so far as it is relevant to any matter arising in the additional claim;

(b) subject to paragraph (3), if default judgment under Part 12 is given against the additional claimant, the additional claimant may obtain judgment in respect of the additional claim by filing a request in the relevant practice form.
(3) An additional claimant may not enter judgment under paragraph (2)(b) without the Court's permission if —
(a) he has not satisfied the default judgment which has been given against him; or
(b) he wishes to obtain judgment for any remedy other than a contribution or indemnity.
(4) An application for the Court's permission under paragraph (3) may be made without notice unless the Court directs otherwise.
(5) The Court may at any time set aside or vary a judgment entered under paragraph (2)(b).

Notes:
Scope This rule limits the instances in which an additional claimant, who is neither advancing a counterclaim nor a defendant seeking a contribution or indemnity from another defendant, can obtain a default judgment. Such a claimant can obtain a default judgement without the leave of the Court, provided that they have satisfied any default judgment against them, and the additional claim seeks only a contribution or indemnity. The former would provide a ground of prejudice that the additional claimant could cite in opposition to an application under r. 18.11(5) to set aside a judgment. The latter would similarly provide an obstacle for an party seeking to set aside a default judgement if they fail to offer any justification for their failure to acknowledge, or offer a defence to the additional claim.

18.12 Procedural steps on service of an additional claim form on a nonparty.
(1) Where an additional claim form is served on a person who is not already a party it must be accompanied by —
(a) a form for defending the claim;
(b) a form for admitting the claim;
(c) a form for acknowledging service; and
(d) a copy of —
(i) every statement of case which has already been served in the proceedings; and
(ii) such other documents as the Court may direct.
(2) A copy of the additional claim form must be served on every existing party.

18.13 Case management where a defence to an additional claim is filed.
(1) Where a defence is filed to an additional claim the Court must consider the future conduct of the proceedings and give appropriate directions.
(2) In giving directions under paragraph (1) the Court must ensure that, so far as practicable, the original claim and all additional claims are managed together

Notes:

In order for the Court to further the overriding objective, it must engage in adequate case management of the original claim and all other additional claims.

Practice Direction No. 6 provides that where the defendant to an additional claim files a defence, other than to a counterclaim, the Court will arrange a hearing to consider case management of the additional claim. This will normally be at the same time as a case management hearing for the original claim and any other additional claims. The Court will give notice of the hearing to each party likely to be affected by any order made at the hearing. At the hearing the Court may, before or after any judgment in the claim has been entered by the claimant against the defendant –

(a) treat the hearing as a summary judgment hearing;
(b) order that the additional claim be dismissed;
(c) give directions about the way any claim, question or issue set out in or arising from the additional claim should be dealt with;
(d) give directions as to the part, if any, the additional defendant will take at the trial of the claim; and
(e) give directions about the extent to which the additional defendant is to be bound by any judgment or decision to be made in the claim.

Part 19 – Addition and Substitution of Parties

19.1 Scope of this Part

This Part deals with the addition or substitution of parties after proceedings have been commenced.

General Note
Part 19 deals with the addition or substitution of parties to proceedings after litigation has commenced. Many of these matters were previously dealt with under Rule 20 of the Rules of the Supreme Court 1978. The Court has broad powers to add or substitute a party if it deems it desirable and it is necessary to resolve a matter in dispute or an issue between the parties. The rule should be read in the context of the overriding objective and the court's case management powers. Rationale for rule is as expressed in **Commonwealth Caribbean Civil Practice**[50] : "*The broad policy of the law is that where there are multiple claims there should be as few actions and as few parties as possible; the ends of justice will be better served and the court's resources more efficiently utilized if all the parties to a dispute are before the court so that its decision will bind all of them*".

19.2 Change of Parties
(1) The Court may add, substitute or remove a party —
(a) on application by a party; or
(b) without an application.
(2) A claimant may add a new defendant to proceedings without permission at any time before the case management conference by filing at the court office, an amended claim form and statement of claim.
(3) Parts 5, 7, 9, 10 and 12 apply to an amended claim form referred to in paragraph (2) as they do to a claim form.
(4) The Court may add a new party to proceedings without an application, if —
(a) it is desirable to add the new party so that the Court can resolve all the matters in dispute in the proceedings; or
(b) there is an issue involving the new party which is connected to the matters in dispute in the proceedings and it is desirable to add the new party so that the Court can resolve that issue.
(5) The Court may, by order remove any party if it considers that it is not desirable for that person to be a party to the proceedings.
(6) The Court may order a new party to be substituted for an existing one if —
(a) the Court can resolve the matters in dispute more effectively by substituting the new party for the existing party; or
(b) the existing party's interest or liability has passed to the new party.
(7) The Court may add, remove or substitute a party at the case management conference.

[50] Kodilinye, Gilbert, Kodilinye, Vanessa 4th Edition, pg 47

(8) The Court may not add a party, except by substitution, after the case management conference on the application of an existing party unless that party can satisfy the Court that the addition is necessary because of some change in circumstances which became known after the case management conference.

Note:
CPR 19.2 speaks generally to the power of the court to add new persons to proceedings prior to the expiration of the relevant limitation period. While parties to proceedings are still able to make applications to add, remove or substitute parties, the new rules expressly vest in the Court broad case management powers that allow it to act on its own motion to add, substitute or remove a party to proceedings where necessary to advance the efficient resolution of matters in dispute. The rule encourages parties as far as possible to make any applications to add new parties prior to the case management conference.
The Rule gives a Claimant a longer period to add a Defendant to proceedings without the need to seek leave of the court to do so. While previously a Plaintiff required leave to add a Defendant after a Writ had been served, a Claimant may now do so at any time prior to the Case Management Conference without need to seek leave of the Court. Amendment is made by filing the amended claim form and amended statement of claim at the Court.
The Court's power to add a party after case management is restricted by the rule.

Cases:
International Distillers and Vinters Ltd. v J.F. Hillebrand (UK) Ltd. QBD 25 Jan. 2000: (Principles expounded under the RSC regarding addition, removal or substitution of parties to claims equally applicable under the CPR)
United Film Distribution Limited v Chhabria [2001] EWCA Civ 416 (Power of Court under Rule 19.2 no narrower than under RSC; learning under the RSC useful in assessing when "desirable" to exercise the power)
Ragbir v Horn Beck Offshore Company (TT 2008 HC 270): (Party seeking to be joined after case management conference must satisfy Court addition is necessary due to change of circumstances which became known after the Case Management Conference)
In Re Pablo Star [2018] 1 WLR 738 (No inherent or general discretion to add a party to proceedings, power limited to circumstances where conditions of rule are satisfied)
Columbus Communications Trinidad Ltd v Telecommunications Authority of Trinidad and Tobago TT 2020 HC 102
Molavi v Hibbert & Ors [2020] EWHC 121 (Ch) (Limbs of test at CPR Rule 19.2(3) are independent and different. Even where one or both criteria satisfied, the court must still consider and exercise an overall discretion having regard to the circumstances of the case)

19.3 Procedure for adding, and substituting or removing parties.

(1) An application for permission to add, substitute or remove a party may be made by —

(a) an existing party; or

(b) a person who wishes to become a party.

(2) An application for an order under rule 19.2(6) may be made without notice but must be supported by evidence on affidavit.

(3) A person may not be added or substituted as a claimant unless that person's written consent is filed with the Court office.

(4) An order for the addition, substitution or removal of a party must be served on —

(a) all parties to the proceedings;

(b) any party added or substituted; and

(c) any other person affected by the order.

(5) If the Court makes an order for the removal, addition or substitution of a party, it must consider whether to give consequential directions about —

(a) filing and serving the claim form and any statements of case on any new defendant;

(b) serving relevant documents on the new party; and

(c) the management of the proceedings,

and subject to such directions rule 19.2(2) applies.

(6) These Rules apply to a new defendant as they apply to any other defendant where —

(a) the Court makes an order for the addition or substitution of a new defendant; and

(b) the claim form is served on the new defendant.

Note:

While the Court has the power to add, remove or substitute a party at its own instance, a party to proceedings that wishes to add, remove or substitute a party must secure leave of the Court to do so. An application for leave to substitute a party for another under Rule 19.3 may be made ex-parte but must be supported by evidence. Where a party seeks to add or substitute another as a claimant, the prospective claimant's written consent must be secured filed.

Where the Court makes an order to add, remove or substitute a new party, it should consider any necessary consequential case management directions.

Cases:

PNPF Trust Co. Ltd (claiming as trustee of the Pilot's National Pension Fund) v Taylor and others [2009]EWHC 169.3 (Ch) : (Power to add parties to be exercised in the interest of the Overriding Objective; whether exercise of powers under rule is desirable involves a value judgment that depends on application of overriding objective)

London Borough of Hounslow v Cumar [2012] EWCA Civ 1426 : (Court's power to add or substitute a party is wide)

Auto-Guadeloupe Investissement S.A. v Alvarez, Lee and the Attorney General CV 199 of 2013 BB 2013 HC 36 : (Two-stage test for exercise of power to add party to be applied)

Moe v Moe BB 2016 HC 16: (Application to add new defendant prior to case management conference may be made ex-parte)

In Re Pablo Star Ltd [2017] EWCA Civ 1768: (In applying the desirability test, two lodestars are the policy objective of enabling parties to be heard if their rights may be affected by a decision in the case and the overriding objective in CPR Part 1.)

19.4 Special provisions on adding, etc., parties after limitation period.

(1) The Court may add or substitute a party after the end of a relevant limitation period only if the —

(a) addition or substitution is necessary; and

(b) relevant limitation period was current when the proceedings were started.

(2) For the purposes of paragraph (1), the addition or substitution of a party is necessary only if the Court is satisfied that —

(a) the claim cannot properly be carried on by or against an existing party unless the new party is added or substituted as claimant or defendant;

(b) the interest or liability of the former party has passed to the new party; or

(c) the new party is to be substituted for a party who was named in the claim form in mistake for the new party.”.

Note:
Rule 19.4 prevents a claim from being defeated by virtue of a limitation provision but the Court can only add or substitute a party after the expiry of a relevant limitation period if the claim was brought within the limitation period and it is necessary to add or substitute the party. As to when addition or substitution is “necessary” see 19.4(3).

Cases:
Adelson v Associated Newspapers Ltd [2007] EWCA Civ 701: (Addition or substitution after relevant period of limitation available where mistake is as to the name rather than the identity of the party. In assessing whether it should exercise this power after the relevant period of limitation has expired, the Court can consider the overriding objective.)
Elita Flickinger v David Preble et al, CL F 013 of 1997, Supreme Court, Jamaica unreported (Criterion of necessary set out at Rule 19.4(3) to be read disjunctively; type of mistake relevant to determining whether Rule 19.4(3) applies, intention of party making mistake to be considered)

PART 20 – CHANGES TO STATEMENT OF CASE

20.1 Changes to statement of case.

(1) A statement of case may be amended once, without the Court's permission, at any time prior to the date fixed by the Court for the first case management conference.

(2) The Court may give permission to amend a statement of case at a case management conference or at any time on an application to the Court.

(3) When considering an application to amend a statement of case pursuant to paragraph (2), the factors to which the Court must have regard are —

(a) how promptly the applicant has applied to the Court after becoming aware that the change was one which he wished to make;

(b) the prejudice to the applicant if the application was refused;

(c) the prejudice to the other parties if the change were permitted;

(d) whether any prejudice to any other party can be compensated by the payment of costs and or interest;

(e) whether the trial date or any likely trial date can still be met if the application is granted; and

(f) the administration of justice.

(4) A statement of case may not be amended without permission under this rule if the change is one to which any of the following applies —

(a) rule 19.4; or

(b) rule 20.2.

(5) An amended statement of case must include a statement of truth under rule 3.8.

(6) The Chief Justice may, by practice direction, set out additional factors to which the Court must have regard when considering an application under this rule.54

Notes:
A statement of case may be amended once, without permission of the Court prior to the first case management conference, so long as the amendment does not involve adding or substituting parties or adding or substituting a new claim after end of the relevant limitation period. Such amendments and/or amendments after the first case management may only be made with permission of the Court.
CPR 19.4. specifies the circumstances in which the Court may allow a party to be added or substituted after the relevant limitation period.
The factors to which the Court must have regard when hearing an application to amend under CPR 20.1 are derived from a Practice Direction made pursuant to 4.21 of the EC CPR 2000, which supplements Part 20 of the EC CPR.
Case law emanating from the superior courts of the Eastern Caribbean are therefore instructive.

Practice Direction No. 7 of 2023 states that applications to amend a statement of case may be dealt with at a hearing or, if CPR 11.14 applies, without a hearing. The applicant should file (a) the application and affidavit in support together with a copy of the statement of case with the proposed changes. A party applying for an amendment will usually be responsible for the costs of and arising from the amendment.

Practice Direction No. 7 of 2023 stipulates that where permission to change has been given, the applicant should within 14 days of the date of the order, or within such other period as the Court may direct, file with the Court the amended statement of case. A copy of the amended statement of case and order should be served on every party to the proceedings unless the Court orders otherwise.

Practice Direction No. 7 prescribes how the amended statement of case should be endorsed and how amendments should be shown on the amended statement of case. It also makes clear that if the substance of the statement of case is changed by reason of the amendment, the statement of case should be re-verified by a statement of truth.

Cases:

20.1(3) Applications to amend a statement of case

In *Mark Brantley v Dwight C. Cozier [2015] ECarSC 195* the full panel of the Eastern Caribbean Court of Appeal held that in exercising its discretion with regard to an application to amend a statement of case, "the Court should be guided by the general principle that amendments should be made where they are necessary to ensure that the real question in controversy between the parties is determined, provided that such amendments can be made without causing injustice to the other party and can be compensated in costs. The amendment should be allowed regardless of how negligent or careless the omission from the statement of case may have been, and no matter how late the proposed amendment is."

In MS Amlin Corporate Member Limited v Buckeye Bahamas Hub Limited 2020/COM/adm/00016 (4 December 2023), the Court held that, on an amendment of statement of case application, the Court must bear in mind the following factors: (a) how promptly the applicant has applied to the Court after becoming aware that the change was one which he wished to make; (b) the prejudice to the applicant if the application was refused; (c) the prejudice to the other parties if the change were permitted; (d) whether any prejudice to any other party can be compensated by the payment of costs and or interest;(e) whether the trial date or any likely trial date can still be met if the application is granted; and (f) the administration of justice. Amendments based on information disclosed in discovery or expert opinion obtained in the course of preparation for trial should be made as promptly as the circumstances reasonably permit. Where an amendment will defeat a limitation defence the Court will take into account that as part of the prejudice to the defendant; limitation periods should be adhered to and only controverted where justice demands it.

20.2 Changes to statements of case after end of relevant limitation period.

(1) This rule applies to a change in a statement of case after the end of a relevant limitation period.

(2) The Court may allow an amendment the effect of which will be to add or substitute a new claim but only if the new claim arises out of the same or substantially the same facts as a claim in respect of which the party wishing to change the statement of case has already claimed a remedy in the proceedings.

(3) The Court may allow an amendment to correct a mistake as to the name of a party but only where the mistake was —

 (a) genuine; and

 (b) not one which would in all the circumstances cause reasonable doubt as to the identity of the party in question.

(4) The Court may allow an amendment to alter the capacity in which a party claims.

Notes:
The language of this rule is almost identical to EC CPR 20.3. Further, it is substantively similar to the English CPR 17.4 and case law interpreting those rules may be helpful.

Cases:

20.2(2) Amendments to add or substitute a new claim only where the new claim arises out of the same or substantially the same facts

In *Denise Stevens v Luxury Hotels International Management [2014] ECarSC 277* the Eastern Caribbean Supreme Court in St Christopher and Nevis determined that the addition or substitution of a new loss ~~is~~ does not necessarily amount to the addition or substitution of a new cause of action. The Court held that it was permissible to add or substitute further losses where they stem from an original breach of duty which has caused some loss.

A claim for misrepresentation may be held not to arise out of the same facts as a claim for negligence: *Paragon Finance plc v DB Thakerar & Co (a firm), also Paragon Finance plc v Thimbleby & Co (a firm) [1999] 1 All ER 400, CA*.

An amendment for which permission might not be given was one in respect of which the following three propositions applied: (1) the amendment was sought to be made outside the limitation period; (2) the amendment involved the addition or substitution of a new cause of action and; (3) the new cause of action did not arise out of the same facts or substantially the same facts as a cause of action already pleaded: *Alliance and Leicester plc v Pellys (a firm) 9 July 1999, BLD 130799833, [1999] All ER (D) 765 (Jul), Ch D*.

In *Phelps v Spon-Smith & Co (a firm) [1999] 46 LS Gaz R 38* the claimant was allowed to amend the writ (issued and served under the old Rules) to include an additional cause of action, which had been included in the statement of claim; the statement of claim had been served within the time limit but the application to amend the writ was made outside. An amendment to allege a bare trust as well as a constructive trust was held not to be a "new claim" for the purposes of the Rule and an amendment to this effect was therefore permitted after the expiration of the limitation period: *Abbey National plc v John Perry & Co* [2001] EWCA Civ 1630, [2001] All ER (D) 348 (Oct).

In *Smith v Henniker-Major* [2002] EWCA Civ 762 Walker LJ said: "[I]n identifying a new cause of action the bare minimum of essential facts abstracted from the original pleading is to be compared with the minimum as it would be constituted under the amended pleading."

In MS Amlin Corporate Member Limited v Buckeye Bahamas Hub Limited 2020/COM/adm/00016 (4 December 2023), the Court held that (i) amendments regarding the design, construction and/or operation of the defendant's fuel tanks would be a novel pleading in a statement of claim alleging breach of a duty of care to ensure that the fuel tanks were fit for their intended purpose and properly maintained but (ii) that amendments to refer to additional fuel tanks owned by the defendant as causing the damage the claimant sustained were substantially based on the same facts and did not create a new claim.

Notes:

20.2(3) Amendments to correct a mistake as to the name of a party. If there is a genuine mistake as to the name of the party and there is no reasonable doubt as to the identity of the party intended to be sued then the Court will — applying the overriding objective — give permission to amend so as to correct the name of the party under CPR 20.3 and not under CPR 19.

Cases:

See *Gregson v Channel Four Television Corpn [2000] All ER (D) 956, (2000) Times, 11 August, CA)* where the claimant had mistakenly issued defamation proceedings against "Channel Four Television Co Ltd" (a dormant company) instead of against "Channel Four Television Corporation".

In *Ramsey v Leonard Curtis (a firm) [2001] BPIR 389* an amendment to correct the name of the defendants from that of the firm to that of two partners who had been appointed as administrators was rejected on the ground that the error was not a genuine mistake.

See also *Morgan Est (Scotland) Ltd v Hanson Concrete Products Ltd [2005] EWCA Civ 134, [2005] 3 All ER 135, [2005] All ER (D) 251 (Feb)*.

20.3 Filing an amended statement of case.

A party who amends his statement of case must file in the court office the original amended statement of case and one copy of the amended statement of case and, after filing, serve a copy of it on every other party.

20.4 Amendments to statements of case and time for service.

(1) Where an amended statement of claim is served on a defendant —

- (a) the defendant, if he has already served a defence on the claimant, may file and serve an amended defence;
- (b) the period for filing and serving an amended defence is the period of twenty-eight days after the date of service of the amended statement of claim;
- (c) if the defendant has not already served a defence on the claimant, the period for filing and serving a defence is the period of twenty-eight days after the date of service of the amended statement of claim.

(2) Where an amended defence is served on the claimant by a defendant —

- (a) the claimant, if he has already served a reply on the defendant, may file and serve an amended reply; and
- (b) the period for filing and serving an amended reply is the period of fourteen days after the date of service of the amended defence;
- (c) if the claimant has not already served a reply on the defendant, the period for filing and serving a reply is the period of twenty-eight days after the date of service of the amended defence.

(3) In paragraphs (1) and (2), reference to a defence and a reply include references to a counterclaim and a defence to a counterclaim respectively.

(4) Where a party has filed a statement of case in answer to another statement of case which subsequently amended and served on him or her under this rule, then, if that party does not amend his or her statement of case in accordance with this rule, he shall be taken to rely on it in answer to the amended statement of case.

(5) This rule shall apply *mutatis mutandis* to an amended ancillary claim.

PART 21 – Representative Parties

General Note:
This Rule generally concerns proceedings where multiple persons have the same or similar interests. The overarching purpose is to avoid the multiplicity of actions between persons who have the same or similar interest in a right and those who have a corresponding interest in contesting the right. The Court's practice is to appoint individuals from each group to represent the interests of the wider body with a view to dealing with cases expeditiously, fairly and without unnecessary expense. In the exercise of powers under the rule, the Court's overriding objective is to be considered and the rule should be viewed as a "flexible tool of convenience in the administration of justice, and one that may be applied to meet the demands of modern life, as occasion required.[51]"

21.1 Representative claimants and defendants – General

(1) This rule applies to any proceedings, other than proceedings falling within rule 21.4, in which five or more persons have the same or a similar interest in the proceedings.

(2) The Court may appoint –
(a) a body having sufficient interest in the proceedings; or
(b) one or more of those persons;
to represent all or some of the persons with the same or similar interest.

(3) A representative under this rule may be either a claimant or a defendant.

Note:
Unlike provisions under RSC O. 15 r.13, CPR 21 requires a prospective litigant seeking to begin or conduct representative proceedings to secure an order from the Court.
The meaning of the "same or similar interest" condition set out in Rule 21.1 should be purposively construed to give effect to the overriding objective to make representative proceedings available where they would save costs and allow a matter to be dealt with expeditiously.
The editors of the Civil Court Practice 2004 comment "To enable a claim to be constituted as a representative claim it must be shown that all the members of the class on whose behalf the claimant sues had a common interest in a common subject matter, that all had a common grievance and that the relief was in its nature beneficial to them all". – Civil Court Practice (The Green Book)[52]

Cases:
Vera Bennett (Executor of the Estate of Valda Ferrest Bennett) et al v Vincent Pearson (Executor of the Estate of Agnes May Pearson) et al JM 2004 SC 102 – (Rule in 21.1(1) is permissive not prescriptive)
Emerald Supplies Ltd v British Airways plc [2010] EWCA Civ 1284, [2011] 2 WLR 203– Fundamental requirement of representative proceedings is that those represented have the same interest and that at all stages of the proceedings it is possible to say of any person whether they qualify for membership in the represented class of persons by virtue of having the same interest.
Lloyd v Google LLC [2021] UKSC 50: (Requiring a representative to have the same interest in the entity/persons he seeks to represent is to ensure the representative can be relied on to conduct the litigation in a way that will protect and promote the interests of the members of the represented class)

[51] Per Lord Leggatt, Lloyd v Google LLC [2021] UKSC 50, para. 68
[52] Thompson, P.K.J.,Civil Court Practice 2004

Jalla v Shell International Trading and Shipping Co. Ltd (2021) EWCA Civ 1389: (Court will adopt a common-sense approach to assessment of "same interest"; summary of requirement for representative actions per Coulson LJ)
La Brea Environs Protectors v The Petroleum Company of Trinidad and Tobago (Petrotrin) and another [2022] UKPC 22: (Purposive approach to be adopted in considering the elements of the rule and the meaning and scope of the word "same or similar interest" and "a body having sufficient interest")
See also Millharbour Management Ltd. and ors v Weston Homes Ltd and anor [2011] EWHC 661 (TCC ; Dexter Simon v Timothy Mohammed TT 2020 HC 271 (High Court, Trinidad & Tobago)

21.2 Appointment of representative claimant or defendant – Procedure

(1) An application for an order appointing a representative party may be made at any time, including a time before proceedings have been started.
(2) An application for such an order may be made by any –
  (a) party;
  (b) person or body who wishes to be appointed as a representative party; or
  (c) person who is likely to be a party to proceedings.
(3) An application for such an order must –
  (a) be supported by affidavit evidence; and
  (b) identify every person to be represented, either
    (i) individually; or
    (ii) by description, if it is not practicable to identify a person individually.
(4) An application to appoint a representative defendant must be on notice to the claimant.
(5) An application to appoint a representative claimant may be made without notice.
(6) The Court may direct that notice of an application be given to such other persons as it thinks fit.
(7) If the Court directs that a person not already a party is to be a representative defendant, it must make an order adding that person as a defendant.

Note:
An application to appoint a representative party may be made before or after the commencement of proceedings and may be made by an existing party to the proceedings, any person who is likely to be a party to proceedings or by any person or body that wants to be appointed as a representative party. Applications for appointment must be supported by evidence.
While an application must be to appoint a representative claimant may be made without notice to the other parties, an existing claimant must be notified of an application to appoint a representative defendant. No consent needed from represented class. The Court continues to exercise a discretion even where the requirements of appointment under the Rule are met and will consider the nature and adequacy of the class definition and whether it is just and convenient to have the claim proceed on a representative basis.
It is no bar to representative proceedings that each person has a separate cause of action or a separate claim for damages.

Case:
IBM United Kingdom Pensions Trust Limited [2012] EWHC 125 : (Timing of application for appointment as representative; not necessary for representation order to be made at an early stage; may be made near end of proceedings provided the Court is satisfied the interests of the class have been fully aired)

21.3 Consequence of order appointing representative party

(1) If there is a representative claimant or defendant, an order of the Court binds everyone whom that party represents.
(2) It may not however be enforced against a person not a party to the proceedings unless the person wishing to enforce it obtains permission from the Court.
(3) An application for permission must be supported by evidence on affidavit and must be served on the person against whom it is wished to enforce the judgment.

Note:
Where a representative party has been appointed, any Court orders made in the proceedings bind everyone the representative party represents. However, leave of the Court is necessary to enforce an order made in proceedings against a person who is not a party to the proceedings.

Cases:
Maria Agard v Mia Mottley et al BB 2017 HC 32, unreported (Conjoint effect of CPR 21.1(1), (2) and (3); effect of failure to secure representative order)
Daniel et al v Maharaj et al TT 2014 HC 375 (Having regard to the overriding objective at Rule 1 of the CPR, whether failure to apply for representative order is a fundamental flaw that vitiates the entire claim is dependent on circumstances of the case)

21.4 Representation of persons who cannot be ascertained, etc., in proceedings about estates, trusts and construction of written instruments.

(1) This rule applies only to proceedings about –
- (a) the construction of a written instrument;
- (b)the estate of someone who is deceased; or
- (c) property subject to a trust.

(2) The Court may appoint one or more persons, whether or not a party, to represent any person or class of persons, including an unborn person, who is or may be interested in or affected by the proceedings, whether presently or for any further, contingent or unascertained interest, where –
- (a) the person, or the class or some member of it, cannot be ascertained or cannot be readily ascertained, including a person who may be ascertained only in the future;
- (b) the person, or the class or some member of it, though ascertained cannot be found; or
- (c) it is expedient to do so for any other reason.

(3) An application for an order to appoint a representative party under this rule may be made by any –
- (a) party; or
- (b) person who wishes to be appointed as a representative party.

(4) A representative appointed under this rule may be either a claimant or defendant.

(5) A decision of the Court binds everyone whom a representative claimant or representative defendant represents.

Note:
Rule carves out a separate procedure where proceedings concern an estate, trust or construction of a written instrument and there is no requirement in those cases that the representative class have 5 or more persons. The Court may appoint a representative to act on behalf of interested persons who either cannot be ascertained, cannot be readily ascertained or cannot be found. An application may be made by an existing party to the proceedings or a person that wishes to be appointed the representative.

Cases:
Mohan Jogie v Angela Sealy [2022] UKPC 32 (Trinidad & Tobago) (Rule is concerned with representative proceedings and not intended to usurp established role of executor and administrators and the way they are appointed.)
Vesta Dillon v RBC Financial (Caribbean) Ltd TT 2019 HC 37 (Rule 21.4 wider than rule 21.1; no requirement that persons represented must have same or similar interest)

21.5 Compromise in proceedings to which rule 21.4 applies

(1) If –
(a) a compromise is proposed in proceedings to which rule 21.4 applies;
(b) some of the persons who are interested in, or may be affected by, the compromise are not parties to the proceedings;
(c) those persons referred to in paragraph (b) are represented by a representative appointed under rule 21.4 when the Court considers the proposed compromise; and
(d) the Court is satisfied that the compromise will be for the benefit of the absent persons;
the Court may approve the compromise.
(2) The persons for whose benefit the Court may approve a compromise may be unborn or unascertained.
(3) The Court's order approving the compromise binds the absent persons unless it has been obtained by fraud or non-disclosure of material facts.

Note:
The rules provide that a compromise can be entered into where there are representative parties provided the Court is satisfied the compromise is for the benefit of the represented parties. The order approving the compromise is binding on the absent parties unless obtained fraudulently or by failure to disclose material facts.

21.6 Representation of beneficiary by trustees

(1) A claim may be made by or against a person in that person's capacity as a trustee, executor or administrator.
(2) If a claim is so made, there is no need for a beneficiary also to be a party.
(3) The Court may direct that notice of proceedings be given to a beneficiary.

(4) A decision of the Court in such proceedings binds a beneficiary unless the Court otherwise orders.
(5) The only grounds for an order that a decision is not binding on a beneficiary is that the trustee, executor or administrator –

- (a) could not or did not in fact represent the interest of the beneficiary; or
- (b) has acted fraudulently.

Note:
Where proceedings are brought against a trustee, executor or administrator in his capacity as representative for the beneficiaries, the beneficiaries do not need to be made parties to proceedings. Orders made will be binding on the beneficiaries unless the Court is satisfied that the trustee, executor or administrator did not represent the interest of the beneficiary, whether willful or not, or has acted fraudulently.

21.7 Proceedings against estate of a deceased person

(1) If in any proceedings it appears that a deceased person was interested in the proceedings, but the deceased person has no personal representatives, the Court may make an order appointing someone to represent the deceased person's estate for the purpose of the proceedings.
(2) A person may be appointed as a representative if that person –
  (a) can fairly and competently conduct proceedings on behalf of the estate of the dead person; and
  (b) has no interest adverse to that of the estate of the deceased person.
(3) The Court may make such an order on or without an application.
(4) Until the Court has appointed someone to represent the deceased person's estate, the claimant may take no step in the proceedings apart from applying for an order to have a representative appointed under this rule.
(5) A decision in proceedings in which the Court has appointed a representative under this rule binds the estate to the same extent as if the person appointed were an executor or administrator of the deceased person's estate.

Note:
Rule empowers the Court to make an order appointing a person to represent a deceased's estate in circumstances where the deceased has no personal representative. While an application for such an order may be made by a party, the Rule also provides that the Court can make on its own motion. This express power allows the Court to advance the proceedings itself should it deem that appropriate. Where appointing a representative, the Court must be satisfied the representative has no interests that are adverse to the Estate, that s/he is competent and can act fairly.
Until a representative of the Estate is appointed, the only further step the claimant can take in the proceedings is applying to have a representative appointed.

Once a representative has been appointed under this rule, a decision of the Court binds the Estate to the same extent it would had the representative been an executor or administrator of the Estate.

Cases:
Sharon Mott (Administrator of the Estate of Kishauna Ann-Marie Clarke, Deceased, Intestate) v University of Technology et al [2022] JMSC Civ 17 (Unless Order made against a deceased claimant of no effect in the absence of an order appointing representative of Estate)
Marjorie Ilma Knox v Eric Lain Deane BB 2019 HC 5 (Whether grant of probate or letters of administration necessary to be appointed under rule; existence of procedural discretion under CPR Rule 1 to dispense with need for formal grant of letters of administration or probate as a precursor to be appointed as representative for claimant's estate.)
Evon Bennett v Raymond Ramdatt [2022] JMCA Civ 16 (Rule 21.7 cannot be utilized to circumvent the requirement for a grant of letters of administration before instituting proceedings)

21.8 Power of Court to give directions to enable proceedings to be carried on after a party's death

(1) If a party to proceedings dies, the Court may give directions to enable the proceedings to be carried on.
(2) An order under this rule may be made on or without an application.

Note:
Rule vests in the Court the power to give directions to permit proceedings to be carried on if a party has died. The Court can be moved to exercise this overriding power on an application or on its own motion.

21.9 Power of Court to strike out a claim after death of claimant.

(1) If a claimant dies and the claimant's personal representatives do not apply for an order under rule 19.3 to be substituted as claimants, the defendant may apply for the claim to be struck out.
(2) Notice of the application must be given to the personal representatives of the claimant, if any, and such other persons as the Court directs.
(3) The general rule is that if the Court makes an order on an application under this rule it will be that unless the personal representatives or some other persons on behalf of the estate apply to be substituted under rule 19.3 or for directions under rule 21.8 by a specified date, the claim is to be struck out.
(4) The Court may give directions under rule 21.9 at the hearing of an application under this rule.

Note:
Rule provides that where a claimant dies and his/her personal representatives do not apply to be substituted as claimant, the Defendant can apply to have the claim struck out. General rule is that the Court will make an unless under directing the matter be struck out unless a party on behalf of the estate applies to be substituted as claimant by a specified date. Notice of the Defendant's application must be given to the claimant's personal representative and such other person as the Court directs.

Part 22 – Miscellaneous Rules About Parties

General note: This Part speaks generally to claims by or against partners, persons carrying on business in another name and bodies corporate.

Part 22.1 Partners

(1) Persons claiming to be entitled, or alleged to be liable, as partners may sue or be sued in the firm name if –
  (a) The firm name is the name of the firm in which they were partners; and
  (b) They carried on business in that name within the jurisdiction when the right to claim arose.
(2) If partners sue or are sued in the firm's name, they must, if any other party so demands in writing, immediately –
  (a) Deliver to that party; and
  (b) File,
  a statement of the names and residential addresses of all the persons who were partners in the firm when the right to claim arose.
(3) If the partners do not comply, the Court on application by any other party may order them to provide such a statement and to certify it to the Court.
(4) An application under paragraph (3) may be made without notice.
(5) The party making the application must –
  (a) State the date of the demand;
  (b) Certify that the party has made a demand in writing; and
  (c) Certify that the other party has not complied.
(6) If the partners do not comply within twenty-one days after service of the order any claim or defence brought by them is deemed to be struck out.
(7) A duly authorized employee of a partnership or firm may –
  (a) Conduct proceedings on behalf of the partnership or firm; or
  (b) represent it in Court with the Court's permission.

(8) Permission under paragraph (7)(b) is to be given or refused at a case management conference.

Note:
Part 22.1 addresses matters previously covered by RSC Order 71 and provides procedural rules in relation to claims by or against partners. Parties alleged to be liable as partners may sue or be sued in the name of the partnership firm provided they were carrying on business within the jurisdiction using the firm's name at the time the claim arose. Partners are required to disclose the names and residential addresses of partners in the firm at the time the claim arose. Where they fail to do so even after a written demand for that information by another party, the information seeker can apply to the Court for an order compelling the production of the information sought. Such an application may be made ex-parte. Where the Court makes an order and the partners do not provide the information within 21 days of service, any claim or defence by the defaulting party will be deemed struck out without need for further approach to the Court.

An authorized employee of a partnership or firm can, with leave of the Court, conduct proceedings on the partnership's or firm's behalf. The application for leave to do so should be made at the Case Management Conference.

Part 22.2 Person carrying on business in another name

(1) A claim may be made by or against a person –
  (a) Carrying on business within the jurisdiction; or
  (b) Who was carrying on business within the jurisdiction when the right to claim arose –
    (i) In that person's own name;
    (ii) In that person's own name, followed by the words "trading as X.Y.";
    (iii) As "X.Y." followed by the words "(a trading name)"; or
    (iv) As "X.Y." followed by the words "a firm".

(2) If a claim is made by or against a person in his or her business name, the Rules about claims by or against partners apply as if that person had been a partner in a firm when the right to claim arose and the business name were the firm's name.

Note:
Part 22.2 governs the manner in which legal proceedings by or against a person carrying on business in their own or another name should be styled. Rule captures persons using a business name.
This rule applies to claims brought against persons who are still carrying on business in the jurisdiction or who at the time the claim crystallised were carrying on business in the jurisdiction either in their own name or using the particular variations of name as set out in the Rule.

Case:
Deidre Pigott Edgecombe et al v Antigua Flight Training Centre AG 2015 CA 4 (Tenor of CPR 22.1 and 22.2 suggest their intent and purpose is to ensure a claim brought in a business name only does not fail *ab initio*)

22.3 Bodies Corporate

(1) Except as expressly provided by or under any enactment, a body corporate may not begin or carry on any court proceedings otherwise than by an attorney unless the Court permits it to be represented by a duly authorized director or other officer.
(2) Permission for a duly authorized director or other officer to represent the body corporate at the trial should wherever practicable be sought at a case management conference or pre-trial review.
(3) In considering whether to give permission the Court must take into account all the circumstances including the complexity of the case.
(4) In paragraphs (1) and (2) "duly authorized" means authorized by the body corporate to conduct the proceedings on its behalf.

Note:
A body corporate must engage an attorney-at-law to begin or conduct court proceedings on its behalf unless it secures leave of the Court to be represented by an authorized Director or Officer. A company that wishes

to have an authorized Director or other Officer conduct its proceedings at trial should seek the Court's permission at the Case Management Conference or the Pre-trial Review.

In determining whether the case is one appropriate for the exercise of its power under this rule, the Court should take into account all the circumstances including the complexity of the case.

Part 23 – Minors and Patients

23.1 Scope of this part

(1) This Part –
  (a) contains special provisions which apply in proceedings involving minors and patients;
  And
  (b) sets out how a person becomes a litigation guardian of a minor or patient.

(2) In this Part, “Act” means the Mental Health Act.

Note:
The provisions under Part 23 are for the protection of a persons under a disability that are parties to litigation. The Rule applies to matters where the claimant or defendant is a minor, that is, under the age of 18 and/or a “patient” as defined by the Mental Health Act, Chapter 230, Statute Laws of The Commonwealth of The Bahamas. The Rule treats with many of the matters previously addressed in RSC Order 70 and speaks to the appointment & removal of a litigation guardian, the manner in which documents are served on persons under a disability, the requirements for entering compromises on behalf of persons under disability, and the handling of money recovered for their benefit.

23.2 Requirement of litigation guardian in proceedings by or against minors or patients.

(1) The general rule is that a minor or patient must have a litigation guardian to conduct proceedings on his or her behalf.
(2) The Court may, on the application of a minor, make an order permitting the minor to conduct proceedings without a litigation guardian.
(3) An application for an order under paragraph (2) –
  (a) May be made by the minor;
  (b) If the minor has a litigation guardian, must be on notice to that litigation guardian; and
  (c) If there is no litigation guardian, may be made without notice.
(4) The Court may appoint a person to be the minor’s litigation guardian if –
  (a) The Court has made an order under paragraph (2); and
  (b) It subsequently appears to the Court that it is desirable for a litigation guardian to conduct the proceeding on behalf of the minor.
(5) A litigation guardian must act by an attorney unless the Court otherwise orders.
(6) The litigation guardian must sign any statement of truth under rule 3.8 on behalf of the minor or patient.

Note:
The CPR replaces the previously used nomenclature of “*guardian ad litem*” and “*next friend*” for persons acting on behalf of a party under disability and replaces them with the term “*litigation guardian*”. The general

position is that minor or patient must have a litigation guardian to conduct proceedings on his behalf. However a minor may apply to the Court for leave to conduct his own proceedings or to remove a previously appointed litigation guardian. Where the Court makes such an order, it can subsequently appoint a litigation guardian if it appears desirable.

Patients have no such power. A patient must have a litigation guardian to conduct proceedings on his behalf.

A litigation guardian must act by attorney unless the Court orders otherwise and will be obliged to sign any Certificate of Truth that may be required under Rule 3.8 on behalf of the Minor or Patient.

There is no definition of "patient" in the Rule as currently drafted. In the absence of a definition, reference will be had to the existing Mental Health Act, Ch. 230. "Patient" is not defined in s. 2 of the recently tabled Mental Health Bill, 2022 and care should be taken to ensure a definition is included.

23.3 Stage of proceedings at which litigation guardian becomes necessary

(1) A minor or patient must have a litigation guardian in order to issue a claim except where the Court has made an order under rule 23.2(2).

(2) A person may not –

(a) Make any application against a minor or patient before proceedings have started; or

(b) Take any step in proceedings except –

(i) Applying for the appointment of a litigation guardian under rule 23.8; or

(ii) Issuing and serving a claim form against a minor or patient;

until the minor or patient has a litigation guardian.

(3) If a person other than a minor becomes a patient during proceedings, any party may not take any step in the proceedings apart from applying to the Court for the appointment of a litigation guardian until patient has a litigation guardian.

(4) Any step taken before a minor or patient has a litigation guardian, other than an application under rule 23.2(2) or (b) paragraph (2)(b), is of no effect unless the Court otherwise orders.

Note:

Unless the Court so orders, a person under disability cannot commence proceedings unless s/he has a litigation guardian. No applications may be made against a person under disability before the start of proceedings. Where a person under disability is a party to proceedings, prior to the appointment of a litigation guardian, the only steps that can be taken in the proceedings are an application to appoint a litigation guardian under rule 23.8 or the issue and service of a claim form on the person under disability.

If an adult becomes a patient while proceedings are ongoing, the only step that can be taken in the proceedings is an application to appoint a litigation guardian for the patient. Steps taken in contravention of this rule will be of no effect unless the Court orders otherwise.

Case:

Sharon Pottinger v Keith Anderson [2013] JMCA App 35: (Court has a discretion in relation to effect of an order obtained against a person under disability where party has no litigation guardian.)

23.4 Who may be a minor's litigation guardian

A person who satisfies the condition set out in rule 23.6 may act as a minor's litigation guardian without a court order, unless –

(a) the Court has already appointed a litigation guardian; or

(b) [the Court] Makes or has made an order under rule 23.9.

Note:
Any person who satisfies the statutory conditions set out at Rule 23.6 can act as a minor's litigation guardian without need for a court order unless the Court has already appointed a litigation guardian to act or the Court has by order terminated their appointment as litigation guardian or appointed a new litigation guardian in substitution for them.

23.5 Who may be patient's litigation guardian

(1) Unless the Court appoints some other person, a person authorized under the Act to conduct legal proceedings in the name of the patient or on the patient's behalf is entitled to be the litigation guardian of the patient in any proceedings to which the authority extends.

(2) Where nobody has been appointed by the Court or authorized under the Act, a person who satisfies the conditions set out in rule 23.6 may be a patient's litigation guardian without a court order.

Note:
The Mental Health Act makes provision for the treatment of matters involving patients including authorizing persons to conduct legal proceedings on their behalf. Persons authorized under the Act are empowered to act as litigation guardians without more unless the Court appoints a litigation guardian. Where no one has been authorized pursuant to the Act and the Court has not appointed a litigation guardian, a person satisfying the Rule 23.6 conditions is at liberty to act as litigation guardian without need to apply to the Court.

23.6 Conditions to act as litigation guardian

A person may act as a litigation guardian if that person –

(a) can fairly and competently conduct proceedings on behalf of the minor or patient; and

(b) has no interest adverse to that of the minor or patient.

Notes:
The Rule 23.6 conditions stipulate that the prospective litigation guardian can fairly and competently conduct the proceedings on behalf of the person under disability and that they have no interest adverse to those of the person under disability.

The provision seeks to ensure that the interests of the person under disability are properly represented as proper representation is in their best interest. In acting for the minor or patient, the litigation guardian is expected to take and assess legal advice and properly weigh all relevant factors when making decisions on the behalf of the minor or patient.

Cases:
[Hinduja v Hinduja [2020] EWHC 1533 (Ch)] - (functions of litigation guardian; expected to take proper legal advice and take steps to further interests of the party under disability; requirements of parts (a) and (b) closely linked; discussion of adverse interest)
[Nottinghamshire County Council v Bottomley [2010] EWCA Civ 756] - (Consideration of conflict of interest; litigation friend must be able to exercise independent judgment on the advice received)
[Davila v Davila [2016] EWHC B14 (Ch)] - (Inquiry to determine whether person has interests adverse to those of the person under disability should be directed toward the conduct and outcome of the litigation in relation to which the person seeks to act as litigation guardian; being able to "fairly and competently conduct proceedings" speaks to ensuring litigation guardian has skill, ability and experience to properly conduct the litigation concerned)

23.7 How person becomes litigation guardian without court order

(1) If the Court has not appointed a litigation guardian, a person who wishes to act as litigation guardian must follow the procedure set out in this rule.
(2) A person authorized under the Act must file an official copy of the order or other document which constitutes that person's authority to act.
(3) Any other person must file a certificate that that person satisfies the conditions specified in rule 23.6.
(4) A person who is to act as a litigation guardian for a claimant must, at the time when the claim is made, file the authorization or certificate under paragraph (3).
(5) A person who is to act as a litigation guardian for a defendant must file the –
 (a) authorisation; or
 (b) certificate under paragraph (3),
 at the time when the litigation guardian first takes a step in the proceedings on behalf of the defendant.
(6) The litigation guardian must –
 (a) Serve a copy of the certificate under paragraph (3) on every person on whom in accordance with rule 5.10 the claim form should be served; and
 (b) File an affidavit of service.

Note:
A person authorized to act as litigation guardian pursuant to the Mental Health Act, must file copy of the Order or other document constituting his authority to act (the Authorization). Any other person seeking to act must file a Certificate that they satisfy the conditions specified in 23.6 (the Certificate).

A litigation guardian acting for a Claimant, must file the Authorization or Certificate at the time the claim is made. A litigation guardian acting for a defendant must file the Authorization or Certificate of truth when he takes the first step in the proceedings on behalf of the Defendant.

A litigation guardian acting for a minor must serve a copy of the Certificate on the Minor's parent, guardian or the person with whom the Minor lives.

A litigation guardian acting for a patient, must similarly serve anyone authorized by law to conduct proceedings on the Patient's behalf. If there is no such person, then items must be served on the person with whom the Patient resides.

23.8 How person becomes litigation guardian by court order

(1) The Court may make an order appointing a litigation guardian with or without an application.
(2) An application for an order appointing a litigation guardian may be made by a –
  (a) party, or
  (b) person who wishes to be a litigation guardian.
(3) If –
  (a) a person makes a claim against a minor or patient;
  (b) the minor or patient has no litigation guardian; and
  (c) either –
    (i) someone who is not entitled to be a litigation guardian files a defence; or
    (ii) the claimant wishes to take some step in the proceedings,
    the claimant must apply to the Court for an order appointing a litigation guardian for the minor or patient.
(4) An application for an order appointing a litigation guardian must be supported by evidence on affidavit.
(5) The Court may not appoint a litigation guardian under this rule unless it is satisfied that the person to be appointed complies with the conditions specified in rule 23.6.

Note:
Purpose of the application to appoint a litigation guardian is to protect the position of a patient and those advising him
The Court can appoint a litigation guardian of its own instance, or on the application of a party to proceedings or any person seeking to be appointed.

A claimant in proceedings against a minor or patient who does not have a litigation guardian must apply to the Court to appoint a litigation guardian for the person under disability before taking a step in the proceedings. Similarly, if a party that is not entitled to be a litigation guardian in such proceedings files a defence, the Claimant must move the court to appoint a litigation guardian.

The application to appoint a litigation guardian must be supported by affidavit evidence and the Court cannot appoint an LG under this rule unless it is satisfied the person applying satisfies the 23.6 conditions.

Case:
Robert Folks v Gary Faizey [2006] EWCA Civ 381 The rules provide that there is to be evidence to support any application for an order appointing a litigation friend. That is necessary if the court is to be more than merely a rubber stamp. However, that does not mean that the other party to the litigation is then entitled to put in evidence disputing the basis for such an order….especially when there is no justifiable basis for refusing such an order. A judge is obliged to seek to give effect to the overriding objective, including saving expense and ensuring expedition in these matters.

23.9 Court's power to terminate appointment of and substitute litigation guardian

(1) The Court may –
- (a) appoint a new litigation guardian in substitution for an existing one;
- (b) direct that a person may not act as a litigation guardian; or
- (c) terminate a litigation guardian's authority to act.

(2) The Court may make an order under paragraph (1) with or without an application.

(3) An application for an order under paragraph (1) must be supported by evidence on affidavit.

(4) The Court may not appoint a litigation guardian under this rule unless it is satisfied that the person to be appointed complies with the conditions specified in rule 23.6.

Note:

The Court can substitute, remove or bar someone from acting as litigation guardian on application or of its own instance. Applications must be supported by affidavit evidence and must comply with the peculiar rules of service on a minor or patient as set out at CPR Rule 5.10 Where relevant, both an existing litigation guardian and the proposed new litigation guardian must be served the application. Court must be satisfied the proposed litigation guardian satisfies Rule 23.6 criteria.

Cases:

Keays v Parkinson [2018] EWHC 1006 (Ch) (Application to remove litigation guardian)
Shirazi v Susa Holdings Establishment & Anor [2022] EWHC 477 (Ch) (The fact a litigation guardian satisfies the conditions for appointment is no bar to their removal, the Overriding Objective can be considered)

Re A (Conjoined Twins: Medical Treatment) (No 2) [2001] FLR 267 (Where a litigation guardian acts manifestly contrary to the child's best interest, the Court can remove him though neither his good faith nor diligence is in issue)

Zarbafi v Zarbafi [2014] EWCA Civ 1267 : (No limit on the Court's power to remove a litigation guardian, Court may move to remove or replace a litigation guardian on its own motion to ensure proper representation and protection of parties under a disability)

23.10 Appointment of a litigation guardian by court order – supplementary

(1) An application for an order under rule 23.8 or 23.9 must be served on every person on
whom, in accordance with rule 5.10 the claim form should have been served.

(2) An application for an order under rule 23.9 must also be served on the person who –
- (a) Is or who purports to act as litigation guardian; and
- (b) It is proposed should act as litigation guardian if that person is not the applicant.

(3) On an application for an order under rule 23.8 or 23.9, the Court may appoint the proposed person or any other person.

23.11 Procedure where appointment as litigation guardian ceases

(1) The appointment of a minor's litigation guardian ceases when a minor who is not a patient reaches the age of majority.

(2) When a party ceases to be a patient during the course of proceedings, the litigation guardian's appointment continues until it is ended by court order.

(3) An application for an order under paragraph (2) may be made by –

(a) a party; and

(b) the former patient; or

(c) the litigation guardian;

and must be supported by evidence on affidavit.

(4) The minor or patient in respect of whom the appointment to act has ceased must serve notice on the other parties –

(a) giving an address for service;

(b) stating that the appointment of the litigation guardian has ceased; and

(c) stating whether or not he chooses to carry on the proceedings.

(5) If the notice is not served within twenty-eight days after the appointment of the litigation guardian ceases the Court may, on application, strike out any claim or defence brought or filed by the minor or patient.

(6) The liability of a litigation guardian for costs continues until the –

(a) minor or patient serves the notice referred to in paragraph (4); or

(b) litigation guardian serves notice on the other parties that the appointment has ceased.

Note:

Unless a Minor is also a Patient, appointment of his litigation guardian ceases automatically upon his reaching the age of majority.

Where a Patient ceases to be a Patient during proceedings, the litigation guardian's appointment will continue until ended by Court Order. The application to terminate a litigation guardian's appointment may be made by any party, the litigation guardian or the former Patient himself and must be supported by affidavit evidence.

Once a litigation guardian's appointment ceases, the party he previously acted for must serve all other parties notice of *inter alia,* (i) his new address for service, (ii) the end of the litigation guardian's appointment and (iii) stating whether s/he will continue the proceedings. Such notice must be served with 28 days of the LG's appointment ending failing which, a party can apply to strike out any claim or defence filed by the Minor/Patient. The former litigation guardian's liability for costs continues until the other parties are served notice he no longer acts in that capacity.

23.12 Compromise, etc. by or on behalf of minor or patient

(1) If a claim is made –
  (a) Against a minor or patient; or
  (b) By or on behalf of a minor or patient;
  Any settlement, compromise or payment and any acceptance of money is not valid, so far as it relates to the claim by, on behalf of, or against the minor or patient, without the approval of the Court.

(2) If –
  (a) Before proceedings in which a claim is to be made by or on behalf of a minor or patient, whether alone or with any other person, are begun, an agreement is reached for the settlement of the claim; and
  (b) the sole purpose of proceedings on that claim is to obtain the approval of the Court to a settlement or compromise of the claim, the claim may be made by a fixed date claim form Form G4 which may –
    (i) be issued jointly by the claimant and defendant; and
    (ii) include a request to the Court for approval of the settlement.

Note:
Where a claim is made against a person under disability or on their behalf, any settlement, compromise, acceptance or payment of money is not valid unless approved by the Court even where the compromise purports to be made before court proceedings are commenced. The authors of Commonwealth Caribbean Civil Procedure posit the rationale for seeking court approval is two-fold, …"(*a) to protect the minor from disadvantageous settlements; and (b) to provide a defendant with a valid discharge for any money paid in settlement*."[53]

Where a claim settled before the start of proceedings and the sole purpose of the proceedings is to secure Court approval of a settlement or compromise, that claim may be made by Fixed Date Claim (Form 2). The Fixed Date Claim form may be issued jointly by Claimant and Defendant and include a request for the Court to approve the settlement.

Cases:
Revill v Damiani [2017] EWHC 2630 (QB) – (Objectives of the compromise rule)

Dunhill (a protected party by her litigation friend Tasker) v Burgin [2014]1 WLR 933 – (Purpose of the Court's approval is act as an "external check" on the propriety of the settlement; court approval required whether a litigation friend appointed or not)

Tiffany Barrett v Suzette Ann Marie DeSouza and Another [2014] JMSC Civil 25

Masterman-Lister v Brutton & Co (Nos 1 and 2) [2002] EWCA Civ 1889 (Court may approve compromise retrospectively where parties acted in good faith and no manifest disadvantage to the patient)

23.13 Control of money recovered by or on behalf of minor or patient.

(1) If, in any proceedings money –

[53] Kodilinye, Gilbert, Kodilinye, Vanessa 4th Edition, pg 42

(a) is recovered by or on behalf of or for the benefit of a minor or patient; or

(b) paid into Court is accepted by or on behalf of a minor or patient;

that money must be dealt with in accordance with directions given by the Court under this rule and not otherwise.

(3) Directions given under this rule may provide that the money must be wholly or partly paid into Court and invested or otherwise dealt with.

Note:

Where money is recovered by, or on behalf of, or for the benefit of a person under disability or where money paid into Court for that purpose is accepted by the patient or minor, the interested party must apply to the Court for directions as to how to deal with that money pursuant to this rule.

The Court has power to order that such funds are invested or otherwise dealt with.

Case:
Roberts and Roberts v Bhagan and Medcorp Ltd TT 2016 CA 16 : (Rule is permissive; Court's discretion is wide under the rule but is not an uncontrolled discretion. Court must seek to protect interests of child and only order money be paid out if to do so is in the best interests of the person under disability)

PART 24 - SECURITY FOR COSTS

24.1 Scope of this Part

This Part deals with the power of the Court to require a claimant to give security for the costs of the defendant.

24.2 Application for order for security for costs.

(1) A defendant in any proceedings may apply for an order requiring the claimant to give security for the defendant's costs of the proceedings.
(2) Where practicable such an application should be made at or before a case management conference.
(3) An application for security for costs must be supported by evidence on affidavit.
(4) The amount and nature of the security shall be such as the Court thinks fit.

Notes:
An application for security for costs may be made by a defendant pursuant to Rule 24.2. The application is to be supported by an Affidavit and the court will exercise its discretion to determine the amount of the security and the manner and time in which it is to be paid. The discretion must be exercised applying the overriding objective and affording a proportionate protection justifying security for costs in question[54].
The general rule in relation to costs is that the unsuccessful party will be ordered to pay the successful party's costs. A defendant, who is in a favorable position, is granted protection pursuant to Part 24 when encountering a claimant who appears to be a risk to the general rule. The purpose of a security for costs order, an interim remedy, is to alleviate that concern by requiring the claimant to pay money into court, or to provide some other form of security for the defendant's costs, as a precondition to being able to continue with the claim.

Cases*:*
Brainbox Digital Ltd v Backboard Media GMBH [2017] EWHC 2465 (QB) *(applications for security for costs should normally be made promptly as soon as the facts justifying the order are known)*
Kay Simon v Stephen Hardman et al Claim No GDAHCV 2009/0211 *(the grant for an order for security for costs is a discretionary one)*
Someret-Leeke v Kay Trustees (security for Costs) [2003] EWHC 1243 *(In every application, the ground on which the applicant relies must be identified in the written evidence and the information that is contained in the Affidavit should be clearly aimed at that ground.)*

24.3 Conditions to be satisfied.

The court may make an order for security for costs under rule 24.2 against a claimant only if it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order, and that –

[54] Blackstone's Civil Practice 2014, The Commentaries, paragraph 67.16

a. some person other than the claimant has contributed or agreed to contribute to the claimant's costs in return for a share of any money or property which the claimant may recover;
b. the claimant –
    i. failed to give his or her address in the claim form;
    ii. gave an incorrect address in the claim form; or
    iii. has changed his or her address since the claim was commenced; with a view to evading the consequences of the litigation;
c. the claimant has taken steps in relation to his assets that would make it difficult to enforce an order for costs against him;
d. the claimant is acting as a nominal claimant, other than as a representative claimant under Part 21, and there is reason to believe that the claimant will be unable to pay the defendant's costs if ordered to do so;
e. the claimant is an assignee of the right to claim and the assignment has been made with a view to avoiding the possibility of a costs order against the assignor;
f. the claimant is an external company; or
g. the claimant is ordinarily resident out of the jurisdiction.

Notes

Part 24.3 "a" and "c" are new grounds for security for costs. Under "a" an order for security for costs may be granted in a case where a person, other than the claimant, has agreed to contribute to the costs of the claimant in return for a share in the proceeds (money or property) should the claimant succeed in his claim. Before an order for security for costs is made the court n exercising its discretion must be satisfied that having regard to all the circumstances of the case, it is just to make such an order.

Cases

Teisha Combes v Russell Investments Limited t/a PIER 1 [2022] JMSC Civ 129 *(Significance of Rule 24.3)*
Sir Lindsay Parkinson & Co. v Triplan Ltd [1973] QB 609 *(Circumstances which the court might take into account whether to order security for costs)*
Surfside Trading Ltd v Landsome Inc Claim No. AXAHCV2005/0016 *(Considerations as to whether it is just to make an Order for Security for Costs)*
Symsure Limited v Kevin Moore [2016] JMCA Civ. 8 (Court's considerations)
Richard Rowe v Mark Secrist et al SKBHC 2003/0222 *(the power to order security for costs should be exercised only where residence abroad presented special obstacles to enforcement)*
Manning Industries and Another v Jamaica Public Service Limited (unreported), Supreme Court, Jamaica, Suit No CL 2002/M058, judgment delivered on 30 May 2003 *(Prerequisites to be satisfied before an order for security for costs is made | Factors to be considered)*
Mado Gajadar v Sham Gajadhar CV 2013–00695 (2013.07.17) *(Whether the order is fair in all circumstances | Court's discretion)*

CPR 24.3 (g)

Kay Simon v Stephen Hardman et al Claim No GDAHCV 2009/0211 *(resident normally outside the jurisdiction | difficulty in enforcing the order for security for costs)*
Berkeley Administration Inc and others v McClelland [1990] F.S.R. 381 *(residence abroad not sufficient a ground for making an order for security but merely conferred jurisdiction to do so)*
British American Insurance Company Limited v First Citizens Investment Services Limited CV 2011–03501 (2012.07.25) *(Ordinarily Resident out of the Jurisdiction)*

24.4 Security for costs against counter-claiming defendant

Rules 24.2 and 24.3 apply where a defendant makes a counterclaim as if references in those rules –

a. to a claimant – were references to a defendant making a counterclaim;
b. to a defendant – were references to a claimant defending a counterclaim.

Notes

Where a defendant has brought a counterclaim against the claimant, he is now in the position of the claimant in the counterclaim proceedings. Rule 24.4 allows the claimant to make an application for security for costs against the defendant. The defendant who counter-claims is still permitted to seek security for costs against the claimant in the original action. Each case will be determined on its own set of circumstances.

24.5 Enforcing order for security for costs

On making an order for security for costs the court must also order that –

a. the claim, or counterclaim, be stayed until such time as security for costs is provided in accordance with the terms of the order;
b. if security is not provided in accordance with the terms of the order by a specified date, the claim (or counterclaim) be struck out

Notes

To ensure compliance with the order for security for costs Rule 24.5 allows the court to stay proceedings pending payment of the security for costs or order that the claim be struck out. This application is usually made at the same time as the application for security for costs

Cases

Ian Bailey v Corporal Carmona Ag No 13235 and Others CV 2012–03147 (2013.05.06) *(Stay Pending Payment)*

PART 25 – CASE MANAGEMENT – THE OBJECTIVE

25.1 Court's duty actively to manage cases.

The Court must further the overriding objective by actively managing cases including —

(a) identifying the issues at an early stage;

(b) actively encouraging and assisting parties to settle the whole or part of their case on terms that are fair to each party;

(c) considering whether the likely benefits of taking a particular step will justify the cost of taking it;

(d) dealing with as many aspects of the case as is practicable on the same occasion;

(e) dealing with as many aspects of the case, as it appears appropriate to do, without requiring the parties to attend Court;

(f) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;

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

(h) encouraging the parties to co-operate with each other in the conduct of proceedings;

(i) encouraging the parties to use any appropriate form of ADR procedure including, in particular, mediation, if the Court considers it appropriate and facilitating the use of such procedures;

(j) ensuring that no party gains an unfair advantage by reason of that party's failure to give full disclosure of all relevant facts prior to the trial or the hearing of any application;

(k) fixing timetables or otherwise controlling the progress of the case;

(l) giving directions to ensure that the trial of the case proceeds quickly and efficiently; and

(m) making appropriate use of technology.

NOTES - CASE MANAGEMENT – PARTS 25 to 27

Since the body rules are premised on the overriding objectives – to deal with cases justly and efficiently and less costly and proportionately - case management is critical to

achieving such an objective.[55] Case Management requires the court's intervention, careful monitoring and active supervision in order to ensure that the objectives are observed and met. The rules herald a shift in direction from a litigant-driven timetable and process to a court-managed process that should result in less delays and expense, in procedural certainty and in fair and equal treatment of parties in a matter.

Parts 25, 26 and 27 deal specifically with case management – the means by which a court timetables and monitors the progress of a case. Together, the parts provide for an active role by the court designed to move cases along expeditiously, justly and at a proportionate cost.[56] The parts establish the objectives of case management (Part 25), powers, sanctions and consequences of non-compliance with certain orders or timelines (Part 26) and the process of a case management conference (Part 27). The Case Management Conference is said to be at the heart of case.[57] management.

NOTES - PART 25 - CASE MANAGEMENT

Part 25 is directly aligned to the overriding objective of the rules which the Court must give effect to in the application of the rules.[58] It underscores the court's duties in managing cases and links the objective in doing so to the overriding duty. Part 25 sets out a non-exhaustive[59] list of ways by which a court may further the overriding objective through case management. This requires a court's early involvement with the substantive issues and not merely an overseeing of procedural issues. It is said that the listed duties do not stand on their own but are for the furthering of the overriding objective.[60] However the plain language of a rule may curtail how it is to be applied.[61]

By Part 25.1 the court is to actively manage cases and to encourage the parties to cooperate in the case management exercise. It is for the court to determine and to take into account Part 25 considerations during case management.[62] While the overriding

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[55] Super Industrial Services Ltd and another (Respondents) v National Gas Company of Trinidad and Tobago Ltd (Appellant) (Trinidad and Tobago) [2018] UKPC 17 https://www.jcpc.uk/cases/jcpc-2017-0049.html - the purpose of case management and the case management conference

[56] Part 1 Overriding Objective

[57] Super Industrial Services Ltd and another (Respondents) v National Gas Company of Trinidad and Tobago Ltd (Appellant) (Trinidad and Tobago) [2018] UKPC 17 https://www.jcpc.uk/cases/jcpc-2017-0049.html - the purpose of case management and the case management conference

[58] Part 1, rule 1.2

[59] The use of the word "including" at the end of the preamble and before the enumeration of non-exclusive steps to employ in actively managing cases, suggests that this is an incomplete list. ("The Court must further the overriding objective by actively managing cases including - ")

[60] The Caribbean Civil Court Practice 2nd ed, Edited by: David di Mambro, The Honourable Mr Justice Saunders, Louise di Mambro, ISBN13: 9781405773676, August 2011, LexisNexis Butterworths, UK, Note 23.4, page 236

[61] AG v Universal Projects Ltd. [2011] UKPC 37 per Lord Dyson, para. 27

[62] *Powell v Pallisers of Hereford Ltd* [2002] EWCA Civ 959, [2002] All ER (D) 16 (Jul) Case management decisions involves the exercise of a judge's discretion. An appellate court would be slow to intervene - unless the overriding objective had not been observed or maintained.

objective must be used in the interpretation of the rules, it does not operate to vest a discretion in the court.[63] Such discretion, if it exists, is to be found in the specific rule. [64]

The rules do not displace the Court's inherent jurisdiction but that jurisdiction must not be exercised in such a way to lay down a procedure that is inconsistent with the rules.[65] However, Inherent jurisdiction cannot apply in breach of clear court rules.[66]

Case management also includes early identification of cases that need not make it all the way to trial for a resolution of the dispute. Some of those tools captured in Part 25.1 are early identification and disposal of issues, determining whether a particular step justifies the cost of taking it, encouraging the parties to settle and facilitating ADR (Alternative Dispute Resolution). [67] Such measures along with the encouragement to use technology support the objectives of an expeditious and less expensive procedure and the proportionate treatment of cases.

It is widely accepted that the court under the CPR has a wider discretion than existed under past rules and so, in having regard to the overriding objectives, may consider past authorities on the exercise of its discretion, irrelevant.[68]

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[63] However, if the court is exercising an inherent jurisdiction, the overriding objective may be relied on in the exercise of its discretion. Atkin's Court Forms/Costs Management, Case Management and Applications Vol 13(2)/Practice/A: Introduction To Costs Management, Case Management And Applications/1.

[64] *Treasure isles et v Audubon* [BVI] Civil Appeal No. 22 of 2003 (20 September 2004) Per Chief Justice (Ag) Adrian Saunders at para. 24.

[65] *Texan Management v Pacific Electric Wire and Cable Co Ltd* [2009] UKPC 46 https://www.jcpc.uk/cases/docs/jcpc-2009-0018-judgment.pdf "The modern tendency is to treat the inherent jurisdiction as inapplicable where it is inconsistent with the CPR, on the basis that it would be wrong to exercise the inherent jurisdiction to adopt a different approach and arrive at a different outcome from that which would result from an application of the rules." Per Lord Dyson, paragraph 57

[66] *Belgravia International Bank & Trust Company Limited v Sigma* SCCivApp No. 75 of 2021; https://www.courtofappeal.org.bs/download/092063800.pdf Inherent jurisdiction cannot apply in breach of clear court rules. per Sir Michael Barnett, para. 64 in considering Order 31A under the old rules which had similar case management provisions as the current rules.

[67] The court may stay the proceedings for attempts at settlement by alternative dispute resolution or other means where the parties request it (or, where the court considers it appropriate, the claim may be stayed on the court's own initiative). Halsbury's Laws of England/Civil Procedure (Volume 11 (2020), paras 1–496; Volume 12 (2020), paras 497–1206; Volume 12A (2020), paras 1207–1740)/13. Case Management/(1) Court's General Powers of Case Management/(iv) Settlement or Compromise of Proceedings/506. Court's duty to encourage and facilitate the settlement or compromise of proceedings.

[68] *Biguzzi v Rank Leisure plc* - [1999] 4 All ER 934 "Earlier authorities are no longer generally of any relevance once the CPR applies." Per Lord Woolf, MR at p.941

PART 26 – CASE MANAGEMENT – THE COURT'S POWERS

26.1 Court's general powers of management.

(1) The list of powers in this rule is in addition to any powers given to the Court by any other rule, practice directions or any enactment.

(2) Except where these rules provide otherwise, the Court may —

(a) adjourn or bring forward a hearing to a specific date;

(b) consolidate proceedings;

(c) deal with a matter without the attendance of any of the parties;

(d) decide the order in which issues are to be tried;

(e) direct a separate trial of any issue;

(f) direct that any evidence be given in written form;

(g) direct that notice of any proceedings or application be given to any person;

(h) direct that part of any proceedings, such as a counterclaim or other additional third party claim, be dealt with as separate proceedings;

(i) dismiss or give judgment on a claim after a decision on a preliminary issue;

(j) exclude an issue from determination if the Court can do substantive justice between the parties on the other issues and determines it would therefore serve no worthwhile purpose;

(k) extend or shorten the time for compliance with any rule, practice direction, order or direction of the Court even if the application for an extension is made after the time for compliance has passed;

(l) give the conduct of any matter to any person it thinks fit and make any appropriate consequential order about costs;

(m) hold a hearing and receive evidence by telephone or use any other method of direct oral communication;

(n) instead of holding an oral hearing deal with a matter on written representations submitted by the parties;

(o) require any party or a party's attorney to attend the Court;

(p) require the maker of an affidavit or witness statement to attend for cross-examination;

(q) stay the whole or part of any proceedings generally or until a specified date or event;

(r) transfer the whole or any part of any proceedings to another court office in the Bahamas from the court office where the proceedings

were filed;

(s) try two or more claims on the same occasion;

(t) where there is a substantial inequality in the proven financial position of each party, order any party having the greater financial resources who applies for an order to pay the other party's costs of complying with the order;

(u) where two or more parties are represented by the same attorney —

(i) direct that they be separately represented;

(ii) if necessary, adjourn any hearing to a fixed date to enable separate representation to be arranged; and

(iii) make any consequential order as to costs thrown away; and

(v) take any other step, give any other direction, or make any other order for the purpose of managing the case and furthering the overriding objective, including hearing an Early Neutral Evaluation, or directing that such a hearing take place before a Court appointed neutral third party, with the aim of helping the parties settle the case.

(3) When the Court makes an order or gives a direction, it may make the order or direction subject to conditions.

(4) The conditions which the Court may impose include —

(a) requiring a party to give an undertaking;

(b) requiring a party to give security;

(c) requiring a party to pay all or part of the costs of the proceedings;

(d) requiring the payment of money into Court or as the Court may direct; and

(e) that a party permit entry to property owned or occupied by that party to another party or someone acting on behalf of another party.

(5) In considering whether to make an order, the Court may take into account whether a party is prepared to give an undertaking.

(6) In special circumstances on the application of a party the Court may dispense with compliance with any of these rules.

NOTES - PART 26 - CASE MANAGEMENT – THE COURT'S POWERS

Whereas Part 25 deals with the court's duties, Part 26 deals with the court powers, consequences of the exercise of such powers, sanctions and relief from sanctions.

NOTES - PART 26.1

26.1 The powers under Part 26 are not exhaustive but are in addition to powers under any other rule or powers outside of the CPR.[69] While the powers of the court are wide-ranging, the powers in this part are subject to rules that may circumscribe the exercise of the power under as a case management tool. This provision also allows for the possibility that some of the powers exercisable via case management may have been exercised earlier in the life of a case pursuant to an application under a different rule, for example, applications to extend time. The management of the case is to be seen as a cohesive, wholesome exercise.

The duty of the court is to further the overriding objective by actively manage the cases. Therefore, while the court is to encourage the parties to cooperate with each other in the conduct of the proceedings[70], it is not limited by the parties' consent in the orders that it may make.

It is also thought that the language of the powers allow the court to flexibly manage cases in a manner appropriate for each case and in keeping with the overriding objectives. A court may resort to embracing practices in other jurisdictions that are not yet captured in the rules or by practice direction but which do not infringe the rules. For example, by virtue of Part 26.1(2)(v), a court may require the use of questionnaires or checklists to help parties prepare, gather and share information, identify the issues etc. A court may even, in special circumstances and upon application of a party, dispense with compliance with a rule (Part 26.1(6)).

In order to enforce compliance with the rules or practice direction or order, a court may make order certain consequences (or make orders subject to conditions or sanctions) such as to stay the whole or part of the proceedings or judgment[71], order a party to pay a sum of money into court or to pay costs or to give an undertaking or to give security[72] or order that a party's statement of case be struck out.[73]

Litigants should note the requirements of Practice Direction No. 13 of 2023 regarding skeleton arguments and bundles of authorities. A failure to adhere to its requirements may have costs consequences.

CASES

Robert v Momentum Services Ltd. [2003] EWCA Civ 299, [2003] 2 All ER 74 - Considerations where extension of time applications made before sanctions are imposed.

Trincan Oil Ltd v Keith Shnake (Civil Appeal No. 91 of 2009) Trinidad and Tobago https://www.ttlawcourts.org/index.php/component/attachments/download/428
– Application for extension of time - A court is to exercise a general discretion where extension of time applications are made before sanctions are imposed. The timelines in the rules are to be strictly observed.

American Life Insurance Company v RBTT Merchant Bank Ltd. (CV 2008 – 00215) 12 April 2011) per Madam Justice Tiwary-Reddy http://webopac.ttlawcourts.org/LibraryJud/Judgments/HC/tiwary-reddy/2008/cv_08_00215DD12apr2011.pdf
Application for extension of time - Different considerations apply where extension of time applications are made after time has expired.

Rose Stroh v Haringey London Borough Council [1999] EWCA Civ 1825. Extension of time for Witness statement not allowed where prejudice to party outweighs prejudice to other party being unable to adduce the evidence

[69] Part 26.1(1)
[70] Part 25.1(h)
[71] Part 26.1(2)(q)
[72] Part 26.1(4)
[73] Part 26.3

Lomax v Lomax [2019] EWCA Civ 1467, [2019] 1 WLR 6527 (the court's case management powers, in furthering the overriding objective, includes ordering an early neutral evaluation hearing even without the consent of the parties.

Glenda Edwards v North West Regional Health Authority, Claim No. CV2006 – 00458 per Mr. Justice G. Smith, April 25, 2007 – Witness statement allowed where good reason for delay and its admission raised no new matter that would take other side by surprise or that would delay trial.

Sleeman v Highway Care Ltd. (1999) Times, 3 November, CA – A Court may determine a matter on written submissions without having parties present the submissions orally, or, in an appropriate case, without having the parties respond to the other side's written submissions.

Steele v Steele (2001) Times, 5 June, [2001] CP Rep Court's power to order separate trial of issues - Considerations for ordering the separate trial of issues

Reeves v Platinum Trading Management Ltd (2008) 72 WIR 195 There should be special grounds for ordering a separate trial of issues.

Bobby Ramesar, Bobby v Maharaj, Chandrabhan Police Constable No.7746 and The Attorney General of Trinidad and Tobago Dismissal of a claim after a decision on a preliminary issue.
http://webopac.ttlawcourts.org/LibraryJud/Judgments/HC/j_jones/1997/cv_97_1502DD06jul2006.pdf

GKR Karate (UK) Ltd v Yorkshire Post Newspapers Ltd [2000] 2 All ER 931, [2000] 1 WLR 2571, CA. A court may determine whether to try issues separately, having regard to the overriding objective. This may include trying preliminary issues to save time and expense.

MacIntyre v Chief Constable of Kent [2002] EWCA Civ 1087, [2002] 37 LS Gaz R 36, (2002) Times, 30 August, CA. [2002] EWCA Civ 1087, [2003] 37 LS Gaz R 36, (2002) Times, 30 August, [2003] EMLR 194, [2002] All ER (D) 338 (Jul) A court may, in its discretion , refuse an application for the separate trial of issues if the issues are complex or intertwined and trying issues separately would delay the ultimate trial.

Sterling Asset Management Ltd v Sunset Equities Ltd 2022/COM/com/00034 The defendant applied to cross-examine the claimant's affiants in proceedings commenced by originating summons. The claimant submitted that it would be contrary to the overriding objective to permit cross-examination as the case was simple as the only relief sought was an order permitting inspection of the defendant's books and records under section 68 of the International Business Companies Act 2000 or the inherent jurisdiction and the Fruit Shippers case showed that the Court could make a determination of a section 68 application without cross-examination. The Court held that under CPR 26.1(2)(p) and CPR 30.1(3) it has a discretion to permit and compel the cross-examination of deponents. The Court permitted cross-examination on the facts as the extensive history of the matter warranted further examination of the evidence provided and there was a contest of evidence.

Sunil Chankersingh and Another v Crystal Morton Gittens, Civ App No. 10 of 2011 (Trinidad and Tobago) While there is jurisdiction under CPR Part 26 to order split trials of liability and quantum, i.e. the separate hearing of the assessment of damages from the issue of liability, such an order should be the exception rather than the rule.
https://www.ttlawcourts.org/attachments/article/2315/CvA_11_10DD01jun2011.pdf

Johnson v Johnson [2000] HCA 48 (Modern judges, responding to a need for more active case management, intervene in the conduct of cases to an extent that may surprise a person who came to court expecting a judge to remain, until the moment of pronouncement of judgment, as inscrutable as the Sphinx. This does not indicate bias. Judges are not expected to wait until the end of a case before they start thinking about the issues.)

Nomiki Drosos Tsakkos v Peter Drosos Tsakkos 2021/CLE/gen/00621 (The Court refused an application (pursuant to CPR 26.1(2)(b)) to consolidate a section 77 application under the *Trustee Act* in the nature of a *Beddoe* application brought by the first defendant in his capacity as the executor of his father's estate with the claimants' action main against the first defendant and other defendants alleging that they misappropriated the claimants' father's assets for their own personal benefit. The intent of section 77 applications and *Beddoe* applications is to be heard by a separate judge for the purposes of gaining advice on the administration of the trust, initiating or defending proceedings and costs. The Court also refused to stay the proceedings pending the determination of a co-executor issue as there was a possibility successive applications pursuant to section 77 could result in unconscionable delays in the main action, which would be contrary to the overriding objective.)

Treasure Island Company v Audubon Holdings Limited BVI Civil Appeal No. 22 of 2003 (The Eastern Caribbean Court of Appeal held that EC CPR 26.1(6) conferred jurisdiction on the Court to dispense with strict compliance with EC CPR 29.11 which the court below had been correct to exercise where the witness statements had been served three months prior to trial and no delay or injustice had been caused by the breach.)

Star Reefers Pool Inc v JFC Group Company Ltd Claim No. BVIHC (Com) 2012/008 (The BVI High Court held that EC CPR 26.1(6) permits the Court to dispense with "compliance with a rule", which is distinct from permitting a party to do something which a rule expressly prohibits. If a judgment creditor issues execution on a registered foreign judgment before the period for setting aside has elapsed, it is not failing to comply with a rule, it is doing something which the rules forbid it to do and the Court has no power under EC CPR 26.1(6) to permit that which the EC CPR forbids.)

JSC VTB Bank v Alexander Katunin et al BVIHCMAP2016/0047 and *JSC VTB Bank v Alexander Katunin* et al BVIHCMAP2017/0006 (The Eastern Caribbean Court of Appeal held that the first instance judge had been wrong to import a test of requiring that the circumstances must "truly be exceptional, and then only if to do so otherwise would wreak an injustice" before the power under EC CPR 26.1(6) could be exercised. EC CPR 26.1(6) used "special circumstances" which was intentionally left unqualified, open and undefined. It permits the application to be dealt with on a case by case basis. The simple question for the court is whether, in all the circumstances of the particular case, special circumstances are made out. The circumstances presented by the appellant, when taken together, did constitute special circumstances.)

26.2 Court's power to make orders of its own initiative.

(1) Except where a rule or other enactment provides otherwise, the Court may exercise its powers on an application or of its own initiative.

(2) If the Court proposes to make an order of its own initiative it must give any party likely to be affected a reasonable opportunity to make representations.

(3) The opportunity may be to make representations orally, in writing, telephonically or by any other means as the Court considers reasonable.

(4) If the Court proposes to —

(a) make an order of its own initiative; and

(b) hold a hearing to decide whether to do so;

the court office must give each party likely to be affected by the order atleast seven days' notice of the date, time and place of the hearing.

NOTES - PART 26.2

PART 26.2 underscores the court's active role in managing cases. The court may propose an order but must give the parties an opportunity to be heard on the proposal before the making of such an order. Because the parties are given an opportunity to be heard there is no equivalent in CPR 26.2 to UK CPR 3.3(5), which permits parties affected by the order to apply to the court to have it set aside or varied.

CASES

Barbara Campbell v David Sookwa SLUHCVAP 2014/0018 (The Eastern Caribbean Court of Appeal held that EC CPR 26.2 expressly provides the court with the jurisdiction to make orders of its own initiative. One of the powers that the court uses to deal with absent litigants and lawyers is the making of such orders. However, EC CPR 26.2 also states that where this discretion is exercised the court must give any party likely to be affected a reasonable opportunity to make representations. Nonetheless, a party can, by his conduct, lose the right to be informed of an intended order that affects him, for example, by not attending a scheduled CMC. Faced with the absence of the appellant from a scheduled CMC, the master had the power to make an order of her own initiative under EC CPR 26.2 and to strike out the appellant's defence for want of prosecution.)

Dr The Rt Hon Keith Mitchell v Lloyd Noel et Al HCVAP 2007/023 (A master made an order setting aside the judgment acting on her own initiative, without there being a notice of application before her, and without giving any opportunity to the appellant to be heard in opposition to the proposed order to set aside the default judgment. The Eastern Caribbean Court of Appeal held that the error might, in certain circumstances, be sufficient to justify setting aside the order, but the master was right to hold the default judgment was wrongly entered and therefore was correct to set aside the default judgment.)

Dubisette v Grenada Cooperative Bank Ltd GDAHVCVAP 12 of 2009 (The ECCA held that a trial judge was wrong to treat a claimant's application for summary judgment, supported by his affidavit evidence, as an application by the defendant for summary judgment and to strike out the claimant's case without giving him any notice that the court was proposing to make such an order and giving him an opportunity to make representations. In light of the provisions of EC CPR Part 15 and EC CPR 26.2, the court below had no jurisdiction to summarily dismiss the claimant's claim without an application by the defendant supported by evidence. And, in any event, the court gave the claimant no notice that it was proposing to make such an order, and giving him an opportunity to respond.)

Jean v 1st National Bank of St. Lucia SLUHCV 934 of 2010 (St Lucia) (The St. Lucian High Court held that under EC CPR 26.2 the court of its own initiative and in keeping with its objective of active case management has power to strike out a statement of case under the CPR where the court thinks the party's statement of case does not disclose any reasonable ground for bringing or defending the claim; is an abuse of the process of the court; is likely to obstruct the just disposal of the proceedings; or for a failure to comply with a rule, practice direction, order or direction given by

the court in the proceedings. The court struck out a claimant's statement of case after concluding it raised an unwinnable case and to continue with the proceedings would be without any possible benefit to the claimant and would waste resources on both sides.)

John Oliver Dryrud v Palmavon Jasamin Webseter et al AXAHCVAP2021/0010 (A judge appointed a single expert acting on his own initiative without bringing what he was proposing to do to the attention of the parties. The Eastern Caribbean Court of Appeal held that the judge had no jurisdiction to do what he purported to do under EC CPR 32.9 and, in any event, he could not do so without first following the procedure under EC CPR 26.2, unless he had received the consent of the parties. His failure to follow 26.2 was a "serious error of principle and procedure". The procedure laid out by EC CPR 26.2 is to ensure that while a judge may of his own initiative, in the absence of an application by one of the parties, and in exercise of his or her case management powers, make certain orders or give certain directions in proceedings, he cannot do so without first notifying the parties affected or who would be affected by the intended course of action, order or direction, and afford them a reasonable opportunity to be heard and to make representations. That does not require him to conduct a formal in person hearing with the parties and their respective counsel. The requirement, and it is a requirement, may be met in other ways or utilizing different means, such as written submissions and deciding the matter on paper, or by a telephonic hearing, which may be a short hearing as the exigencies of the matter require.)

Liao Hwang Hsiang v Liao Chen Toh BVIHCVAP2014/0002 (The Eastern Caribbean Court of Appeal held that a judge had been wrong to, on her own initiative, consolidate two applications before her which in her view raised similar issues, without giving any party affected an opportunity to make representations either orally or in writing or by any other means that the court considered reasonable pursuant to EC CPR 26.2.)

Malcolm Maduro v Department of Customs BVIHCVAP 2022/0001 (The Eastern Caribbean Court of Appeal held that a master was wrong to set aside a default judgment for irregularity on grounds on which the appellant had neither notice nor an opportunity to respond. The failure by the master to provide the appellant with an opportunity to make submissions on the issue of the alleged irregularity of the default judgment as enshrined in EC CPR 26.2(4) amounted to a denial of natural justice. A judge or master should identify the issues in dispute which arise on the pleadings or as the basis of an application and determine only those issues. Where a new issue is raised during or after the conclusion of a hearing, the judge or master is obliged to afford the parties an opportunity to make submissions before adjudicating upon that issue. Failing to do so would be tantamount to not hearing the party who is aggrieved by the decision at all and may amount to a denial of justice.)

26.3 Sanctions – striking out statement of case.

(1) In addition to any other power under these Rules, the Court may strike out a statement of case or part of a statement of case if it appears to the Court that —

(a) there has been a failure to comply with a rule, practice direction, order or direction given by the Court in the proceedings;

(b) the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim;

(c) the statement of case or the part to be struck out is frivolous, vexatious,

scandalous, an abuse of the process of the Court or is likely to obstruct the just disposal of the proceedings; or

(d) the statement of case or the part to be struck out is prolix or does not comply with the requirements of Part 8 or 10.

(2) Where —

(a) the Court has struck out a claimant's statement of case;

(b) the claimant is ordered to pay costs to the defendant; and

(c) before those costs are paid, the claimant starts a similar claim against the same defendant based on substantially the same facts,

the Court may on the application of the defendant stay the subsequent claim until the costs of the first claim have been paid.

NOTES - PART 26.3

Statement of Case is defined in Part 2.1. The court has a discretion to strike out the statement of case, or a part of the statement of case, on application or by its own initiative (Part 26.2). This rule does not displace the court's inherent jurisdiction to strike out proceedings that abuse its process. Note that if the proceedings were commenced prior to the coming into effect of these rules but are subject to these rules, then the new regime and considerations for striking out will apply.

CASES

John W. Russell (in his capacity as Administrator of the Estate of William Russell) v Bahamas Agricultural and Industrial Corporation 2019/CLE/gen/00093 (The defendant applied to strike out the claimant's statement of claim in which it was alleged that the defendant knowingly practised deceit on a third party by granting a lease over the claimant's land to an entity who then sub-leased it. The claimant claimed to have owned the land as the heir-at-law of the true owner of the land since 1827 under a Crown grant. The defendant argued that fraud was not specifically pleaded and the claim was brought outside of the limitation period pursuant to section 16(3) and 41(1)(a) of the Limitation Act. The Court held that striking out is reserved for plain and obvious cases. The Court held that, in applying Order 18, rule 19(a) RSC or CPR 26.3(1)(b), the statement of claim should be read on its face without a consideration of the evidence and assuming all the allegations it contains are true. The Court was satisfied that, approached on this basis, the statement of claim disclosed a reasonable cause of action. The Court held that a pleading is scandalous if it imputes dishonesty, bad faith or other misconduct against the defendant or a third party and the allegations are immaterial or irrelevant. The Court noted that the issue of whether a pleading is frivolous or vexatious depends on all the circumstances and considerations of public policy and the interests of justice may be "very material". The Court was not persuaded that the claim was frivolous or vexatious. Nor was the Court persuaded that the statement of claim or claim were an abuse of process. The Court noted under its inherent jurisdiction it could consider evidence but even taking into account the evidence there was no evidence to show how the Crown was able to lease the land to the defendant.)

Glenard Evans v Airport Authority 2022/CLE/gen/01521 (23 November 2023) (The claimant was allegedly terminated from his employment with an airline until he received his badges/credentials from the defendant.

He allegedly applied for a job with another airline and was informed by employees/servants/agents of the defendant before applying that he would be re-issued his badges/credentials. However, the claimant complained that the defendant delayed in responding to his application and only granted him limited access, without reasons and without an opportunity to be heard, which caused the airline to which he applied for a job to rescind its offer of employment. The claimant averred that the actions of the defendant were "malicious and/or reckless and/or negligent" and sought damages, interest and costs. The defendant sought to strike out the claimant's originating summons and statement of claim on the basis that the action was an abuse of process because the claimant chose to proceed by ordinary action instead of judicial review and had brought another identical action against the defendant and on the basis that the claimant had no reasonable grounds for bringing the claim.

The Court held that, as a general rule, it would be an abuse of process, which may be addressed under the inherent jurisdiction, for a claimant to avoid the judicial review procedure and the built-in safeguards therein and go by way of an ordinary procedure to vindicate a public law right or to challenge a public law act or decision (the "exclusivity principle"). CPR 26.3 does not displace the Court's inherent jurisdiction to strike out pleadings which are an abuse of the process of the court. CPR 26.3 (1) is not merely a rule on technicality but it goes to furthering the overriding objective in an appropriate case. If, on review of a statement of case, it is clear that it is groundless, then it would be a waste of time and resources to allow the matter to proceed to trial and for the parties to incur further costs. Dealing with a matter expeditiously and fairly includes acceding to a party's application to pre-empt trial where a statement of case is defective or does not disclose a reasonable ground for bringing or defending a claim. Striking out is often described as a draconian step and, therefore, striking out should be allowed only in plain and obvious cases. If the application to strike out is complex and requires extended argument and fact-finding, then the case is not appropriate for striking out and such matters are to be resolved at trial. CPR 26.3(1)(b) requires that the statement of case must disclose on its face, a ground or cause of action known in law, for otherwise it is defective and doomed to fail. "No reasonable grounds for bringing the claim" allows for a court to, on considering the statement of case, find that even if the allegations are proven, a party cannot succeed at trial. A court is also empowered to strike out the statement of case under the rule where the pleaded cause of action is not supported in the allegations or is not otherwise viable or justiciable.

On the facts, the Court held that the case fell "squarely within" the exclusivity principle as the case was, at its core, a case for the review of the defendant's decision and the defendant's decision-making process. The public law decision was not collateral but the main issue in the proceedings. The Court further held that the case was fit for striking out as disclosing no reasonable cause of action as the claimant was attacking a decision which had not been overturned, the claimant had failed to show how he was entitled to the badges/credentials that he sought such that the failure by the defendant to issue the badges/credentials would amount to a breach of duty and there was no application to amend.)

Dorothy Bain v Royal Bank of Canada (Bahamas) limited 2014/CLE/gen/00283 (29 December 2023*)* (The claimant brought an action against the defendant alleging that the her and her husband's signature had been forged on a promissory date loan application for a loan in the amount of $5,000 and that the defendant wrongfully and without their authority disbursed the loan proceeds and debited their accounts. The claimant applied for leave to amend her statement of claim and the defendant applied to strike out the action on the basis that it disclosed no reasonable cause of action. The Court refused permission to amend, holding that the application to amend was made very late, many of the amendments were evidentiary or narrative in nature, the amendments were unspecific and not tightly drawn, the allegations of fraud or forgery were inadequately particularized and the proposal to add a new claim regarding title documents would have required essentially restarting the case management process which would entail additional cost and delay. The Court acceded to the application to strike out on the basis that the claimant's claim was frivolous as the relationship between the claimant and defendant was not fiduciary and the claimant had exhibited to an affidavit an expert report which contradicted the entire substance of the claimant's case. The Court also granted summary judgment against the claimant.)

Christine Layne v Wilma Antoine H.C.1543/2020, CV.2020-01543, High Court of Justice, Trinidad and Tobago, Judgment delivered 2022.11. 23. Application to strike out often inextricably linked with application for summary judgment – 2 different tests

http://webopac.ttlawcourts.org/LibraryJud/Judgments/HC/mohammed_r/2020/cv_20_01543DD23nov2022.pdf

East-West United Bank SA v Gusinski and others [2022] EWHC 3056 (Ch) Interplay between summary judgment and striking out a statement of case

Walsh v Misseldine [2001] CPLR 201, CA Court to bear in mind the overriding objective in exercising its discretion to strike out.

Citco Global Custody NV v Y2K Finance Inc HCVAP 2008/022 On hearing an application to strike out for disclosing no reasonable grounds for bringing or defending the claim, the judge should assume that the facts alleged in the statement of case are true. Despite this general approach, however, care should be taken to distinguish between primary facts and conclusions or inferences from those facts. Such conclusions or inferences may require to be subjected to closer scrutiny. Striking out is inappropriate where the argument involves a substantial point of law which does not admit of a plain and obvious answer; or the law is in a state of development; or where the strength of the case may not be clear because it has not been fully investigated. It is also well settled that the jurisdiction to strike out is to be used sparingly since the exercise of the jurisdiction deprives a party of its right to a fair trial, and its ability to strengthen its case through the process of disclosure and other court procedures such as requests for information; and the examination and cross–examination of witnesses often change the complexion of a case. Also, before using CPR 26.3(1) to dispose of 'side issues', care should be taken to ensure that a party is not deprived of the right to trial on issues essential to its case. In deciding whether to strike out, a judge should consider the effect of the order on any parallel proceedings and the power of the court in every application must be exercised in accordance with the overriding objective of dealing with cases justly.

Ian Peters v Roger George Spencer HCVAP 2009/016 Striking out for disclosing no reasonable cause of action is appropriate in the following instances: where the claim sets out no facts indicating what the claim is about or if it is incoherent and makes no sense, or if the facts it states, even if true do not disclose a legally recognisable claim against the defendant. A statement of case is not suitable for striking out if it raises a serious live issue of fact which can only be properly determined by hearing oral evidence.

Tawney Assets Limited v East Pine Management Limited et al HCVAP 2012/007 The striking out of a party's statement of case, or most of it, is a drastic step which is only to be taken in clear and obvious cases.

Belize Telemedia Ltd and another v Magistrate Usher and another - (2008) 75 WIR 138 – striking out is intended to save time and resources of court and parties – distinguish applicability of dismissing claim on a preliminary issue.

Summers v Fairclough Homes Ltd - [2012] 4 All ER 3170 Court has powers both under the CPR and its inherent jurisdiction to strike out a statement of case.

Masood v Zahoor [[2009] EWCA Civ 650, [2010] 1 All ER 888, [2010] 1 WLR 746, [2010] Bus LR D12, [2009] All ER (D) 33 (Jul) - Court's power to strike out for abuse of its process

Alpha Rocks Solicitors v Alade [2015] EWCA Civ 685 The jurisdiction to strike out is available at an early stage of proceedings where a claimant is guilty of misconduct in relation to those proceedings which is so serious that it would be an affront to the court to permit him to continue to prosecute the claim, and where the claim should be struck out in order to prevent the further waste of precious resources on proceedings which the claimant has forfeited the right to have determined

Candy v Holyoake [2017] EWHC 373 (QB) – Court's power to strike out for deficiencies in disclosure

Masqood v Mahmood [2012] EWCA Civ 251 – Court's power to strike out for failure to comply with a rule, practice direction or court order

Abduelle v Commissioner of Police of the Metropolis [2015] EWCA Civ 1260 - On an application under to strike out a statement of case for failure to comply with a rule, practice direction or court order, the judge may consider the matter by reference to the approach laid down for the exercise of the discretion to grant relief from sanctions, even though a sanction has yet to be imposed, though the judge must also consider the proportionality of the sanction. See also *Walsham Chalet Park Ltd v Tallington Lakes Ltd [2014] EWCA Civ 1607*.

Alba Exotic Fruit SH PK v MSC Mediterranean Shipping Company S.A. [2019] EWHC 1779 (Comm) – Application to strike out where there was significant delay by the claimant in pursuing the proceedings

Keith v Benka [2023] EWCA Civ 821 – Recent consideration of the jurisdiction of the court to strike out for delay

Auto-Guadeloupe Investissement SAS v Alvarez and others - (2014) 84 WIR 49 - Claims for constitutional redress are also subject to the Court's power to strike out

Biguzzi v Rank Leisure plc - [1999] 4 All ER 934; new considerations for striking out apply under the rules

Purdy v Cambran - [1999] Lexis Citation 4011, [1999] All ER (D) 1518
– new considerations for striking out apply under the rules

Partco Group Ltd v Wragg [2002] EWCA Civ 594, [2002] 2 BCLC 323, [2002] 2 Lloyd's Rep 343, [2004] BCC 782, (2002) Times, 10 May, [2002] All ER (D) 08 (May) Test for striking out under Part 26.3(1)(b) - paragraph 45 per Potter, LJ - Case (i) refers to a case which is unwinnable on the merits, whereas case (ii) refers to the failure of a claim which is misconceived or, upon the facts or matters pleaded is bound to fail as a matter of law

26.4 Court's general power to strike out statement of case.

(1) If a party has failed to comply with any of these rules or any Court order in respect of which no sanction for non-compliance has been imposed, any other party may apply to the Court for an "unless order".

(2) Such an application may be made without notice but must be supported by evidence on affidavit which —

(a) contains a certificate that the other party is in default;

(b) identifies the rule or order which has not been complied with; and

(c) states the nature of the breach.

(3) The judge or registrar may —

(a) grant the application;

(b) direct that an appointment be fixed to consider the application and

that the applicant give to all parties notice of the date, time and place for such appointment; or

(c) seek the views of the other party.

(4) If an appointment is fixed the applicant must give seven days' notice of the date, time and place of the appointment to all parties.

(5) An "unless order" must identify the breach and require the party in default to remedy the default by a specified date.

(6) The general rule is that the respondent should be ordered to pay the assessed costs of such an application.

(7) If the defaulting party fails to comply with the terms of any "unless order" made by the Court, that party's statement of case shall be struck out subject to an order under rule 26.8.

NOTES - PART 26.4

A court may make an unless order to enforce compliance with a rule or order on pain of a penalty. The unless order in this case must identify the breach and require the party in default to remedy the default by a specified date. [74] If a party fails to comply with an 'unless order' under Part 26.4, there is an automatic striking out of the statement of case and an automatic sanction (judgment against it) unless relief from sanctions under Part 26. 8 is obtained. Once the time for compliance has expired, the party entitled to judgment may file for same without notice to the other side. However, the court may have the other side notified and fix a hearing or invite them to make representation. As a general rule, the defaulting party will pay the costs of the application. The statement of case (or part thereof) remains struck out unless the defaulting party applies for relief from sanction under Part 26.8.

CASES

Marcan Shipping (London) Ltd v Kefalas [2007] EWCA Civ 463, [2007] 3 All ER 365, [2007] 1 WLR 1864 Consequences of non-compliance

Belgravia International Bank & Trust Company Limited v Sigma SCCivApp No. 75 of 2021; https://www.courtofappeal.org.bs/download/092063800.pdf Once there is failure to comply with an unless order, the sanction imposed by the unless order is automatic and the order cannot be varied by a judge. For the sanction to not take effect, the defaulting party will have to apply for relief from sanctions.

26. 5 Judgment without trial after striking out.

(1) This rule applies where the Court makes an order which includes a term that the statement of case of a party be struck out if the party does not comply with the "unless order" by the specified date.

(2) If the party against whom the order was made does not comply with the order, any other party may apply for a judgment to be entered and

[74] Part 26.4(5)

for costs to be assessed appropriate to the stage that the proceedings have reached.

(3) A party may obtain judgment under this rule by filing a request for judgment.

(4) The request must —

   (a) certify that the right to enter judgment has arisen because the Court's order was not complied with;

   (b) prove service of the "unless order"; and

   (c) state the facts which entitle the party to judgment.

(5) If the party wishing to obtain judgment is the claimant and the claim is for —

   (a) an amount of money to be decided by the Court;

   (b) a specified sum of money;

   (c) delivery of goods and the claim form gives the defendant the alternative of paying their value; or

   (d) any combination of these remedies,

   judgment must be in accordance with the terms of the statement of claim plus any interest and costs after giving credit for any payment that may have been made.

(6) If the party wishing to obtain judgment is the claimant and the claim is for some other remedy the judgment must be such as the Court considers that the claimant is entitled to.

(7) If the party wishing to obtain judgment is a defendant, judgment must be for assessed costs.

(8) If a decision of the Court is necessary in order to decide the terms of the judgment the party making the request must apply for directions.

NOTES - PART 26.5

If an 'unless order' under Part 26.4 is not complied with, the other side may file requesting judgment on that basis. The judgment will be a natural consequence of the automatic striking out of the other party's statement of case pursuant to the unless order.

CASES

Marcan Shipping (London) Ltd v Kefalas [2007] EWCA Civ 463, [2007] 3 All ER 365, [2007] 1 WLR 1864 If the party in default wishes to prevent the entering of a judgment, then they must apply for relief from sanctions.

Butler et al v Bahamas Telecommunications Company Limited BS 2012 SC 150 A default judgment entered after an unless order was made without the evidence required by Order 31A, rule 22 of the RSC was held to be irregular and was set aside where there was no indication on the file that (a)

the unless order was served on the defendant; (b) the plaintiffs certified that the right to enter judgment had arisen when the default judgment was submitted to the Deputy Registrar for his signature; and (c) the plaintiffs filed a statement of the facts which entitled them to judgment as required by rule 22(4).

26.6 Setting aside judgment entered after striking out.

(1) A party against whom the Court has entered judgment under rule 26.5 when the right to enter judgment had not arisen may apply to the Court to set it aside.

(2) If the right to enter judgment had not arisen at the time when judgment was entered, the Court must set aside judgment.

(3) If the application to set aside is made for any other reason, rule 26.8 applies.

26.7 The Court's powers in cases of failure to comply with rules, etc.

(1) If the Court makes an order or gives directions the Court must whenever practicable also specify the consequences of failure to comply.

(2) If a party has failed to comply with any of these rules, a direction or any order, any express sanction for non-compliance imposed by the rule, direction or the order has effect unless the party in default applies for and obtains relief from the sanction, and rule 26.9 does not apply.

(3) If a rule, practice direction or order —

(a) requires a party to do something by a specified date; and
(b) specifies the consequences of failure to comply,
the time for doing the act in question may not be extended by agreement between the parties.

(4) If a party has failed to comply with any of these rules, a direction or any order, where no express sanction for non-compliance is imposed by the rule, direction or the order the party in default may make an application under rule 26.9.

(5) If a rule, practice direction or order —

(a) requires a party to do something by a specified date; and

(b) does not specify the consequences of failure to comply,

the time for doing the act in question may be extended by agreement in writing between the parties provided that the extension does not affect the date of any hearing or the trial.

NOTES - PART 26.7

Case Management includes sanctions for non-compliance with court orders or a timeline. The sanctions may be express and contained in the order or may be implied as a result of the operation of a rule in an instance of default. Parties cannot, by agreement, extend the timeline set by rule, practice direction or order if that rule, practice direction or order also imposes a sanction for non-compliance. The court has general powers to extend or shorten time on application by a party – even if the application is made after the time has expired – Part 26.1(2)(k). If the application for extension of time is made before time has expired, a court is not likely to refuse a reasonable extension that did not put a future hearing date or proceedings in jeopardy.[75] However, where the application is made after time has expired and after a sanction took effect, then the application ought to be an application for relief from sanctions where more stringent considerations apply. [76]

CASES

Marcianno Devon Pickering v Enid Geraldine Pickering et al BVIHCVAP2021/0010 (The Eastern Caribbean Court of Appeal noted that EC CPR 26.7(1) is an exhortation to judges to, whenever practicable, specify the consequence of failure to comply with any order the court might give. The exhortation recognises that judges do not always specify the consequence of a party's failure to comply with orders the court makes. CPR 26.7(2) and (3) go on to set out the consequences of failing to comply with a rule, direction or order where that rule, direction or order imposes a sanction for non-compliance. If a party fails to comply with a rule, direction or court order, any sanction for non-compliance imposed by the rule, direction or court order has effect unless the party in default applies for and obtains relief from the sanction. Parties cannot by agreement extend time nor can the court's general powers to rectify errors under CPR 26.9 be used to cure the non-compliance. However, this rule does not deal with the situation where the rule, direction or order does *not* specify a sanction for failing to comply with that rule, direction or order.)

Gladys Scatliffe (Window and Intended Personal Representative of the Estate of Jacinto Scatliffe) v The BVI Health Services Authority Claim No. BVIHCV 2011/0087 (The BVI High Court noted that, under the EC CPR, a court has "ample" power to strike out a claim in appropriate circumstances. CPR 26. 4 is just one of the enabling provisions. The power is also to be found in CPR 26.3 which provides that the Court may strike out a statement of case if it appears to the Court that there has been a failure to comply with a rule, practice direction, order or direction given by the Court in the proceedings and in CPR 26.2(2)(w) [BAH CPR 26.1(2)(v)] which provides that the court may take any step or make any order for the purpose of managing the case and furthering the overriding objective or under a court's inherent jurisdiction.)

[75] *Hallam Estates Ltd v Baker* [2014] EWCA Civ 661, [2014] All ER (D) 163 (May)

[76] Denton and others v TH White Ltd and another; Decadent Vapours Ltd v Bevan and others; Utilise TDS Ltd v Davies and others - *)* [2014] EWCA Civ 906, [2014] 1 WLR 3926 [2015] 1 All ER 880

26.8 Relief from sanctions.

(1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or Court order, the Court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need —

(a) for litigation to be conducted efficiently and at proportionate cost; and

(b) to enforce compliance with rules, practice directions and orders.

(2) An application for relief must be supported by evidence.

(3) The Court may not order the respondent to pay the applicant's costs in relation to any application for relief unless exceptional circumstances are shown.

NOTES - PART 26.8

Case Management includes sanctions for non-compliance with court orders or a timeline. The sanctions may be express as contained in an order, direction or rule. The rules apply to express sanctions.[77] In such an instance, the sanction is automatic unless the defaulting party applies for relief.[78] This section is applicable to relief from any sanction once attached to an order, even if the result of that sanction could have been a default position for non-compliance with another rule. Non-compliance with the rules must be discouraged and not tolerated. However, the court must, in each application for relief, consider the seriousness and significance of the breach. The court will also look at the underlying breach in order to assess the seriousness of the breach.[79] The court will consider all the circumstances of the case. Such circumstances include the effect of the breach and the promptness of the application for relief. A court should treat the application for relief in 3 stages.[80]

CASES

2018/PRO/CPR/00035 *Re The Estate of Raymond Adams (Deceased), Robert Adams (A Beneficiary of The Estate of Raymond Adams) v. Gregory Cottis (As Executor of The Estate of Raymond Adams)* per Charles, J, Judgment Date: December 29, 2020 A court will not grant relief from sanctions where there is no good explanation for non-compliance with the court's unless order and in the face of a history of non-compliance with the court's orders.

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[77] See the wording of Part 26.7(2).

[78] *Marcan Shipping (London) Ltd v Kefalas* [2007] EWCA Civ 463, [2007] 3 All ER 365, [2007] 1 WLR 1864 Consequences of non-compliance

[79] *British Gas Trading Ltd v Oak Cash & Carry Ltd* [2016] EWCA Civ 153 at [38], [2016] 1 WLR 4530

[80] *Denton and others v TH White Ltd and another; Decadent Vapours Ltd v Bevan and others; Utilise TDS Ltd v Davies and others* - [2015] 1 All ER 880 "A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the 'failure to comply with any rule, practice direction or court order' which engages r 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate 'all the circumstances of the case, so as to enable [the court] to deal justly with the application, including [factors (a) and (b)]'." per Lord Dyson MR and Vos LJ at paragraph 35

SCCivApp & CAIS No. 23 of 2021 *Re The Estate of Raymond Adams (Deceased), Gregory Cottis (As Executor of The Estate of Raymond Adams)* v. *Robert Adams (A Beneficiary of The Estate of Raymond Adams)* A court of appeal will not interfere with the exercise of the discretion of a judge on the refusal to allow relief from sanctions where there has been no error in law and there was evidence to support the exercise of the discretion.

2007/CLE/gen/No.00633 *Tim Wilson v Johnathan Pratt* per Moree, CJ Judgment date: November 5, 2021 Civil Practice and Procedure - Rules of the Supreme Court (RSC 1978) - Order 31A rule 25 – Unless Orders - Relief from Sanctions

Andrew Smith and Sophia Smith v First Caribbean International Bank (Bahamas) Limited and Insurance Management (Bahamas) Limited 2020/CLE/gen/00662 (9 August 2023) - The Court held that CPR 26.8 confers a wider discretion on the court to grant relief from sanctions than existed under Order 31A of the RSC. In a transitional case, the fact that the parties were operating under the RSC is a relevant factor the court must consider when making procedural decisions. CPR 26.8 is modelled upon CPR 3.9 of the English CPR after amendment by the English *Civil Procedure (Amendment) Rules 2013* and therefore English cases are likely to be highly persuasive.

The Court distilled the following principles from the English case law:

1. In the ordinary course there is a clear distinction between the initial imposition of a sanction and the exercise to be conducted in considering whether to grant relief from a sanction that has already taken effect. Where a sanction has been imposed under the CPR, an application for relief from sanctions must proceed on the basis that the sanction was properly imposed.

2. An application for relief from sanctions must be supported by evidence pursuant to CPR 26.8(2). Pursuant to CPR 11.9, that evidence must be in an affidavit unless otherwise provided by a court order, a practice direction or a rule. If there is no evidence, or if the evidence is not in an affidavit without the sanction of a court order, a practice direction or a rule, the application for relief is irregular and the Court must decide how to deal with it.

3. A judge should address an application for relief from sanctions in three stages:
i)the first stage is to identify and assess the seriousness and significance of the "failure to comply with any rule, practice direction or court order" which engages CPR 26.8(1).
ii)the second stage is consider why the default occurred, i.e., the reason for the breach.
iii)the third stage is to consider all the circumstances of the case so as to enable the Court to deal justly with the application.

4. At the first stage of the analysis, it is not a matter of determining whether the breach which occurred may be described as "trivial". The focus should be on whether the breach was "serious or significant". There will be many circumstances in which "materiality", in the sense of whether the breach imperiled future hearing dates or disrupted the conduct of the particular litigation or impacted other litigation, will be the most useful measure of whether a breach has been serious or significant. However, some breaches may be serious even though they are not capable of affecting the efficient progress of the litigation. If the breach is neither serious nor significant, the Court is unlikely to need to spend much time on the second and third stages. In contrast, if the breach is serious and significant then the second and third stages assume greater importance.

5. The assessment of the seriousness and significance of the breach should not, initially at least, involve a consideration of other unrelated failures that may have occurred in the past. At the first stage, the Court should concentrate on an assessment of the seriousness and significance of the "very breach" in respect of which relief from sanctions is sought. (Denton at para 27). However, unless orders are an exception. Unless orders do not stand on their own. Not every breach of an unless order is serious or significant. However, the very fact that a defaulting party has failed to comply with an unless order is a pointer towards seriousness and significance because the defaulting party is in breach of two successive obligations to do

the same thing and the Court has already underlined the importance of doing that thing by specifying a sanction in default.

6. At the second stage of the analysis, the Court should consider why the failure or default has occurred. There is no closed list of good and bad reasons for a failure to comply with rules, practice directions or court orders. Good reasons, such as illness or accident, are likely to arise from circumstances outside the control of the party in default, Later developments in the course of the litigation process are likely to be a good reason if they show that the period for compliance originally imposed was unreasonable though the period seemed to be reasonable at the time. Simply overlooking a deadline, whether on account of overwork or otherwise, is unlikely to be a good reason.

7. At the third stage of the analysis, the Court must stand back and consider all the circumstances of the case so as to enable it to deal justly with the application. The Court should give particular weight or importance to the need for litigation to be conducted efficiently and at proportionate cost and the need to enforce compliance with rules, practice directions and orders, which are specifically mentioned in CPR 26.8(1). In doing so, the Court should take into account the seriousness and significance of the breach which it assessed at the first stage and any explanation which it considered at the second stage. The more serious or significant the breach, the less likely it is that relief will be granted unless there is a good reason for it. Where there is a good reason for a serious or significant breach, relief is likely to be granted. Where the breach is not serious or significant, relief is also likely to be granted. Importantly, however, the Court is not bound to refuse relief unless a default can be characterized as "trivial" or there is a good reason for the failure to comply.

8. At the third stage of the analysis, among other factors, the promptness of the application for relief from sanctions, other past or current breaches of the rules, practice directions and court orders by the parties and the effect on the proceedings of relief being granted or the sanction taking effect may be taken into consideration and weighed in the balance. The two factors specifically identified in CPR 26.8(1) must be given greater weight than other relevant factors. The mere fact that a trial date may be kept and any default in compliance may be compensated by an award of costs does not necessarily mean relief from sanctions or an extension of time should be granted. The strength of a party's case on the ultimate merits of the proceedings will generally be an irrelevant consideration except where a party has a case whose strength would entitle him to summary judgment and the Court is able to quickly be persuaded of this.

9. Contested applications for relief from sanctions ordinarily require a hearing given their importance and judges should normally give reasons for their decisions on such applications, even if only brief and orally. Expensive satellite litigation is to be discouraged. Pursuant to CPR 1.3, the parties have a duty to help the Court further the overriding objective. An unreasonable refusal to consent to an application for relief from sanctions may be taken into consideration when the Court deals with the costs of the application.

On the facts, the Court granted relief from sanctions as the parties attempted to comply with the unless order, the breaches took place under the RSC, the breaches were not contumacious, some responsibility for the breaches appeared to lie with the claimants' attorney, if the sanctions were effective the claimants would have been driven from the seat of judgment with only a claim against their legal advisors and, if relief from sanctions was granted, the parties would only have to prepare for trial in the usual way and the defendants were not specifically prejudiced.

Kenton Collinson St. Bernard v The Attorney General of Grenada and others [2003] ECSCJ No. 38, Judgment Date: 06/04/2003; https://www.eccourts.org/kenton-collinson-st-bernard-v-attorney-general-grenada-et-al/ Sanctions will take automatic effect unless a prompt application for relief, supported by evidence, is made. "The effect of rule 29.11 is that a defaulter may have a good explanation for non-compliance but no good reason for having failed to previously apply for relief from sanction and in that event the defaulter must suffer the sanction. " per Barrow J (Ag) para. 9

AG v Keron Matthews [2011] UKPC 38 https://www.jcpc.uk/cases/docs/jcpc-2010-0068-judgment.pdf Part 26.8 relates to sanctions imposed in an order, direction or rule. Failure to take a step under a rule that could result in a course of action is not a sanction. The Privy Council appears in this case to disapprove of the concept of 'implied sanctions'. "Sanctions imposed by the rules are consequences which the rules themselves explicitly specify and impose." Per Lord Dyson paragraph 16

AG v Universal Projects Ltd. [2011] UKPC 37 https://www.jcpc.uk/cases/docs/jcpc-2010-0067-judgment.pdf The word sanction must be given its ordinary meaning. "Dictionary definitions of "sanction" include "the specific penalty enacted in order to enforce obedience to a law". per Lord Dyson at paragraph 13

Denton and others v TH White Ltd and another; Decadent Vapours Ltd v Bevan and others; Utilise TDS Ltd v Davies and others -) [2014] EWCA Civ 906, [2014] 1 WLR 3926 [2015] 1 All ER 880 "The more serious or significant the breach the less likely it is that relief will be granted unless there is a good reason for it. Where there is a good reason for a serious or significant breach, relief is likely to be granted. Where the breach is not serious or significant, relief is also likely to be granted." per Lord Dyson MR and Vos LJ at paragraph 35

Denton and others v TH White Ltd and another; Decadent Vapours Ltd v Bevan and others; Utilise TDS Ltd v Davies and others -) [2014] EWCA Civ 906, [2014] 1 WLR 3926 [2015] 1 All ER 880 "A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the 'failure to comply with any rule, practice direction or court order' which engages r 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate 'all the circumstances of the case, so as to enable [the court] to deal justly with the application, including [factors (a) and (b)]'." per Lord Dyson MR and Vos LJ at paragraph 35

Mitchell v News Group Newspapers Ltd - [2014] 2 All ER 430 – Guidance on factors that a court will take into account on an application for relief from sanctions

Regina (Hysaj) v Secretary of State for the Home Department [2014] EWCA Civ 1633 (The English Court of Appeal held that the fact that a party is unrepresented is of no significance at the first stage of the inquiry when the court is assessing the seriousness and significance of the failure to comply with the rules. Whether there is a good reason for the failure will depend on the particular circumstances of the case, but the mere fact of being unrepresented does not provide a good reason for not adhering to the rules. Litigation is inevitably a complex process and it is understandable that those who have no previous experience of it should have difficulty in finding and understanding the rules by which it is governed. if proceedings are not to become a free-for-all, the court must insist on litigants of all kinds following the rules.)

26.9 General power of the Court to rectify matters.

(1) This rule applies only where the consequence of failure to comply with a rule, practice direction or court order has not been specified by any rule, practice direction, court order or direction.

(2) An error of procedure or failure to comply with a rule, practice direction or court order does not invalidate any step taken in the proceedings, unless the Court so orders.

(3) If there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the Court may make an order to put matters right.

(4) The Court may make such an order on or without an application by a party.

NOTES - PART 26.9

This rule does not apply where a sanction for non-compliance was imposed. Not all instances of non-compliance will attract a sanction. In such instances, Part 26.9 allows the rectification of a misstep on an application or on the Court's own initiative. Since there is no sanction, Part 26.8 is inapplicable. However, even where there was no previous sanction, the court can impose a sanction on a grievous misstep such as striking out a statement of case on application of the other party or the other party may apply for an unless order under Part 26.4(1). Presumably the court can also act under Part 26. 2 on its own initiative. Any order which the Court subsequently makes can introduce a sanction which would remove subsequent acts of non-compliance from the realms of Part 26.9.

The court's power to rectify only extends to instances where there is no consequence for the non-compliance specified by a rule, practice direction or order. The rule cannot be used to circumvent statutory requirements.[81] The rule contemplates procedural errors.[82] The rule cannot be used to bypass another rule that outlines a procedural step to be taken to rectify an error.[83] The rule cannot be used to cure a nullity in law.[84]

There is no time limit on the court's ability to procedural errors under this rule if the interests of justice so require.

CASES

Reeves v Platinum Trading Management Ltd - (2008) 72 WIR 195 - "…it is not every instance of non-compliance that will result in sanctions, express or implied. …. It will sometimes be the case that non-compliance is so trifling that the court is justified in rectifying the error in a summary manner, as r 26.9 permits, without resorting to the provisions and criteria in r 26.8.
Per Barrow JA, para. 39

[81] *Bamber v Eaton* [2004] EWHC 2437 (Ch), [2005] 1 All ER 820
[82] *Steele v Mooney* [2005] EWCA Civ 96, [2005] 2 All ER 256, [2005] 1 WLR 2819
[83] Ibid.
[84] *Jennison (as personal representative of the estate of Graham Jennison (deceased)) v Jennison and another* [2022] EWCA Civ 1682

Jennison (as personal representative of the estate of Graham Jennison (deceased)) v Jennison and another [2022] EWCA Civ 1682 The rule cannot operate to create standing or to circumvent a limitation period.

Carleen Pemberton v Mark Brantely SKBHVCVAP 2011/009 The Eastern Caribbean Court of Appeal held, in the context of a 6-day late notice of appeal, that EC CPR 26.9 brings into play the exercise of a discretionary power by the court. This discretionary power, although a very broad one, cannot be exercised in a vacuum or on a whim, but must be exercised judicially in accordance with well established principles. Overall, in the exercise of the discretion the court must seek to give effect to the overriding objective which is to ensure that justice is done as between parties. Much depends on the nature of the failure, the consequential effect, weighing the prejudice, and of course the length of the delay, and whether there is any good reason for it which makes it excusable.

Savita Indira Salsbury v Director of the Office of National Drug and Money Laundering Control Policy ANUHCVAP 2012/0144 The Eastern Caribbean Court of Appeal held that EC CPR 26.9(3) conferred jurisdiction on a judge to make an order to put matters right if there has been an error of procedure or a failure to comply with a rule, practice direction, court order or direction, on or without an application by a party. The court has a very broad discretionary power under EC CPR 26.9 which must be exercised judicially in accordance with well-established principles. Overall and in the exercise of this discretion, the court must seek to give effect to the overriding objective which is to ensure that justice is done between the parties. The failure of the appellant to file affidavit evidence in support with their fixed date claim was a procedural error and no sanction was specified. Hence, the learned trial judge had jurisdiction to give an appropriate direction to put matters right under EC CPR 26.9. Considering that the appellant had filed a statement of claim to which the respondent responded and the respondent would not have been prejudiced by an order to put matters right, and that doing so would only further the overriding objective of the CPR, the learned trial judge, erred in refusing to make an order to put matters right.

Apple Inc v Swatch AG (Swatch SA) Swatch Ltd [2019] JMCA Civ 29 The Jamaican Court of Appeal held that, in order for the court's power to regularize matters under JAM CPR 26.9 to be triggered, there must be no sanction specified for the procedural error or non-compliance sought to be cured. Mere mandatory language in a rule will not automatically preclude a judge from relying on JAM CPR 26.9. On the facts, the judge in the case was empowered by JAM CPR 26.9 to make an order that the matter should proceed as if commenced by a fixed date claim form (as it ought to have been commenced) and to cure late service of the notice of appeal in circumstances where there was no prejudice or disadvantage to the other side, as the document filed contained all the information required and the main defect was the title of the document. JAM CPR 26.9(3) gave the judge a wide discretion to "put matters right" and the judge could have made whatever orders the particular situation called for "on or without an application by a party". No application for extension of time or otherwise was necessary.

Douglas Thompson v Peter Jennings [2021] JMCA Civ 6 The Jamaican Court of Appeal noted that while JAM CPR 26.9(1) refers to instances in which the general powers of the court to rectify procedural errors cannot be exercised while JAM CPR 26.9(2) and (3), reflect the broad instances in which the powers can be utilised (i.e. where there has been an error of procedure <u>or</u> a failure to comply with a rule, practice direction, court order or direction). The Jamaican Court of Appeal confirmed that JAM CPR 26.9 did not apply to procedural errors amounting to nullities but confirmed that not every procedural irregularity or error is to be taken as invalidating the proceedings or to be deemed a nullity. What is to amount to a nullity will depend on the circumstances of each case. The court does not readily find that a matter is a nullity. On the facts, the power under JAM CPR 26.9 could be exercised as the error was a matter of form and not substance.

Guy Eardley Joseph v McDowall Broadcasting Corporation SLUHCVAP 2022/0008 The Eastern Caribbean Court of Appeal held that EC CPR 26.9 could be used to correct a defect in the service in the proceedings where the claim form had been served on a receptionist at a company's place of business and not an officer of the company as contemplated by EC CPR 5.7(c) and section 521 of the Companies Act. The defect did

not render service a nullity. The company had acknowledged service and filed a defence. The Eastern Caribbean Court of Appeal held that, under EC CPR 26.9, the court has the jurisdiction and the discretion to cure defects and irregularities depending on the circumstances of the particular case, and procedural irregularities are within the discretionary powers of the court to rectify, if the justice of the case requires that it be done to give effect to the overriding objective of the CPR. The master had erred by finding that the express provisions of the Companies Act did not allow him to invoke the inherent powers of ECCPR 26.9 to correct what was a procedural matter.

PART 27 – CASE MANAGEMENT CONFERENCES - PROCEDURE

27.1 Scope of this Part.

This Part deals with the procedures by which the Court will manage cases.

27.2 Fixed date claims – first hearing.

(1) When a fixed date claim is filed the claimant must obtain from the court office a date for the first hearing of the claim.

(2) On that hearing, in addition to any other powers that the Court may have, the Court shall have all the powers of a case management conference.

(3) The Court may treat the first hearing as the trial of the claim if it is not defended or it considers that the claim can be dealt with summarily.

(4) Subject to any rule or statutory provision which specifies a different period, all parties must be given at least fourteen days' notice of any first hearing.

(5) The Court may on or without an application direct that shorter notice be given —

(a) if the parties agree; or

(b) in urgent cases.

(6) Unless the defendant files an acknowledgement of service the claimant must file evidence by affidavit of service of the claim form and the relevant documents specified in rule 5.2(3) at least seven days before the first hearing.

27.3 Case management conference.

(1) The general rule is that the claimant must apply for a date for a case management conference as soon as practicable upon the filing of a defence to a claim other than a fixed date claim.

(2) If the defendant files a defence and also an admission of a specified sum of money, the case management conference is not to be fixed until the claimant gives notice under rule 14.7(3) that the claim is to continue.

(3) The case management conference must take place not less than four weeks

nor more than twelve weeks after the defence is filed, or notice is given under rule 14.7(3), unless any rule or practice direction prescribes a shorter or longer period or the case is urgent.

(4) Notwithstanding paragraph (3), a party may apply to the Court to fix a case management conference before a defence is filed.

(5) The application may be without notice but must state the reasons for the application.

(6) The applicant must give all parties' not less than fourteen days' notice of the date, time and place of the case management conference.

(7) The Court may with or without an application direct that shorter notice be given —

(a) if the parties agree; or

(b) in urgent cases.

(8) Notwithstanding any provisions of this rule, the Court shall at the first case management conference consider mediation either by agreement between the parties or by Court referral.

27.4 Attendance at case management conference or pre-trial review.

(1) If a party is represented by an attorney, that attorney or another attorney who is authorised to negotiate on behalf of the client and competent to deal with the case must attend the case management conference and any pre-trial review.

(2) The general rule is that the party or a person who is in a position to represent the interests of the party, other than the attorney, must attend the case management conference or pre-trial review.

(3) The Court may dispense with the attendance of a party or representative, other than an attorney.

(4) If the case management conference or pre-trial review is not attended by the attorney and the party or a representative the Court may adjourn the case management conference or pre-trial review to a fixed date and may exercise any of its powers under Part 26 or Part 71.

27.5 Orders to be made at case management conference.

(1) The general rule is that at a case management conference the Court mustconsider whether to give directions for —

(a) service of experts' reports, if any;

(b) service of witness statements; and

(c) standard disclosure and inspection,

by dates fixed by the Court.

(2) The Court may also give directions for the preparation of an agreed statement —

(a) as to any relevant specialist area of law;

(b) of facts;

(c) of issues; and

(d) of the basic technical, scientific or medical matters in

issue, which statement does not bind the trial judge.

(3) The Court must fix a date for a pre-trial review unless it is satisfied that having regard to the value, importance and complexity of the case it may be dealt with justly without a pre-trial review.

(4) The Court must in any event, fix the —

(a) period within which the trial is to commence; or

(b) trial date.

(5) The claimant must serve an order containing the directions made on all parties in Form G19 and give notice of the —

(a) date of any pre-trial review; and

(b) trial date or trial period.

27.6 Dispensing with case management conference in simple and urgent proceedings.

(1) The Court may, of its own motion or on the application of a party, makean order dispensing with a case management conference if it is satisfied that the —

(a) case can be dealt with justly without a case management conference;

(b) case should be dealt with as a matter of urgency; or

(c) cost of a case management conference is disproportionate to the

value of the proceedings or the benefits that might be achieved froma case management conference.

(2) If the Court dispenses with a case management conference, it must at the same time —

(a) fix a trial date or the period within which the trial is to take place;

(b) give directions in writing about the preparation of the case; and

(c) set a timetable for the steps to be taken before the date of trial.

(3) If the Court dispenses with a case management conference, it may —

(a) dispense with all or any of the requirements relating to the preparation and filing of bundles of documents under rule 39.1;

(b) dispense with a pre-trial review under Part 38; and

(c) give any other direction that will assist in the speedy and just trialof the claim, including any direction that might be given under Part 38.

27.7 Adjournment of case management conference.

(1) The Court may adjourn a case management conference whenever it deems it appropriate to do so including when it is satisfied that the parties are —

(a) attending, or have arranged to attend, a form of ADR procedure; or

(b) in the process of negotiating, or are likely to negotiate a settlement.

(2) The Court may not adjourn a case management conference without fixing a new date, time and place for the adjourned case management conference.

(3) If the case management conference is adjourned under paragraph (1) each party must notify the court office promptly if the claim is settled.

(4) The Court may give directions as to the preparation of the case for trial if the case management conference is adjourned.

(5) So far as practicable any adjourned case management conference and procedural application made prior to a pre-trial review must be heard and determined by the judge or registrar who conducted the first case management conference.

27.8 Variation of case management timetable.

(1) A party must apply to the Court if that party wishes to vary a date which the Court has fixed for —

(a) a case management conference;

(b) a party to do something where the order specifies the consequences

of failure to comply;

(c) a pre-trial review; or

(d) the trial date or trial period.

(2) Any date set by the Court or these rules for doing any act may not be varied by the parties if the variation would make it necessary to vary any of the dates mentioned in paragraph (1).

(3) A party seeking to vary any other date in the timetable without the agreement of the other parties must apply to the Court, and the general rule is that the party must do so before that date.[62]

(4) A party who applies after that date must apply for —

(a) an extension of time; and

(b) relief from any sanction to which the party has become subject under these Rules or any court order or an order under rule 26.9.[63]

(5) The parties may agree to vary a date in the timetable other than one mentioned in paragraph (1) or (2).

(6) Where the parties so agree, they must —

(a) submit a draft consent order for the consideration of the Court; and

(b) certify on the draft consent order that the variation agreed will not affect the date fixed for the trial or, if no date has been fixed, the period in which the trial is to commence,

and the Court will determine without a hearing whether or not to accept and sign it.

Cases:

C.O. Williams Construction (St. Lucia) Limited v Inter-Island Dredging Co. Ltd. HCVAP 2011/017 (The Eastern Caribbean Court of Appeal held that EC CPR 27.8 stipulates the circumstances that must exist for a party to apply for an extension of time and relief from sanctions (as opposed to an extension of time simpliciter). That party would have to be seeking to vary a date which the court has fixed for: a case management conference; or for a party to do something where the order specifies a sanction for non-compliance; or for pre-trial review, return of a listing questionnaire, or a trial; or for the variation of a date set by the court or the rules for doing any act which will affect any of the previously mentioned dates. It is only where those circumstances exist and the party seeks to vary a date set in the timetable after the deadline date has passed that EC CPR 27.8(4) requires that the party must apply for an extension of time and relief from the sanction to which the party has become subject under the EC CPR or any court order. [N.B. The wording of BAH CPR 27.8(4) refers to an application for relief from sanctions or an order under CPR 26.9, if there is no sanction.])

Prudence Robinson v Sagicor General Insurance Inc. SLUHCVAP2013/0009 (The Eastern Caribbean Court of Appeal held that EC CPR 27.8(3) provides that a party seeking to vary any other date in the timetable without the agreement of the other parties must apply to the court, and the general rule is that the party must do so before that date. EC CPR 27.8(4) states that a party who applies after that date must

apply for (a) an extension of time; and (b) relief from any sanction to which the party has become subject under these Rules or any court order. EC CPR 27.8(3) and 27.8(4) do not envisage piecemeal applications for relief from sanctions and extensions of time regarding the same document. The relief from sanction granted does not advance the matter as from the very moment made, the respondent still remains in breach of the case management order without an extension of time. In the circumstances, the relief granted by the judge lacked efficacy; the judge erred in treating the matter in a piecemeal manner.)

Hilton Lake v Pirate's Nest Limited Claim No. SKBHCV2016/0159; 2016/160 ***(St Christopher and Nevis)*** (The St. Christopher and Nevis High Court held that where the parties merely filed their agreement to extend the time for filing witness statements but did not file a consent order which was approved by the court, there was no valid variation to the case management timetable under EC CPR 27.8 and the parties were in breach of the court's case management order. EC CPR 27.8(6) compels parties wishing to vary the case management timetable to, first, file a consent application for an order reflecting their agreement, and, second, certify on that application that the agreed variation will not affect the trial date or trial window. Once this is done, the variation comes into effect immediately unless the court directs otherwise. The application must be filed ahead of the deadline to be effective and the court retains a residual discretion to not approve any consent order. Parties should not assume that their agreement has the effect of varying the case management timetable until the consent order is approved by the court. The consent order must be done under CPR 42.7, i.e. it must be – (a) drawn in the terms agreed; (b) expressed as being "By Consent"; (c) signed by the legal practitioner acting for each party to whom the order relates; and (d) filed at the court office for sealing. The consent order will then be approved by the court.)

27.9 Fixing trial date.

(1) As soon as practicable after the case management conference fix a trialdate if one was not fixed under rule 27.5(4).

(2) The general rule is that the court office must give the parties at least eightweeks' notice of the date of the trial.

(3) The Court may, notwithstanding paragraph (1) give shorter notice —

(a) if the parties agree; or

(b) in urgent cases.

NOTES - PART 27

Save for a fixed date claim[85], a case management conference will be held to track and guide cases as part of the court's overall duty to actively manage cases. However, all the powers of a court at a case management conference are available to a court at the hearing of the fixed claim.

The case management conference may be dispensed with in simple and urgent matters. This is in keeping with the overriding objectives to treat cases proportionately, expeditiously and to save time and expense. In those cases, there is no need for a substantial pre-hearing preparation and, instead, a court will fix a trial period and give directions for the conduct of the case.[86]

[85] A fixed date claim is defined in Part 2.1

[86] Part 27.6; *Super Industrial Services Ltd and another (Respondents) v National Gas Company of Trinidad and Tobago Ltd (Appellant) (Trinidad and Tobago)* [2018] UKPC 17

The onus is on the claimant to apply for a case management conference but any party can apply.[87] In keeping with the overriding objective to move proceedings along, the attendance of a party or its representative as well the party's lawyer at the case management conference.[88] A party must appear in person with its legal representative unless the court dispenses with appearance. This rule is designed to have the litigant actively be a part of the management of his case as a way of ensuring that the matter progresses without undue delay.[89] Unless the Court dispenses with attendance, failure to attend may attract a sanction by exercise of the Court's powers under Part 26.

Since the objective of the rules are premised on the overriding objectives – to deal with cases justly and efficiently and less costly and proportionately - case management is critical to achieving such an objective and the Case Management Conference is said to be at the heart of case management.[90] At the case management conference, a court will review the steps taken in the case thus far and give directions for its progression to resolution. The parties should therefore consider what directions they would like to have made at the case management conference. The parties may cooperate and agree directions but a court may not sanction the agreed directions, having regard to the overriding objective. One example of such an area could be the number of experts to be called in a trial. Usual directions would address matters such as stating the issues between the parties, addressing issues of evidence, witnesses (fact and expert) and disclosure, facilitating settlement and timetabling the steps to be taken to lead to the trial.

A statement of case cannot be amended without leave, once the case management conference is held.[91]

Once the court has fixed the case management timetable, the parties cannot consent to vary a date if that variation would affect core dates in the timetable.[92] In such an instance, a party must seek leave to vary a date. If a party applies for extension of time to comply with an order that also specifies a consequence of failure to comply, the party must also apply for relief from sanctions.

CASES

Kenton Collinson St. Bernard v The Attorney General of Grenada and others [2003] ECSCJ No. 38, Judgment Date: 06/04/2003; https://www.eccourts.org/kenton-collinson-st-bernard-v-attorney-general-grenada-et-al/ "The litigation belongs to the litigant, not the lawyer. The client needs at all times to be involved with the litigation. This truth was ignored under the old rules and practice. The new rules position that truth as a centerpiece. This is seen in the general rule that the litigant or his representative (which means someone other than the lawyer) must attend the case management conference or pre-trial review and in the sanctions provided for non- attendance..." per Barrow J (Ag) para. 14

Super Industrial Services Ltd and another (Respondents) v National Gas Company of Trinidad and Tobago Ltd (Appellant) (Trinidad and Tobago) [2018] UKPC 17 https://www.jcpc.uk/cases/jcpc-2017-0049.html per Lord Briggs:

[87] Part 27.3(4)
[88] Part 27.4
[89] The litigation belongs to the party: *Kenton Collinson St. Bernard v The Attorney General of Grenada and others* [2003] ECSCJ No. 38, Judgment Date: 06/04/2003; https://www.eccourts.org/kenton-collinson-st-bernard-v-attorney-general-grenada-et-al/
[90] *Super Industrial Services Ltd and another (Respondents) v National Gas Company of Trinidad and Tobago Ltd (Appellant) (Trinidad and Tobago)* [2018] UKPC 17 https://www.jcpc.uk/cases/jcpc-2017-0049.html - the purpose of case management and the case management conference
[91] Part 20.1(1) and Part 20.1(2)
[92] Part 27.8(1)

23. The CMC is, as the Chief Justice describes, at the heart of the new procedural code, and of the system whereby the court takes over from the parties (under the pre-CPR culture) the active management of cases for the furtherance of the overriding objective. The CMC is an event which must take place early in the progression of every claim except (i) for fixed date claims and (ii) where the judge otherwise orders, for example by dispensing with a CMC under rule 27.4.

…

26. Those who have been involved in judicial case management under the pre-CPR culture and under the CPR, both in Trinidad & Tobago and elsewhere, in jurisdictions where similar reforms have been implemented, well know that the key to getting rid of the old culture, under which cases proceeded, if at all, only at the pace selected by the parties, is fixing a trial date (or window) and laying down a full timetable for its preparation. Rule 27.6(4) makes it clear that this is something which the court is required to do at a CMC.

27. It is because the CMC is the occasion upon which a trial date or window is chosen for a particular case that it lies at the intersection between the court's responsibility for case-flow management and its case management duty in an individual case. It is at that point that the court decides what resources should be made available to the parties, and at what time, for the determination of their dispute, as one of many for which the court is responsible, under an overriding objective which, in express terms, requires the court to allot to each case an appropriate share of the court's resources, while taking into account the need to allot resources to other cases: see rule 1.1(2)(e).

28. In addition to fixing the trial date and timetable, the CMC is an event with important procedural significance for the parties in numerous other respects. First, it marks the end of a period when the parties have a relatively unrestricted opportunity to amend statements of case, add or substitute parties and introduce ancillary claims: see rules 10.6(3), 10.10(2), 18.4(1), (4) and (5), 19.2(2), (6) and (7) and 20.1(1), (2) and (3). The general thrust of these provisions is that the parties may amend, add parties and ancillary claims freely before a CMC, with the court's permission at a CMC, but only if they can demonstrate a relevant change of circumstances after a CMC.

29. The CMC is also the event which brings to an end the period during which a party may make an application for costs budgeting: see rule 67.8(2). In order to give the parties time to prepare for such matters, rule 27.3 lays down a timetable, pursuant to which: (i) the CMC must take place between four and eight weeks after the filing of defences (unless the case is urgent): see rule 27.3(9); (ii) the parties are to be given not less than 14 days' notice of the date, time and place of the CMC: see rule 27.3(13); and (iii) a timetable is laid down whereby the court office or, in default, the claimant must fix or apply to have fixed the date of a CMC in sufficient time to ensure that it takes place within the stated four to eight week window: see rule 27.3(3)(b).

30. Other provisions in the CPR emphasize the need for a CMC to be held at an early stage in the proceedings. Rule 15.6(2) requires the court to treat the hearing of a summary judgment application as a CMC, when the decision on the application does not bring the proceedings to an end. Likewise, the court may treat the hearing of an unsuccessful application disputing the court's jurisdiction as the occasion for a CMC: see rule 9.7(7)(b). When the court sets aside a default judgment under Part 13, it must treat the hearing as a CMC unless it is not possible to deal with the matter justly at that stage: see rule 13.6(1). If not, it must then and there fix a date, time and place for a CMC: see rule 13.6(2). More generally, by rule 11.11(4) the court may exercise any powers available at a CMC at the hearing of an interim application.

31. The rules also lay down requirements as to the attendance of parties, their attorneys and authorised representatives at a CMC: see rule 27.5. These are designed to enable the court and the parties to work together, with full authority, in the active management of the case, in accordance with the general duty of the parties, laid down in rule 1.3, to help the court to further the overriding objective.

32. Read together, these detailed provisions establish the following, in relation to the CMC:

i) It is the single most important event in the court's active management of each case, and in its integration of individual case management with its duties to manage its case-load as a whole.

ii) It is an event with very important procedural consequences for the parties, of which they are therefore to be given reasonable notice, and sufficient time to prepare.
iii) Even if the CMC is (for any reason) spread over more than one hearing, it is an event at the end of which there will definitely be a trial date or window, together with a full timetable for preparation.
iv) It is an event without which no claim (other than a fixed date claim) is to be permitted to proceed a significant distance beyond the exchange of statement of case and defence, unless the court, for good reason, orders otherwise.

Estate Management and Business Development Company Limited v Saiscon LIMITED CA. CIV.P.104/2016 – the purpose of Case management and the case management conference
Judgments per:
Peter Jamadar, JA
http://webopac.ttlawcourts.org/LibraryJud/Judgments/coa/2016/jamadar/CvA_16_P104DD26apr2017.pdf
Nolan Bereaux, JA
https://webopac.ttlawcourts.org/LibraryJud/Judgments/coa/2016/bereaux/CvA_16_S104DD26apr2017.pd
Judith Jones, JA
http://webopac.ttlawcourts.org/LibraryJud/Judgments/coa/2016/j_jones/CvA_16_S104DD26apr2017(2).pdf

PART 28 – DISCLOSURE AND INSPECTION OF DOCUMENTS

28.1 Scope of this Part.

(1) This Part sets out rules about the disclosure and inspection of documents.
(2) In this Part —

> **"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; and
>
> **"document"** means anything on or in which information of any description is recorded whether in writing, electronically or howsoever.

(3) A party "discloses" a document by revealing that the document exists or has existed.
(4) For the purposes of this part a document is "directly relevant" if —

> (a) the party with control of the document intends to rely on it;
> (b) it tends to adversely affect that party's case; or
> (c) it tends to support another party's case,
> but the rule of law known as "the rule in Peruvian Guano" does not apply to make a document "directly relevant".

Notes

28.1 Overarching Goals and Key Principles

PART 28 governs the procedural rules relating to the disclosure and inspection of documentary evidence. The rules are to be read in line with the Overriding Objective in Part 1. To the extent that parties are in possession of documentary evidence, their duties to disclose and facilitate inspection under Part 28 are to be undertaken inline with their duty to to help the Court to further the overriding objective (Part 1.3(1)) Evidence is central to the adjudicative process as a case is determined on available and admissible evidence. The overarching goals of evidence management include: (i) Giving practical effect to the Overriding Objective so as to allow evidential issues to be dealt with justly; (ii) Effectively, efficiently and pro-actively managing cases[93]; (iii) Proactively exploring possibilities for settlement; (iv) Robust preparation for trial by means of using the Court's powers to effectively receive and use evidence and to apply consequences to directions and orders[94]; and (v) Minimizing costs and reducing delay.
The key principles of disclosure and evidence include:

1. Disclosure of all documents that are directly relevant must be encouraged and compelled at the earliest opportunities.

2. Pre action protocols, identification of documents in pleadings, and early consequential orders for standard disclosure promote just disposition, and the effective and efficient management of both evidence and cases.

---

[93] In accordance with the Court's duty actively to manage cases (see specifically Pt 25.1 (a) (g) (j) (k) (l) (m)).
[94] See the Court's general powers of management, particularly Pt 26.1 (1), (2) (f) (k) (m) (v), 26.2 & 26.7.

3. Standard disclosure should be routinely ordered at the earliest opportunity and generally at the first Case Management Conference, or first hearing and be time bound, with specific default consequences applied.
4. There is a duty to disclose all documents and evidence that are directly relevant, and this duty is a continuous one.
5. Serious consequences can result as a consequence of default – e.g. non-reliance, striking out.

28.1(1) Duty of court and parties to further overriding objective[95]
The case management powers of the court give the court the responsibility and the means of ensuring that disclosure is limited to what is really necessary in individual cases. Accordingly, the procedure for the "automatic" discovery of non-specified documents without order is abolished. In r.1.1(1) it is stated that the overriding objective of the CPR is to "enable the court to deal with cases justly" and this duty is elaborated in r.1.1(3). The court must apply the Rules to further this objective (r.1.1(2)) and parties must help the court in this endeavour (r.1.2). Ultimate responsibility for the regulation of the disclosure process in accordance with the rules in Pt 28, and in a manner consistent with the furtherance of the overriding objective, rests with the court. The parties have a responsibility only to seek discovery when it is justifiable to do so and to co-operate in giving discovery in response to a reasonable request. Particularly for the purposes of minimising costs they should adopt a co-operative, constructive and sensible approach which the court must encourage, supporting it when necessary, by appropriate orders for costs.

28.1(2) Managing Cases
There is a positive duty and responsibility to pro-actively manage cases, and to do so effectively and efficiently. Each case is to be treated as a project. Evidence management is most effective and efficient when the issues are identified at the earliest stages of a matter. Evidence must be relevant. Relevance can only be ascertained when the issues are identified and prioritized. Efficiency and effectiveness are achieved by the skilful use of fixed timelines, default consequences, and technology. Expedition is a core value of the CPR.

28.1(3) Robust Preparations for Trial
The court's powers are wide – r26.1 (2)(v). Time is malleable. Orders and directions should make use of this to ensure timeliness and efficiency in both Evidence Management and Case Management. Evidence can be given in written form – and using this power to order that, say, witness statements, depositions, reports, etc. stand as evidence in chief should be routinely applied. The court can act on its own initiative and exercise its wide powers, and should do so when appropriate and in order to deal with cases justly. Pre action protocols, and early consequential orders for standard disclosure promote just disposition, and the effective and efficient management of both evidence and cases.

"Disclosure" is defined as "revealing that the document exists or has existed" (r.28.1(3)).The reference is to documents that are "directly relevant" as defined in r.28.1(4). There is no provision under the rules for automatic disclosure. The duty to disclose will arise if and when and to the extent that the court orders disclosure. This will generally be at the first case management hearing or upon application by a party, but parties are reminded that consistent with the parties' duty to help the court further the overriding objective of the rules the parties can proceed with disclosure and inspection on a consensual basis, albeit subject to review by the Court. The process of disclosure is performed by serving a list in accordance with the rules.

[95] *Civil Procedure Volume I,* The White Book 2019 ("**the White Book 2019**"), 31.0.1.

There is a right to inspect a disclosed document save where the right or privilege to withhold from disclosure is claimed or where the document is no longer in the physical possession of the party who served the list (see r. 28.11).
Central to the rules on disclosure is the concept of standard disclosure. This is defined in terms of:

(a) Documents upon which a party relies; and
(b) Documents which adversely affect their own case, or adversely affect another party's case or which support another party's case (see rr.28.1(4) and 28.4).

Any party is free to make an application for specific disclosure of a document or class of documents (see rr. 28.5 & 28.6). It is considered that the concept of proportionality is implicit in the granting of an order for specific disclosure.

28.0.3 Form - G20 (list of documents)

CPR 28.1(2) 'Copy'[96]

This term has a wide meaning and includes computer hard disks, floppy disks, audio tape, video tape and e-mails. Furthermore, whilst a party need not disclose more than one copy of a document, a document which contains a modification, obliteration or other marking or feature may be disclosed as a separate document. Examples include fax markings, notes upon differing travelling draft contracts or alterations to a draft letter.

CPR 28.1(2) 'Document'

This term has the widest possible meaning and means anything in which information of any description is recorded.[97]

Cases[98]:

Grant v Southwestern and County Properties Ltd [1975] Ch. 185 (per Walton J at 190E: "the derivation of the word is from the Latin 'documentum': it is something which instructs or provides information"; also see 191 and 197 which states, the fact that an instrument is needed to retrieve, decipher, translate or decode the information does not prevent an object containing information from being a document). Examples of objects which would be "documents" include:

- audio recordings (Grant v Southwestern and County Properties Ltd (ibid.) at 193G and 198B);
- film (Senior v Holdsworth [1976] Q.B. 23 at 36B-D);
- video-tape (Garcin v Amerindo Investment Advisors Ltd [1991] 4 All E.R. 655 at 656g);
- plans (Hayes v Brown [1920] 1 K.B. 250 at 252);
- computer files so long as there is information capable of being retrieved (Derby & Co Ltd v Weldon (No.9) [1991] 1 W.L.R. 652 at 657-658); and
- computer databases (Marlton v Tectronix UK Holdings [2003] EWHC 383 (Ch)).

There must be some information contained for the thing to be a "document" A blank piece of paper may not be a "document": Hill v The King [1945] K.B. 329 at 334.

CPR 28.1(3) 'revealing that the document exists'[99]

[96] The CCCP 2008, Note 24.5
[97] The CCCP 2008, Note 24.4
[98] The White Book 2019, 31.4.1
[99] The White Book 2019, 31.2.2.

In Smithkline Beecham plc v Generics (UK) Ltd [2003] EWCA Civ 1109, Aldous L.J. for the Court of Appeal held at [29] that: “no distinction is sought to be drawn between documents obtained from third parties and no limitation is placed on the way that the statement is made. In my view a reference by a party to a document in a witness statement is a statement that the document exists.”

CPR 28.1(4)(a) ‘intends to rely'

There is no definition of "rely" or "reliance”. It probably means those documents which are to be used in court, including in use for cross-examination.[100]

CPR 28.1(4)(b) & (c) ‘adversely affect’; ‘support’[101]

There are no definitions of "adversely affect'' or "support". In determining the issues in a party's case the statement of claim is an essential reference point: Harrods Ltd v Times Newspaper Ltd [2006] EWCA Civ 294; [2006] All E.R. (D) 302 (Feb) at [12]. Parties probably do not need to give disclosure of documents relating to non-material allegations in pleadings, i.e. those which even if substantiated would not affect the result. The confidentiality of a particular document does not of itself justify non-disclosure: see Nassé v Science Research Council [1979] UKHL 9.

A document which of itself does not "adversely affect" a case, but which may provide lines of inquiry leading to other information having a negative effect, is not covered by this provision. Adverse effect is normally primarily assessed by reference to the material allegations in the statement of claim. However, there is nothing in the CPR to restrict the concept in this manner, and a document casting doubt on the credibility of a party whose own evidence was important could be seen as one "adversely affecting" that party's case: Hedrich v Standard Bank London Ltd [2008] EWCA Civ 905.

28.2 Duty of disclosure limited to documents which are or have been in party's control.

(1) A party's duty to disclose documents is limited to documents which are or have been in the control of that party.
(2) For this purpose a party has or has had control of a document if —
  (a) it is or was in the physical possession of the party;
  (b) the party has or has had a right to inspect or take copies of it; or
  (c) the party has or has had a right to possession of it.

NOTES

CPR 28.2 - Duty of disclosure limited

North Shore Ventures Ltd v Anstead Holdings Inc [2012] EWCA Civ 11 (per Toulson LJ at [40]).

Montpellier Estates Ltd v Leeds City Council [2012] EWHC 1343 (QB) (at [36]).

[100] The White Book 2019, 31.6.1.
[101] As amended from The White Book 2019, 31.6.2.

CPR 28.2(2)(a) – 'physical possession'

This equates to the concept of "custody" under the former RSC, and RSC cases concerning that concept may be instructive.[102]

CPR 28.2(2)(b) – 'right to inspect or take copies'[103]

This may be a similar concept to that which existed under the former RSC covering documents within a party's "power", so cases concerning that RSC category may be useful; note the manner in which the RSC concept of documents under a party's "power" was described in Lonrho Ltd v Shell Petroleum Ltd [1980] 1 W.L.R. 627 at 635. Documents in the possession of subsidiary companies were not in the "power" of the parent companies for the purposes of the RSC. Where there is no presently enforceable legal right to obtain the documents without a third party's consent, then the documents may be outside this concept; for example, where there is no enforceable legal right to obtain the documents of a subsidiary company without their consent.

Documents in the possession and control of a non-party may fall within a party's "control" if there is a prior or current practice of that party having access and inspection rights to the non-party's documents: Schlumberger Holdings Ltd v Electromagnetic Geoservices [2008] EWHC 56 (Pat) or other "situation in which the separate identity of the company can effectively be ignored" per Patten J. at [39] of Thunder Air Ltd v Hilmarsson [2008] EWHC 355 (Ch).

CPR 28.2(2)(c) – 'right to possession'[104]

In this context the 'right' is a legal right such that for a party to have control over a document which is or was in the possession of another person he must be or have been entitled to compel that other person to deliver possession of the document to him or permit him to inspect it or take copies of it.

This covers instances where a third party is in possession of documents as an agent or servant of the litigant: North Shore Ventures Ltd v Anstead Holdings Inc [2012] EWCA Civ 11 (at [40]). It does not apply to the agent's own working papers which belong to them: Chantrey Martin v Martin [1953] 2 Q.B. 286, CA; R. v Mid-Glamorgan Family Health Services, Ex p. Martin [1995] 1 W.L.R. 110, CA.

The position of documents which are subject to joint rights to possession is uncertain. Under the RSC such documents were disclosable (Alfred Crompton Amusement Machines Ltd v Commissioners of Customs & Excise (No.2) [1974] A.C. 405 at 429). The same should apply under the CPR.

A right of inspection of documents may arise from contract, in which case the relevant documents would be disclosable. However, this is unlikely to be the case where the contract provides that the documents be kept confidential: Unilever plc v Gillette (UK) Ltd [1988] R.P.C. 416. The right may arise from various other sources, e.g. a principal's right to see the agent's records; a company director's right to see certain company documents; a partner's similar right in relation to partnership documents; a beneficiary's right to see trust documents or documents relating to a deceased estate.

28.3 Disclosure of copies

(1) Except where required by paragraph (2), a party need not disclose more than one copy of a document.

[102] The White Book 2019, 31.8.1.
[103] As amended from The White Book 2019, 31.8.3 & 31.8.4.
[104] As amended from The White Book 2019, 31.8.2.

(2) A party must however disclose a copy if it contains a modification, obliteration or other marking or feature which is not present in the original or any copy of the document which is being disclosed.

28.4 Standard disclosure – what documents are to be disclosed.

If a party is required by any direction of the Court to give standard disclosure that party must disclose all documents which are directly relevant to the matters in question in the proceedings.

Cases:

Taggart Global Trinidad Limited v Arcelor Mittal Point Lisas Limited CV 2012–00056 (2014.07.28)
Nairob Smart v Director of Personnel Administration and Another CV 2014–00038 (2014.07.25)

28.5 Specific disclosure

(1) An order for specific disclosure is an order that a party must do one or more of the following things —

(a) disclose documents or classes or categories of documents specified in the order;
(b) disclose documents relevant within the principles relating to discovery of documents, or, alternatively, directly relevant, to a specified issue or issues in the proceedings; or
(c) carry out a search to the extent stated in the order for —

(i) documents relevant, in the sense indicated in paragraph (b), or directly relevant to the proceedings or to a specified issue or issues; or
(ii) documents of a particular description or class or in a particular category or identified in any other manner, and disclose any documents within the scope of the order located as a result of that search.

(2) An order for specific disclosure may be made on or without an application.
(3) An application for specific disclosure is to be made on notice and unless in special circumstances at a case management conference.
(4) An application for specific disclosure may identify documents —

(a) by describing the class to which they belong; or
(b) in any other manner.

(5) An order for specific disclosure may require disclosure only of documents which are directly relevant to one or more matters in issue in the proceedings.

NOTES
CPR 28.5(3) & (4) – Application[105]

Such an application will involve questions as to the reasonableness under the overriding objective. The application should state what order is sought, contain the reasons why the applicant is not satisfied with the disclosure afforded so far by the respondent (if applicable) and must be supported by evidence.

If a class of documents is specified, the class should be carefully defined so it is limited to what is relevant and proportionate, and so the disclosing party is in no doubt as to the scope of their obligation: City of Gotha v Sotheby's [1998] 1 W.L.R. 114 at 123H, CA. It may also be appropriate to explain why it is reasonable and appropriate for that disclosure or search to be done. The former RSC contained a requirement that the evidence state the source and grounds for believing the document exists. While this is not an express requirement under the CPR, a court may require such evidence in an appropriate case.

28.6 Criteria for ordering specific disclosure.

(1) When deciding whether to make an order for specific disclosure, the Court must consider whether specific disclosure is necessary in order to dispose fairly of the claim or to save costs.
(2) The Court must have regard to —

(a) the likely benefits of specific disclosure;
(b) the likely cost of specific disclosure; and
(c) whether it is satisfied that the financial resources of the party against whom the order would be made are likely to be sufficient to enable that party to comply with any such order.

(3) If, having regard to paragraph (2)(c), the Court would otherwise refuse to make an order for specific disclosure it may nonetheless make such an order on terms that the party seeking the order must pay the other party's costs of such disclosure in any event.
(4) If the Court makes an order under paragraph (3) it must assess the costs to be paid in accordance with rule 71.6.
(5) The party in whose favour such order for costs was made may apply to vary the amount of costs so assessed.

Notes & Cases:

CPR 28.6 – 'criteria'[106]

The court will take into account all the circumstances of the case and in particular the overriding objective. The rationale for the discretion to order specific disclosure is that the overriding objective obliges the parties to give access to those documents which will assist the other's case. The court has a discretion as to whether it makes the order. It may make an order at any time, regardless of whether standard disclosure has already occurred.

[105] As amended from The CCCP 2008, Note 24.16 and The White Book 2019, 31.12.1
[106] As amended from The White Book 2019, 31.12.2 and The CCCP 2008, Note 24.16

Such an order requires stronger justification under the CPR than was the case under the RSC and should not be made in relation to matters not pleaded. When asked to make an order for specific disclosure the court should also be particularly mindful of the requirement of proportionality. It would appear that the power to make an order for specific disclosure is not by any means intended to enable disclosure to be extended beyond the standard level in every case. It can be used, for instance, to enable a party to see a document at an earlier stage of proceedings than would otherwise occur, if circumstances justify it – see Rigg v Associated Newspapers Ltd [2003] EWHC 710 (QB), [2004] EMLR 52, [2003] All ER (D) 97 (Apr).

The court will need to satisfy itself as to the relevance of the documents sought, and that they are or have been in the party's control, or at last that there is a prima facie case that these requirements will be met. The relevance of documents is analysed by reference to the pleadings, and the factual issues in dispute on the pleadings: Harrods Ltd v Times Newspaper Ltd [2006] EWCA Civ 294; [2006] All E.R. (D) 302 (Feb) at [12]. Where a claim is likely to turn on particular documents, there is a stronger case for an order to be made: Chantry Vellacott v Convergence Group plc [2006] EWHC 490 (Ch) Rimer J.

The power to order disclosure for the purpose of interlocutory proceedings should be exercised sparingly and then only for such documents as can be shown to be necessary for the just disposal of the application, Harris v The Society of Llyod's [2008] EWHC 1433 (Comm); [2009] Lloyd's Rep. I.R. 119 at [10].

28.7 Procedure for disclosure.

(1) Paragraphs (2) to (5) set out the procedure for disclosure.

(2) Each party must make, and serve on every other party, a list of documents in Form G20.

(3) The list must identify the documents or categories of documents in a convenient order and manner and as concisely as possible.

(4) The list must state what documents are no longer in the party's control, and —

> (a) what has happened to those documents; and
>
> (b) where each such document then is, to the best of the party's knowledge, information or belief.

(5) The list must include documents already disclosed.

(6) A list of documents served by a company, firm, association or other organisation must —

> (a) state the name and position of the person responsible for identifying individuals who might be aware of any document which should be disclosed; and
>
> (b) identify those individuals who have been asked whether they are aware of any such documents and state the position of those individuals.

NOTES

CPR 28.7(4) – documents 'no longer in the party's control'[107]

Each party is required to identify those documents which are no longer in the party's control and to say what has happened to them. The court refused to make an order of inspection in Three Rivers District Council v Bank of England (No 4) [2002] EWCA Civ 1182 on the ground that the bank did not have or currently have a right to possession of archive material in the Public Record Office following its use in the Birmingham Inquiry.

A statement and explanation is required as to documents which have been lost or destroyed. In the 'run of the mill' case a general statement may suffice but where the contents of the missing documents are of apparent importance they should be itemised and their appearance explained: Punjab National Bank v Jain [2004] EWCA Civ 589, CA.

28.8 Duty of attorney.

The attorney for a party must —

(a) explain to the maker of the list of documents the —

(i) necessity of making full disclosure in accordance with the terms of the order for disclosure and these Rules; and

(ii) possible consequences of failing to do so; and

(b) certify on the list of documents made pursuant to rule 28.7(2) that the explanation required by paragraph (a) has been given.

NOTES

CPR 28.8 – 'duty of attorney'[108]

It is necessary for attorneys to take positive steps to ensure that their clients appreciate at an early stage of the litigation, promptly after the claim form is issued, not only the duties of disclosure and inspection which will arise if disclosure is agreed or ordered by the court, but also the importance of not destroying documents which might possibly have to be disclosed (per Megarry J in Rockwell Machine Tool Co Ltd v E.P. Barrus (Concessionaires) Ltd [1968] 2 All E.R. 98 (Note)). Moreover, it is not enough simply to give instructions that documents be preserved, steps should be taken to ensure that documents are preserved.

CPR 28.8(a) – 'possible consequences'[109]

Where a party has raised concerns as to sufficiency of disclosure conducted by opposing lawyers, an application for a further review of their disclosure exercise carried out by independent lawyers may be sought: see Vilca v Xstrata Ltd, Compania Minera Antapaccay S.A. [2016] EWHC 1824 (QB). Where the failure to provide disclosure is sufficiently serious it may be lead to the making of an unless order and then the striking out of a party's case, as occurred in Re Atrium Training Services Ltd subnom Smailes (or Smails) v McNally [2014] EWCA Civ 1299, see [40] onward.

[107] As amended from The CCCP 2008, Notes 24.10, 24.11 & 24.12
[108] As amended from The White Book 2019, 31.10.6
[109] As amended from The White Book 2019, 31.7.5 & 31.10.7

28.9 Requirement for maker to certify understanding of duty of disclosure.

(1) The maker of the list of documents must certify in the list of documents that —

(a) the maker understands the duty of disclosure; and

(b) to the best of the knowledge of the maker the duty has been carried out.

(2) In the case of a list served on behalf of a company, firm, association or other organisation the certificate referred to in paragraph (1) must be made by the person identified in rule 28.7(6)(a).

(3) If it is impracticable for the maker of the list of documents to sign the certificate required by paragraph (1), it may be given by that person's attorney.

(4) A certificate given by the attorney must also certify —

(a) that the certificate is given on the instructions of the maker; and

(b) the reasons why it is impractical for the maker of the list of documents to give the certificate.

Cases:

Arrow Trading v Edwardian Group Ltd [2004] EWHC 1319.

Carlco Ltd v Chief Constable of Dyfed-Powys Police [2002] EWCA Civ 1754 at [9 -10] & [22], CA.

28.10 Disclosure in stages.

The parties may agree in writing or the Court may direct that disclosure or inspection or both may take place in stages.

NOTES

Baldock v Addison [1995] 1 W.L.R. 158

Punjab National Bank v Jain [2004] EWCA Civ 589

Montpellier Estates Ltd v Leeds City Council [2012] EWHC 1343 (QB)

28.11 Inspection and copying of listed documents.

(1) When a party has served a list of documents on any other party, that party has a right to inspect any document on the list, except documents —

(a) for which the right or privilege to withhold from disclosure is claimed; or

(b) which are no longer in the physical possession of the party who served the list.

(2) The party wishing to inspect the documents must give the party who served the list written notice of the wish to inspect documents in the list.
(3) The party who is to give inspection must permit inspection not more than seven days after the date on which the notice is received.
(4) If the party giving the notice undertakes to pay the reasonable cost of copying, the party who served the list must supply the other with a copy of each document requested not more than seven days after the date on which the notice was received.

NOTES
CPR 28.9(1)(a) – 'right or privilege to withhold'
Legal Professional Privilege:
R v Derby Magistrates' Court Ex p. B [1996] A.C. 487
R. (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax [2003] 1 A.C. 563 at [7]
McE v Prison Service of Northern Ireland [2009] UKHL 15
General Mediterranean Holdings v Patel [1999] EWHC 832 (Comm)
B v Auckland District Law Society [2003] UKPC 38
Conlon v Conlons Ltd [1952] 2 All ER 462, CA
Balabel v Air India [1988] Ch 317 at 331
Ramac Holdings Ltd v Brachers [2002] EWHC 1605 (Ch)
Foakes v Webb (1884) 28 Ch D 287

Legal Advice Privilege:
Three Rivers DC v Bank of England (No. 5) [2003] EWCA Civ 474
Three Rivers DC v Bank of England (No. 6) [2004] UKHL 48; [2004] W.L.R. 1274
The Sagheera [1997] 1 Lloyd's Rep 160 at 168
Greenough v Gaskell (1833) 1 My & K 98; [1824-34] All ER Rep 767
Alfred Crompton Amusement Machines Ltd v Customs and Excise Comrs (No 2) [1972] 2 QB 102
Re Duncan, Garfield v Fay [1968] P 306
New Victoria Hospital v Ryan [1993] ICR 201, EAT
Slade v Tucker (1880) 14 Ch D 824
Chantrey Martin (a firm) v Martin [1953] 2 QB 286
Price Waterhouse v BCCI Holdings (Luxembourg) SA [1992] BCLC 583

Litigation privilege:
Waugh v British Railways Board [1980] AC 251
Re Barings plc [1998] Ch 356
Re Highgrade Traders Ltd [1984] BCLC 151
Guinness Peat Properties v Fitzroy Robinson Partnership [1987] 2 All ER 716
Jones v Great Central Railway Co [1910] AC 4
Alfred Crompton Amusement Machines Ltd v Comrs of Customs and Excise (No 2) [1974] AC 405
ISTIL Group Inc v Zahoor [2003] EWHC 165 (Ch)

28.12 Duty of disclosure continuous during proceedings

(1) The duty of disclosure in accordance with any order for standard or specific disclosure continues until the proceedings are concluded.

(2) If documents to which that duty extends come to a party's notice at any time during the proceedings, that party must immediately notify every other party and serve a supplemental list of those documents.
(3) The supplemental list must be served not more than fourteen days after the documents to which that duty extends have come to the notice of the party required to serve it.

Notes:
CPR 28.12 – 'supplemental list'
Lonrho Ltd v Shell Petroleum Co Ltd [1980] 1 W.L.R. 627 at 635, HL
Vernon v Bosley (No.2) [1999] Q.B. 18
McTear v Engelhard [2016] EWCA Civ 487

28.13 Consequence of failure to disclose documents under order for disclosure

(1) A party who fails to give disclosure by the date ordered or to permit inspection, may not rely on or produce at the trial any document not so disclosed or made available for inspection.
(2) A party seeking to enforce an order for disclosure may apply to the Court for an order that the other party's statement of case or some part of it be struck out.
(3) An application under paragraph (2) relating to an order for specific disclosure may be made without notice but must be supported by evidence on affidavit that the other party has not complied with the order.
(4) On an application under paragraph (2) the Court may order that unless the party in default complies with the order for disclosure by a specific date that party's statement of case or some part of it be struck out.

28.14 Claim of right to withhold disclosure or inspection of a document

(1) A person who claims a right to withhold disclosure or inspection of a document or part of a document must —

(a) make such claim for the document; and

(b) state the grounds on which such a right is claimed, in the list or otherwise in writing to the person wishing to inspect the document.

(2) A person may however apply to the Court, without notice, for an order permitting that person not to disclose the existence of a document on the ground that disclosure of the existence of the document would damage the public interest.
(3) A person who applies under paragraph (2) must —

(a) identify the document, documents or parts thereof for which a right to withhold disclosure is claimed; and

(b) give evidence on affidavit showing —

(i) that the applicant has a right or duty to withhold disclosure;

and

(ii) the grounds on which the right or duty is claimed.

(4) Unless the Court orders otherwise, an order of the Court under paragraph (2) is not to be open for inspection by, nor served on any person.

(5) A person who does not agree with a claim of right to withhold inspection or disclosure of a document may apply to the Court for an order that the document be disclosed or made available for inspection.

(6) On hearing such an application the Court must make an order that the document be disclosed unless it is satisfied that there is a right to withhold disclosure.64

(7) If a person —

(a) applies for an order permitting that person not to disclose the existence of, a document or part of a document; or

(b) claims a right to withhold inspection, the Court may require the person to produce that document to the Court to enable it to decide whether the claim is justified.

(8) On considering any application under this rule, the Court may invite any to make representations on the question of whether the document ought to be withheld.

28.15 Restrictions on use of a privileged document inspection of which has been inadvertently allowed

Where a party inadvertently allows a privileged document to be inspected the party who has inspected it may use it only with the —

(a) the agreement of the party disclosing the document; or

(b) the permission of the Court.

Notes

Al-Fayed v Commissioner of Police of the Metropolis [2002] EWCA Civ 780
Property Alliance Group Ltd v The Royal Bank of Scotland Plc [2015] EWHC 3341 (Ch)
Atlantisrealm Ltd v Intelligent Land Investments (Renewable Energy) Ltd [2017] EWCA Civ 1029
Single Buoy Moorings Inc v Aspen Insurance UK Limited [2018] EWHC 1763 (Comm)

28.16 Documents referred to in statements of case, etc.

(1) A party may inspect and copy a document mentioned in —

(a) an affidavit;

(b) an expert's report;

(c) a statement of case;

(d) a witness statement or summary; or

(e) the claim form.

(2) A party who wishes to inspect and copy such a document must give written notice to the party who, or whose witness, mentioned the document.
(3) The party to whom the notice is given must comply with the notice not more than seven days after the date on which the notice is served.

Notes

CPR 28.16 – right to inspect
The right to inspect here arises simply by virtue of the documents having been mentioned (specifically or a direct allusion) in one of the documents in r.28.16(1), irrespective of whether or not a List of Documents has been served, and irrespective of whether pleadings are closed.

Cases:
Quilter v Heatly (1883) 23 Ch. D. 42, CA
Expandable Ltd v Rubin [2008] EWCA Civ 59
National Crime Agency v Abacha [2016] EWCA Civ 760
Dubai Bank Ltd v Galadari (No. 2) [1990] 1 W.L.R. 731
Rigg v Associated Newspapers [2003] EWHC 710 (QB)
Re Fenner and Lord [1897] Q.B. 667, CA

28.17 Subsequent use of disclosed documents.

(1) A party to whom a document has been disclosed may use the document only for the purpose of the proceedings in which it is disclosed, unless —

(a) the document has been read to or by the Court, or referred to, in open court; or
(b) the party disclosing the document and the person to whom the document belongs; or
(c) the Court gives permission.

(2) The Court may make an order restricting or prohibiting the use of a document which has been disclosed, even where the document has been read to or by the Court, or referred to in open court.
(3) An application for such an order may be made by any —

(a) party; or
(b) person to whom the document belongs.

28.18 Notice to prove a document Notice to prove a document.

(1) A party shall be deemed to admit the authenticity of any document disclosed to that party under this Part unless that party serves notice that the documents must be proved at trial.
(2) A notice to prove a document must be served not less than forty-two days before the trial.

PART 29 – EVIDENCE

29.1 Power of Court to control evidence.

The Court may control the evidence to be given at any trial or hearing by giving appropriate directions, at a case management conference or by other means, as to the —

(a) issues on which it requires evidence; and

(b) way in which any matter is to be proved.

29.2 Evidence at trial – general rule.

(1) Any fact which needs to be proved by evidence of witnesses is to be proved at —

(a) trial, by their oral evidence given in public; and

(b) any other hearing, by affidavit.

(2) Paragraph (1) is subject to any order of the Court or provision to the contrary contained in these Rules or elsewhere.

(3) Any evidence taken at the trial or other hearing of any proceedings maybe used subsequently in those proceedings.[65]

29.3 Evidence by video link or other means.

The Court may allow a witness to give evidence without being present in the courtroom, through a video link or by any other means.

Notes:

In Rosalyn Brown v Cotswold Group Limited and others 2018/GEN/GLE/01042 (January 22 2024), the court refused a late application by the Defendants to have one of its key witness give evidence remotely. The Court noted that it had wide powers aimed at managing its process and moving matters to resolution in a just, expeditious, fair and cost-proportionate way. One such power is the power to control the nature of the evidence and the mode in which it is taken at trial under Part 29.1. In determining how to control the nature of the evidence and the mode in which it is taken, the Court must bear in mind the Overriding Objective. The Overriding Objective provides several factors that ought to be considered, where appropriate, in the exercise of a court's discretion. In determining whether to permit the taking of evidence remotely under Part 29.3, a court must have regard to the relevant circumstances. So, for example, cost-savings is a factor relied upon by the Defendants in their application. Cost-savings can only be one relevant consideration in such an instance. Another question that a court must ask itself is whether such permission should be granted in the interest of justice. A court must consider whether such a direction would result in a trial that would be fair as between the parties. A court is to ensure that such a direction would serve to ensure, as far as practicable, that the parties are on an equal footing. In such an instance it becomes

necessary to consider, inter alia, the complexity of the issues, the nature of the evidence to be taken and the best way for this court to weigh and assess that evidence in order to make a proper determination in the matter. It is a balancing exercise.

29.4 Requirement to serve witness statements.

(1) The Court may order a party to serve on any other party a statement of the evidence of any witness upon which the first party intends to rely in relation to any issue of fact to be decided at the trial.

(2) A statement of the evidence referred to in paragraph (1) is known as a **"witness statement"**.

(3) A party's obligation to serve a witness statement is independent of any other party's obligation to serve such a statement.[66]

(4) The court may give directions as to —

(a) the order in which witness statements are to be served; and

(b) when they are to be filed.

29.5 Form of witness statements.

(1) A witness statement must —

(a) be dated;

(b) be signed or otherwise authenticated by the intended witness;

(c) give the name, address and occupation of the witness;

(d) include a statement by the intended witness that he believes the statements of fact in it to be true;

(e) not include any matters of information or belief which are not admissible or, where admissible, must state the source of any matters of information or belief;

(f) so far as reasonably practicable, be in the intended witness's own words; and

(g) sufficiently identify any document to which the statement refers without repeating its contents unless this is necessary in order to identify the document.

(2) The Court may order that any inadmissible scandalous, irrelevant or otherwise oppressive matter be struck out of any witness statement.

29.6 Witness summaries.

(1) A party who is required to provide and is not able to obtain a witness statement may serve a witness summary instead.

(2) The party who serves a witness summary must certify on the witness summary the reason why a witness statement could not be obtained.

(3) A **"witness summary"** is a summary of the —

(a) evidence, so far as is known, which would otherwise be included ina witness statement; or

(b) matters about which the party serving the witness summary proposes to question the witness, if the evidence is not known.

(4) Unless the Court orders otherwise, a witness summary must include the name and address of the intended witness or other sufficient means of identifying the intended witness.

(5) A witness summary must be served within the period in which a witness statement would have had to be served.

(6) Where a party provides a witness summary, so far as practicable, rules 29.4, 29.7, 29.8 and 29.9 apply to the witness summary.

29.7 Procedure where one party will not serve witness statement by date directed.

(1) This rule applies where —

(a) one party (the "first party") is able and prepared to comply with the order to serve witness statements; and

(b) the other party fails to make reasonable arrangements to exchange statements.

(2) The first party may comply with the requirements of this Part by —

(a) filing the witness statements in a sealed envelope at the court office by the date directed; and

(b) giving notice to all other parties that the witness statements have been filed.

(3) Statements filed pursuant to paragraph (2) must not be disclosed to the other party until the other party certifies that the witness statements or summaries in respect of all witnesses upon whose evidence the other party intends to rely have been served.

29.8 Witness to give evidence unless Court otherwise orders.

(1) Unless the Court orders otherwise, a party must call a witness to give evidence where that party —

(a) has served a witness statement or summary; and

(b) wishes to rely on the evidence of that witness.

(2) If a party —

(a) has served a witness statement or summary; and

(b) does not intend to call that witness at the trial,

that party must give notice to that effect to the other parties not less than twenty-eight days before the trial.

29.9 Amplifying witness statements at trial.

A witness giving oral evidence may with the permission of the Court —

(a) amplify the evidence as set out in his or her witness statement if that statement has disclosed the substance of the evidence which the witness is asked to amplify;

(b) give evidence in relation to new matters which have arisen since the witness statement was served on the other parties; or

(c) comment on evidence given by other witnesses.

29.10 Cross-examination on witness statement.

If a witness is called to give evidence at trial, that witness may be cross-examined on the evidence as set out in his or her witness statement, whether or not the statement or any part of it was referred to during the witness's evidence in chief.

29.11 Consequence of failure to serve witness statement or summary.

(1) If a witness statement or witness summary is not served in respect of an intended witness within the time specified by the Court, the witness may not be called unless the Court permits.

(2) The Court may not give permission at the trial unless the party asking for permission has a good reason for not previously seeking relief under rule 26.8.

29.12 Use of witness statement for other purposes.

(1) Except as provided by this rule, a witness statement may be used only for the purpose of the proceedings in which it is served.

(2) Paragraph (1) does not apply if and to the extent that the —

(a) Court gives permission for some other use of it;

(b) witness gives consent in writing to some other use of it; or

(c) witness statement has been put in evidence.

29.13 Notice to admit facts.

(1) A party may serve notice on another party requiring that other party to admit the facts or the part of the first party's case specified in the notice.

(2) A notice to admit facts must be served no later than forty-two days before the trial.

(3) If the other party makes any admission in response to the notice to admit facts, the admission may be used against that party only —

(a) by the party who served the notice; and

(b) in the proceedings in which the notice is served.

(4) If the party served with the notice to admit does not admit the facts set out in the notice within twenty-one days of service of the notice upon that party the Court may assess the costs incurred by the party serving the notice in proving such facts and order the party served with the notice to pay such costs.[67]

NOTES – EVIDENCE

These provisions differ only slightly from Order 38 of the Rules of the Supreme Court 1978. However, these provisions must now be viewed through the lenses of the overriding objectives – to deal with cases justly and efficiently and less costly and proportionately. It is worth noting that the majority of these provisions are contained in the rules of other Caribbean jurisdictions, for example in Barbados, the Eastern Caribbean, Jamaica and Trinidad and Tobago.

EVIDENCE ON INTERIM APPLICATIONS

As a general rule, the applicant need not give evidence in support of an application unless it is required by a –

(a) Court order;

(b) Practice direction;

(c) Rule.

However, whether or not an applicant is required to give evidence in support of an application by a Court order, practice direction or rule, the application may fail if there is no evidence in support of it.

EVIDENCE AT A HEARING OR AT TRIAL AND WITNESS STATEMENTS

By Part 29.1 the Court has the ability to control the evidence to be given at trial or other hearing and to exclude evidence if it so directs, regardless of whether the evidence is relevant or admissible. *Grobbelaar v Sun Newspapers Ltd* (1999) Times, CA

If a witness statement (or witness summary in respect of a intended witness) is not served within the time specified by the court, the court may not permit the witness to be called. Further, permission will not be given unless there is good reason for not seeking the relief from sanctions under the court's case management powers that is, prior to trial.

The following cases provide some insight into how the court has addressed this issue:

Mealey Horgan plc v Horgan (1999) Times, 6 July

St Bernard v A.G of Grenada per Barrow J

In *Cowland and Kendrick v District Judges* of the West London County Court 20 July, 1999, unreported), CA (a case involving an issue of whether the court had been notified of a dispute as to ownership in respect of goods to be taken in execution), the Court of Appeal overturned the decision of the trial judge to refuse permission for a witness to give evidence at the hearing concerning the sending of the relevant fax; neither party had had the foresight to obtain a witness statement from him and ought to have done so; the witness was 'not the claimant's witness'; therefore, the defendants could not protest at the calling of a witness whom they could have "proofed" and called themselves.

In *Rose Stroh v London Borough of Haringey* (13 July 1999, unreported), ENG CA, the Court of Appeal decided that the judge was correct to refuse the defendant's application to adduce the evidence of four witnesses; the reason for the delay had been the defendants' failure to investigate

the matter with diligence; the court concluded that the prejudice to the claimant of being faced with the evidence outweighed the prejudice to the defendant of being unable to adduce the evidence, even though the effect of refusing the application was that the judge went on to order that judgment be entered for the claimant.

In *John Rahael v TNT News Centre Ltd* CV 2005-00059 both sides were ordered by the Judge at the case management hearing to exchange witness statements for use as evidence in chief and the failure to do so would result in no evidence of the witnesses to be allowed. Both sides failed to comply with the said order with the result that neither party was allowed to adduce oral evidence at the trial.

In *Glenda Edwards v North West Regional Health Authority*, Claim No CV 2006-00458 the Defendant applied for an extension of time for service of its witness statements on the morning of the trial. The Judge granted the extension based on all of the circumstances of the case including the fact that the breach was unintentional; the application made promptly upon discovery of the failure to comply and the trial could be kept.

PART 30 – AFFIDAVITS

30.1 Affidavit evidence.

(1) The Court may require evidence to be given by affidavit instead of, or in addition to oral evidence.

(2) In this Part, **“deponent”** means the maker of an affidavit.

(3) Whenever an affidavit is to be used in evidence, any party may apply to the Court for an order requiring the deponent to attend to be cross-examined.

(4) Such an application must be made not less than —

(a) in the case of a trial, twenty-one days; or

(b) any other hearing, seven days,

before the date of the hearing at which it is intended to cross-examine the deponent.

(5) If the deponent does not attend as required by the Court order, the affidavit may not be used as evidence unless the Court permits.

(6) The general rule is that an affidavit must be filed before it may be used inany proceedings.

(7) In a case of urgency the Court may make an order on an affidavit which has not been filed if the party tendering it undertakes to file it.

30.2 Form of affidavits.

Every affidavit must —

(a) be headed with the title of the proceedings;

(b) be divided into paragraphs numbered consecutively;

(c) be in the first person and state the name, address and occupation of

the deponent and, if more than one, of each of them;

(d) be marked on the top right hand corner of the affidavit and of the back-sheet with —

(i) the name of the party on whose behalf it is filed;

(ii) the initials and surname of the deponent;

(iii) where the deponent swears more than one affidavit in any proceedings, the number of the affidavit in relation to the deponent;

(iv) the identifying reference of each exhibit referred to in the affidavit;

(v) the date when sworn;

(vi) the date when filed; and

Example: Claimant: N. Berridge: 2nd:NB 3 and 4:1.10.98:3.10.98.

(e) state if any deponent is employed by a party to the proceedings.

30.3 Contents of affidavits.

(1) The general rule is that an affidavit may contain only such facts as the deponent is able to prove from his or her own knowledge.

(2) An affidavit may contain statements of information and belief —

(a) if any of these Rules so allows; and

(b) if the affidavit is for use in an application for summary judgment under Part 15 or any procedural or interlocutory application, provided that the affidavit indicates —

(i) which of the statements in it are made from the deponent's own knowledge and which are matters of information or

belief; and

(ii) the source of any matters of information and belief.

(3) The Court may order that any scandalous, irrelevant or otherwise oppressive matter be struck out of any affidavit.

(4) An affidavit containing any alteration may not be used in evidence unless all such alterations have been initialled both by the deponent and the person before whom the affidavit is sworn.

30.4 Documents to be used in conjunction with affidavits.

(1) Any document to be used in conjunction with an affidavit must be exhibited with it.

(2) If there is more than one such document those documents may be includedin a bundle which is arranged chronologically or in some other convenientorder and is properly paginated.

(3) Clearly legible photocopies of original documents may be exhibited, provided that the originals are made available for inspection by the other parties before the hearing and by the Court at the hearing.

(4) Each exhibit or bundle of exhibits must be —

(a) produced to and verified by the deponent;

(b) accurately identified by an endorsement on the exhibit or on a certificate attached to it signed by the person before whom the affidavit is sworn or affirmed; and

(c) marked in accordance with rule 30.2(d).

30.5 Making of affidavits.

(1) An affidavit must —

(a) be signed by all deponents;

(b) be sworn or affirmed by each deponent;

(c) be completed and signed by the person before whom the affidavit issworn or affirmed; and

(d) contain the full name, address and qualifications of the person before whom it is sworn or affirmed.

(2) The statement authenticating the affidavit ("the jurat") must follow immediately from the text and not be on a separate page.

(3) An affidavit may not be admitted into evidence if sworn or affirmed before the attorney of the party on whose behalf it is to be used or before any agent, partner, employee or associate of such attorney.

(4) If it appears that the deponent is illiterate or blind, the person before whom the affidavit is sworn or affirmed must certify in the jurat that the

—

(a) affidavit was read to the deponent by him;

(b) deponent appeared to understand it; and

(c) deponent signed or made his mark in his presence.

(5) A person may make an affidavit outside the jurisdiction in accordance with —

(a) the law of the place where he makes the affidavit; or

(b) this part.

(6) Any affidavit which purports to have been sworn or affirmed in accordance with the law and procedure of any place outside the jurisdiction is presumed to have been so sworn.

30.6 Service of affidavits.

(1) A party who is giving evidence by affidavit must serve a copy of the affidvait on every other party.

(2) Paragraph (1) applies whether the affidavit was made in the proceedings or in some other proceedings.

(3) The general rule does not apply if the affidavit is being used in support of an application that may be made without notice.

Notes:
An affidavit is a sworn (written or printed) statement by a deponent normally drawn by the deponent's attorney and containing relevant, admissible evidence.
By Part 30.3 the case of *Re Steadmen Labier Investments Ltd* set out the approach to the application of the rules of evidence and procedure as it relates to affidavits.

PART 31 – MISCELLANEOUS RULES ABOUT EVIDENCE

31.1 Use of plans, photographs etc., as evidence.

(1) A party who intends to rely at a trial on evidence which is not —

(a) to be given orally, and

(b) contained in a witness statement, affidavit or expert report, must disclose that intention to the other parties in accordance with this rule.

(2) If a party fails to disclose the intention to rely on the evidence as required by this rule, the evidence may not be given.

(3) Subject to paragraphs (4) and (5), a party who intends to use the evidence referred to in paragraph (1) to prove any fact must disclose such intention not later than the latest date for serving witness statements.

(4) Where there is no order for service of witness statements, the party proposing to tender the evidence must disclose it at least twenty-one days before the hearing.

(5) If the evidence referred to in paragraph (1) forms part of expert evidence, the intention to put in the evidence must be disclosed when the expert's report is served on the other party.

(6) Where a party has disclosed the intention to put in the evidence referred to in paragraph (1) that party must give every other party an opportunity to inspect the evidence and to agree to its admission without proof.

31.2 Evidence on questions of foreign law

(1) This rule sets out the procedure which must be followed by a party who intends to adduce evidence on a question of foreign law.

(2) A party who intends to adduce evidence on a question of foreign law must first give every other party notice of that intention.

(3) Notice under paragraph (2) must be given not less than forty-two days before the hearing at which the party proposes to adduce the evidence.

(4) The notice must -

(a) Have attached a document which forms the basis of the evidence; and

(b) Specify the question on which the evidence is to be adduced.

31.3 Evidence of consent to trustee to act

A document purporting to contain the written consent of a person to act as trustee and to bear that person's signature verified by some other person is evidence of such consent.

Notes:

By 31.1 the party to whom notice was given to use a plan, photograph as evidence if dissatisfied with it, may prepare his own evidence and may in this regard seek directions from the court to enter upon and inspect the property. See: **Oxford v Rasmi Electronics [2002] EWCA Civ 1672**

PART 32 – EXPERTS AND ASSESSORS

32.1 Scope of this Part.

(1) This Part deals with the provision of expert evidence to assist the Court.

(2) In this Part, **"expert witness"** means an expert who has been instructed to prepare or give evidence for the purpose of court proceedings.

Notes:
General Overview
Part 32 of the CPR governs the use of experts before the court. Rule 32.6(1) is clear that a party cannot call an expert witness or put in an expert's report without the court's permission. Once the court has given this permission the expert's overriding duty is to the court since his duty is to help the court impartially on all matters relevant to his expertise and this duty overrides any obligations to the persons from whom he has received instructions (Rule 32.3).

The expert's report must set out the facts or assumptions upon which his opinion is based and must clearly indicate if any particular matter or issue falls outside his expertise (Rule 32.4). He can apply to the court for directions (Rule 32.5). Further, it is the court that directs the date by which the report is to be served (Rule 32.6(5)). The expert's report must be addressed to the court and not to any person from whom he received instructions (Rule 32.13). The contents of his report must give details of his qualifications, any literature or other material on which he has relied in the making of his report, indicate the persons who carried out any tests which he has used in his report, give details of the qualifications of those persons, summarise any range of opinions and give reasons for his opinion (Rule 32.14(1)).

At the end of the report there must be a statement indicating that he understands his duty under Rules 32.3 and 32.4, he has complied with that duty, that all matters are within his knowledge and are of expertise relevant to the issue and he has given details which may affect the validity of the report. (Rule 32.14(2)) More importantly, there must be attached to the expert's report copies of all written instructions given to the expert, supplemental instructions or a note of oral instructions (Rule 32.14(3)).

Part 32 therefore controls the volume, quality and impartiality of expert evidence restricting parties from calling how many and whoever experts they wanted to give evidence at trial.

32.2 General duty of Court and of parties.

Expert evidence must be restricted to that which is reasonably required to resolve the proceedings justly.

Cases:
32.2 Expert evidence must be restricted

Expert evidence must be restricted to that which is reasonably required to resolve the proceedings justly: CPR rule 32.2. Mere desirability or helpfulness is not enough: see *British Airways plc v Spencer [2015] EWHC 2477*, per Warren J. at [68]. Unless and until a particular issue is excluded from consideration under CPR 26.1(2)(j), the Court must ask itself the following important questions:

(i) Whether, looking at each issue, it is necessary for there to be expert evidence before that issue can be resolved. If it is necessary, rather than merely helpful, it must be admitted.

(ii) If the evidence is not necessary, the second question is whether it would be of assistance to the court in resolving that issue. If it would be of assistance, but not necessary, then the court would be able to determine the issue without it.

32.3 Expert's overriding duty to Court.

(1) It is the duty of an expert witness to help the Court impartially on the matters relevant to his or her expertise.

(2) This duty overrides any obligation to the person by whom he is instructed or paid.

Notes:
An expert's overriding duty is to the court first. Any report produced by that expert must contain a statement that he understands and has complied with that duty (CPR 32.14(2)(a) and (b)).

While some degree of consultation between experts and legal advisers is entirely proper, it is necessary that expert evidence presented to the court should be, and should be seen to be, the independent product of the expert, uninfluenced as to form or content by the exigencies of litigation: *Whitehouse v Jordan [1981] 1 WLR 246*, per Lord Wilberforce at pages 256H–257A.

32.4 Way in which expert's duty to Court is to be carried out.

(1) Expert evidence presented to the Court must be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the demands of the litigation.

(2) An expert witness must provide independent assistance to the Court by way of objective unbiased opinion in relation to matters within the witness's expertise.

(3) An expert witness must state the facts or assumptions upon which his or her opinion is based and must consider and include any material fact which could detract from his or her conclusion.

(4) An expert witness must state if a particular matter or issue falls outside his or her expertise.

(5) If the opinion of an expert witness is not properly researched then this must be stated with an indication that the opinion is no more than a provisional one.

(6) If an expert witness cannot assert that his or her report contains the truth, the whole truth and nothing but the truth without some qualification, that qualification must be stated in the report.

(7) If after service of a report, an expert witness changes his or her opinion on a material matter, that change of opinion must be communicated to all parties.

Cases:

32.4 Way in which expert's duty to Court is to be carried out

The most frequently cited statement of an expert's duties is set down in the judgment of Cresswell J in *National Justice Compania Naviera SA v Prudential Assurance Co (the Ikarian Reefer)* [*1993] 2 Lloyds Rep 68*:

- expert evidence should be, and should be seen to be, the independent product of the expert uninfluenced as to the form or content by the demands of litigation
- expert witnesses should provide independent assistance to the court by way of an objective, unbiased opinion in relation to matters within their expertise
- an expert witness should never take on the role of an advocate
- an expert witness should state the facts or assumptions upon which his opinion is based without omitting any consideration or material fact which could detract from his concluded opinion
- an expert witness should make clear when a question or issue falls outside the scope of his expertise
- if an expert's opinion is not properly researched because he considers that insufficient data is available, this must be stated with an indication that the opinion is, in such circumstances, no more than a provisional one
- if an expert witness changes his view, such a change of view should be communicated, through the legal representatives, to the other side without delay and, where appropriate, to the Court
- all materials referred to in an expert's report, such as photographs, plans, calculations, analyses and the like, must be provided to the opposing parties at the same time as the exchange of the report.

32.5 Expert's right to apply to Court for directions.

(1) An expert witness may apply in writing to the Court for directions to assist him or her in carrying out his or her functions and duty to the Court as an expert witness.

(2) An expert witness who applies for directions under paragraph (1) need not give notice of the application to any party.

(3) The Court may direct that —

(a) notice of an application under paragraph (1) be given to any party; or
(b) a copy of the application and any directions given be sent to any party.

32.6 Court's power to restrict expert evidence.

(1) A party may not call an expert witness or put in the report of an expert witness without the Court's permission.

(2) The general rule is that the Court's permission is to be given at a case management conference.

(3) When a party applies for permission under this rule —

(a) that party must name the expert witness and identify the nature of his or her expertise; and
(b) any permission granted shall be in relation to that expert witness only.

(4) The expert witness' oral or written evidence may not be called or put in unless the party wishing to call or put in that evidence has served a report of the evidence which the expert witness intends to give.

(5) The Court must direct by what date the report must be served.

(6) The Court may direct that part only of an expert witness' report be disclosed.

Cases:

Christianne Kelsick (an Infant Suing by her father and next of kin, Rawle Kelsick) v Dr. Ajit Kuruvilla et al Civil Appeal No. 277 of 2012 (The Trinidad & Tobago Court of Appeal held that the principle to be applied in determining whether or not permission ought to be granted to allow expert evidence is as provided for in Part 33.4 of the T&T CPR [BAH CPR 32.2], viz. expert evidence must be restricted to that which is reasonably required to resolve the proceedings justly.

In determining whether permission should be granted to use expert evidence and what expert evidence is reasonably required to resolve the issues that arise for determination, a court ought to weigh in the balance the likelihood of the following (assuming admissibility): (i) how cogent the proposed expert evidence will be; (ii) how useful or helpful the proposed expert evidence will be to resolving the issues that arise for determination. The two factors of cogency and usefulness and helpfulness contain some commonalities and there will often be overlap in what one considers under these two heads.

Under cogency, the objectivity, impartiality and independence of the proposed expert, together with the qualifications and experience of the proposed expert, in relation to both the specific subject under consideration and the particular issues to be resolved, are material considerations. At the stage of giving permission, the judge is simply required to assess how cogent the expert evidence is likely to be. That is, how convincing and compelling it is likely to be based on the stated considerations.

Under usefulness or helpfulness, the technical nature of the evidence to be reconciled and the focus of the issues to be determined, as well as the familiarity of the expert with the areas under scrutiny, are material considerations, especially when that expertise is relevant for necessary fact and/or inferential findings. As with cogency, at the permission stage, the judge is only required to assess the likelihood of usefulness or helpfulness.

In determining whether the evidence is reasonably required to resolve the proceedings justly, the following factors that allow one to assess proportionality should also be weighed in the balance: the cost, time and resources involved in obtaining that evidence, proportionate to the quantum involved, the importance of the case, the complexity of the issues, the financial position of each party involved in the litigation, and the court resources likely to be allocated to the matter (in the context of the court's other obligations). Proportionality involves a comparative assessment of the multiple considerations stated in the overriding objective, which are not exhaustive.

In addition, depending on the particular circumstances, the following factors may also be relevant: (i) fairness, (ii) prejudice, (iii) bona fides and (iv) the due administration of justice.

The above factors are not to be understood as hurdles to be cleared when considering whether to grant permission for expert evidence. They are intended to function as guidelines to assist the court in determining whether to grant permission. The factors of cogency and usefulness/helpfulness may also be relevant at the stage in the proceedings when the trial judge has heard the evidence and is analyzing the expert evidence and determining the matter on the merits.

On the issue of the timing of the application, it is clear that the general rule is that a court ought to consider whether to use expert evidence and reports at the stage of case management. The general rule that the use of expert evidence ought to be considered at case management is there for guidance and as a matter of common sense, given the judge driven case flow management process that now operates in civil litigation. However, this is not an absolute rule. Flexibility must be applied by the court because an expert is there primarily to assist the court. whenever an application to use expert evidence is made, the approach should be to consider admissibility, cogency, usefulness and proportionality, together with, when relevant, fairness, prejudice, bona fides and the due administration of justice.

The Court does not necessarily have to wait for a party to raise the issue of expert evidence. With or without an application, a judge is entitled to consider the use of expert evidence to enable the Court to resolve the proceedings justly.

32.7 General requirement for expert evidence to be given in written report.

(1) Expert evidence is to be given in a written report unless the Court directs otherwise.

(2) This rule is subject to any enactment restricting the use of hearsay evidence.

Notes:
Pursuant to Rule 32.4(3), an expert witness is required to state the facts or assumptions upon which his opinion is based. He may give his opinion upon facts which are either admitted, or proved by himself, or other witnesses in his hearing, at the trial, or are matters of common knowledge; as well as upon a hypothesis based thereon. An expert's opinion is therefore inadmissible as to material which is not before the court or which have merely been reported to him by hearsay: see *Phipson on Evidence (14th Edition) at paragraph 32-14*:
Section 39(1) of the Evidence Act, 1996 provides that hearsay evidence shall be inadmissible subject to section 39(2) and other provisions of that Act. Further, section 58 of the Evidence Act, 1996 expressly provides for the admission of oral and documentary hearsay evidence in certain circumstances.
See the decision of the Eastern Caribbean High Court of St. Christopher and Nevis in *Lauren Cundari et al v Gerald Anthony Dwyer Astaphan, SKBHCV2011/0369* where Ward J. considered the admissibility of an expert report based on documentary hearsay.

32.8 Written questions to experts.

(1) A party may put written questions to an expert witness, instructed by another party or parties jointly, about his or her report.

(2) Written questions under paragraph (1) —
 (a) may be put once only;
 (b) must be put within twenty-eight days of service of that expert witness' report; and
 (c) must only be in order to clarify the report; unless —
  i) the Court permits; or
  (ii) the other party agrees.

(3) An expert witness' answers to questions under this rule must be treated as part of that expert witness' report.

(4) If a party has put a written question to an expert witness instructed by another party in accordance with this rule and the expert witness does not answer the question, the Court may make one or more of the following orders in relation to the party who instructed the expert, namely that —

(a) that party may not recover the fees and expenses of the expert witness from any other party;

(b) that party may not rely on the evidence of the expert witness;

(c) the party asking the question may seek to obtain the answer from another expert.

(5) This rule also applies where evidence from a single expert witness is to be used under rule 32.9.

32.9 Court's power to direct evidence by single expert.

(1) If two or more parties wish to submit expert evidence on a particular issue (hereinafter referred to as "the instructing parties"), the Court may direct that expert evidence be given by one expert witness.

(2) If the instructing parties cannot agree who should be the expert witness, the Court may —

(a) select the expert witness from a list prepared or identified by the instructing parties; or

(b) direct that the expert witness be selected in such other manner as the Court may direct.

(3) The Court may vary a direction given under this rule.

(4) The Court may appoint a single expert witness instead of permitting the parties to instruct their own expert witnesses. It may also replace multiple expert witnesses instructed by the parties with the single expert witness the Court appoints.

32.10 Cross-examination of Court expert.

If an expert appointed by the Court under rule 32(9) gives oral evidence, the expert may be cross-examined by any party.

32.11 Instructions to single expert.

(1) If the Court gives directions under rule 32.9 for a single expert witness to be used, each instructing party may give instructions to the expert witness.

(2) When an instructing party gives instructions to the expert witness that party must, at the same time, send a copy of the instructions to the other instructing parties.

(3) The Court may give directions about the arrangements for —

(a) any inspection, examination or experiment which the expert witness wishes to carry out; and
(b) the payment of the expert witness' fees and expenses.

(4) The Court may, before an expert witness is instructed —

(a) limit the amount that can be paid by way of fees and expenses to the expert witness; and
(b) direct that the instructing parties pay that amount into Court in such proportions as may be directed.

(5) Unless the Court directs otherwise, the instructing parties are jointly and severally liable for the payment of the expert witness' fees and expenses.

Cases:
32.11 Single joint experts
In a case where the jointly appointed expert wanted an increase in fees out of proportion to the value of the claim, the Court was entitled to order the appointment in his place of an expert who charged less: *Kranidiotes v Paschall[2001] EWCA Civ 357*, *[2001] All ER (D) 342 (Mar)* applying *Tanfern Ltd v Cameron-MacDonald[2000] 2 All ER 801*, *[2000] 1 WLR 1311, CA*.

A single joint expert should not attend any meeting or conference that is not a joint one unless all the parties have first agreed in writing: *Peet v Mid-Kent Healthcare Trust[2001] EWCA Civ 1703*, *[2002] 3 All ER 688*, *[2002] 1 WLR 210* (in which para 19.9 of the Academy of Experts' guide was quoted with approval).

32.12 Power of Court to direct party to provide expert report.

(1) If a party has access to information which is not reasonably available to the other party, the Court may order that party —

(a) to arrange for an expert witness to prepare a report on any matter;
(b) if appropriate, to arrange for an examination to be carried out in relation to that matter; and
(c) to file the report and serve a copy on any other party.

(2) The Court's powers under this rule may be exercised only on the application of a party.

32.13 Expert's report to be addressed to Court.

An expert must address his or her report to the Court and not to any person from whom the expert witness has received instructions.

32.14 Contents of report.

(1) An expert witness' report must —

(a) give details of the expert witness' qualifications;
(b) give details of any literature or other material which the expert witness has used in making the report;
(c) say who carried out any test or experiment which the expert witness has used for the report;
(d) give details of the qualifications of the person who carried out any such test or experiment;
(e) if there is a range of opinion on the matters dealt with in the report

(i) summarise the range of opinion;
(ii) give reasons for his or her opinion; and
(f) contain a summary of the conclusions reached.

(2) At the end of an expert witness' report there must be a statement that the expert witness —

(a) understands his or her duty to the Court as set out in rules 32.3 and 32.4;
(b) has complied with that duty;
(c) has included in the report all matters within the expert witness' knowledge and area of expertise relevant to the issue on which the expert evidence is given; and
(d) has given details in the report of any matter which to his or her knowledge might affect the validity of the report.

(3) There must also be attached to an expert witness' report copies of —

(a) all written instructions given to the expert witness;
(b) any supplemental instructions given to the expert witness since the original instructions were given; and
(c) a note of any oral instruction given to the expert witness, and the expert must certify that no other instruction than those disclosed have been received by him or her from the party instructing the expert, the party's legal practitioner or any other person acting on behalf of the party.

(4) If a report refers to photographs, plans, calculations, survey reports or other similar documents, these must be provided to the other party in the action at the same time as the service of the report.

(5) If it is not practicable to provide a copy of the documents referred to in paragraph (4), those documents must be made available for inspection by the other party or any expert witness instructed by that party within seven days of a request to do so.

Cases:

32.14 Contents of report

In Josephine Gabriel and Company Ltd v Domincan Brewery and Beverages Ltd, DM 2007 CA 5 Civil Appeal 10 of 2004, Court of Appeal (Dominica) *https://dominica.vlex.com/vid/josephine-gabriel-and-company-792685317* the reports for both experts did not contain a statement that the expert understood her or his duty to the court or that she or he had complied with that duty. There was no indication that either expert had included in her or his report all matters within her or his knowledge and area of expertise relevant to the issue. The instructions given to the experts were not disclosed. Barrow, J.A. stated:

"*It would have been entirely appropriate, because it would have been proportionate to the scale of the violations, for the judge to refuse to receive the evidence of both expert witnesses… The administration of justice cannot countenance the conduct of litigation in such flagrant violation of rules specifically designed to protect the courts against the danger of deception by apparently credible expertise that conceals its true intent of promoting the interests of its purchaser. Expert evidence of that character will often be of limited, if any true, value. In this case it remains to be seen whether, and to what extent, the evidence of the experts really assisted the judge in arriving at his decision*."

See also: *Stevens v Gullis [2000] 1 All E.R. 527*

32.15 Meeting of experts.

(1) The Court may direct a meeting of expert witnesses of like speciality.
(2) The Court may specify the issues which the expert witnesses must discuss.
(3) The contents of the discussion between the expert witnesses must not be referred to at the trial unless the parties agree.
(4) The meeting may take place personally, over the telephone or by any other suitable means.
(4) After the meeting, the expert witnesses must prepare for the Court a statement of any issue within their expertise on which they —
(a) agree; and
(b) disagree, with their reasons for disagreeing.
(6) Instead of, or in addition to such statement, the Court may direct that the expert witnesses prepare an agreed statement of the basic discipline and methodology which applies to the matters relevant to their expertise.
(7) The statement referred to in paragraph (6) must be as short as practicable.

32.16 Consequence of failure to disclose expert's report.

(1) A party who fails to comply with a direction to disclose an expert witness' report may not use the report at the trial or call the expert witness unless the Court gives permission.

(2) The Court may not give permission at the trial unless the party asking for permission can show that it was not reasonably practicable to have applied for relief at an earlier stage.

32.17 Appointment of assessor.

(1) The Court may appoint an assessor to —

  (a) advise the judge at the trial with regard to evidence of expert witnesses called by the parties;
  (b) assist the Court in understanding technical evidence; or
  (c) provide a written report.

(2) On making an order under paragraph (1), the Court must decide —
  (a) what fee is to be paid to the assessor; and
  (b) by whom.

(3) Notwithstanding paragraph (2), the Court may ultimately order any party to pay the fee of the assessor.

(4) All communications apart from written instructions between the Court and an assessor must be in open court.

(5) Before requesting a written report or opinion from an assessor the Court must allow the parties to make submissions in respect of the form and content of the questions to be asked.

(6) Before giving judgment the Court must provide the parties with the questions asked of, and any opinion given by, the assessor and give them an opportunity to make submissions.

PART 33 – COURT ATTENDANCE BY WITNESSES AND DEPOSITIONS

33.1 Scope of this Part.

(1) This Part provides —
(a) for a party to obtain evidence prior to a hearing; and
(b) for the circumstances in which a person may be required to attend Court to give evidence or to produce a document.

(2) In this Part, reference to a hearing includes a reference to the trial.

33.2 Witness summonses.

(1) A witness summons is a document issued by the Court requiring a witness to attend Court —
(a) to give evidence; or
(b) to produce documents to the Court.

(2) A witness summons must be in Form G21.

(3) There must be a separate witness summons for each witness.

(4) A witness summons may require a witness to produce documents to the Court either on —
(a) the date fixed for the trial or the hearing of any application in the proceedings; or
(b) any other date the Court may direct.

33.3 Issue of witness summons.

(1) A witness summons is issued on the filing date entered on the summons by the court office.

(2) A party must obtain permission from the Court when that party wishes to have —
(a) a witness summons issued less than twenty-one days before the date of the hearing; or
(b) a summons issued for a witness to attend Court to give evidence or to produce documents on any date except the date fixed for the trial or the hearing of any application.

(3) An application for permission under paragraph (2) may be without notice but must be supported by evidence on affidavit.

(4) The Court may set aside or vary a witness summons.

33.4 Witness summons in aid of inferior Court or tribunal.

(1) The Court may issue a witness summons in aid of an inferior court or of a tribunal.
(2) The Court may set aside a witness summons issued under this rule.
(3) In this rule, "inferior court or tribunal" means any court or tribunal which does not have power to issue a witness summons in relation to proceedings before it.

33.5 Time for serving witness summons.

(1) The general rule is that a witness summons is binding only if it is served at least fourteen days before the date on which the witness is required to attend before the court or tribunal.

(2) The Court may direct that a witness summons shall be binding although it will be served less than fourteen days before the date on which the witness is required to attend before the court or tribunal.

(3) An application under paragraph (2) may be made without notice but must be supported by evidence on affidavit.

(4) A witness summons which —
(a) is served in accordance with this rule; and
(b) requires the witness to attend court to give evidence,
is binding until the conclusion of the hearing at which the attendance of the witness is required.

33.6 Compensation for loss of time.

At the time of service of a witness summons the witness must be offered or paid —
(a) a sum reasonably sufficient to cover his or her subsistence and expenses in travelling to and from the court; and
(b) such sum by way of compensation for loss of time as may be specified in a practice direction.

33.7 Evidence by deposition before examiner.

(1) A party may apply for an order for a person to be examined before the trial or the hearing of any application in the proceedings.

(2) In this rule —
“deponent” means a person from whom evidence is to be obtained following any order under this rule; and
“deposition” means the evidence given by the deponent.

(3) An order under this rule shall be for a deponent to be examined on oath before —
(a) a judge;
(b) an attorney who has practised for at least five years;
(c) a magistrate; or
(d) a registrar.

(4) A person listed in paragraph (3) is referred to as an “examiner”.

(5) The order must state —
(a) the date, time and place of the examination; and
(b) the name of the examiner.

(6) The order may require the production of any document which the Court considers may be necessary for the purposes of the examination.

(7) Rule 2.6 applies to an examination under this rule.

(8) At the time of service of the order the deponent must be offered or paid travelling expenses and compensation for loss of time in accordance with rule 33.6.

(9) An application may be made by any party whether or not that party would otherwise call the witness.

(10) If the application is made by the party who would call the witness to give evidence, the Court may order that party to serve a witness statement or witness summary in relation to the evidence to be given by the person to be examined.

33.8 Conduct of examination.

(1) Subject to any directions contained in the order for examination, the examination must be conducted in the same way as if the witness were giving evidence at a trial.

(2) If all the parties are present, the examiner may, with the consent of the parties, conduct the examination of a person not named in the order for examination.

(3) The examiner may conduct the examination in private if he considers it appropriate to do so.

(4) The examiner must ensure that a full record is taken of the evidence given by the witness.

(5) If any person being examined objects to answer any question put to him or her, the ground of the objection and the answer to any such question must be set out in the deposition or in a statement annexed to the deposition.

(6) The examiner must send the original deposition to the court office and a copy of the deposition to —
(a) every party to the proceedings; and
(b) the deponent.

(7) If the witness or any attorney present at the hearing is of the opinion that the deposition does not accurately represent the evidence, he may —
(a) endorse on the copy deposition the corrections which in his or her opinion should be made;
(b) file the endorsed copy deposition; and
(c) serve a copy of it on all other parties.

33.9 Evidence without examiner being present.

(1) With the consent of the parties, the Court may order that the evidence of a witness be taken as if before an examiner, but without an examiner being appointed or present.

(2) Where such an order is made then, subject to any directions that may be contained in the order —
(a) an attorney for any party may administer the oath to a witness;

(b) any person transcribing evidence given need not be sworn but must certify as correct the transcript of the evidence and deliver it to the attorney for the party whose witness was examined;
(c) the attorney for the party whose witness was examined must file the original transcript and deliver a true copy to all other parties and to the witness who was examined;
(d) the party whose witness is to be examined must provide a means of recording the evidence of the witness; and
(e) if the witness or any attorney present at the hearing is of the opinion that the transcript does not accurately represent any evidence given, he may —

(i) endorse on the copy transcript the corrections which in his or her opinion should be made;
(ii) file the endorsed copy transcript; and
(iii) serve a copy of it on all other parties.

33.10 Enforcing attendance of witness.

(1) If a person served with a witness summons to attend before an examiner
—
(a) fails to attend;
(b) refuses to answer any lawful question or produce any document at the examination; or
(c) refuses to be sworn or to affirm for the purpose of the examination,

the party requiring the deposition may file a certificate signed by the examiner of such failure or refusal.

(2) On the filing of the certificate, the party requiring the deposition may apply to the Court for an order requiring the person to attend, to be sworn, to affirm or to answer any question or produce any document, as the case may be.

(3) An application for an order under this rule may be made without notice.

(4) Any order made by the Court under this rule must be served personally on the person served with the witness summons and be endorsed with a notice prescribed by practice direction.
(5) The Court may order the person against whom an order is made under this rule to pay any costs resulting from the —
(a) failure to attend before a referee;

(b) refusal to answer any lawful question or produce any document at the inquiry; or
(c) refusal to be sworn or to affirm for the purpose of the inquiry.

33.11 Special report.

The examiner may make a special report to the Court with regard to the —
(a) absence of any person; or
(b) conduct of any person present,
when the deposition was taken.

33.12 Fees and expenses of examiner.

(1) On appointing an examiner the Court must fix the fee to be paid to the examiner for carrying out the examination.

(2) If an examination is carried out by a person other than an attorney, the fee must be paid into the court office.

(3) The party who obtained the order must also pay the fee and all reasonable travelling and other expenses including charges for a room, other than the examiner's own chambers or office, where the examination takes place.

(4) Notwithstanding paragraphs (1) and (3), the Court may ultimately order any party to bear the costs of the examination.

33.13 Order for payment of examiner's fees.

(1) The examiner may report to the Court the fact that any fees or expenses due to him or her have not been paid and the Court may make an order that the party who obtained the order for the examination should pay such fees and expenses.

(2) An order under paragraph (1) may be enforced as a money judgment.

33.14 Use of deposition at hearing.

(1) A deposition ordered under rule 33.7 or 33.9 maybe given in evidence at the trial unless the Court orders otherwise.

(2) A party intending to put in evidence a deposition at a hearing must serve notice of such intention on every other party at least twenty-one days before the day fixed for the hearing.

(3) The Court may require a deponent to attend the hearing and give oral evidence.

33.15 Where person to be examined is out of the jurisdiction — letter of request.

(1) If a party wishes to take a deposition from a party outside the jurisdiction, the Court may direct the issue of a letter of request to the judicial authorities of the country in which the proposed deponent is.

(2) A letter of request is a request to a judicial authority to take the evidence of that person, or arrange for it to be taken.

(3) If the government of the country to which the letter is sent allows a person appointed by the Court to examine a person in that country, the Court may make an order appointing an examiner for that purpose.

(4) A person may be examined under this rule on oath or affirmation or in accordance with any procedure permitted in the country in which the examination is to take place.

(5) If the Court makes an order for the issue of a letter of request, the party who sought the order must file —
(a) the following documents and, except where paragraph (6) applies, a translation of them —
  (i) a draft letter of request
  (ii) a list of questions or the subject matter of questions to be put to the person to be examined; and
  (iii) a statement of the issues relevant to the proceedings; and
(b) an undertaking to be responsible for the expenses of the minister with responsibility for foreign affairs in relation to the request.

(6) There is no need to file a translation if English is one of the official languages of the country where the examination is to take place.

33.16 Early appointment to produce documents.

(1) The Court may permit a party to issue a witness summons requiring any person to attend at a date, time or place specified in the summons prior to the date of the trial for the purpose of producing one or more documents.

(2) The only type of document that a summons under this rule can require a person to produce is a document which that person could be compelled to produce at the trial.

Notes:

While the provisions concerning court attendance by witnesses and depositions are straightforward and require no explanation, the following observations are worth highlighting:

- The term “witness summons” replaces the formerly used term “subpoena”.
- There must be a separate witness summons for each witness.
- Particular attention should be given to the provisions of rules 33.3 and 33.5 regarding the timeframe for issuing and serving witness summonses and the circumstances in which the Court’s permission may be required.

The provisions of Practice Direction No. 11 of 2023, which addresses witness summonses, should also be noted. In overview:

- A witness summons may require a witness to attend court to give evidence, produce documents or both on either the date fixed for the trial or the hearing of any application in the proceedings or such other date as the Court may direct.
- A witness summons must be in form G12 and a witness summons which requires a witness to produce documents must identify the documents individually or by reference to a class of documents or things so that it is possible to identify the documents to be produced with sufficient certainty to leave no real doubt in the mind of the witness about what they are required to do.
- The Court may issue a witness summons in aid of an inferior court or of a tribunal.
- A mistake in the name of a witness or the address of a witness may be corrected without an application to vary the summons if the summons has not been served by having an amended witness summons re-sealed by the court office.
- A witness summons is issued on the date entered on the summons by the court office. A separate summons is required for each witness.
- A witness summons may be obtained by filing a praecipe in the form annexed to the practice direction in the court office and filing at least two copies of the summons for sealing, one of which will be retained on the court file
- No witness summons may be issued out of the court office without the prior permission of the Court where – (i) the witness summons will be issued less than 21 days before the date of the trial or hearing to which it relates or (ii) the witness

summons will require the witness to attend the court or tribunal to give evidence or to produce documents on any date except the date fixed for the trial or the hearing of any application. An application for permission may be made without notice but must be supported by an affidavit.

- As a general rule, a witness summons is binding only if it is served at least 14 days before the date on which the witness is required to attend before the court or tribunal to which it relates but the Court may order that it will be binding notwithstanding it will be served less than 14 days before the date which the witness is required to attend before the court or tribunal. Such a direction should be obtained before the witness summons is served; the application may be made without notice but must be supported by an affidavit.
- Once a witness summons is served an affidavit of service should be filed.
- When a witness summons is served with a witness summons he must be offered a sum to cover his travelling expenses to and from the court or tribunal that he is required to attend and compensation for his loss of time, in accordance with the practice direction. No compensation for loss of time shall be offered or paid to any person in the service of The Government of The Bahamas required to give evidence or to produce documents by virtue of such service.

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Cases:

The Attorney-General v Securities and Exchange Commission and others 2023/CLE/gen/00125 (6 December 2023) – The Court held that the law in relation to the conduct of the examination of a witness is that the examination conducted by the Registrar must follow the method known in this jurisdiction as obtains at trial. While the RSC specifically provided for examination, cross-examination and re-examination, the CPR in CPR 33.8 provides merely for the examination to “be conducted in the same way as if the witness were giving evidence at a trial”. In The Bahamas, evidence at trial is adduced via examination, cross-examination and re-examination. Therefore, the law allows for the examination, cross-examination and re-examination of a witness ordered deposed pursuant to a request under the *Evidence (Proceedings in Other Jurisdictions) Act*. A witness may be asked specific clarifying questions outside of those contained in the Court’s Order, where, for example, the question posed or the answer given was vague or ambiguous, or where the answer given by the witness is obviously out of context suggesting a misunderstanding of the question.

PART 34 – REQUESTS FOR INFORMATION

34.1 Right of parties to obtain information.

(1) This Part enables a party to obtain from any other party information relevant to the determination of any matter which is in dispute in the proceedings.
(2) To obtain the information referred to in paragraph (1), the party must serve on the other party a request identifying the information sought.

Note: [110]
The duty of the parties and their legal representatives to help the court to further the overriding objective by avoiding disproportionate expense and excessive use of court time, require that they cooperate in attempting to significantly narrow, or compromise, disputes over providing further information in accordance with the provisions of this Part.

Cases:
Real Time Systems Ltd v Renraw Investments Ltd and others [2014] UKPC 6
Premnath Bowlah v The Attorney General of Trinidad and Tobago CV 2008–04924 (2009.12.09)
Basdeo Panday and Another v Her Worship Ejenny Espinet and Another CV 2008–02265 (2009.04.29)

34.2 Order compelling reply to request for information.

(1) If a party does not, within fourteen days, give information or agree to give such information within a reasonable period thereafter which another party has requested under rule 34.1, the party who served the request may apply for an order compelling the other party to do so.
(2) An order may not be made under this rule unless it is necessary in order to dispose fairly of the claim or to save costs.
(3) When considering whether to make an order, the Court must have regard to —
 (a) the likely benefit which will result if the information is given;
 (b) the likely cost of giving it; and
 (c) whether the financial resources of the party against whom the order is sought are likely to be sufficient to enable that party to comply with the order.

Note: [111]
The considerations listed at r.34.2(3) are consistent with the overriding objective to which the Court is obliged to give effect when exercising any power given to it by the CPR. Requests for further information which are merely “fishing” will not be allowed. “Fishing” requests are comprised of requests for information in which a party is trying to see if he can find a case, either of complaint or defence, of which he knows nothing or which is not yet pleaded.

Where the Court makes an order under r.34.2 the party against whom it is made must file their response and serve it on the other parties within the time specified by the court. The general grounds of privilege applicable to giving disclosure of documents may also apply to requests for, and orders for, further information under Pt. 34.

[110] Civil Procedure Volume I, The White Book 2019 (“**the White Book 2019**”), 18.1.3 (as amended)
[111] The White Book 2019, 18.1.3, 18.1.10 & 18.1.12 (as amended)

When the court makes an order it may make it subject to conditions, and specify the consequences of failure to comply with the order (see Pt 11). Where a party has failed to comply with a court order made under r.34.2, any sanction for failure to comply with the order imposed by the order has effect unless the party in default applies for and obtains relief from the sanction (see r.26.8). The Court may strike out a statement of case or part of a statement of case if it appears to the Court that there has been a failure to comply with a court order. Presumably, a failure to provide information may be treated as conduct relevant to the question of costs.

Cases:
King v Telegraph Group Ltd [2004] EWCA Civ 613 (Brooke LJ)
Lexi Holdings v Pannone and Partners [2010] EWHC 1416 (Ch)
Thorpe v Chief Constable of Greater Manchester [1989] 1 W.L.R. 665
Hennessy v Wright (No. 2) (1888) 24 Q.B.D. 445, CA
Barness v Formation Group Plc [2018] EWHC 1228 (Ch)
Watson v Ian Snipe & Co [2002] EWCA Civ 293
Toussaint v Mattis [2000] EWCA Civ 167
Harcourt v Griffin [2007] EWHC 1500 (QB)

34.3 Information obtained under Part 34 not to be used in other proceedings.

A party may use information obtained —
(a) in compliance with an order under rule 34.2; or
(b) in response to a request under rule 34.1,
only in the proceedings in which the request or order was made unless otherwise ordered by the Court.

Cases:
Lovell v Lovell [1970] 1 W.L.R. 1451

34.4 Statement of truth.

Any information provided under this Part must be verified by a statement of truth in accordance with rule 3.8.

PART 35 – OFFERS TO SETTLE
35.1 Scope of this Part.

(1) This Part contains Rules about —

(a) offers to settle which a party may make to another party; and
(b) the consequences of such offers.

(2) This Part does not limit a party's right to make an offer to settle otherwise than in accordance with this Part.

(3) The Rules in this Part are subject to rule 23.12.[72]

Notes:
Part 35. 1 defines the scope and application of Part 35 generally. The overriding objective (see Part 1.1) of these Rules is to avoid wasted expense (to both litigants and the system and administration of justice) and to ensure that cases are dealt with as expeditiously as possible whilst maintaining fairness and the interest of justice. To that end, parties are encouraged to engage in settlement discussions prior to commencing litigation and to continue such efforts even as the action progresses to trial. In furtherance of that overriding objective. It is intended not to force the parties to settle unreasonably, but to encourage parties to actively pursue settlement and to thoughtfully consider offers extended to them. Parties should consider the potential cost and interest consequences under this Part prior to making, accepting or refusing an offer, as the case may be. It preserves the right to make offers otherwise than under this section. It also expressly defers to Rule 23.12, which may be applicable where a party is a minor or a patient, as defined in the Mental Health Act .Chapter 230 of the Statute Laws of the Commonwealth of The Bahamas.

Cases:
Dirk Burkhardt et al v Donald Frederick et al GDAHCV2009/0030 (The Grenada High Court held that EC CPR Part 35 relates to a specific method of making offers to settle which then have the consequences as outlined in that Part. An offer which is not in accordance with Part 35 will be afforded such weight in relation to any issue as to costs as arises as the court thinks appropriate.)

Half Moon Bay Ltd et al v Rose Hall (Developments) Ltd et al [2014] JMSC 94 (The Jamaican Supreme Court rejected a submission that since Part 35 of the JAM CPR came into force it replaced all other means of compromising or settling claims. Part 35 is a self-contained code designed to encourage settlements and the primary benefit is in terms of costs saved. Part 35 is an additional mechanism to those stated in *Green v Rozen [1955] 2 All ER 797* by which parties can settle proceedings. No litigant is compelled to use Part 35 but if he wishes to do so he must comply with its provisions closely.)

UWUG Ltd and Haiss v Ball [2015] EWHC 74 (IPEC) (The EWHC rejected the proposition that any special indulgence should be given to a litigant in person in relation to Part 36 offers under the English CPR. Litigants in person, like all litigants, must live with the consequences of ill-advised procedural decisions.)

35.2 Introductory.

(1) An offer to settle may be made in any proceedings whether or not there is a claim for money.

(2) The party who makes the offer is called the "offeror".

(3) The party to whom the offer is made is called the "offeree".

(4) An offer to settle is made when it is served on the offeree.

Notes:
Part 35.2 defines the terms applicable to each party and the point at which an offer is deemed to be made.

35.3 Making offer to settle.

(1) A party may make an offer to another party which is expressed to be "without prejudice" and in which the offeror reserves the right to make the terms of the offer known to the Court after judgment is given with regard to —

(a) the allocation of the costs of the proceedings; and

(b) (in the case of an offer by the claimant) the question of interest on damages.

(2) The offer may relate to the whole of the proceedings or to part of them or to any issue that arises in them.

Notes:
Part 35.3 expressly retains and codifies the common law tradition of "without prejudice" offers. Part 35 is applicable, even if the offer extended would only potentially settle a part or parts of the claim.

35.4 Time when offer to settle may be made.

A party may make an offer to settle under this Part at any time before the beginning of the trial.

Notes:
Offers may be made under Part 35 before litigation is commenced, up to 22 days before the trial commences (see Part 35.9).

35.5 Procedure for making offer to settle.

(1) An offer to settle must be in writing.

(2) The offeror must serve the offer on the offeree and a copy on all other parties.

(3) Neither the fact nor the amount of the offer or any payment into Court in support of the offer must be communicated to the Court before all of liability and the amount of money to be awarded, other than interest, have been decided.

(4) Paragraph (3) does not apply to an offer which has been accepted or where a defence of tender before claim has been pleaded.

Notes:
Part 35.5 sets out the procedure for making an offer to settle. There is no provision in this Part that imposes consequences on the party failing to comply with the procedure. Unless an offer is accepted or a defence of tender before claim is pleaded (see Part 10.8), Part 35 offers are not to be made known to the Court prior to final determination of all issues of liability, damages, awards, or relief (other than interest) to preserve the Court's actual (and appearance of) impartiality. Notably, an offeror must notify all parties of a Part 35 offer.

35.6 Extent to which offer to settle covers interest, costs or counterclaim.

(1) An offer to settle a claim for damages must state whether or not the amount offered includes interest or costs.

(2) If the offer covers interest or costs it must state the amount which is included for each.

(3) If there is a counterclaim as well as a claim, the offer must state in the case of an offer by the —

(a) claimant, whether or not it takes into account the counterclaim; or

(b) defendant, whether or not it takes into account the claim, and in each case in what amount.

35.7 Offer to settle made after interim payment.

If an interim payment has been made, whether voluntarily or under an order under Part 17, any subsequent offer to settle must state whether it is in addition to the interim payment or whether it is intended to replace it.

35.8 Offer to settle part of claim.

(1) An offer to settle must state whether or not it covers the whole or part of the claim.

(2) If it does not state that it covers part of the claim, it is to be taken to cover the whole claim.

(3) If the offer covers only part or parts of the claim it must —

(a) identify the part or parts of the claim in respect of which it is made; and
(b) if more than one, state what is offered in respect of each part covered by the offer.

Notes:
Much like Part 35.7, Part 35.8 aims to ensure clarity between the offeror and the offeree. If an offer fails to indicate that it is in respect of only part of a claim, to identify which part if pertains to, and to separate offers in respect of multiple claims, the offeree may be entitled to assume that the offer relates to the whole of the claim, and, in any event, may unintentionally refuse a reasonable offer.

35.9 Time limit for accepting offer to settle.

(1) The offeror may state in the offer that it is open for acceptance until a specified date.
(2) The offer shall have no effect on any decision that the Court makes as to the consequences of the offer unless it is made at least twenty-two days prior to the commencement of the trial and that it is open for acceptance for at least twenty-one days.

(3) Acceptance of the offer after the commencement of the trial shall have no effect on any decision that the Court makes as to the consequences of such acceptance.

(4) The Court may permit an offeree to accept an offer after the specified date on such terms as the Court considers just.

Notes:
Part 35.9 permits an offeror to place a time limitation on an offer's availability for acceptance. However, a Part 35 offer must be available for acceptance for a period of at least 21 days, and such 21-day period shall expire prior to the trial date. Nonetheless, an offer made more than 22 days before trial may remain available for acceptance even after the commencement of trial. The Court may intervene to permit an offeree to accept an expired offer.

35.10 Procedure for acceptance.

(1) To accept an offer a party must —

(a) serve written notice of acceptance on the offeror; and

(b) send a copy of the notice to any other party.

(2) The offeree accepts the offer when notice of acceptance is served on the offeror.

(3) If an offer or payment into Court under Part 36 is made in proceedings to which rule 23.12 applies —

(a) the offer or payment may be accepted only with the permission of the Court; and

(b) no payment out of any sum paid into Court may be made without a Court order.

Notes:
Acceptance of a Part 35 offer must be in writing and must be disclosed to all parties. Acceptance occurs at the time of proper service of notice on the offeror. Court permission is required prior to acceptance of an offer or payment out of any sums paid into Court where minors or patients are involved. The Rules do not include a form for acceptance of a Part 35 offer but it must be in writing.

35.11 Effect of acceptance – generally.

(1) If the offeree accepts an offer which is not limited in accordance with rule 35.8, the claim is stayed upon the terms of the offer.

(2) If the offer covers a claim and a counterclaim, both the claim and the counterclaim are stayed on the terms of the offer.

(3) In any other case, the proceedings are stayed to the extent that they are covered by the terms of the offer.

(4) If the Court's approval is required for the settlement of the proceedings, any stay arising on the acceptance of the offer has effect only when the Court gives its approval.

(5) A stay arising on the acceptance of an offer does not affect proceedings to deal with any question of interest on damages or any question of costs relating to the proceedings which have been stayed and which have not been dealt with by the offer.

(6) If money has been paid into Court in support of an offer, a stay arising out of the acceptance of the offer does not affect any proceedings to obtain payment out of Court.

(7) If an offer is accepted and its terms are not complied with, any stay arising on acceptance ceases to have effect and —

(a) the proceedings or the part which was stayed may continue; and

(b) either party may apply to the Court to enforce those terms.

(8) If a party claims damages for breach of contract arising from an alleged failure of another party to carry out the terms of an agreed offer, that party may do so by applying to the Court without the need to commence new proceedings unless the Court orders otherwise.

Notes:

Acceptance of an offer operates as a stay of proceedings in relation to any and all part(s) of the claim that offer pertained to, save that where the Court's approval required (See Part 23 and Parts 35.10), proceedings will only be stayed once the requisite court approval is obtained.
If the offer doesn't include costs/interests, the parties are not precluded from proceeding on determination of those issues.

Notwithstanding a stay of proceedings may apply to the claim, if an offer includes a payment into court, the receiving party may proceed to obtain the payment (See Part 36.3).
If terms of an offer are not complied with a party may either proceed as though the stay was lifted, or may apply to enforce the terms of the offer. If any damages arise from breach of the terms of acceptance, the damaged party can apply to the court for damages in the same action in which the offer was made, rather than commencing a new action.

35.12 Effect of acceptance – more than two parties.

(1) If there is more than one defendant whom the claimant claims are jointly and severally, or severally, liable and the claimant —

(a) agrees to settle the claim as against one or more, but not all of them; and

(b) discontinues the claim against any other defendant, the claimant is liable to pay the costs of the defendant against whom the claim has been discontinued unless the Court otherwise orders.

(2) If a claimant accepts an offer made by one of a number of joint defendants —

(a) paragraph (1) does not apply; and

(b) the defendant who made the offer is liable for the costs of the other joint defendants.

(3) If —

(a) there is more than one claimant and

(b) one or more, but not all, of them agree to settle, the other claimants may continue the proceedings.

Notes:
Part 35.12 addresses circumstances in which there are more than two parties to an action, and an offer is accepted by some, but not all, of them. Offeree claimants accepting an offer should consider, first, whether the claim against the Defendants is one to which joint or several liability applies, as liability for costs will depend on the nature of the claim and whether the claim against the remaining defendants can be sustained upon acceptance of the offer. Costs implications may be a crucial factor in determining whether an offer should reasonably be accepted.

An offer accepted by some, but not all, claimants does not preclude the remaining claimants from proceeding with the action.

35.13 Costs of offeror and offeree where offer is accepted – defendant's offer.

(1) If the —

(a) defendant makes an offer to settle; and

(b) claimant accepts the offer within any period stated for accepting it and before the beginning of the trial, the claimant is entitled to the costs of the proceedings up to the date of acceptance of the offer.

(2) If the defendant permits a claimant to accept an offer after the time stated for accepting it, the general rule is that the —

(a) claimant is entitled to costs to the end of the period stated for accepting the offer; and

(b) defendant is entitled to any costs incurred between the end of the period stated for accepting the offer and the date when the offeree accepts the offer, unless the Court orders otherwise.

(3) If the settlement relates only to part of the proceedings and the remaining part or parts of the proceedings continue —

(a) the claimant is entitled under this rule only to the costs relating to that part of the proceedings which has been settled; and

(b) unless the Court orders otherwise or the defendant agrees, the claimant may not recover any such costs, nor have them quantified, until the conclusion of the rest of the proceedings, when the Court can deal with the costs of the whole of the proceedings including any costs relating to those parts of the proceedings that were not settled.

Notes:
Part 35.13 is only applicable where an offer is made by a defendant and accepted by a claimant. However, offeree claimants should be mindful of deadlines for accepting an offer, as they will be liable for any costs incurred by an offeror defendant after the deadline has passed through to the date of acceptance.

35.14 Costs of offeror and offeree where offer is accepted – claimant's offer.

If the claimant makes an offer which is accepted by the defendant, the claimant is entitled to costs up to the time when notice of acceptance of the offer is served.

Notes:
Part 35.14 embraces the common law rule that "costs follow the event," so that a defendant who accepts a claimant's offer will pay the claimant's costs up to the time of acceptance. Notably, a defendant who accepts an offer for damages significantly less than the amount claimed, or which offers only to withdraw the claim with no award, may be equally liable for the claimant's costs under Part 35.

35.15 Costs where offer not accepted – general rules.

(1) The general rule for defendants' offers is that, if the defendant makes an offer to settle which is not accepted and in —

(a) the case of an offer to settle a claim for damages, the Court awards less than 90% of the amount of the defendant's offer;

(b) any other case, the Court considers that the claimant acted unreasonably in not accepting the defendant's offer,

the claimant must pay any assessed costs incurred by the defendant after the latest date on which the offer could have been accepted without the court's permission.

(2) If a claimant makes an offer to settle and in —

(a) the case of an offer to settle a claim for damages, the Court awards an amount which is equal to or more than the amount of the offer;

(b) any other case, the Court considers that the defendant acted unreasonably in not accepting the claimant's offer, the Court may, in exercising its discretion as to interest take into account the rates set out in the following table —

Net amount of damages	Rate of Interest
Not exceeding B$100,000	12% per annum
For the next B$150,000	10% per annum
For the next B$500,000	9% per annum
In excess of B$800,000	7% per annum
'net' means the amount of damages on the claim less the amount, if any, awarded on any counter-claim	

Example
One year since the offer.
Damages – B$400,000;
The Court might award —
(a) 12% on the first $100,000 for one year ($12,000);
(b) plus 10% interest on the next $150,000 for one year ($15,000); and
(c) plus 9% interest on the remaining $150,000 for one year ($13,500),
for a total of B$40,500 interest on damages.

(3) The Court may decide that the general rule under paragraph (1) is not to apply in a particular case.

(4) In deciding whether the rule in paragraph (1) above should not apply and in considering the exercise of its discretion the Court may take into account the —

(a) conduct of the offeror and the offeree with regard to giving or refusing information for the purposes of enabling the offer to be made or evaluated;

(b) information available to the offeror and the offeree at the time that the offer was made;

(c) stage in the proceedings at which the offer was made; and

(d) terms of any offer.

(5) This rule applies to offers to settle at any time, including before proceedings were started.

Notes:
Part 35.15 sets out the consequences for parties who refuse a reasonable offer. Such consequences have the effect of potentially reversing the usual “costs follow the event” principle to the extent that upon judicial determination of a claim, a successful claimant may nonetheless be liable to the unsuccessful defendant in costs. Moreover, a defendant may suffer consequences as to the rate of interest applicable to an award, where such defendant refused a Part 35 offer from a claimant.
Notably, in claims for damages, a claimant will suffer cost consequences for refusing a defendant’s offer if the Court ultimately awards 90% of the offer value or less. This should be contrasted with a defendant, who will suffer interest consequences for refusing a claimant’s offer if the Court awards the same or more than the amount offered.
In claims other than for damages, an offeree who refuses an offer may suffer cost and interest consequences if the Court determine that the offer was reasonable and that the refusing party was unreasonable to refuse it.

Cases:
CPR 35.15 Costs where offer not accepted- General rules
Whilst the English CPR Part 36 is not identical to Part 35, the following cases may be instructive as to how the refusal of a reasonable offer may be treated by the Court
Shah & Anor v Shah & Anor [2021] EWHC 1668 (QB) – (Lower Court emphasized the "sometimes harsh, even brutal, default consequences" of refusing a reasonable offer)
Rawbank S.A v Travelex Banknotes Limited [2020] EWHC 1619 (CH)- (refusing a Part 36 Offer of 99.7% of total damages claimed may still attract consequences)
Thinc Group Ltd. v Kingdom [2013] EWCA Civ 1306- (Court retains discretion as to whether consequences under Part 36.15(1) and (2) should apply)

RBTT Trust Ltd v Flowers Civil Appeal No. 29 of 2008 (Belizean equivalent to CPR 35.15(1)(a) applied.)

Sumitomo Mitsuitrust (UK) Ltd et al v Spectrum Galaxy Ltd Claim No. BVIHC (Com) 2018/0172 (The BVI High Court held that an offer to pay less than full costs is a valid "offer to settle". "Offer to settle" stands to be construed on ordinary common law contractual lines. If there is consideration for the offer, then that is sufficient to be an "offer to settle" under EC CPR Part 35. Failing to beat a CPR 35.15 offer is a necessary pre-condition for the court to exercise its discretion under Part 35, but it is not always sufficient. In some cases, in accordance with the rules, the court has to consider whether the party receiving the offer acted unreasonably in rejecting the offer. There must be a real and substantial benefit (as opposed to a notional benefit) to a party before the rejection of a Part 35 offer can be considered to be unreasonable. It was held on the facts not to be unreasonable to refuse an offer to reduce costs exposure by $150,000 in return for abandoning an arguable claim worth millions.)

35.16 How costs are to be dealt with.

(1) If an offer to settle is accepted, the parties may agree the amount of costs that are due to be paid under this Part.

(2) If an offer to settle —

(a) is accepted after the time originally stated for accepting it under rule 35.10(2); or

(b) deals only with part of the case in accordance with rule 35.13(3), the amount of costs to be paid to the party entitled to such costs must be assessed by the Court.

Notes:
Part 35.16 preserves the rights of parties to agree the amount of costs to be paid as part of a settlement agreement. However, where an offer is accepted after an express deadline set out in the offer, or where only part of the claim is settle, such costs must be assessed by the Court. This does not prevent the Court from taking into consideration any potential agreement indicated by the parties. Part 71 addresses Costs, generally, and the Court's exercise of discretion in relation thereto.

PART 36 - PAYMENTS INTO COURT TO SUPPORT OFFERS UNDER PART 35 AND UNDER COURT ORDER

36.1 Scope of this part.

(1) This Part deals with payments into Court made —

(a) in accordance with an order of Court;

(b) to support a defence of tender; and

(c) to support an offer of payment under Part 35.

(2) A defendant is not obliged to make a payment into Court to support an offer under Part 35.

(3) With the —

(a) agreement of the claimant; or

(b) permission of the Court,

a defendant may pay money in support of an offer of payment into an interest bearing account on such terms as to the —

(i) names of the account holders; and

(ii) terms on which money may be paid out of the account as may be ordered by the Court or agreed between the parties.

Notes:
Previously payments into court were permissible only when Ordered by the Court or in support of a defence of tender (see Part 10.8 in relation to defence of tender). Part 36 additionally applies to payments into Court in support of a Part 35 offer, an option available to a Defendant although not required. A Defendant may also pay an amount into an interest bearing account if the claimant agrees or with permission of the court, but such agreement or court order must specify the names of the account holders as well as the terms under which money may be debited from the account once established.

36.2 Payments into Court to support offers to settle.

(1) A defendant who offers to settle the whole or part of a claim may pay money into Court in support of the offer.

(2) A defendant may not pay money into court unless the —

(a) defendant certifies that such payment is in support of an offer to settle;

(b) payment is made to support a defence of tender; or

(c) payment is made under a court order.

(3) A payment into court may not be made until a claim is filed.

(4) A payment into court to support an offer may be made —

(a) when the offer is made; or

(b) at any time while the offer is outstanding.

(5) A defendant who pays money into court must —

(a) serve notice of payment on the claimant; and

(b) file a copy of the notice with a statement of the date, if any, by which the offer is open for acceptance under rule 35.9(1).

Notes:
Payments may only be made into court under limited circumstances as listed in Part 36.1(2) and (3). Most notably, no payments may be made into court prior to an action being commenced. Whilst parties may make a Part 35 offer at any time, even prior to commencement of an action (see Part. 35.4), payments into court to support such offers may not be made unless and until an action is commenced. However, if an action has been commenced, and an offer has been made, a payment may be made into Court at any time whilst the offer is available for acceptance.
Notices filed in accordance with Part 36.2(5) must indicate the deadline, if any, for acceptance of the offer (see Part 35.9 in relation to deadlines for Part 35 offers and Part 36.3 in relation to the procedure for receiving funds paid into Court.) Notice must be in writing although there is no Notice form.

36.3 Right to payment out on acceptance of offer.

(1) The general rule is that a claimant who accepts an offer to settle —

(a) within the period stated; or

(b) where no period is stated, for accepting it in the defendant's offer

is entitled to payment of the sum which the defendant paid into court to support the offer, without needing a court order.

(2) To obtain payment, the claimant must file a request for payment certifying that the offer has been accepted in accordance with paragraph (1)(a) or (b).

(3) The general rule is qualified by rule 36.4.

Notes:
Part 36.3 addresses the general rules on entitlement to receive funds paid into Court, as well as the procedure for doing so. Part 36.3 should be read in conjunction with Part 36.4, which addresses exceptions to this Part, in which a court order is required prior to receiving funds paid into Court, and Part 36.7, which address funds paid into Court in proceedings under the Fatal Accidents Act. Chapter 71 of the Statute Laws of the Commonwealth of The Bahamas.

36.4 Cases where payment out requires court order.

(1) If a claimant accepts money paid into court —
- (a) after the end of the period stated for accepting it;
- (b) by one or more, but not all, of a number of defendants;
- (c) to settle a claim to which —
  - (i) Part 23 applies; or
  - (ii) rule 36.7 applies; or
- (d) with a defence of tender before claim,

the money in court may only be paid out under an order of the court.

(2) An order under paragraph (1)(c) may not be made by consent.

(3) If —
- (a) a claimant accepts money paid into court after the trial has begun; and
- (b) all further proceedings on the claim or that part of it to which the acceptance relates are stayed,

the money in court may only be paid out under a court order.

(4) An order under this rule must deal with the costs of the proceedings which have been stayed.

Notes:
Part 36.4 addresses exceptions to the general rule set out in Part 36.3. See Part 36.7 for additional exceptions.

Cases:
CPR 36.4 Cases where payment out requires court order.
Proetta v Times Newspapers Ltd (1991) 1 WLR 337- (Accepting and offer and payment out of court after expiry of the offer).

36.5 Money paid into court under order.

(1) When a party makes a payment into court under a court order that party must give notice of the payment to every other party.
(2) Money paid into court under a court order may not be paid out unless the court gives permission.

(3) Paragraph (2) does not apply where —

(a) the money is paid into court by a defendant;

(b) in accordance with rule 36.6(2) that defendant chooses to treat the money paid into court as if it were payment into court in support of an offer to settle; and

(c) the claimant accepts the offer to settle.

36.6 Money paid into court as condition for permission to defend or to continue to defend.

(1) This rule applies where the Court makes an order permitting a defendant to —

(a) continue to defend; or

(b) defend, on condition that the defendant makes a payment into court.

(2) If —

(a) a defendant makes such a payment into court; and

(b) makes an offer to settle, whether before or after the order to pay money into court,

the defendant may choose to treat the whole or any part of the money paid into court as if it were a payment into court made in support of the offer to settle.

(3) If the defendant chooses to act in accordance with paragraph (2), he must —

(a) file a notice that the defendant so chooses; and

(b) serve a copy of it on every other party to the proceedings.

Notes:
See also Part 36.5(3)

36.7 Proceedings under Fatal Accidents Act.

(1) If a single sum of money is paid into court in satisfaction of proceedings arising under a Fatal Accidents Act (Ch. 71) and that sum is accepted, the court must, where there is more than one cause of action, apportion that sum between the different causes of action when —

(a) giving directions under rule 23.13; or

(b) authorising its payment out of court.

(2) If in proceedings arising under a Fatal Accidents Act (Ch. 71) a claim is made by more than one person and a single sum of money is paid into or apportioned by the court to the

cause of action under the Act and is accepted by such persons, the court must apportion the payment between those persons.

PART 36 Commentary:
Payment of money into Court to support an offer of settlement under Part 35 is not required, but may be a useful tool to assist parties in settlement discussions. Prior to making a payment into Court to support a Court order, parties should consider whether payment into an interest bearing account may be preferred.

PART 37 – DISCONTINUANCE
37.1 Scope of this Part.

(1) The Rules in this Part set out the procedure by which a claimant may discontinue all or any part of a claim.

(2) A claimant who —

(a) claims more than one remedy; and
(b) subsequently abandons a claim to one or more remedies but continues with the claim for the other remedies,
is not treated as discontinuing part of a claim for the purposes of this Part.

Notes:
Part 37 addresses discontinuance of the whole or part of a claim. This is to be distinguished between discontinuing a claim for a particular remedy whilst maintaining the claim itself for an alternate remedy.

37.2 Right to discontinue claim.

(1) The general rule is that a claimant may discontinue all or part of a claim without the permission of the Court.

(2) Notwithstanding paragraph (1) —
(a) a claimant needs permission from the Court to discontinue all or part of a claim in relation to which —
(i) any party has given an undertaking to the Court; or
(ii) the Court has granted an interim injunction;

(b) a claimant who has received an interim payment in relation to a claim, whether voluntarily or pursuant to an order under Part 17, may discontinue only if —

(i) the Court gives permission; or
(ii) the defendant who made the payment consents in writing;

(c) if there is more than one claimant, a claimant may not discontinue unless —

(i) every other claimant consents in writing; or
(ii) the Court gives permission, judgment or otherwise.

(3) If there is more than one defendant the claimant may discontinue all or part of the claim against all or any of the defendants.

Notes:
Generally, a claimant may discontinue a claim against some or all defendants without Court permission. However, special rules apply where there has been an undertaking to the Court, where an interim injunction has been granted, where an interim payment has been received or where there is more than one claimant.

37.3 Procedure for discontinuing.

(1) To discontinue a claim or any part of a claim a claimant must —

(a) serve a notice of discontinuance on every other party to the claim in Form G15; and
(b) file a copy of such notice.

(2) The claimant must certify on the filed copy that notice of discontinuance has been served on every other party to the claim.

(3) If the claimant needs the consent of some other party, a copy of the necessary consent must be attached to the filed copy of the notice of discontinuance.

(4) If the claimant needs permission from the Court, the notice of discontinuance must contain details of the order by which the Court gave permission.

(5) If there is more than one defendant, the notice of discontinuance must specify against which defendant or defendants the claim is discontinued.

Notes:
Part 37.3 sets out the procedure for discontinuing the whole or part of a claim. Notice of discontinuance must be served prior to filing, and the filed copy of the notice must certify that every other party has been duly served and that any requisite permissions have been obtained. See Part 6 in relation to service of documents other than a claim form.

37.4 Right to apply to have notice of discontinuance set aside.

(1) If the claimant discontinues without the consent of the defendant or the permission of the Court, where such consent or permission is required, any defendant who has not consented may apply to have the notice of discontinuance set aside.

(2) A defendant may not apply under this rule more than twenty-eight days after the date when the notice of discontinuance was served on that defendant.

Notes:

Where a claimant discontinues an action otherwise than in accordance with Parts 37.2 and 37.3, a defendant may apply to set aside the discontinuance, but must do so within 28 days.

37.5 Effect of discontinuance.

(1) Discontinuance against any defendant takes effect on the date when the notice of discontinuance is served on that defendant under rule 37.3(1)(a).

(2) A claim or the relevant part of a claim is brought to an end as against that defendant on that date.

(3) Paragraphs (1) and (2) do not affect —

(a) any proceedings relating to costs; or
(b) the right of the defendant under rule 37.4 to apply to have the notice of discontinuance set aside.

Notes:

Notice of discontinuance must be served on all parties (see Part 37.3), but does not take effect until served on the defendant against whom the action is being discontinued. Upon such service, the action is deemed to have ended as against that defendant, save that the Court may still address issues of costs or hear an application to have the discontinuance set aside.

37.6 Liability for costs.

(1) Unless —
(a) the parties agree; or
(b) the Court orders otherwise,
a claimant who discontinues is liable for the costs incurred by the defendant against whom the claim is discontinued, up to the date on which notice of discontinuance was served.

(2) If a claim is only partly discontinued —
(a) the claimant is only liable for the costs relating to that part of the claim which is discontinued; and
(b) unless the Court orders otherwise, the costs which the claimant is liable to pay are not to be quantified until the conclusion of the rest of the claim.

Notes:

Generally, Part 37.6 preserves the common law principle that “costs follow the event.” A claimant who discontinues an action is treated as an unsuccessful litigant, and must pay the costs of the defendant in relation to the claim or part of a claim that was discontinued. Where a claimant discontinues only part of a claim, costs of that part will not be assessed until the conclusion of the surviving claims, unless the Court otherwise orders.

37.7 Quantification of costs.

If the claimant discontinues part of the case only, the amount of costs must be assessed by the Court when the remainder of the claim is resolved.

Notes:

See Part 36.6 in relation to the effect on costs of discontinuing part of a claim.

37.8 Discontinuance and subsequent proceedings.

If the claimant —

(a) discontinues a claim after the defendant against whom the claim is discontinued has filed a defence; and
(b) makes a subsequent claim against the same defendant arising out of facts which are the same or substantially the same as those relating to the discontinued claim; and
(c) has not paid the defendant's costs of the discontinued claim,
the court may stay the subsequent claim until the costs of the discontinued claim are paid.

Notes:
Principles of double jeopardy and/or *res judicata* do not apply to civil claims which are discontinued. As such, claimants may bring a claim which was previously discontinued in a new action, subject to the provisions of the Limitation Act. Part 37.8 provides a protection to defendants in such circumstances, so that claimants may be ordered to pay the costs of the discontinued action (see Part 36.6 and Part 36.7) prior to proceeding in the second renewed action.

Cases:

CPR 37.8 Discontinuance and subsequent proceedings.
Hess v Labouchere (1988) 14 T.L.R 350- (party discontinued one action and brought another action).

PART 37 Commentary:

Claimants should consider carefully bringing claims which may turn out to be unmaintainable and/or discontinuing a claim, as they may face costs consequences as a result.

PART 38 – PRE-TRIAL REVIEW

38.1 Scope of this Part.

This Part deals with the pre-trial review which is to be held shortly before trial if the court so orders.

Notes:
The overriding objective of the CPR is to manage cases efficiently. Parties are held to strict compliance with case management and ought to apply to the Court in the event of any delays which would affect the trial date (see Part 27.8). Consequently, conducting a pre-trial review is in the discretion of the Court, and pre-trial reviews are only conducted if the Court so orders.

38.2 Direction for pre-trial review.

(1) At any case management conference and at any subsequent hearing in the claim other than the trial the court must consider whether a pre-trial review should be held to enable the court to deal justly with the claim.

(2) A party may apply for a direction that a pre-trial review be held.

(3) An application for a pre-trial review must be made at least sixty days before the trial date or the beginning of any trial period fixed under rule 27.5(4).

(4) The court office must give each party at least fourteen days' notice of the date time and place for the pre-trial review.

Notes:
The Court must consider whether pre-trial review should be held at the case management conference and any subsequent hearing, including any interlocutory applications. Parties may apply for a pre-trial review, which may be useful for parties wishing to make applications which could not be made at the case management conference (see Part 11.3). Parties must apply for a pre-trial review at least 60 days before the trial. Parties must be given at least 14 days' notice of a pre-trial review.

38.3 Rules relating to case management conferences to apply.

Parts 25 and 26, where appropriate, apply to a pre-trial review as they do to a case management conference.

Notes:
Part 25 and Part 26 deal with the objectives of case management and the court's case management powers, respectively.

38.4 Who is to conduct pre-trial review.

Wherever practicable the pre-trial review is to be conducted by the trial judge.

Notes:
One of the overriding objectives is active management of cases by the trial judge so much as practicable to foster efficient and just administration of justice (see Part 1 on the overriding objective).

38.5 Parties to prepare pre-trial memorandum.

(1) The parties must seek to agree on and file at the court office a pre-trial memorandum not less than seven days before the pre-trial review.

(2) If the parties are not able to agree on such a memorandum each party must file its own memorandum and serve a copy on all other parties not less than three days before the date fixed for the pre-trial review.

(3) A pre-trial memorandum must contain —

(a) a concise statement of the nature of the proceedings;

(b) a statement of the issues to be determined at the trial;

(c) details of any admissions made; and

(d) the factual and legal contentions of the party or parties filing it.

Notes:
Similar to a Statement of Facts and Issues, the pre-trial memorandum assists the Court and the parties in identifying the facts and issues in dispute, the facts and issues which are agreed and do not require adjudication, and the case that each party must prove or refute.

38.6 Directions at pre-trial review.

(1) At the pre-trial review the judge must give directions as to the conduct of the trial in order to ensure the fair, expeditious and economic trial of the issues.

(2) In particular, the Court may —

(a) decide on the total time to be allowed for the trial;
(b) direct either party to provide further information to the other;
(c) direct how that time shall be allocated between the parties;
(d) direct the parties jointly to prepare one or more of —

(i) a bundle containing only the documents which the trial judge will need to pre-read or to which it will be necessary to refer repeatedly at the trial (hereinafter referred to as "a core bundle");
(ii) an agreed statement of facts;
(iii) an agreed statement of the basic technical, scientific or medical matters in issue;
(iv) an agreed statement as to any relevant specialist area of law, which statement shall not be binding on the trial judge;

(e) direct when and by whom the documents should be filed at the court;
(f) direct whether or not there are to be any opening or closing addresses and the time to be allocated to each;
(g) give directions as to the extent to which evidence may be given in written form;
(h) give directions as to the procedure to be followed at the trial; and
(i) give directions for the filing by each party and service on all other parties of one or more of the following —

(i) a chronology of relevant events;
(ii) a list of authorities which it is proposed to cite in support of those propositions;
(iii) a skeleton argument; and
(iv) a summary of any legal propositions to be relied on at the trial.

Notes:
The Court must give directions as to the further progress of the action at any pre-trial review, keeping in mind the overriding objective, and ensuring that cases are dealt with in a manner proportionate to their value, importance, and complexity (see Part 1). The Court is encouraged to actively manage cases, including but not limited to, fixing dates and deadlines and setting limitations on the amount of time that will be allowed for each case, and how that time will be apportioned between the parties. See Part 26 and Part 38.4 in relation to the Court's powers at case management and pre-trial review.

PART 38 Commentary:
Pre-trial reviews are not mandatory but are in the discretion of the Court. Pre-trial reviews may be a useful tool to ensure active case management and to deal with any necessary applications which could not be made at the case management conference. Parties must be aware of the trial date, as any applications for a pre-trial review must be made no less than 60 days before the trial period.

Cases:

Azard Mohammed v The Attorney General for Trinidad and Tobago Claim No. CV2016-01760 (The Trinidad and Tobago held that a PTR is not a sterile exercise where automatic directions are given by the Court for a trial. That would not be in keeping with the philosophy of Court driven case management nor the ethos of the rules that a trial of a claim is the last resort to its determination. Every case needs to be assessed and re-assessed by the Court and the parties at every opportunity of case management, including the PTR. The PTR is perhaps the "last stop" on the journey to a trial or resolution of a claim. Far too often parties do not take the opportunity to use the PTR as a helpful event to critically examine their respective cases, to make an informed determination of their chances at trial or to revise their own case plans. The Court is, at the PTR, in a better position to engage with the parties in an assessment of the necessity for trial and is able to further refine the triable issues, obtain agreement on facts based on what has been disclosed, and narrow the field of dispute between the parties. At the PTR stage, with witness statements having been filed, the Court and the parties are entitled to "re-examine" the issues raised on the pleadings or as agreed by them to be determined at a case management conference and to discern whether those or any of the issues so raised or agreed remain live ones for consideration at a trial having regard to the state of the proposed evidence. The Court, on the facts, determined there was no case to answer on a claim for malicious prosecution as the claimant's evidence did not make out the ingredients of the tort and struck it out in the exercise of its case management powers.)

Eastern Engineering and Marketing Service (1994) Ltd v The Attorney General of Trinidad and Tobago CV2012-02045 (The Trinidad & Tobago High Court held that it had power to grant judgment at a PTR and granted judgment to the claimant on a claim for monies due and owing. The claimant had fully justified every aspect of its claim in its witness statements while the defendant had filed no evidence.)

PART 39 – TRIAL
39.1 Documents for use at trial.

(1) At least twenty-one days before the date fixed for the trial all parties must inform the claimant of the documents that they wish to have included in the bundle of documents to be used at the trial.

(2) The claimant must prepare a bundle including all the documents which any party wishes to make use of at the trial.

(3) The bundle of documents should separate those which are agreed and those which are not agreed.

(4) The claimant must paginate and index the bundle of documents.

(5) At least ten days before the date fixed for the trial the claimant must file at the Registry —

(a) a bundle comprising copies of —

(i) all statements of case;

(ii) any document which the parties were ordered to file under rule 38.6(2)(b);

(iii) any requests for information and the replies;

(iv) the claim form; and

(v) the pre-trial memorandum or memoranda;

(b) a second bundle comprising copies of —

(i) all expert reports;

(ii) all witness statements or affidavits filed for the purpose of the trial; and

(iii) any agreed statements under rule 38.6(2) (d) (ii)-(iv);

(c) a third bundle comprising the documents referred to in paragraph (2); and

(d) where the bundles exceed one hundred pages of documents in total, a core bundle (that is, a bundle containing only the documents which the trial judge will need to pre-read or to which it will be necessary to refer repeatedly at the trial).

(6) There must be excluded from the bundles prepared under this rule any —

(a) application or order relating to interim payments under Part 17; and

(b) offer to settle under Part 35 or notice of payment into court under Part 36, and any reference to any such payment or offer must be excised from any document contained in the bundles.

(7) Where only a counterclaim is to be tried, references in this rule to the "claimant" should be construed as references to the defendant.

(8) The Court may direct that all or some of the bundles required under this rule are to be electronic bundles prepared in accordance with practice directions issued by the Chief Justice.

Notes:
Any party wishing to rely on a document must inform the claimant of their intention to do so at least 21 days before the trial date. Bundles are to be produced by the claimant and filed no less than 10 days before the trial date. Parties must be aware of deadlines, as the overriding objective promotes promptness and adherence to the case management schedule and discourages adjourning of trial dates. See Part 1 in relation to the overriding objective. See also Part 27.8 in relation to case management.

39.2 Cross-examination.

The court may limit examination, cross-examination or re-examination of any witness.

Notes:
The overriding objective promotes active case management by the Court which includes ensuring that a case is dealt with in a time proportionate to the value, importance and complexity of the case. This may include limiting the amount of time dedicated to witness testimony. See Part 1 in relation to the overriding objective.

39.3 Written submissions.

(1) The parties may with the consent of the judge file written submissions —

(a) instead of; or
(b) in addition to closing speeches.

(2) Such written submissions must be filed within seven days of the conclusion of the trial or such other period as the judge directs.

Notes:
Parties should consider prior to the end of trial whether written submissions would best assist the Court, whether instead of or in addition to closing speeches, bearing in mind the overriding objective (see Part 1). Parties must bear in mind, that written submissions must be filed within 7 days of the conclusion of trial unless the Court otherwise orders.

39.4 Failure of party to attend trial.

If the judge is satisfied that notice of the hearing has been served on the absent party or parties in accordance with these Rules —

(a) if no parties appear at the trial, the judge may strike out the claim;

(b) if one or more but not all parties appear, the judge may proceed in the absence of the parties who do not appear.

Notes:
In furtherance of the overriding objective (see Part 1), failure to appear at trial may result in an action being struck out or proceeding in the absence of one or more parties.

Cases:

Green Elite (in Liquidation) v Fang Ankong Claim No BVIHC (COM) 2018/022 (The BVI High Court held that EC CPR 39.4 [BAH CPR 39.4] is directed at parties who have previously appeared in a case, not at parties who have never appeared. The rule provides that the Court is not obliged to refuse to hear a trial where a party who has participated in the litigation fails to appear at trial, notwithstanding that party being aware of the date and place of the trial. On the facts, where two defendants had simply not engaged with the Court process at all, there was no purpose requiring them to be served with the notice of trial. Such defendants' interests were adequately protected by the provision of EC CPR 39.5, which allowed them to apply within fourteen days after service of the judgment or order to set aside a judgment given after a trial which he or she had not attended.)

Claudia Henlon v Sharon Martin Pink et al [2015] JMCA Civ 4 (The Jamaican Court of Appeal held that under JAM CPR 39.5 [BAH CPR 39.4] a judge is not obliged to proceed in the absence of the parties who do not appear. The judge has a discretion. If the circumstances are such that a judge would clearly be wasting judicial time by proceeding with a trial, which will result in a justifiable application to set aside the resulting judgment, the judge should not do so. That process would be contrary to the overriding objective of the CPR.)

Justin Pemberton v Attorney General of the Commonwealth of Dominica et al HCVAP 2010/016 (Dominica) (The Eastern Caribbean Court of Appeal held that a claim should not be automatically struck out under EC CPR 39.4 [BAH CPR 39.4] when counsel is present in court, but his client is not. Presence of counsel is a sure indication that, without more, the claimant is not intentionally absent and there may be some good reason for his not turning up for the trial on time. Any costs incurred by any delay or postponement may be visited on the delinquent claimant.)

39.5 Application to set aside judgment given in party's absence.

(1) A party who was not present at a trial at which judgment was given or an order made may apply to set aside that judgment or order.

(2) The application must be made within fourteen days after the date on which the judgment or order was served on the applicant.

(3) The application to set aside the judgment or order must be supported by evidence on affidavit showing —

(a) a good reason for failing to attend the hearing; and

(b) that it is likely that had the applicant attended some other judgment or order might have been given or made.

Notes:
Adherence to trial dates and final disposition of cases are important aspects of case management in furtherance of the overriding objective (see Part 1 and Parts 25-27). Parties who failed to attend at a trial date risk the Court proceeding in their absence (see Part 39.4) and potentially having orders made or judgment entered against them. Such parties must apply within 14 days of being served with the judgment or order, and must not only show good reasons for their absence, but must also demonstrate that some other order or judgment was likely if they had attended.

Cases:

Bank of Scotland v Periera [2011] EWCA Civ 24 (The English Court of Appeal held that an application to set aside judgment given in the applicant's absence is now subject to clear rules. As was made clear by Simon Brown LJ in *Regency Rolls Ltd v Carnall [2000] EWCA Civ 379,* the court no longer has a broad discretion whether to grant such an application: all of the conditions listed in English CPR 39.3 [BAH CPR 39.5] must be satisfied before it can be invoked to enable the court to set aside an order. So, if the applicant had no good reason for being absent from the original hearing, or if the applicant would have no substantive case at a retrial, the application to set aside must be refused. On the other hand, it is a fundamental principle of any civilised legal system, enshrined in the common law and in article 6 of the Convention, that all parties in a case are entitled to the opportunity to have their case dealt with at a hearing at which they or their representatives are present and are heard. If the case is disposed of in the absence of a party, and the party (i) has not attended for good reasons, (ii) has an arguable case on the merits, and (iii) has applied to set aside promptly, it would require very unusual circumstances indeed before the court would not set aside the order. The strictness of the hurdles is plain, but the rigour of the rule is modified by the fact that, among other things, what constitutes a good reason for not attending is, in each case, very fact-sensitive, and the court should, at least in many cases, not be very rigorous when considering the applicant's conduct; similarly, the court should not pre-judge the applicant's case, particularly where there is an issue of fact, when considering the prospects of a different result had they been present. Like all other rules, English CPR 39.3 [BAH CPR 39.5] is subject to the overriding objective, and must be applied in that light. The fact that an application under CPR 39.3 [BAH CPR 39.5] to set aside an order fails does not prevent the applicant seeking permission to appeal the order. It is not very convenient, but an applicant may be well advised to issue both a CPR 39.3 [BAH CPR 39.5] application and an application for permission to appeal at the same time, or to get agreement from the other party for an extension of time for the application for permission to appeal. Where a defendant seeks a new trial on the ground that he did not attend the trial, then she should "normally" proceed under CPR 39.3 [BAH CPR 39.5], provided he reasonably believes he can satisfy the requirements of the rule. If a defendant seeks to appeal without first making a CPR 39.3 [BAH CPR 39.5] application, when such an application could have been made, the appellate court could still entertain the appeal although it will normally require unusual facts before it should do so.)

Brazil v Brazil [2002] EWCA Civ 1135 (The English Court of Appeal held that the search for a definition or description of "good reason" or for a set of criteria differentiating between good and bad reasons is unnecessary. Although the court must be satisfied that the reason is an honest or genuine one, that by itself is not sufficient to make a reason for non-attendance a "good reason." The court has to examine all the evidence relevant to the defendant's non-attendance; ascertain from the evidence what, as a matter of fact, was the true "reason" for non-attendance; and, looking at the matter in the round, ask whether that reason is sufficient to entitle the applicant to invoke the discretion of the court to set aside the order. An over analytical approach to the issue is not appropriate, bearing in mind the duty of the court to give effect to the overriding objective.)

Consolidated Finance Co Ltd v Dawe Case No. 2065 of 2012 (Barbados) (An application to set aside an a judgment entered in default appearance to a fixed date claim form seeking sums outstanding under a hire purchase agreement at the second hearing of the fixed date claim form was analyzed by the Barbados High Court under CPR 11.15 [BAH CPR 11.18].)

David Watson v Adolphus Sylvester Roper SCCIVAppeal No. 42 of 2005 (Jamaica) (The Jamaican Court of Appeal held that the predominant consideration for the court in setting aside a judgment given after

a trial in the absence of the applicant, is not whether there is a defence on the merits but the reason why the applicant had absented himself from the trial. If the absence was deliberate and not due to accident or mistake, the court would be unlikely to allow a rehearing. Other relevant considerations include the prospects of success of the applicant in a retrial; the delay in applying to set aside; the conduct of the applicant; whether the successful party would be prejudiced by the judgment being set aside; and the public interest in there being an end to litigation. There is no residual discretion to set aside a judgment given after trial if there is no good reason for the failure to attend or if the defendant has no reasonable prospect of success.)

Forcelux Ltd v Binnie ***[2009] EWCA Civ 854*** ***https://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWCA/Civ/2009/854.html*** (A landlord initiated proceedings to terminate a residential lease for non-payment of a minor sum for ground rent. The proceedings were served on the tenant, but he had no notice of them because he had moved. A possession order was made at the first hearing under CPR Part 55, at which there was no appearance by the defendant and no material before the judge to suggest that the defendant had a case at all. The English Court of Appeal held that the hearing for a possession order was not a "trial" and therefore English CPR 39.3 [BAH CPR 39.5] could not be invoked.)

Justin Pemberton v Attorney General of the Commonwealth of Dominica et al HCVAP 2010/016 (Dominica) (The Eastern Caribbean Court of Appeal held that if a claim is struck out for the non-appearance of a claimant, it should be restored on an application made in good time and showing a good reason for the claimant's failure to attend. What is a good reason is not defined or limited by the rules. The court must examine all the evidence relevant to the party's non-attendance. Looking at the matter in the round, the court must ask whether the reason proffered is sufficient to entitle the applicant to invoke the discretion of the court to set aside the order. Going fishing would certainly not be a good reason. Being held up in traffic on the way to court would be. The Eastern Caribbean Court of Appeal held the learned judge did not exercise their discretion reasonably and not apply the correct test for determining whether the reason provided was a good reason.)

Owen v Black Horse Ltd [2023] EWCA Civ 325 (The English Court of Appeal held that a party "attends" trial for the purposes of English CPR 39.3 [the English provision corresponding to BAH CPR 39.5] if he is represented by counsel at the hearing, whether or not he is personally in attendance.)

Pickard v Roberts [2016] EWHC 187 (Ch) (The English High Court held that the default position with respect to whether or not what takes place at a hearing can be properly described as a "trial" within CPR 39.3 [BAH CPR 39.5] depends on the context, depends upon the purpose of the hearing and upon the procedural orders which have been made leading up to the hearing, rather than upon the form of whatever has been used in order to get to that hearing.)

Tinkler and another v Elliott [2012] EWCA Civ 1289 (The English Court of Appeal held that an opponent of a litigant in person is entitled to assume finality without expecting excessive indulgence to be extended to the litigant in person. The fact that a litigant in person "did not really understand" or "did not appreciate" the procedural courses open to him for months does not entitle him to extra indulgence if he delays in applying to set aside a judgment entered in his absence.)

Violet Roselyn Banmally also called Rosie Banmally v Richard Radhay Claim No. CV2016-04203 (Trinidad and Tobago) (The Trinidad and Tobago High Court held that the Court can extend the time to hear an application under T&T CPR 40.3 [BAH CPR 39.5] notwithstanding that the time to do so has expired, under its general case management powers conferred by Part 26. The appropriate application is for an extension of time and not relief from sanction since there is no expressed sanction imposed by CPR 40.3 [BAH CPR 39.5] for making a late application. The Court will have to exercise its general discretion as to whether or not, in all the circumstances, an extension should be granted.)

Williams v Hinton [2011] EWCA Civ 1123 (The English High Court held that the mere fact that a litigant is a litigant in person will not, at least ordinarily, constitute an "unusual fact" (within Lord Neuberger MR's

observations in ***Pereira*** at 37), warranting this court entertaining an appeal when the correct course was to proceed by way of English CPR 39.3.)

39.6 Adjournment of trial.

(1) The judge may adjourn a trial on such terms as the judge thinks just.
(2) The judge may only adjourn a trial to a date and time fixed by the judge or to be fixed by the court office.

Notes:
The overriding objective (see Part 1) emphasizes adherence to fixed court dates (see Part 27.8) and discourages adjournments *sine die.*

Bilta (UK) Ltd v Tradition Financial Services Ltd [2021] EWCA Civ 221 (TheEnglish Court of Appeal held that the illness of a key witness or a litigant in person will usually be a good reason for an adjournment of trial, however, the decision is one for the court to make and is not one that can be forced upon it. The guiding principle in an application to adjourn on medical grounds is whether if the trial goes ahead it will be fair in all the circumstances. The assessment of what is fair is a fact-sensitive one, and not one to be judged by the mechanistic application of any particular checklist. Although the inability of a party himself to attend trial through illness will almost always be a highly material consideration, it is artificial to seek to draw a sharp distinction between that case and the unavailability of a witness. The significance to be attached to the inability of an important witness to attend through illness will vary from case to case, but it will usually be material, and may be decisive. If the refusal of an adjournment would make the resulting trial unfair, an adjournment should ordinarily be granted, regardless of inconvenience to the other party or other court users, unless this were outweighed by injustice to the other party that could not be compensated for.)

David Irving v Penguin Books Limited [2001] EWCA Civ 935 (The English Court of Appeal refused a 21-day adjournment made a week before the date hearing for an appeal after having already granted an adjournment of three months. The court could not, on the information it had been given, grant an application by one of the parties simply because he had fallen out with his solicitors and expected an adjournment to instruct further solicitors at a point so close to the hearing.)

Donald Panton et al v Financial Institution Services Limited Supreme Court Civil Appeal No. 6 of 2006 (Jamaica) (A refusal by a trial judge to grant a second adjournment of a four week trial was upheld on appeal to the Jamaican Court of Appeal as not being unfair. The refusal was made after a history of delay and an initial adjournment of about a week after their former instructing attorneys withdrew from the record.)

Ebanks v McClymont [2007] JMSC 21 (The Jamaican Supreme Court held that JAM CPR 39.6 is cast in very wide terms but that does not mean that it has no boundaries. When exercising any discretion under the CPR, a judge must take into account rule 1.1 which requires that the matter be dealt with justly. It emphasises that dealing with the case justly includes, ensuring that the case is dealt with expeditiously, fairly and allotting to it an appropriate share of the court's resources while taking into account the need to allot resources to other cases. A further adjournment of the trial date was refused when defendant, a recording artist, went to Australia with full knowledge of the trial date and there was no evidence he had to depart for the trip on short notice. A litigant who deliberately absents himself from trial cannot legitimately complain of injustice if the matter proceeds in his absence.)

Elliot Group v GECC UK [2010] EWHC 409 (TCC) (The English High Court held that when considering an application for an adjournment of trial based on matters such as an unexpected amount of disclosure, the court is faced with a balancing exercise between, on the one hand, the obvious desirability of retaining a fixed trial date (which promotes certainty) and avoiding any adjournment (which can only add to the costs

of the proceedings) and, on the other, the risk of irredeemable prejudice to one party if the case goes ahead in circumstances where that party has not had proper or reasonable time to prepare its case. It is doubtful it is ever a good ground or an adjournment of a fixed date trial to say that the proposed adjournment would allow the parties an opportunity to settle the case.)

Fitzroy Robinson Ltd v Mentmore Towers Ltd [2009] EWHC 3070 (TCC) (The English High Court held that when considering an application for an adjournment of trial, the starting point should be the overriding objective. Thus, the court must ensure that the parties are on an equal footing; that the trial is dealt with proportionately, expeditiously and fairly; and that an appropriate share of the court's resources is allotted, taking into account the need to allot resources to other cases. When the court is considering a contested application at the 11th hour to adjourn trial necessitated by a failure to comply with earlier case management directions, the court should have specific regard to (1) the parties' conduct and the reason for the delays; (2) the extent to which the consequences of the delays can be overcome before the trial; (3) the extent to which a fair trial may have been jeapordized by the delays; (3) specific matters affecting trial, such as the illness of a critical witness and the like; and (4) the consequences an adjournment for the claimant, the defendant and the court. The court dismissed an application for an adjournment of trial made at the pre-trial review on the basis that joint expert evidence had not been prepared. The delays could be overcome soon enough to keep the current trial date and a fair trial had not been imperilled.)

Hare v Pollard [1997] Lexis Citation 3926 (In considering whether to grant an adjournment of trial at the last minute, the overriding principle is that justice must be done. There are other considerations which a judge must bear in mind, three of which are the principles that litigants are entitled to have their cases resolved with reasonable expedition; that vacation or adjournment of the date of trial prejudices other litigants and disrupts the administration of justice; and that extensions of time which involve the vacation or adjournment of trial dates should therefore be granted only as a last resort.)

Lloyd's Bank v Dix [2000] EWCA Civ 269 (An adjournment may be refused where it would make no material difference to the outcome of the litigation in view of the weakness of the applicant's case.)

Lowenthal v Whittington Hospital NHS Trust [2013] EWCA Civ 1102 (A refusal of an application to adjourn trial to enable the claimant to instruct an alternative expert which was made when the case was called on was upheld on appeal to the English Court of Appeal. The judge had leaned over backwards to try to afford the appellant a fair opportunity to marshal her case. In the circumstances that arose by the time of the trial, the judge was fully entitled to conclude that, in view of the failure of the appellant to ensure that her case could be properly presented, it was right to refuse the adjournment of the trial and to proceed with the trial and to enter judgment against her.)

Teinaz v Wandsworth London Borough Council [2002] EWCA Civ 1040 (A litigant whose presence is needed for the fair trial of a case, but who is unable to be present through no fault of his own, will usually have to be granted an adjournment, however inconvenient it may be to the tribunal or court and to the other parties. But the tribunal or court is entitled to be satisfied that the inability of the litigant to be present is genuine, and the onus is on the applicant for an adjournment to prove the need for such an adjournment.)

Wright v Chappell [2023] EWHC 2873 (Ch) (Example of a complicated contested application to adjourn trial on the basis of, among other things, medical grounds, where earlier English authorities were reviewed.)

39.7 Inspection.

The judge trying a claim may inspect any place or thing that may be relevant to any issue in the claim.

Notes:
The Court retains wide discretionary powers in an effort to ensure the just and efficient determination of cases.

PART 39 Commentary:

The overriding objective (see Part 1) remains paramount in trial procedure. Parties are encouraged to make every effort to adhere to the case management schedule and to ensure that bundles, written submissions and other pre-trial requirements are produced or otherwise met timely. The Court is given wide powers to limit the amount of time apportioned to each case, proportionate to the value, importance, and/or complexity of the case.

PART 40 – APPOINTMENT OF REFEREE TO INQUIRE AND REPORT

40.1 Power to order trial before referee.

Where —

(a) the parties agree;

(b) the Court considers that the claim requires —

(i) prolonged examination of documents; or

(ii) scientific or local investigation which cannot conveniently be carried out by the Court; or

(c) the matters in dispute are wholly or mainly matters of account, then, subject to rule 40.7, the Court may order the claim or any issue or allegation to be tried by a referee.

Notes:

This Part 40 reflects the similar provisions of Order 36 of the UK Rules of the Supreme Court (1998). Following the Wolff Reforms official referees ceased to be used in English civil procedure, with their role now largely provided by Assessors under CPR 35.15, section 70 of the Senior Courts Act 1981 and section 63 of the County Courts Act 1984. Their use has declined with the establishment of the Technology and Construction Court in 1998, in which the Judges are specialised in many of the areas where referees were previously relied on.

Much of the commentary below is derived from the English 1999 White Book, amended with Bahamian legislation where applicable.

Jurisdiction. Under s15 of the Supreme Court Act 1996 provision is made for the jurisdiction of the Court to be exercised, as regards procedure and practice, in any manner provided by the rules of court. As such, whilst the referee will produce a report and make findings, such findings must thereafter be accepted by the Court under Part 40.6 to be final.

By virtue of Part 40.1(b)(i-ii), referees work will likely consist of:

a) Civil or mechanical engineering;
b) Building or other construction work generally;
c) Claims by and against engineers, architects, surveyors, accountants and other such specialised professional bodies or persons;
d) Claims between neighbours, owners and occupiers of land, trespass, and nuisance and liability under Rylands v Fletcher (1868) L.R. 3 H.L. 330;
e) Claims between landlords and tenants for breach of repairing covenants;
f) Claims relating to the quality of goods sold and hired;
g) Claims relating to work done and materials supplied or services rendered;
h) Claims involving taking of accounts especially where these are complicated;

i) Claims arising out of or relating to fires, computers, and relating to the environment.

40.2 Reference to referee for inquiry and report.

The Court may refer to a referee for inquiry and report any question or issue of fact arising in a claim.

Notes:

The Court may make such a reference on its own motion, or any party may apply by application for the same. It is to be noted that it is a reference and not a transfer of proceedings as such the Action remains under the oversight of the Court.

The Court may make a reference with the consent of the parties or against their wishes if the Court considers that the reference is appropriate, provided that if any party objects they are first given the opportunity to be heard. Furthermore, as per 40.3 the referee should be a person agreed upon by the parties, if possible.

40.3 Appointment of referee.

(1) The general rule is that the appointment of a referee under rule 40.1 or 40.2 must be made at a case management conference or pre-trial review.

(2) The referee must be a person agreed upon by the parties or, if they fail to agree, a person selected by the Court in accordance with paragraph (3).

(3) Where the parties cannot agree who should be the referee, the court may —

(a) select the referee from a list prepared or accepted by the parties; or

(b) direct that the referee be selected in such other manner as the court may direct.

(4) The Court must specify the question or issue upon which the referee is to report.

(5) The Court must decide —

(a) what fee is to be paid to the referee; and

(b) by whom the fee is paid.

(6) Notwithstanding paragraph (5), the Court may ultimately order any party to pay the fee of the referee.

(7) The Court may on application by either party or of its own motion revoke the appointment of any person as referee and may appoint another person as referee.

40.4 Conduct of referee.

(1) For the purpose of the inquiry, the referee has the same powers as the Court other than the power to commit for contempt of court.

(2) Unless the Court otherwise orders, the referee must adopt what appears to the referee to be the simplest, least expensive, most expeditious and just method of conducting the reference.

(3) The referee may hold the trial or conduct the inquiry by videoconference or by in person hearings at any place and at any time which appears to the referee to be convenient to the parties.

(4) Where a person served with a witness summons to appear before a referee —

(a) fails to attend;

(b) refuses to be sworn or to affirm for the purposes of the inquiry; or

(c) refuses to answer any lawful question or produce any document at the inquiry,

the referee may sign and file a certificate of such failure or refusal.

(5) Any party may apply to the Court for an order requiring the witness to attend, to be sworn or to affirm, to answer any question or to produce any document as the case may be.

(6) An application for an order under paragraph (5) may be made on three days' notice to the witness and to each interested party, supported by evidence on affidavit.

(7) In the case of non-attendance, the affidavit must prove —

(a) service of an appropriate witness summons; and

(b) that the person served with the witness summons was paid or offered the payments required by rule 33.6.

(8) Any order made by the Court must be served personally on the witness and be endorsed with the following notice —

"*NOTICE: If you fail to comply with the terms of this order, proceedings may be commenced against you for contempt of court and you may be liable to be imprisoned.*"

(9) A person who wilfully disobeys an order made against that person under paragraph (5) which complies with paragraph (8) is guilty of contempt of court.

(10) The court may order the person against whom an order is made under this rule to pay any costs resulting from the —

(a) failure to attend before a referee;

(b) refusal to answer any lawful question or produce any document at the inquiry; or

(c) refusal to be sworn or to affirm for the purpose of the inquiry.

Notes:

Unless otherwise specified, the trial or inquiry held shall, insofar as circumstances permit, be in the like manner as the like proceedings before a judge. The proceedings in a trial before a referee are public: *Hesz v Sotheby* [1960] 1 W.L.R. 285.

Whilst not binding in this jurisdiction, some helpful guidance regarding procedure following the appointment of a referee is provided by the old English Practice Direction [1968] 1 W.L.R. 1425, [1968] 2 All E.R. 1213: which, if adopted, would provide the following principles:

1. At the time of the issue of the first application before a referee, a copy of all the pleadings, including particulars already served, should be lodged with the referee so that they can be considered by the referee before the hearing of the application.
2. At the hearing of the first application before the referee, the attorneys for the parties should be in the position to state the nature of the claim and the defence.
3. At the first hearing the referee will give the necessary directions and make the necessary orders regarding the steps in the action to be taken by the parties. It is of the utmost importance that these steps should be taken within the time limits set by the direction or order, so that costs may be controlled and fixed hearing dates are not lost. This accords with Part 40.4(2) and the Overriding Objective. Failure in this respect may result in unnecessary adjournments with attendant costs.
4. Once a fixed trial date has been given, no alteration will be granted except with leave of the referee, which will only be granted in exceptional circumstances. If a fixed date for trial is vacated, the fresh date may not be a fixed date.
5. Where a party intends to adduce expert evidence, he should produce to the other party his expert's statement of proposed evidence, together with any reports, plans, models, calculations, etc., relevant to it, for agreement if possible. Failing such agreement, the other party should deliver to the first party a written statement setting out particulars of matters not agreed. Where both parties intend to adduce expert evidence, each should follow this procedure. Failure by any party to follow this procedure may result in a special order as to costs.

40.5 Reports following reference.

(1) The report of the referee appointed under this Part is to be made to the court.

(2) The referee must supply a copy of the report to each party.

(3) The referee may in his report —

(a) submit any question for the decision of the court; or

(b) make a special statement of facts from which the court may draw inferences.

Notes:

The referee has a judicial role and is not an expert witness appointed by the Court, as such they cannot be cross-examined.

The report should sufficiently set out the facts to enable the Court to form a judgment thereon. In questions of account it should state what items are allowed and what disallowed and not merely the result: *Burrard v Calisher* 30 W.R. 321; see, however, Re Taylor 44 CH. D. 128. The referee is not bound to state the reasons for his findings on issues of fact unless required by the Court, per Bramwell L.J. *Dunkirk Colliery Co. v Lever* 9 Ch. D. p.28; *Miller v Pilling* 9 Q.B.D. 736; *Walker v Bunkell* 22 Ch. D. 722.

40.6 Consideration of report by the court.

(1) Upon receipt of the report, the Court must fix a date, time and place for its consideration by the Court.

(2) The Court must give twenty-one days' notice thereof to the parties.

(3) The Court may, after hearing the parties —

(a) adopt the report in whole or in part;

(b) vary the report;

(c) ask the referee to explain any part of the report;

(d) remit any question or issue for further consideration;

(e) decide the question or issue on the evidence taken by the referee;

(f) direct that additional evidence be given to the Court; or

(g) reject the report.

Notes: The Report is addressed to the Court or Judge by whom the matter was referred, and the Court may adopt, or partially adopt, or reject it as it thinks right: *Wenlock (baroness) v River Dee Co.* 19 Q.B.D. 155. The Court retains the power to review the evidence on which the referee reports: *Walmsley v Mundy* **(**1884) 13 Q.B.D. 807.

40.7 Restrictions on appointment of referee in proceedings by or against Crown.

In proceedings by or against the Crown, a referee may not be appointed under this Part without the consent of the Attorney-General.

PART 41 – ACCOUNTS AND INQUIRIES

41.1 Scope of this Part.

(1) This Part deals with claims —

(a) for an account; or

(b) for some other relief which requires the taking of an account.

(2) A claim for an account must be made —

(a) in existing proceedings, by an application under Part 11 supported by evidence on affidavit

(b) where there are no existing proceedings, by a fixed date statement of claim supported by evidence on affidavit.

Notes:
Part 41 supersedes the old RSC Order 43. Like RSC 43, an order for an account will only be made where an account is claimed in the proceedings, or where there is some other relief claimed in the proceedings which requires the taking of an account.

Much of the balance of the notes are derived (amended as necessary to refer to Bahamian legislation) from the English 1999 White Book commentary to the English Order 43. In England, there are now significantly differing rules provided in CPR Practice Direction 40A.

Accounts and Inquiries - Accounts and inquiries may deal with purely formal matters (such as computing the interest payable on completion, in a specific performance action), or they may be indistinguishable from a full trial with witnesses. For this reason, there is no standard procedure laid down in the rules. When a Judge or Registrar orders an account or inquiry, he will generally in the same order give directions for the taking of the account or inquiry (Part 41.2); otherwise, it will be necessary to issue an application seeking the necessary directions. See generally Atkin's Court Forms, Vol.1, "Accounts" and Vol.33, "Reference and Inquiries by the Court".

Limitation – An action for an account may not be brought after the expiration of any limitation period applicable to the claim which is the basis of the duty to account (Limitation Act 1995, s.35): for claims based on contract the normal six-year period applies. An action for breach of fiduciary duty simpliciter is outside the provisions of the Limitation Act 1995 and therefore is not subject to a period of limitation (*Att. -Gen. v. Cocke* [1988] Ch. 414, as explained in *Nelson v. Rye* [1996] 1 W.L.R 1378 at 1390 E, F) but will be subject to the equitable defences of laches, acquiescence, and delay (*ibid*., p. 1391 *et seq.*).

Where breach of fiduciary duty gives rise to a constructive trust, the provisions of S.33 of the 1995 Act determine whether there is a limitation period and its duration. An action for breach of an express trust is, in like manner, subject to limitation periods of S.33. In neither case is it possible to avoid any limitation period under the Act by treating the case as one of breach of fiduciary duty (ibid., p. 1390 E, F).

"*At law, the relationship between an agent and his principal is that of debtor and creditor. In equity, however, the relationship of trustee and beneficiary may be superimposed . . . the question of whether an agent is trustee depends on all circumstances and in particular the intention of the parties, expressed or inferred. A right of the agent to mix his principal's money with his own . . . is inconsistent with the existence of the trust*" (Sir Peter Millett [1993] R.L.R. 7, quoted in *Nelson v. Rye* supra at 1387).

It may well be that the breakdown of a relationship which arises out of a contract gives rise to alternative causes of action for breach of contract, negligence, and breach of trust. Where a limitation period exists and can be invoked in relation to one cause of action, it is *nihil ad rem* that no, or a different, limitation period applies to an alternative cause of action which has been or could have been pleaded *(ibid*., p. 1389 A, B).

It may often be more convenient for problems of limitation to be decided on the taking of the account.
The order – If the taking of accounts will end the dispute between the parties, the Order should direct payment of the balance declared due and of any consequential costs.
Interim payments – See Part 17. rule 15 (1) (b)
Scope of inquiry – Election – It was said *obiter* in *Potton v. Yorkclose Ltd* [1990] F.S.R. 11 that an account of profits could include an account of profits which the defendant stood to make by his wrongful acts but had not yet realised. Since the plaintiffs wished to continue the action to obtain further relief in respect of alleged but unadmitted infringements, they were, on their motion for interim judgment on admissions, put to their election whether to proceed with the taking of an account or to continue with the action, and in the interim a stay of the account ordered. See this case also for observations on the apportionment of profits between the infringing acts and other factors affecting the infringer's profits.

41.2 Directions for account

(1) The Court may —

(a) direct that any preliminary issue of fact be tried;

(b) order an account to be taken;

(c) order that inquiries be made; and

(d) order that any amount shown to be due to a party on the account be paid by a date specified in the order.

(2) Every direction that an account be taken must be so numbered that each distinct account and inquiry may be designated by that number.

(3) On directing that an account be taken, or subsequently, the Court must direct how it shall be taken or verified.

(4) The Court may direct that any relevant books of account shall be evidence of the matters contained in them, subject to any objection that any party may properly take.

Notes:

Effect of rule – Whereas Part 41.1 only applies in an action for an account, this rule applies in any action. It is unlikely however that the Court will order an account in respect of a matter that has nothing to do with the claim in the action. See *Dawson-Damer v. Grampian Trust Company Limited and another* [2019] 1 BHS J. No. 38. While this case was a case under the old RSC Order 43, it is suggested that the reasoning still applies.

See also *Atlantic Medical Insurance Limited v. Fred S. Ramsey General Insurance Agency Ltd.* [2011] 3 BHS J. No. 48.

Practice – An order may be made at any stage, *e.g.* after judgment, as in *Barber v. Mackrell* (1879) 12 Ch. D. 534; *Taylor v. Mostyn* (1886) 33 Ch.D. 226.

By whom order made – The order may be made by a Registrar or Judge of the Supreme Court.

41.3 Verification of account.

(1) When there has been a direction for an account to be taken, the accounting party must prepare an account and verify it by affidavit exhibiting the account.

(2) The items on each side of the account must be numbered consecutively.

(3) Unless the Court otherwise orders, the accounting party must file the affidavit and the account and serve a copy of each on all other parties.

41.4 Omissions etc.

Any party who claims that there are omissions or who challenges any item in the account must give written notice to the accounting party with —

(a) the best particulars that the party who so claims can give of the omission or error; and

(b) the grounds for alleging it.

41.5 Allowances.

In taking any account all just allowances shall be made without any express directions to that effect.

Cases:

CPR 41.5 – Allowances

See Trinidad and Tobago, High Court decision of *Sanjay Sagar v Rajesh Sagar* - CV 2007–03631 (2016.04.01)

41.6 Delay.

Where there is undue delay in taking the account, the Court may —

(a) require the accounting party, or any other party, to explain the delay;

(b) give directions to expedite the taking of the account;

(c) direct any other party to take over the taking of the account; or

(d) make such other order, including an order as to costs, as is just.

Notes:

Effect of rule – After final judgment the action cannot be dismissed either under the inherent jurisdiction or under this rule, but a stay of the inquiry can be ordered if there is contumacy, or if there is inordinate delay in prosecuting the inquiry which has prejudiced the opposing party (*Nichols Advanced Vehicle Systems v Rees, Oliver* [1985] R.P.C. 445). In general *Birkett v. James* principles apply to applications for such a stay, but, where an inquiry as to damages had been ordered at trial, it was held that it would be an abuse of process for the plaintiff to commence new proceedings for the same relief, and therefore the fact that the limitation period had not expired would not prevent the Court ordering a stay of the inquiry under this rule (*Nichols Advanced Vehicle Systems v Rees, Oliver*, above at 454 and 457).

A cross-undertaking in damages given on obtaining an injunction is given to the Court, not to the opposing party, and may be enforced or discharged by the Court in its discretion. Accordingly, an application to dismiss for want of prosecution an inquiry as to damages under a cross-undertaking need not show prejudice in order to succeed. While prejudice is relevant, the principles to be applied are the same as those applied to the grant or refusal of the inquiry in the first place. The greater the delay, the less the need to establish prejudice. Where there has been excessive and prolonged delay the court should not hesitate to discharge the cross-undertaking even though it could not be shown to have occasioned any prejudice to the other party (*Barratt Manchester Ltd v. Bolton Metropolitan Borough Council* (1997) The Times, November 3, CA).

If in an inquiry as to damages the paying party defaults in complying with a direction of the Court, the party prosecuting the inquiry must either obtain a "four day order", enforceable by committal or sequestration (Part 50 rule 3 -5), or an order that unless the direction is complied with by a specified date the defaulting party will be debarred from adducing evidence on the inquiry (*Dowson & Mason Ltd v Potter* [1986] 1 W.L.R. 1419 at 1421E, F, 1425H.)

41.7 Distribution before entitlement ascertained.

Where some of the persons entitled to share in a fund are known but there is, or is likely to be, difficulty or delay in ascertaining other persons so entitled, the Court may direct or allow immediate payment of their shares to the known persons without reserving any part of those shares to meet the subsequent costs of ascertaining the other persons.

PART 42 – JUDGMENTS AND ORDERS

42.1 Scope of this Part.

(1) This Part contains rules about judgment and orders made by the court.

(2) This Part does not apply to the extent that any other rule makes a different provision in relation to the judgment or order in question.

Notes:

The terms "judgment" and "order" have to be defined in context. The proper definitions may be matters of considerable importance (see *Knight* v *Rochdale Healthcare NHS Trust* [2003] EWHC1831; [2003] 4 All E.R. 416, (QB) (Crane J), where the question was whether a consent order was a judgment within the meaning of the Limitation Act).

Judgments are not orders but reasons for orders. An order by reference to paragraphs of a judgment is undesirable (see *Richardson Roofing Company Ltd* v *The Coleman Partnership Ltd* [2009] EWCA Civ 839).

An order should reflect the judgment and may properly relate only to the formal disposal of an appeal or application; the reasons for an order are to be contained in the judgment, not in the order (see *D'Silva* v *University College Union* [2009] EWCA Civ 1269, CA).

42.2 Parties present when order made or notified of terms to be bound.

A party is bound by the terms of the judgment or order whether or not the judgment or order is served where that party –

(a) is present whether in person, by videoconference or by an attorney when the judgment is given or the order is made; or
(b) is notified of the terms of the judgment or order by telephone or email.

Notes:

A party is bound by the terms of the judgment or order whether or not the judgment or order is served where that party is present when the judgment is given or the order is made, or is notified of the terms of the judgment or order by telephone or email (see *Wakeem Guishard* a *The Attorney* v *General* (British Virgin Islands) at paragraph 39 of the judgment of Glasgow, M (BVIHCV 2016/0319)).

See also *Kern Cooke* v. *Police Constable Adrian Toussaint and The Attorney General* (Trinidad and Tobago) at paragraphs 27 and 28 of the judgment of Quinlan-Williams, J, where it was held that a party is bound by the terms of the order or judgment whether or not a defective order was later served because the party was present when the order was given or order was made. Service of the order is not mandatory.

42.7 Consent judgments and orders.

(1) This rule applies where –

(a) none of these Rules prevents the parties agreeing to vary the terms of any court order; and

(b) all relevant parties agree upon the terms in which judgment should be given or an order made.

(2) Except as provided by paragraphs (3) and (4), this rule applies to the following kinds of judgment or order

(a) a judgment for –
- (i) the payment of a debt or damages, including a judgment or order for damages or the value of goods to be assessed;
- (ii) the delivery up of goods with or without the option of paying the value for the goods to be assessed or the agreed value; or
- (iii) costs;

(b) an order for –
- (i) the dismissal of any proceeding, wholly or in part;
- (ii) the stay of proceedings on terms which are attached as a schedule to the order but which are not otherwise part of it (a "Tomlin order");
- (iii) the stay of enforcement of a judgment, either unconditionally or on condition that money due under the judgment is paid on a stated date or by installments specified in the order;
- (iv) the setting aside of a default judgment under Part 13;
- (v) the paying out of money which has been paid into court;
- (vi) the discharge from liability of any party;
- (vii) the payment, assessment or waiver of costs, or such other provision for costs as may be agreed; or
- (viii) any procedural order other than one falling within rule 26.7(3), 27.8(1) and (2).

(3) This rule does not apply –

(a) where any party is a litigant in person;

(b) where any party is a minor or patient;

(c) in Admiralty proceedings; or

(d) where the court's approval is required by these Rules or by any enactment before an agreed order can be made.

(4) This rule does not allow the making of a consent order by which any hearing date fixed by the court is to be adjourned.

(5) Where this rule applies the order must be –

(a) drawn in the terms agreed;

(b) expressed as being 'By Consent';

(c) signed by the attorney acting for each party to whom the order relates; and

(d) filed at the Registry for sealing.

Notes:

In order for a consent judgment to be effective all relevant parties should agree upon the terms in which the judgment should be given or an order made. A party cannot be compelled to enter into a consent order to settle a judgment debt. (See *TDC (Nevis) Limited* vs. *Percy Drew* (St. Kitts and Nevis) (NEVHCV 2006/0126) which cited Lord Denning M.R in McCallum v County Residences Ltd. [1965] I.W.L.R. 657. There it was held that for the making of a Tomlin order for settlement of a stated sum and costs, there was no jurisdiction to make it, but where an action had been compromised by a settlement on terms, the compromise gave rise to a new cause of action and terms could be enforced only by starting new proceedings. The claimant has to sue on the compromise. This is the only course of action the claimant has to enforce the settlement unless he can get an order of the court.)

Tomlin Orders
There are various ways in which a claim can be disposed of when a settlement is arrived at, such as by way of a Tomlin Order. The effect of a Tomlin order is that proceedings are stayed on agreed terms to be scheduled to the order (se e *Horizon Technologies international* v *Lucky Wealth Consultants* 1992 1 WLR 24PC).

42.8 Time when judgment or order takes effect.

A judgment or order takes effect from the day it is given or made unless the court specifies that it is to take effect on a different date.

Notes:

See *Wycliffe H. Baird* v *David Goldgar and Ors.* (St. Kitts and Nevis) (HCVAP 2008/005) at paragraph 5.

42.10 Correction of error in judgment or order.

(1) The Court may at any time, without an appeal, correct a clerical mistake in a judgment or
order, or an error arising in a judgment or order from any accidental slip or omission.

(2) A party applying for a correction must give notice to all other parties.

Notes:

The slip rule
The slip rule only applies to a clerical error or an accidental slip or omission in a judgment or order in order to do no more than correct typographical errors. The rule is limited to genuine slips and cannot be used to enable the Court to have second thoughts or add to its original order. A judge does have the power to recall their order before it is issued but not afterward; (see *Saint Christopher Club Ltd* v *Saint Christopher Club Condominiums* (St. Kitts and Nevis) [2008] ECSC J0115-2).

However, the Court has an inherent jurisdiction to vary its own orders to make the meaning and intention of the Court clear and can use the slip rule to amend an order to give effect to the intention of the Court (see *Bristol – Myers Squibb* v *Baker Norton Pharmaceuticals Inc.* [2001 EWCA] Civ 414).

If the errors complained of are substantive it would be more appropriate to challenge the order by way of an appeal rather than on an application to vary or amend the order under the slip rule (see *Travia Douglas* v *Shivoughn Warde et al*, considering the *Bristol-Myers* case; see also *The Trustee in the Bankruptcy of the Estate of Richard Paul Joseph Pelletier* v *Olga Pelletier et al* (St.Kitts and Nevis) KN 2021 HC 2). See *Scotiabank (Bahamas) Limited* v *Ricardo N. Gibson and Another* [2018] 2 BHS J. No.18 for considerations of the Court in deciding whether to exercise its discretion.

The Court also has the jurisdiction to hear and determine an application for reconsideration of its previous decision under the Re Barrell jurisdiction where there are strong reasons for doing so see *In Re Barrell Enterprises* [1973] 1 WLR 19 and the case of *Belgravia International Bank & Trust Company Limited Bretton Woods Corporation v Sigma Management Bahamas Ltd. And Frank R. Forbes* SCCiv App. No. 75 of 2021.

PART 43 – ENFORCEMENT OF JUDGMENTS OR ORDERS: GENERAL PROVISIONS

43.1 Scope of this Part and Interpretation

(1) This Part contains general rules about enforcement of judgments and orders.

(2) In this Part, in Parts 44, 45, 47, 48, 50, 51 and in Section II of Part 53 –

"judgment creditor" means a person who has obtained or is entitled to enforce a judgment or order;

"judgment debtor" means a person against whom a judgment or order was given or made;

"judgment order" includes an award which the Court has –

(i) registered for enforcement;
(ii) ordered to be enforced; or
(iii) given permission to enforce as if it were a judgment or order of the Court, and in relation to such an award;

"the court which made the judgment or order" means the Court which registered the award or made such an order;

"judgment or order for the payment of money" includes a judgment or order for the payment of costs, but does not include a judgment or order for the payment of money into court; and

"Provost Marshal" includes one of his Deputies.

Notes:

The Court does not automatically enforce its judgments nor even help determine how they should be enforced. It is up to the judgment creditor.

43.7 Judgments for sum in foreign currency.

(1) This rule has effect where the Court gives judgment for a sum expressed in a currency of a country other than that in use in The Bahamas.

(2) The judgment creditor must, when commencing enforcement proceedings in The Bahamas, file a certificate stating the current exchange rate in The Bahamas at the close of business on the previous business day for the purpose of the unit of foreign currency in which the judgment is expressed.

Notes:

The Court has power to give judgment for a sum of money expressed in a foreign currency (see *Miliangos v George Frank (Textiles) Ltd* [1976] A.C. 443; [1975] 3 All E.R. 801, HL).

43.10 Enforcement of awards, etc. made by outside body.

(1) This rule has effect –

(a) in relation to the enforcement of an award not made by the Court but which is enforceable by virtue of a statutory provision as if it were an order of the Court.

(b) in relation to the registration of such an award, so that it may be enforceable as if it were an order of the Court.

(2) In this rule –

"award" means the award, order or decision which it is sought to enforce; and

"outside body" means any authority other than the Court.

(3) The general rule is that an application –

(a) for permission to enforce an award; or

(b) to register an award,

is to be made on notice supported by evidence on affidavit.

(4) The applicant must –

(a) exhibit or annex to the affidavit the award or a copy of it.

(b) where the award is for the payment of money, certify the amount remaining due to the applicant; and

(c) give an address for service on the person against whom the applicant seeks to enforce the award.

Notes:

This rule deals with the enforcement of awards made by an authority other than the Court and the words have been held to be wide enough to encompass a foreign arbitral award being made by a body other than that Court. However, for the rule to apply the award must be enforceable by virtue of a statutory provision; see *Dantzler Inc. v Galloway Hardware & Building Materials Ltd* (Montserrat) (MNHCV 24 OF 2014).

43.11 Methods of Enforcing Judgments or Orders

(1) A judgment creditor may enforce a judgment or order for the payment of money by any of the following methods –

(a) a writ of fieri facias or warrant of execution under Part 48;

(b) a third party debt order under Part 45;

(c) in relation to securities, a charging order, stop order or stop notice under Part 47;

(d) in relation to land, by a fixed date claim to enforce the equitable charge created by section 63 of the Act under (Part 50);

(e) the appointment of a receiver under Part 53;

(f) a writ of sequestration under Part 50.

(2) A judgment creditor may, except where an enactment or rule provides otherwise –

(a) use any method of enforcement which is available; and

(b) use more than one method of enforcement, either at the same time or one after another.

(3) If a judgment creditor is claiming interest on a judgment debt, he must include in his application or request to issue enforcement proceedings in relation to that judgment details of –

(a) the amount of interest claimed and the sum on which it is claimed

(b) the dates from and to which interest has accrued; and

(c) the rate of interest which has been applied and, where more than one rate of interest has been applied, the relevant dates and rates.

Notes:

Writ of fi. Fa.

The writ of *fi. fa.* is the mode for the enforcement of a money judgment by the seizure and sale of the debtor's goods and chattels sufficient to satisfy the judgment debt and costs of the execution (see *Cavalier Construction Co* v *Antares Properties Ltd*. [1984] BHS J. No. 84)

The writ of *fi. fa.* may issue to enforce a judgment or order for the payment to, or for the recovery by, any person, of money or costs. A writ of fi. fa. may issue immediately upon payment becoming due and as a matter of course without leave and without necessity for prior notice to, or for prior service of the judgment or order upon the debtor (see *Land Credit Company of Ireland* v Fermoy (1870)L L.R. 5 Ch 323; *Hopton* v Robertson (1884) W.N. 77; *Re A Solicitor* (1884) 33 W.R. 131). Accordingly, a judgment in the ordinary form of requiring the defendant to pay money to a person, is enforceable by writ of fi. fa., immediately it is entered, even though no time is specified for the payment to be made and even though no notice of the judgment, still less the judgment itself, has been served on the debtor. Where the judgment or order directs payment within a specified time, the writ will issue immediately after, but not before, such time has expired. Where the judgment or order directs payment within a certain time after service on the debtor, the writ will issue immediately after, but not before due service has been effected, or if the order is conditional, the writ will issue immediately after, but not before, there has been default in complying with the condition.

Where the judgment or order is for the payment (or recovery) of money and costs to be taxed, separate writs of *fi.fa.* may issue to enforce payment of the judgment debt and the costs after they have been taxed.

It is wrongful to issue a writ of *fi.fa.* after payment, and therefore a person who issues execution after payment (*Clissold* v *Cratchley* [1910] 2 K.B. 244) or after a valid tender (*Cubitt* v *Gamble* (1919) 35. T.L.R. 233) is liable to trespass. Ignorance of the payment is no defence. Similarly, it is wrongful to issue a writ of *fi.fa.* for a sum greater than the amount actually due at the time of its issue.

Third Party Debt Order

Third party debt orders replaced the familiar method of enforcement known as "garnishee proceedings". If a judgment debtor is owed money by a third party the judgment creditor can obtain an order that the third party should pay the judgment creditor. The order is obtained without notice on an interim basis. A hearing follows when the court decides whether or not to make a final third party debt order.

There must be money "due" to the judgment debtor. Where the debt is not due there is nothing to be attached (see *Webb* v *Stenton* (1882-83) L.R. 1102).

The Court will exercise its judicial discretion in deciding whether to grant such an order and the order will be refused where it would be inequitable, for example, where the third party would still be liable in a foreign court(see *Martin* v *Nadel* [1906] 2 K.B. 26 CA).

Charging Order, Stop Order or Stop Notice

The nature of property which may be charged includes, in addition to land, securities, funds in court, beneficial interests under a trust and, in certain circumstances, property held in trust. The Court will exercise its judicial discretion in deciding whether to grant such an order. The order is likely to be refused if it would be oppressive for example if the debt appears too small to justify the remedy.

A charging order on property or assets of the debtor is one of the modes of enforcement of an order for the payment of money to the creditor (see *Acadien Limited* v *Rolle (t/a Rolle, Newton & Co.)* [2016] 2 BHS J. No. 164). It is however, not a direct mode of enforcement in the sense that the creditor can immediately proceed to recover the fruits of his judgment, but is rather an indirect mode of enforcement in the sense that it provides the creditor with security, in whole or in part over the property of the debtor. It makes the creditor a secured creditor, who having obtained his charging order must proceed, as may be necessary according to the nature of the property charged, to enforce his charge in order to obtain the actual proceeds of his charge to satisfy his judgment, in whole or in part.

"The judgment creditor cannot by his charging order get any more than the debtor could honestly give him" (per Bramwell B., *Gill* v *Continental Gas Co.* (1872) L.R. 7 Ext. 332, 338) by an instrument of charge made by him (see *Re Onslow's Trusts* (1875) L.R. 20 Eq. 677). The beneficial interest of the debtor only is affected (see *Gray* v *Stone* (1893) 69 L.T. 282; *Hawks* v *McArthur* [1951] 1 All E.R. 22)

A *stop order* has the effect of preventing dealings in the various securities over which a charging order may be obtained until further order. Its purpose is to give the applicant an opportunity to make whatever further application he considers appropriate to secure his judgment.

A stop notice prevents dealing in the securities, without first giving notice to the person (usually a judgment creditor) who has served the stop notice. This gives that person the opportunity to apply to court for whatever order he considers appropriate to protect his interests.

Appointment of a Receiver

The power to appoint a receiver is discretionary and accordingly, the Court will do so whenever it appears to it to be just and convenient to do so. The Court will have regard to the amount claimed by the judgment

creditor, the amount likely to be obtained by the receiver and the probable costs of his appointment and may direct an inquiry on any of these matters or any other matter before making the appointment.

The appointment of a receiver by way of equitable execution is designed to enable a judgment creditor to obtain payment of his debt when legal execution is not available because of the nature of the judgment debtor's interest in the property. Other assets which may be the subject of equitable execution include rents and debts due at the date of appointment as well as future debts (which cannot be the subject of a third party debt order) (see *Soinco* v *Novokuznetsk Aliminium* [1998] QB 406).

Writ of Sequestration

This is the most drastic method of enforcing a judgment or order, and therefore the writ of sequestration shall not issue except with the leave of the Court. Such leave must be obtained by motion to a Judge. Sequestration is a process of contempt (*Pratt* v *Inman* (1890) 43 Ch. D. 175), and upon an application for sequestration, the question for the Court is whether a contempt has been committed. The court has no jurisdiction otherwise to declare rights of the parties *inter se* as regards any of the facts alleged in support of the application (see *Meters Ltd.* v *Metropolitan Gas Meters Ltd.* (1907) 51 S.J. 499). It is not necessary for the party to show that there is property which can be seized under a sequestration (*Hulbert* v *Cathcart* [1896] A.C. 470).

43.13 Forms of Writs.

(1) a writ of fieri facias must be in Form EX1.

(2) A writ of delivery must be in Form EX2.

(3) A writ of possession must be in Form EX3.

(4) A writ of sequestration must be in Form EX4.

Notes:

These forms must be used where applicable and appropriate in the particular case, but of course with such variations as the circumstances of the particular case require. The form must be followed, having regard to the directions contained in the judgment or order itself (see *Boswell* v *Coaks* (1887) 36 W.R. 65).

43.12 Matters occurring after judgment: stay of execution etc.

Without prejudice to rule 48.1, a party against whom a judgment has been given or an order made may apply to the Court for a stay of execution of the judgment or order or other relief on the ground of matters which have occurred since the date of the judgment or order, and the Court may by order grant such relief, and on such terms, as it thinks just.

Notes:

Traditionally there have been two principles which must be borne in mind at all times when considering a stay of execution. The primary one is that a successful litigant should not be deprived of the fruits of his judgment and second, that the Court ought to see that a party exercising his right to appeal does not have his appeal, if successful, rendered nugatory. The Court has the jurisdiction to stay the execution of a judgment or order based on matters occurring after judgment. See *Turtle Creek Investments Ltd* v *Daybreak Holdings Ltd* (SCCivApp No. 234 of 2018) at paragraph 10.

Cases:

Ei Du Point de Nemours v Enka BV (No 2) [1988] RPC 497

City Services Limited v. Aes Ocean Cay Limited [2012] 1 BHS J. No. 85

Bettas Limited v Hongkong and Shanghai Banking Corporation Limited et al [2023] 1 BHS J. No. 61

The Committee to Restore Nymox Shareholder Value, Inc (CRNSV) and others v Paul Averback and others (3 November 2023) – The grant of a stay of execution is discretionary. The Court will take into consideration all the circumstances of the case but the essential question is whether there is a risk of injustice to one or other or both parties of the Court grants or refuses a stay. There must be good reasons for granting a stay and departing from the starting principle that the successful party should not be deprived of the fruits of the judgment in his favour. The proper approach is to make the order which best accords with the interests of justice. Where there is a risk of harm to one party or another, whichever order is made, the Court has to balance the alternatives to decide which is less likely to cause injustice. The normal rule is for no stay, but where the justice of that approach is in doubt, the answer may well depend on the perceived strength of the challenge to the judgment. On the facts, where a stay of execution on an injunction was sought on the basis that the injunction was impossible to comply with and the applicant intended to file an application to set aside the injunction, a stay was appropriate, as the injunction was made in the absence of the applicant and the applicant intended to apply to set aside the injunction; there were several disputed matters that warranted ventilation before execution; and there could have been irreversible consequences for the applicant if the injunction was not stayed.

PART 44 – ORDERS TO OBTAIN INFORMATION FROM JUDGMENT DEBTORS

Editorial Introduction

Part 44 replace RSC Ord 48 and deals with the procedure usually referred to as "examination of judgment debtor" or "oral examination".

It is for the judgment creditor, not the court, to enforce the judgment. Enforcement can be expensive and abortive enforcement amounts to throwing good money after bad. Part 44 enables the judgment creditor to obtain information from the judgment debtor for the purpose of being able to better decide which method or methods of enforcement to use (sequentially or to simultaneously, see rule 43.11(2)). There must, of course, be a judgment: this procedure is not available pre-action. Note the requirements of service in rule 44.4 and to pay travelling expenses if requested in rule 44.5. Where the judgment debtor fails to comply with the order, rule 44.10 simplifies and clarifies the procedure.

Forms

- **EX6** Notice requiring judgment debtor to complete and serve Form EX7
- **EX7** Judgment Debtor's Financial Statement
- **EX8** Application for order that judgment debtor attend court for examination
- **EX9** Order to attend court for questioning
- **EX10** Warrant for the arrest of judgment debtor who fails to attend examination

44.1 Scope of this Part

This part contains rules which provide for a judgment debtor to be required to attend court to provide information, for the purpose of enabling a judgment creditor to enforce a judgment or order against him.

Notes:

The purpose of Part 44 is set out in r.44.1 and explained above at 44.0.1. The Part is not confined to money judgments. For example, a judgment debtor who has not complied with an order for the return of specific goods can be questioned pursuant to this Part.

See the Antiguan and Barbudan case of *Osbourne v Galloway* - AG 2002 HC 22 where Mitchell J at paragraph 6 discussed the "useful innovations" of this Part.

44.2 Notice to judgment debtor to complete financial statement

(1) A judgment creditor may serve on the judgment debtor a notice in Form EX6 with two copies of Form EX7

(2) A notice in Form EX6 requires the judgment debtor to complete and serve on the judgment creditor a statement in Form EX7 of the judgment debtor's –

(a) receipts and payments for the preceding twelve months; and

(b) assets and liabilities; and

(c) income and expenditure; and

(d) means of satisfying the judgment.

(3) The judgment debtor must serve the statement in Form EX7 on the judgment creditor within fourteen days after the date on which the notice in EX6 is served on him.

Notes:

See the Trinidadian case of *Rattan v Ramnath et al* TT 2012 HC 67, where Mohammed, M ordered that the statement as outlined in r. 44.2(3) be produced within 14 days.

44.3 Order to attend court

(1) Whether or not a notice has been served under 44.2 above, a judgment creditor may apply for an order requiring –

(a) a judgment debtor; or

(b) if a judgment debtor is a company or other corporation or legal entity, an office of that body,

To attend court, either in person or by videoconference, to provide information about,

(i) the judgment debtor's receipts and payments for the preceding twenty-four months, assets and liabilities, income and expenditure; and

(ii) any other matter about which information is needed to enforce a judgment or order.

(2) An application under paragraph (1) may be made without notice.

(3) An application with notice must be in the Form EX8.

(4) An application under paragraph (1) may be dealt with by a Registrar without a hearing.

(5) If the application is made without notice (notice complies with paragraph (2)), an order to attend court will be issued in the terms of paragraph (6).

(6) The judgment debtor or officer served with an order issued under this rule must –

(a) attend court, either in person or by videoconference as provided in the order, at the time and place specified in the order;

(b) when he does so, produce at court documents in his control which are described in the order; and

(c) answer on oath or affirmation such questions as the court and judgment creditor may require.

(7) An order under this rule must be in Form EX9 and will contain notice in the following terms –

"You must obey this order. If you do not, you may be arrested and then sent to prison for contempt of court."

Notes:

Application Notice:

An application by a judgment creditor under rule 44.2(1) must be made by filing an application notice in Form EX8. The application notice must –

(1) State the name and address of the judgment debtor;

(2) Identify the judgment or order which the judgment creditor is seeking to enforce;

(3) If the application is to enforce a judgment or order for the payment of money, state the amount presently owed by the judgment debtor under the judgment or order;

(4) If the judgment debtor is a company or other corporation state –

a. The name and address of the officer of that body whom the judgment creditor wishes to be ordered to attend court; and

b. His position in the company;

(5) If the judgment creditor wishes the questioning to be conducted before a judge instead of a Registrar, state this and give his reasons;

(6) If the judgement creditor wishes the judgment debtor (or other person to be questioned) to be ordered to produce specific documents at court, identify those documents; and

(7) If the application is to enforce a judgment or order which is not for the payment of money, identify the matters about which the judgment creditor wishes the judgment debtor (or officer of the judgment debtor) to be questioned.

(8) The court officer considering the application notice –

a. May, in an appropriate case, refer it to a judge; and

b. Will refer it to a judge for consideration, if the judgment creditor requests the judgment debtor (or officer of the judgment debtor) be questioned before a judge rather than a Registrar.

Penal Notice

Note the requirement of r.44.3(7) as to the endorsement of words usually referred to as a "penal notice". This is important if the order needs to be enforced.

An application may be dealt with by Registrar

In *Antoni and another v Antoni and others* [2008] 1 BHS J. No. 14, Evans J held that these types of applications are "*good example[s] of the two (2) functions which the registrar performs: the judicial, in issuing the said Order, and the administrative, in conducting the examination*".

See the Grenadian case of *Edwards v Bhola et al* – GD 2013 CA 3 where Mitchell J.A. states at paragraph 10 that "The debtor is examined orally and on oath before the master, usually by the attorney for the creditor. The master, or a clerk under the direction of the master, writes down the testimony of the debtor about his or her assets and proposed means for satisfying the judgment debt."

The order will provide for questioning to take place before a judge (rather than before a Registrar) only if the judge considering the request decides that there are compelling reasons to make such an order.

"answer on oath such questions as the court may require"

The purpose of Part 44 is clear from its title and rule 44.1. A judgment debtor who does not answer questions is in contempt of court (see further 44.10). A former procedure of oral examination was held to be "*not only intended to be an examination, but a cross-*

examination and that of the severest kind" (*Republic of Costa Rica v Stronsberg* (1880) 16 Ch.D. 8) and this remains so under the modern procedure.

Overseas assets

When a judgment debtor is being examined regarding any debtors owing to them and their assets they are required to answer questions relating to assets outside the jurisdiction (*Interpool ltd v Galani* [1998] W. B. 738]

Foreign companies

In *Masri v Consolidated Contractors International (No. 4)* [2009] UKHL 43; [2009] 3 W.L.R. 385 the House of Lords held that the UK equivalent of r.44.3(1)(b) did not apply to enable an officer of a company domiciled in Greece to be questioned. The principle of extraterritoriality still applied.

"will be issued"

R. 44.3(5) states that if the "*If the application notice complies with paragraph (2), an order to attend court* ***will be issued*** *in the terms of paragraph (6)"*. This rule places no restriction on repeat examinations no doubt relying on the courts case management and costs powers to prevent abuse.

However, despite the mandatory wording of the rule, the Registrar always has power to refer cases of doubt to the judge and the judge can refuse to issue (or require a hearing) where the application is misconceived eg. Because time for payment has not yet expired (see *White Son & Pill v Stennings* [1911] 2 K.B. 418).

An order made under r.44.3 is an order anterior to the enforcement process. A party who has obtained judgment is a "judgment creditor" within the meaning of the rule and may obtain an order in circumstances where enforcement of the judgment has been stayed (e.g. to give the judgment debtor the opportunity to apply for permission to appeal) (*Sucden Financial Ltd. v Fluxo-Cane Overseas Ltd* [2009] EWHC 3555 (QB), December 4, 2009, unrep. (Teare J.))

44.4 Service of order

An order to attend court must, unless the Court otherwise orders, be served personally on the judgment debtor or officer ordered to attend court not less than fourteen days before the hearing.

"Must…be served personally"

Service of an order to attend court for questioning may be carried out by the judgment creditor or someone acting on the judgment creditor's behalf.

"Unless the Court otherwise orders"

Service by an alternative method is dealt with in Part 6. Usually there will have to be an attempt at personal service first.

44.5 Travelling expenses

(1) A judgment debtor or officer resident in another island of The Bahamas who is ordered to attend court in person in New Providence or Grand Bahama may, within seven days of being served with the order, ask the judgment creditor to pay him a sum not exceeding a sum reasonably sufficient to cover his travelling expenses to and from court and in any event an amount not exceeding three hundred dollars.

(2) The judgment creditor, if requested to pay a sum mentioned in paragraph (1), must pay the same in sufficient time for the judgment debtor to be able to attend the examination in person.

44.6 Judgment creditor's affidavit

(1) The judgment creditor must file an affidavit or affidavits –

(a) by the person who served the order giving details of how and when it was served;

(b) stating either that –

(i) in the event that the person is ordered to attend court in person, he has not requested payment of his travelling expenses; or

(ii) the judgment creditor has paid a sum in accordance with such a request; and

(c) stating how much of the judgment debt remains unpaid.

(2) The judgment creditor must either –

(a) file the affidavit or affidavits not less than two days before the hearing; or

(b) produce it or them at the hearing.

Notes:

Proof of service

Proof that the judgment debtor has been served is essential. This is no mere formality as a debtor who fails to attend can be committed to prison for contempt of court; see r.44.10. Thus formal proof of service is essential and an affidavit of service is required.

44.7 Conduct of the hearing.

(1) The judgment debtor or officer served —

(a) must appear either in person or by videoconference as directed by

the order;

(b) may be represented by an attorney, who may examine the judgment debtor or officer and be heard on the matter of the judgment debtor's means;

(c) may be cross examined by the judgment creditor or his attorney;

(d) may be examined by a Registrar or a Judge.

(2) The information given by the person must be given on oath or affirmation,

taken down and read to the judgment debtor or officer who shall be given

an opportunity to correct any information incorrectly recorded.

Notes:

Questioning

All questioning is carried out by a court officer initially. Only if there is difficulty which requires the greater authority of a judge will the examination be heard by a judge. The judgment creditor may attend before the court officer but must attend and conduct the questioning if the hearing is before a judge.

An examination under this rule "is not only intended to be an examination, but to be a cross-examination and that of the severest kind," and is not confined to answering the

simple question "what debts are owing," but the debtor must answer all questions "fairly pertinent and properly asked" with a view of ascertaining what debts are owing to him, and from whom they are due and must give "all necessary particulars to enable the creditor to recover under a garnishee order." (*Republic of Costa Rica v Strousberg* (1880) 16 Ch.D.8, see judgments of James L.J. and Jessel M.R. at 12).

Where an examination of the judgment debtor has been held pursuant to an order under r.44.3, a further examination may be ordered in special circumstances. See *Sturges v Countess of Warwick* (1914), 30 T.L.R. 112.

44.8 Adjournment of hearing.

If the hearing is adjourned, the Registrar or Judge must give directions about the manner in which notice of the new hearing is to be served on the judgment debtor or officer, if necessary.

Notes:

Adjournment

If the hearing is adjourned e.g. for the debtor to produce documents – the better practice is for the debtor to be given the date and time of the new hearing before leaving court. Additionally or alternatively, the debtor should be asked to agree to postal service of notice of the new date the expense of further personal service should be avoided if possible.

44.9 Orders by court.

(1) After an examination is completed, the Registrar or Judge who conducted the hearing may, after giving all parties or persons an opportunity to be heard, do any one or more of the following-

(a) direct that enforcement proceedings be commenced or continued,

direct any steps to be taken in those proceedings, and issue any summons or make any order for the purpose of those proceedings;

(b) make an order that the money owing under the judgment be paid by instalments payable at times fixed by the court;

(c) stay any proceeding for the enforcement of the judgment;

(d) make an order varying any order relating to the enforcement of the

judgment.

(2) The Registrar or Judge may do any one or more of the things referred to in

paragraph (1), even though —

(a) no application was made for the particular direction, order, or stay; or

(b) that application was made for a different direction, order, or stay.

44.10 Failure to comply with order for examination.

(1) A Judge may issue a warrant, to be made in Form EX10, for the arrest of the judgment debtor or officer who fails to attend the examination.

(2) A warrant for arrest under paragraph (1) must not be made unless the judgment creditor has filed the affidavit(s) required by rule 44.6.

(3) If a warrant for arrest is made, the Judge must direct that the warrant is suspended provided the judgment debtor or officer attends the court in person for examination at a time and place specified in the order.

(4) If a judgment debtor or officer who has been served with an arrest order fails to attend in person the examination or fails to comply with any other term on which the arrest order was suspended, the Registrar or Judge may issue a certificate to that effect.

(5) Upon the Registrar or Judge certifying under (4) above that the judgment debtor or officer named is in breach of the warrant of arrest, the judgment debtor or officer shall be arrested and brought before a Judge so that the Judge may consider whether to commit the judgment debtor or officer named to prison.

Notes:

Suspended committal order

The most common type of non-compliance in r.44.10 and r.44.12 is the debtor's failure to attend court to be examined. The examination itself would have been before a court officer or Judge. That person certifies the debtor's failure to attend. The Judge in reliance on that certificate then makes an arrest order r.44.10(1) but suspends it provided that the debtor attends on a subsequent occasion. If the debtor immediately does so, the examination then takes place, and the suspended committal order is thereupon discharged.

If the debtor fails to attend pursuant to the suspended arrest order, the judgment debtor shall be arrested and brought before the court pursuant to r.44.10(5). The judge's task is to consider whether the arrest order should be discharged (e.g. because of irregularity).

In practice the order is invariably discharged because the debtor agrees to be examined there and then thus completing the purpose of Part 44.

While it is rare, if for any reason the judge decides not to discharge the arrest order (e.g. because the debtor refuses to answer questions) then a warrant of committal is issued immediately and thereupon the debtor is conveyed to prison to serve the sentence.

In *Deutsche Bank AG v Sebastian Holdings Ltd* [2016] EWHC 3222 (Comm), 16 December 2016, unrep. (Teare J) a judge rejected the submission that, where committal is sought in respect of alleged breaches of an order made under Part 71 [similar to Part 44], the court's powers are limited to the making of a suspended committal order in accordance with the provisions of r.71.8 [similar to r.44.10]. The judge noted that the power to commit to prison for contempt is a common law power and is not conferred by any provision in the CPR and concluded (1) that that power applies as much to the enforcement of a judgment as it does to enforcement of a procedural order, and (2) that the procedural rules in Part 81 and in Part 71 provide for the procedure to be followed when that common law power or jurisdiction is exercised.

Should a committal order be made

In order to be efficacious the procedure under Part 44 is necessarily robust. Even so, in *Islamic Investment Company of the Gulf (Bahamas) Ltd. v Symphony Gems* [2008] EWCA Civ 389, to make a committal order, even a suspended committal order, is a serious matter which requires a cautious approach and proof that the debtor's failure to attend is deliberate. In that case there was some suggestion that the alleged contemnor was in India and was subject to an order of the Indian court prohibiting him from being out of India on the date of the hearing in England that he failed to attend. Accordingly the evidence did not show to the criminal standard of proof that he had been contumacious with the court so a suspended committal order ought not to have been made. *Broomleigh Housing Association Ltd. v Okonkwo* [2010] EWCA Civ 1113 provides guidance at para. 22 to assist judges asked to make a suspended committal order. The judge has at least three options:

(a) if satisfied not only that the debtor was served with the order to attend but also that there is sufficient evidence to justify a finding to the criminal standard that the debtor's failure to attend (or refusal to take the oath and answer questions) was intentional and that in all the circumstances it is appropriate to do so, he may proceed to make a suspended committal order. This will not infringe the debtor's art.6 rights as he will have the opportunity to challenge the order before it is enforced. If he does make the order the judge must provide written reasons, at any rate briefly, for recital in the N79A for service on the debtor;

(b) if not satisfied of the matters necessary for the making of a suspended committal order the judge can adjourn consideration of it and proceed either (i) to give

directions, supported by a penal notice, for a hearing in court including directions for the debtor (and perhaps also for the creditor) to attend or (ii) to give directions, again supported by a penal notice for the debtor (and perhaps also for the creditor) to depose to specified matters and to file and serve the affidavit or affirmation by a specified date;

(c) the judge can decide there and then not to make a committal order and to proceed in a different way probably by making a further order under r.71.2 for the debtor's attendance at court to provide information (before a court officer unless there are compelling reasons for the hearing to be before a judge). The further order will contain a penal notice but the judge may favour including a recital which, in light of the background, stresses the possible consequences of further non-attendance even more clearly to the debtor.

Rule 44.4 (service of order) and r.44.6(1)(a) and (2) (affidavit of service) apply with the necessary changes to an arrest order as they do to an order to attend court.

44.11 Discharge of arrest order.

(1) When an judgment debtor or person named is brought before a Judge, the

Judge must discharge the arrest order unless the Judge is satisfied beyond reasonable doubt that—

(a) the judgment debtor or officer has failed to comply with —

(i) the original order to attend court; and

(ii) the terms on which the warrant of arrest was suspended; and

(b) both orders have been served on the judgment debtor or officer.

(2) If the judge does not discharge the warrant of arrest, the judge may fine

the judgment debtor or officer a sum not exceeding five thousand dollars or commit the judgment debtor or officer to prison for a term of imprisonment of not more than one month.

Notes:

If the judge decides that the warrant for arrest should not be discharged, a warrant of committal shall be issued immediately.

44.12 Refusal by judgment debtor or officer to be sworn, etc.

If at any hearing under this Part, a judgment debtor or officer refuses —

(a) to be sworn or to affirm;

(b) to answer one or more of the questions put to him;

(c) refuses to produce or permit to be inspected any document or property after being ordered to do so by the Registrar or Judge,

the Judge may commit the judgment debtor or officer to prison for a term of imprisonment not exceeding one month.

Notes:

See 44.10 Notes.

PART 45 – THIRD PARTY DEBT ORDERS

45.1 Scope of this Part and interpretation.

(1) This Part contains rules which provide for a judgment creditor to obtain an order for the payment to him of money which a third party who is within the jurisdiction owes to the judgment debtor.

(2) In this Part, "bank or credit union" includes any person carrying on a business in the course of which he lawfully accepts deposits in The Bahamas.

45.2 Third party debt order.

(1) Upon the application of a judgment creditor, the court may make an order (a "final third party debt order") in Form EX13 requiring a third party to pay to the judgment creditor —

(a) the amount of any debt due or accruing due to the judgment debtor from the third party; or

(b) so much of that debt as is sufficient to satisfy the judgment debt and the judgment creditor's costs of the application.

(2) The court will not make an order under paragraph (1) without first making an "interim third party debt order" pursuant to rule 45.4(2).

45.3 Application for third party debt order.

An application for a third party debt order must be in Form EX11 and may be made without notice.

45.4 Interim third party debt order.

(1) An application for a third party debt order will initially be dealt with by a judge without a hearing.

(2) The judge may make an interim third party debt order in Form EX12 —

(a) fixing a hearing date to consider whether to make a final third party debt order; and

(b) directing that until that hearing the third party must not make any payment which reduces the amount he owes the judgment debtor to less than the amount specified in the order.

(3) An interim third party debt order will specify the amount of money which the third party must retain, which will be the total of —

(a) the amount of money remaining due to the judgment creditor under the judgment or order; and

(b) an amount for the judgment creditor's fixed costs of the application, as specified in the relevant practice direction.

(4) An interim third party debt order becomes binding on a third party when it is served on him.

(5) The date of the hearing to consider the application shall be not less than twenty-eight days after the interim third party debt order is made.

45.5 Service of interim order.

(1) Copies of an interim third party debt order, the application notice and any documents filed in support of it must be served —

(a) on the third party, not less than twenty-one days before the date fixed for the hearing; and
(b) on the judgment debtor not less than —
(i) seven days after a copy has been served on the third party; and
(ii) seven days before the date fixed for the hearing.
(2) If the judgment creditor serves the order, he must either —
(a) file a certificate of service not less than two days before the hearing; or
(b) produce a certificate of service at the hearing.

45.6 Obligation of third parties served with interim order.
(1) A bank or credit union served with an interim third party debt order must carry out a search to identify all accounts held with it by the judgment debtor.
(2) The bank or credit union must disclose to the court and the creditor within seven days of being served with the order, in respect of each account held by the judgment debtor —
(a) the number of the account;
(b) whether the account is in credit; and
(c) if the account is in credit —
(i) whether the balance of the account is sufficient to cover the amount specified in the order;
(ii) the amount of the balance at the date it was served with the order, if it is less than the amount specified in the order; and
(iii) whether the bank or credit union asserts any right to the money in the account, whether pursuant to a right of set-off or otherwise, and if so giving details of the grounds for that assertion.
(3) If —
(a) the judgment debtor does not hold an account with the bank or credit union; or
(b) the bank or credit union is unable to comply with the order for any other reason, for example, because it has more than one account holder whose details match the information contained in the order, and cannot identify which account the order applies to, the bank or credit union must inform the court and the judgment creditor of that fact within seven days of being served with the order.
(4) Any third party other than a bank or credit union served with an interim third party debt order must notify the court and the judgment creditor in writing within seven days of being served with the order, if he claims —
(a) not to owe any money to the judgment debtor; or
(b) to owe less than the amount specified in the order.

45.7 Arrangements for debtors in hardship.
(1) If —
(a) a judgment debtor is an individual;
(b) he is prevented from withdrawing money from his account with a bank or credit union as a result of an interim third party debt order; and
(c) he or his family is suffering hardship in meeting ordinary living expenses as a result, the court may, on an application by the judgment debtor, make an order permitting the bank or credit union to make a payment or payments out of the account ("a hardship payment order").

(2) An application notice seeking a hardship payment order must —

(a) include detailed evidence explaining why the judgment debtor needs a payment of the amount requested; and

(b) be verified by a statement of truth.

(3) Unless the court orders otherwise, the application notice —

(a) must be served on the judgment creditor at least two days before the hearing; but

(b) does not need to be served on the third party.

(4) A hardship payment order may —

(a) permit the third party to make one or more payments out of the account; and

(b) specify to whom the payments may be made.

45.8 Further consideration of the application.

(1) If the judgment debtor or the third party objects to the court making a final third party debt order, he must file and serve written evidence stating the grounds for his objections.
(2) If the judgment debtor or the third party knows or believes that a person other than the judgment debtor has any claim to the money specified in the interim order, he must file and serve written evidence stating his knowledge of that matter.
(3) If —

(a) the third party has given notice under rule 45.6 that he does not owe any money to the judgment debtor, or that the amount which he owes is less than the amount specified in the interim order; and

(b) the judgment creditor wishes to dispute this, the judgment creditor must file and serve written evidence setting out the grounds on which he disputes the third party's case.

(4) Written evidence under paragraphs (1), (2) or (3) must be filed and served on each other party as soon as possible, and in any event not less than three days before the hearing.
(5) If the court is notified that some person other than the judgment debtor may have a claim to the money specified in the interim order, it will serve on that person notice of the application and the hearing.
(6) At the hearing the court may —

(a) make a final third party debt order;

(b) discharge the interim third party debt order and dismiss the application;

(c) decide any issues in dispute between the parties, or between any of the parties and any other person who has a claim to the money specified in the interim order; or

(d) direct a trial of any such issues, and if necessary give directions.

45.9 Effect of final third party order.

(1) A final third party debt order shall be enforceable as an order to pay money.
(2) If —

(a) the third party pays money to the judgment creditor in compliance with a third party debt order; or

(b) the order is enforced against him, the third party shall, to the extent of the amount paid by him or realised by enforcement against him, be discharged from his debt to the judgment debtor.

(3) Paragraph (2) applies even if the third party debt order, or the original judgment or order against the judgment debtor, is later set aside.

45.10 Money in court.

(1) If money is standing to the credit of the judgment debtor in court —

(a) the judgment creditor may not apply for a third party debt order in respect of that money; but

(b) he may apply for an order that the money in court, or so much of it as is sufficient to satisfy the judgment or order and the costs of the application, be paid to him.

(2) An application notice seeking an order under this rule must be served on —

(a) the judgment debtor; and

(b) the Registrar.

(3) If an application notice has been issued under this rule, the money in court must not be paid out until the application has been disposed of.

45.11 Costs.

If the judgment creditor is awarded costs on an application for an order under rule 45.2 or 45.10 —

(a) he shall, unless the court otherwise directs, retain those costs out of the money recovered by him under the order; and

(b) the costs shall be deemed to be paid first out of the money he recovers, in priority to the judgment debt.

45.12 Judgment creditor resident outside scheduled territories.

(1) The Court shall not make an order under this part requiring the third party to pay any sum to or for the credit of any judgment creditor resident outside the scheduled territories unless that creditor produces a certificate that the Central Bank of The Bahamas has given permission under the Exchange Control Regulations Act (Ch. 360), for the payment unconditionally or on conditions which have been complied with.

(2) If it appears to the Court that payment by the third party to the judgment creditor will contravene any provision of the said Act, it may order the third party to pay into court the amount due to the judgment creditor and the costs of the proceedings under this Part after deduction of his own costs, if the Court so orders.

Notes:

Third Party Debt Orders invokes the process akin to Garnishee Proceedings When a judgment debtor is owed money from a third party Part 45 permits the judgment creditor to obtain a final third party debt order (previously the garnishee order absolute). Proceedings may be instituted where a person, referred to as “the judgment creditor”, has obtained a judgment or order for payment of money by some other person, referred to as “the judgment debtor”, not being a judgment or order for the payment of money into court. A final third party debt order has the effect of transforming the third party’s obligation to

pay money to the judgment debtor into an obligation to pay that money to the judgment creditor. **(Part 45.10).**

What debts are attachable? The debt must be unconditional, owing or accruing to the judgment debtor in his own right beneficially. So long as there is a debt in existence it is not necessary that it should be immediately payable. E.g. Where an existing debt is payable by future installments, the third party debt order may be made to become operative as and when each installment becomes due. The fact that the amount of the debt due or accruing due is not ascertained does not prevent an interim third party debt order being made. See notes under 49/1 of White Book for examples of enforceable debts. Wages are not attachable.

Procedure -two stage process to obtain final third party debt order The process of attaching debts due or accruing due to the judgment debtor operates in two stages which are quite separate and distinct. The **first stage** is the obtaining by the judgment creditor of **an interim third party debt order *Part 45.4)**, that is, in the first instance, an order directed to the third party to show cause why the debt claimed to be due or accruing from him to the judgment debtor should not be attached to answer the judgment debt and costs of the proceedings. The interim third party debt order is made in terms of Form EX12 and specifies the time and place for further consideration of the matter, and in the meantime attaches the debt claimed to be due or accruing due from the third party to the judgment debtor, or so much of it as may be specified in the order. The **second stage** in the proceedings is the further consideration of the matter when, in an appropriate case, a **final third party debt order** will be made against the third party ordering him to pay the attached debt to answer the judgment debt and costs of the proceedings.

Application is made to the court without notice in the Form of EX11 and should be supported by evidence. In Bahamas rules do not set out what should be contained in the affidavit. The evidence would be expected to do the following:

(a) identify the judgment or order to be enforced stating the amount remaining unpaid under it at the time of the application,
(b) state that, to the best of the deponent's information or belief, the third party (who must be named) is within the jurisdiction and is indebted to the judgment debtor,
(c) state the sources of the deponent's belief.
(d) it is suggested that the practitioner also include
    (i.) where the third party is a bank having more than one place of business, the name and address of the branch at which the judgment debtor's account is believed to be held (see Part 50.8(4)) or,
    (ii) if it be the case, that this information is not known to the deponent, and
    (iii) the name and last known address of the judgment debtor.

The order gives no rights to the judgment creditor until it has been served on the third party. (Part 45.4(4) Therefore, until service, any disposition of the debt made by the judgment debtor takes priority over the order, and payment to the judgment debtor by the third party will discharge him.

The interim third party order must be served at least 21 days before the time appointed and on the judgment debtor, at least 7 days after the order has been served on the third party and at least 7 days before the time appointed for the further consideration. **Part 45.5**

Service of the interim order has the effect of binding in the hands of the third party any debt due or accruing due from the third party to the debtor, up to the amount of the judgment. The service of the interim debt order does not have the effect of making the judgment creditor a creditor of the third party in respect of the debts specified in the order, but he at once acquires a right over them, entitling him to prevent the third party from paying to his creditor, although he cannot, until the order is made final, insist on payment to himself.

Third party not appearing or not disputing liability Where, on the further consideration of the matter, the third party does not attend, or does not dispute the debt due or claimed to be due from him to the judgment debtor, the court may, **[subject to Central Bank approval where the judgment creditor is out**

of the jurisdiction] make a final third party debt order under which the third party is ordered forthwith to pay to the judgment creditor the amount of the debt due from the judgment debtor, or so much of it as is sufficient to satisfy the judgment debt together with the costs of the proceedings, including the costs of the third party.

Third party disputing liability – Part 45.8 If the third party disputes liability he must appear and show cause against it. He must show some real ground for disputing liability. He must not merely deny the particular debt or debts alleged to be due, but should state specifically whether he is indebted to the judgment debtor at all. The third party is entitled to set off any debt due to him from the judgment debtor at the date when the order was served upon him. He cannot set off debts accruing after service of the third party debt order, nor can he set off a debt due to him from the judgment creditor.

The court may either summarily determine the question at issue or order that any question necessary for determining the third party's liability be tried in any manner in which any question or issue may be tried **(Part 45.8(6)**. If the judgment creditor declines to contest the issue, the interim third party order will be discharged and the judgment creditor may have to pay the costs incurred.

PART 46 – ENFORCEMENT AGAINST FIRM OR PERSON

CARRYING ON BUSINESS IN ANOTHER NAME

46.1 General.

(1) Where a judgment is given or order made against a firm, execution to enforce the judgment or order may, subject to rule 6, issue against any property of the firm within the jurisdiction.
(2) Where a judgment is given or order made against a firm, execution to enforce the judgment or order may, subject to rule 46.2 and to the next following paragraph, issue against any person who —
- (a) entered an acknowledgement of service in the action as a partner; or
- (b) having been served as a partner with the statement of claim, failed to enter an acknowledgement of service in the action; or
- (c) admitted in any pleading that he is a partner; or
- (d) was adjudged to be a partner.

(3) Execution to enforce a judgment or order given or made against a firm may not issue against a member of the firm who was out of the jurisdiction when the claim was issued unless he —
- (a) entered an acknowledgement of service in the action as a partner; or
- (b) was served within the jurisdiction with the statement of claim as a partner; or
- (c) was, with the leave of the Court, served out of the jurisdiction with the statement of claim, or notice of the statement of claim, as a partner, and, except as provided by paragraph (1) and by the foregoing provisions of this paragraph, a judgment or order given or made against a firm shall not render liable, release or otherwise affect a member of the firm who was out of the jurisdiction when the statement of claim was issued.

(4) Where a party who has obtained a judgment or order against a firm claims that a person is liable to satisfy the judgment or order as being a member of the firm, and the foregoing provisions of this rule do not apply in relation to that person, that party may apply to the Court for leave to issue execution against that person, the application to be made by application notice which must be served personally on that person.
(5) Where the person against whom an application under paragraph (4) is made does not dispute his liability, the Court hearing the application may, subject to paragraph (3), give leave to issue execution against that person, and, where that person disputes his liability, the Court may order that the liability of that person be tried and determined in any manner in which any issue or question in an action may be tried and determined.

46.2 Enforcing judgment or order in actions between partners, etc.

(1) Execution to enforce a judgment or order given or made in —
- (a) an action by or against a firm in the name of the firm against or by a member of the firm; or

(b) an action by a firm in the name of the firm against a firm in the name of the firm where those firms have one or more members in common, shall not issue except with the leave of the Court.

(2) The Court hearing an application under this rule may give such directions, including directions as to the taking of accounts and the making of inquiries, as may be just.

46.3 Attachment of debts owed by firm.

(1) An order may be made under Part 45 in relation to debts due or accruing due from a firm carrying on business within the jurisdiction notwithstanding that one or more members of the firm is resident out of the jurisdiction.
(2) An order to show cause under Part 45 must be served on a member of the firm within the jurisdiction or on some other person having the control or management of the partnership business.
(3) Where an order made under Part 45 requires a firm to appear before the Court, an acknowledgement of service by a member of the firm constitutes a sufficient compliance with the order.

46.4 Actions begun by originating application or fixed date claim form.

This Part shall, with any necessary modification, apply in relation to an action by or against partners in the name of their firm begun by originating application or fixed date claim form as they apply in relation to such an action begun by standard claim form.

46.5 Application to person carrying on business in another name.

An individual carrying on business within the jurisdiction in a name or style other than his own name, may be sued in that name or style as if it were the name of a firm, and this Part shall, so far as practicable, apply as if he were a partner and the name in which he carries on business were the name of his firm.

46.6 Applications for orders charging partner's interest in partnership property, etc.

(1) Every application to the Court by a judgment creditor of a partner for an order under section 24 of the Partnership Act (Ch. 310) (which authorizes the Supreme Court to make on the application of a judgment creditor of a partner an order charging the partner's interest in the partnership property), and every application to the Court by a partner of the judgment debtor made in consequence of the first-mentioned application must be made by interlocutory application.
(2) The Registrar may exercise the powers conferred on a judge by in accordance with section 24 of the Partnership Act (Ch. 310).
(3) Every application issued by a judgment creditor under this rule, and every order made on such application, must be served on the judgment debtor and on such of his partners as are within the jurisdiction or, if the partnership is a cost book company, on the judgment debtor and the purser of the company.

(4) Every application issued by a partner of a judgment debtor under this rule, and every order made on such application, must be served —

(a) on the judgment creditor; and

(b) on the judgment debtor; and

(c) on such of the other partners of the judgment debtor as do not join in the application and are within the jurisdiction or, if the partnership is a cost book company, on the purser of the company.

(5) An application notice or order served in accordance with this rule on the purser of a cost book company or, in the case of a partnership not being such a company, on some only of the partners thereof, shall be deemed to have been served on that company or on all the partners of that partnership, as the case may be.

Notes:

Part 46.1-46-6 embodies (with very slight modifications to accommodate the renumbering) what was contained Order 71 Rules 5-10. It does not represent any change in the law.

PART 47 – SECURITIES: CHARGING ORDERS, STOP ORDERS AND STOP NOTICES

47.1 Order imposing charge on securities.

(1) The Court may, for the purpose of enforcing a judgment or order for the payment of an ascertained sum of money, impose on any interest to which the judgment debtor is beneficially entitled in such of the securities to which this rule applies a charge for securing payment of the amount due under the judgment or order and interest thereon.
(2) Any such order shall in the first instance be an order to show cause, specifying the time and place for further consideration of the matter and imposing the charge until that time in any event.
(3) The securities to which this rule applies are —

(a) any government stock, and any stock of any company registered under any general Act of Parliament; and
(b) any dividend of or interest payable on such stock.

(4) In this Part —
"government stock" means any stock issued by, any funds of or annuity granted by the Government; and
"stock" includes shares, debentures and debenture stock.

47.2 Application for order under 47.1.

An application for an order under rule 47.1 must be made by application supported by an affidavit —

(a) identifying the judgment or order to be enforced, stating the amount unpaid under it at the date of the application, and showing that the applicant is entitled to enforce the judgment order;
(b) specifying the securities on the judgment debtor's interest in which it is sought to impose a charge and in whose name they stand;
(c) stating that to the best of the information or belief of the witness the judgment debtor is beneficially entitled to an interest in the securities in question, describing that interest, and stating the sources of the deponent's information or the grounds for his belief.

47.3 Service of notice of order to show cause.

(1) Unless the Court otherwise directs, a copy of the order under rule 47.1 to show cause must, at least seven days before the time appointed thereby for the further consideration of the matter, be served on the judgment debtor, and if he does not attend on such consideration proof of service must be given.
(2) Notice of the making of the order to show cause, with a copy of that order, must as soon as practicable after the making of the order be served —

(a) where the order relates to government stock, on the Central Bank of The Bahamas;
(b) where the order relates to other stock, on the company concerned.

47.4 Effect of order to show cause.

(1) No disposition by the judgment debtor of his interest in any securities to which an order under rule 47.1 to show cause relates made after the making of that order shall, so long as that order remains in force, be valid as against the judgment creditor.
(2) Until such order is discharged or made absolute, the Accountant-General or, as the case may be, a company shall not permit any transfer of any such stock as is specified in the order, or pay to any person any dividend thereof, or interest payable thereon, except with the authority of the Court.
(3) If after notice of the making of such order is served on the Central Bank of The Bahamas or a company, the Central Bank of The Bahamas or company permits any transfer or makes any payment prohibited by paragraph (2), it shall be liable to pay the judgment creditor the value of the stock transferred or, as the case may be, the amount of the payment made or, if that value or amount is more than sufficient to satisfy the judgment or order to which such order relates, so much thereof as is sufficient to satisfy it

47.5 Making and effect of charging order absolute.
(1) Where on the further consideration of the matter, the Court, unless it appears that there is sufficient cause to the contrary, shall —
(a) make the order absolute with or without modifications.
(b) not make the order absolute and discharge the order.
(2) An order made absolute under this rule shall —
(a) have the same effect; and
(b) subject to paragraph (3), entitle the judgment creditor, in whose favour it is made, to the same remedies for enforcing it,
as if it were a valid charge effectively made by the judgment debtor.
(3) No proceedings to enforce a charge imposed by an order made absolute under this rule shall be taken until after the expiration of six months from the date of the order to show cause.

47.6 Discharge, etc., of charging order.
The Court, on the application of the judgment debtor or any other person interested in the securities to which an order made under rule 47.1 relates, may, whether before or after the order is made absolute, discharge or vary the order on such terms, if any, as to costs as it thinks just.

47.7 Money in court: charging order.
(1) The Court may, by order, for the purpose of enforcing a judgment or order for the payment of an ascertained sum of money to a person, impose on any interest to which the judgment debtor is beneficially entitled to any money in court identified in the order,

a charge for securing payment of the amount due under the judgment or order and interest thereon.
(2) A n y order made under paragraph (1), shall in the first instance be an order to show cause, specifying the time and place for the further consideration of the matter and imposing the charge until that time in any event.
(3) Rules 47.2 and 47.3(1) shall, with the necessary modifications, apply in relation to an application for an order under this rule and to the order as they apply in relation to an application for an order under rule 47.1 and to such order.
(4) Rules 47.4(1), 47.5(1) and 47.6 shall, with the necessary modifications, apply in relation to an order under this rule as they apply in relation to an order under rule 47.1.

47.8. Jurisdiction of Registrar to grant injunction or appoint receiver to enforce charge.
(1) A Registrar shall have power to grant —
(a) an injunction if it is ancillary or incidental to an order under rule 47.1 or 47.7; and
(b) an application for the appointment of a receiver.
(2) An application for an injunction under this rule may be joined with the application for the order under rule 47.1 or 47.7 to which it relates.

47.9 Funds in court: stop order.
(1) The Court, on the application of any person —
(a) who has a mortgage or charge on the interest of any person in funds in court; or
(b) to whom an interest referred to in subparagraph (a) has been assigned; or
(c) who is a judgment creditor of the person entitled to an interest referred to in subparagraph (a),
may make an order prohibiting the transfer, sale, delivery out, payment or other dealing with such funds, or any part thereof, or the income thereon, without notice to the applicant.
(2) An application for an order under this rule must be made on notice in the cause or matter relating to the funds in court, or, if there is no such cause or matter, by fixed date claim.
(3) The application must be served on every person whose interest may be affected by the order applied for but shall not be served on any other person.
(4) Without prejudice to the Court's powers and discretion as to costs, the Court may order the applicant for an order under this rule to pay the costs of any party to the cause or matter relating to the funds in question, or of any person interested in those funds, occasioned by the application.

47.10 Securities not in court: stop notice.
(1) Any person claiming to be beneficially entitled to an interest in any securities to which rule 47.1 applies, other than securities in court, who wishes to be notified of any proposed transfer or payment of those securities may avail himself of the provisions of this rule.
(2) A person claiming to be so entitled must file in the Registry —
(a) an affidavit identifying the securities in question and describing his interest therein by reference to the document under which it arises; and

(b) a notice in Form EX14, signed by the deponent to the affidavit, and annexed to it, addressed to the Central Bank of The Bahamas or the company concerned,
and must serve an office copy of the affidavit, and a copy of the notice sealed with the seal of the Supreme Court on the Central Bank of The Bahamas or that company.
(3) There must be indorsed on the affidavit filed under this rule a note stating the address to which any such notice as is referred to in rule 47.11(1) is to be sent and, subject to paragraph (4), that address shall for the purpose of that rule be the address for service of the person on whose behalf the affidavit is filed.
(4) A person on whose behalf an affidavit under this rule is filed may change his address for service for the purpose of rule 47.11 by serving on the Central Bank of The Bahamas, or the company concerned, a notice to that effect, and as from the date of service of such a notice the address stated therein shall for the purpose of that rule be the address for service of that person.

47.11 Effect of stop notice.
(1) Where a notice under rule 47.10 has been served on the Central Bank of The Bahamas or a company, then, so long as the notice is in force, the Central Bank of The Bahamas or company shall not register a transfer of any stock or make a payment of any dividend or interest, being a transfer or payment restrained by the notice, without serving on the person on whose behalf the notice was filed at his address for service a notice informing him of the request for such transfer or payment.
(2) Where the Central Bank of The Bahamas or a company receive a request for such a transfer or payment as is mentioned in paragraph (1) made by or on behalf of the holder of the securities to which the notice under rule 47.10 relates, the Central Bank of The Bahamas or company shall not by reason only of that notice refuse to register the transfer or make the payment for longer than eight days after receipt of the request except under the authority of an order of the Court.

47.12 Amendment of stop notice.
If any securities are incorrectly described in a notice filed under rule 47.10 the person on whose behalf the notice was filed may file in the office or registry in which the notice was filed an amended notice and serve on the Central Bank of The Bahamas or the company concerned a copy of that notice sealed with the seal of that office or registry, and where he does so the notice under rule 47.10 shall be deemed to have been served on the Central Bank of The Bahamas or company on the day on which the copy of the amended notice was served on it.

47.13 Withdrawal, etc. of stop notice.
(1) The person on whose behalf a notice under rule 47.10 was filed may withdraw it by serving a request for its withdrawal on the Central Bank of The Bahamas or, as the case may be, the company on whom the notice was served.
(2) Such request must be signed by the person on whose behalf the notice was filed and his signature must be witnessed by a practising attorney.
(3) The Court, on the application of any person claiming to be beneficially entitled to an interest in the securities to which a notice under rule 47.10 relates, may by order discharge the notice.

(4) An application for an order under paragraph (3) must be made to the Court by on notice, and must be served on the person on whose behalf the notice under rule 47.10 was filed.

47.14 Order prohibiting transfer, etc., of securities.
(1) The Court, on the application of any person claiming to be beneficially entitled to an interest in any government stock or any stock of any company registered under any general Act of Parliament may by order prohibit the Central Bank of The Bahamas or that company from registering any transfer of such part of that stock as may be specified in the order or from paying any dividend thereof or interest thereon.
(2) An order made under this rule shall state the name of the holder of the stock to which the order relates.
(3) An application for an order under this rule must be made on notice.
(4) The Court, on the application of any person claiming to be entitled to an interest in any stock to which an order under this rule relates, may vary or discharge the order on such terms, if any, as to costs as it thinks fit.".

Notes:
Part 47 does not reflect any change in the law.

PART 48 – WRIT OF FIERI FACIAS

48.1 Power to stay execution by writ of fieri facias.

(1) Where a judgment is given or an order made for the payment by any person of money, and the Court is satisfied —

(a) that there are special circumstances which render it inexpedient to enforce the judgment or order; or

(b) that the applicant is unable from any cause to pay the money, then, notwithstanding anything in rule 48.2 or 48.3, the Court may by order stay the execution of the judgment or order by writ of fieri facias either absolutely or for such period and subject to such conditions as the Court thinks fit

(2) An application under this rule, if not made at the time the judgment is given or order made, must be made by application on notice and may be so made notwithstanding that the party liable to execution did not enter an acknowledgement of service in the action.
(3) An application made by application on notice must be supported by an affidavit made by or on behalf of the applicant stating the grounds of the application and the evidence necessary to substantiate them and, in particular, where such application is made on the grounds of the applicant's inability to pay, disclosing his income, the nature and value of any property of his and the amount of any other liabilities of his.
(4) The application on notice and a copy of the supporting affidavit must, not less than four clear days before the return day, be served on the party entitled to enforce the judgment or order.
(5) An order staying execution under this rule may be varied or revoked by a subsequent order.

Notes:
48.1 This rule is in all material respects identical to the provisions which exists under the Rules of the Supreme Court. Accordingly, much of the commentary in The Supreme Court Practice applies. It confers express power on the Court to stay execution by writ of fi fa either absolutely or for such period and subject to such conditions as the Court thinks fit (***The Supreme Court Practice 1999***).
48.1(2) The judgment debtor is entitled to apply for a stay of execution of fi fa notwithstanding that he has not acknowledged the service of the writ or had stated in his acknowledgement that he intended to apply for such a stay of execution (***The Supreme Court Practice 1999***).
48.1(3) An application, if not made at the time the judgment is given or order made, must be supported by affidavit, which contains the particulars required by this rule.

48.2 Separate writs to enforce payment of costs, etc.

(1) Where only the payment of money, together with costs to be assessed, is adjudged or ordered, then, if when the money becomes payable under the judgment or order the costs have not been assessed, the party entitled to enforce that judgment or order may issue a writ of fieri facias in Form EX 1 to enforce payment of the sum, other than for costs, adjudged or ordered and, not less than eight days after the issue of that writ, he may issue a second writ to enforce payment of the assessed costs.

(2) A party entitled to enforce a judgment or order for the delivery of possession of any property, other than money, may, if he so elects, issue a separate writ of fieri facias to enforce payment of any damages or costs awarded to him by that judgment or order.

Notes
48.2(1) As with the RSC version, the effect of the rule is to entitle the judgment creditor to levy execution for a debt and costs separately, or for the delivery of possession of any property and for damages or costs separately. The principle is that the judgment creditor should not have to wait to levy execution until his costs have been taxed or his damages assessed as the case may be before bringing execution to recover the judgment debt or delivery of possession of property, as the case may be (***The Supreme Court Practice 1999***).
48.2(2) This Rule allows for a judgment creditor to issue execution for his judgment debt immediately upon entering judgment and afterwards tax his costs (***Harris v Jewell*** (1883) WN 216).

48.3 No expenses of execution in certain cases.

Where a judgment or order is for less than such sum as shall be specified from time to time by the Chief Justice by practice direction the claimant shall not be entitled to costs against the person against whom the writ of fieri facias to enforce the judgment or order is issued, the writ may not authorise the Provost Marshal to whom it is directed to levy any fees, poundage or other costs of execution.[112]

Notes
48.3 This rule applies where (a) the judgment or order is for less than the sum as shall be specified from time to time by the Chief Justice by practice direction and (b) it does not entitle the plaintiff to costs.

48.4 Order for sale otherwise than by auction.

(1) An order of the Court under the Bankruptcy Act *(Ch. 69)* that a sale under an execution may be made otherwise than by public auction may be made on the application of the judgment creditor or the judgment debtor or the Provost Marshal to whom it was issued.
(2) Such an application must be made by application notice and the application notice must contain a short statement of the grounds of the application.
(3) Where the applicant for an order under this rule is not the Provost Marshal, the Provost Marshal must, on the demand of the applicant send to the applicant a list containing the name and address of every person at whose instance any other writ of execution against the goods of the judgment debtor was issued and delivered to the Provost Marshal (hereinafter referred to as "the Provost Marshal's list") and where the Provost Marshal is an applicant, he must prepare such a list.
(4) Not less than four clear days before the return day the applicant must serve the application notice on each of the other persons by whom the application might have been made and on every person named in the Provost Marshal's list.
(5) The applicant must produce the Provost Marshal's list to the Court on the hearing of the application.

(6) Every person on whom the application notice was served may attend and be heard on the hearing of the application.

Notes:

48.4(1) The rule allows the judgment creditor, the judgment debtor or the Provost Marshal to apply to Court for sale other than by public auction.

Applications for leave to sell a debtor's goods by private contract are now made in the manner prescribed by this rule and must be made with 4 clear days' notice on each of the other persons by whom the application might have been made and on every person named in the Provost Marshal's list.

PART 49 – INTERPLEADER

49.1 Interpretation.

In this rule and rules 49.1 to 49.8, unless the context otherwise requires —
"applicant" means a person entitled under rule 49.2 to apply to the court for relief under rule 49.7;
"claimant" means a person claiming against an applicant in terms of rule 49.2.

49.2 Right to interplead.

(1) When a person who is under a liability in respect of a debt or in respect of any money or chattels is, or expects to be, sued for or in respect of the debt, money, or chattels by two or more persons making adverse claims, that person may apply to the court, on notice to the persons making the adverse claims, for relief under rule 49.7.

(2) A person who claims money or chattels taken or intended to be taken by the Provost Marshal may apply to the court, serving notice on the judgment creditor, the judgment debtor, and the Provost Marshall for relief under rule 49.7 and shall serve notice of his application on the judgment creditor, the judgment debtor and the Provost Marshal.
(3) Paragraph (2) applies —
(a) whether or not there has been a return of the order; and
(b) whether or not a proceeding has been commenced against the officer in respect of the money or chattels.

Notes:
Interpleader is the process by which a person from whom two or more persons claim the same property or debt, and who does not himself claim the property or dispute the debt, can protect himself from legal proceedings by calling upon rival claimants to interplead (***Civil Procedure – The White Book 2001***).
The two classes of interpleaders remain the same, (1) where a Provost Marshall seizes or intends to seize goods by way of execution and a person (other than the judgment debtor) claims them. Here the Provost Marshall initiates the proceedings to determine whether the property belongs to the judgment debtor (and therefore can be seized) or to the claimant. Para 49.2(1) of this rule applies to such cases. (2)The second class being all other interpleader proceedings. Para 49.2(1) of this rule applies to such cases. The same general principles apply to both classes.
Language consistent the previous version contained within the Rules of the Supreme Court ('RSC').
Given the similarities to the rule contained in the RSC, much of the commentary in the Supreme Court Practice 1999 remains applicable.
a person is under a liability in respect of a debt" – The applicant may interplead as to so much of a debt as he admits, the dispute as to the residue being settled separately (Reading v London School Board, (1886) 16 QBD 686). A liability to unliquidated damages is not a "debt" for this purpose (Walter v Nicholson (1838) 6 Dowl. 517; Ingram v Walker (1887) 3 TLR 448, CA. [Cf. Attenborough v London and St Katharine's Dock Co. (1878) 3 CPD 450 CA where a separate claim for damages was reserved, and cf Ex p Mersey

Docks [1899] 1 QB 546, CA)] A debt due but not yet payable is presumably within the words of the rule (Reading v London School Board).
"chattels" – Chattels is "one of the widest words known to the law in its relation to personal property" (per Fry LJ in Robinson v Jenkins (1890) 24 QBD 275, at 279).
"taken or intended to be taken" - There must have been either an actual seizure or an intention of the Provost Marshall to seize (*Day v Carr* (1852) 7 Ex 883; *Lea v Rossi* (1855) 11 Ex 13) The fact that the goods are seized in the possession of the claimant or a third person and not in that of the judgment debtor does not, of course, affect the Provost Marshall's right to interplead (*Allen v Gibbon* (1833) 2 Dowl 292; *Aylwin v Evans* (1882) 52 LJ Ch 105) (***Civil Procedure – The White Book 2001***).

49.3 Form of application.

(1) When a claimant has issued a proceeding against the applicant in respect of the debt or money or chattels referred to in rule 49.2(1), and in cases within rule 49.2(2), the application must be an interlocutory application in the proceeding.
(2) Subject to rules 49.5 to 49.8, Part 11 of these rules applies to the application.[113]
(3) In other cases the application must be made by filing and serving a fixed date statement of claim and notice of proceeding under Part 8.

Notes:
49.3(2) See Part 11 (re General Rules about Applications for Court Orders)
49.3(3) See Part 8 (re How to Start Proceedings)

49.4 Affidavit in support.

(1) An application under rule 49.2 must be supported by an affidavit stating

(a) that the applicant claims no interest in the subject matter in dispute other than the charges or costs;
(b) that adverse claims, of which details must be given, have been made by the claimants and the steps already taken by the respective claimants in support of their claims;
(c) that the applicant is not colluding with any of the claimants to that subject matter; and
(d) that the applicant is willing to pay or transfer that subject matter into court or dispose of it as the court may direct.

(2) A copy of the affidavit must be served on each claimant when the application under rule 49.2 is served.

Notes:
49.4(1)(a) A party may have an interest in the subject matter, even though he claims no right of property, if he has a financial stake in the result of the proceedings. *Murietta v South American Co* (1893) 62 LJ QB 396 at 397 and 398).
49.4(1)(b) "other than for charges or costs" – A lien over goods for charges for storage, or over the proceeds of sale for commission on the sale, does not disentitle the applicant to relief (*Cotter v Bank of*

England (1833) 2 Dowl 728; *Best v Hayes* (1863) 1 H&C 718; *De Rothchild Freres v Morrison, Kekwich & Co* (1890) 24 QBD 750, CA)
49.4(1)(c) "**Collusion**" does not here necessarily entail anything morally wrong, but means "playing the same game" as one of the claimants (*Murietta v South American*; *Tucker v Morris* (1832 1 C & M 73; 2 LJ Ex 1; and see, as to sheriffs *Uddin v Long* (1834) 3 Dowl 139); *Fredericks and Pelhams Timber Buildings v Wilkins, Read* (Claimant) [1971] 1 WLR 1197 at 1204; [1971] 3 All ER 545 at 550-551, CA) and where the applicant has agreed to do so, or has taken an indemnity from that claimant (*Murietta v South American Co*; Thompson v Wright (1884) 13 QBD 632).

49.5 Time for applying.

(1) If a claimant has commenced a proceeding against the applicant to enforce the claim, an application under rule 49.2 must be made before a statement of defence has been filed by the applicant.
(2) If no statement of defence has been filed by the applicant, it must be made before judgment has been entered against the applicant.

49.6 Claimants to file affidavits.

(1) Subject to paragraphs (2) and (3), a claimant who wishes to justify a claim must, within five working days after service of an application made under paragraph (1) or (2) of rule 49.2, file and serve on other claimants and on the applicant an affidavit stating the facts and matters relied on.[114]
(2) When, in accordance with rule 49.3(3), a statement of claim and notice of proceeding have been filed and served together with an affidavit under rule 49.4, the claimant must file and serve a statement of defence with the claimant's affidavit.
(3) If the claimant, had the claimant been a defendant, might have filed an acknowledgment of service under Part 9, the claimant may, instead of filing and serving an affidavit under paragraph (1), file and serve an acknowledgement of service.
(4) An acknowledgment of service filed and served under paragraph (3), for all the purposes of rules 49.7 and 49.8, has effect as though the claimant were a defendant in a proceeding brought by the applicant or by any other claimant referred to in the acknowledgement of service.

Notes:
49.6 Rule now sets out the procedure to be followed by claimants served with an interpleader application and requires affidavits to be filed within 5 working days after service, unless paragraphs (2) or (3) apply.

49.7 Powers of court.

(1) Upon hearing an application under rule 49.2, the court may make whatever orders and directions justice requires.

(2) In particular, and without limiting paragraph (1), the court may —
   (a) stay a proceeding commenced by a claimant;
   (b) bar the claim of a claimant who has not filed and served either —
      (i) an affidavit justifying the claim under rule 49.6(2); or
      (ii) an acknowledgment of service under rule 49.6(3);
   (c) adjudicate upon the competing claims on the affidavits filed, or adjourn the application for that purpose;
   (d) if the question appears to be one of law only, direct that the question be determined by the court;
   (e) direct the trial of the issues involved by the method that the court directs;
   (f) order that one of the claimants commence a proceeding against any other or others to
   try the question involved or, if a proceeding has been commenced by a claimant, order that any other claimant be joined as a defendant to that proceeding;
   (g) order that the chattels in dispute or any part of them be sold, and that the proceeds of the sale be applied in such manner and on such terms as are just.

(3) Paragraph (4) applies to a claimant who has been served with an application and —
   (a) does not appear on the hearing of the application; or
   (b) having appeared, fails or refuses to comply with an order.

(4) The court may make an order declaring that the claimant and all persons claiming under that claimant may not continue or subsequently prosecute that claim against the applicant and all persons claiming under the applicant but that order does not affect the rights of the claimants as between themselves.

Notes:
49.7(2)(b) The failure to comply with 49.6(2) and 49.6(3) rule can result in claims banned.
49.7(2)(c) Summary disposal is one possible method of disposal and is to be contrasted with ordering an issue to be stated and tried 49.7(2)(e).
49.7(2)(f) The court can direct which of the rival interpleader claimants is to be claimant and which defendant.
49.7(2)(g) Where it is not appropriate for the goods to be sold, the court can order that the property be deposited into the joint names of the solicitors for the parties.

49.8 Costs of applicant.

(1) An applicant shall be entitled to such costs as the court may direct and such costs may comprise the entirety of the costs incurred by the applicant.[115]

(2) The court may order that the applicant's costs be paid by any one or more of the claimants and may apportion the liability between any two or more claimants, as it thinks just.

(3) The court may charge any property in dispute, or the proceeds of the sale of it, or both, with payment of the costs of the applicant.

PART 50 – ENFORCEMENT IN RELATION TO POSSESSION OF LAND, DELIVERY OF GOODS AND INJUNCTION

50.1 Enforcement of judgment for possession of land.

(1) A judgment or order for the giving of possession of land may be enforced by one or more of the following —

(a) writ of possession;

(b) in a case in which rule 50.3 applies, an order of committal; or

(c) in such a case, writ of sequestration.

(2) A writ of possession to enforce a judgment or order for the giving of possession of any land shall not be issued without the leave of the Court except where the judgment or order was given or made in a mortgage action to which Part 62 applies.

(3) Such leave shall not be granted unless it is shown that every person in actual possession of the whole or any part of the land has received such notice of the proceedings as appears to the Court sufficient to enable him to apply to the Court for any relief to which he may be entitled.

(4) A writ of possession may include provision for enforcing the payment of any money adjudged or ordered to be paid by the judgment or order which is to be enforced by the writ.

Notes:

Part 50 (***Civil Procedure – The White Book 2001***)

The present rule maintains the Court's general discretion.

50.1(a) The writ of possession may be combined with the writ of fiere facias.

The writ of possession contains a recital of the judgment or order that the defendant "do give" to the claimant possession of the land. It must therefore contain a description of the property of which possession is to be given. General words will not do, and if necessary the writ of possession may have to be altered by inserting a sufficient description (*Thynne v Sarl* [1981] 2 Ch. 79).

50.1(2) It remains the case that under this rule, permission is required in all cases to enforce a judgment or order for the giving of possession of land, inclusive of a writ of possession, except in the case of a mortgage action to which Part 62 applies.

50.1(3) Where the defendant is the only person in possession of the premises, the claimant must give the defendant notice of the judgment or order and call upon him to give up possession under the judgment or order. Where there are other persons (not parties to the proceedings) in actual possession it is also necessary to serve them with such written notice as will give them a reasonable opportunity of applying to the Court.

It should be observed that the rule does not confer any new rights on tenant or other occupier. Its only effect is to give those who may apply for relief an opportunity of doing so (***Civil Procedure – The White Book 2001***).

50.2 Enforcement of judgment for delivery of goods.

(1) A judgment or order for the delivery of any goods which does not provide the alternative of paying the assessed value of the goods may be enforced by one or more of the following —

(a) writ of delivery to recover the goods without alternative provisions for recovery of their assessed value (hereafter in this rule referred to as a “writ of specific delivery”);
(b) in a case in which rule 3 applies, an order of committal;
(c) in such a case, writ of sequestration.

(2) A judgment or order for the delivery of any goods or payment of their assessed value may be enforced by —
(a) writ of delivery to recover the goods or their assessed value;
(b) with the leave of the Court, writ of specific delivery;
(c) in a case in which rule 50.3 applies, writ of sequestration.

(3) A writ of specific delivery and a writ of delivery to recover any goods or their assessed value, may include provision for enforcing the payment of any money adjudged or ordered to be paid by the judgment or order which is to be enforced by the writ.

(4) A judgment or order for the payment of the assessed value of any goods may be enforced by the same means as any other judgment or order for the payment of money.

Notes:
50.2 This rule makes a sharp distinction between a judgment or order for delivery of goods (1) which does *not* give the defendant the option of retaining them by paying their assessed value and (2) which *does* give the defendant such an option.
In the case of a judgment or order in the first form, the method of enforcement is by writ of specific delivery, for the issue of which no permission of the court is required. In the case of a judgment or order in the second form, the method of enforcement is by a writ of delivery to recover the goods or their assessed value, for which again no permission is required, but in the case of such a judgment, if it is desired to enforce it by a writ of specific delivery, *i.e.* by depriving the defendant of the option of paying the assessed value of the goods, then the permission of the court must first be obtained.
A judgment or order to deliver goods which does not give the defendant the option of retaining them by paying their assessed value will not be enforceable by an order of committal or by writ of sequestration unless it specifies the time within which this act is required to be done and the defendant refuses or neglects to do either such acts within that time. Accordingly, as a judgment or order to deliver goods, whether or not it gives the defendant the option of paying their assessed value, will not in practice specify the time which the act is required to be done it will not ordinarily be enforceable by an order of committal or by writ of sequestration but only by a writ of specific delivery or writ of delivery.
If, however, in an extreme case it is desired to enforce the judgment or order by an order of committal or writ of sequestration, as the case may be, it will be necessary first to apply to the court for an order for a writ of specific delivery which will fix the time within which the defendant is required to deliver the goods and to serve such order upon the defendant with the requisite penal notice indorsed thereon and then to apply under for an order of committal or for a writ of sequestration, as the case may be (***Civil Procedure – The White Book 2001***).

Writ of Delivery

The writ of delivery may be combined with a writ of *fi fa.*
The writ of delivery contains a recital of the judgment or order that the defendant's “do deliver” the goods to the claimant. It must therefore contain sufficient description of the goods which are to be delivered.
Where a writ of delivery is issued for the delivery up of goods which are not in the custody of the defendant or for payment of their value, it is the duty of the defendant to take proper steps to make effective the delivery of the goods wherever they are to the claimant and for this purpose to at least inform the claimant and any other persons concerned that the goods, being the property of the claimant, were at his disposal, otherwise the claimant is entitled to issue a writ of *fi fa*. For the assessed value of the goods. (*Metals and Ropes co. Ltd v. Tattersall* [1996] 1 WLR 1500 (***Civil Procedure – The White Book 2001***).

Permission to issue writ of delivery

Where the judgment creditor has obtained a judgment or order for the delivery of the goods which does not give to the judgment debtor the option of paying their assessed value, he is entitled to issue a writ of specific delivery without the permission of the court, and without the previous assessment of their value (see *per* Collins M.R. in *Hymas v Ogden* [1905] 1 K.B. 246, CA).
Where the judgment creditor has obtained a judgment or order for the delivery of the goods or the payment of their assessed value, he must first proceed to the assessment of the value, and then he may issue the writ of delivery for the delivery of the goods or their assessed value, and he is entitled to do so without permission or leave.
On the other hand, where the judgment creditor has obtained a judgment or order for the delivery of the goods, or the payment of their assessed value, and he desires to proceed to recover the goods without giving the judgment debtor the option of paying their value, he must apply for an order of the court to issue a writ of specific delivery.
The court has a discretion whether to grant such permission to issue a writ for specific delivery (see *Whiteley Ltd v. Hilt* [1918] 2 K.B. 808, CA; *Cohen v Roche* [1927] 1 K.B. 169) (***Civil Procedure – The White Book 2001***).

50.3 Enforcement of judgment to do or abstain from doing any act.

(1) Where —

(a) a person required by a judgment or order to do an act within a time specified in the judgment or order refuses or neglects to do it within that time, or, as the case may be, within that time as extended or abridged under these Rules or
(b) a person disobeys a judgment or order requiring him to abstain from doing an act; then, subject to the provisions of these Rules, the judgment or order may be enforced by one or more of the following means —

(i) with the leave of the Court, a writ of sequestration against the property of that person;
(ii) where that person is a body corporate, with the leave of the Court, a writ of sequestration against the property of any director or other officer of the body;
(iii) subject to the provisions of the Debtors Act *(Ch. 70)* an order of committal against that person or, where that person is a body corporate, against any such officer.[116]

(2) Where a judgment or order requires a person to do an act within a time therein specified and an order is subsequently made under rule 50.4 requiring the act to be done within some other time, references in paragraph (1), to a judgment or order shall be construed as references to that order made under rule 50.4.
(3) Where under any judgment or order requiring the delivery of any goods the person liable to execution has the alternative of paying the assessed value of the goods, the judgment or order shall not be enforceable by order of committal under paragraph (1) but the Court may, on the application of the person entitled to enforce the judgment or order, make an order requiring the person so liable to deliver the goods to the applicant within a time specified in that order, and that order may be so enforced.
(4) An application for committal or sequestration under this rule is to be made in the proceedings in which the judgment or order was made or the undertaking was given by an application in accordance with Part 11.

(5) Where an application to commit or for sequestration under paragraph (4) is made against a person who is not an existing party to the proceedings, then the committal application is made against that person by an application under Part 11.
(6) The application must —

(a) set out in full the grounds on which the application is made and must identify, separately and numerically, each alleged act of contempt including, if known, the date of each of the alleged acts; and
(b) be supported by one or more affidavits containing all the evidence relied upon.

(7) Subject to paragraph (8), the application notice and the evidence in support must be served personally on the respondent.
(8) The court may —

(a) dispense with service under paragraph (8) if it considers it just to do so; or
(b) make an order in respect of service by an alternative method or at an alternative place.

Notes:
50.3 This rule governs the methods for the enforcement by the Court of its judgments or orders in circumstances amounting to a contempt of Court. It applies to both positive and negative judgments or orders, *i.e.* those which requires a party to do an act as well as those which require a party to abstain for doing an act, subject, however, to this important qualification that the coercive methods of enforcement under this rule cannot be employed to enforce a judgment or order to do an act unless that act is required to be done, but is not done, within a specified time which has been fixed either by the original judgment, or order, or by a subsequent order extending or abridging such time.

An order made by a Court of unlimited jurisdiction, even though irregular, must be obeyed unless and until it is set aside, and therefore disobedience to an interlocutory injunction which is irregular amounts to a contempt of Court (*Isaacs v Robertson* [1985] A.C. 97); [1984] 3 WLR 705; [1984] 3 All E.R. 140, PC).
The effect of the qualification is, that a judgment or order to pay money to some other person or to give possession of land or to deliver goods which need not, and will not as a general rule, specify the time within which such act is required to be done will not come within this rule, and so will not be enforceable by writ of sequestration or order of committal, unless and until time is specified for the doing of the act.

The methods of enforcement under the rule are

(i) By writ of sequestration; and
(ii) By order of committal, which is additional to the powers of the court under the Debtors Act.

This rule must be read together with r.50.5, under which as a general rule, enforcement under this rule cannot be obtained unless a copy of the order is served personally on the person in default with the requisite penal notice indorsed thereon (***Civil Procedure – The White Book 2001***).
50.3(1)(a) "**Refuses or neglects or disobeys"** The remedies under this rule may be applied where the person "refuses or neglects" to do an act within the time specified by the judgment or order, or where he "disobeys" a judgment or order requiring him to abstain from doing an act. Such refusal, neglect or disobedience must, however, be of a character or quality to constitute a contempt of Court (See per Lord Wilberforce in *Heatons Transport (St. Helens) Ltd v. Transport and General Workers' Union* [1973] A.C. 15 at 109; [1972] 3 All E.R. 101 at 117).

A person or corporation commits a breach of the injunction requiring him to abstain from doing an act, and is liable for process of contempt, if he or it does the act, and it is no answer to say that the act was not contumacious in the sense that, in doing it, there was no direct intention to disobey the order, and only those acts will be excluded from constituting a breach of the injunction which are casual or accidental and unintentional (*Heatons Transport (St. Helens) Ltd v. Transport and General Workers Union).* Lack of intention to disobey, may however affect the penalty (*Chelsea Man plc v. Chelsea Girl Ltd (No. 2)* [1988] F.S.R. 217). It has been held that it is not necessary to show a willful intention to disobey a court order but

merely an intention to do a prohibited act knowing the consequences (*P v P (Contempt of Court: Mental Capacity* [1999] 2 F.L.R 897).

It is not a defence that the claimant's application is stale, though delay in bringing proceedings may affect any penalty. (*Chanel Ltd. v F.G.M. Cosmetics* [1981] F.S.R. 471. A question of contempt must be decided even if it is virtually a decision of the matter in question in the action between the parties. Whilst there may be jurisdiction to dismiss a contempt application for want of prosecution, such an application failed in *Japan Capsule Computers UK Ltd v Sonic Games Sales* [1988] F.S.R 256. However, when the breach alleged is of an interlocutory order, subsistence and ownership of the rights claimed must be assumed.

Disobedience means refusal by the corporation or its servants (*Att.-Gen v. Walthamstow U.D.C* (1895) 11 T.L.R. 533) or neglect by its servants (*Stancomb v Trowbridge U.D.C* [1910] 2 Ch. 190) to do the things which the corporation has been ordered to do. In the two cases cited the writ of sequestration was ordered to lie in the office for a period of nine and six months respectively. A person is deemed to do a relevant act "by his service or agents" if (a) the person who did the acts were his servants or agents (b) the acts were done in the course of the service or agency and (c) he either (i) authorized the acts or (ii) could reasonably have foreseen the possibility of such acts and failed to take all reasonable steps to prevent them (Hone v Page [1980] F.S.R. 500).

Accidental and unintentional results of an act may be sufficient to cause that act to constitute disobedience if repeated (*Davis v. Rhayader Granite Quarries Ltd* (1911) 131 LTJ 79). Moreover, failure to carry out an undertaking for no excuse whatever cannot be regarded as casual, accidental or unintentional, but will amount to a refusal or neglect or even disobedience under this rule, and will constitute a contempt of court, for which sequestration may issue, though if the disregard of the order is not obstinate a fine may be imposed in lieu of sequestration.

As to the enforcement of a declaratory order by the process of sequestration, see *Webster v Southwark London Borough Council* [1983] Q.B. 698.
Costs may be awarded on the indemnity basis (*Att.-Gen v Walthamstow UDC).* This may be a sufficient punishment where there have been minor breaches of the order because the defendant did not take sufficient care to comply with its terms (***Civil Procedure – The White Book 2001***).
50.3(3) A judgment or order requiring any act to be done must state the time within which the act is to be done before it can be enforced by the methods provided by this rule.
A further requirement for the enforcement under this rule of a judgment or order requiring an act to be done is due to compliance with r. 50.5.

An act required to be done may be directed to be done by the party by whom the judgement or order was obtained or by some other person appointed by the court, and at the expense of the disobedient party (see 50.6) (***Civil Procedure – The White Book 2001***).

50.4 Judgment, etc. requiring act to be done: order fixing time for doing it.

(1) Notwithstanding that a judgment or order requiring a person to do an act specifies a time within which the act is to be done, the Court shall have power to make an order requiring the act to be done within some other time.[117]
(2) Where a judgment or order requiring a person to do an act does not specify a time within which the act is to be done, the Court shall have power subsequently to make an order requiring the act to be done within such time as the court may specify.

(3) An application for an order under this rule must be made by application under Part 11 and the application must be served on the person required to do the act in question.

Notes:
50.4(1) A judgment or order which specifies the time within which an act is required to be done may, by supplemental order of the court made subsequently, fix another time for the required act to be done. It only applies to a judgment or order which requires an act to be done. It does not apply to merely prohibitive orders.

The practice extends to an order containing a positive undertaking to do a certain act within a specified time. (*D v. A & Co* [1900] 1 Ch 484; *Re Launder* (1908) 98 L.T. 721) or where no time was fixed (*Carter v Roberts* [1903] 2 Ch. 312) orders were made fixing a time. In *Cotton v Heyl* [1930] 1 Ch. 510, where the undertaking was to "pay out of the first moneys received", the court made a similar order.

50.4(2) This rule empowers the court to make an order specifying the time within which the required act is to be done in two cases, namely –

(1) Where the judgment or order does not itself specify such a time whether by omission or inadvertence or otherwise: and
(2) Where the judgment or order is to pay money to some other person, or to give possession of land or to deliver goods, and the time within which such act is to be done is not, as it generally would not be, specified by the judgment or order. The time within which the court may under the rule specify that the required act is to be done may be fixed by reference to the sense of the order, or it may be such other time as the court may think fit. It is, however, desirable that the time should be stated in the order with precision. *Eg* "on or before (*or* not later than) the – day of – 2022" or "before noon (*or* 4pm or as may be) on – day of – 2022 (***Civil Procedure – The White Book 2001***).

50.5 Service of copy of judgment, etc. prerequisite to enforcement under rule 3.

(1) In this rule references to an order shall be construed as including references to a judgment.
(2) Subject to rule 28.2, and paragraphs (6) and (7) of this rule, an order shall not be enforced under rule 50.3 unless —

(a) a copy of the order has been served personally on the person required to do or abstain from doing the act in question; and
(b) in the case or an order requiring a person to do an act, the copy has been served before the expiration of the time within which he was required to do the act.

(3) Subject as aforesaid, an order requiring a body corporate to do or abstain from doing an act shall not be enforced as mentioned in rule 50.3(1)(ii) or (iii) unless —

(a) a copy of the order has also been served personally on the officer against whose property leave is sought to issue a writ of sequestration or against whom an order of committal is sought; and
(b) in the case of an order requiring the body corporate to do an act, a copy has been so served before the expiration of the time within which the body was required to do the act.

(4) There must be endorsed on the copy of an order served under this rule a notice informing the person on whom the copy is served —

(a) in the case or service under paragraph (2), that if he neglects to obey the order within the time specified therein, or, if the order is to abstain from doing an

act, that if he disobeys the Order, he is liable to process of execution to compel him to obey it; and

(b) in the case of service under paragraph (3), that if the body corporate neglects to obey the order within the time so specified or, if the order is to abstain from doing an act, that if the body corporate disobeys the order, he is liable to process of execution to compel the body to obey it.

(5) With the copy of an order required to be served under this rule, being an order requiring a person to do an act, there must also be served a copy of any order made under rule 26.1(2)(k), extending or abridging the time for doing the act and, where the first-mentioned order was made under rule 50.3(3) or rule 50.4, a copy of the previous order requiring the act to be done.

(6) An order requiring a person to abstain from doing an act may be enforced under rule 50.3 notwithstanding that service of a copy of the order has not been effected in accordance with this rule if the Court is satisfied that, pending such service, the person against whom or against whose property it is sought to enforce the order has had notice thereof either —

(a) by being present when the order was made; or

(b) by being notified of the terms of the order, whether by telephone, email, text message or otherwise.

(7) The Court may dispense with service of a copy of an order under this rule if it thinks it just to do so.

Notes:

50.5 The rule or part makes explicit the conditions precedent to the enforcement of a judgment or order by writ of sequestration or by order of committal under this rule or part by specifying that -

1. The requisite document(s) to be served;
2. The time within which such document(s) must be served;
3. The person on whom such document(s) must be served; and
4. The terms of the execution notice to be indorsed.

The rule or part also recognizes the present practice under which the court may dispense with service of the requisite document(s).

By paragraph 6 the court has the power to proceed to the enforcement of a negative order by writ of sequestration or by order of committal even though the original order has not been served in accordance with the requirements of this rule or part, provided however that the court is satisfied that the person or party in question has had notice of it either by being present when the order was made or by being notified of its terms by telephone, email, text message or otherwise. A negative order is often made without notice in circumstances of great urgency to preserve the status quo, and it would be highly inconvenient if it could not be enforced until it was first served as required by this rule or part.

Paragraph 6 is designed to enable the Court, if necessary, before service, to prevent disobedience or further disobedience or to compel obedience to a negative order.

50.5(2) - Documents to be served- The document or documents which are required by this rule or part to be served as a condition precedent to enforcement by writ of sequestration or order of committal under are:

(a) In the case of a judgment or order to abstain from doing an act, a copy of that judgment or order;
(b) In the case of a judgment or order to do an act

(i) A copy of that judgment, whether or not it specifies the time within which the required act is to be done;

(ii) A copy of any order extending or shortening time or any written agreement to extend a time limit; and

(iii) If an order is subsequently made, whether or not the original judgment or order specified the time within which the required act was to be done, specifying the time within which such required act is to be done under 50.4 or 50.3 (3) a copy of that order

Methods of Service - In every case the requisite document or documents must be served personally on the person required to do or abstain from doing the act in question, or on the officer of the body corporate against whom it is sought to enforce an order requiring that body to do or abstain from doing the act in question. The Court, however, has power to order service of the requisite documents "by an alternative method".

Time for service of documents

Where a specified time is limited for doing the act required, the order must be served within that time; or else a supplemental order extending the time fixed must be obtained.

Person on whom documents to be served

In the case of a judgment or order requiring an individual to do or abstain from doing an act, the requisite documents must be served on that person personally.

Where an order is made against parties jointly and severally (as *e.g. trustees)* and one of them cannot be served with the requisite documents, service against the other is sufficient to found committal against him.

In the case of a judgment or an order requiring a body corporate to do or abstain from doing an act, the requisite documents must be served on the body corporate in order to found an application for a writ of sequestration against the property of any director or other officer of that body or by way of committal against the person of such director or other officer, the requisite documents must be served personally on that director or officer.

Indorsement of penal notice or order - It is the necessary condition for the enforcement of a judgment or order under r.5 by way of sequestration or committal, that the copy of the judgment or order served under this rule should have the requisite penal notice prominently indorsed thereon.

This must be endorsed on the copy for service of all orders which are required to be served, whether personally or not, and this rule applies, even where the "defendant" is a limited liability company (*Benabo v Williams Jay &Partners Ltd.* [1941] Ch. 52.

The endorsement on the front of the order should be in the following words or in words to the following effect –

In the case of a judgment or order requiring a person to do an act within a specified time or to abstain from doing an act:

> "If you, the within named AB, neglect to obey this judgment or order by the time stated (or in this case of an order to abstain from doing an act), "If you within named AB disobey this judgment you may be held in contempt of court and liable to imprisonment."

In the case of a judgment (or order) requiring a body corporate to do within a specified time or to abstain from doing an act:

> "If you, the within named AB Ltd, neglect to obey this judgment (or order) by the time stated (*or in the case of an order to abstain from doing the act,* "If you, the within named A.B Ltd disobey this judgment (or order), you may be held in contempt of Court and liable to sequestration of your assets."

In the case of a judgment (*or* order) requiring a body corporate to do or to abstain from doing an act, but it is sought to take enforcement proceedings against a director or other officer of that body: -

> "If AB Ltd neglect to obey this judgment (*or order)* by the time stated (or in the case of an order to abstain from doing an act), If AB Ltd disobey this judgment (or order), you XY, (a director or officer of the said AB Ltd) May be held in contempt of court and liable to imprisonment."

The Court has a discretion under O50.5(6) to dispense with the failure to incorporate a penal notice in a judgment or order requiring a person to abstain from doing an act but it has no such discretion to dispense with the penal notice where the judgment or order requires the person to do an act (*Dempster v Dempster* Independent, November 9,1990, CA). Nevertheless, as liberty of the subject is involved, strict compliance with the rule is desirable and it is unwise to rely on this discretion.

50.5(3) The remedies under this rule for enforcement of a judgment or order against a body corporate are (1) By writ of sequestration against the corporate property of that body; (2) By writ of sequestration against the personal property of any director or other officer of the body; and (3) By an order of committal against any director or other officer of that body.

Where a company disobeys an injunction, a director or other officer of the company will not be liable for contempt to be committed or have his property sequestrated merely by virtue of his office or his knowledge of the order but will only be liable if he can be shown to be in contempt under the general law of contempt and accordingly, in the absence of mens rea or actus reus, such a director or other officer will not be liable in contempt (*Director General of Fair Trading v Buckland* [1990] 1 W.L.R. 920; [1990] 1 All E.R. 545) (***Civil Procedure – The White Book 2001***).

50.5(7) Dispensing with service of documents -The court has power to dispense with the service of the requisite documents in order to found an order for sequestration or committal.
An order to sign judgment unless a sum is paid before a day named need not be served on the defendant before judgment is signed upon it (*Hopton v Robertson* (1884) W.N. 77; 23 QBD 126(n)).

An order of committal of a person for disobedience to an order requiring him to do a given act within a given time will not be directed unless a copy of the order, with a proper indorsement, has been personally served upon him in due time, or unless he has had notice of the order and is evading service thereof. The fact that the person was present in court when the order was made is not sufficient to dispense with service of the order (*Re Tuck; Century insurance Co v Larkin* [1910] 1 Ir. R.); but in *Haydon v Haydon* [1911] 2 KB 191, CA, on an application under the Debtors Acts, an order for committal was made although the debtor had not been personally served with the order disobeyed, but he was in court when it was made and was present when the order was made for his committal.

Effect of notice of injunction - Where the injunction is to restrain the doing of an act, the person restrained or a person who chooses to step into his place to do the act enjoined against (*Avory v. Andrews* (1882) 51 LJ Ch. 414) may be committed for breach of the injunction if he has in fact had notice of the granting of the injunction, either by his presence in court at the time of the granting the injunction or by telegram. Telegrams are abolished but consider whether fax or email would now be sufficient for this purpose. But the person charged with the breach for the injunction swears positively that he did not believe the injunction had been granted, and is not cross-examined on that point, he will not be committed for contempt.

Where notice of an injunction had been obtained from the Press Association by newspapers subscribing to the Association, they were shown to have sufficient notice of the injunction and could be in contempt of court if they published material subject to an injunction since personal service could be dispensed with if unpracticable (*Cleveland County Council v. W.,* Independent, May 5, 1988).

Receipt by a person who has been restrained by injunction from receiving it, of money from the Crown, which is not bound by the injunction, is a contempt (*Eastern Trust Co. v. McKenzie, Mann & Co.* [1915] AC 750) (***Civil Procedure – The White Book 2001***).

50.6 Court may order act to be done at expense of disobedient party.

If an order of mandamus, a mandatory order, an injunction or a judgment or order for the specific performance of a contract is not complied with, then, without prejudice to any other power it may have including its powers to punish the disobedient party for contempt, the Court may direct that the act required to be done may, so far as practicable, be done by the party by whom the order or judgment was obtained or some other person appointed by the Court, at the cost of the disobedient party, and upon the act being done the expenses incurred may be ascertained in such manner as the Court may direct and execution may issue against the disobedient party for the amount so ascertained and for costs.

Notes:
50.6 The Court has power to order a conveyance, contract or other document to be executed or a negotiable instrument to be indorsed by a person nominated by the Court in place of the party who has neglected or refused to comply with a judgment or order directing him to do so; and such conveyance, contract, document or instruments executed or indorsed by the party directed to do so.

Where a party fails to carry out an undertaking (e.g. to remove a wall) permission may be given to the other party to do the work and apply for an order for payment of his expenses. (*Mortimer v Wilson* (1885) 33 WR 927).
Upon an application to rectify the register of a company, where it appeared that there was no one having authority to carry out the order of the Court, Kekewich J. refused to make an order under this rule in the first instance but made a mandatory order on the company to rectify, leaving the parties to make a subsequent application in case of non-compliance. (*Re L.L. Syndicate* (1901) 17 TLR 711; *cf. Manihot Plantations* (1919) 63 SJ 827) (***Civil Procedure – The White Book 2001***).

PART 51 – COMMITTAL

51.1 Committal for contempt of court.

(1) The power of the Court to punish for contempt of court may be exercised by an order of committal.
(2) Where contempt of court -
(a) is committed in connection with-
(i) any proceedings before the Court including but not limited to the making of a false statement of truth in a witness statement or breach of duty of a party or his attorney in
relation to disclosure; or
(ii) criminal proceedings, except where the contempt is committed in the face of the court or consists of disobedience to an order of the court or a breach of an undertaking to the court; or
(b) is committed otherwise than in connection with any proceedings, then, subject to paragraph (4), an order of committal may be made by the Court.
(3) Where contempt of court is committed in connection with any proceedings in the Court, then, subject to paragraph (2), an order of committal may be made by a judge of the Court.
(4) Where by virtue of any enactment the Court has power to punish or take steps for the punishment of any person charged with having done anything in relation to a court, tribunal or person which would, if it had been done in relation to the Court, have been a contempt of that Court, an order of committal may be made by a judge of the Court.
(5) An application for committal under rule 51.1(2)(a)(i) may be made only with the permission of the court dealing with the claim.

Notes:
With some minor exclusions this rule mirrors the same Order in the English CPR and retains many of the features of Order 52 of the old Rules of the Supreme Court. Contempt of Court has been defined as 'any interference with the administration of law'[1] and is essentially punitive in character while also having the purpose of supplying compliance with the court's orders[1] In The Bahamas, the Court's power to punish for contempt of court is derived from the Common Law as there is no Bahamian equivalent to the Contempt of Court Act in the UK.

Cases:
51.1(1) The Court's power
Cummings and Myeran v. Sumner Point Holdings (SCCiv App no. 170 of 2018) (destructive effects of Contempt and the court's power to deal with it)
James Fleck v Pittstown Point Landings Ltd SCCiv App No 131 of 2019 (contempt may be punished by other penalties than committal)
51.1(2)(a)(i) Types of contempt
James Fleck v Pittstown Point Landings Limited (ibid) (disobedience of injunction)
Donna Dorsett-Major v. Director of Public Prosecutions and The Attorney General SCCiv App No 156 of 2021 (scandalous remarks in affidavit)

In the matter of the contempt of Maurice Glinton Q.C. in the face of the Court Appeal Nos 1 and 2 of 2015 (contempt in the face of the court-remarks made during hearing)
Albert Rolle v. Cat Island Air Company and Elma Bain SCCiv App No. 84 of 2021 (breach of undertaking to pay)
51.1(3) When contempt is found to have been committed
Cummings and Myeran v. Sumner Point Holdings (ibid) par 44 (contempt must be proved beyond a reasonable doubt)

51.1(4) Contempt in other tribunals
S.104 Defence Act (contempt in Court martial will be punished by Supreme Court)

51.1(5)- Application for permission
The application is made in accordance with **Part 11** hereof

51.2 Application for order.

(1) The application for the order must be made by originating application to the Court and, unless the Court or Judge granting leave has otherwise directed, there must be at least eight clear days between the service of the originating application and the day named therein for the hearing.
(2) Unless within fourteen days after such leave was granted the originating application is entered for hearing the leave shall lapse.
(3) Subject to paragraph (4), the originating application , accompanied by a copy of the statement and affidavit in support of the application for leave under this rule, must be served personally on the person sought to be committed.
(4) The Judge may dispense with service of the originating application under this rule if he thinks it just to do so.

Notes:
This section deals with the procedural requirements for an application for committal. The procedure for enforcement is set out in **Part 50.3.** The Application for is made using the alternative procedure set out in **Part 8** hereof using form **G5** and must be supported by an Affidavit and Statement. In circumstances where the contempt involves the breach of an Order it is also generally necessary to establish to the satisfaction of the court that the proposed contemnor has been served with the Order alleged to have been breached and that the Order was endorsed with a penal notice confirming the consequences of breaching the Order however this may be waived in appropriate circumstances (see **part 50.5(6) and (7)**)
Additionally, the Statement must be set out the grounds of the contempt and no additional grounds can be relied on at the hearing of the substantive application
Due to the punitive nature of the proceedings the contempt must be proved beyond a reasonable doubt

Cases:
Rolle v. Cat Island Air and Bain (ibid) (personal service of Order, Statement, Affidavit and Notice of Motion required)
Philip v Mottley Claim No. CV2020-00026 (Trinidad and Tobago) (service of order with penal notice dispensed with because contemnor is an Attorney)
Harmsworth v. Harmsworth [1987] 3 ALL ER 816 (Statement must contain all grounds relied on)
Cummings and Myeran v. Sumner Point Holdings (Ibid) (Standard of proof)

51.3 Saving for power to commit without application for purpose.

Nothing in the foregoing provisions of this Order shall be taken as affecting the power of the Court to make an order of committal of its own motion against a person guilty of contempt of court.

Notes:
This section preserves the court's power to initiate proceedings for contempt in the face of the court and in relation to any other matter that the court feels such action is appropriate.

Cases:
Donna Dorsett-Major v. Director of Public Prosecutions and The Attorney General (ibid) (scandalous remarks in affidavit)
In the matter of the contempt of Maurice Glinton Q.C. in the face of the Court Appeal Nos 1 and 2 of 2015 (contempt in the face of the court-remarks made during hearing)

51.4 Provisions as to hearing.

(1) Subject to paragraph (2), the Court hearing an application for an order of committal may sit in private in the following cases, that is to say -

(a) where the application arises out of proceedings relating to the wardship or adoption of an infant or wholly or mainly to the guardianship, custody, maintenance or upbringing of an infant, or rights of access to an infant;

(b) where the application arises out of proceedings relating to a person suffering or appearing to be suffering from mental disorder within the meaning of the Mental Health Act;

(c) where the application arises out of proceedings in which a secret process, discovery or invention was in issue;

(d) where it appears to the Court that in the interests of the administration of justice or for reasons of national security the application should be heard in private, but, except as aforesaid, the application shall be heard in open court.

(2) If the Court hearing an application in private by virtue of paragraph (1) decides to make an order of committal against the person sought to be committed, it shall in open court state -

(a) the name of that person;

(b) in general terms the nature of the contempt of court in respect of which the order of committal is being made; and

(c) if he is being committed for a fixed period, the length of that period.

(3) Except with the leave of the Court hearing an application for an order of committal, no grounds shall be relied upon at the hearing except the grounds set out in the originating application under rule 51.2.

(4) The foregoing provision is without prejudice to the powers of the Court to amend a

statement of case, make case management orders and rectify matters under rule 26.9.
(5) If on the hearing of the application the person sought to be committed expresses a wish to give oral evidence on his own behalf, he shall be entitled to do so.

Notes:
In general hearings under this Part should be heard in public so that the aim of discouraging interference with the administration of justice can be achieved however when the proceedings arise in relation to the matters listed this requirement is waived. The matters in relation to which committal proceedings are able to be held in private are all matters which are required to be heard in this manner or where for reasons specific to the matter the Court deems it just to hear the application in private and this derogation from the normal procedure should only be to the extent necessary to achieve the purpose of the privacy[1] (see *JIH v News Group Newspapers*[1]). If a decision is made to hear the committal proceedings in private the court must state the particulars of the order, namely the name of the person committed, the nature of the contempt and the length of the sentence in open court.

51.5 Power to suspend execution of committal order.

(1) The Court by whom an order of committal is made may by order direct that the execution of the order of committal shall be suspended, for such period or on such terms or conditions as it may specify.
(2) Where execution of an order of committal is suspended by an order under paragraph (1), the applicant for the order of committal must, unless the Court otherwise directs, serve on the person against whom it was made a notice informing him of the making and terms of the order under that paragraph.

Notes:
This section preserves the court's inherent power to suspend a sentence imposed by it as it deems appropriate in the circumstances of the indvidual case.

Cases:
James Fleck v Pittstown Point Landings Limited (ibid)

51.6 Discharge of person committed.

(1) The Court may, on the application of any person committed to prison for any contempt of court, discharge him.
(2) Where a person has been committed for failing to comply with a judgment or order requiring him to deliver anything to some other person or to deposit it in court or elsewhere, and a writ of sequestration has also been issued to enforce that judgment or order, then, if the thing is in the custody or power of the person committed, the commissioners appointed by the writ of sequestration may take possession of it as if it were the property of that person and, without prejudice to the generality of paragraph (1), the Court may discharge the person committed and may give such directions for

dealing with the thing taken by the commissioners as it thinks fit.

Notes:
This section codifies the court's inherent power to discharge a person committed for an offence. As in any other sentencing the court has the option to discharge a contemnor in place of a fine or custodial sentence.
Sub-section 2 applies when the committal order is accompanied by a Writ of sequestration and enables a person whose property has been sequestered to be dicharged upon the sequestration thus preserving their right to not be punished twice for the same offence.

51.7 Saving for other powers.

Nothing in the foregoing provisions of this Order shall be taken as affecting the power of the Court to make an order requiring a person guilty of contempt of court, or a person punishable by virtue of any enactment in like manner as if he had been guilty of contempt of the Court, to pay a fine or to give security for his good behaviour, and those provisions, so far as applicable, and with the necessary modifications, shall apply in relation to an application for such an order of committal order as they apply in relation to an application for an order of committal.

Notes:
In the same manner as the foregoing section this section preserves and codifies the Court's ability to use other remedies for contempt. In this jurisdiction fines are more often used that custodial sentences.

Cases:
Donna Dorsett-Major v. Director of Public Prosecutions and The Attorney General (ibid) (fine reduced by Court of Appeal)

PART 52 - SALES, ETC, OF LAND BY ORDER OF COURT

Section I – Sale of Land by Order of the Court

Part 52.1 Power to order sale of land.

(1) Where in any cause or matter relating to any land it appears necessary or expedient for the purposes of the cause or matter that the land or any part thereof should be sold, the Court may order that land or part to be sold, and any party bound by the order and in possession of that land or part, or in receipt of the rents and profits thereof, may be compelled to deliver up such possession or receipt to the purchaser or to such other person as the Court may direct.

(2) In this Part, “land” includes any interest in, or right over, land.

Notes:
This Part was preserved without modification from Order 31 of the old Rules of The Supreme Court and relates to the sale of land in enforcement of an order of the court. The application will generally be made in the course of enforcement proceedings and will utilize the general procedure set out in **Part 11** hereof.
Cases:
52.1(1) Necessary or expedient
Williams v. Omotoso Uswale-Nketia JSC Suit No. 1996/W239 (meaning of 'necessary or expedient')
Packman Lucas Ltd v. Mentmore Towers Ltd [2010] BLR 465 (factors to be taken into account when ordering sale)
52.1(2) Interest in or right over land
Dove Properties Limited v. The Treasurer of the Commonwealth of The Bahamas SCCiv App No. 133 of 2020 (meaning of 'interest in or right over land')
Walker v. Lundborg 2008 UKPC 17 (jointly owned property sold)

52.2 Manner of carrying out sale.

(1) Where an order is made, whether in court or in chambers, directing any land to be sold, the Court may permit the party or person having the conduct of the sale to sell the land in such manner as he thinks fit, or may direct that the land be sold in such manner as the Court may either by the order or under paragraph (4) direct for the best price that can be obtained, and all proper parties shall join in the sale and conveyance as the Court shall direct.

(2) The party entitled to prosecute the order must -

(a) leave a copy of the order at the judge’s chambers with a certificate that it is a true copy of the order; and

(b) subject to paragraph (3), take out an application to proceed with the order.

(3) Where an order for sale contains directions with regard to effecting the sale, the party entitled to prosecute the order shall not take out a summons under paragraph (2) unless and until he requires the further directions of the Court.

(4) On the hearing of the application the Court may give such directions, as it thinks fit for the purpose of effecting the sale, including, without prejudice to the generality of the

foregoing words, directions -

(a) appointing the party or person who is to have the conduct of the sale;
(b) fixing the manner of sale, whether by contract conditional on the approval of the Court, private treaty, public auction, tender or some other manner;
(c) fixing a reserve or minimum price;
(d) requiring payment of the purchase money into court or to trustees or other persons;
(e) for settling the particulars and conditions of sale;
(f) for obtaining evidence of the value of the property;
(g) fixing the security, if any, to be given by the auctioneer, if the sale is to be by public auction, and the remuneration to be allowed him;
(h) requiring an abstract of the title to be referred to conveyancing attorney of the Court or some other conveyancing attorney for his opinion thereon and to settle the particulars and conditions of sale.

Notes:
This section sets out the procedure for the conduct of the sale ordered under rule 1.
52.2 (1) "all proper parties"
Lake v Vento (Anguilla) AXAHCVAP2016/0012

52.3 Certifying result of sale.

(1) If either the Court has directed payment of the purchase money into court or the Court so directs, the result of a sale by order of the Court must be certified -
(a) in the case of a sale by public auction, by the auctioneer who conducted the sale; and
(b) in any other case, by the attorney of the party or person having the conduct of the sale, and the Court may require the certificate to be verified by the affidavit of the auctioneer or attorney, as the case may be.
(2) The attorney of the party or person having the conduct of the sale must leave a copy of the certificate and affidavit, if any, at the judge's chambers and, not later than two days after doing so, file the certificate and any affidavit in the Registry.

Notes
This measure is an additional protection to a party in conjunction with the Order and conveyancing documents. It is helpful if the certificate includes the purchase price, amount of fees and expenses payable to the auctioneer or other agents, amount of other expenses relative to the sale (eg Real Property Taxes paid or details of mortgages and encumbrances satisfied) and net amount received[1].

52.4 Mortgage, exchange or partition under order of the court.

Rules 2 and 3 shall, so far as applicable and with the necessary modifications, apply in relation to the mortgage, exchange or partition of any land under an order of the Court

as they apply in relation to the sale of any land under such an order.

Notes:
This section expands the previous sections to include the listed matters for the voidance of doubt.

SECTION II - CONVEYANCING ATTORNEY OF THE COURT

52.5 Reference of matters to conveyancing attorney of court.

The Court may appoint and refer to a conveyancing attorney of the Court -

(a) any matter relating to the investigation of the title to any property with a view to an investment of money in the purchase or on mortgage thereof, or with a view to the sale thereof;

(b) any matter relating to the settlement of a draft of a conveyance, mortgage, settlement or other instrument; and

(c) any other matter it thinks fit, and may act upon his opinion in the matter referred.

Notes:
The Conveyancing attorney becomes by virtue of this section an agent of the court in the same manner as any other professional so appointed. However as between the Vendor and the Purchaser the attorney is treated as the agent of the Vendor.

Cases:
Re. Bannister, Broad v Hunton(1879) 12 ChD 131

52.6 Objection to conveyancing attorney's opinion.

Any party may object to the opinion given by any conveyancing attorney on a reference under rule 52.5, and if he does so the point in dispute shall be determined by the judge either in chambers or in court as he thinks fit.

52.7 Distribution of references among conveyancing attorney.

The Court may direct or transfer a reference to a particular conveyancing attorney of the Court.

Notes:
There is no list of Attorneys designated for this purpose in this jurisdiction therefore Attorneys may be agreed or a choice made by the court between attorneys submitted by the parties.

52.8 Obtaining attorney's opinion on reference.

(1) When any matter is referred to conveyancing attorney of the Court, a minute of the

order of reference shall be prepared and signed by the Registrar.
(2) A minute signed as mentioned in paragraph (1) is sufficient authority for attorney to proceed with the reference.

Notes:
The reference should also include the Order and any necessary documents relative to the land which will assist the Conveyancing attorney with the opinion[1].

PART 53 – RECEIVERS BY APPLICATION; RECEIVERS BY EQUITABLE EXECUTION; DEBENTURE HOLDERS' ACTION AND RECEIVER'S REGISTER

SECTION I – RECEIVERS BY APPLICATION

53.1 Application for receiver and injunction.

(1) An application for the appointment of a receiver must be made by application.
(2) An application for an injunction ancillary or incidental to an order appointing a receiver may be joined with the application for such order.
(3) Where the applicant wishes to apply for the immediate grant of such an injunction, he may do so without notice.
(4) The Court hearing an application under paragraph (3) may grant an injunction restraining the party beneficially entitled to any interest in the property of which a receiver is sought from assigning, charging or otherwise dealing with that property until after the hearing of an application for the appointment of the receiver and may require such application to be issued and to be returnable on such date as the Court may direct.

Notes:
CPR 53 represents the successor provisions to the previous Orders 30 (Receivers) and 51 (Receivers by way of equitable execution).

The Supreme Court has the power pursuant to section 21 of the Supreme Court Act to appoint a Receiver whenever it is "just and convenient" to do so. Under section 21 the remedy of the appointment of a receiver is usually more invasive and expensive than the granting of an injunction. As such, the Courts will generally apply a more restrictive approach than for injunctions (the *American Cyanamid* guidelines). However, as in the *American Cyanamid* guidelines, the Court should first satisfy itself that there is a triable issue before consisting whether the appointment of a receiver would be 'just and convenient'. See *Arbuthnot Leasing International Limited v Havelet Leasing Limited and Others* [1990] BCC 636. A common concern of the Court is that to satisfy itself that the appointment of a Receiver will serve to 'hold the ring' and preserve assets as between the parties pending trial. See judgment of Harman J in *Re a company (00596 of 1986)* [1987] BCLC 133 and *Wilton-Davies v Kirk* [1998] 1 BCLC 274.

For a recent consideration of the principles in the Bahamas, see the Bahamas Supreme Court case of *Investar Securities Ltd. v Sun Island Transfers Ltd.* [2021] 1 BHS J. No. 32, approving dicta in *Asiatt v Corporation of Southampton* (1880) 16 Ch D 143, where *Jessel MR* discussed how the *just and convenient test* should be considered. He stated:

> *"…the words "just and convenient" did not mean that the Court was to grant an injunction simply because the Court thought it convenient: it meant that the Court should grant an injunction for the protection of rights or for the prevention of injury according to legal principles; but the moment you find there is a legal principle, that a man is about to suffer a serious injury, and that there is no pretense for inflicting that injury upon him, it appears to me that the Court ought to interfere. Now it has been said – and I think truly said – that, as a general rule, the Court only interferes where there is a question as to property, I do not think that the interference of the Court is absolutely confined to that now; there may be cases on which the Court would interfere even when personal status is the only thing in question; but it is not necessary for me to decide that question at the present moment."*

Rule 53.1(3) provides that an application for the appointment of a receiver may be made without notice and by 52.1(1) must be made by an application, which includes being supported by written evidence. Although the application may be made without notice that will not be in the ordinary case. In the usual case the application notice should be served on the person to be appointed receiver and every other party to the claim. A without notice application may be suitable in cases of urgency or other special circumstances warranting it. In that event the court is likely to grant an interim order only with the usual permission to all parties to apply to vary or discharge the order.

Guidance as to the evidence required to be given (by affidavit pursuant to Part 11) may be found in PD 69 to the English CPR. In particular, Paragraph 4.1 of the PD sets out comprehensively what, in England & Wales, the written evidence in support of the application must contain and best practice is to comply with this guidance where unless inapplicable. This evidence will be given by affidavit in The Bahamas, rather than by Witness Statement as in England & Wales. Nevertheless paragraph 4 of the English P.69 can be viewed as helpful guide as to the matters that a Court is likely to find helpful in support of an application for a receiver,

"4.1 The written evidence in support of an application for the appointment of a receiver must—

(1) explain the reasons why the appointment is required;

(2) give details of the property which it is proposed that the receiver should get in or manage, including estimates of—

(a) the value of the property; and

(b) the amount of income it is likely to produce;

(3) if the application is to appoint a receiver by way of equitable execution,give details of—

(a) the judgment which the applicant is seeking to enforce;

(b) the extent to which the debtor has failed to comply with the judgment;

(c) the result of any steps already taken to enforce the judgment; and

(d) why the judgment cannot be enforced by any other method; and

(4) if the applicant is asking the court to allow the receiver to act—

(a) without giving security; or

(b) before he has given security or satisfied the court that he has security in place, explain the reasons why that is necessary.

4.2 In addition, the written evidence should normally identify an individual whom the court is to be asked to appoint as receiver ('the nominee'), and should—

(1) state the name, address and position of the nominee;

(2) include written evidence by a person who knows the nominee, stating that he believes the nominee is a suitable person to be appointed as receiver, and the basis of that belief; and

(3) be accompanied by written consent, signed by the nominee, to act as receiver if appointed.

4.3 If the applicant does not nominate a person to be appointed as receiver, or if the court decides not to appoint the nominee, the court may—

(1) order that a suitable person be appointed as receiver; and

(2) direct any party to nominate a suitable individual to be appointed.

4.4 A party directed to nominate a person to be appointed as receiver must file written evidence containing the information required by paragraph 4.2 and accompanied by the written consent of the nominee."

As set out above, paragraphs 4.3 and 4.4 of the English PD 69 deals with situations where the applicant for the appointment of a receiver does not nominate a person to be appointed or where the court in its discretion decides not to nominate the person suggested; in either case this will be dealt with in the order made.

An Order appointing a receiver should provide initial directions in relation to the appointment. Paragraph 6 of the English PD 69 lists the matters on which directions will be usually given. A draft order should accompany the application. While the directions should preferably be set out in the order appointing the receiver, the application may be made separately on application. Paragraph 6 of the English PD69 provides as follows:

"6.1 The court may give directions to the receiver when it appoints him or at any time afterwards.

6.2 The court will normally, when it appoints a receiver, give directions in relation to security—see paragraph 7 below.

6.3 Other matters about which the court may give directions include—

(1) whether, and on what basis, the receiver is to be remunerated for carrying out his functions;

(2) the preparation and service of accounts—see rule 69.8(1) and paragraph 10 below;

(3) the payment of money into court; and

(4) authorising the receiver to carry on an activity or incur an expense.

Directions relating to security—rule 69.5"

53.1(4) gives the court the express jurisdiction to enjoin a party pending an inter parties hearing for the appointment of a receiver.

Where a receivership order has been made over assets the beneficial ownership of which has already been determined in proceedings, a mere assertion of ownership of those assets by a third party (who was not a party to the proceedings) is not sufficient to set aside the receivership order: *Behbehani v Behbehani* [2019] EWCA Civ 2301; [2020] 1 F.C.R. 603. The third party is not bound by the order in the proceedings, but its claim to ownership may be determined as an issue in the receivership application.

53.2 Giving of security by receiver.

1) Where a judgment is given, or order made, directing the appointment of a receiver, then, unless the judgment, or order otherwise directs, a person shall not be appointed receiver in accordance with the judgment or order until he has given security in accordance with this rule.
2) Where by virtue of paragraph (1), or of any judgment or order appointing a person named therein to be receiver, a person is required to give security in accordance with this rule he must give security approved by the Court duly to account for what he receives as receiver and to deal with it as the Court directs.
3) Unless the Court otherwise directs, the security shall be by guarantee or by an undertaking.
4) The guarantee or undertaking must be filed in the Registry, and it shall be kept as of record until duly vacated.

Notes:

Security: if the applicant is seeking permission for the receiver to act without giving security or before security is given then the evidence should be given by way of affidavit from a person who knows the receiver and their belief of fitness. The general position is that the court is likely to require the receiver to give security by guarantee or undertaking before they begin to act or within a specified time unless there is sufficient evidence that they have already in force sufficient security to cover any liability for acts and omissions as receiver.

The order appointing the receiver should provide that the appointment is determined unless security is given as set out in the order. Good practice suggests that a draft order should in every case be available to the judge together with details of guarantee (including any draft guarantee with a clearing bank or insurance company) or undertaking to be given.

53.3 Remuneration of receiver.

A person appointed receiver shall be allowed such proper remuneration, if any, as may be fixed by the Court.

Notes:
This rule makes it clear that a receiver may only charge for his services if the court has so authorised and that authorisation will be given in an order. A receiver may only, therefore, charge for services if the court so directs and specifies the basis on which they are to be remunerated. The court will also be likely in its order to specify who is to be responsible for the receiver's charges and identify the fund or property from which such remuneration is to be taken.

Guidance for the Court as to the matters to be taken into account in determining the remuneration to be authorised on the basis of what is reasonable and proportionate may be found in Rule 69.7(4) of the English CPR and para.9.2 of the English practice direction 69. The court may refer the determination of a receiver's remuneration to a Registrar or Deputy Registrar. The court may take such a course if the remuneration is substantial and if it feels that the Registrar is best placed to determine amounts.

Best practice guidance as to what written evidence that a receiver may consider providing when seeking determination of their remuneration is provided by PD69 paragraph 9.4 of the English CPR. The court may require the receiver to provide further information in support of their claim to remuneration (para.9.5(1) of the English PD 69). It is good practice to submit to the parties the receiver's remuneration claim for approval before seeking the court's determination and approval;

A receiver appointed under the general law or under specific statutory provisions is entitled to recover their remuneration, costs and expenses from the assets over which he is appointed. Expenses should be treated separately from remuneration. See para.9.6 of the English PD 69. In an appropriate case a receiver should consider whether it is appropriate to seek the court's approval in respect of expenses, particularly if such expenses may be contentious or require scrutiny.

In England, remuneration may be ordered in respect of work required to be done after discharge: Glatt v Sinclair [2013] EWCA Civ 241; [2013] 1 W.L.R. 3602; and the court has power to direct that a contingency sum may be retained by the receiver following discharge to cover costs and expenses following discharge: *Bartlett v Somaia* [2020] EWHC 3718 (QB).

As in England, there appears to be no reason why the court cannot in an appropriate case make an interim order authorising a receiver's remuneration; equally in a suitable case an interim order specifying how the remuneration is to be determined and who is responsible for paying the receiver or the fund from which the remuneration is to be recovered.

53.4 Receiver's accounts.

(1) A receiver must submit accounts to the Court at such intervals or on such dates as the Court may direct in order that they may be passed.
(2) Unless the Court otherwise directs, each account submitted by a receiver must be accompanied by an affidavit verifying it.
(3) The receiver's account and affidavit, if any, must be filed in at the Registry, and the party having the conduct of the cause or matter must thereupon obtain an appointment for the purpose of passing such account.
(4) The passing of a receiver's account must be certified by the Registrar.

Notes:
The court may order the receiver to prepare and serve accounts. The order can require the receiver to do so by a specified date or at specified intervals. The rule does not provide for the service of the accounts on the parties, though it is likely implied, and ought to in the ordinary case be as directed by the Court.
In practice, the court need not become involved in the receiver's accounts if the accounts are agreed by the parties, after service of the accounts, or if no objection is taken by them.

The entitlement of parties served with the accounts to object to items in it is not express in the Bahamian rules, in contrast to the equivalent English rules under CPR 69. This is likely to be deemed subject to the discretion of the Court, though in the ordinary course a Court should allow challenge of items by a party with a legitimate interest therein.

53.5 Payment of balance, etc., by receiver.

The receiver must pay into court any balance shown on the accounts under rule 53.4 as due from him, or such part thereof as the Court may certify as proper to be paid in by him, within fourteen days of the passing of any account or within such other period as fixed by the Court.

53.6 Default by receiver.

(1) Where a receiver fails to attend for the passing of any account of his, or fails to submit any account, make any affidavit or do any other thing which he is required to submit, make or do, he and any or all of the parties to the cause or matter in which he was appointed may be required to attend in chambers to show cause for the failure, and the Court may, either in chambers or after adjournment into court, give such directions as it thinks proper including, if necessary, directions for the discharge of the receiver and the appointment of another and the payment of costs.
(2) Without prejudice to paragraph (1), where a receiver fails to attend for the passing of any account of his or fails to submit any account or fails to pay into court on the date fixed by the Court any sum shown by his account as due from him, the Court may disallow any remuneration claimed by the receiver in any subsequent account and may, where he has failed to pay any such sum into court, charge him with interest at the rate of twelve per cent per annum on that sum while in his possession as receiver

Section II - Receivers By Way of Equitable Execution

53.7 Appointment of receiver by way of equitable execution.

(1) Where an application is made for the appointment of a receiver by way of equitable execution, the Court in determining whether it is just or convenient that the appointment should be made shall have regard to the amount claimed by the judgment creditor, to the

amount likely to be obtained by the receiver and to the probable costs of his appointment and may direct an inquiry on any of these matters or any other matter before making the appointment.
(2) Where on an application for the appointment of a receiver by way of equitable execution it appears to the Court that the judgment creditor is resident outside the scheduled territories, or is acting by order or on behalf of a person so resident, then, unless the permission of the Central Bank of The Bahamas required by the Exchange Control Regulations has been given unconditionally or on conditions that have been complied with, any order for the appointment of a receiver shall direct that the receiver shall pay into court to the credit of the cause or matter in which he is appointed any balance due from him after deduction of his proper remuneration.

Notes:
This section is the successor to the previous Order 51 of Rule 1 of the Rules of the Supreme Court. According to the Supreme Court Practice 1999 Order 51/1/3,

> "*there are various interests in property to which a judgment debtor may be entitled, yet which cannot be taken in execution under any of the processes specified in these rules. Such interests may generally be reached by the appointment of a receiver; supplemented, if necessary, by an injunction restraining the judgment debtor from dealing with the property*."

See also section 64 of the Supreme Court Act, which extends the power of the Court to appoint a receiver by way of equitable execution to operate in relation to all legal estate and interests in land.

For the principles relating to appointment of receivers by way of equitable execution see *JSC VTB Bank v Skurikhin* [2015] EWHC 2131 (Comm), *Cruz City 1 Mauritius Holdings v Unitech Ltd* [2014] EWHC 3131 (Comm); [2015] 1 B.C.L.C. 377 at [47]. See also the Bahamian decision of *Skinner v. Jervis and another* [2010] 2 BHS J No. 145, in which it was confirmed that the power of the Court to appoint a receiver by way of equitable execution is discretionary. The Court in determining whether to make an appointment must consider the amount claimed by the judgment creditor, the amount likely recoverable by the receiver, and the probable costs of his appointment. The court can direct an inquiry into all matters before making an appointment.
See also *Maclaine Watson & Co Ltd v International Tin Council* [1987] 3 All ER 787 (the Court has jurisdiction to appoint a receiver in aid of equitable execution where the processes of legal execution cannot be used).
See also *Bourne v Colodense Ltd* [1985] IRLR 339 (the Court can refuse an Order for an appointment if it would be fruitless because there was nothing for the receiver to obtain.)
See also *Soinco S.A.C.I. and another v Novokuznetsk Aluminum Plant and others* [1997] 3 All ER 523 (the Court can appoint a receiver by way of equitable execution to receive future debts as well as debts due or accruing at the date of an Order).
See also Masri v Consolidated Contractors International (UK) Ltd and others (No 2) - [2008] 2 All ER (Comm) 1099 (the appointment of a receiver was not limited to property as might be taken in execution, but extends to whatever is considered in equity to be assets.

53.8 Application of rules as to appointment of receiver, etc.

An application for the appointment of a receiver by way of equitable execution may be made in accordance with rule 53.1 and rules 53.2 to 53.6 shall apply in relation to a receiver appointed by way of equitable execution as they apply in relation to a receiver appointed for any other purpose.

SECTION III – DEBENTURE HOLDERS' ACTION AND RECEIVER'S REGISTER

53.9 Receiver's register.

Every receiver appointed by the Court in an action to enforce registered debentures or registered debenture stock shall, if so directed by the Court, keep a register of transfers of, and other transmissions of title to, such debentures or stock (hereinafter referred to as "the receiver's register").

53.10 Registration of transfers, etc.

1) Where a receiver is required by rule 53.9 to keep a receiver's register then, on the application of any person entitled to any debentures or debenture stock by virtue of any transfer or other transmission of title, and on production of such evidence of identity and title as the receiver may reasonably require, the receiver shall, subject to the following provisions of this rule, register the transfer or other transmission of title in that register.
2) Before registering a transfer the receiver must, unless the due execution of the transfer is proved by affidavit, send by post to the registered holder of the debentures or debenture stock transferred at his registered address, or by email if there is a registered email address for the holder of the debentures or debenture stock, a notice stating —
   a. that an application for the registration of the transfer has been made; and
   b. that the transfer will be registered unless within the period specified in the notice the holder informs the receiver that he objects to the registration, and no transfer shall be registered until the period so specified has elapsed.
3) The period to be specified in the notice shall in no case be less than seven days after a reply from the registered holder would in the ordinary course of post reach the receiver if the holder had replied to the notice on the day following the day when in the ordinary course of post the notice would have been delivered at the place to which it was addressed.

4) On registering a transfer or other transmission of title under this rule the receiver must indorse a memorandum thereof on the debenture or certificate of debenture stock, as the case may be, transferred or transmitted, containing a reference to the action and to the order appointing him receiver.

53.11 Application for rectification of receiver's register.

(1) Any person aggrieved by anything done or omission made by a receiver under rule 53.10 may apply to the Court for rectification of the receiver's register, the application to be made by application notice in the action in which the receiver was appointed.
(2) The summons shall in the first instance be served only on the claimant or other party having the conduct of the action but the Court may direct that the application notice be served on any other person appearing to be interested.
(3) The Court hearing an application under this rule may decide any question relating to the title of any person who is party to the application to have his name entered in or omitted from the receiver's register and generally may decide any question necessary or expedient to be decided for the rectification of that register.

53.12 Receiver's register evidence of transfers, etc.

Any entry made in the receiver's register, if verified by an affidavit made by the receiver or by such other person as the Court may direct, shall in all proceedings in the action in which the receiver was appointed be evidence of the transfer or transmission of title to which the entry relates and, in particular, shall be accepted as evidence thereof for the purpose of any distribution of assets, notwithstanding that the transfer or transmission has taken place after the making of a certificate in the action certifying the holders of the debentures or debenture stock certificates.

53.13 Proof of title of holder of bearer debenture, etc.

(1) This rule applies in relation to an action to enforce bearer debentures or to enforce debenture stock in respect of which the company has issued debenture stock bearer certificates.
(2) Notwithstanding that judgment has been given in the action and that a certificate has been made therein certifying the holders of such debentures or certificates as are referred to in paragraph (1), the title of any person claiming to be such a holder shall, in the absence of notice of any defect in title, be sufficiently proved by the production of the debenture or debenture stock certificate, as the case may be, together with a certificate of identification signed by the person producing the debenture or certificate

identifying the debenture or certificate produced and certifying the person, giving his name and address, who is the holder thereof.

(3) Where such a debenture or certificate as is referred to in paragraph (1) is produced in the chambers of the judge, the attorney of the claimant in the action must cause to be endorsed thereon a notice stating —

(a) that the person whose name and address is specified in the notice, being the person named as the holder of the debenture or certificate in the certificate of identification produced under paragraph (2), has been recorded in the chambers of the judge as the holder of the debenture or debenture stock certificate, as the case may be; and (b) that that person will, on producing the debenture or debenture stock certificate, as the case may be, be entitled to receive payment of any dividend in respect of that debenture or stock unless before payment a new holder proves his title in accordance with paragraph (2); and

(b) that if a new holder neglects to prove his title as aforesaid he may incur additional delay, trouble and expense in obtaining payment.

(4) The attorney of the claimant in the action must preserve any certificates of identification produced under paragraph (2) and must keep a record of the debentures and debenture stock certificates so produced and of the names and addresses of the persons producing them and of the holders thereof, and, if the Court requires it, must verify the record by an affidavit.

53.14 Requirements in connection with payments.

(1) Where in an action to enforce any debentures or debenture stock an order is made for payment in respect of the debentures or stock, the Accountant-General shall not make a payment in respect of any such debenture or stock unless either there is produced to him the certificate for which paragraph (2) provides or the Court has in the case in question for special reason dispensed with the need for the certificate and directed payment to be made without it.

(2) For the purpose of obtaining any such payment the debenture or debenture stock certificate must be produced to the attorney of the claimant in the action or to such other person as the Court may direct, and that attorney or person must indorse thereon a memorandum of payment and must make and sign a certificate certifying that the statement set out in the certificate has been endorsed on the debenture or debenture stock certificate, as the case may be, and send the certificate to the Accountant-General.

PART 54 – JUDICIAL REVIEW[118]

54.1 Cases appropriate for application for judicial review.

(1) An application for —
(a) an order of mandamus, prohibition or certiorari; or
(b) an injunction under section 18 of the Act restraining a person from acting in any office of a public nature in which he is not entitled to act, shall be made by way of an application for judicial review in accordance with the provisions of this Part.
(2) An application for a declaration or an injunction, not being an injunction mentioned in paragraph (1)(b), may be made by way of an application for judicial review, and on such an application the Court may grant the declaration or injunction claimed if it considers that, having regard to —
(a) the nature of the matters in respect of which relief may be granted by way of an order or mandamus, prohibition or certiorari;
(b) the nature of the persons and bodies against whom relief may be granted by way of such an order; and
(c) all the circumstances of the case, it would be just and convenient for the declaration or injunction to be granted on an application for judicial review.

Notes:
In judicial review proceedings, the applicant has the onus of establishing that a ground for review exists and warrants a hearing by the Court.

Cases:
CPR 54.1 Cases appropriate for application for judicial review.

Judicial review is concerned *"with the legality rather than the merits of the decision, with the jurisdiction of the decision-maker and the fairness of the decision-making process rather than whether the decision was correct.": Kemper Reinsurance Co. v Minister of Finance [2000] 1 A.C. 1 at 14.*

Judicial Review is the process by which the Court exercises a *"supervisory jurisdiction over public decision-making bodies to ensure that those bodies observe the substantive principles of public law and do not exceed or abuse their powers while performing their duties.": Phillippa Michelle Finlayson v The Bahamas Pharmacy Council [2019] 1 BHS J. No. 63 at 130.*

The exercise of a public function is amenable to judicial review even in the absence of there being a statutory source for the power being exercised: see paragraphs 3-024 and 3-025 of De Smith and Woolf on Judicial Review (8th Edn)." Decisions regarding the manner and conduct of a *"consultation are also justiciable, even before the consultation has concluded."* Briefly put, each decision in the exercise of a public function is justiciable. [*R v The Rt. Hon. Perry Christie, Prime Minister and Minister of Finance, et al ex parte Smith and Another 2015/PUB/jrv/FP/00005 (decision dated 5 May 2016) at 48-50]*

The powers derived from the prerogative are public law powers and their exercise is amenable to the judicial review jurisdiction: *Council of Civil Service Unions v Minister for the Civil Service [1985] A.C. 374 at 410-*

[118] There is little change from Order 53 of the Rules of the Supreme Court 1978 ("**RSC**") and the practice as developed and outlined in The Supreme Court Practice 1999, Volume 1 ("**1999 White Book**") continues to apply, subject to a few exceptions. Accordingly, references herein are mostly to UK cases decided under the Order 53 regime, and local cases decided under the RSC.

411. There are three established grounds upon which administrative action is subject to control by judicial review: "*illegality", "irrationality" or "Wednesbury unreasonableness"* and "procedural impropriety", with a caveat for additional development on a case-by-case basis which may add further grounds such as the principle of "proportionality"; and, accordingly to Professor Albert Fiadjoe in his text, *Commonwealth Caribbean Public Law (3rd ed)*, p.27, the fourth ground and "*most important category as far as the Caribbean States are concerned: unconstitutionality*."

While there is admittedly some overlap between judicial review and constitutional challenges, the case laws shows that as a matter of principle judicial review is not the appropriate vehicle for seeking substantive redress of fundamental rights, or to challenge the validity of primary legislation: *R v Dwight Armbrister* [2021] 1 BHS J. N. 2; *Dwayne Woods et. al. v. John Pinder et. al.* [2020/PUB/jrv/21 at 30.

A judicial review is not an appeal. The function of the court in judicial review is not to act as an appellate forum from the body whose decision is being challenged: *Bethell v. Barnett and Others [2011] 1 BHS No. 30 at 85.* If the process was fair and the decision not deviant, then the order sought under judicial review must be refused: *Hugh Wildman v The Judicial and Legal Services Commission of the Eastern Caribbean States, Civil Appeal No. 9 of 2006 at paragraph 31*.

An Applicant seeking leave to bring judicial review proceedings *"should first exhaust any right of appeal or other means provided for challenging the decision before making an application for judicial review." "In determining whether the Applicant had an alternative remedy, the Court considers whether the alternative remedy offers recourse that is equal to or better than the recourse available under judicial review.": The Queen and another v Dwight Armbrister [2021] 1 BHS J. No. 2 at 19- 21.*In other words, the alternative remedy must be adequate to debar judicial review.

Where Parliament has provided by statute appeal procedures, as in the taxing statutes, it will only be very rarely that the courts will allow the collateral process of judicial review to be used to attack an appealable decision: *R v Inland Revenue Commissioners, ex parte Preston [1985] AC 835 at page 852*).

In *Dwayne Woods et al v John Pinder et* al *2020/PUB/jrv/21 at 17,* the Respondents raised the preliminary challenge that the Applicants had not exhausted alternative remedies before applying for judicial review. The Court held that an application for judicial review will be denied where there are available alternative remedies. *"The legal principle is simply that judicial review is a remedy of last resort and not first recourse and the Court will exercise its discretion to refuse to hear applications for judicial review where there are available alternative remedies (See also Isaacs JA in Moxey v Bahamas Bar Council and others [2017] 1 BHS J. No. 125).*

54.2 Joinder of claims for relief.

On an application for judicial review any relief mentioned in rule 54.1(1) or (2) may be claimed as an alternative or in addition to any other relief so mentioned if it arises out of or relates to or is connected with the same matter.

Notes:
See 1999 White Book, paragraph 53/14/46, page 912

54.3 Grant of leave to apply for judicial review.

(1) No application for judicial review shall be made unless the leave of the Court has been obtained in accordance with this rule.
(2) An application for leave shall be made without notice to a judge by filing in the Registry —
(a) a notice in Form JR1 containing a statement of —
(i) the name and description of the applicant;
(ii) the relief sought and the grounds upon which it is sought;
(iii) the name and address of the applicant's attorney, if any;
(iv) the applicant's address for service; and
(b) an affidavit which verifies the facts relied on.
(3) The judge may determine the application without a hearing, unless a hearing is requested in the notice of application, and need not sit in open Court provided that in no case shall leave be refused or granted on terms not sought in the application without giving the applicant a hearing.
(4) Where the application for leave in any criminal cause or matter is refused by the judge, or is granted on terms, the applicant may renew it by applying to the Court of Appeal.
(5) In order to renew his application for leave the applicant shall, within ten days of being served with notice of the judge's refusal, file in the Registry notice of his intention in Form JR2.
(6) The Court hearing an application for leave may allow the applicant's statement to be amended, whether by specifying different or additional grounds of relief or otherwise, on such terms, if any, as it thinks fit provided that if the applicant shall fail to amend his statement within the time specified by the order of the court then such order shall cease to have effect unless the court orders otherwise.
(7) The Court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates.
(8) Where leave is sought to apply for an order of certiorari to remove for the purpose of its being quashed any judgment, order, conviction or other proceedings which is subject to appeal and a time is limited for the bringing of the appeal, the Court may adjourn the application for leave until the appeal is determined or the time for appealing has expired.
(9) If the Court grants leave, it may impose such terms as to costs and as to giving security as it thinks fit.
(10) Where leave to apply for judicial review is granted, then —
(a) if the relief sought is an order of prohibition or certiorari and the Court so directs, the grant shall operate as a stay of the proceedings to which the application relates until the determination of the application or until the Court otherwise orders;
(b) if any other relief is sought, the Court may at any time grant in the proceedings such interim relief as could be granted in an action begun by writ.

Notes:

Part 54.3 reflects a slight change from the equivalent Order 53 rule 3 of the RSC.
In particular, it omits what was formerly Order 53 r 3(4)(b). Rule 3(4)(b) had provided for an applicant to renew his application for leave "in any other case" (i.e., other than a criminal cause or matter) to a single

judge in open court, provided *that "…no application for leave may be renewed in any non-criminal cause or matter in which the judge has refused leave under paragraph (3) after a hearing."*
There is now no ability to renew an application for leave in a non-criminal cause or matter. Presumably, where leave to apply for judicial review has been refused in a civil matter after a hearing, the applicant may appeal the refusal to the Court of Appeal in accordance with the normal rules regarding appeals under s. 10 of the Court of Appeal Act.

The proviso at 3(6) for leave to amend a statement to lapse if the amendment is not effected within the time specified in the order is likewise an addition to what was contained in Order 53 r 3(6).

There are also differences in the new forms prescribed for use under Part 54 and annexed to the CPR: See Form JR1: "Application for Leave to Apply for Judicial Review"; and Form JR2: "Notice of intention to Renew Application for Leave to Apply for Judicial Review". (See further, the note to 54.10.)

Cases:

54.3 Grant of leave to apply for judicial review

O'Reilly v Mackman *[1983] 2 A.C. 237 at 280 (*The purpose of the leave requirement is to *"protect the public administration against false, frivolous or tardy challenges to official action.")*

Jarol Investments Limited (t/A Chances Games) v The Hon. Chester Cooper et al 2023/PUB/jrv/FP/0004
(The Court refused leave to commence judicial review pursuant to CPR 54.3. The Court held that on an application for leave to apply for judicial review, the applicant has an "exceptionally low" threshold to meet. However, the applicant must establish that (i) he/she has a sufficient interest in the matter to which the application relates; (ii) the application was made promptly and in any event within 6 months from the date when the grounds for the application first arose (unless the Court considers that there is good reason for extending the period within which the application shall be made); and (iii) there is an arguable ground with a realistic prospect of success. The Court also has to consider whether the applicant has an alternative remedy available. The Court refused leave to commence judicial review noting that the application was "woefully" out of time, as the decision against which the intended claimant wished to proceed was comprised in a letter dated 26 March 2020 whereas the application for leave was only filed on 9 June 2023. The Court found that the destruction caused by Hurricane Dorian in September 2019 and the COVID-2019 pandemic in March 2020 were not good reasons to extend the period beyond which the application ought to have been made as provisions were made for parties to commence and continue their actions. The Court also found the claimant had an alternative remedy.)

Rosetta Foster and another v The Attorney General and another [2020] 1 BHS J. No. 80 at [9] ([Rule 54.3 (1)] provides that no application for judicial review shall be granted unless the leave of the Court has been obtained. "*The permission stage in judicial review is to filter out challenges where the applicant either does not have the necessary interest to maintain the challenge, or in which the claim is unarguable, doomed to fail or subject to some legal or discretionary bar."*)

IRC v National Federation of Self Employed and Small Businesses [1982] A.C. 617 Page 642 (The procedure involves two stages: *"(1) the application for leave to apply for judicial review, and (2) if leave is granted, the hearing of the application itself. The former, or "threshold," stage is regulated by rule 3. The application for leave to apply for judicial review is made initially ex parte but may be adjourned for the persons or bodies against whom relief is sought to be represented*.")

IRC v National Federation of Self Employed and Small Businesses [1982] A.C. 617 Page 644 (Leave to apply for the relief should be granted if on a "*quick perusal of the material,"* the court in the exercise of its discretion thinks there is an arguable case in favour of granting the applicant the relief claimed)

R v Secretary of State for the Home Dept Ex Parte Rukshanda Begum [1990] WL 753267 *("For my part, as it seems to me, a judge who is confronted with an application for leave to apply for judicial review should grant it if he is clear that there is a point fit for further investigation on a full inter partes basis with all such evidence as is necessary on the facts and all such argument as is necessary on the law. If he is satisfied*

that there is no arguable case he should dismiss it. But there is an inter-mediate category of cases in which the judge, on looking at the papers which support the application, can very reasonably come to the conclusion that he really does not know whether there is or is not an arguable case, either because the facts are not clear or because he has not received sufficient assistance with the law to enable him to be satisfied as to precisely what the relevant law is. That is not necessarily a criticism of counsel supporting the application: it may well be inherent in the problem. In those circumstances, where he is in doubt, the right course, in my view, is always to invite the putative respondent to attend and to make representation as to whether leave should or should not be granted. This is not to say that the subsequent inter partes hearing should become anything remotely like the hearing which would ensue if leave were granted. It is analogous to the approach which was considered by Lord Diplock in Antaios Compania Naviera SA v. Salen Rederierna AB (1985) A.C. 191 at p. 207 in a quite different context, that of arbitration: if, taking account of a brief argument on either side, the judge is satisfied that there is a case fit for further consideration, then he should give leave. Adjournment for an inter partes hearing will at least enable the judge to have a bird's eye view of the contentions on both sides and any doubts or difficulties are likely to be resolved one way or the other; that is to say either in favour of granting leave or in favour of refusing leave, or resolved in the sense that it is obviously very difficult and needs further thought, which of course amounts to a requirement for leave to be granted.")

Pindling v Bahamas Electric Corporation BS 1996 SC 44 ("*sufficiency of interest remains an inescapable requirement"* to access judicial review)

Callenders & Co. (a firm) v. The Comptroller of H.M. Customs [2014] 1 BHS J. No. 45 (For a court to grant leave for judicial review, it must be determined whether an applicant has a sufficient interest in the matter.)

Regina v The Water And Sewerage Corporation and Others [2008] 5 BHS J No. 79 at 18 (Applications for interlocutory reliefs in a judicial review application may be made and granted at any time before the hearing of the substantive judicial review application is completed. It may be made and may be granted before leave is granted. The power or the jurisdiction to grant an interlocutory injunction or other interim relief in judicial review proceedings as provided under [54.3 (10)] is ancillary to the application for leave to move for judicial review, or the substantive application for judicial review. The provisions of [54.5 (5)] begins to run from the date when leave to move for judicial review is granted.)

Regina v The Water And Sewerage Corporation and Others [2008] 5 BHS J No. 79 at 19 ("The practice and procedure in The Bahamas relating to applications for interlocutory injunctions or other interim relief pending the determination of the substantive judicial review proceedings follow the practice and procedure stated in the following passage in The Supreme Court Practice (The 1999 White Book) 1999 Vol. 1 "53/14/48 Practice and procedure relating to application for interlocutory relief – In R. v Kensington & Chelsea Royal London Borough Council, ex p. Hammell [1989] 1 All E.R. 1202, the Court of Appeal held: (1) The jurisdiction to grant interim relief in judicial review proceedings arises on the grant of leave to move for judicial review. An application for an interlocutory injunction or other interim relief can be made ex parte *with the application for leave. In deciding whether to grant interlocutory relief at the* ex parte *stage, the Judge should consider whether the urgency and the other circumstances of the case warrant the grant of* ex parte *relief and should have regard to the approach adopted in the case of applications under 0.29 for* ex parte *relief. Unless the Judge is satisfied that the urgency and other circumstances of the case justify the grant of* ex parte *relief, he should adjourn the application for interlocutory relief for* inter partes *hearing. (2) With a view to avoiding two hearings, the applicant should give notice to the respondent (s) of any* ex parte *application for interim relief, so that the respondent (s) can consider whether to attend the* ex parte *hearing and make representations. (3) Applying* De Falco v. Crawley Borough Council [1980] 1 Q.B. 460; [1980] 1 All E.R. 913*, interim relief by way of mandatory injunction should be granted only where a strong prima facie case of breach of duty has been made out at the interlocutory stage.* Cf. R. v. Cardiff City Council, ex p. Barry*, CA, November 6, 1988 (unrept'd.) where the Court of Appeal granted an injunction at the* ex parte *stage when granting leave to move for judicial review in respect of a local authority's decision under ss. 62 and 63 of the Housing Act 1985. […] Interlocutory injunctions in judicial review proceedings - An interlocutory injunction can be obtained in judicial review proceedings pending the determination of the substantive judicial review application, or, if the urgency of the case justifies it pending the hearing of the leave application. The approach to applications for interlocutory injunctions in judicial review proceedings*

is similar to that adopted in the case of applications under O. 29 or an interlocutory injunction in an ordinary action (See R. v Kensington and Chelsea Royal London Borough Council, ex p. Hammell [1989] Q.B. 518; [1989] 1 All E.R. 1202, above). In M. v. Home Office [1993] 3 W.L.R. 433; [1993] 3 All E.R. 537, HL. It was held that injunctions, including interlocutory injunctions, can be granted against ministers and Crown servants, see further para 53/14/43 and 53/14/44.")

See, also, *The Queen v. The Director of Environmental Planning and Protection et. al., ex parte Paul Fuchs et. al.* [2021/PUB/jrv/00039], unrept'd., where Klein J., after reviewing the relevant provisions of the Supreme Court Act and Order 53, stated [21]: "*I am not of the view that any of the provisions cited above can be read so restrictively as to prevent the court, in appropriate circumstances, from granting interim injunctive relief to preserve and protect the interest of the parties or the subject matter of an application pending a hearing for leave to commence judicial review*."

54.4 Delay in applying for relief.

(1) An application for judicial review shall be made promptly and in any event within six months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made.

(2) Where the relief sought is an order of certiorari in respect of any judgment, order, conviction or other proceeding, the date when grounds for the application first arose shall be taken to be the date of that judgment, order, conviction or proceeding.

(3) The preceding paragraphs are without prejudice to any statutory provision which has the effect of limiting the time within which an application for judicial review may be made.

Notes:
This part is patented almost verbatim from the RSC.

Cases:
54.4 Delay in applying for relief.
Regina v. Securities Commission of the Bahamas, Ex Parte Petroleum Products Ltd [2000] BHS J. No. 30 at 18-19 (If the essential requirement that the application is made promptly is not satisfied in any event within the objective six-month period, "*the question arises whether or not 'the Court considers that there is good reason for extending the period'…the Court should take account of the time the impugned matter came to the knowledge of the applicant, it should consider whether the applicant, after acquiring such knowledge, made the application promptly, there being a greater need to act promptly the greater the period since the objective date of the grounds for the application. If the applicant did then apply promptly the period should be extended to that necessary to make the application timely*.")

Responsible Development of Abaco (RDA) Ltd et al v The Rt. Hon. Hubert Ingraham et al SCCivAPP. No, 139 of 2010 at 24, 28, 30 (The effect of [rule 54.5] is that even if an application is made within the six month period, a court has discretion to hold that it not was made promptly. However, "*if an application is not made promptly, or within the six month period prescribed, the court nevertheless has discretion to extend the time, if there is good reason for the delay*." Rule 54.4 also extends protection from an applicant "*being run out of court merely on the basis of undue delay, and allows the court to grant an extension of time when there good reasons for the delay."* Prejudice to other parties and/or detriment to good administration are factors to consider when exercising the discretion whether to grant an extension.")

54.5 Mode of applying for judicial review.

(1) In any criminal cause or matter, where leave has been granted to make an application for judicial review, the application shall be made to a judge sitting in open Court by an originating application.

(2) In any other such cause or matter, the application shall be made by an originating application to a judge sitting in open Court, unless the Court directs that it shall be made to a judge in Chambers.

(3) The originating application shall be served on all persons directly affected and where it relates to any proceedings in or before a magistrates court or tribunal and the object of the application is either to compel the magistrates court or tribunal or an officer of the magistrates court or tribunal to do any act in relation to the proceedings or to quash them or any order made therein, the originating application shall also be served on the Clerk or Registrar of the magistrates court or tribunal and, where any objection to the conduct of the magistrate or tribunal is to be made, on the magistrate or the president of the tribunal.

(4) Unless the Court granting leave has otherwise directed, there must be at least ten clear days between the service of the originating application and the hearing.

(5) The originating application must be entered for hearing within fourteen days after the grant of leave.

(6) An affidavit giving the names and addresses of, and the places and dates of service on all persons who have been served with the originating application shall be filed before the originating application is entered for hearing and, if any person who ought to be served, under this rule has not been served, the affidavit shall state that fact and the reason for it and the affidavit shall be before the Court on the hearing of the originating application.

(7) If on the hearing of the originating application the Court is of opinion that any person who ought, whether under this rule or otherwise, to have been served has not been served, the Court may adjourn the hearing on such terms, if any, as it may direct in order that the originating application may be served on that person.

Notes:

This part is patented almost verbatim from the RSC.

No application for judicial review may be made unless the leave of a judge has been obtained, which application may be made ex parte to a judge. Rule 54.5 (5) provides inter alia, that where such leave has been granted, the application shall be made by originating motion, which must be entered for hearing within 14 days after the grant of leave.

Cases:

Regina v. The Water And Sewerage Corporation and The Attorney General of the Commonwealth of The Bahamas ex parte *Biwater International Limited and Biwater Bahamas Limited SCCiv App. No. 62 of 2007 at 22* (the Court of Appeal confirmed the decision of the Supreme Court to set aside the leave, which had been granted to the Applicant some 15 months earlier and for which no motion had been entered per [rule 54.5 (5)]. The Supreme Court found that the failure to enter the motion more than 15 months after the expiry of the 14-day limit prescribed for entering the required motion [under rule 54.5 (5)] was an indication that the Applicants had no intention to comply with the rule and that there was no indication as to when the

motion would be entered.) See also the Judgment of Allen P. in *Kelly's Freeport Limited v HM Comptroller of Customs*, *SCCivApp 50 of 2011* (dated 24 September 2013) as regards to the late filing of the motion and the ability to obtain an extension of time.

54.6 Statements and affidavits.

(1) Copies of the statement in support of an application for leave under rule 54.3 shall be served with the originating application and, subject to paragraph (2) no grounds shall be relied upon or any relief sought at the hearing except the grounds and relief set out in the statement.
(2) The Court may on the hearing of the application allow the applicant to amend his statement, whether by specifying different or additional grounds of relief or otherwise, on such terms, if any, as it thinks fit and may allow further affidavits to be used if they deal with new matters arising out of an affidavit of any other party to the application.
(3) Where the applicant intends to ask to be allowed to amend his statement or to use further affidavits, he shall give notice of his intention and of any proposed amendment to every other party.
(4) Any respondent who intends to use an affidavit at the hearing shall file it in the Registry as soon as practicable and in any event, unless the Court otherwise directs, within six weeks after service upon him of the documents required to be served by paragraph (1).
(5) Each party to the application shall supply to every other party on demand copies of every affidavit which he proposes to use at the hearing, including, in the case of the applicant, the affidavit in support of the application for leave under rule 54.3.

Notes:
There is no reference to the form to entered by the Respondent as in the RSC. Regard should be had to paragraphs 53/14/69 through to paragraph 53/14/74.

Case:
On timing of service and what is required see the ruling of Bain J in *R v Christie et al Ex Parte Coalition to Protect Clifton Bay*, 2014/PUB/jrv/00015 (dated 17 October, 2010).

54.7 Claim for damages.

(1) On an application for judicial review the Court may, subject to paragraph
(2) award damages to the applicant if —
(a) he has included in the statement in support of his application for leave under rule 3 a claim for damages arising from any matter to which the application relates; and
(b) the Court is satisfied that, if the claim had been made in an action begun by the applicant at the time of making his application, he could have been awarded damages.
(2) Any rule and any practice direction relating to the contents and form of a statement of case shall apply to a statement relating to a claim for damages in any application under this Part.

Notes:
Mirrors the RSC.

De Smith, Woolf & Jowell's "Principles of Judicial Review" at paragraph 15-002 on page 582 ("A claim for damages may also be included in an application for judicial review, but these will be awarded only if the applicant proves that an actionable tort has been committed by the respondent public body. In practice, any claim for damages is usually adjudicated upon at a separate hearing after the public law issues have been determined.")

Cases:

54.7 Claim for damages.

Pratt v. The Royal Bahamas Police Force and others [2005] 5 BHS J No. 608 at 28-29 (Damages not awarded in the absence of a recognized cause of action in tort being pleaded and proved. " *It is well settled that in appropriate circumstances, a Court may award damages in an Application for Judicial Review provided, inter alia, that she has included in her Statement in support of her Application for Leave, a claim for damages arising from any matter to which the application relates and the Court is satisfied that if the claim had been in an action began by the Applicant at the time of making the Application an award of damages would have been made*.")

Rufa v R and another (2018) 92 WIR 46 at 112 (The Supreme Court has the power in a judicial review application to award damages to the applicant "*provided that the applicant has firstly, included a claim for damages in the supporting statement filed with the application as required by rule 3; and secondly, the court is satisfied that the applicant could have been awarded damages had he, at the time of applying for judicial review, also instituted a separate action for damages.")*

See, also, *R v The Bahamas Medical Council, ex parte Dr. Gauri Shirodkar* [2021/PUB/jrv/0003], unrept'd., on the need for an applicant to clearly plead a cause of action that would sustain a claim for damages if made in a civil claim (para.103-105).

54.8 Application for disclosure, further information, cross-examination, etc.

(1) Unless the Court otherwise directs, any interlocutory application in proceedings on an application for judicial review may be made to a judge in chambers, notwithstanding that the application for judicial review is to be heard by a judge in open court.
(2) In this paragraph 'interlocutory application' includes an application for an order discontinuing the application or for cross-examination of the maker of an affidavit.
(3) This rule is without prejudice to any statutory provision or rule of law restricting the making of an order against the Crown.

Notes:

Part 54.8 has notable departures from the counterpart Order 53 rule 8 of the RSC.
Order 53 rule 8 permitted the Registrar to hear interlocutory applications. The result is that the Registrar cannot now hear interlocutory applications.
The meaning of "interlocutory application" differs from that in Order 53 rule 8 (2) of the RSC in that Order 53 rule 8 (2) included "*an application for an order under Order 24 [Discovery and Inspection of Documents] or 26 [Interrogatories] or Order 38, rule 2(3) [Evidence by Affidavit] or for an order dismissing the proceedings by consent of the parties."*

Cases:

Application for disclosure, further information, cross-examination, etc.

Save Guana Cay Reef Assn Ltd v R [2009] UKPC 44 at 47 ("It is no longer the rule that disclosure should be ordered only where the affidavit evidence put in on behalf of the decision-maker can be shown to be inaccurate or misleading: Tweed v Parades Commission for Northern Ireland [2007] 1 AC 650. Nevertheless orders for discovery and cross-examination are still exceptional in judicial review proceedings, for good reason. Such proceedings are essentially a review of official decision-making, and need to be

determined without any avoidable delay.") See also *Mitchell and others v Melidor and another (2017) 92 WIR 1.*

In the *Belize Alliance v DOE (No.2) [2004] Env. LR 38* (The Belize Case) the Privy Council made important observations about the approach which should be adopted in discovery in judicial review matters and also the approach to the conduct of such matters. From page 781 Lord Walker quotes Sir John Donaldson MR to the effect that once judicial review has been issued **"***it becomes the duty of the Respondent to make full and fair disclosure***".** Although it is not for the respondents to make out the applicant's judicial review case for them, Sir John Donaldson MR said "*it is a process which falls to be conducted with all the cards face upwards on the table and the vast majority of the cards will start in the [decision-making] authority's hands***".** Lord Walker continued at paragraph 86: **"***It is now clear that proceedings for judicial review should not be conducted in the same manner as hard-fought commercial litigation. A respondent authority owes a duty to the court to co-operate and to make candid disclosure, by way of affidavit, of the relevant facts and (so far as they are not apparent from contemporaneous documents which have been disclosed) the reasoning behind the decision challenged in the judicial review proceedings."* Although Lord Walker was in a 2:3 minority in the Belize case, the majority did not differ with Lords Walker and Steyn on the issue of the obligations of the Respondents to make full and frank discovery. See also restatement of discovery principles *in R v Minnis et al Ex Parte Respect our Homes Limited et al*, Ruling of Grant-Thompson J dated 21 September, 2020.

While declining to exercise the power to order cross examination as requested on the basis of relevance, the jurisdiction may be exercised: Bain J in *R v Christie et al Ex Parte Coalition to Protect Clifton Bay*, 2013/PUB/jrv/00012, Ruling dated 4 October, 2016.

As regards to injunctions and stay see paragraphs 53/14/47 through to 53/14/51 of the 1999 White Book and the applicable principles as set out in *Smith et al v Christie et al*, 2015/PUB/jrv/00005, dated 5 October, 2015.

Interrogatories are also permissible in judicial review: *R v Minnis et al Ex Parte Respect our Homes Limited et al*, Ruling of Grant-Thompson J dated 21 September, 2020.
Security for Costs is generally permissible on application: *Smith et al v Christie et al*, 2015/PUB/jrv/00005, dated 11 September, 2015. As regards quantum, see the guidance in *Bimini Blue Coalition Limited v Christie et a*l, SCCivApp 35 of 2014 dated 18 July 2014 and, more recently, *Responsible Development for Abaco (RDA) Ltd v Christie et al* [2023] UKPC 2. The procedure adopted is the same as in a writ action with the applicable principles.
With respect to applications for security for costs based on section 285 of the Companies Act, the JCPC at 54-72 of *Responsible Development for Abaco (RDA) Ltd v Christie et al* [2023] UKPC 2, held that security for costs can be granted against an incorporated local action group bringing judicial review proceedings in accordance with the principles enunciated in *Keary Developments Ltd v Tarmac Construction Ltd* [1995] 3 All ER 534; and *Goldtrail Travel Ltd v Onur Air Taşimacilik AŞ* [2017] UKSC 57. In order to avoid an order for security for costs being made against it, the burden is on the applicant to show "*on the balance of probabilities, and with full candour, that it had no realistic prospect of raising funds…to proceed and that its claim would therefore be stifled."*

As regards security for costs for affected parties and intervenors (i.e. the developer(s) or person(s) participating in judicial review proceedings), the principles enunciated in *Bolton Metropolitan District Council v Secretary of State for the Environment* [1995] 1 WLR 1176 (HL) at 1178F-1179A ("*Bolton*") are applicable, as set out and applied in *Responsible Development for Abaco (RDA) Ltd v Christie et al* [2023] UKPC 2. The JCPC at 98 stated that: "*The issue… is not the participation of the Developers in the [judicial review] proceedings but whether that participation is likely to lead to a costs order being made in their favour in accordance with the Bolton principles*." At 103: In order to justify an order for security for costs being made in favour of the [affected parties/intervenors and in this case Developers],.it is "*incumbent on the Developers to show, as a minimum, that a costs order in their favour was likely to be made if the judicial review claim was ultimately dismissed. In accordance with the Bolton principles this meant establishing that there was a separate issue on which the Developers were entitled to be heard, which would not be covered by the*

Government respondents, or that they had an interest which required separate representation, and that this was likely to justify an order for a second set of costs."

In lieu of security for costs, the courts have the power to make protective costs orders in judicial review proceedings: ***Responsible Development for Abaco (RDA) Ltd v Christie et al*** [2023] UKPC 2 at 77-78. *"A claimant who maintains that there is a sufficiently strong public interest in the proceedings may seek a protective costs order in advance, to limit the extent of their ultimate potential costs liability if they lose the case….****The courts have power to make a protective costs order in an appropriate case, pursuant to the wide discretion under section 30 (1) of the Supreme Court Act.****"* At 81: "*The courts in The Bahamas have jurisdiction to make a protective costs order*." The principles in ***R (Corner House Research) v Secretary of State for Trade and Industry [2005] EWCA Civ 192 ("Corner House")*** *"are one way in which proper weight can be given to the public interest in the determination of judicial review claims, to the extent that public law litigation is to be distinguished from private law civil litigation: see Corner House, paras 69-70."*

54.9 Hearing of application for judicial review.

(1) On the hearing of any application under rule 54.5, any person who desires to be heard in opposition to the application, and appears to the Court to be a proper person to be heard, shall be heard, notwithstanding that he has not been served with the originating application.
(2) Where the relief sought is or includes an order of certiorari to remove any proceedings for the purpose of quashing them, the applicant may not question the validity of any order, warrant, commitment, conviction, inquisition or record unless before the hearing of the application he has filed in the Registry a copy thereof verified by affidavit accounting for his failure to do so to the satisfaction of the Court hearing the originating application.
(3) Where an order for certiorari is made in any such case as is referred to in paragraph (2) the order shall, subject to paragraph (4) direct that the proceedings shall be quashed forthwith on their removal into the Court.
(4) Where the relief sought is an order of certiorari and the Court is satisfied that there are grounds for quashing the decision to which the application relates, the Court may, in addition to quashing it, remit the matter to the Court, tribunal or authority concerned with a direction to reconsider it and reach a decision in accordance with the findings of the Court.
(5) Where the relief sought is a declaration, an injunction or damages and the Court considers that it should not be granted on an application for judicial review but might have been granted if it had been sought in an action begun by a claim form by the applicant at the time of making his application, the Court may, instead of refusing the application, order the proceedings to continue as if they had been begun by a claim form and the court shall give such directions as it considers appropriate pursuant to its case management powers.
(6) No action or proceedings shall be begun or prosecuted against any person in respect of anything done in obedience to an order of mandamus

Notes:
This part mirrors the RSC and guidance can be obtained from the 1999 White Book, paragraphs 53/14/84 through to 53/14/88.

Cases:
R. v. Police Service Commission, ex parte Bethel [2001] BHS J. No. 70 (Rule 54.9 deals with *"the procedures that take place after the ex parte stage when there is "the hearing of any motion or summons.")*
Brian R. Christie v Civil Aviation Authority [2020] 1 BHS J. No. 21 at 41-42 (An order of certiorari is a *"prerogative remedy available as a relief on a judicial review application in the event of a breach of public law right. There are a number restrictions on the availability of judicial review seeking a prerogative remedy one of which is that only public law claims are justiciable through judicial review. Where a body derives its functions and authority from a contract or an agreement judicial review is usually not available.")*

Boyce v Beckles BB 2004 HC 2 (an order for certiorari is a remedy on an application for judicial review where a superior court quashes the decision of an inferior authority or court where it finds that the decision made by that body was irregular or futile and thus of no effect in law.)
R v Electricity Commission [1924] KB 171 (an order for prohibition precludes the public body from acting unlawfully and is usually granted before the public body has acted unlawfully)
Bazie v Attorney General of Trinidad and TT 1971 CA 7 (an order for prohibition may be granted to *"restrain an inferior court*" if it "*fails in its duty to act in good faith and to listen to both sides, and to give a fair opportunity to the parties …to present their case and to contradict any relevant statement prejudicial to their view".)*
An order for mandamus compels the performance of a public duty. *Belize Institute for Environment Law v Chief Environmental Officer BZ 2008 SC 13* (mandamus is "*a weapon in the hands of the ordinary citizen, when a public authority fails to do its duty by him"* and*'[t]he essence of mandamus is that it is a command ordering the performance of a public legal duty.")*
Bahamas Hotel Catering and Allied Workers Union v. The Attorney General of the Commonwealth of the Bahamas and another; West Bay Management Limited v. The Attorney General of the Commonwealth of the Bahamas and another [2010] 1 BHS J No. 65 at 29 ("On the hearing of an application for judicial review, the court has the power to make a declaration or declarations - that is, to declare what is the true legal position of the parties or the issues in the case.")

54.10 Appeal from Judge's order.

No appeal shall lie from an order made under paragraph (3) of rule 54.3 on an application for leave which may be renewed under paragraph (4) of that rule.

Notes:

Mirrors Rule 10 of the RSC. However, this rule may have to be amended to achieve consistency with the changes wrought by rule 54.3. As explained (see Notes to 54.3, *supra*), with the deletion of sub-paragraph 4 (b) of Rule 3 of the RSC, the court is no longer able to make any order under para. 3 of rule 54.3 in respect of which an application for leave may be renewed in the Supreme Court. Paragraph 4 of Rule 54.3 now relates exclusively to renewal in a criminal cause or matter, which is done before the Court of Appeal. Queare: whether Form JR2 ("Notice of Intention to Renew Application for Leave to Apply for Judicial Review") has any utility in light of these changes.

Cases:
Beckford and others v. Registrar of Trade Unions of the Commonwealth of the Bahamas and others [2015] 2 BHS J. No. 93 at 7 ("An application for leave which may be renewed under [paragraph (4) of rule 54.3] applies to a case where a judge has determined the application without a hearing *pursuant to paragraph (3) of [rule 54.3] and refused leave or granted leave on terms. In such case application may be made to renew the application pursuant to paragraph (4) of rule [54.3].")*

54.11 Meaning of Court.

In relation to the hearing by a judge of an application for leave under rule 54.3 or of an application for judicial review, any reference in this Part to "the Court" shall, unless the context otherwise requires, be construed as a reference to the judge.

Notes:
Mirrors the RSC.

PART 55- APPLICATION FOR WRIT OF HABEAS CORPUS

55. 1 Application for writ of habeas corpus ad subjiciendum.

(1) An application for a writ of habeas corpus ad subjiciendum must be made to a judge in open court except that in cases where the application is made on behalf of an infant, it must be made in the first instance to a judge in chambers.

(2) An application for such writ may be made without notice and, subject to paragraph (3), must be supported by an affidavit by the person restrained showing that it is made at his instance and setting out the nature of the restraint.

(3) Where the person restrained is unable for any reason to make the affidavit required by paragraph (2), the affidavit may be made by some other person on his behalf and that affidavit must state that the person restrained is unable to make the affidavit himself and for what reason.

Notes: Part 55.1 mirrors Order 54 Rule 1 of the 1978 Rules of the Supreme Court ("**RSC**"). In addition to prescribing the procedure on how to make an application for a writ of habeas corpus, Part 55.1 imposes a mandate whereas if a restrained person is unable to make the affidavit for any reason, the affidavit may be made by some other person on his behalf, however, the affidavit must state that the person restrained is unable to make the affidavit and for what reason. As guidance has been had in respect of the equivalent UK RSC (same mirroring the RSC and Part 54, rule 1) to Supreme Court Practice, 1999, Volume 1 ("**1999 White Book**"), paragraphs 54/1/2 through to paragraphs 54/1/10, same ought to equally apply.

The practice of seeking leave first and then a return hearing has been maintained.

Cases:

CPR 55.1 (1)

Jean-Rony v Attorney General (Bah) et al [2022] UKPC 51 (An applicant can raise an application for constitutional redress by motion in his action for habeas corpus.) See also *Kajeepan et al v Been et al* 97 WIR 521

Greene v Secretary of State for Home Affairs [1942] A.C. 284 at 302 (In the affidavit, the applicant must show a prima facie case that he is being unlawfully detained.)

Sonnette Joseph v The Hon. Brent Symonette et al; and Marc Henry v The Hon. Brent Symonette et al CRI/HCS/000/2018, Ruling of Forbes J (Acting) dated 15 March, 2018 (For the application for a writ of habeas corpus to be sustainable, the applicant must be in custody at the time of hearing of the application).

CPR 55.1 (3)

R v Batcheldor (1839) 1 Per & Dav 516 (The court will not grant a habeas corpus to bring up a prisoner for the purpose of being discharged on the ground that he is illegally in custody unless there be an affidavit from himself, or it be shown that he is so coerced as to be unable to make one.)

Jean and others v Minister of Labour and Home Affairs and others (1981) 31 WIR 1 (The applicants' applications were supported by affidavits sworn by some other persons on their behalf on the ground that the applicants were unable to make the affidavits themselves because they spoke very little English and were unable to retain and instruct a legal representative to act on their behalf.)

The failure to adhere to this mandate may result in the court dismissing the writ of habeas corpus however arguments have been made and seemingly upheld that such failure is capable of being waived pursuant to

the provisions of Order 2 RSC (*Jean-Rony v Bethel et al*, 2017/CRI/hcs/00068, Judgment dated 26 January 2017 same having been appeal however this point not having been overturned).

55.2 Powers of court to whom application without notice is made.

(1) The judge to whom an application under rule 55.1 is made without notice may make an order forthwith for the writ to issue, or may-

(a) where the application is made to a judge otherwise than in court, direct that an originating application applying for the writ be issued;

(b) where the application is made to a judge in court, adjourn the application so that notice thereof may be given.

(2) The originating application must be served on the person against whom the issue of the writ is sought and on such other persons as the judge may direct, and, unless the judge otherwise directs, there must be at least eight clear days between the service of the originating application and the date named therein for the hearing of the application.

Notes:

Part 55.2 is fairly identical to Order 54 Rule 2 RSC and in that regard rather than permitting an originating summons or motion, the process is now that of an originating application. Accordingly, as previously required this Part prescribes that the court has the power to make an order issuing the writ of habeas corpus on an *ex parte* application or order the applicant to file an originating application which would then trigger an *inter parte* hearing. Guidance by reference to the 1999 White Book may be adopted and regard given to paragraphs 54/2/2 and 54/2/3. Upon the making of the application, time may be abridged for the hearing and bail and or an injunction restraining any interference with the applicant pending determination of the substantive hearing may be granted. In short, the first stage of the process is the issuance of the writ of habeas corpus by allowing the originating application to be filed and served.

55.3 Copies of affidavits to be supplied

Every party to an application under rule 55.1 must supply to every other party on demand and on payment of the proper charges copies of the affidavits which he proposes to use at the hearing of the application.

Notes:

Part 55.3 is patented verbatim to Order 54 Rule 3 RSC as it imposes a duty on the parties to supply affidavits on demand once payment is made (see also 1999 White Book, paragraph 54/3). As a matter of practice however and in an effort to prevent delays in the hearing, it may be preferrable to simply serve copies at the time of serving of the originating application, order granting leave and papers filed in accordance with Part 55.1 having regard to that fact that leave was most likely granted *ex parte* and by the very nature of

the same materials are usually provided to the Respondents. Judicial pronouncements should the affidavit not be served would be helpful to address this.

55.4 Power to order release of person restrained

Without prejudice to rule 55.2 (1), the judge hearing an application for a writ of habeas corpus ad subjiciendum may in his discretion order that the person restrained be released, and such order shall be a sufficient warrant to any superintendent of a prison, constable or other person for the release of the person under restraint.

Notes:

Part 55.4 (which mirrors Order 54 rule 4 RSC) vests the judge with the discretionary power to order the immediate release of a person restrained upon hearing an application to issue a writ of habeas corpus ad subjiciendum (see also *1999 White Book*, paragraph 54/4/2).

55.5 Directions as to return to writ

Where a writ of habeas corpus ad subjiciendum is ordered to issue, the judge by whom the order is made shall give directions as to the judge before whom, and the date on which, the writ is returnable.

Notes:

Part 55.5 mirrors Order 54 Rule 5 of the RSC. Any directions (i.e. service of papers, filing of return, extensions, injunctions, conditions etc. and the returnable date) are to be given and usually done on the granting of the leave to issue the writ of habeas corpus ad subjiciendum. This is usually by the court by which leave was granted.

55.6 Service of writ and notice.

(1) Subject to paragraphs (2) and (3), a writ of habeas corpus ad subjiciendum must be served personally on the person to whom it is directed.

(2) If it is not possible to serve such writ personally, or if it is directed to a superintendent of a prison or other public official, it must be served by leaving it with a servant or agent of the person to whom the writ is directed at the place where the person restrained is confined or restrained.

(3) If the writ is directed to more than one person, the writ must be served in manner provided by this rule on the person first named in the writ, and copies must be served on each of the other persons in the same manner as the writ.

(4) There must be served with the writ a notice in Form HC1 stating the judge before whom and the date on which the person restrained is to be brought and that in default of obedience proceedings for committal of the party disobeying will be taken.

(5) A copy of the writ must be served on the Attorney-General.

Notes:
Part 55.6 prescribes the procedure on service of a writ of habeas corpus as it dictates that a writ of habeas corpus must be served on the first person named in the writ if there are more than one party named and with copies thereof served on the other parties. Physical personal service is required unless otherwise ordered or the circumstances outlined applies. This part also introduces a requirement that was not expressly stated namely the requirement to serve the Attorney-General, which ought to mean despite express statement, service on the Office of the Attorney General and not personal service on his or her person. Also, the CPR introduces a new notice form as appended to the rule for service: Form HC1.

Cases:
CPR 55.6 (3)
Re Douglas [1835-42] All ER Rep 129 (A writ of habeas corpus may be directed to several persons.)

55.7 Return to the writ.

(1) The return to a writ of habeas corpus ad subjiciendum must be endorsed on or annexed to the writ and must state all the causes of the detainer of the person restrained.

(2) The return may be amended, or other return substituted therefor, by leave of the judge before whom the writ is returnable.

Notes:
The return is filed by the detainer and must be indorsed on or annexed to the writ and state all of the causes upon which the applicant is being held and or restrained. Part 55.7 is evidently identical to Order 54 Rule 7 RSC. This Rule prescribes the procedure for returning a writ of habeas corpus ad subjiciendum and also asserts that a writ can be amended with the leave of the judge. In the instance where the return is too long for endorsement, a schedule should be attached. Reference as the 1999 White Book equivalent is similar should be made to paras 54/7/1 through to 54/7/4.

Case(s):
Jean and others v Minister of Labour and Home Affairs and others (1981) 31 WIR 1 (The Court will not inquire into the facts justifying the detention however based on the facts stated in the return the same were examined and it was held that same could not lawfully justify the detention as a matter of law). For further guidance see also: Sewell v Attorney General et al, 2015/CRI/HBS/00010 Judgment of Issacs Sr. J dated 19 November 2015 and Earl Burton v Minister of Immigration et al, CRI/HCS 0076 of 2017, Judgment of Hilton J dated 27 February 2018

55.8 Procedure at hearing of writ

When a return to a writ of habeas corpus ad subjiciendum is made, the return shall first be read, and motion then made for discharging or remanding the person restrained or

amending or quashing the return, and where that person is brought up in accordance with the writ, his attorney shall be heard first, then the attorney for the Crown, and then one attorney for the person restrained in reply.

Notes:
Part 55.8 mirrors Order 54 rule 8 of the RSC and sets forth the procedure and order of speeches on the substantive/final hearing of the writ of habeas corpus. Regard should also be had to paragraph 54/8/2 of the 1999 White Book which provides "If the respondent does not appear, and the body is not produced, application may be made to the Court, supported by an affidavit of service and disobedience, for committal for contempt, or to a Judge for the issue of a bench warrant. This procedure ought to similarly be permissible given the non-change in the rule.

Cases:
CPR 55.8
Secretary of State For Home Affairs v O'Brien [1923] AC 603 (The issue of the legality of the custody of the applicant is determined on the return to the writ.)
R v Governor of Risley Remand Centre ex p. Hassan [1976] 1 WLR 971 (The onus is on the Applicant to establish a prima facie case that his detention is illegal if on the face of the return of the writ there is a valid reason for the Applicant being detained. If the Applicant is unable to discharge this onus, the release will not be ordered.)

55.9 Application to be made on affidavit

(1) An application for a writ of habeas corpus ad testificandum or of habeas corpus ad respondenum must be made on affidavit to a judge in chambers.

(2) An application for an order to bring up a prisoner, otherwise than by writ of habeas corpus, to give evidence in any cause or matter, civil or criminal, before any court, tribunal or justice, must be made on affidavit to a judge in chambers.

Notes:
Part 55.9 mirrors Order 54 rule 9 which relates to and stipulates that a writ of habeas corpus or an application for an order to bring up a prisoner otherwise than by a writ of habeas corpus to give evidence must be made on affidavit. As these rules mirror the equivalent in the 1999 White Book, reference should be made to paragraphs 54/9/2 and 54/9/3.

55.10 Form of Writ

A writ of habeas corpus must be in Form HC2, HC3 or HC4 whichever is appropriate.

Notes:
Part 55.10 prescribes that a writ of habeas corpus must be in an appropriate Form and thus replaces the forms under the RSC. The forms are annexed and exhibited to the CPR.
See Form HC2: Writ of Habeas Corpus Ad Subjiciendum Form which requires for the Respondent to produce the applicant before the court and to justify the detention/custody of the applicant
See Form HC3: Writ of Habeas Corpus Ad Testificandum production and testimony before the court
See HC4: Writ of Habeas Corpus Ad Respondendum Form production and answer charge before the court.

PART 56 – APPLICATIONS BY THE ATTORNEY-GENERAL

56.1 Attorney-General's application.
(1) Every application to the Court by the Attorney-General under section 29 of the Act shall be heard and determined by a judge.
(2) The application must be made by an originating application, notice of which, together with an affidavit in support, shall be filed in the Registry and served on the person against whom the order is sought who in this Part is referred to as the respondent.

56.2 Affidavit in support of application.
(1) The affidavit required under rule 56.1(2) must list the legal proceedings previously instituted by the respondent which form the basis of the originating application giving the name of the parties, the date when each of the proceedings were instituted, the outcome of each of the proceedings and such other particulars as may be relevant to the application.
(2) An affidavit in response by the respondent may be filed and served within fourteen days of receiving the affidavit under paragraph (1) above.
(3) An application under section 29(2) of the Act by the respondent to have attorney assigned to him can be made without notice to the Registrar or a judge in chambers supported by an affidavit setting out his financial means.

Notes:
The heading for Part 56 is extremely misleading as it relates specifically to one type of application, an application to the Supreme Court by the Attorney-General under section 29 of the Supreme Court Act, 1996. The provision relates to a vexatious litigant. Section 29(1) of the Supreme Court Act provides: 29. (1) If, on an application made by the Attorney General under this section, the Court is satisfied that any person has habitually and persistently and without any reasonable ground instituted vexatious legal proceedings whether in the Court or in any inferior court and whether against the same person or against different persons, the Court may, after hearing that person or giving him an opportunity to be heard, order that no legal proceedings shall, without leave of the Court or a judge, be instituted by him in any court and that any legal proceedings instituted by him before the making of the order shall not be continued by him without such leave, and such leave shall not be given unless the Court or judge is satisfied that the proceedings are not an abuse of the process of the Court and that there is a prima facie ground for the proceedings.

Cases:
CPR 56 – APPLICATIONS BY THE ATTORNEY-GENERAL
Attorney-General of the Commonwealth of the Bahamas v. Bowleg [1997] BHS J. No. 35. Harry Alphonso Bowleg had commenced over 26 actions in the Courts of the Bahamas. He had been unsuccessful in all actions and appeals. Attorney General successfully obtained the Order under Section 29 of the Supreme Court Act precluding Bowleg from commencing (or continuing) any action without the leave of the Court.

PART 57 CIVIL PROCEDURE RULES PRACTICE GUIDE

APPEALS, ETC., TO SUPREME COURT BY CASE STATED: APPEAL FROM MAGISTRATE'S COURT BY CASE STATED

57.1 General provisions regarding appeals

(1) All appeals from a magistrate's court by case stated shall be heard and determined by a judge of the Court.

(2) An appeal from a magistrate's court by case stated shall not be set down for hearing unless and until the case and a copy of the judgment, order or decision in respect of which the case has been stated have been served on the office of the Attorney-General.

(3) No such appeal shall be filed after the expiration of six months from the date of the judgment, order or decision in respect of which the case was stated unless the delay is accounted for to the satisfaction of a judge of the Court.

(4) Notice of intention to apply for an extension of time for filing the appeal must be served on the respondent at least three clear days before the day named in the notice for the hearing of the application.

(5) Where any such appeal has not been filed by reason of a default in complying with the provisions of this rule, the magistrate's court may proceed as if no case had been stated.

Notes:

This part contains procedural rules for the handling of appeals from the decisions of the Magistrates Court and also from the decisions of tribunals, bodies, office holders (e.g. Ministers) and individuals where the nature of the decision appealed against and the procedure by which it was reached may differ substantially.

The appellant's notice must be filed within six months from the date of the judgement, order or decision that is being appealed. The brevity of the time allowed reflects the clear policy decision in favour of finality. Any party seeking to challenge a judicial decision must move with expedition. In the immediate aftermath of the judgement below both the party and their advisers are fully seized of the case. They can be expected to formulate any grounds of appeal without delay. The background to this rule is set out in *Sayers v Clarke Walker [2002] EWCA Civ 645* at [12]-[16]; [2002] 1 WLR 3095.

If a party has good reason for seeking a longer period in which to appeal, they must satisfy the Court that the delay was unavoidable. An example of a good reason for seeking a modest extension of time may be that the appellant (through no fault of his own) has an unwieldy decision-making process, such as a board of trustees which needs to be convened. Another example may be that a national holiday period is about

to begin. Another example may be that an approved transcript of a judgement or a perfected written judgement may reasonably be required before the notice of appeal can be prepared.[119]

Cases:

CPR 57.1 AN APPEAL BY WAY OF CASE STATED IS RESERVED FOR APPEALS RELATING TO DISPUTES REGARDING THE INTERPRETATION OF THE LAW: *Isle of Wright Council v Platt [2016] EWHC 1283 (Admin).*

CPR 57.1 (2) SERVICE ON THE ATTORNEY-GENERAL

Where an advocate to the court has been instructed in the court below, the appellant should notify the Attorney-General of the filing of the appellant's notice in order to ensure that the advocate may be involved in the appeal: *M v F [2011] EWCA Civ 273, [2011] 1 FCR 533, (2011) Times, 22 April*.

CPR 57.1 ((3) DATE WHEN TIME STARTS TO RUN

The notice must be filed within six months after the date of the decision of the Magistrate's Court. This is the date when the judge makes his decision and not the date when the order reflecting his decision is drawn up: *Sayers v Clarke Walker [2002] EWCA Civ 645; [2002] 3 All ER 490; [2002] All ER (D) 189 (May)*

TIME LIMIT DOES NOT APPLY IN CERTAIN CIRCUMSTANCES

The time limit provided by Part 57 will not apply if a statutory provision makes a contrary provision: *Van Aken v London Borough of Camden [2002] EWCA Civ 1724, [2003] 1 All ER 552, [2003] 1 WLR 684* and *Harrison v General Medical Council [2011] EWHC 1741 (Admin), [2011] All ER (D) 34 (Jun)*, where a primary statute lays down a time limit, there is no power in the court to extend it unless the statute provides otherwise: Harrison citing *Mucelli v Government of Albania [2009] UKHL 2, [2009] 3 All ER 1035, [2009] 1 WLR 276* and *Mitchell v Nursing and Midwifery Council [2009] EWHC 1045 (Admin), [2009] All ER (D) 29 (Jun).*

57.2 Form of Case

Where the judgment, order or decision of the magistrate's court in respect of which a case is to be stated states all the relevant facts found by that court and the questions of law to be determined by the Court, a copy of the judgment, order or decision signed by the person who presided at the hearing in the magistrate's court must be annexed to the case, and the facts so found and the questions of law to be determined shall be sufficiently stated in that case by referring to the statement thereof in the judgment, order or decision.

Notes:

This Rule addresses how the form of the case should be outlined. It provides that where the case that is to be stated states all the relevant facts found by the court and the question of law to be determined by the Court a copy of the Judgment or the decision signed by the person who presided in the lower court must

[119] Civil Procedure Rules (The White Book) 2014, Vol.1

be annexed, and the facts found and the questions of law to be determined shall be sufficiently stated in that case by making reference to the statement in the judgement, order or decision.

At the conclusion of the hearing in the Divisional Court of an appeal by case stated by justices LORD GODDARD C.J. said: I am not referring to the drafting of the particular case here, but I do want the attention of practitioners and magistrates' clerks directed to the fact that the form for a case stated is now prescribed... I have been oppressed for a long time with the long and unnecessary recitals which are always put into cases, and, therefore, settled a form, which has been accepted by the Committee, in which cases should be stated, and which will be found to leave out a great deal of these unnecessary recitals, consequently reducing the costs. I hope practitioners and magistrates' clerks will remember that there is this form now prescribed and use it.[120]

57.3 Notice of Filing appeal

Within four days after an appeal from the magistrate's court by case stated is filed the appellant must serve notice of the appeal on the respondent.

Notes:
The appellant's notice must be served on all respondents within four days after they are filed at the appeal court.
The Court seals an appeal notice (see rule 3.5(1)(b)). Service on the respondent takes place after filing and must be effected by the appellant; the Court does not serve documents.

57.4 Appeals relating to affiliation proceedings.

Appeals from the magistrate's court by case stated which relate to affiliation proceedings shall be heard and determined by a judge of the Court, and the foregoing provisions of this Part shall accordingly apply to such appeals.

Note:

This Rule gives a Judge jurisdiction to hear an appeal by way of case sated in relation to affiliation proceedings. Further the rules in this part in relation to the general provisions regarding appeals, the form of case and the Notice of filing an appeal are applicable to a case stated which relates to affiliation proceedings.

[120] Practice Note (Form of case stated) [1953] 1 WLR 1309

57.5 Case stated by Ministers, tribunal, etc.

(1) The jurisdiction of the Supreme Court under any enactment to hear and determine a case stated by a Minister of the Crown, government department, tribunal or other person, or a question of law referred to that Court by such a Minister or department or tribunal or other person by way of case stated, shall be exercised by a judge of the Supreme Court.

(2) The jurisdiction of the Supreme Court under any enactment to hear and determine an application for an order directing such a Minister or department or tribunal or other person to state a case for determination by the Supreme Court, or to refer a question of law to that Court by way of case stated, shall be exercised by a judge of the Supreme Court.

(3) The following rules of this Part shall apply to proceedings for determination of such a case, question or application and, in relation to any such proceedings, shall have effect subject to any provision made in relation to those proceedings by any other provision of these Rules by or under any enactment.

(4) In this Part, references to a tribunal shall be construed as references to any tribunal constituted by or under any enactment other than any of the ordinary courts of law.

(5) In this Part, a reference to a Minister shall be construed as including references to a government department, and in those rules and this rule "case" includes a special case.

Notes:

"An appeal by case stated is an appeal to a superior court on the basis of a set of facts specified by the inferior court, for the superior court to make a decision on the application of the law to those facts . Provision is made where, under any enactment: (1) an appeal lies to the court by way of case stated; or (2) a question of law may be referred to the court by way of case stated."[121]

[121] Halsbury's Laws of England/Civil Procedure Volume 12A (2020), paras 1207

Cases:

DIFFERENCE BETWEEN CASE STATED AND JUDICIAL REVIEW

In an attempt to differentiate between the route of 'judicial review' and 'case stated', Justice Langstaff in the case of *B v Carlisle Crown Court (2009)*, made reference to the judgement of Lord Bingham CJ in the case of Chester (Alan Ronald) v Gloucester Crown Court indicating that appeal by case stated is the preferable route when there is a question of evidence. Justice Langstaff states:

> *"It is plain from the observations of the Lord Chief Justice in that case, first, that judicial review is not necessarily inappropriate, though, second, that appeal by case stated would normally be the preferable way of proceeding, particularly where matters of evidence are concerned; and, third, that the procedural advantages of the case-stated procedure are such as to make it undoubtedly more appropriate in most cases where an applicant has been dissatisfied by the* ***result*** *of an appeal from the Magistrates' court to the Crown court."*

Brogan v Nottingham Crown Court [2020] EWHC 2646 (Admin) *"It should not become the position that applications for judicial review are regarded as an alternative to a proper route of appeal which would ordinarily be by case stated, in particular if a question as to a matter of law or matter of evidence, or sufficiency of evidence, arose. It would be a sad day if appellants generally felt that they could appeal indirectly, by judicial review, a decision of the Crown Court, which, after all, is provided as the route of appeal from the Magistrates' Court and has no onward appeal to the Court of Appeal. It must therefore be in exceptional circumstances, in general terms, that judicial review is appropriate at all; and indeed it will usually be the case that applications which ought to be brought (if at all) by case stated, and are brought by way of judicial review, may find that permission is refused at the permission stage."*

In the case of ***Coke v Southend Borough Council [1990] 1 All Er 242*** the Appellant; a taxi driver, appealed against the decision of Simon Brown J dismissing his appeal by way of case stated against the order of the Crown Court at Southend allowing the appeal of the respondent; the Southend Borough Council, against the decision of the Southend-on-Sea justices to allow the Appellant's appeal against the decision of the council to revoke his hackney carriage vehicle and driver's licenses pursuant to ss 60(1)*(c)* and 61(1)*(b)* of the Local Government (Miscellaneous Provisions) Act 1976. In this case a discussion was held to determine if a Public Authority could be considered a party aggrieved in an appeal by way of case stated. In deciding, Woolf LJ states;

> *"However, I suggest that, except for criminal cases which come within a special category, and where the decision against which a local authority seeks to appeal can be regarded as being an acquittal, the normal result of that re-examination should be that a public authority who has an adverse decision made against it in an area where it is required to perform public duties, is entitled to be treated as a person aggrieved. Whether a local authority is in this context a 'person' the Interpretation Act 1978 will normally be decisive. It should not be forgotten that frequently the body against which the public authority will take action will itself be a body corporate and if this body is a person there are difficulties in treating a public authority in a different way."*

57.6 Application for order to state a case.

(1) An application to the Court for an order directing a Minister, tribunal or other person to state a case for determination by the Court or to refer a question of law to the Court by way of case stated must be made by originating application, a copy of which shall be

served on the Minister, secretary of the tribunal or other person, as the case may be, and every party, other than the applicant, to the proceedings to which the application relates.

(2) The originating application must state the grounds of the application, the question of law on which it is sought to have the case stated and any reasons given by the Minister, tribunal or other person for his or its refusal to state a case.

(3) The application must be set down for hearing, and the notice thereof served, within fourteen days after receipt by the applicant of notice of the refusal of his request to state a case.

Notes:

These rules prescribe that in order to impel a Minister, tribunal or other person to state a case for the Supreme Court's determination or to give their decision/opinion as it relates to a question of law, the applicant must proceed by way of originating application and serve same upon the relevant parties. Further, the particulars of the said application must include the grounds relied upon, questions of law, and the reasons for the decision of the Minister, tribunal or other person.

57.7 Signing and service of case.

(1) A case stated by a tribunal must be signed by the chairman or president of the tribunal, and a case stated by any other person must be signed by him or by a person authorised in that behalf to do so.

(2) The case must be served on the party at whose request, or as a result of whose application to the Court, the case was stated and if a Minister, tribunal, arbitrator or other person is entitled by virtue of any enactment to state a case, or to refer a question of law by way of case stated, for determination by the Supreme Court without request being made by any party to the proceedings before that person, the case must be served on such party to those proceedings as the Minister, tribunal, arbitrator or other person, as the case may be, thinks appropriate.

(3) When a case is served on any party under paragraph (2), notice must be given to every other party to the proceedings in question that the case has been served on the party named, and on the date specified, in the notice.

Notes:

These rules indicate who is required to sign the stated case, and that same must be served upon the person requesting; the applicant; or any person who has interest or is entitled to be served same in accordance with any legislation; and that notice must be given of such service to any other party.

57.8 Proceedings for determination of case.

(1) Proceedings for the determination by the Court of a case stated, or a question of law referred by way of case stated, by a Minister, tribunal, arbitrator or other person must be begun by originating application by the person on whom the case was served in accordance with rule 57.7(2).

(2) The persons to be served with the originating application are —

(a) the Minister, secretary of the tribunal, arbitrator or other person by whom the case was stated; and

(b) any party, other than the applicant, to the proceedings in which the question of law to which the case relates arose, and a copy of the case stated must be served with the originating application on any such party.

(3) The originating application must set out the applicant's contentions on the question of law to which the case stated relates.

(4) The originating application must be set down for hearing, and the notice thereof served, within fourteen days after the case stated was served on the applicant.

(5) If the applicant fails to enter the application within the period specified in paragraph (4), then, after obtaining a copy of the case from the Minister, tribunal, arbitrator or other person by whom the case was stated, any other party to the proceedings in which the question of law to which the case relates arose may, within fourteen days after the

expiration of the period so specified, begin proceedings for the determination of the case, and paragraphs (1) to (4) shall have effect accordingly with the necessary modifications.

(6) The references in paragraph (5) to the period specified in paragraph (4) shall be construed as including references to that period as extended by any order of the Court.

(7) Unless the Court otherwise directs, the motion shall not be heard sooner than seven days after service of the originating application.

Notes:

An appeal by case stated is an appeal to a superior court on the basis of a set of facts specified by the inferior court, for the superior court to make a decision on the application of the law to those facts [1]. Provision is made where, under any enactment: (1) an appeal lies to the court by way of case stated; or (2) a question of law may be referred to the court by way of case stated.

Cases: CPR 57.8 PROCEEDINGS FOR DETERMINATION OF CASE
Harris Simon & Co Ltd v Manchester City Council [1975] 1 All ER 412, [1975] 1 WLR 100, DC.[122] An appeal under the 1851 Act against the decision of the Crown Court could only be by way of case stated on the ground that it was wrong in law or was in excess of jurisdiction. It was not an appeal by way of rehearing but a form of consultation with the Court to obtain an answer on a point of law in the same way as an appeal by way of case stated by justices.

57.9 Amendment of case

The Court hearing a case stated by a Minister, tribunal, arbitrator or other person may amend the case or order it to be returned to the person for amendment, and may draw inferences of fact from the facts stated in the case.

Notes:

The court may amend the stated case or order it to be returned to the Minister or tribunal etc. for amendment and may draw inferences of fact from the facts stated in the case.[123]

57.10. Right of Minister to appear and be heard

A Minister shall be entitled to appear and be heard in proceedings for the determination of a case stated, or a question of law referred by way of case stated, by him.

[122] Harris Simon & Co Ltd v Manchester City Council, LexisNexis (Queens Bench Division 1975). Retrieved November 10, 2022, from https://www.lexisnexis.com/uk/legal/auth/checkbrowser.do?t=1668127393267&bhcp=1

[123] Practice Direction 52E - Appeals by Way of Case Stated." *Practice Direction 52E - Appeals by Way of Case Stated,* www.justice.gov.uk/courts/procedure-rules/civil/rules/part52/practice-direction-52e-appeals-by-way-of-case-stated#IDAYAUWC. Accessed 10 Nov. 2022.

Notes:
A Minister is entitled to be heard on any appeal against a decision made by that minister.[124]

[124] Mambro, David di. *The Caribbean Civil Court Practice Second Edition*. 2011

PART 58 - APPEALS FROM THE REGISTRAR

58.1 Appeals from certain decisions of the registrar to judge in chambers

(1) Except as provided by rule 58.2, an appeal shall lie to a judge in chambers from any judgment, order or decision of the Registrar.

(2) The appeal shall be brought by filing a Notice of Appeal and serving a copy thereof on every other party to the proceedings in which the judgment, order or decision was given or made a notice to attend before the judge on a day specified in the notice.

(3) Unless the Court otherwise orders, the Notice must be filed —

(a) if it is made by a party who was present or represented when the judgment, order or decision of the Registrar was given within five working days after the judgment, order or decision; or

(b) if it is made by a party who was not present or represented when the judgment, order or decision of the Registrar was given within five working days after receipt by the party of notice of the judgment, order or decision.

(4) Except so far as the Court may otherwise direct, an appeal under this rule shall not operate as a stay of the proceedings in which the appeal is brought.

Notes:

Part 58.1 provides that an appeal shall lie to a judge in chambers from any judgment, order or decision of the Registrar other than those matter identified in Rule 58.2. It further outlines the procedure in relation to same, requiring the filing of a Notice of Appeal and serving on every other party to the proceedings in which the judgment, order or decision was given or made a notice to attend before the judge on a day specified in the notice.

It also provides that unless the Court orders otherwise, the Notice must be filed within five working days after the judgment, order or decision was given by the party who was present or represented or if it is made by a party who was not present or represented when the judgment, order or decision of the Registrar was given, within five working days after receipt by the party of the notice of the judgment, order or decision. It must also be noted that an appeal under this rule does not operate as a stay of proceedings in which the appeal is brought. Therefore, further proceedings may continue in relation to the matter.

In England and Wales appeals from decisions of the registrar to the court are assigned to the Chancery Division of the High Court. Such appeals are subject to the ordinary procedural rules applying to appeals. Where they require a document to be served, it must also be served on the registrar. Unless the court orders otherwise, an appellant's notice must be served on each respondent as soon as practicable; and in any event not later than seven days after it is filed.[125]

Cases:

CPR 58.1 APPEALS FROM CERTAIN DECISIONS OF THE REGISTRAR

[125] Halsbury's Laws of England (Volume 97A (2021) (4) Appeals from the Registrar/(iii) Appeals to the High Court/727. Appeals from decisions of the registrar.

Donnalee Maria Peet V. Michael Baptiste 2008/CLE/gen/00869 - An appeal from a Registrar to a Judge in Chambers is dealt with by way of an actual rehearing of the application which led to the order under appeal, and the Judge treats the matter as though it came before him for the first time: see Commentary 58/1/2 of the Supreme Court Practice 1970.

CPR 58.1 (4) EXCEPT THE COURT DIRECTS AN APPEAL DOES NOT OPERATE AS A STAY
Donnalee Maria Peet V. Michael Baptiste 2008/CLE/gen/00869 **-** An appeal does not operate as a stay so the Appellant should have lodged her Bill of Costs within the three months unless time was extended by the Registrar: see Conteh JA in Michael Wilson & Partners v Sinclair (SCCivApp No. 40 of 2007).

58.2 Appeals from certain decisions of registrar to Court of Appeal

(1) An appeal shall lie to the Court of Appeal from any judgment order or decision of a registrar (other than an interlocutory judgment, order or decision) given or made —

(a) on the hearing or determination of any cause, matter, question or issue tried before or referred to him; or

(b) on an assessment of damages under Part 16 or otherwise; or

(c) on the hearing or determination of any proceedings under Part 45 or Part 49; or

(d) on the hearing or determination of any other proceedings whereby such an appeal is provided for in any enactment, provision or practice direction.

(2) In the case of an appeal in proceedings under Part 45 or Part 49 the time within which notice of appeal must be filed and served shall be the same as in the case of an appeal from an interlocutory order.

Notes:
Part 58.2 provides that the appeal of the matters listed in this Rule must lie to the Court of Appeal. This this excludes any interlocutory judgment, order or decision given or made in respect of such matters. Part 58.2 further provides that in a case of appellate proceedings brought under third party debt orders or interpleader, the notice of appeal must be filed and served within the same time period as in a case of an appeal from an interlocutory order.

PART 59 - ADMIRALTY PROCEEDINGS

59.1 Application and interpretation.

(1) This Part applies to Admiralty causes and matters, and the other provisions of these Rules apply to those causes and matters subject to the provisions of this Part.
(2) In this Part—
"action in rem" means an Admiralty action in rem;
"caveat against arrest" means a caveat entered in the caveat book under rule 59.6;
"caveat against release and payment" means a caveat entered in the caveat book under rule 59.14;
"caveat book" means the book kept in the Registry in which caveats issued under this Part are entered;
"limitation action" means an action by shipowners or- other persons under the Merchant Shipping Act (Ch. 268) for the limitation of the amount of their liability in connection with a ship or other property;
"marshal" means the Admiralty Marshal;
"pleading" means statement of claim, defence or reply;
"ship" includes any description of vessel used in navigation.

Notes
Scope of Order - This part does not provide a complete code for proceedings. It is largely procedural in nature and must be read in conjunction with the other Supreme Court Civil Procedure Rules. This section is closely mirrored after the Order 67 of the Rules of the Supreme Court 1978, with minor deviations. Thus, much of the Supreme Court Practice pursuant to the 1978 Rules remains applicable.
Admiralty Jurisdiction – is provided for in the Supreme Court Act 1997 (as amended s.8 to 12). The court is seized as an action in rem from the moment of service of the claim or of arrest of a ship (whichever is the earlier). A court cannot have jurisdiction over a ship which does not come within the jurisdiction (Freccia del Nord [1989] 1 Lloyd's rep.388)
Action in rem – Admiralty action may be in rem or in personam or, in circumstances both. An Admiralty action in rem is in action against a res. A res is normally a ship but could in some cases be cargo or freight or an aircraft.
Action in personam – An Admiralty action in personam is like an action in tort or contract in the Supreme Court. It differs from such an action however in that it is subject to the rule of this Order which modify those generally applicable to an ordinary Supreme Court Action

59.2 Certain Admiralty actions.

(1) Every action to enforce a claim for damage, loss of life or personal injury arising out of —
(a) a collision between ships; or
(b) the carrying out of or omission to carry out a maneuver in the case of one or more of two ships; or
(c) non-compliance, on the part of one or more of two or more ships, with the collision regulations; and
(d) every limitation action, shall be heard by the Court.
(2) In this rule "collision regulations" means regulations made under section 189 of the Merchant Shipping Act or any such rules as are mentioned in subsection (3) of section 289 of that Act.

Notes
Limitation action: For special rules relating to limitation actions see O.59 rr36.

59.3 Issue of claim and acknowledgement of service.
(1) An action in rem must be begun by statement of claim; and the statement of claim must be in Form ADM2 or ADM3, whichever is appropriate.
(2) Rule 8.11 shall apply in relation to a statement of claim by which an Admiralty action is begun, and Part 9 shall apply in relation to such an action.

Notes
See 8.1 and 8.2 for commencing actions.
There is the need to acknowledge service and give intention to defend.

59.4 Service of statement of claim out of the jurisdiction.
(1) Subject to the following provisions of this rule, service out of the jurisdiction of a statement of claim containing any such claim as is mentioned in rule 59.2(1) is permissible with the leave of the Court if, but only if —

(a) the defendant has his habitual residence or a place of business within The Bahamas; or
(b) an action arising out of the same incident or series of incidents is proceeding in the Court or has been heard and determined in the Court; or
(c) the defendant has submitted or agreed to submit to the jurisdiction of the Court.

(2) Part 7 shall apply in relation to an application for the grant of leave under this rule.
(3) Paragraph (1) shall not apply to an action in rem.

Notes
Effects of this rule - This Rule permits, with leave of the Court, service out of the jurisdiction in collision and similar cases of a claim in actions in personam where the court is not deprived of jurisdiction in personam.
A claim in personam is a claim against a person, this is contrasted with a claim in rem which for many purposes is a claim against the ship itself. See Halsbury's Laws of England/Shipping and Maritime Law (Volume 93 (2022), paras 1–578; Volume 94 (2022), paras 579–1166)/2.

Cases
The Good Herald [1987] 1 Lloyd's Rep 236- An in rem claim form may not be served out of the jurisdiction, nor may an order for substituted service of an in rem claim form be made.

59.5 Warrant of arrest
(1) After a statement of claim has been issued in an action in rem a warrant in Form ADM4 for the arrest of the property against which the action or any counterclaim in the action is brought may, subject to the provisions of this rule, be issued at the instance of the claimant or of the defendant, as the case may be.
(2) A party applying for the issue out of the Registry of a warrant to arrest any property shall procure a search to be made in the caveat book for the purpose of ascertaining whether there is a caveat against arrest in force with respect to that property.
(3) A warrant of arrest shall not be issued until the party applying for it has filed a praecipe in Form ADM5 requesting issue of the warrant together with an affidavit made

by him or his agent containing the particulars required by paragraphs (6), (7) and (8) so, however, that the Court may, if it thinks fit, allow the warrant to issue notwithstanding that the affidavit does not contain all those particulars.

(4) Except with the leave of the Court, or where notice has been given under paragraph (11), a warrant of arrest shall not be issued in an action in rem against a foreign ship belonging to a port of a State having a consulate in New Providence, being an action for the possession of the ship or for wages, until notice that the action has been begun has been sent to the consul.

(5) Except with the leave of the Court, a warrant of arrest shall not be issued in an action in rem in which there is a claim arising out of bottomry until the bottomry bond and, if the bond is in a foreign language, a notarial translation thereof is produced to the Registrar.

(6) Every affidavit must state —

(a) the name and address of the applicant for the warrant;

(b) the nature of the claim or counterclaim in respect of which the warrant is required and that it has not been satisfied; and

(c) the nature of the property to be arrested and, if the property is a ship, the name of the ship and the port to which she belongs.

(7) Every affidavit in an action in rem for possession of a ship or for wages must state the nationality of the ship against which the action is brought and that the notice (if any) required by paragraph (4) has been sent.

(8) A copy of any such notice must be annexed to the affidavit.

(9) An affidavit in such an action as is referred to in paragraph (6), must have exhibited thereto a certified copy of the bottomry bond, or of the translation thereof.

Notes

This rule deals with the issue of a warrant of arrest and applies to an action in rem if the res proceeded against is in the jurisdiction. Once an action is brought against a ship by issue of a writ, a sale of the ship by her owner will not deprive the plaintiff of any rights he may have. See The Monica S [1967 3 All ER 740.

Affidavits filed in accordance with this rule must comply with part 30.

“Caveat book” – there’s only one book in which all caveats in admiralty are entered; it is kept at the registry.

Cases

The Carmania II [1963] 2 Lloyd’s Rep 152- the phrase “action is brought” is deemed to mean “when the [claim] is issued.

The Gniezno [1968] P. 418- the same rules apply to a defendant seeking to arrest in support of a counterclaim.

59.6 Caveat against arrest

(1) A person who desires to prevent the arrest of any property must file in the Registry a praecipe, in Form ADM6, signed by him or his attorney undertaking —

(a) to enter an acknowledgement of service in any action that may be begun against the property described in the praecipe; and

(b) within three days after receiving notice that such an action has been begun, to give bail in the action in a sum not exceeding an amount specified in the praecipe or to pay the amount so specified into court; and on the filing of the praecipe, a caveat

against the issue of a warrant to arrest the property described in the praecipe shall be entered in the caveat book.

(2) The fact that there is a caveat against arrest in force shall not prevent the issue of a warrant to arrest the property to which the caveat relates.

Notes

A person who wishes to prevent the arrest of property may have a caveat against arrest entered.

"... desires to prevent the arrest ..."- While the entry of a caveat does not in fact prevent the issue or execution of a warrant of arrest (see para. (2) of this rule) but a person who causes property to be arrested despite the existence of a caveat and without good and sufficient reason may be ordered to pay damages.

"... discharge the warrant..."- These words mean no more than "authorise the registry to issue a release of the res upon application being made in that behalf." See 59.13(1). A release (Form ADM7) is required.

Cases

The Walter D. Wallett [1893] P. 202- Whether a caveat has been entered or not, if property is arrested by reason of mala fides or crassa negligentia, damages may be recovered in Admiralty or, indeed, at common law.

(The Cheshire Witch (1858) Br. & Lush. 362; The Margaret and lane (1869) L.R. 2 A. & E. 345)- Damages may also be recovered where an arrest has been unduly continued

59.7 Remedy where property protected by caveat is arrested (without good and sufficient reason).

Where any property with respect to which a caveat against arrest is in force is arrested in pursuance of a warrant of arrest, the party at whose instance the caveat was entered may apply to the Court by motion for an order under this rule and, on the hearing of the application, the Court, unless it is satisfied that the party procuring the arrest of the property had a good and sufficient reason for so doing, may by order discharge the warrant and may also order the last mentioned party to pay to the applicant damages in respect of the loss suffered by the applicant as a result of the arrest.

59.8 Service of statement of claim in action in rem.

(1) Subject to paragraph (2), a statement of claim by which an action in rem is begun must be served on the property against which the action is brought except —

(a) where the property is freight, in which case it must be served on the cargo in respect of which the freight is payable or on the ship in which that cargo was carried; or

(b) where that property has been sold and the proceeds of sale paid into court, in which case it must be served on the Registrar.

(2) A statement of claim need not be served on the property or Registrar mentioned in paragraph (1) if —

(a) the defendant's attorney endorses on the statement of claim a statement that he accepts service of the statement of claim on behalf of that defendant, in which event the statement of claim shall be deemed to have been duly served on that defendant and to have been so served on the date on which the endorsement was made; or

(b) a statement of claim is not duly served on a defendant but he unconditionally acknowledged service in the action begun by the statement of claim, the statement of claim shall be deemed to have been duly served on him and to have been so served on the date on which he entered the Acknowledgment of Service.

(3) Where by virtue of this rule a statement of claim is required to be served on any property, the claimant may request service of the statement of claim to be effected by the marshal if, but only if, a warrant of arrest has been issued for service against the property or the property is under arrest, and in that case the claimant must file in the Registry and lodge —

(a) the statement of claim and a copy thereof; and

(b) an undertaking to pay on demand all expenses incurred by the marshal or his substitute in respect of the service of the statement of claim, and thereupon the marshal or his substitute shall serve the claim form on the property described in the praecipe.

(4) Where the claimant in an action in rem, or his attorney, becomes aware that there is in force a caveat against arrest with respect to the property against which the action is brought, he must serve the statement of claim forthwith on the person at whose instance the caveat was entered.

(5) Where a statement of claim by which an action in rem is begun is amended under rule 20.4, after service thereof, then, unless the Court otherwise directs on an application made without notice, the amended statement of claim must be served on any defendant who has entered an acknowledgement of service in the action or, if no defendant has acknowledged service therein, on the property or Registrar mentioned in paragraph (1) of this rule.

Notes

Para. (1)(b)—The property must have been sold by the Court and part of the proceeds of sale must still be in Court.

Cases

The Optima (1905) 74 L.T.P. 94- Where property has been sold by an agent who retains the proceeds, a writ cannot be served on those proceeds.

59.9 Committal of attorney failing to comply with undertaking.

Where the attorney of a party to an action in rem fails to comply with a written undertaking given by him to any other party or his attorney to enter an acknowledgement of service in the action, give bail or pay money into court in lieu of bail, he shall be liable to committal.

Cases

The Borre [1921] P. 393- “a written undertaking” to put in bail cannot be withdrawn on offering the ship, within the jurisdiction, for arrest, nor do the plaintiffs, by arresting the ship under such circumstances, forfeit their rights under the undertaking.

59.10 Execution, etc. of warrant of arrest.

(1) A warrant of arrest is valid for twelve months beginning with the date of its issue.

(2) A warrant of arrest may be executed only by the marshal or his substitute.

(3) A warrant of arrest shall not be executed until an undertaking in writing, satisfactory to the marshal to pay the fees and expenses of the marshal has been lodged in the marshal's office.
(4) A warrant of arrest shall be not be executed if the party at whose instance it was issued lodges a written request to that effect with the marshal.
(5) A warrant of arrest issued against freight may be executed by serving the warrant on the cargo in respect of which the freight is payable or on the ship in which that cargo was carried or on both of them.
(6) Subject to paragraph (5), a warrant of arrest must be served on the property against which it is issued.
(7) Within seven days after the service of a warrant of arrest, the warrant must be filed in the Registry by the marshal.

Notes

To obtain the execution of the arrest warrant and have the property proceeded against arrested it is necessary to file an undertaking.

Para. (1) "...valid for 12 months..."— Provided the writ has either been served or, by virtue of its renewal, remains valid for service, a further warrant may be issued. A warrant will not be executed unless writ has been served or is still valid for service at date of execution.

Para. (2) "...executed by the marshal..."—The warrant is executed by being served by the Marshal or his substitute upon the ship or property concerned in accordance with 59.11.

Cases

The Italy II (1987] 2 Lloyd's Rep. 162- The marshal is not a shipkeeper and parties should not delay in prosecuting an action in which a vessel is under arrest.

59.11 Service on ships, etc.: how effected.

(1) Subject to paragraph (2), service of a warrant of arrest or statement of claim in an action in rem against a ship, freight or cargo shall be effected by —

(a) affixing the warrant or statement of claim for a short time on any mast of the ship or on the outside of any suitable part of the ship's superstructure; and
(b) on removing the warrant or statement of claim, leaving a copy of it affixed, in the case of the warrant, in its place or, in the case of the statement of claim, on a sheltered conspicuous part of the ship.

(2) Service of a warrant of arrest or statement of claim in an action in rem against freight or cargo or both shall, if the cargo has been landed or transshipped, be effected —

(a) by placing the warrant or statement of claim for a short time on the cargo, and, on removing the warrant or statement of claim, leaving a copy of it on the cargo; or
(b) if the cargo is in the custody of a person who will not permit access to it, by leaving a copy of the warrant or statement of claim with that person.

Notes

Generally, it is best practice to serve a writ and warrant at approximately the same time, but either may be served first. A warrant can be executed (served) only by the Marshal or his substitute (59.10(2)). The writ

and or warrant has to be fixed on the outside of the property proceeded against in a position which may reasonably be expected to be seen.

As freight is incorporeal, it cannot be arrested nor can a writ be served upon it. However, where an action is brought against freight, or cargo and freight, or ship, cargo and freight, the writ can as against freight, be served on the cargo concerned or the ship in which it was carried, sec 59.8(1)(a) and a warrant can be executed against the cargo or ship or both (59.10(5)) in the manner prescribed by this rule.

If the cargo has not been discharged from the ship in which it was laden at the time of the occurrence which gives rise to the claim the warrant will be served on the ship and/or cargo in respect of freight (see 59.10(5)); if it has been trans-shipped or landed, 59.11(2) provides that service shall be on the cargo itself or on the person who has custody of the cargo.

Service on freight is effected by service on the cargo in respect of which the freight is payable, or on the ship in which that cargo was carried. See The Kaleten (1914) 30 TLR 572.

The effect of arresting cargo in a ship is, of course, to detain the ship until such time as the cargo can be discharged and discharge cannot take place without leave of the Court.

Cases

The Prins Bernhardt [1964] P 117- It is not valid service to purport to serve the claim form on the master on board the ship.

The Prins Bernhard [1963] 3 All E.R. 735- Illustration of effect of failure to comply with the requirements as to service.

The Sullivar [1965] 2 Lloyd's Rep. 350- Illustration of the non-fatal character of a minor failure.

59.12 Applications with respect to property under arrest.

(1) The marshal may at any time apply to the Court for directions with respect to property under arrest in an action and may, or, if the Court so directs, shall, give notice of the application to any or all of the parties to every action against the property.

(2) The marshal shall send a copy of any order made under paragraph (1), to all the parties to every action against the property to which the order relates.

Notes

If a res is under arrest and is being adversely affected by property on board, such as perishables, which are not under arrest, an order, if granted, may include an order for sale of that property.

Cases

The Queen of the South [1968] 1 All E.R. 1163- Illustrates the practice to be followed by the Marshal when a ship is under arrest and a harbour or dock authority claims or purports to exercise a statutory power of detention or sale in respect of unpaid dock dues. However, where questions arise concerning the right of a harbour or dock authority to detain a ship, that authority should seek a declaration from the Court see The Baltico (1982) H. No.140, Hartlepool District Registry.

59.13 Release of property under arrest.

(1) Except where property arrested in pursuance of a warrant of arrest is sold under an order of the Court, property which has been so arrested shall be released only under the authority of an instrument of release (hereinafter referred to as a "release"), in Form ADM7, issued out of the Registry.

(2) A party at whose instance any property was arrested may, before an acknowledgement of service is entered in the action, file a notice withdrawing the warrant of arrest and, if he does so, a release shall, subject to paragraphs (3) and (5), be issued with respect to that property.

(3) Unless the Court otherwise orders, a release shall not be issued with respect to property as to which a caveat against release is in force.
(4) A release may be issued at the instance of a party interested in the property under arrest if the Court so orders, or, subject to paragraph (3), if all the other parties to the action in which the warrant of arrest was issued consent.
(5) Before a release is issued the party entitled to its issue must —
    (a) if there is a caveat against release in force as to the property in question, give notice to the party at whose instance it was entered or his attorney requiring the caveat to be withdrawn; and
    (b) file a praecipe in Form ADM8 requesting issue of a release.
(6) Before property under arrest is released in compliance with a release issued under this rule, the party at whose instance it was issued must, in accordance with the directions of the marshal either —
    (a) pay the fees of the marshal already incurred and lodge in the marshal's office an undertaking to pay on demand the other fees and expenses in connection with the arrest of the property and the care and custody of it while under arrest and of its release; or
    (b) lodge in the marshal's office an undertaking to pay on demand all such fees and expenses, whether incurred or to be incurred.
(7) The Court, on the application of any party who objects to directions given to him by the marshal under paragraph (6), may vary or revoke the directions.

Notes
The owner may obtain the consent of the arresting party to the issue of a release by giving bail to its satisfaction, or the arresting party may agree to release the property before bail is given on the strength of an undertaking to acknowledge issue or service of the Statement of Claim and give bail. An alternative to bail is payment into court of an equivalent amount.
Usually, the arresting party is satisfied with a guarantee or undertaking given out of court. However, such party may insist on bail.
An application can be made to the Registrar by Summons to determine the amount to be given as security to be provided. However, should a party desire that the summons be heard initially by a Judge, he can indicate why the Summons is more suitable for the Judge than the Registrar (e.g., substantial savings in costs or time would be considered viable reasons)
In salvage actions, the value of the property under arrest should be agreed, in writing, between the parties before the property is released or an affidavit of value should be sworn by a person acquainted with the res and filed.
If a party demands an excessive bail he may have to pay the costs of a successful application to reduce the amount of bail and the expense of providing the excess.

Cases
The Moscanthy [1971] 1 Llyod's rep 37 at 44.- the arresting party is "entitled to sufficient security to over the amount of his claim with interest and costs on the basis of his reasonably argued best case".
The Moscanthy [1971] 1 Llyod's rep 37 at 46-47- the power to exact security must not be used oppressively. The party seeking security ought to put his cards on the table and explain to the other party the grounds he claims to exercise this strong power.
The Charlotte [1920] P 78- the amount shouldn't exceed the value of the res.
The Varna [1993] 2 Lloyd's Rep 253- Where the affidavit leading to warrant of arrest contains material inaccuracies relating to the statutory requirement, an arrest cannot be maintained.
The Hanna (1878) 3 Asp 503- If the arresting party is in disagreement with the amount shown in the affidavit, he may apply for an appraisement. If he does not make such an application, the value shown in the affidavit is binding.

59.14 Caveat against release and payment.

(1) A person who desires to prevent the release of any property under arrest in an action in rem and the payment out of the court of any money in court representing the proceeds of sale of that property, must file in the Registry a praecipe as caveat against the issue of a release in Form ADM 9 with respect to that property and the payment out of court of that money shall be entered in the caveat book.

(2) Where the release of any property under arrest is delayed by the entry of a caveat under this rule, any person having an interest in that property may apply to the Court by motion for an order requiring the person who procured the entry of the caveat to pay to the applicant damages in respect of the loss suffered by the applicant by reason of the delay, and the Court, unless it is satisfied that the person procuring the entry of the caveat had a good and sufficient reason for so doing, may make an order accordingly.

Note

A caveat under this rule may be entered by any person, whether he has begun an action against the property under arrest or not. The effect of entering a caveat is to prevent the release of the property or payment out of the process of sale without the consent of the caveator or Court order. Any Summons seeking an Order for release notwithstanding the existence of a caveat should be served on the caveators.

Cases

Re Aro Co. Ltd [1980] Ch 196- A plaintiff who has issued a writ in rem against a ship which is under arrest and has entered a caveat will be considered a secured creditor for the purposes of deciding whether or not the discretion of the court should be exercised in his favour.

59.15 Duration of caveats.

(1) Every caveat entered in the caveat book is valid for six months beginning with the date of its entry but the person at whose instance a caveat was entered may withdraw it by filing a praecipe in Form ADM10.

(2) The period of validity of a caveat may not be extended but this provision shall not be taken as preventing the entry of successive caveats.

Notes

Where an attorney acts for more than one caveator and wishes to withdraw some or all of their caveats, this may be done by a single praecipe.

59.16 Bail.

(1) Bail on behalf of a party to an action in rem must be given by bond in Form ADM11 and the sureties to the bond must enter into the bond before a notary public not being a notary public who, or whose partner, is acting as attorney or agent for the party on whose behalf the bail is to be given, or before the registrar or any deputy or assistant registrar.

(2) Subject to paragraph (3), a surety to a bail bond must make an affidavit stating that he is able to pay the sum for which the bond is given.

(3) Where a corporation is a surety to a bail bond given on behalf of a party, no affidavit shall be made under paragraph (2) on behalf of the corporation unless the

opposite party requires it, but where such an affidavit is required it must be made by a director, manager, secretary or other similar officer of the corporation.

(4) The party on whose behalf bail is given must serve on the opposite party a notice of bail containing the names and addresses of the persons who have given bail on his behalf and of the notary public or the registrar before whom the bail bond was entered into; and after the expiration of twenty-four hours from the service of the notice, or sooner with the consent of the opposite party, he may file the bond and must at the same time file the affidavits, if any, made under paragraph (2) and an affidavit proving due service of the notice of bail to which a copy of that notice must be exhibited.

Note

The purpose of an action in rem was to obtain security in respect of a judgment of the Court. The Court had no jurisdiction to arrest ships or to keep ships under arrest for other purposes. See The Cap Bon [1967] I Lloyd's Rep. 543

Cases

The Point Breeze [1928] P 135- When bail has been given, the property cannot be arrested or re-arrested after judgment if the bail proves to be insufficient.

The Prinsegracht [1993] 1 Lloyd's Rep 41- considers arrest or re-arrest after bail is given and before judgment is viewed in light of whether the arrest or re-arrest is oppressive and vexatious.

59.17 Interveners.

(1) Where property against which an action in rem is brought is under arrest or money representing the proceeds of sale of that property is in court, a person who has an interest in that property or money but who is not a defendant to the action may, with the leave of the Court, intervene in the action.

(2) An application for the grant of leave under this rule must be made without notice by affidavit showing the interest of the applicant in the property against which the action is brought or in the money in court.

(3) A person to whom leave is granted to intervene in an action must file an acknowledgment of service therein in the Registry within the period specified in the order granting leave; and rules 9.1 to 9.5 shall, with the necessary modifications, apply in relation to that acknowledgment of service by an intervener as if he were a defendant named in the statement of claim.

(4) The Court may order that a person to whom it grants leave to intervene in an action shall, within such period as may be specified in the order, serve on every other party to the action such pleading as may be so specified.

Notes

The application can be made to a Registrar and the object of rule is to enable a person who has a substantial interest in the res to intervene, to protect such interest if such interest may be injuriously affected by the action against the res.

Cases

The Lord Strathcona [1925] P. 143- The intervener's rights are generally limited to the protection of his interest in the res, He has no locus standi to raise issues which are not material to his purpose. However, the Court also has an inherent jurisdiction to allow persons with no interest in the property under arrest to intervene, if the effect of the arrest is to cause him serious hardship, difficulty or danger. See The Mardina Merchant [1974] 3 All E.R. 749.

DNB Bank USA v The Owners and Parties Interested in the Motor Vessel "Crystal Symphony" et al 2022/COM/adm/00012 & other actions (25 September 2023) - The Office of the Attorney General applied on behalf of the Comptroller of VAT to intervene in the proceedings to recover payment of the VAT the Comptroller assessed to be due on the court-ordered sales of the "MV Crystal Symphony" and "MV Crystal Serenity" out of funds subject to the Court's order. (The claimant successfully applied to set aside the Office of the Attorney General's irregularly entered appearance before the leave of the Court was obtained.) The claimant objected to the levying of VAT on the sales. The Court held that, under CPR 59.17, a party who wishes to intervene in an admiralty action must show that they have a substantial interest in the res and such intervention is to protect the interest which may be injuriously affected by the action against the res. The Court refused to grant leave as the Office of the Attorney General had not shown the applicable threshold was met as provision had already been made in an order of the Court for setting aside the sums the Office of the Attorney General asserted were due to the Department of Inland Revenue as the VAT levied on the sales of the vessels. The Court also refused to allow the Office of the Attorney General to represent the Admiralty Marshal as the Admiralty Marshal was an officer of the Court and was subject to the Court's direction.

59.18 Preliminary acts.

(1) In an action to enforce a claim for damage, loss of life or personal injury arising out of a collision between ships, unless the Court otherwise orders, the claimant must, within two months after issue of the statement of claim, and the defendant must, within two months after acknowledging service or filing a defence, in accordance with rule 9.1(2), and before any pleading is served, lodge in the Registry a document (hereinafter referred to as "a preliminary act") containing a statement of the following particulars —

(a) the names of the ships which came into collision and their ports of registry;

(b) the date and time of the collision;

(c) the place of the collision;

(d) the direction and force of the wind;

(e) the state of the weather;

(f) the state, direction and force of the tidal or other current

(g) the course steered and speed through the water of the ship when the other ship was first seen or immediately before any measures were taken with reference to her presence, whichever was the earlier;

(h) the lights, if any, carried by the ship;

(i) the —

(A) distance and bearing of the other ship if and when her echo was first observed by radar;

(B) distance, bearing and approximate heading of the other ship when first seen;

(j) what light or combination of lights, if any, of the other ship was first seen;

(k) what other lights or combinations of lights, if any, of the other ship were subsequently seen before the collision, and when;

what alterations, if any, were made to the course and speed of the ship after the earlier of the two times referred to in subparagraph (g) up to the time of the collision, and when, and what measures, if any, other than alterations of course or speed, were taken to avoid the collision, and when;

(m) the parts of each ship which first came into contact and the approximate angle between the two ships at the moment of contact;

(n) what sound signals, if any, were given, and when;

(o) what sound signals, if any, were heard from the other ship, and when.
(2) Every preliminary act shall be sealed by the proper officer and shall be filed in a closed envelope, stamped with an official stamp showing the date of filing, and, unless the Court otherwise orders, no envelope shall be opened until the pleadings are closed and a consent signed by each of the parties or his attorney to the opening of the preliminary acts is filed with the proper officer.
(3) Where the Court orders the preliminary acts to be opened, the Court may further order the action to be tried without statements of case but, where the Court orders the action to be so tried, any party who intends to rely on the defence of compulsory pilotage must give notice of his intention to do so to the other parties within seven days after the opening of the preliminary acts.
(4) Where the Court orders the action to be tried without pleadings, it may also order each party, within such period as may be specified in the order, to file a statement of the grounds on which he charges any other party with negligence in connection with the collision and to serve a copy thereof on that other party.
(5) In an action in which preliminary acts are required, the claimant must serve a particulars of claim on each defendant within fourteen days after the latest date on which the preliminary act of any party to the action is filled unless the Court orders the action to be tried without pleadings.

Notes

A preliminary act is distinguished from a pleading. The object of the preliminary act is to obtain from the parties statements of the facts at a time when they are fresh in their recollection.

An order to dispense with the filing of preliminary acts will not be made on a consent summons or under 59.34. It is the practice of the Court to require the parties to attend on a Summons before the Registrar to explain the reasons for the application.

Cases

The Seacombe, The Devonshire [1912] P. 21, 59- It is a formal admission, binding the party making it, and can only be departed from by special leave.

The Miranda (1882) 7 P.D. 185- Illustrates that the Court will not allow either party subsequently to alter anything in his preliminary act, not even to correct a clerical error).

The Godiva (1886) 11 P.D. 20- A party who has filed a defective preliminary act, which does not give the information required by the rule, may be ordered on application by the other party to amend it or to give particulars.

The Pelican I (1926) 25 LI.L.Rep. 150- Illustrates that if preliminary acts differ largely from the proven facts at trial, the costs of such preliminary act may be disallowed on taxation.

59.19 Failure to lodge preliminary act: proceedings against party in default.

(1) Where in such an action as is referred to in rule 59.18(1) the claimant fails to lodge a preliminary act within the prescribed period, any defendant who has lodged such an act may apply to the Court by interlocutory application for an order to dismiss the action, and the Court may by order dismiss the action or make such other order on such terms as it thinks just.
(2) Where in such an action, being an action in personam, a defendant fails to lodge a preliminary act within the prescribed period, Part 12 shall apply as if the defendant's failure to lodge the preliminary act within that period was a failure by him to serve a

defence on the claimant within the period fixed by or under these Rules for service thereof, and the claimant, if he has lodged a preliminary act may, subject to Part 65, accordingly enter judgment against the defendant in accordance with Part 12.
(3) Where in such an action, being an action in rem, a defendant fails to lodge a preliminary act within the prescribed period, the claimant, if he has lodged such an act, may apply to the Court by interlocutory application apply for judgment against that defendant, and it shall not be necessary for the claimant to file or serve a particulars of claim or an affidavit before the hearing of the application.
(4) On the hearing of an application under paragraph (3), the Court may make such order as it thinks just, and where the defendant does not appear on the hearing and the Court is of opinion that judgment should be given for the claimant provided he proves his case, it shall order the claimant's preliminary act to be opened and require the claimant to satisfy the Court that his claim is well founded.
(5) The claimant's evidence may, unless the Court otherwise orders, be given by affidavit without any order or direction in that behalf.
(6) Where the claimant in accordance with a requirement under paragraph (4) satisfies the Court that his claim is well founded, the Court may give judgment for the claim with or without a reference to the Registrar and may at the same time order the property against which the action is brought to be appraised and sold and the proceeds to be paid into court or make such order as it thinks just.
(7) The Court may, on such terms as it thinks just, set aside any judgment entered in pursuance of this rule.
(8) In this rule references to the prescribed period shall be construed as references to the period within which by virtue of rule 59.18(1) or of any order of the Court the claimant or defendant, as the context of the reference requires, is required to lodge a preliminary act.

59.20 Special provisions as to pleadings in collision, etc., actions.

(1) Notwithstanding any provision in these Rules to the contrary, the claimant in any such action as is referred to in rule 59.2(1) may not serve a reply or a defence to counterclaim on the defendant except with the leave of the Court.
(2) If in such an action there is a counterclaim and no defence to counterclaim by the claimant, then, there shall be an implied joinder of issue on the counterclaim, and the joinder of issue operates as a denial of every material allegation of fact made in the counterclaim.

59.21 Judgment by default.

(1) Where a statement of claim is served under rule 59.8(4) on a party at whose instance a caveat against arrest was issued, then if —
(a) the sum claimed in the action begun by the statement of claim does not exceed the amount specified in the undertaking given by that party or his attorney to procure the entry of the caveat; and
(b) that party or his attorney does not within fourteen days after service of the statement of claim fulfil the undertaking given by him as aforesaid, the claimant may, after filing an affidavit verifying the facts on which the action is based, apply to the Court for judgment by default.

(2) Judgment given under paragraph (1) may be enforced by the arrest of the property against which the action was brought and by committal of the party at whose instance the caveat with respect to that property was entered.
(3) Where a defendant to an action in rem fails to file an acknowledgment of service within the time limited for appearing, then, on the expiration of fourteen days after service of the statement of claim and upon filing an affidavit proving due service of the statement of claim, an affidavit verifying the facts on which the action is based and, if a particulars of claim was not endorsed on the statement of claim, a copy of the particulars of claim, the claimant may apply to the Court for judgment by default.
(4) Where the statement of claim is deemed to have been duly served on the defendant by reason that the defendant's attorney has endorsed on the statement of claim a statement that he accepts service of the statement of claim on behalf of that defendant or was served on the Registrar under rule 59.8, an affidavit proving due service of the statement of claim need not be filed under this paragraph, but the statement of claim endorsed as mentioned in rule 59.1(2) or endorsed by the Registrar with a statement that he accepts service of the statement of claim must be lodged with the affidavit verifying the facts an which the action is based.
(5) Where a defendant to an action in rem fails to serve a defence on the claimant, then, after the expiration of the period fixed by or under these Rules for service of the defence and upon filing an affidavit stating that no defence was served on him by that defendant during that period, an affidavit verifying the facts on which the action is based and, if a particulars of claim was not endorsed on the statement of claim, a copy of the particulars of claim, the claimant may apply to the Court for judgment by default.
(6) Where a defendant to a counterclaim in an action in rem fails to serve a defence to counterclaim on the defendant making the counterclaim, then, subject to paragraph (7), after the expiration of the period fixed by or under these Rules for service of the defence to counterclaim and upon filing an affidavit stating that no defence to counterclaim was served on him by the first-mentioned defendant during that period, an affidavit verifying the facts on which the counterclaim is based and a copy of the counterclaim, the defendant making the counterclaim may apply to the Court or judgment by default.
(7) No application may be made under paragraph (6) against the claimant in any such action as is referred to in rule 59.2(1)(a).
(8) An application to the Court under this rule must be made by interlocutory application and if, on the hearing of the application, the Court is satisfied that the applicant's claim is well founded it may give judgment for the claim with or without a reference to the Registrar and may at the same time order the property against which the action or, as the case may be, counterclaim is brought to be appraised and sold and the proceeds to be paid into court or may make such other order as it thinks just.
(8) In default actions in rem evidence may, unless the Court otherwise orders, be given by affidavit without any order or direction in that behalf.
(9) The Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuance of this rule.
(10) Part 12 shall not apply to actions in rem.

Notes

This rule applies only to certain specified defaults in actions in rem, namely, breach of an undertaking to provide bail given to procure a caveat against arrest; default of acknowledgment of service of the statement of claim; default of defence, default of defence to counterclaim when service of this is required. As to judgment in default where a defendant fails to lodge a preliminary act see 59.19.

Cases
The Nautik [1895] P. 121 at 124 per Bruce J- It is not a pre-requisite that the res be arrested before a judgment in default can be ordered.
The Ruben Martinez Villena [1987] 1 Lloyd's Rep. 621- A defendant does need to have acknowledged service of the writ of summons (statement of claim) when applying to set aside a judgment given in default
It is best practice to file Affidavits and exhibits well in advance of the hearing so that figures, etc. may be checked so it may be possible to obtain judgment for a specified sum. Any exhibit in a foreign language must be accompanied by a translation which must be exhibited to the affidavit concerned or a separate affidavit. If an order for appraisement and sale (see 59.22) is desired this should be stated in the application.
If caveats have been entered under 56.14, any decree made may reserve all questions of priorities. As to the determination of priorities.

59.22 Order for sale of ship: determination of priority of claims.

(1) Where in an action in rem against a ship the Court has ordered the ship to be sold, any party who has obtained or obtains judgment against the ship or proceeds of sale of the ship may —

(a) in a case where the order for sale contains the further order referred to in paragraph (2), after the expiration of the period specified in the order under paragraph (2)(a); or

(b) in any other case, after obtaining judgment, apply to the Court by motion for an order determining the order of priority of the claims against the proceeds of sale of the ship.

(2) Where in an action in rem against a ship the Court orders the ship to be sold, it may further order —

(a) that the order of priority of the claims against the proceeds of the sale of the ship shall not be determined until after the expiration of ninety days, or of such other period as the Court may specify, beginning with the day on which the proceeds of sale are paid into Court;

(b) that any party to the action or to any other action in rem against the ship or the proceeds of sale thereof may apply to the Court in the action to which he is a party to extend the period specified in the order;

(c) that within seven days after the date of payment into court of the proceeds of sale the marshal shall send for publication in Lloyd's List and Shipping Gazette and such other newspaper, if any, as the Court may direct, a notice complying with paragraph (3).

(3) The notice referred to in paragraph (2)(c) must state —

(a) that the ship, naming her, has been sold by order of the Supreme Court in an action in rem, identifying the action;

(b) that the gross proceeds of the sale, specifying the amount thereof, have been paid into court;

(c) that the order of priority of the claims against the said proceeds will not be determined until after the expiration of the period specified in the order for sale; and

(d) that any person with a claim against the ship or the proceeds of sale thereof, on which he intends to proceed to judgment should do so before the expiration of that period.

(4) The marshal must lodge in the Registry a copy of each newspaper in which the notice referred to in paragraph (2)(c) appeared.

(5) The expenses incurred by the marshal in complying with an order of the Court under this rule shall be included in his expenses relating to the sale of the ship.

(6) An application to the Court to extend the period referred to in paragraph (2)(a) must be made by interlocutory application, and a copy of the application notice, must, at least three days before the day fixed for the hearing thereof, be served on each party who has begun an action in rem against the ship or the proceeds of sale thereof.

59.23 Appraisement and sale of property.

(1) A commission for the appraisement and sale of any property under an order of the Court shall not be issued until the party applying for it has filed a praecipe in Form ADM12.

(2) Such a commission must, unless the Court otherwise orders, be executed by the marshal and must be in Form ADM13.

(3) A commission for appraisement and sale shall not be executed until an undertaking in writing satisfactory to the marshal to pay the fees and expenses of the marshal on demand has been lodged in the marshal's office.

(4) The marshal shall pay into court the gross proceeds of the sale of any property sold by him under a commission for sale and shall bring into court the account relating to the sale, with vouchers in support, for taxation.

(5) On the taxation of the marshal's account relating to a sale any person interested in the proceeds of the sale shall be entitled to be heard, and any decision of the Registrar made on the assessment to which objection is taken may be reviewed in the same manner and by the same persons as any decisions of the Registrar made in assessment proceedings under Part 16.

Cases

The Halycon the Great [1975] 1 All E.R. 882- The Marshal may, if he thinks fit, in order to obtain the best price in any particular case, invite offers and sell the property for a price in a foreign currency.
Where property is sold for foreign currency the marshal pays the proceeds into court in that currency. They will not be invested unless an application in that behalf is made to the court.

59.24 Payment into and out of court.

(I) Parts 35 and 36 shall apply in relation to an Admiralty action as they apply to an action for debt or damages.

(2) Subject to paragraph (3), money paid into court shall not be paid out except in pursuance of an order of a judge in person.

(3) The Registrar may, with the consent of the parties interested in money paid into court, order the money to be paid out to the person entitled thereto in the following cases, that is to say —

(a) where a claim has been referred to the Registrar for decision and all the parties to the reference have agreed to accept the Registrar's decision and to the payment out of any money in court in accordance with that decision;

(b) where property has been sold and the proceeds of sale thereof paid into court, and the parties are agreed as to the persons to whom the proceeds shall be paid and the amount to be paid to each of those persons;

(c) where in any other case there is no dispute between the parties.

(4) Where, in an Admiralty action, money has been paid into court pursuant to an order made under Section III of Part 17, the Registrar may make an order for the money to be paid out to the person entitled thereto.

Notes

The Court lacks jurisdiction to order payment out from the proceeds of a sale by order of the Court, to persons other than judgment holders or, in the case of the residue after all claims have been satisfied. However, payment out may be ordered to any person where the defendants and all other parties interested in the proceeds of sale (judgment holders, interveners and caveators) consent.

59.25 Application of Parts 25, 26, 27 and 38.

(1) Parts 25, 26, 27 and 38 shall apply to Admiralty actions, other than limitation actions and actions ordered to be tried as Admiralty short causes, as it applies to other actions, except that —

(a) the interlocutory application for directions shall be returnable in not less than seven weeks; and

(b) unless a judge otherwise directs, the interlocutory application for directions shall be heard by a judge in person.

(2) An order made at a case management conference shall determine whether the trial is to be without assessors or with one or more assessors, nautical assessors or other assessors.

(3) The trial shall be in the Supreme Court before a judge without a jury unless, on the ground that there are special reasons to the contrary, an order made on the interlocutory application for directions otherwise provides.

(4) An order may be made on the case management conference, or a direction may be given at the trial, limiting the witnesses who may be called at the trial, whether they are expert witnesses or not.

(5) Any such order or direction as is referred to in paragraph (2), (3) or (4), including an order made on appeal, may be varied or revoked by a subsequent order or direction made or given at or before the trial by a judge in person or, with the judge's consent, by the Registrar.

59.26 Fixing date for trial, etc.

(1) The Court may at any stage of an action, either on an application made by interlocutory application by any party or by order made by virtue of rule 59.30, fix a date for the trial and vacate or alter any such date.

(2) Not later than seven days after a date for the trial of the action has been fixed, the action must be set down for trial —

(a) where the date was fixed on an application made under paragraph (l), by the applicant;

(b) where the date was fixed by order made under any other rule, by the claimant.

(3) Where the applicant or claimant does not, within the period fixed by this paragraph, set the action down for trial, any other party may set it down or an application may be made to the Court to dismiss the action for want of prosecution and, on the hearing of any such application, the Court may order the action to be dismissed accordingly or make such other order as it thinks just.

(4) Not less than seven days before the date fixed for the trial, or such other period before that date as may be specified in general directions given by the Chief Justice, the party by whom the action was set down for trial must, unless the Court otherwise orders, file in the Registry —

(a) if trial with one or more assessors has been ordered, a praecipe for his or their attendance; and

(b) five copies of any pleadings, preliminary acts, notices given under rule 59.18(3) and statements filed under rule 59.18(4).

(5) If an action which has been set down for trial is settled or withdrawn it shall be the duty of all the parties to notify the Registry of the fact without delay and take such steps as may be necessary to vacate the date fixed for the trial.

(6) Part 37 shall not apply to Admiralty actions.

59.27 Stay of proceedings in collision, etc. actions until security given.

Where an action in rem, being an action to enforce any such claim as is referred to in rule 59.2(1)(a), is begun and a cross action in rem arising out of the same collision or other occurrence as the first mentioned action is subsequently begun, or a counterclaim arising out of that occurrence is made in the first mentioned action, then —

(a) if the ship in respect of or against which the first mentioned action is brought has been arrested or security given to prevent her arrest; but

(b) the ship in respect of or against which the cross action is brought or the counterclaim made cannot be arrested and security has not been given to satisfy any judgment given in favour of the party bringing the cross action or making the counterclaim, the Court may stay proceedings in the first-mentioned action until security is given to satisfy any judgment given in favour of that party.

59.28 Inspection of ship, etc.

The Court may, on the application of any party, make an order for the inspection by the assessors, if any, or by any party or witness, of any ship or other property, whether real or personal, the inspection of which may be necessary or desirable for the purpose of obtaining full information or evidence in connection with any issue in the action.

Notes

An order made pursuant to 59.28 permitting a party's surveyor to inspect a ship and her documents and to take samples from a vessel, although mandatory in form, is not an injunction. Plaintiffs seeking such an order must produce affidavit evidence to show:

1. That they have a good arguable case on the merits.
2. That there was more than de minimis shortage of cargo on delivery.
3. That such inspection and/or taking of samples and/or analysis is likely to assist the trial judge.

To protect the shipowners from unnecessary interference and any third party adversely affected by the order, the plaintiffs will be required to give an undertaking in damages against any loss suffered as a result of the order.
An order made pursuant to 59.28 permitting a party's surveyor to inspect a ship and her documents and to take samples from a vessel, although mandatory in form, is not an injunction. Plaintiffs seeking such an order must produce affidavit evidence to show:
1. a good arguable case on the merits.
2. that there was more than de minimis shortage of cargo on delivery.
3. that such inspection and/or taking of samples and/or analysis is likely to assist the trial judge.

Cases
The Olympic and HMS Hawke [1913] P 214- illustration of the principle.

59.29 Examination of witnesses and other persons.

(1) The power conferred Part 33, shall extend to the making of an order authorizing the examination of a witness or person on oath before a judge sitting in court as if for the trial of the cause or matter, without that cause or matter having been set down for trial or called on for trial.'
(2) The power conferred by Part 33 shall also extend to the making of an order, with the consent of the parties, providing for the evidence of a witness being taken as if before an examiner, but without an examiner actually being appointed or being present.
(3) Where an order is made under paragraph (2), it may make provision for any consequential matters and, subject to any provision so made, the following provisions shall have effect —

(a) the party whose witness is to be examined shall provide a stenographer to take down the evidence of the witness;
(b) any representative, being the attorney, of either of the parties shall have authority to administer the oath to the witness;
(c) the stenographer need not himself be sworn but shall certify in writing as correct a transcript of his notes of the evidence and deliver it to the attorney for the party whose witness was examined, and that attorney shall file it in the Registry;
(d) unless the parties otherwise agree or the Court otherwise orders, the transcript or a copy thereof shall, before the transcript is filed, be made available to the attorney or other persons who acted as advocates at the examination, and if any of those persons is of opinion that the transcript does not accurately represent the evidence he shall make a certificate specifying the corrections which in his opinion should be made therein, and that certificate must be filed with the transcript.

(4) In actions in which preliminary acts fall to be filed under rule 59.18, an order shall not be made authorising any examination of a witness before the preliminary acts have been filed, unless for special reasons the Court thinks fit so to direct.
(5) The Chief Justice may appoint such number of attorneys as he thinks fit to act as examiners of the Court in connection with Admiralty causes and matters, and may revoke any such appointment.
"Rule 33.16 provides that the court may permit a party to issue a witness summons requiring any person to attend prior to the date of trial at a time and place specified in the summons for the purposes of producing one or more documents.

59.30 Trial as an Admiralty short cause.

(1) Where any defendant has entered an acknowledgment in an Admiralty action, the claimant or that defendant may, within seven days after the filing of the same, apply by an interlocutory application, returnable before the Registrar for an order that the action be tried as an Admiralty short cause.

(2) The interlocutory application shall be served on every other party to the action not less than seven days before the hearing.

(3) On the hearing of the application the Registrar may, if he decides to make an order under paragraph (1) —

(a) direct that the trial of the action be heard without pleadings or further pleadings;

(b) abridge the period within which a person is required or authorised by these Rules to do any act in the proceedings;

(c) in the case of such an action as is referred to in rule 59.18(1), fix the time within which, notwithstanding the provisions of that rule, preliminary acts are to be lodged;

(d) require the parties to the action to make mutual disclosure of documents notwithstanding that the action is ordered to be tried without pleadings;

(e) if the parties so agree, order that the evidence in support of their respective cases may be given in whole or in part by the production of documents or entries in books;

(f) give such directions as could be given on an interlocutory application for directions in the action; and

(g) fix a date for the trial of the action.

(4) The party issuing an interlocutory application under this rule shall include in it an application for such orders or directions as he desires the Registrar to make or give in the exercise of the powers set out in paragraph (3), and any party on whom the application is served shall, within three days after service of the interlocutory application on him, give notice to every other party of any other order or direction he desires the Registrar to make or give as aforesaid and lodge a copy of such notice in the Registry.

(5) An application for an order that an Admiralty action be tried without pleadings or further pleadings shall be made by way of an application for an order under paragraph (1) and not otherwise.

(6) Where an order is made under paragraph (1), the statement of claim by which the action was begun shall be marked in the top left-hand corner "Admiralty Short Cause".

(7) Any application subsequent to an interlocutory application under paragraph (1) and before judgment as to any matter capable of being dealt with on an interlocutory application in the action shall be made by an interlocutory application by two clear days' notice to the other party stating the grounds of the application.

59.31 Further provisions with respect to evidence.

Unless the Court otherwise directs, an affidavit for the purposes of rules 59.19(4), 59.21 or 59.37(2) may, except in so far as it relates to the service of a statement of claim, contain statements of information or belief with the source and grounds thereof.

59.32 Proceedings for apportionment of salvage.

Proceedings for the apportionment of salvage the aggregate amount of which has already been ascertained shall be begun by a fixed date claim form.

(2) The application notice, together with the affidavits in support thereof, must be filed in the Registry seven days at least before the hearing of the application, unless the Court gives leave to the contrary, and a copy of the notice and of the affidavits must be served on all the other parties to the proceedings before the originals are filed.

(3) On the hearing of the application the judge may exercise any of the jurisdiction conferred by the Merchant Shipping Act (Ch. 268).

Notes

The apportionment of a salvage award may come before the Court in either of two ways: (1) it may be requested in the course of or promptly, on motion, after the close of an ordinary salvage action by parties interested in the award- The Firethorn (1948) 81 Ll.L.Rep. 178 as case illustration; or (2) it may form the subject of proceedings under this rule the substantive object of which is to obtain an apportionment.

Cases

The Nicolaou Georgios [1952] 2 Lloyd's Rep. 215- is a case illustration.

59.33 Filing and service of interlocutory application.

(1) The application notice in any action, together with the affidavits, if any, in support thereof, must be filed in the Registry three days at least before the hearing of the application unless the Court gives leave to the contrary.

(2) A copy of the application notice and of the affidavits, if any, in support thereof must be served on all the other parties to the proceedings before the originals are filed.

59.34 Agreement between attorneys may be made order of court.

Any agreement in writing between the attorneys of the parties or a cause or matter, dated and signed by those attorneys, may, if the Registrar thinks it reasonable and such as a judge would under the circumstances allow, be filed in the Registry, and the agreement shall thereupon become an order of court and have the same effect as if such order had been made by a judge in person.

Notes

The object of this provision is to provides a convenient method of settling an Admiralty action and such an agreement filed pursuant to this rule will bind only the parties to it.

Cases

The Karo (1888) 13 P.D. 24) as case illustration.

59.35 Originating application notice procedure.

(1) An originating application notice in Admiralty may be issued out of the Registry.

(2) Rule 59.26, except paragraph (3), shall, with any necessary modifications, apply in relation to an Admiralty cause or matter begun by originating application.

Notes

The scope of this rule appears to apply only to actions commenced in personam. The provisions of 59.3(1) make this provision inapplicable to rem actions.

59.36 Limitation action: parties.

(1) In a limitation action the person seeking relief shall be the claimant and shall be named in the statement of claim by his name and not described merely as the owner of, or as bearing some other relation to, a particular ship or other property.

(2) The claimant must make one of the persons with claims against him in respect of the casualty to which the action relates defendant to the action and may make any or all of the others defendants also.

(3) At least one of the defendants to the action must be named in the statement of claim by his name but the other defendants may be described generally and not named by their names.

(4) The statement of claim must be served on one or more of the defendants who are named by their names therein and need not be served on any other defendant.

(5) In this rule and rules 59.37, 59.38 and 59.39 'name' includes a firm name or the name under which a person carries on his business, and where any person with a claim against the claimant in respect of the casualty to which the action relates has described himself for the purposes of his claim merely as the owner of, or as bearing some other relation to, a ship or other property, he may be so described as defendant in the statement of claim and, if so described, shall be deemed for the purposes of the rules aforesaid to have been named in the statement of claim by his name.

Notes

Limitation action is defined in rule 59.1(2). These actions are assigned to the Supreme Court by virtue of rule 59.2(1)(d). Limitation of liability may be relied on by way of defence to a claim or counterclaim.

Form of Statement of Claim —See Form ADM2 or ADM3.
Service—The Statement of Claim must be served on at least one defendant named therein and not merely described. As to service out of the jurisdiction see rule 59.4.
Owner-master—As to the right of an owner-master to limit his liability, see The Annie Hay [1968] P. 341; [1968] 1 All E.R. 657; [1968] 1 Lloyd's Rep. 141.

59.37 Limitation action: application for decree or directions.

(1) Within seven days after the entry of acknowledgment of service by one of the defendants named by their names in the statement of claim, or, if none of them enters an acknowledgment of service, within seven days after the time limited for appearing, the claimant, without serving a particulars of claim, must issue an interlocutory application returnable in chambers before the Registrar, asking for a decree limiting his liability or, in default of such a decree, for directions as to the further proceedings in the action.

(2) The application must be supported by an affidavit or affidavits proving —

(a) the claimant's case in the action; and

(b) if none of the defendants named in the statement of claim by their names has filed an acknowledgement of service, the service of the statement of claim on at least one of the defendants so named.

(3) The affidavit in support of the application must state —

(a) the names of all the persons who, to the knowledge of the claimant, have claims against him in respect of the casualty to which the action relates, not

being defendants to the action who are named in the statement of claim by their names; and

(b) the address of each of those persons, if known to the claimant.

(4) The application notice and every affidavit in support thereof must, at least seven clear days before the hearing of the application, be served on any defendant who has filed an acknowledgement of service.

(5) On the hearing of the application the Registrar, if it appears to him that it is not disputed that the claimant has a right to limit his liability, shall make a decree limiting the claimant's liability and fix the amount to which the liability is to be limited.

(6) On the hearing of the application the Registrar, if it appears to him that any defendant has not sufficient information to enable him to decide whether or not to dispute that the claimant has a right to limit his liability, shall give such directions as appear to him to be appropriate for enabling the defendant to obtain such information and shall adjourn the hearing.

(7) If on the hearing or resumed hearing of the application the Registrar does not make a decree limiting the claimant's liability, he shall give such directions as to the further proceedings in the action as appear to him to be appropriate including, in particular, a direction requiring the taking out of an interlocutory application for directions under Part 27.

(8) Any defendant who, after the Registrar has given directions under paragraph (7), ceases to dispute the claimant's right to limit his liability must forthwith file a notice to that effect in the Registry and serve a copy on the claimant and on any other defendant who has filed an acknowledgement of service.

(9) If every defendant who disputes the claimant's right to limit his liability serves a notice on the claimant under paragraph (8), the claimant may take out an interlocutory application returnable in chambers before the Registrar asking for a decree limiting his liability.

(10) Paragraphs (4) and (5) shall apply to an application under this paragraph as they apply to an application under paragraph (1).

Notes

Para. (5) "... not disputed ..."—A bare assertion that the right to limit liability is disputed is sufficient to prevent a decree being made under this paragraph.

Para. (6) "... directions ..."—An order for discovery of specified classes of documents is usually made.

Para. (7) "... directions ..."—An order is usually made providing for pleadings, discovery and the issue of a summons for directions according to an agreed or, if necessary, imposed timetable.

Para. (9)—A new summons must be issued, the old one cannot be restored.

Restricted decree—When a claimant in a limitation action is satisfied that there will be no claims upon the fund other than the claims of the defendants who have acknowledged issue or service of the writ, the claimant may not want a decree which is good against the world. The claimant may apply to the Admiralty Registrar to amend the writ by deleting reference to any defendants other than those named. The application should be accompanied by a letter signed by all consenting parties stating that in their view it is not anticipated that any further claims will emerge. The Registrar may then order payment out of the limitation fund in Court.

If further claimants do emerge after payment out the Claimant will be obliged to constitute a new fund should they wish to limit their liability against the new claimants. This practice arises from a decision of Sheen J. in an unreported case, The Rena 1979 Fo. 138.

59.38 Limitation action: proceedings under decree.

(1) Where the only defendants in a limitation action are those named in the statement of claim by their names and all the persons so named have either been served with the statement of claim or filed an acknowledgement of service, any decree in the action limiting the claimant's liability, whether made by the Registrar or on the trial of the action —

(a) need not be advertised; but

(b) shall only operate to protect the claimant in respect of claims by the persons so named or persons claiming through or under them.

(2) In any case not falling within paragraph (1), any decree in the action, limiting the claimant's liability, whether made by the Registrar or on the trial of the action —

(a) shall be advertised by the claimant in such manner and within such time as may be provided by the decree;

(b) shall fix a time within which persons with claims against the claimant in respect of the casualty to which the action relates may take part in the action by filing an acknowledge service as if they were a defendant in the action, if they have not already done so, and file their claims, and, in cases to which rule 59.39 applies, take out an interlocutory application if they think fit, to set the order aside.

(3) The advertisement to be required under paragraph (2)(a), shall, unless for special reasons the Registrar or judge thinks fit otherwise to provide, be a single advertisement in each of three newspapers specified in the decree, identifying the action, the casualty and the relation of the claimant thereto (whether as owner of a ship involved in the casualty or otherwise as the case may be), stating that the decree has been made and specifying the amounts fixed thereby as the limits of the claimant's liability and the time allowed thereby for filing an acknowledgement of service, the filing of claims and the taking out of an interlocutory application to set the decree aside.

(4) The claimant must within the time fixed under paragraph (2)(b) file in the Registry a copy of each newspaper in which the advertisement required under paragraph (2)(a) appears.

(5) The time to be allowed under paragraph (2)(b) shall, unless for special reasons the Registrar or judge thinks fit otherwise to provide, be not less than two months from the latest date allowed for the appearance of the advertisements; and after the expiration of the time so allowed, no acknowledgment of service may be entered, claim filed or interlocutory application taken out to set aside the decree except with the leave of the Registrar or, on appeal, of the judge.

(6) Save as aforesaid, any decree limiting the claimant's liability (whether made by the Registrar or on the trial of the action) may make any such provision as is authorised by the Merchant Shipping Act (Ch. 268).

Notes

Costs of application—The costs of an application for a decree of limitation should normally follow the event, see The Capitan San Luis [1994] 2 W.L.R. 299; [1994) 1 All E.R. 1016; [1993] 2 Lloyd's Rep. 573. This case held that the shipowner should pay the costs of proving the matters which he had to establish in order to obtain the decree and that the claimant should pay the costs of investigating and determining the facts which the Convention provided he must prove, if at the end of the day he failed to establish those facts

59.39 Limitation action: proceedings to set aside decree.

(1) Where a decree limiting the claimant's liability (whether made by the Registrar or on the trial of the action) fixes a time in accordance with rule 59.38(2), any person with a claim against the claimant in respect of the casualty to which the action relates, who —
(a) was not named by his name in the statement of claim, as a defendant to the action; or
(b) if so named, neither was served with the statement of claim nor filed an acknowledgement of service, may, within that time, after filing an acknowledgement of service, take out an interlocutory application returnable in chambers before the Registrar asking that the decree be set aside.
(2) The application must be supported by an affidavit or affidavits showing that the defendant in question has a bona fide claim against the claimant in respect of the casualty in question and that he has sufficient prima facie grounds for the contention that the claimant is not entitled to the relief given to him by the decree.
(3) The interlocutory application and every affidavit in support thereof must, at least seven clear days before the hearing of the application, be served on the claimant and any defendant who has entered an acknowledgment of service.
(4) On the hearing of the application the Registrar, if he is satisfied that the defendant in question has a bona fide claim against the claimant and sufficient prima facie grounds for the contention that the claimant is not entitled to the relief given him by the decree, shall set the decree aside and give such directions as to the further proceedings in the action as appear to him to be appropriate including, in particular, a direction requiring the taking out of an interlocutory application for directions at a case management conference under rule 27.3.

59.40 References to Registrar.
(1) Any claim by a claimant which is referred to the Registrar for decision must, within two months after the order is made, or, in a limitation action, within such other period as the Court may direct, file his claim and, unless the reference is in such an action, serve a copy of the claim on every other party.
(2) At any time after the claimant's claim has been filed or, where the reference is in a limitation action, after the expiration of the time limited by the Court for the filing of claims but, in any case, not less than twenty-eight days before the day appointed for the hearing of the reference, any party to the cause or matter may apply to the Registrar by interlocutory application for directions as to the proceedings on the reference, and the Registrar shall give such directions, if any, as he thinks fit including without prejudice to the generality of the foregoing words, a direction requiring any party to serve on any claimant, within such period as the Registrar may specify, a defence to that claimant's claim.
(3) The reference shall be heard on a day appointed by the Registrar and, unless the reference is in a limitation action or the parties to the reference consent to the appointment of a particular day, the appointment must be made by order on an interlocutory application made by any party to the cause or matter.
(4) An appointment for the hearing of a reference shall not be made until after the claimant has filed his claim or, where the reference is in a limitation action, until after the expiration of the time limited by the Court for the filing of claims.

(5) Not later than seven days after an appointment for the hearing of a reference has been made, the claimant or, where the reference is in a limitation action, the claimant must enter the reference for hearing by lodging in the Registry a praecipe requesting the entry of the reference in/ the list for hearing on the day appointed.
(6) Not less than fourteen days before the day appointed for the hearing of the reference the claimant must file —
(a) a list, signed by him and every, other party, of the items, if any, of his claim which are not disputed, stating the amount, if any, which he and the other parties agree should be allowed in respect of each such item; and
(b) such affidavits or other documentary evidence as is required to support the items of his claim which are disputed, and, unless the reference is in a limitation action, he must at the same time serve on every other party a copy of every document filed under this paragraph.
(7) If the claimant fails to comply with paragraph (1) or (6)(b), the Court may, on the application of any other party to the cause or matter, dismiss the claim.

Notes
It is the long-established practice that after liability has been determined, to refer to the Registrar the matter of the assessment of the amount of the plaintiff's claim and of the counterclaim if there be one. There is, however, no rule that the assessment of damages must be referred (The Fremantle [1954] 2 Lloyd's Rep. 20) and in personal injury and Fatal Accidents Acts cases it is not unusual for the Judge to assess damages. See e.g. Connell v. Hellyer Brothers Ltd. [1963] 2 Lloyd's Rep. 249; The St. Chad (No. 2) [1965] 2 Lloyd's Rep. 347.
Questions of amount have occasionally been referred before trial. (See e.g. The Happy Return (1828) 2 Hagg. 198, p.20'7) but this has not been done for many years. In The Lathara (1930) 37 Ll.L.Rep. 160, it seems that all issues in the action were referred to the Registrar.
Where the assessment of damages involves a question of causation this is in some cases decided by the Judge at the trial or thereafter. See, e.g. The Maid of Kent (1881) 6 P.D. 178, The Guildford [1956] 2 Lloyd's Rep. 74; The Lucile Bloomfield [1967] 2 Lloyd's Rep. 308. In exercising its discretion the Court will be guided by the consideration whether the matter is one which can better be dealt with by the Court at the trial, or later at the reference (The Maid of Kent, ibid.).
Assessors—While it is the modern practice of the Registrar to decide questions without the assistance of merchants, nautical and other assessors, however, are sometimes appointed. If the parties agree in desiring the Registrar to sit with a merchant (the full title is "merchant assessor") or other assessor, they should apply by letter to the Registry or district registry concerned. In the event of disagreement between the parties an application should be made by summons.
How references may arise—A reference may arise out of the judgment or decree made on the trial or the hearing of a motion; out of the decree in a limitation action made on the hearing of a summons under rule 59.37; out of an agreement filed under rule 59.34, or an order on a consent summons.
Claim in reference—The claim referred to in rule 59.40 should in the first place state in a few words how the claim arises; thus in a collision action it would begin with a short statement giving the date of the collision, the voyage on which the vessel was engaged, and, if she was repaired, the place and date and duration of such repair. In every case the several heads of claim should then be set out and numbered consecutively. It is not correct, and is confusing, to call the claim a statement of claim. It is a claim in a reference. For forms of claim see British Shipping Laws, Forms and Precedents 1973, and Atkin's Encyclopaedia of Court Forms in Civil Proceedings, Vol. 3, Form 155 (1990 issue).
Para. (2) "...summons for directions (case management) ..."—The taking out of such a summons (case management) is not obligatory, but doing so may well save time and costs on the hearing. Matters which may be raised include a defence to the claim, particulars, discovery and directions
Para (5) Appointment of day for hearing reference—An appointment may be made at any time after the claimant has filed his claim but will not normally be made unless the Registrar is satisfied that the claimant will be ready for the hearing on the date appointed.

Evidence—The ordinary rules of evidence apply on the hearing of a reference but are, by agreement between the parties, frequently relaxed in order to save time and expense.
Limitation references—In references in limitation actions a claimant need not serve a copy of his claim on any other party. Any claimant may, however, on the payment of the proper fee, inspect and obtain a copy of the claim and any other documents filed by any other claimant against the fund. In practice copies of these documents are supplied on request by the solicitors concerned on payment of the usual copying charges.
If any claimant wishes to dispute the claim of another he should so inform the registry by letter in order that he can be given notice of the appointment fixed for the hearing of that other's claim.
In an action arising out of a collision between ships A and B if there are cross claims and both ships have been held to blame (or the action has been settled on a both to blame basis) and the owners of A obtain a limitation decree it may be necessary to assess their claim inorder to arrive at the amount which the owners of B are entitled to claim against the fund. It will be necessary to do this if there are other claimants against the fund. See The Khedive (1882) 7 App.Cas. 795. In this event the practice is for the owners of B to put forward in their claim a deduction in respect of the appropriate proportion of the damages of the owners of A as agreed or, failing agreement, estimated. This figure may be disputed by any other claimant.
Filing amended claims—A claimant should not amend his filed claim but should file another claim in amended form. No leave is required. If, however, the alterations arc of such a character and are made at such a late stage as to embarrass the paying party at the reference, the registrar may, in his discretion, adjourn the reference or take some other course as he thinks fit.

59.41 Hearing of reference.

(1) The Registrar may adjourn the hearing of a reference from time to time as he thinks fit.
(2) At or before the hearing of a reference, the Registrar may give a direction limiting the witnesses who may be called, whether expert witnesses or not, but any such direction may, on sufficient cause being shown, be revoked or varied by a subsequent direction given at or before the hearing.
(3) Subject to paragraph (2), evidence may be given orally or by affidavit or in such other manner as may be agreed upon.
(4) When the hearing of the reference has been concluded, the Registrar shall
 (a) reduce to writing his decision on the questions arising in the reference (including any order as to costs) and cause it to be filed;
 (b) cause to be filed either with his decision or subsequently such statement (if any) of the grounds of the decision as he thinks fit; and
 (c) send to the parties to the reference notice that he has done so.
(5) Where no statement of the grounds of the Registrar's decision is filed with his decision and no intimation has been given up by the Registrar that he intends to file such a statement later, any party to the reference may, within fourteen days after the filing of the decision, make a written request to the Registrar to file such a statement.

Notes

A reference may arise out of the judgment or decree made on the trial or the hearing of a motion; out of the decree in a limitation action made on the hearing of a summons under 59.37; out of an agreement filed under 59.34, or an order on a consent summons.
It is commonplace after liability has been determined, to refer to the Registrar the matter of the assessment of the amount of the plaintiff's claim and of the counterclaim if there be one. If the parties agree, the Registrar or judge may sit with a merchant or other assessor. This may be done via application by letter to the Registry. If there is disagreement between the parties, an application may be made by summons.

59.42 Objection to decision on reference.

(1) Any party to a reference to the Registrar may, by an interlocutory application in objection, apply to a judge in court to set aside or vary the decision of the Registrar on the reference, but the application notice specifying the points of objection to the decision must be filed within fourteen days after the date on which notice of the filing of the decision was sent to that party under rule 59.41(4) or, if a notice of the filing of a statement of the grounds of the decision was subsequently sent to him thereunder, within fourteen days after the date on which that notice was sent.

(2) The decision of the Registrar shall be deemed to be given on the date on which it is filed, but unless he or the judge otherwise directs, the decision shall not be acted upon until the time has elapsed for filing an interlocutory application in objection thereto, or while such an application is pending or remains undisposed of.

(3) A direction shall not be given under paragraph (2) without the parties being given an opportunity of being heard, but may, if the Registrar announces his intended decision at the conclusion of the hearing of the reference, be incorporated in his decision as reduced to writing under rule 59.41 (4).

Cases

The Princess Helena (1861) Lush 190- No objection can be taken to an item which was uncontested at the reference.

The Thurigia (1871) 1 Asp. 166 Fresh evidence will not be allowed on the hearing of the motion in objection unless the Judge is satisfied that the evidence could not reasonably, by proper diligence and application, have been produced at the reference.

59.43 Drawing up and entry of judgments and orders.

Every judgment given or order made in an Admiralty cause or matter shall be drawn up in the Registry and shall be entered by an officer of the Registry in the book kept for the purpose.

PART 60 – ARBITRATION PROCEEDINGS

SECTION I – ARBITRATION ACT

60.1 Applications to the Court under the Arbitration Act.

(1) The rules in this section of this Part are to be applied subject to the provisions of section 4 of the Arbitration Act, 2009 (No. 42 of 2009).

(2) Every application to the Court pursuant to the Arbitration Act, 2009 (No. 42 of 2009) under—

(a) section 12;
(b) section 21;
(c) section 53;
(d) section 55;
(e) section 56;
(f) section72;
(g) section 85;
(h) section 86;
(i) section 88;
(j) section 89;
k) section 90;
(l) section 91;
(m) section 98; or
(n) section 100,

shall be made by a fixed date claim form with a statement of claim and subject to paragraph (7) below returnable before a judge in chambers.

(3) The fixed date claim form in respect of an application under rules 60.1(2) (b), (d), (e), (f), (g), (h), (j), (k), (l) or (n) shall be served on the arbitrator.

(4) An applicant under section 88 may, at the same time as applying for leave and subject to the court granting leave, apply for an order or orders in relation to the enforcement of the award.

(5) An applicant who is additionally applying for an order for enforcement under paragraph (4) of this rule shall include in the fixed date claim form statement of claim or his affidavit all such particulars and evidence as may be necessary in relation to such order or orders for enforcement for which he is applying and the court may, on the hearing of such application for leave, make such order in relation to enforcement as it thinks fit.

(6) In the case of every application other than an application under section 88, the fixed date claim form or statement of claim must state in general terms the grounds of the application and, where the application is founded on evidence by affidavit, a copy of every affidavit intended to be used must be served with the statement of claim.

(7) The Chief Justice may from time to time direct which applications under the Arbitration Act shall or may be heard by the Registrar.

60.2 Special provisions as to applications to challenge or to appeal in respect of an award.

An application to the court —

(a) under section 89 of the Arbitration Act to challenge an award of the arbitral tribunal as to its substantive jurisdiction; or

(b) under section 90 of the Arbitration Act to challenge an award on the ground of serious irregularity;

(c) under section 91 of the Arbitration Act appeal on point of law,

may be made at any time within twenty-eight days after the award has been published to the parties.

Notes:
Part 60.1 deals with applications to the Court under the Arbitration Act 2009. Part 60.1(2) outlines a number of applications which may be pursued under the Arbitration Act 2009 by Fixed Date Claim Form. The rules also identified at Part 60.1(3) that certain of the applications listed are required to be served on the Arbitrator. The rule also provides that the Fixed Date Claim Form is returnable before a judge in chambers, subject to any directions made by the Chief Justice under Part 60.1(7). Part 60.1(4) provides for an applicant under section 88 (application for leave to enforce award) to apply for leave and subject to the court granting leave, apply for an order or orders in relation to the enforcement of the award at the same time. Part 60.1(5) and (6) sets out the requirement of the Fixed Date Statement of Claim. Part 60.1(7) provides that the Chief Justice may from time to time direct which applications under the Arbitration Act 2009 shall or may be heard by the Registrar. This power of the Chief Justice appears to allow for a direction to be made to provide for those applications under Part 60.1(2) to be heard by a Registrar.

60.2 Special provisions as to applications to challenge or to appeal in respect of an award.
This part deals with the special power of the Court to hear applications to challenge or appeal in respect of an award. Part 60.2 imposes time limits of 28 days for the challenges/appeals under sections 89, 90 and 91 of the Arbitration Act 2009. It provides specifically that the application may be made at any time within 28 days after the award has been published to the parties.

Cases:
CPR 60.2 –APPLICATION TO THE COURT UNDER THE ARBITRATION ACT
RAV Bahamas Ltd and another (Appellants) v Therapy Beach Club Incorporated (Respondent) (Bahamas) [2021] UKPC 8. The Privy Council held that, “while it is good practice and should be encouraged, it is not a requirement of section 90 of the 2009 Act that there be a separate and express allegation, consideration and finding of substantial injustice. It is sufficient that, as a matter of substance, substantial injustice be established and found.

Gabrielle Volpi Applicant/Appellant v Delanson Services Ltd. et al Consolidated Appeals 2020/APP/00013, 2020/APP/sts/00018 Arbitration – Arbitration Act 2009 – Commercial Arbitration – Arbitration Award –

Application to appeal Partial Awards – Bases for Appeal under s. 80 (jurisdiction), s. 90 (serious irregularity), s.91 (point of law) – Stay of Arbitration Pending Appeal – Whether court has power to stay Arbitration pending appeal – Considerations relating to the grant of a stay of arbitral proceedings under the Act – Security for Costs of Appeal, s. 92(6) of Act – Principles relating to security for costs under the Arbitration Act – Leave to serve interrogatories – Interim measures available under the Arbitration Act – Statutory Interpretation – Leave to appeal on points of law –Costs – Principles, arbitration proceedings – Whether stay pursuant to appeal should be treated as discrete aspect of litigation for the purposes of costs – Deductions for partial success.

Cavalier Construction Company Limited v. Ottershaw Investment Limited [2004] BHS J. No. 4 Conflict between the Arbitration Act and the Construction Industry Arbitration Rules of the American Arbitration Association.

Therapy Beach Club Incorported v. RAV Bahamas Limited and another [2018] 1 BHS J. No. 46 Procedure for the enforcement of an award under the Arbitration Act [2018] 1 BHS J. No. 46

BHP International Markets Limited v. Wason Holdings Limited [2016] 2 BHS J. No. 97 Whether a foreign award could form the basis for a statutory demand or must a litigant be confined to relief under the Arbitration Act or the Arbitration (Foreign Arbitral Awards) Act

SECTION II – ENFORCEMENT OF AN ARBITRATION AWARD

60.3 Registration in Supreme Court of foreign awards.

Where an award is made in proceedings on an arbitration to which section 6 of the Reciprocal Enforcement of Judgments Act (Ch. 57) applies, the Rules of Court (Reciprocal Enforcement of Judgments) shall apply in relation to the award as it applies in relation to a judgment given by a court in that place, subject, however, to the following modifications —

(a) for references to the country of the original court there shall be substituted references to the place where the award was made; and

(b) the affidavit required by rule 3 of the said Rules must state, in addition to the other matters required by that rule, that to the best of the information or belief of the deponent the award has, in pursuance of the law in force in the place where it was made, become enforceable in the same manner as a judgment given by a court in that place.

Notes:
Section II, Part 60.3 is a replica of Order 66 rule 5 of the now repealed Rules of the Supreme Court 1978 and in this regard there has been no change to the enforcement of these types of arbitral awards.

SECTION III – ARBITRATION (FOREIGN ARBITRAL AWARDS) ACT, ETC.

60.4 Application to enforce a foreign arbitral award.

(1) An application to enforce an award under this Section of this Part shall be made by fixed date claim form and subject to rule 60.1(7) returnable before a judge in chambers and supported by affidavit.

(2) The applicant shall exhibit to his affidavit —

(a) the duly authenticated original award or a duly certified copy of it;

(b) the original arbitration agreement or a duly certified copy of it; and

(c) a translation of the award or agreement certified by an official or sworn translator or by a diplomatic or consular agent, if the award or agreement is in a language other than English.

(3) The applicant may include in the fixed date statement of claim and in his affidavit all such particulars and evidence as may be necessary in relation to such order or orders for enforcement for which he is applying and the court may, on the hearing of such application, make such order in relation to enforcement as it thinks fit.

(4) The applicant shall file the affidavit with the court and shall serve a copy of the affidavit on every respondent.

(5) The Chief Justice may from time to time direct which applications under the Arbitration Act shall or may be heard by the Registrar.

60.5 Respondent's response.

A respondent who proposes to oppose an application to enforce under Arbitration (Foreign Arbitral Awards) Act shall, within fourteen days after service upon him of the applicant's affidavit, file and serve an affidavit setting out the grounds upon which the enforcement of the award is opposed.

Notes:

Part 60.4 seeks to provide rules to permit the application of *The Arbitration (Foreign Arbitral Awards) Act 2009* (A(FAA)A 2009). The A(FAA)A 2009 seeks to permit the enforcement of foreign arbitral awards *The New York Convention on the recognition and enforcement of foreign arbitral awards adopted by the United Nations Conference on International Commercial Arbitration on 10th June, 1958*. The matter proceeds by Fixed Date Claim Form and the supporting affidavit ought to include all such particulars and evidence as may be necessary in relation to the order or orders for enforcement for which is being sought. The court is empowered, on the hearing of the application, to make such order in relation to enforcement as it thinks fit. The applicant must file the affidavit with the court and shall serve a copy of the affidavit on every respondent. As in Section I, the Chief Justice may from time to time direct which applications under the A(FAA)A 2009 shall or may be heard by the Registrar.

60.5 requires a respondent who proposes to oppose an application to enforce under A(FAA)A 2009 to file and serve an affidavit (setting out the grounds upon which the enforcement of the award is opposed) within 14 days after he has been served with applicant's affidavit.

Cases:

BHP International Markets Limited v. Wason Holdings Limited [2016] 2 BHS J. No. 97 Whether a foreign award could form the basis for a statutory demand or must a litigant be confined to relief under the Arbitration Act or the Arbitration (Foreign Arbitral Awards) Act

GENERAL COMMENTRY

This Part provides a mechanism to facilitate Arbitration proceedings in The Bahamas and those proceedings connected to The Bahamas. The now repealed RSC provisions predated the current Arbitration Act 2009 and The Arbitration (Foreign Arbitral Awards) Act 2009 which are in use and govern arbitration proceedings. The update is therefore necessary. Part 60 is divided into 3 sections to deal with three separate types of arbitration matters- (1) - Arbitration Act 2009- (2)- Enforcement of an arbitration award to which section 6 of the Reciprocal Enforcement of Judgments Act and (3) The Arbitration (Foreign Arbitral Awards)Act 2009 (enforcement pursuant to The New York Convention on the recognition and enforcement of foreign arbitral awards adopted by the United Nations Conference on International Commercial Arbitration on 10th June, 1958).

PART 61 – DEFAMATION ACTIONS

61.1 Application.

These Rules apply to actions for libel or slander subject to the following rules of this Part.

NOTES – PART 61.1
The incorporation of rules on defamation means that the rules ought to be interpreted in accordance with the overriding objective.[126] Defamation actions are to be actively case managed by the courts.[127] The court may direct that issues be tried separately in Defamation actions.[128]

The cause of action in The Bahamas is either libel or slander. The substantive rules therefore refer to the proceedings by those names as opposed to the general descriptive rubric.

61.2 Content of statement of claim in libel action.

Before a statement of claim in an action for libel is issued it must contain sufficient particulars of the publications in respect of which the action is brought to enable them to be identified.

NOTES – PART 61.2
A court has a duty to actively manage defamation proceedings and will exercise its discretion to strike out a non-compliant statement of case[129] in furtherance of the overriding objective.[130]

61.3 Obligation to give particulars.

(1) Where in an action for libel or slander the claimant alleges that the words or matters complained of were used in a defamatory sense other than their ordinary meaning, he must give particulars of the facts and matters on which he relies in

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[126] Part 1.1
[127] *McPhilemy v Times Newspapers Ltd [1999] 3 All ER 775 at 792–793*
[128] Mitchell v News Group Newspapers Ltd [2014] EWHC 2615 (QB), [2014] All ER (D) 269 (Jul) At case management, upon the parties' proposal, the court approved the trial of certain preliminary issues including the meaning of the words complained of and the justification defences pleaded.
[129] Statement of case includes a statement of claim: Part 2.1; *Wissa v Associated Newspapers Ltd* [2014] EWHC 1518 (QB), [2014] All ER (D) 109 (May) court will accede to an application to strike out a statement of case that does not contain sufficient particulars.
[130] Presumably the application to strike out can be made for non-compliance with Part 61.2 or under Part 26.3 pursuant to the Court's general powers to strike out a statement of case.

support of such sense.

(2) Where in an action for libel or slander the defendant alleges that, in so far as the words complained of consist of statements of fact, they are true in substance and in fact, and in so far as they consist of expressions of opinion, they are fair comment on a matter of public interest, or pleads to the like effect, he must give particulars stating which of the words complained of he alleges are statements of fact and of the facts and matters he relies on in support of the allegation that the words are true.

(3) Where in an action for libel or slander the claimant alleges that the defendant maliciously published the words or matters complained of, he need not in his statement of claim give particulars of the facts on which he relies in support of the allegation of malice, but if the defendant pleads that any of those words or matters are fair comment on a matter of public interest or were published upon a privileged occasion and the claimant intends to allege that the defendant was actuated by express malice, he must serve a reply giving particulars of the facts and matters from which the malice is to be inferred.

(4) This rule shall apply in relation to a counterclaim for libel or slander as if the party making the counterclaim were the claimant and the party against whom it is made the defendant.

NOTES – PART 61.3

It is important that the issued statement of claim sets out sufficient particulars of the publication to enable them to be identified.[131] This is said to be a requirement that pre-dates the rule. The rationale is that the defendant must know what he is answering without the defendant or the claimant having to go on a fishing expedition or wanton investigations to substantiate the claim. To allow resources and time to be taken up in such exercises is not a good use of court time, would not be proportionate in allocation of the courts resources and would not save time and expense.

61.4 Provisions as to payment into court.

(1) Where in an action for libel or slander against several defendants sued jointly the claimant, in accordance with Part 35, accepts an offer to settle by any of those defendants in satisfaction of his cause of action against that defendant, then the action shall be stayed as against that defendant only, but —

(a) the sum recoverable under any judgment given in the claimant's favour against any other defendant in the action by way of damages shall not exceed the amount, if any, by which the amount of the damages exceeds the amount paid into court by the defendant as against whom the action has been stayed; and

[131] *Best v Charter Medical of England Ltd* [2001] EWCA Civ 1588, [2001] 47 LS Gaz R 27, (2001) Times, 19 November, [2002] EMLR 335, [2001] All ER (D) 395 (Oct)

(b) the claimant shall not be entitled to his costs of the action against the other defendant after twenty-one days after the date of the offer unless either the amount of the damages awarded to him is greater than the amount paid into court and accepted by him or the judge is of opinion that there was reasonable ground for him to proceed with the action against the other defendant.

(2) Where in an action for libel a party pleads the defence for which, section 3 of the Libel Act (Ch. 72) provides, rule 35.5(3), shall not apply in relation to that pleading.

61.5 Statement in open court.

(1) Where a party accepts, in satisfaction of a cause of action for libel or slander, an offer to settle then the claimant or defendant, as the case may be, may apply to a judge in chambers by application for leave to make in open court a statement in terms approved by the judge.

(2) Where a party to an action for libel or slander which is settled before trial desires to make a statement in open court, an application must be made to the Court for an order that the action be set down for trial, and before the date fixed for the trial the statement must be submitted for the approval of the judge before whom it is to be made.

61.6 Interrogatories not allowed in certain cases.

In an action for libel or slander where the defendant pleads that the words or matters complained of are fair comment on a matter of public interest or were published on a privileged occasion, no request for further information under Part 34 as to the defendant's sources of information or grounds of belief shall be allowed.

61.7 Evidence in mitigation of damages.

In an action for libel or slander, in which the defendant does not by his defence assert the truth of the statement complained of, the defendant shall not be entitled on the trial to give evidence in chief, with a view to mitigation of damages, as to the circumstances under which the libel or slander was published, or as to the character of the claimant, without the leave of the judge, unless seven days at least before the trial he furnishes particulars to the claimant of the matters as to which he intends to give evidence.

NOTES PART 61 (General)
Summary Judgment is not available for defamation proceedings.[132] In granting a final judgment in the absence of the Defendant and upon default of pleadings, a court may award a final injunction.[133]
CASES

Anglia Research Services Ltd and others v Finders Genealogists Ltd and another
[2017] EWHC 1277 (QB), 167 NLJ 7750, [2017] All ER (D) 37 (Jun) – Relevant principles relating to pre-action disclosure

Bourne v Nejad [2019] EWHC 2605 (QB), [2019] All ER (D) 53 (Oct) Final injunction is available on the hearing of the matter for judgment in default of appearance.

Best v Charter Medical of England Ltd [2001] EWCA Civ 1588, [2001] 47 LS Gaz R 27, (2001) Times, 19 November, [2002] EMLR 335, [2001] All ER (D) 395 (Oct) The claimant must plead the actual words used by the defendant save for a narrow exception in a case where the claimant could satisfy the court, by credible evidence that the defendant had made a defamatory statement of a specified nature, that he had a good cause of action. "The realities of defamation actions, including the importance of arguments as to the meaning of the words used and the existence of defences such as justification, have been responsible for the insistence by the courts on the words used being pleaded by the claimant with reasonable precision. Those realities have not been changed by the advent of the Civil Procedure Rules." per Lord Justice Keene, para. 20

McPhilemy v Times Newspapers Ltd [1999] 3 All ER 775 at 792–793
"As with all actions, libel actions should, by proper case management, be confined within manageable and economic bounds. They should not descend into uncontrolled and wide-ranging investigations akin to public inquiries, where that is not necessary to determine the real issues between the parties. The court will, now as when Eady J made his decision, strive to manage the case so as to minimise the burden on litigants of slender means. This includes excluding all peripheral material which is not essential to the just determination of the real issues between the parties, and whose examination would be disproportionate to its importance to those issues. It does not, in my judgment, extend in this case to excluding potentially important evidence, which is central to a legitimate substantial defence." Para. 791 per May LJ

Wissa v Associated Newspapers Ltd [2014] EWHC 1518 (QB), [2014] All ER (D) 109 (May) court will accede to application to strike out a statement of case that does not contain sufficient particulars.

[132] Part 15.3(d)(ii)
[133] *Bourne v Nejad* [2019] EWHC 2605 (QB), [2019] All ER (D) 53 (Oct) Final injunction is available on the hearing of the matter for judgment in default of appearance.

PART 62 – Mortgage Claims and Money-Lending Actions

Section 1 – Mortgage Claims

62.1 Scope of this Section.

(1) This Part deals with a claim by a mortgagor or mortgagee for any of the following forms of relief —

(a) payment of moneys secured by a mortgage;
(b) sale of a mortgaged property;
(c) foreclosure;
(d) possession of a mortgaged property;
(e) redemption of a mortgage;
(f) re-conveyance of the property or release from the mortgage; and
(g) delivery of possession by the mortgagee.

(2) In this Part —

"mortgage" includes a legal or equitable mortgage and a legal or equitable charge;
"mortgage claims" means the claims by a mortgagee or mortgagor for any of the forms of relief referred to in paragraph (1);
"mortgagee" means the person who has granted a mortgage of the mortgaged property; and
"mortgagor" means the person to whom the mortgage was granted.

(3) This Part does not affect any procedure under any enactment relating to the registration of title to land unless court proceedings are taken.

Notes

The application of Section 1 of this Part is expressly limited to one of the seven types of mortgage claims denoted in r. 62.1(1). The permitted types of mortgage claims, and the definitions set out in r. 62.1(2) are uncontroversial. One or more of the permitted mortgage claims can be brought together but a mixed claim consisting of the same, and other claims arising out of or concerning a mortgage are not permissible under the narrow scope of this Part.

There is no prescribed form of, or limit to, the orders the Court may make under on a claim for possession or payment under this Part. A mortgagee remains entitled to possession of the mortgaged premises as of right subject to any contrary provisions in the mortgaged document. Equally, the Court retains its jurisdiction, especially where the provisions of the Homeowners Protection Act, 2017 apply, to adjourn any claim or grant an Order suspending the time period for delivery of possession, in order to enable a defendant to make payment of any and all sums due under the mortgage or otherwise agreed by way of compromise.

62.2 Mortgage claim to be brought by fixed date statement of claim.

(1) A mortgage claim is brought by issuing a fixed date claim form and statement of claim.
(2) In addition to serving the statement of claim on all defendants, the claimant must give notice of the claim to all mortgagees of the land who may not be parties.

Notes

Use of fixed date claim form

While requirement for commencement of mortgage claims by way of a fixed date claim form is clear, non-compliance with this rule does not render the claim a nullity or invariably mean that the claim should be dismissed or struck out. The overriding objective will warrant consideration of factors such as the relevant limitation period being unexpired, the claimant's ability to bring another claim, the additional expense to the parties, and the Court's resources.

Service and notice of the claim

All of the mortgagors must be notified of the claim form, and service of the statement of claim effected on all of the defendants, whether by personal or substituted service. Where such service cannot be effected, the Court can make an order in respect of those served.

Cases:

RBTT Bank (Grenada) v Ricky Anderson MC PHIE GDAHCV2020/0092 – dismissal of a strike out application challenging the failure to use the prescribed originating process for a mortgage claim.

Alliance Building Society v Yap [1962] 3 All ER 6n – An Order for possession could be made against the defendant in occupation of the mortgaged property, where the second defendant could not be located for service.

62.3 Evidence at first hearing.

A claimant who seeks final judgment at the first hearing must —
- (a) file evidence on affidavit in support of the claim; and
- (b) serve, with the claim form —
  - (i) a copy of the affidavit but not necessarily any exhibit; and
  - (ii) a notice stating what relief is sought;
- (c) file a certificate of service not less than seven days before the first hearing.

Notes

Final Judgement at first hearing

The Court only has a discretion, not obligation, to determine mortgage claims on the first hearing. The claimant should therefore ensure that a supporting affidavit containing all relevant documents has been filed. While the rule does not require the Affidavit to be served with all of the exhibits, this would seem limited to excluding service of documents which are unlikely to be disputed. The prudent course for a claimant seeking judgment on the first hearing would be to serve all exhibits as that would limit the scope for any adjournments being sought by the other side on the basis of the need to review and consider documents. See r. 62.4 as to the particular evidence required for claims for possession or payment of the mortgage debt.

62.4 Claim for possession or payment of mortgage debt.

(1) On a claim for possession of the mortgaged property or for payment of the mortgage debt the claimant must file with the claim form, evidence on affidavit —
- (a) exhibiting a copy of the original mortgage;
- (b) exhibiting a copy of any other document which sets out the terms of the mortgage;

(c) giving particulars of —
(i) the amount remaining due under the mortgage; and
(ii) where the claim includes a claim for interest to judgment, the daily rate at which such interest accrues; and
(d) where the claimant seeks possession of the mortgaged property,—
(i) stating the circumstances under which the right to possession has arisen; and
(ii) giving details of any person other than the defendant and his family who to the claimant's knowledge is in occupation of the mortgaged property.

(2) Where the mortgage created a tenancy other than a tenancy at will between the mortgagor and the mortgagee, the affidavit must show how and when the tenancy was determined and if the tenancy was determined by service of a notice, a copy of the notice must be annexed and the affidavit must state when and how the notice was served.

Notes

Evidence in support of claims

True copies of the mortgage documents and full particulars underlying the mortgage debt should be provided to satisfy the Court of the entitlement to possession or the mortgage debt. On either claim, the actual mortgage together with any other document which set out the mortgage terms such as standard terms and conditions and/or an offer letter, should be produced. The claimant should provide particulars as to the sums advanced under the mortgage, the default in its repayment provisions, the balance due, any stipulated interest rates, so that the Court has the complete and accurate state of the account before exercising its discretion.

Non-compliance with this rule will not automatically result in the dismissal or refusal of the claim when the overriding objective is considered. However, a claimant will be unable to resist a request for an adjournment for any particulars or documents to be provided. The claimant may also face a sanction in costs even if successful on the claim.

Particulars of occupation and any tenancy

The Court should also be provided with known details of any person(s) in occupation of the premises, and the basis of that occupation. As concerns a tenancy, the Court should be made expressly aware of the same, and satisfied that there was an effective and proper determination of a tenancy (as may be stipulated in the mortgage) before it can accede to the claim. A tenancy at will is excluded as such an occupation of the premises is not predicated upon a mortgage or charge.

In contrast to the requirement to provide the mortgage and particulars of the mortgage, non-compliance with the requirement to identify all occupiers and any tenancy in respect of the mortgaged property is unlikely to be excused. This requirement is crucial given the importance placed upon the protecting the rights of third parties. A claimant should expressly state that the mortgaged property is unoccupied and that it is unaware of any tenancies in respect of the same, either pre-dating the mortgage or created subsequently. In the case of any known occupiers or tenancies, copies of due and proper notice to them of the claim should be exhibited to the supporting affidavit, or at the very least, tendered in Court at the first hearing.

Cases:

Morley v. Family Guardian Insurance Co. Ltd [2014] 1 BHS J. No. 105 – the failure of a supporting affidavit in a mortgage claim to comply with every prescribed particular does not prevent the Court from proceeding if the affidavit complies with the material particulars. ...

SECTION II – MONEY LENDING ACTIONS

62.5 Application and interpretation.

(1) These Rules apply to a money-lending action subject to the following rules of this Part.
(2) In these Rules —

"the Act" means the Money Lending Act *(Ch. 340)*; and

"money-lending action" means any action for the recovery of money lent or for the enforcement of any agreement or security relating to money so lent, being an action brought by the lender or an assignee, and includes any action to which section 3 of that Act applies.

Application

Claims as defined under this rule are distinct from mortgage claims as defined under r. 62.1. The former is applicable where the obligation to repay exists independently of a mortgage while the latter is confined to those instances where the repayment obligation is wholly predicated upon a mortgage. Preliminary objections to a mortgage claim based solely on an argument that this rule applies should be readily dismissed by the Court.

Cases:
Imperial Life Assurance Co. v. Efficient, Distributors Ltd. [1989] BHS J. No. 85
Citibank N.A. v. Hutchinson [1996] BHS J. No. 127

62.6 Commencing proceedings and Particulars to be included in a statement of claim.

(1) Every action to which this Part applies must be commenced using a fixed date claim form under rule 8.1(5).
(2) Every statement of claim in a money-lender's action must state —

(a) the date on which the loan was made;
(b) the amount actually lent to the borrower;
(c) the rate per cent, per annum of interest charged;
(d) the date when the contract for repayment was made;
(e) the fact that a note or memorandum of the contract was made and was signed by the borrower;
(f) the date when a copy of the note or memorandum was delivered or sent to the borrower;
(g) the amount repaid;
(h) the amount due but unpaid;
(i) the date upon which such unpaid sum or sums became due; and
(j) the amount of interest accrued due and unpaid on every such sum.

Notes

See the above notes under the headings "*Use of fixed date claim form*" and "*Evidence in support of claims*" for guidance on the effect of this rule.

62.7 Judgment in default of acknowledgement of service or of defence.

(1) In a money-lender's action judgment in default of acknowledgement of service or in default of defence shall not be entered except with the leave of the Court.
(2) An application for the grant of leave under this rule must be made by application notice served on the defendant.
(3) If the application is for leave to enter judgment in default of acknowledgement of service, the application notice shall not be issued until after the time limited for acknowledging service or serving a defence under rule 9.1(2) has expired.
(4) On the hearing of such an application, whether the defendant appears or not, the Court —

(a) may exercise the powers of the court under section 3 of the Money Lending Act *(Ch. 340)*;
(b) where it refuses leave under this rule to enter judgment on a claim or any part of a claim, may make or give any such order or directions as it thinks fit.

Restrictions on entry of judgement in default
Even where the proper claim form is used and all of the required particulars provided, and notwithstanding the failure to acknowledge service, judgement in default can still not be entered without the leave of the Court. The defendant is still entitled to be heard on an application for judgment despite any default in acknowledgment of service. In all instances where the Court refuses to grant leave to enter judgement in default, it retains an unfettered discretion as to the determination of the claim.

PART 63 – CONTENTIOUS PROBATE PROCEEDINGS

63.1 Interpretation.

In these Rules —

"grant of probate" means a grant issued by the Court to administer the will of a deceased person;

"probate action" means an action, other than a non-contentious action for —

(a) the grant of probate of the will or of letters of administration of the estate of a deceased person;

(b) the revocation of a grant; or

(c) for a decree pronouncing for or against the validity of an alleged will;

"Probate Registry" means the registry of the Probate Division in the Supreme Court situate in New Providence and includes a sub-registry;

"sub-registry" means a registry

Notes

1. This Part applied to probate causes and matters, and other provisions of these Rules apply to those causes and matters subject to the provisions of this Order.

2. Non-contentious probate proceedings are not subject to these rules (Preliminary Rule 2(4)(c) – Application of Rules) and are instead governed by the Probate and Administration of Estates Rules, 2011.

3. Once probate granted in common form under the non-contentious rules is challenged and is to be granted in solemn form, there can be no reversion to the non-contentious rules. They become inapplicable. Jolley v Jarvis, In the Estate Of Elizabeth Florence Jolley, Deceased, [1964] EWCA Civ J0121-2. https://justis.vlex.com/vid/re-jolley-deceased-jolley-793375605

63.2 Scope and Interpretation.

(1) This Part sets out the procedure for obtaining —

(a) a grant of —

(i) probate of a will;

(ii) letters of administration,

of the estate of a deceased person;

(b) a revocation of a grant referred to under paragraph (a);

(c) a decree pronouncing for or against the validity of an alleged will, not being an action which is non-contentious or common form probate business.

(2) In this Part, a **"will"** includes a codicil.

Notes

1. Any person whose interest in the estate is prejudiced by the will may seek to compel the executor to propound it by the examination of an attesting witness. See Belbin v Skeats (1858) 27 LJP & M 56, 164 ER 669; Montell v Brice and another [2002] BHS J 163
2. A creditor is required to have letters of administration prior to disputing the validity of the will. Menzies v Pullbrook and Ker 163 ER 605, West and Smith v Willby 161 ER 1357distinguished.
3. Attesting witnesses are witnesses of the Court and may be cross examined by the party calling them. Brock, Re, Jones v Jones 24 TLR 839
4. Executor may propound a will for his own protection. Executors who have not acted unreasonably in commencing and defending an action will be entitled to costs out of the estate. Re Plants Estate, Wild v Plant [1926] P 139.
5. Stuart v Stuart and others; Hillard and others v Stuart and another [2009] 2 BHS J 10: Executor entitled to costs unless acted unreasonably or in self-interest rather than benefit to the fund. See Shovelar and others v Lane and other[2011] 4 All E R 669 where executors were not entitled to costs.

63.3 Application for contentious probate.

(1) A person who seeks to begin a contentious probate action must do so by a fixed date claim form and statement of claim issued out of the Probate Registry and endorsed with —

(b) a statement of the nature of the interest of the claimant and of the defendant in the estate of the deceased to which the action relates; and

(c) a memorandum signed by the Registrar showing that the statement of claim has been produced to him for examination and that two copies of the will have been lodged with the Probate Registrar.

(2) Part 12 shall not apply in relation to a probate action.

Notes

1. A default judgment is not available in contentious probate proceedings: Part 12.2(a). In the event of a default of pleadings, the opposing party may apply for (1) apply for an order for trial on affidavit evidence or (2) apply for an order that the action be discontinued or dismissed and for a grant of probate or letters of administration be made to the person applying. [See White Book, UK, 1999].
2. Moss v Moss (In her capacity as Administrator of the Estate of the Late Willam Nazi Moss) [2015] 2 BHS J No 114 re issuance of writ in accordance with RSC Order 68 rule 2- CPR 63.3;
3. Gibson v Darling[1987] BHS J 46: Practice re issuance of writ and failing to comply with rules.
4. Randall v Randall[2016] EWCA Civ 494:Claim form must contain a statement of the nature of the interest of the claimant and of each defendant in the estate. Whether a creditor of a beneficiary of an estate has an interest in the estate.

63.4 Parties to an action for revocation of grant.

A person who is entitled or claims to be entitled to administer the estate of a deceased person under or by virtue of an unrevoked grant of probate of his will or letters of administration of his grant shall be made a party to any action for revocation of the grant.

Notes:

1. See Montell v Brice[2002] BHS J 163: re having an interest in the estate.
2. A probate action is in rem. Generally, all persons who may be affected, whether as a beneficiary under the will or under intestacy, should be joined or served with notice of the proceedings. See The Supreme Court Practice (UK) 1999 Note76/2/3.

63.5 Lodgment of grant for revocation.

(1) Where, at the commencement of an action for the revocation of a grant of —

(a) probate of the will; or

(b) letters of administration,

of the estate of a deceased person, the probate or letters of administration as the case may be, have not been lodged in court, then —

(i) if the action is commenced by a person to whom the grant was made, he shall lodge the probate or letters of administration in the Probate Registry within seven days after the issue of the fixed date claim form and statement of claim;

(ii) if any defendant to the action has the probate or letters of administration in his possession or under his control, he shall lodge it or them in the Probate Registry within fourteen days after the service of the fixed date claim form and statement of claim upon him.

(2) Any person who fails to comply with paragraph (1) may, on the application of any party to the action, be ordered by the court to lodge the probate or letters of administration in the Probate Registry within a specified time and any person against whom such an order is made shall not be entitled to take any step in the action without the leave of the court until he has complied with the order.

63.6 Affidavit of testamentary scripts.

(1) Unless the court otherwise directs, the claimant and every defendant who has filed a defence or an acknowledgement of service in a probate action must swear an affidavit —

(a) describing any testamentary script of the deceased person, whose estate is subject of the action, of which he has any knowledge or, if such be the case, stating that he knows of no such script; and

(b) if any such script of which he has knowledge, is not in his possession or under his control, giving the name and address of the person in whose possession or under whose control it is or, if such be the case, stating that he does not know the name or address of that person.

(2) Any affidavit required by this rule must be filed, and an office copy thereof and any testamentary script referred to therein which is in the possession or under the control of the deponent must be lodged in the Probate Registry within fourteen days after the filing of a defence or acknowledgement of service by a defendant to the action or, if

no defendant enters an acknowledgement of service therein and the court does not otherwise direct, before an order is made for the trial of the action.

(3) Where any testamentary script or any part thereof required by this rule to be lodged in the Probate Registry is written in pencil, then, unless the court otherwise directs, a photostat copy of that script, of the page or pages thereof containing the part written in pencil, must also be lodged in the Probate Registry and the words which appear in pencil in the original must be underlined in red ink in the copy.

(4) Except with the leave of the court, a party to a probate action shall not be allowed to inspect an affidavit filed, or any testamentary script lodged by any other party to the action under this rule, unless and until an affidavit sworn by him containing the information referred to in paragraph (1) has been filed.

(5) In this rule, **"testamentary script"** means—

(a) a will or draft thereof;

(b) written instructions for a will made by or at the request or under the instructions of the testator; or

(c) any document purporting to be evidence of the contents, or to be a copy, of a will which is alleged to have been lost or destroyed.

Notes

1. See The Supreme Court Practice (UK) 1999: Filing affidavits should precede service of pleadings. Affidavit of scripts should contain all of the wills in the deponent possession, custody or power and of which he has knowledge (even if he does not accept that they constitute valid wills). Deponent must lodge all of the scripts of which he has knowledge and under his possession and control. Scripts not in the deponents possession will be the subject of a subpoena or order of the Court unless arrangements can be made to have them voluntarily submitted. Copies should be lodged with the originals. If it merges that there are earlier wills, the defendant must show that all wills are invalid prior to proving intestacy.

2. Affidavits of scripts are to set out every document relation got the testamentary affairs of the deceased whether in possession of the parties or not: (See White Book UK 1999)

3. Scripts are to be described in the affidavit not exhibited. Where a script is to be examined by an expert, application should be made by summons and affidavit explaining he tests required and the reasons why, eg forgery, false dating. Each case will be decided on its merits. (See White Book UK 1999)

4. A deponent is obliged to disclose the contents of an earlier will. Wills are public documents. See James Henry v Philomena Henry (on her own behalf and as a personal representative of the estate of Hugh Henry (deceased) and another [2007] NIQB 67:

5. Re Stewart; Smith and another v Price and others 5 ITELR 622: Executor's instructions not to inform children of death of testatrix, executor concealing death of testatrix from children omitted form will. Executor owed special fiduciary duties to beneficiaries, including potential beneficiaries. Review of the relationship between an executor and the beneficiaries of a will. .

6. Non-service of the affidavit of scripts is a serious irregularity. Se Hiranand v Harilela and others 3 ITELER 297

63.7 Counterclaim.

A defendant to a probate action who alleges that he has any claim or is entitled to any relief or remedy in respect of any matter relating to the grant of probate of the will, or letters of administration of the estate, of the deceased person which is the subject of the action must add to his defence a counterclaim in respect of that matter.

Notes:

1. At trial, being an action in rem, the Court will determine which will is valid. If the Defendant wishes to do more than insist upon the will being proved in solemn form and only intends to cross-examine witnesses, the Defendant has to set up a positive case by way of counterclaim. (See White Book, UK 1999)
2. See Re estate of Dimberline (deceased) Cropper (as personal representative of Bernard Dimberline(deceased) v Dimberline and others [2022 EWHC 2202(Ch)- affect of not pleading a counterclaim.

63.8 Contents of statement of case.

(1) Where the claimant in a probate action disputes the interest of a defendant, he must allege in his statement of claim that he denies the interest of that defendant.

(2) In a probate action in which the interest by virtue of which a party claims to be entitled to a grant of letters of administration is disputed, the party disputing that interest must show in his statement of case that if the allegations made therein are proved he would be entitled to an interest in the estate.

(3) Any party who pleads that at the time when a will, the subject of the action, was alleged to have been executed the testator did not know and approve of its contents, must specify the nature of the case on which he intends to rely, and no allegation in support of that plea which would be relevant in support of any of the following other pleas, that is to say —

- (a) that the will was not duly executed;
- (b) that at the time of the execution of the will the testator was not of sound mind, memory and understanding; and
- (c) that the execution of the will was obtained by undue influence or fraud, shall be made by that party unless that other plea is also pleaded.

Notes

1. Rolle v Ferguson [2013] 2 BHS J 12: effect of non-compliance with CPR P63.8 (O.68 r.2)
2. Re Stott (deceased); Kouda v Lloyds Bank Ltd and others, [1980] 1All E R 259: Part 63.8(3)(RSCO76 r9(3) applies only to cases where under cover of plea of want of knowledge and approval, a pleader was in substance affirmatively alleging undue influence or fraud without specifically introducing it as a n alternative plea. Mere fact that that an allegation, if proved, might constitute evidence that could assist proof of relevant alternative plea, did not bring it within the rule. Applied Wintle v Nye [1959] 1 All E R 552.

3. Particulars of unsoundness of mind must be specifically pleaded and not merely delivered at tie of trial: Re Stott (deceased); Kouda v Lloyds Bank Ltd and others, [1980] 1All E R 259, Couwenbergh v Valkova [2008] EWHC 2451 (Ch)

63.9 Discontinuance and probate dismissal.

(1) Part 37 shall not apply in relation to a probate action.

(2) At any stage of the proceedings in a probate action the court may on the application of —

(a) the claimant; or

(b) of any party to the action who has entered an acknowledgement of service therein, order the action to be discontinued or dismissed on such terms as to costs or otherwise as it thinks just, and may further order that a grant of probate of the will, or letters of administration of the estate, of the deceased person, as the case may be, which is the subject of the action, be made to the person entitled thereto.

(3) An application for an order under this rule may be made by application.

Notes:

1. A claimant may not discontinue a probate action without permission of the court. The claimant must make an application and the court may make an order which includes an order concerning the subject of the action.

2. See The Supreme Court Practice (UK) 1999: Except in revocation actions, the court will generally not make an order under this part without making an order for the grant of probate of letters of administration.

3. Because a probate action is an action in rem, the normal procedure for default of pleadings does not apply.[See White Book, UK, 1999]. In the event of a default of pleadings, the opposing party may apply for (1) apply for an order for trial on affidavit evidence or (2) apply for an order that the action be discontinued or dismissed and for a grant of probate or letters of administration be made to the person applying.

63.10 Compromise of action: trial on affidavit evidence.

Where, whether before or after the service of the defence in a probate action, the parties to the action agree to a compromise, the court may order the trial of the action on affidavit evidence.

Notes:

1. When a probate action is compromised, there are three options; (1) trial on affidavit evidence; or (2) discontinuance or dismissal of the probate action pursuant to Part 63.9;

2. Trial on affidavit evidence: There will be a hearing before a judge in open court, which will lead to proof of the will in solemn form. All affected persons must have notice of the proceedings. The judge will sit in chambers to consider compromises of patients and minors

and persons with disabilities and unascertained persons. [See Supreme Court Practice, UK, (1999) Notes 76/12]

3. Discontinuance/Dismissal: On application, the order will be for grant in common form. While it is desirable that all affected parties are before the court, it is not mandatory that all parties even have notice. [See Supreme Court Practice, UK, (1999) Notes 76/12]

63.11 Application for order to bring in will, etc.

(1) Any application in probate proceedings for an order requiring a person to bring a will or other testamentary paper into court or to attend in court for examination must be supported by evidence on affidavit setting out the grounds of the application.

(2) An application under paragraph (1) shall be made by application in the action, which must be served on the person against whom the order is sought.

(3) Any application for the issue of a subpoena in accordance with section 32 of the Probate and Administration of Estates Act (No. 1 of 2011) to require a person to bring a will or other testamentary paper into the Probate Registry may be made without notice but must be supported by evidence on affidavit setting out the grounds of the application.

Notes

Sere The Supreme Court Practice (UK) 1999 Notes 76/13]: The application will be inter partes.

63.12 Administration pendente lite.

(1) An application under section 6 of the Probate and Administration of Estates Act (No. 1 of 2011) for the grant of representation shall be made by application if there are existing proceedings or otherwise by fixed date claim form and statement of claim.

(2) Where an order for a grant of administration is made under section 9 of the Probate and Administration of Estates Act (No. 1 of 2011), rules 53.21, 53.42 and 53.63 and subject to subsection 9(2) of the Probate and Administration of Estates Act (No. 1 of 2011), rule 53.34, shall apply as if the administrator were a receiver appointed by the Court.

Notes

1. Re Bevan (deceased), Bevan v Houldworth [1948] 1 All E R 271: settled practice in appointing a Administrator pendente lite, is to follow the practice of Chancery division in the matter of the appointment of a receiver. See Bellew v Bellew and others 164 E R 1437.
2. If there are no proceedings afoot, there will be no grant pendente lite. The Supreme Court Practice (UK) 1999 Notes76/14/2]

63.13 Deposits to credit of deceased persons.

The manager of a bank may, in accordance with section 40 of the Probate and Administration of Estates Act, pay any sum not exceeding two thousand five hundred dollars standing to the credit of a deceased person without the production of a grant of probate or letters of administration.

63.14 Default of acknowledgement of service.

(1) Where a defendant to a probate action fails to enter an acknowledgement of service, the claimant, upon filing an affidavit proving due service of the fixed date claim form and statement of claim on that defendant may, after the time limited for appearing by the defendant, proceed with the action as if that defendant had entered an appearance.

(2) Where a defendant to a probate action fails to enter an acknowledgement of service, then, unless on the application of the claimant the Court orders the action to be discontinued, the claimant may, after the time limited for appearing by the defendant, apply to the Court for an order for trial of the action.

(3) Before applying for an order under paragraph (2), the claimant must file an affidavit proving due service of the fixed date claim form and statement of claim on the defendant.

(4) Where the Court grants an order on the paragraph (2), it may direct the action to be tried on affidavit evidence.

Notes:

Part 63.13 replicates Rule 45 Probate and Administration of Estates Rules 2011 (non-contentious proceedings)

PART 64 – ADMINISTRATION AND SIMILAR ACTIONS

64.1 Interpretation.

Administration action means an action for the administration under the direction of the Court of the estate of a deceased person or for the execution under the direction of the Court of a trust.

64.2 Mode of commencement.

(1) Where any proceedings under this Part are unlikely to involve substantial disputes of fact then such proceedings may be brought under Section II of Part 8.

(2) Where any proceedings under this Part are likely to involve substantial disputes of fact or allegations of breach of trust then such proceedings must be brought by a fixed date claim form with a statement of claim.

Notes:
Part 64.2 deals with the manner in which an action pursuant to this part may be commenced and which originating process should be used depending on the circumstances.
See Morgan Trust Company of The Bahamas ITd. v Wong et Al BS 1999 SC 81

64.3 Determination of questions, etc., without administration.

(1) An action may be brought for the determination of any question or for any relief which could be determined or granted, as the case may be, in an administration action and a claim need not be made in the action for the administration or execution under the direction of the Court of the estate or trust in connection with which the question arises or the relief is sought.

(2) Without prejudice to the generality of paragraph (1), an action may be brought for the determination of any of the following questions —

(a) any question arising in the administration of the estate of a deceased person or in the execution of a trust;

(b) any question as to the composition of any class of persons having a claim against the estate of a deceased person or a beneficial interest in the estate of such a person or in any property subject to a trust;

(c) any question as to the rights or interests of a person claiming to be a creditor of the estate of a deceased person or to be entitled under a will or on the intestacy of a deceased person or to be beneficially entitled under a trust.

(3) Without prejudice to the generality of paragraph (1), an action may be brought for any of the following reliefs —

(a) an order requiring an executor, administrator or trustee to furnish and, if necessary, verify accounts;

(b) an order requiring the payment into court of money held by a person in his capacity of executor, administrator or trustee;

(c) an order directing a person to do or abstain from doing a particular act in his capacity of executor, administrator or trustee;

(d) an order approving any sale, purchase, compromise or other transaction by a person in his capacity of executor, administrator or trustee;

(e) an order directing any act to be done in the administration of the estate of a deceased person or in the execution of a trust which the Court could order to be done if the estate or trust were being administered or executed, as the case may be, under the direction of the Court.

Notes:

1. *Farrington v Pinder* (*executrix of Maybell Pratt (Deceased)2012 1 BHS J 108:* whether an executor may be compelled by a beneficiary to assent to a specific devise in a will prior to the debts of the estate being settled.
2. Whether estate may distributed to "illegitimate child" prior to settlement's debts: *See Claridge Estate v Roberts Estate [1992] BHS J 90*
3. Whether an executor may commence proceedings challenging the distribution of estate to a purported beneficiary and an investigation of the distribution of funds and an accounting: *See Johnson Estate v Johnson [1991] BHS J 166*
4. Beddoe Application: Should an executor or trustee, who has been sued or proposing to sue, not have the consent of all of the beneficiaries or the Court to commence or defend an action, the executor/trustee may apply to the court for directions and sanction. The executor/trustee will be the Claimant and the beneficiaries will be the defendants: See *Re Beddoe, Downes v Cottam [1893] 1 CH 547;*
5. Where all beneficiaries are ascertained and of full age and the executor is also a beneficiary, the beneficiaries are usually joined as defendants and left to fight the claim at their own expense rather than the expense of the estate. See *Re Evans dec'd (1986) 1 WLR 101(CA)*
6. The trustee must reveal to the court the full strength and weaknesses of the application, otherwise he will not be protected against personal liability for costs:
7. Whether trustees are entitled to costs where the action has not been completed. See *Belgravia International Bank & Trust Company Limited (by itself and in its capacity as a Trustee) and another v CIBC Trust Company Bahamas Limited [2014] 1 BHS J 58* .
8. A *prima facie* entitlement to costs of a person who has acted in any one the capacities specified in the sub-rule, in this case, as a trustee, (such as Belgravia), *unless* the Court orders otherwise.
9. A trustee asking for directions on recommencing an action against a beneficiary should join the beneficiary as a defendant with all the other beneficiaries but should not furnish him with the evidence: See: *Re Moritz(dec'd) [1960] Ch 251.* Trustees are generally given leave to carry on proceedings up to discovery at which time they will be required to apply for further directions and the beneficiary defendant will have an opportunity to be heard.
10. "Where a compromise is proposed in proceedings in which a representative is to be, or has been, appointed, and the court's approval is required for the benefit of the represented persons. In that situation the court will almost invariably require an opinion on the merits of the proposed compromise from counsel instructed on behalf of the represented class; and that such an opinion should remain confidential and not be served upon, or shown to, the other parties." See *Saga Group Ltd and another v Paul [2017] 4 WLR 12*
11. In exceptional cases, a beneficiary plaintiff may obtain an order in advance of trial that his costs should be paid out of the estate irrespective of the result of the trial if it falls within the second class of cases: *See Buckton, Re Buckton v Buckton [1907] 2 Ch 406 at 414, RE Hyde and others (joint administrators*

of BetIndex Ltd) [2021] EWHC 1542 (Ch)- where the application could have been brought by the trustee but for some reason of convenience or some other justified reason it was not. *This order is only made in exceptional cases, where the order would have been inevitable. Pensions cases are exceptional and are measured against a different test: See Wallensteiner v Moir(2) [1975] QB 373, The Trustee Coproration Ltd v Nadir and Another [2000] Lexis Citation 4288*

12. Where a trustee proposes to purchase part of the trust estate, his co-trustee should swear an affidavit exhibiting the instructions to given to valuer and obtaining an opinion that the purchase in all circumstances is for the benefit of the infant beneficiaries, unborn children. All beneficiaries should be a party to the application.
13. Compromises for Minors- Counsel will be required to provide an opinion as to whether the compromise is for the benefit of the minor children, which should be exhibited to the affidavit of the next friend making the application: See *X(in his capacity as Trustee) and others v A. (In the capacity as beneficiary) and another [2011] 3 BHS J No 76*; *Bank of Nova Scotia Truste Co v Barletta [1985] BHS J 34*
14. A Benjamin Order may be made pursuant to this Part: Where a testator has died and the whereabouts of a beneficiary are unknown, the trustee may apply to the Court for directions on how to distribute the lost beneficiary's estate without a declaration of his death*: See Re Benjamin [1902] 1 Ch 723; Re Green's Will Trusts; Fitzgerald-Hart and another v Attorney General and others [1985] 3 All E R 455*

For all of the above Notes, please see the 1999 UK White Book [Notes 85/3]

64.4 Parties.

(1) All the executors or administrators of the estate or trustees of the trust, as the case may be, to which an administration action or such an action as is referred to in rule 64.3 relates must be parties to the action, and where the action is brought by executors, administrators or trustees, any of them who does not consent to being joined as a claimant must be made a defendant.

(2) All the persons having a beneficial interest under the trust, as the case may be, to which such an action as is mentioned in paragraph (1) relates need not be parties to the action but the claimant may make such of those persons, whether all or any one or more of them, parties as, having regard to the nature of the relief or remedy claimed in the action, he thinks fit.

(3) Where, in proceedings under a judgment or order given or made in an action for the administration under the direction of the Court of the estate of a deceased person, a claim in respect of a debt or other liability is made against the estate by a person not a party to the action, no party other than the executors or administrators of the estate shall be entitled to appear in any proceedings relating to that claim without the leave of the Court, and the Court may direct or allow any other party to appear either in addition to, or in substitution for, the executors or administrators on such terms as to costs or otherwise as it thinks fit.

64.5 Grant of relief in action begun by originating application.

In an administration action or such an action as is referred to in rule 64.3, the Court may make any certificate or order and grant any relief to which the claimant may be entitled by reason of any breach of trust, wilful default or other misconduct of the defendant notwithstanding that the action was begun by original application, but the foregoing provision is without prejudice to the power of the Court to order

that the action shall continue as if begun by a fixed date claim and statement of claim.

Notes

In an action commenced by a beneficiary, the administrator or trustee must be made a party to the action. See *Belgravia International Bank & Trust Company Limited (by itself and in its capacity as a Trustee) and another v CIBC Trust Company Bahamas Limited [2014] 1 BHS J 58*

64.6 Judgments and orders in administration actions.

(1) A judgment or order for the administration or execution under the direction of the Court of an estate or trust need not be given or made unless in the opinion of the Court the questions at issue between the parties cannot properly be determined otherwise than under such a judgment or order.

(2) Where an administration action is brought by a creditor of the estate of a deceased person or by a person claiming to be entitled under a will or on the intestacy of a deceased person or to be beneficially entitled under a trust, and the claimant alleges that no or insufficient accounts have been furnished by the executors, administrators or trustees, as the case may be, then, without prejudice to its other powers, the Court may —

(a) order that proceedings in the action be stayed for a period specified in the order and that the executors, administrators or trustees, as the case may be, shall within that period furnish the claimant with proper accounts;

(b) if necessary to prevent proceedings by other creditors or by other persons claiming to be entitled as aforesaid, give judgment or make an order for the administration of the estate to which the action relates and include therein an order that no proceedings are to be taken under the judgment or order, or under any particular account or inquiry directed, without the leave of the judge in person.

64.7 Conduct of sale of trust property.

Where in an administration action an order is made for the sale of any property vested in executors, administrators or trustees, those executors, administrators or trustees, as the case may be, shall have the conduct of the sale unless the Court otherwise directs.

Notes

1. Evidence: the application must be supported by evidence as required by the court. The death of the person of whose estate is to be administrated must be strictly proved. Where the Court is being asked to interpret a document, the original and a copy should be made available.
2. Dispute of facts: If the parties wish to cross examine the witnesses, directions should be provided for the provision of the witnesses in open court.
3. Point of law: a point of law should be adjourned to open court.

4. Limitation point: an executor who pays a statute barred debt after dismissal commits a *devastavit* and the creditor who received the payment is liable to the estate to return it. Trustees who want to raise the limitation defence for payments made more than 6 years prior to the commencement of the proceedings, must include the defence at the same time that the Court provide direction for an accounting. It is too late to raise the point when the accounts are before the Court. S*ee [Re Williams [1916] 2 Ch 38*

5. Administration Order: there are creditor actions and beneficiary actions. A creditor's action is for the administration of the estate. A beneficiary's action respecting the estate or a trust, may be brought by the beneficiary or the executors, administrators, or trustees. All executors, administrators, or trustees must be made a party to the action and any of them who does not consent to be joined but be made a defendant. *See John Prestwiich v Roya Bank of Canada Truste Co (Jersey) Ltd. 1 ITLR 565 for explanation of Administration Order.*

6. Insolvent estate: where the estate is insolvent, the proceedings should be commenced by a creditor as claimant against the personal representative of the estate (defendant). The personal representative of the estate may commence proceedings against a willing creditor but is not entitled to commence an action against an unwilling creditor. The proper course would then be for the personal representative to commence an action pursuant to the insolvency legislation. *See In Re Bradley [1956] Ch 615*. Where the beneficiaries are no longer interested, the action must be reconstituted by creditors as claimants- See *Re Van Oppen [1935] WN 51* for form of order.

7. Creditors action for administration- an application may be taken out by a creditor for relief against the trustees, executors and administrators. A creditor may sue for administration against an administrator pendente lite in the same manner as a general administration. Where an estate is insolvent, there should be an affidavit containing prima facie evidence of the fact.

(For Notes 1-7 See Supreme Court Practice, UK, 1999 Notes 85/6)

PART 65 - PROCEEDINGS BY AND AGAINST THE CROWN

65.1 Application and interpretation.

(1) These Rules apply to civil proceedings to which the Crown is a party subject to the following rules of this Part.

(2) In this Part –

"civil proceedings by the Crown", "civil proceedings against the Crown" and "civil proceedings by or against the Crown" have the same respective meanings as in Part II of the Crown Proceedings Act (Ch. 68) and do not include any of the proceedings specified in section 23(1) of that Act;

"civil proceedings to which the Crown is a party" has the same meaning as it has for the purposes of section 15 of the Crown Proceedings Act (Ch. 68);

"Order against the Crown" means any order, including an order for costs, made in any civil proceedings by or against the Crown or in connection with any arbitration to which the Crown is a party, in favour of any person against the Crown or against a Government department or against an officer of the Crown as such;

"order" includes a judgment, decree, rule, award or declaration.

65.2 Particulars to be included in statement of claim.

(1) In the case of a statement of claim in civil proceedings against the Crown there shall be included in the statement of claim a statement of the circumstances in which the Crown's liability is alleged to have arisen and as to the Government department and officers of the Crown concerned.

(2) If in civil proceedings against the Crown a defendant considers that the statement of claim does not contain a sufficient statement as required by this rule, he may, before the expiration of the time limited for filing an acknowledgment of service, apply to the claimant by notice for a further and better statement containing such information as may be specified in the notice.

(3) Where a defendant gives a notice under this rule, the time limited for acknowledging service shall not expire until four days after the defendant has notified the claimant in

writing that the defendant is satisfied with the statement supplied in compliance with the notice or four days after the Court has, on the application of the claimant by interlocutory application served on the defendant not less than seven days before the return day, decided that no further information as to the matters referred to in paragraph (1) is reasonably required.

Notes:
Part 65.2, indicates that for Civil proceedings against the Crown, a statement of claim should include a statement of the circumstances in respect of which the Crown liability is alleged and the Government department and officer of the Crown concerned with the stated allegation. Additionally, where the Defendant considers the statement of claim to be insufficient in stating the circumstances of the allegation, the defendant may apply to the claimant by notice for further and better statement containing such information as may be specified in the notice. Further, this part indicates that the time limited for the claimant to acknowledge service of the said notice does not expire until four days after the defendant has notified the claimant in writing that the defendant is satisfied with the statement supplied in compliance with the notice or four days after the Court has, on the application of the claimant by interlocutory application served on the defendant not less than seven days before the return day, decided that no further information is reasonably required.

Cases:
CPR 65.2 PARTICULARS TO BE INCLUDED IN THE STATEMENT OF CLAIM.
Halsbury's Laws of England/Civil Procedure (Volume 11 (2020), Volume 12 (2020), Volume 12A (2020)
Particulars of claim must include: (1) a concise statement of the facts on which the claimant relies; (2) if the claimant is seeking interest, a statement to that effect, with additional information regarding the rates at which interest is being claimed and the dates that are being used for calculating the total amount being claimed; (3) if the claimant is seeking aggravated damages or exemplary damages, a statement to that effect and his grounds for claiming them; (4) if the claimant is seeking provisional damages, a statement to that effect and his grounds for claiming them; and (5) such other matters as may be set out in a practice direction.
Bruce v Odhams Press Limited [1936] 1 All ER 287 per SCOTT LJ "The cardinal provision in rule 4 is that the statement of claim must state the material facts. The word "material" means necessary for the purpose of formulating a complete cause of action; and if any one "material" statement is omitted, the statement of claim is bad; it is "demurrable" in the old phraseology, and in the new is liable to be "struck out" under RSC Ord XXV, r 4 (see Philipps v Philipps); or "a further and better statement of claim" may be ordered under rule 7."
British West Indian Airways Ltd v Carmichael 22 WIR 491. Ordering of particulars is an overriding power. 'A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading, notice or written proceedings requiring particulars may in all cases be ordered, upon such terms as to costs and otherwise as may be just.'

65.3 Service on the Crown.

(1) Part 6 and any other provision of these Rules relating to service within or out of the jurisdiction shall not apply in relation to the service of any process by which civil proceedings against the Crown are begun.

(2) Personal service of any document required to be served on the Crown for the purpose of or in connection with any civil proceedings is not requisite but where the proceedings

are by or against the Crown service on the Crown must be effected by leaving the document at the office of the Attorney-General.

Notes:
These Rules provide that personal service of documents in matters by or against the Crown is not required but rather, service of documents is effected by leaving the documents at the Office of the Attorney General.
Cases:
CPR 65.3 SERVICE ON THE CROWN
Town Investments Ltd, and others and Department of the Environment [1978] AC 359: "Before drawing a conclusion, it only remains to note also the fundamental constitutional doctrine that the Crown in the United Kingdom is one and indivisible.

If such terms as 'aspects of the Crown' or 'emanations of (or from) the Crown' or 'participants of royal authority' are considered to be too cloudy for legal usage, the legal concept which seems to me to fit best the contemporary situation is to consider the Crown as a corporation aggregate headed by the Queen. The departments of state including the ministers at their head (whether or not either the department or the minister has been incorporated) are then themselves members of the corporation aggregate of the Crown. But on this approach two riders must be added. First, the legal concept still does not correspond to the political reality. The legal substratum is overlaid by constitutional convention. The Queen does not now command those legally her servants who are heads or subordinate members or subject to the control of the departments of state. On the contrary she acts on the formally tendered collective advice of those ministers who constitute the Cabinet. Secondly, when the Queen is referred to by the symbolic title of "Her Majesty," it is the whole corporation aggregate, the Crown, which is generally indicated. This distinction between "The Queen" and "Her Majesty" reflects the ancient distinction between "the King's two bodies," "natural" and "politic": see The Case of the Dutchy of Lancaster (1567) 1 Plowden 212, 213."
Attorney-General v Desnoes & Geddes Ltd (1970) 15 WIR 492 "The Attorney-General is entitled, and indeed is under a duty, to sue any person whose negligence has caused damage to a vehicle of the public works department. The success of such an action would in no way depend upon whether the driver was acting as a servant or agent of the department, or upon the character of the act of his driving on the occasion. Consequently, to show that the driver was on a frolic of his own or that the department's vehicle was being used entirely for a private purpose, would afford no defence to the claim of the Attorney-General. If the negligence alleged was established, he would be entitled to a judgment. If, however, in such an action the defendant should file a counterclaim, the question whether a driver was acting as a servant or agent of the department would become of critical importance and if the defendant was unable to establish this, his counterclaim would fail. But the counterclaim would not fail merely because the defendant was unable to show the character of the act of the driver of the department's vehicle, because the Crown is subject to all those liabilities in tort to which, if it were a person of full age and capacity, it would be subject (a) in respect of torts committed by its servants or agents."

65.4 Counterclaim and set-off.

(1) Notwithstanding any provision in these Rules, a person may not in any proceedings by the Crown make any counterclaim or plead a set-off if the proceedings are for the recovery of, or the counterclaim or set off arises out of a right or claim to repayment in respect of, any taxes, duties or penalties.

(2) Notwithstanding any provision in these Rules, no counterclaim may be made, or set-off pleaded, without the leave of the Court, by the Crown in proceedings against the Crown, or by any person in proceedings by the Crown —

(a) if the Crown is sued or sues in the name of a Government department and the subject-matter of the counterclaim or set-off does not relate to that department; or

(b) if the Crown is sued or sues in the name of the Attorney-General.

(3) Any application for leave under this rule must be made by interlocutory application.

Notes:
This rule indicates that in proceedings against the Crown, leave must be obtained to make a counterclaim or plead a set-off.

Cases:
CPR 65.4 COUNTERCLAIM AND SET-OFF
Corporate Rescue and Insolvency Journal/2014 Volume 7/Issue 4, August/Articles/Set-off and Crown departments - (2014) 4 CRI 140 "The most commonly encountered statutory provision is probably s 35(2)(g)(i) of the Crown Proceedings Act 1947 (CPA 1947), which allows the creation of court rules providing that:
[A] person shall not be entitled to avail himself of any set-off or counterclaim in any proceedings by the Crown for the recovery of taxes, duties or penalties, or to avail himself in proceedings of any other nature by the Crown of any set-off or counterclaim arising out of a right or claim to repayment in respect of any taxes, duties or penalties.
The corresponding rules are in CPR 66.4(1) and (2):
(1) In a claim by the Crown for taxes, duties or penalties, the defendant cannot make a counterclaim or other Pt 20 claim or raise a defence of set-off.
(2) In any other claim by the Crown, the defendant cannot make a counterclaim or other Pt 20 claim or raise a defence of set-off which is based on a claim for repayment of taxes, duties or penalties."
Attorney-General v Desnoes & Geddes Ltd (1970) 15 WIR 492 "'Where civil proceedings are brought by the Crown the defendant shall not be entitled without the leave of the judge (to be obtained on an application of which not less than seven clear days' notice has been given to the Crown) to avail himself of any set-off or counterclaim.'"
Dove Properties Limited v The Treasurer of the Commonwealth of the Bahamas SCCivApp. No. 133 of 2020 paragraph 18 states "18. It is also important to note that having regard to the provisions of Order 69, Rule 4(1) of the Rules of the Supreme Court Charles,J was not obligated to have regard to the action filed by GBC. Order 69, rule 4(1) provides that: "4. (1) Notwithstanding Order 15, rule 2, and Order 18, rules 17 and 18, a person may not in any proceedings by the Crown make any counterclaim or plead a set-off if the proceedings are for the recovery of, or the counterclaim or set off arises out of a right or claim to repayment in respect of, any taxes, duties or penalties"."

65.5 Summary judgment

(1) No application against the Crown shall be made under Part 15 for summary judgment or for specific performance in any proceedings against the Crown.

(2) Where an application is made by the Crown under Part 15 for summary judgment or specific performance, the affidavit required in support of the application must be made by an officer duly authorised by the attorney acting for the Crown or by the department concerned, and the affidavit shall be sufficient if it states that in the deponent's belief the applicant is entitled to the relief claimed and there is no defence to the claim or part of a

claim with a real prospect of success to which the application relates at all or only except as to the amount of any damages claimed.

Note:
Part 65.5 provides that no application shall be made against the Crown for summary judgment or specific performance in any proceedings. However, the Crown can make an application for summary judgment or specific performance with a supporting affidavit made by an officer duly authorised by the attorney acting for the Crown or by the department concerned.

65.6 Judgment in default

(1) Except with the leave of the Court, no judgment in default of an acknowledgment of service or of pleading shall be entered against the Crown in civil proceedings against the Crown.

(2) Except with the leave of the Court a party may not enter default judgment against the Crown in third party proceedings.

(3) An application for leave under this rule may be made by interlocutory application and the same must be served not less than seven days before the return day.

Notes:
Part 65.6 provides that except with the leave of the Court, no judgment in default of an acknowledgement of service or pleading or in third party proceedings shall be entered against the Crown. Moreover, an application for leave under this rule is required to be made by interlocutory application and must be served not less than seven days before the return day. See too Practice Direction No. 10 of 2023 on Default Judgment.

Halsbury's Laws of England/Crown and Crown Proceedings (Volume 29 (2019))/2. Crown Proceedings/(5) Practice and Procedure/112. Summary judgment and judgment in default. - Any request for a default judgment in civil proceedings against the Crown must be considered by a Master or District Judge, who must in particular be satisfied that the claim form and particulars of claim have been properly served on the Crown in accordance with the Crown Proceedings Act 1947 and rules of court.

Cases:
CPR 65.6 JUDGMENT IN DEFAULT
Lynch v Attorney General [2015] JMCA Civ 35 at paragraph 32 - Rule 12.1(1) of the CPR gives a claimant the right to apply for judgment in default where a defendant has failed to file an acknowledgment of service or a defence within the time frame provided for by the CPR. However, where the claim has been brought against the Crown, permission must be sought and granted by the court before an application for default judgment may be pursued. It is a procedural requirement that this permission is sought and granted before the application is permissible and failure to adhere to this rule will result in the application being faulty.

65.7 Third party proceedings

(1) A party may not issue or serve a third party notice on the Crown without the leave of the Court, and the application for the grant of such leave must be made by interlocutory application, and the application notice must be served on the claimant and the Crown.
(2) Leave to issue such a notice for service on the Crown shall not be granted unless the Court is satisfied that the Crown is in possession of all such information as it reasonably requires as to the circumstances in which it is alleged that the liability of the Crown has arisen and as to the departments and officers of the Crown concerned.

Notes:
Part 65.7 requires a party to seek leave of the Court by way of an interlocutory application, to issue or serve a third party notice. Said application notice must be served on the claimant and the Crown. However, as a preliminary requirement, the Court must be satisfied that the party is in possession of all relevant information as to the circumstances in which the party alleges that liability of the Crown has arisen and as to the departments and officers of the Crown concerned.

65.8 Interpleader: application for order against crown.

No order shall be made against the Crown under Part 49, except upon an application in Form G13 served not less than seven days before the return day.

Notes:
See Part 49 on interpleader.

65.9 Disclosure.

(1) Part 28 shall not apply in civil proceedings to which the Crown is a party unless the Court orders otherwise.
(2) In any civil proceedings to which the Crown is a party any order of the Court made under the powers conferred by section 22(1) of the Crown Proceedings Act *(Ch. 68)*, shall be construed as not requiring the disclosure of the existence of any document the existence of which it would, in the opinion of a Minister of the Government, be injurious to the public interest to disclose.

(3) Where in any such proceedings an order of the Court directs that a list of documents made in answer to an order for disclosure against the Crown shall be verified by affidavit, the affidavit shall be made by such officer of the Crown as the Court may direct.
(4) Where in any such proceedings an order is made under the said section 22 for further information to be answered by the Crown, the Court shall direct by what officer of the Crown the request for information is to be answered.

Notes:

Discovery Disclosure against the Crown is not automatic, and the Crown need not make disclosure except under order of the Court. See the words of s.22(1) of the Crown Proceedings Act (Ch. 68).

Cases:

CPR 65.9 (2) INJURIOUS TO THE PUBLIC INTEREST TO DISCLOSE

Alfred Crompton Amusement Machines Ltd. v. Customs and Excise Commissioners (No. 2) [1971 A. No. 2393] - [1972] 2 Q.B. 102 Public interest should be balanced against the administration of justice.

R v Chief Constable of the West Midlands Police ex p Wiley [1995] 1 AC 274 [1994] 3 ALL ER 420 per Lord Wolfe: a Minister is not under a duty to claim public interest unless interest is in favour of such a claim.

Bennet v Metropolitan Police Comr [1995] 2 ALL ER 1, [1995] 1 WLR 488 A Government Minister when considering whether to object to the disclosure of documents by reason of public interest immunity owes no private law duty of care to a private litigant who wishes to see the documents for the purpose of his private litigation.[134]

65.10 Evidence.

(1) Civil proceedings against the Crown may be instituted in any case in which the Crown is alleged to have an interest or estate in the honour, title, dignity or office or property in question.

(2) For the avoidance of doubt it is hereby declared that any powers exercisable by the Court in regard to the taking of evidence are exercisable in proceedings by or against the Crown as they are exercisable in proceedings between subjects.

[134] *The Civil Court Practice 2002*, volume 1, page 535

Notes:

This section deals with property in which the Crown may have an interest. The Court's usual powers in the taking of evidence applies the same against the Crown.

65.11 Execution and satisfaction of orders.

(1) Except as expressly provided in this Part, nothing in Parts 43 – 45, 47 – 48, 51 and 53 shall apply in respect of any order against the Crown.

(2) An application under the proviso to section 19(1) of the Crown Proceedings Act *(Ch. 68)* for a direction that a separate certificate shall be issued under that subsection with respect to the costs (if any) ordered to be paid to the applicant, may be made to the Court without notice.

(3) Any such certificate must be in the form prescribed by practice direction.

Notes:

65.11(1) Execution process is not available against the Crown. The Crown may enforce orders in its favour, as provided in s20 of the Crown Proceedings Act but the Crown is not subject to the ordinary processes of execution such as charging orders, garnishee proceedings, execution against goods and so on. The exemption is made by s19 (4) of the Act. However, s19(1) provides instead for the court to issue a certificate, or certificates for money ordered to be paid including costs, and the Minister responsible for Finance is required by sub-s (3) to honour it. In addition, s.21 provides a special process for attaching debts due from the Crown.[135]

65.11(2) Section 19 of the Crown proceedings Act 1947.

65.12 Attachment of debts, etc.

(1) Every application to the Court for an order under section 21 of the Crown Proceedings Act *(Ch. 68)*, restraining any person from receiving money payable to him by the Crown and directing payment of the money to the applicant or some other person must be made by interlocutory application served at least four days before the return day on the Crown and, unless the Court otherwise orders, on the person to be restrained or his attorney and

[135] *The Civil Court Practice 2002*, volume 1, pages 1318-1319

the application must be supported by an affidavit setting out the facts giving rise to it, and in particular identifying the particular debt from the Crown in respect of which it is made.

(2) Rule 45.8(6)(c) shall apply in relation to such an application as is mentioned in paragraph (1) for an order restraining a person from receiving money payable to him by the Crown as that rule applies to an application under rule 45.2, for an order for the third party debt order, except that the Court shall not have power to order execution to issue against the Crown.

Notes:
See Section 21 of the Crown Proceedings Act (Ch.68). This rule applies to persons (the Applicant) who are owed money by a person to whom the Crown owes money. An interlocutory application must be made and the facts set out in a supporting Affidavit.

PART 66

APPLICATIONS AND APPEALS TO THE SUPREME COURT UNDER VARIOUS ACTS

66.1 Scope of this Part.

(1) This Part deals with appeals to the Court from any tribunal or person under any enactment other than an appeal by way of case stated.

(2) In this Part —

"appellant" means any person challenging the decision of a tribunal or person under this Part;

"clerk to the tribunal" means the clerk, secretary or other person responsible for the administration of the tribunal;

"decision" means the order, determination, decision or award appealed against; and

"tribunal" means any tribunal other than a court of law established under an enactment.

(3) This Part takes effect subject to any provisions in the relevant enactment.

Notes:

The language of r.66.1 indicates the broad scope of Pt. 66. Part 66 embraces appeals to the Supreme Court under various Acts. On a similar provision in the United Kingdom's Civil Procedure Rules (CPR r. 52), May L.J. in *EI Dupont Nemours & Co v ST Dupont [2003] EWCA Civ 1368 at [92]; [2006] 1 WLR 2793* stated, *"It encompasses… statutory appeals from the decisions of tribunals, minister or other bodies or persons… it applies to a wide variety of statutory appeals where the nature of the decision appealed against and the procedure by which it was reached may differ substantially*."

Insofar as it states that Part 66 is subject to "any provision in the relevant enactment" which sets out special provisions with regard to any particular category of appeal, r. 66.1(4) states an obvious principle. Many statutes provide rights of appeal. It is important to note that, in doing so, such statutes (a) may make express provision as to procedural matters; and (b) in doing so may make provisions that vary from those contained in the CPR and which would otherwise (but for the statute) apply. A party proposing to exercise a particular statutory right of appeal should take care to consult, not only other relevant CPR provisions, but the statute itself.

Cases:

CPR 66.1 (2) MEANING OF APPELLANT – appellant is defined as "any person challenging the decision of a tribunal or person under this Part". This definition is wide enough to embrace a person who was not a

party to the proceedings below, but who is adversely affected by the outcome (*see MA Holdings Ltd v George Wimpey UK Ltd (1) and Tewkesbury BC(2) [2008] EWCA Civ 12; [2008] 1 W.L.R. 1649.*

The decision in *MA Holdings Ltd* was considered and applied in *Re W [2016] EWCA Civ 1140*.

66.2 How to appeal to the court.

(1) An appeal to the court under this Part must be brought by originating application.

(2) Every originating application by which such an appeal is brought must have attached to it a formal document entitled "Grounds of Appeal".

(3) The appellant's grounds of appeal must show —

(a) details of the decision against which the appeal is made;

(b) the name of the tribunal or person whose decision is under appeal;

(c) the enactment and section enabling an appeal to be made to the court;

(d) the facts found by that tribunal or person; and

(e) the grounds on which it is contended the decision should be reversed, varied or set aside, identifying —

(i) any finding of fact; and

(ii) any finding of law, which the appellant seeks to challenge.

Notes:

This section outlines the process for an appellant to appeal to the court and what is required in the appellants grounds of appeal.

Cases:

CPR 66.2(2) GROUNDS OF APPEAL

The requirement that grounds of appeal should be included in a notice of appeal was mandatory. An inspector clearly needs to know what an appeal is about, in particular because most appeals are settled and there was nothing unjust or contrary to the purpose of the legislation in holding the notice of appeal to be invalid in the circumstances (see *Jacques v Revenue and Customs Commissioners; SpC 513 [2006] STC (SCD) 40*)

66.3 Effect of appeal.

The filing of an appeal does not operate as a stay of proceedings on the decision against which the appeal is brought unless —

(a) the court; or

(b) the tribunal or person whose decision is under appeal so orders.

Notes:

Neither the commencement of an appeal nor the grant of permission to appeal affects the enforceability of the judgment below. If the appellant desires a stay, he must apply for it and put forward solid grounds why such a stay should be granted.

Cases:

CPR 66.3 AN APPEAL DOES NOT OPERATE AS A STAY UNLESS THE COURT OR TRIBUNAL SO ORDERS

"The normal rule is for no stay…" per Potter L.J in *Leicester Circuits Ltd. v Coates Brothers plc [2002] EWCA Civ 474 at [13]*.

In *DEFRA v Downs [2009] EWCA Civ 257 at [8]-[9]* Sullivan L.J., having noted that a stay is the exception rather than the rule, stated that the "solid grounds" which an appellant must put forward are normally "some form of irremediable harm if no stay is granted.

If an appellant puts forward solid grounds for seeking a stay, the court must then consider all the circumstances of the case. It must weigh up the risks inherent in granting a stay and the risks inherent in refusing a stay. In *Hammond Suddard Solicitors v Agrichem International Holding Ltd [2001] EWCA Civ 2065, December 18, 2001, unrep., CA*, Clarke L.J. described the correct approach as follows:

> "Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand, if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover any monies paid from the respondent?"

In considering whether, absent the stay, the appeal would be stifled, the court does not look only at the means of the appellant. It also considers whether the money can be raised from the appellants' directors, shareholders other backers or interested persons (see *Contract Facilities Ltd v Estate of Rees (deceased) [2003] EWCA Civ 1105*).

A stay may be granted subject to conditions. For example, in *Contract Facilities Ltd v Estate of Rees (deceased) [2003] EWCA Civ 1105* the appellant claimant obtained a stay of the cost order below, on condition that he paid into a joint account of the two firms of solicitors 50 per cent of the costs claimed by the defendant.

WHERE THE LOWER COURT ORDERS A STAY OF PROCEEDINGS

A stay of proceedings ordered by the lower court does not preclude an appeal against the order imposing the stay: see *Aoun v Bahri and another [2002] EWCA Civ 1141* at [20]-[23].

66.4 Persons on whom originating application must be served.

The appellant must serve the originating application and grounds of appeal on —

(a) the clerk to the tribunal, minister or other person by whom the decision appealed against was made; and

(b) every other party to the proceedings in which **the decision was made.**

Notes:

The general rule is that, the appellant must serve the originating application and grounds of appeal on every other party to the proceedings and on the clerk to the tribunal, minister or other person from whose decision the appeal is brought.

66.5 Time within which originating application must be served.

The originating application and grounds of appeal must be filed and served within twenty-eight days of the date on which the decision was given to the appellant.

Notes:

The general rule is that an appellant's originating application and grounds of appeal must be filed and served within twenty-eight days from the date of the decision that is being appealed.

Where any statute prescribes a period within which an appeal must be filed then, unless the statute provides otherwise, the appeal court may not extend that period.

66.6 Amendment of Grounds of Appeal, etc.

(1) The appellant may amend the originating application and the grounds of appeal without permission by filing and serving not less than ten days before the hearing of the appeal an amended originating application and grounds of appeal on each of the persons on whom the initial application was served.

(2) Except with the permission of the Court, no grounds other than those stated in the originating application and grounds of appeal by which the appeal is brought may be relied upon by the appellant at the hearing, but the Court may amend the grounds so stated or make any other order, on such terms as it thinks just, to ensure the determination on the merits of the real question in controversy between the parties.

(3) The foregoing provisions of this rule are without prejudice to the powers of the Court under rule 20.4, rule 26.2 and rule 26.9

(4) Permission to amend the grounds of appeal may be given after the ten days specified in paragraph (1) where the court considers that the interest of justice so requires.

Notes:

This Rule makes provision for an appellant to amend their originating application not less than ten days before the hearing of the appeal. Further except with permission of the court the Appellant is bound by the grounds of appeal outlined in the originating application or amended originating application.

Cases:

CPR 66.6 (2) EXCEPT WITH PERMISSION THE APPELLANT IS LIMITED TO THE GROUNDS OF APPEAL OUTLINED IN THE ORIGINATING APPLICATION AND AMENDED ORIGINATING APPLICATION

Gover vs. Propertycare Ltd [2006] EWCA Civ. 286 ICR 1073, The appeal court's jurisdiction is limited to the grounds of appeal outlined in the application.

[Hickey v Secretary of State For Work and Pensions [2018] EWCA Civ 851], para 74 An Appellant who has obtained permission to appeal and wishes to add or amend his grounds must make a formal application pursuant to CPR 52.17.[136]

66.7 First hearing

(1) Unless the Court otherwise directs the date fixed for the first hearing must not be less than twenty-eight nor more than fifty -six days after the issue of the originating application.

(2) The appellant must file at the Registry, not less than seven days before the first hearing, a copy of the transcript of the proceedings in which the decision was made

(3) Where the court does not hear the appeal at the first hearing, the court must fix a date, time and place for the full hearing.

Notes:

This Rule provides that the date fixed for the first hearing must not be less than twenty-eight days nor more than fifty-six days after the issue of the originating application.

66.8 Hearing of appeal

(1) An appeal to which this Part applies shall be heard and determined by a judge of Court.

(2) Unless an enactment otherwise provides, the appeal is to be by way of rehearing.

(3) The court may receive further evidence on matters of fact and the evidence may be given in such manner as the court may direct either by oral examination in court, by affidavit, by deposition taken before an examiner or in some other manner.

(4) The Court may draw any inference of fact which might have been drawn in the proceedings in which the decision was made.

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[136] Civil Court Practice (The Green Book) Part 1 Procedure in the Civil Courts/Civil Procedure Rules 1998 Part 52

(5) It shall be the duty of the appellant to apply to the person presiding at the proceedings in which the decision appealed against was given for a signed copy of any note made by him of the proceedings and to furnish that copy for the use of the Court and in default of production of such note, or, if such note is incomplete, in addition to such note , the court may hear and determine the appeal on any other evidence or statement of what occurred in those proceedings as appears to the Court to be sufficient.

(6) Except where the Court otherwise directs an affidavit or note by a person present at the proceedings shall not be used in evidence under this paragraph unless it was previously submitted to the person presiding at the proceedings for his comments.

(7) The court may –

(a) give any decision or make any order which ought to have been given or make made by the tribunal or person whose decision is under appeal;

(b) make such further or other order as the case requires; or

(c) remit the matter with opinion of the court for rehearing and determination by the tribunal or person.

(8) The Court may, in special circumstances, order that such security shall be given for the costs of the appeal as may be just

(9) The Court is not bound to allow an appeal as a result of-

(a) a misdirection; or

(b) the improper admission or rejection of evidence unless it considers that a substantial wrong or miscarriage of justice has been caused.

Notes:

This Rule makes provision for an appeal to be heard and determined by a Judge. Further unless the enactment otherwise provides an appeal is by way of rehearing.

Cases:

CPR 66.8 (2) UNLESS AN ENACTMENT OTHERWISE PROVIDES, THE APPEAL IS TO BE BY WAY OF REHEARING

In circumstances where a court is considering whether to reverse a factual decision of a lower court the approach of the court should be the same whether conducting a review or rehearing Assicurazioni General SpA v Arab Insurance Group (BSC) [2003] 1 All ER (Comm) 140.

Further the nature of a review or a rehearing is outlined in E I Du Pont de Nemors & Co v ST Dupont [2003] EWCA Civ 1368.

CPR 66.8(3) THE COURT MAY RECEIVE FURTHER EVIDENCE ON MATTERS OF FACT

In relation to a statutory appeal, a mistake of fact that gives rise to unfairness is an error of law 'at least in those statutory contexts where the parties share an interest in co-operating to achieve the correct result': E v Secretary of State for the Home Department [2004] EWCA Civ 49, [2004] QB 1044, [2004] 2 WLR 1351, per Carnwath LJ. Where such a mistake is verifiable, was not the responsibility of the appellant or his advisers and played a material part in the Tribunal's reasoning, then the appeal court may admit new evidence subject to the Ladd v Marshall principles (ibid, paras 66, 91).[137]

CPR 66.8 (c) THE COURT MAY REMIT THE MATTER WITH THE OPINION OF THE COURT FOR REHEARING

In circumstances where a Judge is hearing an appeal from a specialist tribunal and inadequate reasons were given for the decision of that tribunal, he may exercise his discretion and remit the matter so that adequate reason may be provided A failure to remit could be seen as usurping the function of the specialist regulatory body and a quashing order could be a disproportionate response: Adami v Ethical Standards Officer of the Standards Board for English [2005] EWCA Civ 1754, (2005) Times, 2 December. Where a case is remitted on one issue, it does not mean that there should be a complete fresh hearing of all the issues before the court or tribunal: Way v Poole Borough Council [2007] EWCA Civ 1145, (2007) Times, 25 October.[138]

CPR 66.8 (8) THE COURT MAY IN SPECIAL CIRCUMSTANCES, ORDER THAT SUCH SECURITY SHALL BE GIVEN FOR COSTS OF THE APPEAL AS MAY BE JUST

The principles to be applied by an appellate court in determining whether to grant security were outlined by Morrison JA in Cablemax Ltd v Logic One Ltd as adopted from the Judgement of Peter Gibson LJ in Keary Developments Ltd v Tarmac Construction Ltd.[1995] 3 All ER 534.[139]

[137] Civil Court Practice (The Green Book) Part 1 Procedure in the Civil Courts/Civil Procedure Rules 1998 Part 52

[138] Civil Court Practice (The Green Book) Part 1 Procedure in the Civil Courts/Civil Procedure Rules 1998 Part 52

[139] Commonwealth Caribbean Civil Procedure 4th ed G Kodilinye and V Kodilinye p 264

PART 67- LODGEMENT, INVESTMENT, ETC., OF FUNDS IN COURT; APPLICATIONS WITH RESPECT TO FUNDS IN COURT

67. 1 Payment into court under Trustee Act

(1) Subject to paragraph (2), any trustee wishing to make a payment into court under section 75 of the Trustee Act (Ch. 176) must make and file an affidavit setting out-

(a) a short description of the trust and of the instrument creating it or, as the case may be, of the circumstances in which the trust arose;

(b) the names of the persons interested in or entitled to the money or securities to be paid into court with their addresses so far as known to him;

(c) his submission to answer all such inquiries relating to the application of such money or securities as the Court may make or direct; and

(d) an address where he may be served with any application notice, statement of claim order or notice of any proceedings, relating to the money or securities paid into court.

(2) Where the money or securities represent a legacy, or residue or any share thereof, to which an infant or a person resident outside The Bahamas is absolutely entitled, no affidavit need be filed under paragraph (1) and the money or securities may be paid into court.

Notes:
Section 75 of the Trustee Act provides *"(1) Trustees or the majority of trustees having in their hands or under their control money or securities belonging to a trust may pay the same into Court and the same shall, subject to rules of court, be dealt with according to the orders of the Court. (2) The receipt or certificate of the proper officer of the Court shall be a sufficient discharge to the trustees for money or securities so paid into Court. (3) Where money or securities are vested in any persons as trustees and the majority are desirous of paying the same into Court but the concurrence of the other or others cannot be obtained, the Court may order the payment into Court to be made by the majority without the concurrence of the other or others. (4) Where any such money or securities are deposited with any banker, broker or other depository, the Court may order payment or delivery of the money or securities to the majority of the trustees for the purpose of payment into Court. (5) Every transfer, payment and delivery made in pursuance of any such order of the Court shall be valid and shall take effect as if the same had been made on the authority or by the act of all the persons entitled to the money and securities so transferred, paid or delivered."*

Part 67.1 is identical (save for reference to the requisite Trustee Act) to Order 79 of the 1978 Rules of the Supreme Court ("**RSC**") and accordingly no change to the practice.
In addition to outlining the information that must be set out in an affidavit of a trustee who intends to make payment into court, the rule also exempts an infant or those persons residing outside The Bahamas who are wholly entitled to a legacy, residue or share thereof from filing an affidavit to make such payment into court. Further, this part is strikingly similar to the equivalent rule contained in the Supreme Court Practice, 1999, Volume 1 ("1999 White Book"), paragraph 92/2 and guidance may be had from paragraphs 92/2/1 to 92/2/5.

67.2 Notice of lodgment

Any person who has lodged money or securities in court in accordance with rule 67.1 must forthwith send notice of the lodgement to every person appearing from the affidavit on which the lodgement was made to be entitled to, or to have an interest in the money or securities lodged.

Notes:

Part 67.2 mirrors Order 79 rule 2 RSC which is also a mirror of the equivalent in the 1999 White Book which by paragraph 92/4/2 provides that leave may be granted to dispense with the notice on an interested person whose address is unascertainable.

67.3 Applications with respect to funds in court.

(1) Where an application to the Court —

- (a) for the payment or transfer to any person of a separate account or for the payment to any person of any dividend of or interest on any securities or money comprised in such funds;
- (b) for the investment, or change of investment, of any funds in court;
- (c) for payment of the dividends of or interest on any funds in court representing or comprising money or securities lodged in court under any enactment; or
- (d) for the payment or transfer out of court of any such funds as are mentioned in subparagraph (c), is made the application may be disposed of in chambers.

(2) Subject to paragraph (3), any such application must be made by originating application, unless the application is made in a pending cause or matter in which event it shall be made by interlocutory application in those proceedings.

(3) Where an application under paragraph (1)(d) is made in relation to funds which do not exceed five thousand dollars in value, the application may be made without notice to the Registrar and the Registrar may dispose of the application or give directions for the disposal of the application.

(4) Unless otherwise directed, the without notice application under this paragraph shall be made by affidavit.

(5) This rule does not apply to any application for an order under Part 36.

Notes:

Part 67.3 prescribes the procedure in making applications with respect to funds in court which mirrors Order 79 rule 3 RSC subject to such modifications to reflect reference to the new CPR for payments into court. Apart from the increase in the ceiling of funds from $1500 to $5000 the rule is essentially the same and unaffected. The form is now an originating application if it does not arise from a pending action.

Regard must be had to the 1999 White Book for reference, (as appropriately modified for local laws), guidance may be obtained from paragraphs 92/5/1 to 92/5/29.

Similarly silent on fees for payment in, such payments on withdrawal may be subject to a poundage fee due to the court: *Rolle and Sugarman v The Attorney General*, 1990/CLE/qui/00055, Adderley J (as he then was) dated October 7, 2012, where the fee was 1.5%.

Part 68

PROCEEDINGS CONCERNING MINORS; APPLICATION FOR DECLARATION AFFECTING MATRIMONIAL STATUS

Section I
Proceedings Concerning Minors

CPR 68.1

68.1 Application to make minor a ward of court

(1) An application to make a minor a ward of court must be made by fixed date claim form with a statement of claim.
(2) Where there is no person other than the minor who is a suitable defendant, an application may be made without notice to the Registrar for leave to issue a fixed date claim form with a statement of claim with the minor named as defendant thereto; and, except where such leave is granted, the minor shall not be made a defendant to a claim under this rule in the first instance.

Notes:
Wardship is one of many ways that the court exercises its inherent jurisdiction when it is deemed necessary for the protection of children. This jurisdiction is subject to any restrictions imposed by the Child Protection Act. The procedure for making a minor a ward of court is by fixed date claim by a statement of claim. The application is before the Registrar. If there is no suitable person to be named as a defendant an application without notice is made to the Registrar for leave to name the minor as a defendant. Unless leave is granted the minor cannot be made a defendant. There are instances where the court may be asked to intervene even where the minor has not been made a ward of the court, such as, applications for directions for the administration of medical treatment to a child, or where it is sought that medical treatment should be drawn from a child.
Ward of Court – No child can be made a ward of court except by an order of the Court. A child ceases to be a ward of court if the court so orders.
Jurisdiction – Ordinary residence within the country has been held to confer jurisdiction. The Court is also deemed to have jurisdiction if the child is a Bahamian citizen or is physically present within the jurisdiction.
Child Abduction cases – The principles applicable in child abduction cases do not differ from those which apply to any other wardship case – the welfare of the child is always the first and paramount consideration.
Parties – Under CPR 68.1(2) the Chief Justice may make any such practice direction with respect to cases where parents or guardians of a child are agreed (for example, where the child wishes to maintain an association that is considered undesirable), that none should be considered a suitable defendant in the proceedings. The person who is considered the undesirable associate should not be made a party to the originating application.
Guardian ad litem – Where a guardian ad litem is necessary, the Director of Social Services is usually named in any proceedings and acts in that capacity. However, another suitable party may be named with the Courts consent.

Evidence – Evidence is to be filed in the usual form of an affidavit. The birth certificate or proof of birth of the child must be included as a part of the evidence.
Removal of a ward from the jurisdiction – The care agency that has care of the ward may by practice direction in England issued by the CJ to the Registrar, may apply to the court to have the ward travel outside of the jurisdiction for a specified period.
When a minor ceases to be a ward
A child who has been made a ward of court may upon the hearing of an application notice cease to be a ward of court. For the purposes of the CPA a child is any person below the age of 18. However, the Court may also in its inherent jurisdiction make a determination that the child ceases to be a ward of court.

Cases:
Re P. (G.E.) (an Infant) [1965] Ch.568, C.A. (Infant - Ward of court - Jurisdiction - Infant abroad - Alien infant ordinarily resident in England - Infant removed from jurisdiction by father without knowledge of mother - Stateless father furnished with travel document permitting return to United Kingdom within three months - Travel document covering both father and infant - Application by mother to make infant ward of court - Summons by father to set aside mother's application for lack of jurisdiction)

Mark T. McKee Appellant; and Evelyn McKee Respondent. On Appeal From The Supreme Court Of Canada - [1951] A.C. 352 (Infant - Custody - Paramount consideration - Welfare and happiness of infant - Existing judgment of foreign court awarding custody - Not conclusive - To be giver, proper weight, depending on circumstances)

Re L (Minors) (Wardship: jurisdiction) [1974] 1 All ER 913, [1974] 1 WLR 250 (Infants, Children and Young Persons - Family Law - Parental Rights and Duties - Custody and Upbringing - Custody and Welfare - Grounds for Granting, Refusing or Removing From Custody - Safety and Welfare Of Child - Order to Return Child to Foreign Country - Kidnapping Case - Welfare of Child as Paramount Consideration)
Re CT (A minor) (Wardship: Representation) [1993] 2 FLR 278 (appropriateness of invoking wardship jurisdiction – whether child of sufficient understanding to instruct solicitor – ability of child to apply without next friend)
Re W (A minor) (Consent to Medical Treatment) - [1993] 1 FLR 1 **(**Medical treatment – 16-year-old girl suffering from anorexia nervosa refusing recommended treatment – Girl's condition deteriorating rapidly – Whether girl having sufficient understanding to make informed decision – Whether court having jurisdiction to make order conflicting with girl's express wishes)
In re W. (A MINOR) (MEDICAL TREATMENT: COURT'S JURISDICTION) - [1992] 3 WLR 758 (*Children — Court's inherent jurisdiction — Medical treatment — Transfer of 16-year-old girl to specialist unit for treatment for anorexia nervosa — Girl refusing consent to proposed treatment — Whether absolutely entitled to refuse treatment — Whether jurisdiction to override refusal)*
Re R (A Minor) (Blood Transfusion) [1993] 2 FLR 149 (Medical treatment - Child - Parents Jehovah's Witness - Child born prematurely with respiratory problems – Child requiring emergency blood transfusion - Parents objecting – Local authority applying for emergency protection order - Blood transfusion carried out - Local authority applying for care order - Whether court should override sincerely held beliefs of parents - Whether court's inherent jurisdiction was the appropriate legal framework)

CPR 68.2

68.2 Applications under the Child Protection Act

Where there is pending any proceeding by reason of which a minor is a ward of court, any application under the Child Protection Act (hereafter in this Section of this Part referred to as ‘the Act') with respect to that minor may be made by application notice in that proceeding, but except in that case any such application must be made by originating application.

Notes:
The central thrust behind the CPA is set out in section 3 of the Act, which provides that the welfare of the child is the paramount consideration for the court. During the hearing of any application including wardship proceedings, the court is obliged to consider the effect of any order that it may make on the welfare of the child. More detailed considerations for the court are set out at CPA 3(3) which include the wishes of the child, the physical, emotional and educational needs of the child, any changes in the child's circumstances, the age, sex, background, and any harm the child has suffered or is at the risk of suffering. This section of the CPR provides that such applications (wardship) can be heard by application notice. Otherwise proceedings under the CPA are to be commenced by originating application as prescribed.

Cases:
Re B (a juvenile) v AG SCCrimApp 205 of 2015 (Criminal Appeal-Bail-Minor- International Law-Rights of the Child – United Nation Convention on the Rights of the Child – Child Protection Act)
RB v AG 2018 (juvenile - originating motion – constitutional rights of juvenile – criminal proceedings)

CPR 68.3

68.3 Defendants to guardianship applications

(1) Where the minor with respect to whom an application under the Act is made is not the claimant, he shall not, unless the Court otherwise directs, be made a defendant to the claim nor, if the application is made by application notice, be served with the application notice, but subject to paragraph (2) any other person appearing to be interested in, or affected by, the application shall be made a defendant or be served with the claim form or application notice, as the case may be.
(2) The Court may dispense with service of a fixed date claim form and statement of claim or originating application on any person and may order it to be served on any person not originally served.

Notes:
CPR Part 68.3(1) mandates that a minor shall not be made a defendant upon any application under the Child Protection Act without leave. The application notice may not be served on the minor, however any other person whether interested in or affected by the application shall be made a defendant (this is a mandatory provision). The Court may dispense with service or may order service on any person not originally served.

Cases:
Re H (Abduction) [2007] 1 FLR 242 (A child should only be made a party to Hague Convention Proceedings in exceptional circumstances)
Anderton v Clwyd County Council and other appeals - [2002] 3 All ER 813 (*Claim form – Service – Dispensing with service – Whether court having power to dispense with service of claim form in circumstances where retrospective extension of time prohibited)*

CPR 68.4

68.4 Guardianship proceedings may be in chambers

Applications under the Act may be disposed of in chambers.

Notes:
The court has a discretion to determine whether guardianship proceedings are heard in chambers or open court. The practice is generally that such applications are heard in chambers which is a more discrete environment.

Cases:
Department of Economic Policy and Development of the City of Moscow and another v Bankers Trust Co and another - [2004] All ER (D) 476 (implications of in chambers hearing)

CPR 68.5

68.5 Jurisdiction of Registrar
In proceedings to which this Section of this Part applies the Chief Justice by Practice Direction may direct that the Registrar may transact such business and exercise such authority and jurisdiction as may be transacted and exercised by a judge in chambers.
Notes:
In keeping with the administration of justice under the overriding objective, the Chief Justice through Practice Direction, may direct that the Registrar of the Supreme Court may exercise jurisdiction under this Part as exercised by a judge in chambers. This is a new provision.

Cases:
Abdule and others v Foreign and Commonwealth Office and others [2018] EWHC 692 (QB) (jurisdiction of Registrar)

Section II
Application for declaration affecting matrimonial status

CPR 68.6

68.6 Application for declaration affecting matrimonial status
(1) Where, apart from costs, the only relief sought in any proceedings is a declaration with respect to the matrimonial status of any person, the proceedings shall be begun by originating application.
(2) Unless the court otherwise directs, it shall not be necessary for any
person to be named as a defendant to the application nor shall it be served on any person.
(3) The application notice shall state—
(a) the names of the parties and the residential address of each of
them at the date of presentation of the application notice;
(b) the place and date of any ceremony of marriage to which the
application relates;
(c) whether there have been any previous proceedings between the parties with reference to the marriage or the ceremony of marriage to which the application relates or with respect to the matrimonial status of either of them and, if so, the nature of those proceedings;

(d) all other material facts alleged by the petitioner to justify the making of the declaration and the grounds on which he alleges that the Court has jurisdiction to make it, and shall conclude with a prayer setting out the declaration sought and any claim for costs.
(4) Nothing in the foregoing provisions shall be construed—
(a) as conferring any jurisdiction to make a declaration in circumstances in which the Court could not otherwise make it; or
(b) as affecting the power of the Court to refuse to make a declaration notwithstanding that it has jurisdiction to make it.
(5) This rule does not apply to proceedings to which rule 67.3 applies.

Notes:
CPR 68.6 allows a party through an originating application to apply to the Supreme Court for a declaration as to his/her marital status. The application does not require the naming of a defendant or service on any person. The application is not restricted to a request for a single declaration. Common declarations include (a) a declaration that the marriage was valid from inception, (b) a declaration that the marriage subsisted or did not subsist on a date specified in the originating application (c) a declaration that a decree of divorce, nullity or legal separation is valid or not valid as the case may be in The Bahamas, having been obtained outside of the jurisdiction. CPR 68.6(4) does not give the court jurisdiction to make the declaration in circumstances where the court could not otherwise make the declaration. The court could refuse to make the declaration in cases where it would otherwise make it.
A v A (Attorney General intervening) - [2013] 2 WLR 606 **(***Husband and wife — Marriage* — Declaration *of marital* status — *Ceremony of marriage not complying with statutory requirements — Failure to give notice to registrar — Registrar's certificate for marriage not issued — Whether ceremony creating potentially valid marriage — Whether marriage valid)*
Bellinger v Bellinger - [2001] All ER (D) 214 (Jul) (*Marriage – Validity –* Declaration *– Wife registered at birth as male – Wife undergoing sex-change operation before marriage – Whether wife female for purposes of marriage –* Matrimonial Causes Act 1973, *s 11)*

Re P (Forced Marriage) - [2011] 1 FLR 2060 (*Marriage – Forced marriage – Consent – Nullity not available – Appropriate remedy if no valid consent)*

Abassi v Abassi and another [2006] 2 FLR 415 (*discretion of judge to defer issue of validity of marriage to other jurisdiction*)

PART 69 – OBTAINING EVIDENCE FOR FOREIGN COURTS, ETC.

69.1 Jurisdiction of Registrar to make order.

(1) Subject to paragraph (2), the power of the Supreme Court or a judge thereof under any Act to make, in relation to a matter pending before a court or tribunal in a place outside the jurisdiction, orders for the examination of witnesses and for attendance and for production of documents and to give directions may be exercised by the Registrar.

(2) The Registrar may not make such an order if the matter in question is a criminal matter.

69.2 Application for order.

(1) Subject to paragraph (3) and rule 69.3, an application for an order under rule 69.1 may be made without notice by a person duly authorised to make the application on behalf of the court or tribunal in question and must be supported by affidavit.

(2) There must be exhibited to the affidavit in support the letter of request, certificate or other document evidencing the desire of the court or tribunal to obtain for the purpose of a matter pending before it the evidence of the witness to whom the application relates or the production of any documents and, if that document is not in the English language, a translation thereof in that language.

(3) After an application for such an order as is mentioned in paragraph (1) has been made in relation to a matter pending before a court or tribunal, an application for a further order or directions in relation to the same matter must be made by interlocutory application.

69.3 Application by Attorney-General in certain cases.

Where a letter or request, certificate or other document requesting that the evidence of a witness within the jurisdiction in relation to a matter pending before a court or tribunal in a foreign country be obtained —

(a) is received by a Minister of the Government and sent by him to the Registrar with an intimation that effect should be given to the request without requiring an application for that purpose to be made by the agent in The Bahamas of any party to the matter pending before the court or tribunal; or

(b) is received by the Registrar in pursuance of a Civil Procedure Convention providing for the taking of the evidence of any person in The Bahamas for the assistance of a court or tribunal in the foreign country, and no person is named in the document as the person who will make the necessary application on behalf of such a party,

the Registrar shall send the document to the Attorney-General and the Attorney General may make an application for an order and take such other steps as may be necessary, to give effect to the request.

69.4 Person to take and manner of taking examination.

(1) Any order made in pursuance of this Part for the examination of a witness may order the examination to be taken before any fit and proper person nominated by the person applying for the order or before such other qualified person as to the Court seems fit.

(2) Subject to any special directions contained in any order made in pursuance of this Part for the examination of any witness, the examination shall be taken in manner provided by Part 33, and an order may be made under rule 33.12, for payment of the fees and expenses due to the examiner, and those rules shall apply accordingly with any necessary modifications.

Cases:

The Attorney-General v Securities and Exchange Commission et al 2023/CLE/gen/00125 (6 December 2023) The Court held that the law in relation to the conduct of the examination of a witness under CPR 69.4(2) (and therefore CPR 33.8) is that the examination conducted by the Registrar must follow the same method as obtains at trial. In this jurisdiction, evidence at trial is adduced via examination, cross-examination and reexamination. Therefore, the law allows for the examination, cross-examination and re-examination of a witness ordered deposed pursuant to a request under the *Evidence (Proceedings in Other Jurisdictions) Act*. A witness may be asked specific clarifying questions outside of those contained in the Court's Order. It would be counter-productive if follow-up questions were not permitted in cases where, for example, the question posed or the answer given was vague or ambiguous or suggestive of a misunderstanding.

69.5 Dealing with deposition.

Unless any order made in pursuance of this Part for the examination of any witness otherwise directs, the examiner before whom the examination was taken must send the deposition of that witness to the Registrar, and the Registrar shall —

(a) give a certificate sealed with the seal of the Court identifying the documents annexed thereto, that is to say, the letter of request, certificate, or other document from the court or tribunal out of the jurisdiction requesting the examination, the order of the Court for examination and the deposition taken in pursuance of the order; and

(b) send the certificate with the documents annexed thereto to the appropriate Government Minister, or, where the letter of request, certificate or other document was sent to the Registrar by some other person in accordance with a Civil Procedure Convention to that other person, for transmission to that court or tribunal.

Notes:

Rules 69.1- 69.5 is a complete replica of the former Order 65 of the RSC and do not reflect any change in the procedure. The application is made by Originating Application and FORM G6 is specifically provided.

69.6 Claim to privilege.

(1) The provisions of this rule shall have effect where a claim by a witness to be exempt from giving any evidence on the ground specified in section 6(1)(b) of the Evidence (Proceedings in Other Jurisdictions) Act (Ch. 66) is not supported or conceded as mentioned in subsection (2) of that section.

(2) The examiner may, if he thinks fit, require the witness to give the evidence to which the claim relates and, if the examiner does not do so, the court may do so, on the application without notice of the person who obtained the order under section 5 of the Evidence Proceedings in Other Jurisdictions) Act (Ch. 66).

(3) If such evidence is taken —

(a) it must be contained in a document separate from the remainder of the deposition of the witness;

(b) the examiner shall send to the Registrar with the deposition a statement signed by the examiner setting out the claim and the ground on which it was made;

(c) on receipt of the statement the Registrar shall, notwithstanding anything in rule 5, retain the document containing the part of the witness's evidence to which the claim relates and shall send the statement and a request to determine the claim to the foreign court or tribunal with the documents mentioned in rule 5;

(d) and if the claim is rejected by the foreign court or tribunal, the Registrar shall send to that court or tribunal the document containing that part of the witness's evidence to which the claim relates, but if the claim is upheld the Registrar shall send the document to the witness, and shall in either case notify the witness and the person who obtained the order under section 5 of the Evidence (Proceedings in Other Jurisdictions) Act (Ch. 66), the court or tribunal's determination.

Note:

Order 69.6 is new as a rule but merely incorporates the provisions of the Evidence (Proceedings in Other Jurisdictions) Act (Ch. 66) which requires the taking of evidence notwithstanding the claim of privilege and leaves it as a matter to be resolved by the Court in the requesting state.

PART 70 – CHANGE OF ATTORNEY

70.1 Scope of this Part.

This Part deals with the procedure where —

(a) there is a change of attorney;

(b) an attorney acts in the place of a party in person; or

(c) a party who has previously acted by an attorney acts in person.

Notice of Change of Attorney, Appointment of the Attorney, the procedure for a Litigant in Person who previously acted by an Attorney and for the Attorney to cease to be the Attorney of Record for a Litigant is outlined in this part of the CPR[140].

70.2 Change of attorney.

(1) A party to any cause or matter who sues or defends by an attorney may change his attorney without an order for that purpose but, unless and until notice of the change is filed and copies of the notice are served in accordance with this rule, the former attorney shall subject to rules 70.5 and 70.6, be considered the attorney of the party until the final determination of the cause or matter in the Court.

(2) Where a party changes his attorney, the new attorney must —

(a) file a notice of change of attorney which sates his business name, address, telephone number and email address; and

(b) serve a copy of the notice on every other party and the former attorney.

Notes:

CPR 70.2 CHANGE OF ATTORNEY The provision outlines the process of lodging a Notice of Change of Attorney by a Litigant who previously was represented by another Attorney. A person who sues or defendants by an Attorney may at any time during the course of the proceedings without any leave or order of the court lodge a Notice of Change of Attorney by filing the same with the Supreme Court Registry. The Notice of Change of Attorney shall be served on all parties as well as on the former Attorney[141]. The Notice of Change of Attorney must contain the business name, address telephone contact and email address of the new Attorney.

[140] The UKPC Practice Direction 42 provides a comprehensive guide on this provision.
[141] This provision is akin to Order 63 Rule 1 of the Rules of the Supreme Court, 1978

70.3 Notice of appointment of attorney.

Where a person who has previously acted in person instructs an attorney, that attorney must —

(a) file a notice of change at the Registry which states his business name, address, telephone number and email address; and

(b) serve a copy of the notice on every other party.

Notes:

CPR 70.3 NOTICE OF APPOINTMENT OF ATTORNEY
A Litigant who previously acted Pro Se is at liberty to instruct an attorney formerly. The Attorney must file a Notice of Appointment of Attorney with the Supreme Court Registry containing the business name, address, telephone contact and email address of the appointed attorney. The Notice of Appointment of Attorney must be served on all parties to the action[142],[143].

70.4 Party acting in person.

(1) Where a party who has previously been represented by an attorney decides to act in person that party must —

(a) file notice of that fact at the Registry stating the address, an address for service within the jurisdiction, telephone number and email address of that party; and

(b) serve a copy of the notice on every other party and the former attorney.

(2) The former attorney must also, promptly on his instructions being withdrawn, file a notice that he has ceased to act and serve a copy of that notice on every other party and on his former client.

Notes:

CPR 70.4 PARTY ACTING IN PERSON
This provision outlines the procedure whereby a Litigant who was previously represented by an Attorney may continue to act Pro Se.
The Litigant, whether having sued or defended by an Attorney, may without leave of the court file a Notice indicating that they intend to act Pro Se including the address, address to effect service of process within

[142] This provision is akin to Order 63 R 2 of the Rules of the Supreme Court, 1978

[143] See also CPR 42.6

the jurisdiction of The Bahamas, telephone number and email address. The Notice must also be served on every party inclusive of the former attorney[144],[145].

70.5 Application by another party to remove name of attorney from the record.

(1) Where —

(a) an attorney on record for a party has —

(i) died;

(ii) become bankrupt;

(iii) been removed from the roll; and

(b) notice of the appointment of a new attorney under rule 70.2 or of the party acting in person under rule 70.4 has not been received, any other party may apply to the court for an order declaring that the attorney in question has ceased to act.

(2) An application under this Part must be supported by evidence on affidavit and must be served on the attorney, if practicable, and personally on his client.

(3) Any order made must be served by the applicant on the attorney or former attorney, if practicable, and personally on his client.

(4) The applicant must file a certificate of service of the order.

Notes:

CPR 70.5 APPLICATION BY ANOTHER PARTY TO REMOVE NAME OF ATTORNEY FROM THE RECORD

This provision outlines the procedure required to remove an attorney from the record where the attorney has died, become bankrupt; or has been removed from the Roll and there has been no Notice of Change of Attorney or Notice of Appointment of Attorney in accordance with CPR 70.2 or CPR 70.3.

Any Party to the action may apply by Notice of Application[146] and Affidavit[147] seeking an Order of the Supreme Court for a Declaration that the Attorney in question has ceased to act. The Application must be served on the Attorney and if practicable on the party for which the attorney acts. The Order if granted, must be served by the Applicant and if practicable on the party for which the attorney acted. An Affidavit of Service is required to be filed[148],[149].

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[144] IBID

[145] This provision is akin to Order 63 R 3 of the Rules of the Supreme Court, 1978

[146] Form G. 14

[147] In accordance with CPR 30

[148] In accordance with CPR 42.12

[149] This provision is akin to Order 63 Rule 4 of the Rules of the Supreme Court, 1978

70.6 Application by attorney to be removed from the record.

(1) An attorney who wishes to be removed from the record as acting for a party may apply to the court for an order that he be removed from the record.

(2) Notice of the application must be served on the client or former client and all other parties.

(3) The application must be supported by evidence on affidavit which must be served on the client but must not be served on any other party to the proceedings.

(4) Any order made must be served by the applicant on the other parties'attorneys and on the former client.

(5) The applicant must file a certificate of service of the order.

Notes:

CPR 70.6 APPLICATION BY ATTORNEY TO BE REMOVED FROM THE RECORD
This provision outlines the procedure for the Attorney to cease to be the Attorney of Record for a party in proceedings.
The Attorney must make application by Notice of Application[150] with an Affidavit[151] outlining that the Attorney seeks to be removed from the record as the Attorney. Notice of the application must be served on the client, former client and all other parties. Any Order made by the Court must be served by the Attorney on the client, former client and all former parties. An Affidavit of Service must be filed confirming service on the client, former client and all other parties.

[152].

70.7 Time when notice takes effect.

A notice under the foregoing rules of this Part does not take effect until it has been served.

Notes:

CPR 70.7 TIME WHEN NOTICE TAKES EFFECT
A Notice under the provisions of CPR 70 does not take effect until it has been served

[150] Form G. 14
[151] In accordance with CPR 30
[152] See CPR 3.2

PART 71 - COSTS: GENERAL PROVISIONS

71.1 Scope of this Part.

This Part contains general rules about costs and the entitlement to costs.

71.2 Definitions and application.

(1) In this Part and Part 72, unless the context otherwise requires—

“assessed costs” and “assessment” have the meanings given to them by Rules 72.8;

“certificate” includes allocatur;

“costs” includes attorney fees, charges, disbursements, assessed costs, expenses, fixed costs, prescribed costs, and remuneration;

“fixed costs” refers to the costs fixed in accordance with rule 72.22;

“prescribed costs” refers to the costs determined in accordance with rule 72.23;

“detailed assessment” means the procedure by which the amount of costs is decided by the Registrarin accordance with Part 72;

“fund” includes any estate or property held for the benefit of any person or class of person and any

fund to which a trustee or personal representative is entitled in that capacity;

“paying party” means a party liable to pay costs;

“receiving party” means a party entitled to be paid costs;

“summary assessment” means the procedure by which the Court, when making an order about costs, orders payment of a sum of money instead of fixed costs.

(2) The costs to which this Part applies include costs —

(a) of proceedings in the Court;

(b) if and so far as necessary, of proceedings before an arbitrator or umpire;

(c) of proceedings before a tribunal or other statutory body; and

(d) payable by a client to his attorney;

(e) which are payable by one party to another party under the terms of a contract, where the Court makes an order for an assessment of those costs.

(3) When costs of —

(a) an attorney to his or her own client;

(b) arbitration proceedings; or

(c) proceedings before a tribunal or other statutory body;

are to be taxed or assessed by the Court, they must be assessed in accordance with this Part and Part 72.

(4) Where in any enactment there is a reference to the taxation of any costs this is to be construed as referring to the assessment of such costs in accordance with this Part and Part 72, unless the enactment otherwise provides.

71.3 Orders about costs.

The Court may make an order requiring a party to pay the costs of another party arising out of, or related to all, or any part of any proceedings.

Note: Part 71.3
The Court may make an order requiring a party to pay costs of another party arising out of, or related to all, or any part of any proceeding.

71.4 Costs in an appeal.

The Court hearing an appeal may make orders about the costs of the proceedings giving rise to the appeal as well as the costs of the appeal.

71.5 Entitlement to recover costs.

A person may not recover the costs of proceedings from any other party or person except by virtue of —

(a) an agreement between the parties;

(b) an order of the Court; or

(c) a provision of these Rules.

Note: Part 71.5 Entitlement:
A person may not recover the costs of proceedings from any other party or person except by virtue of:
(a) an agreement between the parties;
(b) an order of the. court; or
(c) a provision of these Rules.

Under the CPR, There are three main categories of costs: Fixed Costs, Assessed Costs, and Prescribed Costs. The CPR deals with the principles governing the payment of costs whether for a proceeding or at

the end of a cause or matter. The two main principles, when it comes to deciding which party should pay the costs of an application or the whole proceedings are: (1) The costs payable is in the discretion of the Court; and (2) The general rule is that the unsuccessful party will be ordered to pay costs of the successful party.

71.6 Successful party generally entitled to costs.

(1) Where the Court decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party.

(2) The Court may, however, make no order as to costs or, in an exceptional case, order a successful party to pay all or part of the costs of an unsuccessful party.

Note: Part 71.6 – Successful Party Generally Entitled To Costs

The successful party is generally entitled to costs. The Court may, however, order a successful party to pay all or part of the costs of an unsuccessful party or may make no order as to costs.

The rules have largely dispensed with what Judge Greenslade, the chief consultant in the drafting of the Eastern Caribbean, Trinidad and Tobago, and Jamaican rules, described as 'the arcane and incomprehensible art' of taxation of costs as it was applied under the old RSC.

The Court has the power to order a person to pay -

(a) costs from or up to a certain date only;

(b) costs relating only to a certain distinct part of the proceedings; or

(c) only a specified proportion of another person's costs.

In deciding who should be liable to pay costs the Court must have regard to all the circumstances. In particular, it must have regard to:

(a) the conduct of the parties both before and during the proceedings;

(b) the manner in which a party has pursued -

(i) a particular allegation;

(ii) a particular issue; or

(iii) the case;

(c) whether a party has succeeded on particular issues, even if the party has not been successful-in the whole of the proceedings;

(d) whether it was reasonable for a party to -

(i) pursue a particular allegation; and/or

(ii) raise a particular issue; and(e) whether the claimant gave reasonable notice of intention to issue a claim.[153]

An overriding dynamic of the CPR is the use by the Court of the costs provisions as a management tool to achieve the overriding objective, e.g., to deter through the award of costs orders, any conduct of a party which is considered by the Court to interfere for instance with the expeditious disposal of the claim or the identification of issues at an early stage. The Court has always been able to take into account a party's conduct when considering costs and has done so. The 'conduct' must, however, relate to the prosecution or defence of the claim and not to matters extraneous to the litigation: ***Hall v Rover Financial Services (GB) Ltd [2002] EWCA Civ 1514, [2002] 45 LS Gaz R 34***. But the Court should not use its discretion to award uplift interest except where the conduct meets the conditions in ENG CPR 36 for such an award: see for example ***Ali Reza-Delta Transport Co Lid v United Arab Shipping Co 5.,4,G (No 2) [2003] EWCA Civ 811, [2003] 3 All ER 1297.***

Cases:

William Downie v Blue Planet Limited Civil Appeal 188 of 2019 What the intended appellant was asking the judge to do was to conduct a mini taxation. But the law is clear. The exercise of the judge's discretion in fixing a lump sum should be a broad one and it is not a process similar to that involving taxation. The judge having conducted the hearing is in a better position than any taxing master to assess what are the reasonable costs that the intended respondent as the unsuccessful party should be required to pay to the intended appellant. The judge was clearly of the view that this was a rather simple application that did not require the intended appellant to incur such enormous costs and certainly that the amount sought was unreasonable to require the intended respondent to pay. The court is not obliged to require the intended respondent to pay those charges if considers the charges to be unreasonable. Per Barnett P.

71.7 Two or more parties having same interest.

Where two or more parties having the same interest in relation to proceedings are separately represented, the Court may disallow more than one set of costs.

<u>Multiple Parties: More Than One Defendant</u>

Where an action has reasonably been brought against two or more defendants in alternative and has succeeded against one but failed against the other(s), the Court may, in its discretion, order the unsuccessful defendant to pay the costs of the successful defendant. This may be done in one of two ways:

(1) the Court may order the unsuccessful defendant to pay the **costs of** successful defendant direct, as in ***Sanderson v Blyth Theatre Co* [1903] 533, CA** ('a *Sanderson Order);* or

[153] [1] The Caribbean Civil Court Practice Page 349

(2) it may order the claimant to pay the successful defendant's costs and then him to add such costs to his own and recover them from the unsuccessful defendant, as in ***Bullock v London General Omnibus Co*** **[1907] 1 KB 264, C** ***Bullock Order).***[154]

Multiple Parties: Third Party Joined By Defendant

In cases where the defendant reasonably brings in a third party and is successful in the action, he should generally recover against the claimant not only his own costs but any costs of the third party which he has been ordered to pay or, in proper cases, the Court may order the claimant to pay the third party's costs directly: ***LE Cattan Ltd v A Michaelides & Co [1958] 2 All ER 125, [1958] 1 WLR 717*** (a case of 'string' contracts); ***"Edginton v Clark [1964] 1 QB 367, [1963] 3 All ER 468, CA.***

The fact that the unsuccessful claimant is unable to meet a defendant's claim for costs is not a good reason for refusing an order against the defendant by a successful party: ***Arkin v Borchard Lines Ltd (No 3) [2003] EWHC 3088 (Comm), [2004] NLJR 22, Colman J.***[155]

71.8 Costs against person who is not a party.

(1) This rule applies where —

(a) an application is made for; or

(b) the Court is considering whether to make;

an order that a person who is not a party to the proceedings nor the attorney to a party should pay the costs of some other person.

(2) An application for an order under paragraph (1) must be on notice to the person against whom the costs order is sought and must be supported by evidence on affidavit.

(3) If the Court is considering making an order against a person the Court must give that person notice of the fact that it is minded to make such an order.

(4) A notice under paragraph (3), must state the grounds of the application on which the Court is minded to make the order.

(5) A notice under paragraph (2) or (3), must state a date, time and place at which that person may attend to show cause why the order should not be made.

(6) The person against whom the costs order is sought and all parties to the proceedings must be given fourteen days notice of the hearing.

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[154] Supra Page 364

[155] Supra Page 366

Cases:

Donna Dorsett-Major v The Director of Public Prosecutions and The Attorney General Civil Appeal 156 of 2021 Costs cannot be awarded in favor of or against an amicus curiae, save for exceptional circumstances. There are no exceptional circumstances that warrant an award of costs in favour of 2 the Attorney General, who was still acting as an amicus curiae in this application for leave to appeal to the Privy Council.

71.9 Court's discretion to order costs.

(1) The Court has discretion as to —

(a) whether costs are payable by one party to another;

(b) when to assess costs;

(c) the amount of those costs; and

(d) when they are to be paid.

(2) Without limiting the Court's discretion or the range of orders open to it, the Court may order a person to pay —

(a) costs from or up to a certain date only;

(b) costs relating only to a certain distinct part of the proceedings; or

(c) only a specified proportion of another person's costs.

(3) In deciding who, or if any person should be liable to pay costs, the Court must have regard to all the circumstances.

(4) Without limiting the factors which may be considered, the Court must have regard to —

(a) the conduct of the parties both before and during the proceedings;

(b) whether a party has succeeded on particular issues, even if not ultimately successful in the case, although success on an issue that is not conclusive of the case confers no entitlement to a costs order;

(c) the manner in which a party has pursued —

(i) a particular allegation;

(ii) a particular issue; or

(iii) the case;

(d) whether the manner in which the party has pursued a particular allegation, issue or the case, has increased the costs of the proceedings;

(e) whether it was reasonable for a party to —

(i) pursue a particular allegation; or

(ii) raise a particular issue; and

(iii) whether the successful party increased the costs of the proceedings by the unreasonable pursuit of issues; and

(f) whether the claimant gave reasonable notice of an intention to pursue the issue raised by the application.

Court's Discretion

The Court has a wide discretion in relation to costs:
When applying the general rule that the unsuccessful party should pay the costs of the successful party, the Court has to consider whether it should make an order for costs at all or an order not following the general rule. In doing so, it has to take into account the circumstances, including the conduct of all the parties, and success on all or some of any admissible offers, As to the general principles to be applied to the determination of costs, see ***Johnsey Estates (1990) Ltd v Secretary of State for the Environment Transport Regions [2001] EWCA Civ 535, [2001] All ER (D) 135 (Apr).***[156]

71.10 Circumstances to be taken in to account when exercising its discretion as to costs.

(1) In deciding what order, if any, to make about costs, the Court must have regard to all the circumstances, including —

(a) the conduct of all the parties;

(b) whether a party has succeeded on part of his case, even if he has not been wholly successful;

(c) any payment into court or admissible offer to settle made by a party which is drawn to the Court's attention and which is not an offer to which costs consequences under Part 35 and 36 apply.

(2) For the purposes of paragraph (1)(a), the conduct of the parties includes —

(a) conduct before, as well as during, the proceedings;

[156] [2] Supra Page 358

(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(c) the manner in which a party has pursued or defended his case or a particular allegation or issue;

(d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim; and

(e) unreasonable conduct of any kind by any party in relation to the inclusion or exclusion of documents or authorities in any bundle and whether a joint bundle or otherwise.

(3) The Court may make an order that a party must pay —

(a) a proportion of another party's costs;

(b) a stated amount in respect of another party's costs;

(c) costs from or until a certain date only;

(d) costs incurred before proceedings have begun;

(e) costs relating to particular steps taken in the proceedings;

(f) costs relating only to a distinct issue in or part of the proceedings; and

(g) interest on costs from or until a certain date, including a date before judgment.

(4) Where the Court would otherwise consider making an order under paragraph (3)(f), it must instead, if practicable, make an order under paragraph (3)(a) or (c).

(5) Where the Court has ordered a party to pay costs, it may order an amount to be paid on account before the costs are assessed.

(6) Where a party entitled to costs is also liable to pay costs the Court may assess the costs which that party is liable to pay and either—

(a) set off the amount assessed against the amount the party is entitled to be paid and direct him to pay any balance; or

(b) make an order postponing the date of payment in respect of the costs to which the party is entitled until he has paid the amount which he is liable to pay.

(7) If two or more parties having the same interest in relation to proceedings are separately represented the Court may disallow more than one set of costs.

Notes: The Court's Discretion: Conduct Generally

An overriding dynamic of the CPR is the use by the Court of the costs provisions as a management tool to achieve the overriding objective, e.g., to deter through the award of

costs orders, any conduct of a party which is considered by the Court to interfere for instance with the expeditious disposal of the claim or the identification of issues at an early stage. The Court has always been able to take into account a party's conduct when considering costs and has done so. The 'conduct' must, however, relate to the prosecution or defence of the claim and not to matters extraneous to the litigation: ***Hall v Rover Financial Services (GB) Ltd [2002] EWCA Civ 1514, [2002] 45 LS Gaz R 34***. But the Court should not use its discretion to award uplift interest except where the conduct meets the conditions for such an award: see for example ***Ali Reza-Delta Transport Co Lid v United Arab Shipping Co 5.,4,G (No 2) [2003] EWCA Civ 811, [2003] 3 All ER 1297.***

Notes: The Court's Discretion: Conduct: Party Unsuccessful On One Or More Issues

One of the most difficult and yet frequent tasks for the practitioner and for the Court is the resolution of the appropriate order as to costs where a party has succeeded overall but has been unsuccessful on one or more issues. From the case law below, the following propositions can be drawn:

- The Court, when deciding costs when a successful party has lost an issue, will look at how reasonable it was for the party to have included the issue in their case.
- It needs to be shown that the issue which has been lost was important in relation to the other issues in the case which were won and supported those issues.
- Ultimately, the Judge will exercise his discretion when deciding a costs issue.

Even pre-CPR, the Court was moving towards an issue-led approach to costs: in Re Elgindata Ltd (No 2) [1993) 1 All ER 232, CA the Court stated that the philosophy used to be that the general rule that costs should follow the event did not cease simply because the successful party raised an issue or made allegations that failed; the position had now changed, however, and the winner no longer takes all. ***In Johnsey Estates (1990) Ltd v Secretary of State for the Environment, Transport and the Regions [2001] EWCA Civ 535, [2001]*** the courts summarized the principles applicable as follows:

(i)the starting point for the exercise of discretion is that costs should follow the event; nevertheless

(ii) the judge may make different orders for costs in relation to discrete issues and, in particular, should consider doing so where a party has been generally successful in the litigation; and

(iii) the judge may deprive a party of costs of an issue on which he has been successful if satisfied that the party has acted unreasonable in relation to that issue.[157]

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[157] Supra Page 361

71.11 Factors to be taken into account in deciding the amount of costs.

(1) The Court is to have regard to all the circumstances in deciding whether costs were —

(a) proportionately and reasonably incurred; or

(b) were proportionate and reasonable in amount.

(2) In particular, the Court must give effect to any orders which have already been made.

(3) The Court must also have regard to —

(a) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute;

(b) the amount or value of any money or property involved;

(c) the importance of the matter to all the parties;

(d) the particular complexity of the matter or the difficulty or novelty of the questions raised;

(e) the skill, effort, specialised knowledge and responsibility involved;

(f) the time spent on the case;

(g) the place where and the circumstances in which work or any part of it was done;

(h) the care, speed and economy with which the case was prepared; and

(i) in the case of costs charged by an attorney to his or her client —

(i) any agreement about what grade of attorney should carry out the work;

(ii) any agreement that may have been made as to the basis of charging; and

(iii) whether the attorney advised the client and took the client's instructions before taking any unusual step or one which was unusually expensive having regard to the nature of the case.

71.12 General rule: summary assessment.

(1) As a general rule, a judge hearing an application will summarily assess the costs of that application immediately or as soon as practicable after the same is disposed of.

(2) As a general rule, a judge conducting the trial will summarily assess the costs of the entire claim immediately after he has delivered judgment in respect of the same or as soon as practicable thereafter.

(3) A judge may, instead of summarily assessing the costs under paragraphs (1) or (2), direct that the whole or any part of the costs payable shall be subject to a detailed assessment and he may, when making such direction, indicate which particular matters the Registrar may or shall take into account or exclude in relation to such detailed assessment.

Note: Part 71.12 General Rule, Summary Assessment or Detailed Assessment
Under this rule, a judge hearing an application or conducting a trial may summarily assess the costs of that application or trial or may direct that the whole or any part of the costs payable shall be subject to a detailed assessment by the Registrar

71.13 Cases where costs orders deemed to have been made.

(1) A costs order will be deemed to have been made where aright to costs arises under rule 35.13 or 37.6.

(2) Interest shall be payable on the costs deemed to have been ordered under paragraph (1), and shall begin to run from the date on which the event which gave rise to the entitlement to costs occurred.

71.14 Time for complying with an order for costs.

A party must comply with an order for the payment of costs within twenty-one days of —

(a) the date of the judgment or order if it states the amount of those costs;

(b) if the amount of those costs, or part of them, is decided later in accordance with this Part, the date of the certificate which states the amount; or

(c) in either case, such later date as the Court may specify.

Note: Part 71.14 Time For Complying With An Order For Costs
A party must comply with an order for the payment of costs within twenty-one days.
A party that owes costs may be debarred from continuing to participate in the litigation because of a failure to satisfy a costs order. See Michael Wilson & Partners Ltd v Sinclair [2017] EWHC 2424 (Comm), [2017] 5 Costs LR 877.

71.15 Failure to comply to pay costs ordered during proceedings.

(1) Where, in the course of proceedings, an order for costs is made against a claimant who fails to pay the costs so ordered when those costs become due, the Court may —

> (a) stay or strike out the claim or any defence to counterclaim or to third party proceedings; or
>
> (b) make such other order as it thinks fit.

(2) Where, in the course of proceedings, an order for costs has been made against a defendant who fails to pay the costs so ordered when those costs become due, the Court may —

> (a) strike out the defence or any counterclaim or third party proceedings; or
>
> (b) make such other order as it thinks fit.

71.16 Special situations.

(1) Subject to paragraphs (3) and (4), where the Court makes an order which does not mention costs, the general rule is that no party is entitled to costs.

(2) The general rule in paragraph (1) shall not affect the entitlement of a party to recover costs out of a fund held by that party as trustee or personal representative, or pursuant to any lease, mortgage or other security.

(3) Where the Court makes —

> (a) an order granting permission to appeal;
>
> (b) an order granting permission to apply for judicial review; or
>
> (c) any other order or direction sought by a party on an application without notice,

and its order does not mention costs, it will be deemed to include an order for the applicant's costs in the case.

(4) Any party affected by a deemed order for costs under paragraph (3) may apply at any time to vary the order.

(5) The Court hearing an appeal may, unless it dismisses the appeal, make orders about the costs of the proceedings giving rise to the appeal as well as the costs of the appeal.

(6) Where proceedings are transferred from one court to another, the court to which they are transferred may deal with all the costs, including the costs before the transfer.

71.17 Costs-only proceedings.

(1) This rule sets out a procedure which may be followed where —

(a) the parties to a dispute have reached an agreement on all issues, including which party is to pay the costs, which is made or confirmed in writing; but

(b) they have failed to agree the amount of those costs; and

(c) no proceedings have been started.

(2) Either party to the agreement may start proceedings under this rule by issuing a fixed date claim form.

(3) The claim form must contain or be accompanied by the agreement or confirmation on which party is to pay costs.

(4) The Court may —

(a) assess the costs summarily;

(b) make an order for costs to be determined by detailed assessment; or

(c) dismiss the claim;

(5) Rule 71.16 does not apply to claims started under the procedure in this rule.

Note: Part 71.17 Cost Only Proceedings

In costs-only proceedings, the court may make an order for the payment of costs the amount of which is to be determined by assessment and/or, where appropriate, for the payment of fixed costs.

Where costs are ordered to be assessed, the general rule is that this should be by detailed assessment (*Solomon v Cromwell Group plc, Oliver v Doughty* [2011] EWCA Civ 1584, [2012] 2 All ER 825).

However, when an order is made following a hearing, and the court is in a position to summarily assess costs, it should generally do so (*Coyne v DRC Distribution Ltd* [2008] EWCA Civ 488, [2008] All ER (D) 193 (May)).

71.18 Amount of costs where costs are payable pursuant to a contract.

Where the Court assesses costs, whether by summary or detailed assessment, which are payable by the paying party to the receiving party under the terms of a contract, the costs payable under those terms are, unless the contract expressly provides otherwise, to be presumed to be costs which —

(a) have been reasonably incurred; and

(b) are reasonable in amount,

and the Court will assess them accordingly.

71.19 Costs payable to a party out of a fund.

(1) Save as is provided in paragraph (2), where a person is or has been a party to any proceedings in the capacity of trustee, personal representative or mortgagee, he shall, unless the Court otherwise orders, be entitled to the costs of those proceedings, in so far as they are not recovered from or paid by any other person, out of the fund held by the trustee or personal representative or the mortgaged property, as the case may be.

(2) Where paragraph (1) of this rule would otherwise apply but the Court is of the opinion that the trustee, personal representative or mortgagee has acted unreasonably or, in the case of a trustee or personal representative, such person has in substance acted for his own benefit rather than for the benefit of the fund, the Court may make such other order as it thinks fit.

71.20 Wasted costs orders.

(1) In any proceedings the Court may by order —

(a) direct the attorney to pay; or

(b) disallow as against an attorney's client,

the whole or part of any wasted costs.

(2) In this rule "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 attorney or any employee of an attorney; or

(b) which, in the light of any act or omission occurring after they were incurred,

the Court considers it unreasonable to expect that party to pay.

Note: PART 71.20 Wasted Costs Orders
'Wasted costs' means any costs incurred by a party as a result of any improper, unreasonable or negligent act or omission by a legal practitioner or any employee of the legal practitioner; or which; in the light of any such act or, omission occurring after they were incurred, the Court considers it is unreasonable to expect that party to pay.

The CPR provides that the wasted costs may simply be disallowed, or an order may be made that the legal representative responsible must pay the whole or a part of them.
The wasted costs powers against lawyers and other parties are compensatory in nature and not punitive.[158]
A wasted costs order shall not be made against an attorney if the procedure laid out in Part 71.21 is not followed by the Judge. The pre-CPR case of *Nassau Island Development v The Owner of The Ship "The Blessed 3 aka Blessed 300 and The Grand Bahama Shipyard Company Ltd*[159] is very instructive in this regard. As per the dictum of the President of the Court of Appeal Allen J at para 24 :

> *"It is clear from the transcript of proceedings that the procedure stipulated at sub (2) for making a personal costs order against an attorney was not followed. At no time during the course of the matter was Counsel informed that the Court was considering making a personal costs order against Counsel; neither was Counsel given the opportunity to be heard on such an issue. In light of this, the learned judge's holding at paragraph 17 of the Priorities ruling namely, that Counsel for the appellant is to pay one-half of the Caveator's costs, is set aside".*

Nominal Damages
A claimant who has claimed substantial damages, but has only recovered nominal damages, will normally be ordered to pay the Defendant's costs (***Texaco Ltd v Arco Technology Inc. (1989) The Times, 13th October 1989).***[160]

71.21 Wasted costs orders – procedure.

(1) This rule applies where —

(a) an application is made for; or

(b) the Court is considering whether to make, an order under rule 71.20(1).

(2) An application for an order for wasted costs by a party must be —

(a) on notice to the attorney against whom the costs order is sought; and

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[158] Supra Page 367

[159] SCCivApp No. 63 of 2011 SCCivApp No. 64 of 2014

[160] Blackstone's Civil Practice 2000 Page 671

(b) supported by evidence on affidavit setting out the grounds on which the order is sought.

(3) Where the Court is considering whether to make such an order, the Court must give the attorney notice of the fact that it is considering whether to do so.

(4) Notice under paragraph (3) must state the grounds on which the Court is minded to consider making the order.

(5) A notice under paragraph (2) or (3) must state a date, time and place at which the attorney may attend to show cause why the order should not be made.

(6) At least seven days notice of the hearing must be given to the attorney against whom the costs order is sought, or its making is being considered and all parties to the proceedings.

PART 72 PROCEDURE FOR DETAILED ASSESSMENT OF COSTS

72.1 Scope of this Part.

This Part deals with the way in which any costs awarded by the Court are quantified.

72.2 Powers of the Registrar to assess costs.

The Registrar shall have power to assess —

(a) any costs the assessment of which is directed by an order of the Court; and

(b) the costs directed by an award made on a reference to arbitration or pursuant to an arbitration agreement to be paid.

72.2A Supplementary powers of the Registrar.

The Registrar may, in the discharge of his functions with respect to the assessment of costs —

(a) take an account of any dealings in money made in connection with the payment of the costs being assessed, if the Court so directs;

(b) require any party represented jointly with any other party in any proceedings before him to be separately represented;

(c) direct the production of any document which may be relevant in connection with those proceedings.

72.3 Interim certificates.

(1) The Registrar may, in the course of the assessment of any costs by him, issue an interim certificate for any part of those costs which has been assessed.

(2) If, in the course of the assessment of an attorney's bill to his own client, it appears to the Registrar that in any event the attorney will be liable in connection with that bill to pay money to the client, he may issue an interim certificate specifying an amount which in his opinion is payable by the attorney to his client.

(3) On the filing of a certificate issued under paragraph (2), the Court may order the amount specified therein to be paid forthwith to the client or into Court or in such other manner as the Court may direct.

72.4 Power of Registrar where party liable to be paid and to pay costs.

Where a party entitled to be paid costs is also liable to pay costs, the Registrar may—

(a) assess the costs which that party is liable to pay and set off the amount allowed against the amount he is entitled to be paid and direct payment of any balance; or

(b) delay the issue of a certificate for the costs he is entitled to be paid until he has paid or tendered the amount he is liable to pay.

72.5 Assessment of bill of costs comprised in account.

(1) Where the Court directs an account to be taken and the account consists, in part, of a bill of costs, the Court may direct the Registrar to assess those costs.

(2) The Registrar, in assessing a bill of costs in accordance with a direction given under this rule, shall —

(a) have the same powers of the Court and apply the same fees payable in connection with the assessment as if the order for assessment of the costs had been made by the Court;

(b) return the bill of costs together with his report thereon to the Court.

72.6 Registrar to fix certain fees payable to conveyancing counsel, etc.

(1) Where the Court refers any matter to a conveyancing counsel appointed by the Court, the Registrar shall fix the fees payable to that counsel in connection to the work he has done on the referred matter.

(2) An appeal from the decision of the Registrar under this rule shall lie to the Court, and the decision of the Court thereon shall be final.

72.7 Procedure on assessment.

(1) A party entitled to require any costs to be assessed must begin proceedings for the assessment of those costs by producing the requisite document and leaving a copy thereof at the Registry.

(2) For the purposes of paragraph (1), the "requisite document" means the judgment, order or directions, as the case may be which establishes a party's entitlement to require costs to be assessed.

(3) Subject to paragraph (4) where a party is entitled to require any costs to be assessed —

(a) by virtue of a judgment, direction or order given or made in proceedings in the Court; or

(b) where these rules entitle him to costs without an order, he must begin proceedings for the assessment of those costs within twelve weeks after the judgment, direction or order was entered, signed or otherwise perfected or, as the case may be, within twelve weeks after service of the notice of acceptance of an offer or payment into Court given by him under Part 35 or Part 36.

(4) In relation to the assessment of costs pursuant to an order under the Legal Profession Act (Ch. 64), paragraph (3), shall have effect as if for the period of twelve weeks first mentioned in that paragraph there shall be substituted a reference to fourteen days.

(5) A party who begins proceedings for assessment must at the same time file in the Registry —

(a) a bill of costs showing —

(i) the sum in which the Court is being asked to assess the costs; and

(ii) how such sum was calculated; and

(b) a statement containing the following particulars of each party to the proceedings —

(i) his name and the capacity in which he is a party, to the proceeding,

(ii) his position on the record of the proceedings which gave rise to the assessment proceedings;

(iii) if any costs to which the assessment proceedings relate are to be paid out of a fund, the nature of his interest in the fund; and

(iv) if he appears in person, his address;

(v) if he does not appear in person, the name or firm and business address of the attorney; and

(vi) if the attorney referred to in subparagraph (v) is the agent of another, the name of firm and business address of his principal.

72.8 Notification of time appointed for assessment.

(1) Subject to paragraph (2), where proceedings for assessment have been begun in accordance with rule 72.7, the party who initiated the proceedings for assessment shall give to the other an party entitled to be heard in the assessment proceedings, not less than seven days' notice of the day and time appointed for assessment.

(2) A notice under this rule need not be given to any party who has not filed an acknowledgment of service or taken any part in the proceedings which gave rise to the assessment proceedings.

(3) Paragraph (2) shall not apply where an order for the assessment of an attorney's bill of costs made under any statute at the instance of the attorney gave rise to the assessment proceedings.

72.9 Delivery of bills, etc.

(1) The Registrar shall, as soon as practicable, after proceedings for assessment under rule 72.7 have commenced, give notice to the party whose costs are to be assessed, of the period within which the bill of costs to be assessed is to be sent to the Registrar.

(2) A party whose costs are to be assessed must within seven working days after beginning the proceedings or, as the case may be, receiving notice under paragraph (1), send a copy of his bill of costs to every other party entitled to be heard in the proceedings, who has filed an acknowledgment of service or taken any part in the proceedings which gave rise to the assessment proceedings.

(3) Paragraph (2) shall not apply to assessment proceedings in which an attorney's costs are to be assessed by virtue of an order made under any statute.

72.10 Provisions as to bills of costs.

(1) The form of a bill of costs shall be specified by practice direction.

(2) Before a bill of costs is filed for assessment, it must be indorsed with the name or firm and business address of the attorney whose bill it is.

Notes: Part 72.10 – Form of bill of costs

Practice Direction No. 12 of 2023, which came into effect on 2 January 2024, specifies the form of a bills of costs for use in proceedings for the assessment of costs. A precedent party-and-party bill is annexed to the practice direction as an illustrative model form.

A bill of costs must be paginated and must consist of the following sections –

(i) title page;

(ii) background information;

(iii) items of cost divided into columns;

(iv) summary showing the total costs claimed on each page of the bill; and

(v) a declaration that the bill is both accurate and complete.

Where it is convenient to do so, a bill of costs may be divided into two or more parts, each party containing its own sections (ii), (iii) and (iv).

Every bill of costs should be divided into eight columns as follows:

(i) Column 1 should contain the item numbers.

(ii) Column 2 should contain the item dates.

(iii) Column 3 should contain the name or initials of the persons that performed the professional services for which costs are claimed.

(iv) Column 4 should contain a description of each item of work arranged chronologically; the date(s) on which or period(s) during which it was done; the identity of the person(s) doing the work; the time spent; the applicable hourly rates; and any disbursements.

(v) Column 5 should contain the amounts claimed in respect of disbursements.

(vi) Column 6 should contain the amounts claimed in respect of professional charges.

(vii) Column 7 is for use by a Registrar to summarise the amount taxed off in respect of each item and should be left blank.

(viii) Column 8 is for use by a Registrar to summarise the amount allowed in respect of each item and should be left blank.

A bill of costs drawn up for a taxation between an attorney and his or her own client should generally be drawn up in the same manner as a party-and-party bill. Unless the bill provides otherwise, an attorney will be deemed to have indicated that all items included in the bill are in relation to work done or disbursements incurred with the express or implied approval of the client.

Every bill of costs should distinguish between legal fees and disbursements.

The work done and disbursements incurred should be itemised and set out chronologically. In this regard –

(i) sufficient particulars must be included in the bill to enable a Registrar to exercise their discretion in relation to each item in the bill.

(ii) the amount claimed in respect of any professional charge must not exceed the amount which the receiving party has paid or is liable to pay.

(iii) the amount claimed in respect of any disbursement must not exceed the actual amount paid by the successful party.

The items appearing in a bill of costs should be grouped under the following headings if convenient in the circumstances of the case –

(i) attendances at court up to the date of the notice of commencement;

(ii) attendances on and communications with the client;

(iii) attendances on and communications with the receiving party;

(iv) attendances on and communications with witnesses including any expert witness;

(v) attendances to inspect any property or place for the purposes of the proceedings;

(vi) attendances on and communications with other persons, including offices of public records;

(vii) communications with the Court;

(viii) work done on documents in connection with the proceedings;

(ix) work done in connection with negotiations with a view to settlement if not already covered in the heads listed above;

(x) other work done which was of or incidental to the proceedings and which is not already covered in the heads listed above (other than the costs of assessment); and

(xi) costs of assessment.

A bill of costs must be drawn in B$. Costs incurred in any other currency must be translated into B$ at the exchange rate prevailing on the date of the bill.

72.11 Provisions as to assessment proceedings.

(1) If any party entitled to be heard in any assessment proceedings does not attend within a reasonable time after the time appointed for the assessment, the Registrar, if satisfied by affidavit or otherwise that the party had due notice of the time appointed, may proceed with the assessment.

(2) The Registrar by whom any assessment proceedings are being conducted may, if he thinks it necessary to do so, adjourn those proceedings from time to time.

72.12 Powers of assessing costs payable out of fund.

(1) Where any costs are to be paid out of a fund, the Registrar may —

(a) give directions as to the parties who are entitled to attend on the assessment of those costs; and

(b) disallow the costs of attendance of any party not entitled to attend by virtue of the directions and whose attendance he considers unnecessary.

(2) Where the Court has directed that an attorney's bill of costs be assessed for the purpose of being paid out of a fund, the Registrar may, if he thinks fit, adjourn the assessment for a reasonable period and direct the attorney to send to any person having any interest in the fund, free of charge together with a letter —

(a) enclosing a copy of the bill of costs;

(b) giving notice that the enclosed bill has been referred to the Registrar for assessment;

(c) providing —

(i) the address of the office at which the assessment is proceeding;

(ii) he time appointed by the Registrar at which the assessment will be continued; and

(d) such other information, if any, as the Registrar may direct.

72.13 Assessment of costs.

(1) This rule applies to costs which by, or under these Rules, or any order or direction of the Court are to be paid to a party to any proceedings either by another party to those proceedings or out of any fund, other than a fund which the party to whom the costs are to be paid holds as trustee or personal representative.

(2) Subject paragraph (3), costs to which this rule applies shall be assessed on a standard basis, and on an assessment on that basis there shall be allowed all such costs as were necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being assessed.

(3) The Court in awarding costs to which this rule applies to any person may if it thinks fit and if —

(a) the costs are to be paid out of a fund; or

(b) the person to whom the costs are to be paid is or was a party to the proceedings in the capacity of trustee or personal representative, order or direct that the costs shall be assessed as if that person were a trustee of the fund or as if the costs were to be paid out of a fund held by that person, and where the Court so orders or directs, rule 72.16(2) shall have effect in relation to the assessment in substitution for paragraph (2) of this rule.

72.14 Costs payable to an attorney by his own client.

(1) On the assessment of an attorney's bill to his own client, all costs shall be allowed except in so far as they are of an unreasonable amount or have been unreasonably incurred.

(2) For the purposes of paragraph (1) —

(a) all costs incurred with the express or implied approval of the client shall, subject to subparagraph (b), be conclusively presumed to have been reasonably incurred and, where the amount thereof has been expressly or impliedly approved by the client, to have been reasonable in amount;

(b) any costs which in the circumstances of the case are of an unusual nature and such that they would not be allowed on an assessment of costs in a case to which rule 72.13(2) applies shall, unless the attorney expressly informed his client before they were incurred that they might not be so allowed, be presumed, until the contrary is shown, to have been unreasonably incurred.

(3) In paragraph (2)(a) and (b), a reference to "client" shall be construed —

(a) if the client was at the material time incapable by reason of mental disorder within the meaning of the Mental Health Act (Ch. 230), of managing and administering his property and affairs and represented by a person acting as a litigation guardian, as references to that person acting, where necessary, with the authority of the authority having jurisdiction under that Act;

(b) if the client was at the material time, a minor and represented by a person acting as a litigation guardian, as references to that person.

72.15 Costs payable to attorney where money recovered by or on behalf of minor, etc.

(1) This rule applies to —

(a) any proceedings in which money is claimed or recovered by or on behalf of, or adjudged or ordered or agreed to be paid to, or for the benefit of, a person who is a minor or incapable by reason of mental disorder within the meaning of the Mental Health Act (Ch. 230), of managing and administering his property and affairs or in which money paid into Court is accepted by or on behalf of such a person; and

(b) any proceedings under the Fatal Accidents Act (Ch. 71), in which money is recovered by or on behalf of, or adjudged or ordered or agreed to be paid to, or for the benefit of, the spouse of the person whose death gave rise to the proceedings in satisfaction of a claim under the said Act or in which money paid into Court is accepted by him or on his behalf in satisfaction of such a claim, if the proceedings were for the benefit also of a person who, when the money is recovered, or adjudged or ordered or agreed to be paid, or accepted, is a minor.

(2) The costs payable by a claimant to his attorney in proceedings described in paragraphs (1)(a) or (b), being the costs of those proceedings or incident to the claim therein or consequent thereon, shall be assessed.

(3) No costs shall be payable to the attorney of a claimant in respect of those proceedings described in paragraphs (1)(a) or (b), except such amount of costs as may be certified in accordance with this rule on the assessment under rule 72.14 of the attorney’s bill to that claimant.

(4) On the assessment under rule 72.14 of an attorney’s bill to a claimant who is his own client in proceedings to which this rule applies, the Registrar shall also assess any costs payable to that claimant in those proceedings and shall certify —

(a) the amount —

(i) allowed on the assessment under rule 72.14;

(ii) allowed on the assessment of any costs payable to that claimant in those proceedings; and

(ii) if any, by which the amount specified in subparagraph (a)(i) exceeds the amount specified in subparagraph (a)(ii); and

(b) where necessary, the proportion of the amount of the excess payable respectively by, or out of money belonging to, any party to the proceedings who is an infant or incapable, by reason of mental disorder within the meaning of the Mental Health Act (Ch. 230), of managing and administering his property and affairs or the spouse of the person whose death gave rise to the proceedings and any other party.

(5) Nothing in the foregoing provisions of this rule shall prejudice an attorney’s lien for costs.

(6) This rule shall apply to —

(a) a counterclaim by or on behalf of a person who is a minor or incapable by reason of mental disorder within the meaning of the Mental Health Act (Ch. 230), of managing or administering his property and affairs and a counterclaim consisting of or including a claim under the Fatal Accidents Act (Ch. 71) by or on behalf of the spouse of the person whose death gave rise to the claim; and

(b) a claim made by or on behalf of a person who is a minor or incapable as aforesaid in an action by any other person for relief under the Merchant Shipping Act (Ch. 268), and a claim consisting of or including a claim under the Fatal Accidents Act (Ch. 71), made by or on behalf of that spouse in such an action, as if for references to a claimant there were substituted references to a defendant.

72.16 Costs payable to a trustee out of the trust fund, etc.

(1) This rule applies to every assessment of the costs which a person who is or has been a party to any proceedings in the capacity of trustee or personal representative is entitled to be paid out of any fund which he holds in that capacity.

(2) On any assessment to which this rule applies, no costs shall be disallowed, except in so far as those costs or any part of their amount should not, in accordance with the duty of the trustee or personal representative as such, have been incurred or paid, and should for that reason be borne by him personally.

72.17 Review in relation to detailed assessment of costs.

(1) Any party to any detailed assessment proceeding who is dissatisfied with —

(a) the allowance or disallowance in whole or in part of any item by the Registrar; or

(b) the amount allowed by him in respect of any item, may apply to a judge to review the Registrar's decision in respect of that item.

(2) An application under this rule for review of the Registrar's decision must be made by interlocutory application notice to a judge accompanied by a brief skeleton argument setting out succinctly the matter or matters complained of and why the Registrar was in error.

(3) An application under this rule for review of the Registrar's decision may not be made later than fourteen days after the decision complained of or such longer period as may be fixed by the Registrar or by the judge to whom the application for review has been made.

(4) On review, the judge may make such order as he sees fit including assessing any item of costs or any disbursement or item of expense.

72.18 Costs capping orders – general.

(1) A costs capping order is an order limiting the amount of future costs, including disbursements, which a party may recover pursuant to an order for costs subsequently made.

(2) In this rule, "future costs" means costs incurred in respect of work done after the date of the costs capping order but excluding the amount of any additional liability.

(3) A cost capping order may be in respect of —

(a) the whole litigation; or

(b) any issues which are ordered to be tried separately.

(4) The Court may at any stage of proceedings, make a costs capping order against all of any of the parties, if —

(a) it is in the interests of justice to do so;

(b) there is a substantial risk that without such an order costs will be disproportionately incurred; and

(c) it is not satisfied that the risk in subparagraph (b) can be adequately controlled by —

(i) case management directions or orders made under Part 26; and

(ii) detailed assessment of costs.

(5) In considering whether to exercise its discretion under this rule, the Court will consider all the circumstances of the case, including —

(a) whether there is a substantial imbalance between the financial position of the parties;

(b) whether the costs of determining the amount of the cap are likely to be proportionate to the overall costs of the litigation;

(c) the stage which have been incurred to date and the future costs.

(6) A costs capping order, once made, will limit the costs recoverable by the party subject to the order unless a party successfully applies to vary the order.

(7) No such variation to a costs capping order will be made unless —

(a) there has been a material and substantial change of circumstances since the date when the order was made; or

(b) there is some other compelling reason why a variation should be made.

Notes: Part 72.18 - Costs Capping orders (CCO)
These orders are designed to limit the future costs that a party can incur in pursuing or defending a claim from the date of the order. An application for a CCO must be made as soon as possible (preferably before the first case management conference).
An application is made in accordance with Part 72.19. Specific criteria must be met for a CCO to be made. When determining the quantum for a CCO, the court will consider the factors set out in 72.18. Applications can also be made to vary a CCO.

72.19 Application for a costs capping order.

(1) An application for a costs capping order must be made on notice in accordance with Part 11.

(2) The application must —

(a) set out —

(i) whether the costs capping order is in respect of the whole of the litigation or a particular issue which is ordered to be tried separately; and

(ii) why a costs capping order should be made; and

(b) be accompanied by an estimate of cost setting out —

(i) the costs and disbursements incurred by the applicant to date; and

(ii) the costs and disbursements which the applicant is likely to incur in the future conduct of the proceedings.

(3) The Court may give directions for the determination of the application and such directions may —

(a) direct any party to the proceedings to —

(i) file a schedule of costs;

(ii) file written submissions on all or any part of the issues arising;

(b) fix the date and estimate the time of the hearing of the application;

(c) include any further directions as the Court sees fit.

72.20 Application to vary a costs capping order.

An application to vary a costs capping order must be made by

application notice pursuant to Part 11.

72.21 Basis of quantification.

(1) Where the Court has a discretion as to the amount of costs allowed to a party, the sum to be allowed —

(a) is the amount that the Court deems to be reasonable were the work to be carried out by an attorney of reasonable competence; and

(b) which appears to the Court to be fair both to the person paying and the person receiving such costs.

(2) Where the Court has a discretion as to the amount of costs to be paid to an attorney by his client the sum allowed is —

(a) the amount that the Court deems to be reasonable; and

(b) which appears to be fair both to the attorney and the client.

(3) In deciding what would be reasonable the Court must take into account all the circumstances, including —

(a) any order that has already been made;

(b) the care, speed and economy with which the case was prepared;

(c) the conduct of the parties before as well as during the proceedings;

(d) the degree of responsibility accepted by the attorney;

(e) the importance of the matter to the parties;

(f) the novelty, weight and complexity of the case;

(g) the time reasonably spent on the case; and

(h) in the case of costs charged by an attorney to his client —

(i) any agreement about what grade of attorney should carry out the work;

(ii) any agreement that may have been made as to the basis of charging; and

(iii) whether the attorney advised the client and took the client's instructions before taking any unusual step or one which was unusually expensive having regard to the nature of the case.

72.22 Fixed costs.

(1) A party is entitled to the costs set out in column 3 of Table 1 in the Second Schedule in the circumstances set out in column 2 of that same Table.

(2) The Court may however direct that some other amount of costs be allowed or assessed for the work covered by any item in Part 2 of the Second Schedule.

(3) Where the Court so directs, the Court must assess such costs.

Notes Part 72.22 - Fixed costs.
The system of fixed costs is intended to provide for modest, and defined amounts that will be allowed by way of costs where proceedings are disposed of by the early entry of judgment and without any substantial dispute by the Defendant.[161]
These costs cover four main situations:

1) The costs to be endorsed on a claim for a specified sum of money which defendant must pay, in addition to the sum claimed and interest to and the court fees paid by the Claimant, in order to avoid judgment being entered under Part 12
2) The costs to be allowed when a default judgment is entered.
3) The costs to be allowed on the enforcement of a judgment.
4) The costs allowed on claims for recovery of possession to land or delivery of goods.[162]

The amount allowed is set out in column 3 of Table 1 in the Second Schedule and Part 2 of the Second Schedule of the CPR.

72.23 Prescribed costs for liquidated damages claims.

[161] Blackstone's Civil Practice 2000 Page 694
[162] The Caribbean Civil Court Practice Page 350

(1) Where a party is entitled to costs in a claim for liquidated damages, those costs must be determined in accordance with the Third Schedule and paragraphs (2) to (4) of this rule.

(2) In determining prescribed costs, the value of the claim is to be decided —

(a) in the case of a claimant, by the amount of liquidated damages claimed or ordered to be paid; or

(b) in the case of a defendant by the amount of liquidated damages claimed by the claimant in his claim form.

(3) The amount of costs for claims for liquidated damages to be paid is to be calculated in accordance with the percentages specified in column 3 of the Table in Part A of the Third Schedule against the appropriate value.

(4) The Court may however —

(a) award a proportion only of the sum referred to in paragraph (3) of this rule having taken into account the matters set out in rule 71.6(4) and (5); and

(b) order a party to pay costs —

(i) from or to a certain date; or

(ii) relating only to a certain distinct part of the proceedings in which case it must specify the proportion of the fixed costs which is to be paid by the party liable to pay such costs, and in so doing may take into account the table set out in Part B of the Third Schedule;

(c) order costs to be assessed.

Notes: Part 72.23 Prescribed Costs

The notion of prescribing by a pre-determined formula the quantum of costs to be covered by a litigant is a novel feature of the CPR in those jurisdictions that provide for the same. This approach to costs has the advantage of being transparent, certain, and fair to all parties. The costs are easy to calculate, and the litigant knows well beforehand what his costs liability is likely to be.

The general rule is that where the rule relating to fixed costs does not apply and a party is entitled to the costs of any proceedings, those costs must be determined in accordance with the prescribed scales. The court, however, has a specific discretion to award only a proportion of the prescribed costs after taking into account the matters stated in **rule 71.**

In Claims for unspecified general damages, the claimant's costs are based on the amount awarded, the defendant's on either an agreement between the parties or an order of the court.

Claims that are not for a monetary sum are valued at a sum specified in the rules. There is however, a power for the court to revise this sum upwards or downwards at a management conference, if the court considers that the prescribed costs would be excessive or substantially inadequate.

It was pointed out in ***Donald v A-G Grenada Civil Appeal No 32 of 2003*** that: 'The Rules do not intend that once a claim is to be concluded after trial, the prescribed costs regime should inflexibly be applied in order to determine the costs payable. A perusal of the Rules will indicate that opportunities are afforded to vary the consequences of a mechanical application of the prescribed costs; example, **CPR 72.23** and **CPR 72.24** entitle the court to award a proportion only of the costs detailed in the Scale of Prescribed Costs.

Further, **CPR 72.24** provides for a party at a case management conference to apply to the court for an order that prescribed costs should be calculated on a higher or lower figure than the likely value of the claim.[163]

72.24 Applications to determine value of claim for purpose of prescribed costs in liquidated damages claims.

(1) A party may apply to the Court at any time before trial to direct that the prescribed costs be calculated on the basis of some higher or lower value than the liquidated damages claimed or that the said costs be assessed.

(2) The Court may make an order under paragraph (1), only where it is satisfied that the costs as calculated in accordance with rule 72.23, are likely to be either —

> (a) excessive; or
>
> (b) substantially inadequate, taking into account the nature and circumstances of the particular case.

(3) where an application is made for prescribed costs to be calculated on the basis of a higher value or assessed —

> (a) the Court may not make an order unless there has been filed a document recording the express consent of the litigating party to the application and to any order made as a consequence of the application; and
>
> (b) the consent under subparagraph (a) is in a separate document which —
>
> > (i) is signed by the litigating party;
> >
> > (ii) states the attorney's estimate of what the prescribed or assessed costs appropriate to theproceedings would be;
> >
> > (iii) gives an estimate of the total costs of the proceedings as between the attorney and client; and
> >
> > (iv) sets out the basis of that estimate, supported by a draft bill, including the amount of any hourly charge.

(4) The written consent of the client must not be disclosed to the other party.

(5) A party may apply to vary the terms of an order made under this rule at any time prior to the commencement of the trial but no order may be made increasing the amount of the prescribed costs unless the Court is satisfied that there has been a change of circumstances which became known only after the order was made.

[163] Supra Page 351

72.25 What is included in prescribed costs in liquidated damages claims.

(1) Prescribed costs in liquidated damages claims include all work that is required to prepare the proceedings for trial including, in particular, the costs involved in —

(a) instructing any expert;

(b) considering and disclosing any report made by the expert;

(c) arranging the expert witness' attendance at trial; and

(d) attendance at a case management conference and a pretrial review.

(2) Prescribed costs exclude —

(a) expert's fees for preparing a report and attending any conference, hearing or trial;

(b) costs incurred in enforcing any order, which are generally fixed in accordance with rule 72.22 but may, in certain cases, be assessed in accordance with rule 72.13;

(c) the cost of obtaining a daily transcript of the evidence where the trial judge certifies this as a reasonable disbursement in all the circumstances of the case; and

(d) the making or opposing of any interlocutory application except at a case management conference or pre-trial review.

72.26 Assessed costs – procedural applications.

(1) On determining any interlocutory application except at a case management conference, pre-trial review or the trial, the Court must —

(a) decide which party, if any, should pay the costs of that application;

(b) assess the amount of such costs; and

(c) direct when such costs are to be paid.

(2) In deciding which party, if any, should pay the costs of the application the general rule is that the unsuccessful party must pay the costs of the successful party.

(3) The Court must however take into account all the circumstances including the factors set out in rule 71.11 but where the application is —

(a) an application to amend a statement of case;

(b) an application to extend the time specified for doing any act under these Rules or an order or direction of the Court;

(c) an application for relief under rule 26.8; or

(d) one that could reasonably have been made at a case management conference or pre-trial review;

the Court must order the applicant to pay the costs of the respondent unless there are special circumstances.

(4) In assessing the amount of costs to be paid by any party, the Court must take into account any representations as to the time that was reasonably spent in making the application and preparing for and attending the hearing and must allow such sum as it considers fair and reasonable.

(5) A party seeking assessed costs must on making any such interlocutory application supply to the Court and to all other parties a brief statement showing —

(a) the attorney's fees incurred or estimated;

(b) how that party's attorney's costs are calculated; and

(c) the disbursements incurred or estimated.

(6) The statement under paragraph (5) must comply with any relevant practice direction.

Notes: Part 72.26 Assessed Costs

In respect of *assessed costs* on procedural applications. The common principles may broadly be summarised as:

(1) On determining any application except at a case management conference, pre-trial review or the trial, the court must –

(a) decide which party, if any, should pay the costs of that application;
(b) assess the amount of such costs; and
(c) direct when such costs are to be paid.

(2) In deciding which party, if any, should pay the costs of the application the general rule is that the unsuccessful party must pay the costs of the successful party.

Part 72.26 (3)

In the applications below (unless there are special circumstances) the Court must order the Applicant to pay costs-

a) An application to amend a statement of case;
b) An application to extend time specified for doing any act under these Rules or an order or direction of the Court;
c) An application for relief under rule 26.8;
d) One that could have reasonably been made at a case management conference or pre-trial review.

Cases

Cromwell Property Investment Co. Ltd. v Hucks [1939] 3 All E.R. 257 (when costs do not follow the event) - Master disallowed Plaintiff's costs and ordered Plaintiff to pay Defendant's costs on ground that

the proceedings were vexatious and an abuse of the process of Court and an unnecessary incurring of costs. Writ issued by landlord without previous application to tenant for rent.
Myers v Elman [1940] A.C. 282 (the attorney ordered to pay costs personally)
Exercise of the Court's Discretion to award Costs
Re Spurling's Will Trusts [1966] 1 W.L.R. 920, Wheeler v Somerfield [1966] 2 Q.B. 94, Lush v Duprey (Trinidad & Tobago unreported) Civil Appeal 44 of 1965 Kierson v Joseph L. Thompson & Sons Ltd. (supra), Bevington v Perk (supra)American Tobacco Co. v Guest [1892] 1 Ch. 632, Bostock v Ramsey U.D.C. [1900] 2 Q.B. at 622, Dann v Curzon (1910) 27 T.L.R. 163, Polydor Ltd. v Sandhu & Ors (1980) 130 New L.J. 18, Societe des Hotels Renuis v Hawker (1914) 30 T.L.R. 423

END