BROADWAY HOUSE
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Issue 1 NEWSLETTER November 2006

Welcome to the first issue of the Broadway House Chambers newsletter. Since 1926 Chambers have provided a professional and efficient service to clients in Yorkshire and beyond. This newsletter is intended to strengthen those professional relationships. The newsletter will contain articles on topical points illustrating particular areas of specialisation and discussions on current legal issues. The publication of the newsletter is in keeping with chamber's desire to adapt to new challenges posed by the unending flow of legislation, procedural changes and the desire of government to reduce legal costs and shorten proceedings. Against this background members of chambers will continue their commitment to upholding the rights of those whose brief they hold.

We welcome any suggestions for future issues. Please send any comments to hcraven@broadwayhouse.co.uk

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Expert evidence – new criminal procedures

by David McGonigal

The Criminal Procedure (Amendment No.2) Rules 2006 available online at (http://www.opsi.gov.uk/si/si2006/20062636.htm) fill the void in Part 33 of the Criminal Procedure Rules 2005 (CPR) by creating provisions for the preparation and disclosure of expert reports. These new rules came into force on the 6th November 2006. The purpose is to provide guidance on the application of the overriding objective in rule 1 CPR to expert evidence in criminal courts.

Part 24 CPR contains the existing rules about disclosure of the substance of expert's reports. The existing rules can be viewed at www.dca.gov.uk/criminal/procrules_fin/rulesmenu.htm

The new rules apply to cases where the defendant is charged on or after 6th November and "and in other cases if the court so orders". After that date the court can therefore direct the rules apply to existing cases.

Rule 33.1 defines an expert as " a person who is required to give or prepare expert evidence for the purpose of criminal proceedings including evidence required to determine fitness to plead or for the purpose of sentencing". The common law remains to determine who may give expert evidence (Archbold para. 10-65).

The expert's existing duty to give unbiased evidence is formally enacted in rule 33.2. It is the duty of the expert to help the court by giving unbiased opinion on matters within his expertise. This duty overrides any obligation to the person from whom he receives instructions or by whom he is paid. Significantly his duty includes an obligation to inform all parties and the court if his opinion changes.

The report, as before, must contain certain details for instance the expert's qualifications, details of literature relied upon and the facts supplied on which he bases his opinion. The report must now also state who carried out any "examination, measurement, test or experiment" which the expert has used for the report and the qualifications accreditation and experience of that person must be given and whether or not the expert was supervising (rule 33.3). At present many prosecution reports simply refer to work being carried out by laboratory staff and offer their notes in confirmation (details which at present the defence always have difficulty in obtaining).

The report must summarise the findings on which the expert relies, he must give his reasons and give any qualifications to his opinion if appropriate (rule 33.3). The report must contain a statement that the expert understands his duty to the court that he has complied with that duty and will continue to comply with that duty. Finally the report must contain the same declaration of truth as a witness statement – a new addition.

Existing rules already direct that a report to be relied upon must be served on the court and prosecution. Rule 33.4 now states that once the report has been served the expert must be notified. This has the effect of giving the expert notice that from that time his duty is to the court and if his opinion changes from that contained in a served report he must notify all parties and the court of the change (rule 33.2 (3)). This may have the effect of undermining a defence (or prosecution) case, or part of it, to the knowledge of the court and the other

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Community Legal Service

Criminal Defence Service

side. Importantly the party instructing the expert has no control over the disclosure.

Another new departure is contained in rule 33.5 which states that where more than one party wishes to introduce expert evidence the court may direct the experts discuss the expert issues, and prepare a statement for the court on the matters on which they agree and disagree giving their reasons. Legal representatives must be alive to the danger of their own expert adjusting his opinion to come to agreement where that is inappropriate. If there has been no compliance with a direction under 33.5 a party may not introduce the expert evidence without the court's permission.

Where more than one defendant wishes to introduce expert evidence the court may direct that only one defence expert may give evidence. Where co-defendants cannot agree on an expert the court may direct who the expert should be (rule 33.7). Rules 33.8 allows the court to make directions concerning instructions for and the fees and expenses of an expert being used by co-defendants under rule 33.7.

The provisions may have the result of saving court time and costs. It is important that justice is not compromised. Apart from cases where the experts do not agree there are some where an experts opinion is dependant on the evidence given in court and it will not possible to do without experts on both sides.

David McGonigal is an experienced criminal law advocate with a primarily defence practice.

The Admissibility of fingerprint evidence

by Stephen Wood

The so-called Scottish Fingerprint Scandal of Shirley McKie has put the 'science' of fingerprint examination into the dock. But it is a type of evidence that all of us deal with on almost a daily basis. What is the current position? **Stephen Wood** applies the aluminium powder and looks through the magnifying glass at this fascinating subject.

Case-law:
R v Giles (1997) unreported (97/05495/W2),
R v Charles (1998), unreported (98/00104/Z2)
R v Buckley (1999) The Times, 12 May
[1999] 6 Archbold News 4

These cases serve to allow the admission of fingerprint evidence where the number of matching characteristics <u>is less than 16.</u>

In Buckley the Court of Appeal laid down the following guidelines: -

(i) Where there are less than 8 similar ridge characteristics, it is highly unlikely that the judge will admit such evidence. Save in wholly exceptional circumstances, the Crown should not seek to adduce such evidence.
(ii) If there are 8 or more similar characteristics, a judge may allow the evidence to be admitted. How the discretion will be exercised will depend on all the circumstances of the case, including:
   (a) The experience and expertise of the witness;
   (b) The number of similar ridge characteristics;
   (c) Whether there exist any dissimilar characteristics; and
   (d) The size, quality and clarity of the print relied on.
(iii) In every case where the evidence is admitted and challenged, it will generally be necessary to warn the jury that it is evidence of opinion, that the evidence is not conclusive, and that it is for the jury to determine guilt or otherwise in the light of all the evidence.

Terminology
The criminal lawyer digesting the expert's report should aim to have a good working knowledge of the terminology used. Most people know that fingerprints can be described into arches, loops and whirls visible to the naked eye. These patterns form the basis of the Henry System.

Look at your left hand and fingers and working from your left little finger to the little finger on the right hand describe what you see. This is then classified using either "L" or "R" to signify left and right with the initial of the fingerprint type; i.e. "A" for arch, "L" for loop etc. This gives a 'code' mine would be LW, LW, LA, LW, LA, RL, RL, RA, RW,RA.

Obviously, arches, loops, whirls, are very common and as such they cannot prove an identical match, although a matching code goes some way to narrowing it down. The process of matching of points looks for small imperfections on individual ridges which can occur naturally or occur as a result of, for instance, a cut and resulting scar.

Just as important as the existence of these characteristics is their location on the finger. The fingerprint expert will draw a line from the centre of the print (known as the core) to a 'delta' found on nearly every print. Only the same ridge characteristic in the same location determines a matching point. If ridge characteristics are found on the scene-of-crime mark which are not on the reference print – or vice versa - then the match must be discarded – even if 16 points do match.

So are fingerprints unique? Probably not as it is a statistically viable proposition that two matching prints do exist. But the fingerprint scientist will base his case on the fact that the numbers are so great that for practical purposes fingerprints are unique, as with DNA comparison.

A Practical Approach
Early preparation is vital. If you have been on an interview with a client explain to the Police that you will be seeking access to the material upon which the expert made his comparison.

Following charge write to the CPS asking for a photo of the scene-of-crime mark and the reference print, with the claimed points of comparison. Make it clear at this stage that you do not expect to be provided with a photocopy. Also ensure that that photograph is of sufficient size.

Then when you have the photograph appoint your own expert and in your letter of instruction make it clear that you will be asking him/her to explain his findings to you.

When you get to trial have the photos you were originally provided with blown up (A1 size) and require the prosecution's expert to explain himself with reference to these photographs. Make sure that the judge or magistrates and jury have excellent quality copies.

In a trial it is inevitable that you will be able to point out that there are many points lacking in shared detail.

Stephen Wood has a predominantly criminal defence practice. He regularly speaks to solicitors and other agencies at seminars on current issues. He was appointed a Special Advocate by HM Attorney-General in 2005.

Suspended Sentences

By Giles Bridge

In the current environment of over crowded prisons **Giles Bridge** looks at the increasingly popular suspended sentence in practice. Below is a summary of the guidance issued by the Sentencing Guidelines Council in relation to Suspended Sentences. The full guidance can be found at www.sentencing-guidelines.gov.uk in the document 'New Sentences: Criminal Justice Act 2003'. The Guidelines have the authority of the Court of Appeal.

SUSPENDED SENTENCES OF IMPRISONMENT

Section 189 Criminal Justice Act 2003

Imposing a Suspended Sentence

A suspended sentence is a sentence of imprisonment. This requires a court to be satisfied that the custody threshold has been passed and that the length of the term is the shortest term commensurate with the seriousness of the offence.

1) a sentence of not more than 12 months may be suspended;
2) for between 6 months and 2 years (the operational period);
3) during that period, the court can impose one or more requirements available for a community sentence;
4) the period during which the offender undertakes community requirements is "the supervision period" when the offender will be under the supervision of a "responsible officer"; this period may be shorter than the operational period;
5) the court may periodically review the progress of the offender in complying with the requirements.

(i) The decision to suspend

The decision making process before a suspended sentence can be imposed is:

(a) has the custody threshold been passed?

(b) if so, is it unavoidable that a custodial sentence be imposed?

(c) if so, can that sentence be suspended? (sentencers should be clear that they would have imposed a custodial sentence if the power to suspend had not been available)

(d) if not, impose a sentence which takes immediate effect for the term commensurate with the seriousness of the offence.

It is important to note that a community sentence may be imposed for an offence that passes the custody threshold where the court considers that to be appropriate.

(ii) Length of sentence

It is important to note that a prison sentence that is suspended should be for the same term that would have applied if the offender were being sentenced to immediate custody.

When assessing the length of the operational period of a suspended sentence, the court should have in mind the relatively short length of the sentence being suspended and the advantages to be gained by retaining the opportunity to extend the operational period at a later stage (see below).

(iii) Requirements

A suspended sentence involves a clear deterrent threat. The community requirements should therefore be less onerous than those imposed under a community sentence. If the court wishes to impose onerous or intensive requirements on an offender it should review its decision to suspend the sentence and consider whether a community sentence might be more appropriate. The operational period of a suspended sentence should reflect the length of the sentence being suspended. As an approximate guide, an operational period of up to 12 months might normally be appropriate for a suspended sentence of up to 6 months and an operational period of up to 18 months might normally be appropriate for a suspended sentence of up to 12 months.

(iv) Breaches

Where an offender has breached any of the requirements without reasonable excuse for the first time, the responsible officer must either give a warning or initiate breach proceedings. Where there is a further breach within a twelve-month period, breach proceedings must be initiated.

Where breach proceedings are brought the court must:

(a) Extend the operational period or make the terms of supervision more onerous, however,

(b) The presumption (which also applies where breach is by virtue of the commission of a further offence) is that the suspended prison sentence will be activated, for

(c) The original custodial term or a lesser term, unless,

(d) The court takes the view that this would, in all the circumstances, be unjust.

(e) In reaching that decision, the court may take into account both the extent to which the offender has complied with the requirements and if applicable, the facts of the new offence.

Where a court considers that the sentence needs to be activated, it may activate it in full or with a reduced term. Again, the extent to which the requirements have been complied with will be relevant to this decision.

Where the court decides to amend a suspended sentence order rather than activate the custodial sentence, it should give serious consideration to extending the supervision or operational periods (within statutory limits) rather than making the requirements more onerous.

New Offences:

(a) Near the end of an operational period (having complied with the requirements imposed), it may be more appropriate to amend the order rather than activate it.

(b) Less serious than the offence for which the suspended sentence was passed, may justify activating the sentence with a reduced term or amending the terms of the order.

(c) Non-imprisonable offence, the sentencer should consider whether it is appropriate to activate the suspended sentence at all.

It is expected that any activated suspended sentence will be consecutive to the sentence imposed for the new offence.

Giles Bridge specialises in criminal work. He has expertise in dealing with young and vulnerable defendants, and experience in computer related crime. A former police officer he enjoys a detailed knowledge of police procedures in relation to disclosure, intelligence, and surveillance.

Internet resources for criminal lawyers

www.wikicrimeline.co.uk

This website is run by Andrew Keogh, a partner at Tuckers Solicitors. It contains articles which provide links to the case law. There are sections on bad character evidence and ASBO's which are particularly useful. Andrew Keogh issues weekly email updates on new legislation, case law and funding issues. CPD points are available.

www.criminalsolicitor.net

This website fulfils a similar role to wikicrimeline, though it also provides discussion facilities. It provides links to new case law and legislation. Topics such as procedural and evidential law, legal aid funding and trial tactics can be raised and views sought.

www.jsboard.co.uk

The website of the Judicial Studies Board (the body responsible for training the judiciary, including magistrates) provides a current edition of the Magistrates Court Sentencing Guidelines-essential reading for mitigations. The Crown Court Judges specimen directions are also available which may assist legal submissions in Magistrates Courts as the directions provide a straight forward and simple exposition of the law.

www.sentencing-guidelines.gov.uk

The Sentencing Guidelines Council website provides all the current guidelines, essential for advising clients. Access to discussion documents published by the Sentencing Advisory Panel is available.

www.venables.co.uk.

This website run by Delia Venables provides you with links to many other legal resources. It is "user friendly". CPD points are available through courses.

Seminars

The Broadway House Law Teams continue their popular programme of seminars on current legal topics. Course notes remain available (through Helen Craven) for the recent Criminal Seminar by **Stephen Wood** and **Giles Bridge** on "Bad character evidence".

Forthcoming Seminars

Employment Law *presented by* David Jones *and* Helen Barney:

"Harrassment in the workplace after *Majrowski*"

22nd November 2006 at 6pm at 35a Paradise Street, Sheffield.
29th November 2006 at 6pm at Metropole Hotel, King Street, Leeds.

This will review the various causes of action which can be brought by employees both in the Employment Tribunal and the County/High Court. It will consider any overlap in the differing jurisdictions and the problem or effect of issue or litigation estoppel if claims are brought both in Tribunal and court.

In particular it will examine claims under the Protection from Harassment Act, which the House of Lords recently held in **Majrowski v St Guys and Thomas' NHS Trust,** were available to employees, and that employers would be vicariously liable for acts of harassment committed by one employee upon another, or even on a third party. This is a potentially far-reaching development in the law. Course notes will be available. Any queries contact Robin Slade rslade@broadwayhouse.co.uk

Family Law *presented by* Ian Miller *and* Chris Brown: will take place in early 2007 on "Ancillary Relief Costs"

Employment Law

Raising a grievance

Paul Wilson looks at what an employee has to do to raise a grievance under the grievance procedures introduced by the Employment Act 2002.

There have been a flurry of cases concerning the statutory dismissal and grievance procedures introduced by the Employment Act 2002 this year. One of the most pressing issues has been the need to have some clarification on what will constitute a grievance under the statutory grievance procedure.

It is, of course, important because, from the employee's viewpoint, a failure to raise a grievance in relation to his claim may mean that he is prevented from presenting the claim pursuant to section 32 Employment Act 2002, and from the employer's viewpoint, a failure to recognise a statutory grievance and deal with it accordingly is likely to result in an uplift to any compensatory award under section 31.

The following points have emerged from the case law.

1. There is no need to use the word "grievance" or invoke a grievance procedure[1].

2. There is no need for the grievance letter to indicate that the employee wishes to proceed further to a discussion or resolution of the complaint[2].

3. It may come from a third party on behalf of the employee[3].

4. The grievance letter can fulfil another function about the same or different subject matter[4].

So far the most useful cases to address the issue have been **Shergold v Fieldway Medical Centre [2006] IRLR 76 and Canary Wharf Management v Edebi [2006] ICR 719.**

In Shergold, Burton J, acutely conscious of the dire consequences for employees, placed emphasis on the need to avoid "undue technicality and over-sophistication". He took the view that the statutory requirement was "minimal in terms of what is required", a reference to the statutory definition[5], and emphasises that employees are not required to set out the grievance in technical detail under the standard procedure. In this sense he took note of the distinction between the grievance and the "basis" of the grievance in both the standard and modified procedures. He added that the wording of the grievance and subsequent claim do not have to be "anywhere identical".

Accordingly in **Shergold** the fact that the Claimant had not referred expressly to two "last straw" incidents in her resignation letter which otherwise contained a lengthy complaint about her line manager's behaviour did not mean that the grievance was insufficient and that she was prevented from bringing her claim for constructive dismissal.

In **Canary Wharf** it is discernable that the new President of the EAT, Elias J, whilst approving the approach in **Shergold,** evens the balance in terms of placing more emphasis on the employer's point of view. Whilst stating that it is enough for the employee to identify the complaint and confirming that there is no obligation (under the standard procedure) to set out the basis of the claim the following approach was formulated: would an employer on a fair reading of the statement and having regard to the particular context in which it was made, be expected to appreciate that the relevant complaint is being raised?

It is interesting to look at the facts of **Canary Wharf.** The EAT overturned the tribunal,s decision that Mr Edebi, a security officer at Canary Wharf had raised a grievance in relation to a disability discrimination complaint. He had complained in some detail about how his working conditions had affected his and other officers, health. He had not, however, referred in the letter to his asthma (the condition which he later relied on as constituting the disability), nor identify how he had been treated less favourably than persons who did not have that condition, nor did he complain of any specific failure to make an adjustment in his case which would not be necessary as compared to other security officers. It is clear that the EAT did not expect him to have used terms such as "disability", "less favourable treatment" and "reasonable adjustment" but did expect him to raise his complaints in a non-technical way which could be fairly understood as fitting those concepts.

This approach may lead to a greater paring down of the scope of claims at pre-hearing reviews. That would be welcome news to employers. Claimant's lawyers will be astute to become involved in drafting grievance letters.

Paul Wilson practices in Employment and Discrimination Law .

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[1] Shergold v Fieldway Medical Centre [2006] IRLR 76; Canary Wharf Management v Edebi [2006] ICR 719.

[2] Thorpe and Soleil v Poat and Lake (2005) UKEAT/0503/05/SM; Galaxy Showers v Wilson[2006] IRLR 83 & Mark Warner v Aspland [2006]IRLR 87.

[3] Mark Warner v Aspland (above).

[4] Commotion v Rutty [2006] ICR 290 (a request for flexible working under ERA 80F); Shergold v Fieldway [2006] IRLR 76 (a resignation letter); Arnold Clarke Autos v Stewart UKEATS/0052/05/RN (a without prejudice letter before action from a solicitor); note Holc-Gale v Makers UK Ltd [2006] IRLR 178 - confirming that a discrimination questionnaire cannot constitute a grievance.

[5] "Grievance" means a complaint by an employee about action which his employer has taken or is contemplating taking in relation to him - regulation 2(1) Employment Act 2002 (Dispute Resolution) Regulations 2004.

Family Law

Applications to remove Children from the jurisdiction for the purposes of a holiday in non Hague convention countries

By Ian Miller

An application by one parent to remove a child from the jurisdiction for the purposes of a holiday to a Non-Convention Country (NCC) invariably causes fear on the part of the other parent that the child may not be returned and/or that there will be problems in ensuring the child's return. Where an application is made to remove a child to a country, which is a signatory to the Hague Convention on the Civil Aspects of International Child Abduction many of the fears of the "other" parent can be allayed. Accordingly the vast majority of sensible applications to remove children for the purpose of a holiday to Hague Convention Countries will be granted.

The same now applies to applications to remove to Pakistan as a result of the judicial protocol that exists between the High Court of England and Wales and the High Court in Pakistan.

Applications to remove to NCC's have to be treated differently from applications to move to Convention countries as, without the appropriate safeguards in place, there can be no guarantee of a swift return of the child in circumstances of an abduction or indeed, in the worst case scenario, any chance of the return of the child at all. These types of application should invariably be heard in the High Court. The High Court is unlikely to release the case to a Section 9 family judge of the circuit bench as these cases are considered to warrant the highest level of judicial expertise. Applications need to be made in good time so that a directions hearing can arranged in order for the High Court to give directions as to the type of safeguards the court would like to see in place before it could contemplate granting the application. Ill considered applications are bound to fail and that can sometimes be after a rapid dash to London to get in front of a High Court Judge at the Royal Courts of Justice in the final few weeks or so before intended travel. Therefore, if a client wishes to take their child on holiday to a NCC in only a few weeks time, they should be advised that there is insufficient time to prepare and make a proper application. If the client is privately paying and insists, then it is a matter for them but if the client seeks public funding the advice may have to be that because time is so short then the case will be unmeritorious and that public funding may not be available.

In Non-Convention cases it is desirable that the children concerned are made Wards of Court before travel. The court may wish to declare that the children are British Citizens and that they are habitually resident in the United Kingdom. If a "contact parent" wishes to take the children on holiday, then the court should declare that the children reside with the "resident" parent. The client wishing to remove the children should give solemn undertakings as to their return and of course (like in all other removal cases) to provide the "other" parent with a full itinerary, including copies of airline tickets and the address(s) and contact details in the country where they intend to travel. If your client is a person of means then a substantial cash bond or a surety of property is likely to tip the balance in the applicant's favour.

The investigation and ultimately the imposition of mirror orders and/or notarised agreements are desirable and in some cases essential. Most good experts directories should contain the details and experience of experts in this field who can advise on such orders. In **Re T (Staying Contact in Non-Convention Country) 1999 1 FLR 262;** Mr Justice Hughes ordered that the parties should apply for a "mirror order" in the Cairo Court, confirming (a) the child's residence with the mother in London, and (b) that the child will be returned to England at the end of any periods of contact in Cairo. The effect of that was that the Cairo courts themselves were then bound by their own decision. Accordingly, in circumstances of abduction; there was a mechanism in place to enable the child to be returned. If the advice is received that notarised agreements and/or mirror orders cannot either be entered into or if they were entered into may not be upheld or supported by the judiciary of the state to be visited then, unless some financial bond can be entered into, the application is almost bound to fail.

The following could be regarded as a sensible checklist in applications of this type

- The application should be made many months before the intended date of travel and certainly before tickets and accommodation have been booked.
- The advice at the first instance should be that these applications are fraught with difficulty.
- The applicant should be prepared to have the children made Wards of Court and that there be a declaration of the children's British citizenship and that the children are habitually resident in the United Kingdom.
- That, if possible, a bond/surety involving cash or property will be highly desirable.
- The client will have to enter into formal legal undertakings as to the return of the child and any other adults travelling with the family should also be encouraged to enter into those undertakings.
- The applicant will have to show a good reason for wanting to take the holiday (for example to visit relatives or to see the home country).
- That at the earliest opportunity experts who can advise on the imposition of notarised agreements and/or mirror orders sought.
- Late applications and applications which do not disclose a good reason to travel and applications where mirror orders and/or notarised agreements have not been investigated are bound to fail.

For further information regarding the judicial view on these types of applications the cases of **Re L (Removal from jurisdiction: holiday)[2001] 1 FLR 241; Re S** (Mrs Justice Hogg) 3rd April 2001; **Re T (Staying Contact in Non-Convention Country)[1999] 1 FLR 262; Re K (Removal from Jurisdiction: practice) 1999 2 FLR 1084** are essential reading. A list of Hague Convention Countries can be found in Section 4 Part N Volume 3 of Hershman & MacFarlane.

In **Re L** a bond of £50,000 deposited with the court together with the other standard directions seemed to do the trick. In **Re S** no such bond was possible and it seems that the applicant mother had little or no ties to the United Kingdom but sufficiently impressed Mrs Justice Hogg that she had every intention of returning and that she had very good motivation for her trip. Arguably this was a very generous decision indeed. **Re T** is only a note of the judgment produced for the Family Law Reports but is a good example as to how notarised agreements and/or mirror orders can help along with a very helpful list of the types of orders and undertakings which the court will find desirable before permitting travel. Please note that **Re T** related to staying contact with an absent parent who resided in a Non-Convention Country as opposed to an application to remove for the purposes of a holiday to a Non-Convention Country. However, it is the author's view that it is still a helpful decision.

Ian Miller is a civil and common law practitioner with particular emphasis in family, children's cases and employment and discrimination law.

Members of Chambers

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Richard Barlow
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The New Costs Rules in Ancillary Relief Claims

By Chris Brown

All practitioners in the area of Ancillary Relief will be well aware of the new costs rules, which apply to all applications made on or after 3rd April 2006. However, how will these new rules work in practice?

The ethos behind Rule 2.71 appears to be one of openness so that the Court may take the costs issue fully into account when attempting to do justice between the parties. This change is particularly relevant when the Court is dealing with small money cases as, in theory, there should no longer be the risk of costs orders arising at the end of a case which have a significant impact upon either party's settlement.

The Key Changes

There are 4 key changes which are brought about by the new rules:

- The starting point is that there will be no order as to costs (Rule 2.71 para 4(a))
- Open offers are to be the norm (Rule 2.71 p6)
- Calderbank letters are essentially useless (Rule 2.71 p6)
- The Court may make costs orders due to the conduct of a party (Rule 2.71 p4(b))

To apply for costs or not?

The starting point is that there is to be no order as to costs, except where the conduct of a party demands otherwise. In practice however, it may be that the issue of costs is one which will be argued at each stage of the litigation, particularly if there is a delay, non-disclosure or other non-compliance with the rules. The six factors which the court must have regard to *(Rule 2.71 (5)(a)-(f))* are set out below:

a) failure to comply with these rules, any order of the court or any practice direction which the court considers relevant
b) any open offer to settle made by a party
c) whether it was reasonable for a party to raise, pursue or contest a particular allegation
d) the manner in which a party has responded to the application or a particular allegation or issue
e) any other aspect of a party's conduct in relation to the proceedings which the Court considers relevant; and
f) the financial effect on the parties of any costs order.

Although the conduct of a party may give grounds for claiming costs, the Court will still have to assess how a costs order may affect either party financially *(Rule 2.71 (5)(f))*, so in small money cases it is likely that the general presumption in favour of no order as to costs will apply unless there is serious misconduct by either party.

If a party does choose to apply for costs then the President's Practice Direction makes it clear that this must be made clear in open correspondence or in a skeleton argument. Therefore it is essential that the party applying for costs is in a position to fully argue both the reason for the application and also to quantify their costs.

Death of the Calderbank?

The rules clearly put an end to the usefulness of Calderbank letters in so far as they are capable of bringing pressure of costs to bear on lay clients. However does this mean that offers to settle will no longer have a bearing on the issue of costs? It appears from the rules that this may not be the case, the refusal of a reasonable offer may in effect be classed as "conduct in relation to the proceedings" capable of giving rise to such costs orders. Indeed the issues to which the Court must have regard specifically mentions "any open offer to settle made by a party" Rule 2.71 5(b).

Are Calderbank letters useless though? Calderbank letters may be inadmissible so far as costs are

concerned, however, they may yet have some uses, particularly in cases where proposals are put forward which are too prejudicial to be set out openly. However, under the new rules Calderbank Letters are only admissible at the F.D.R. stage so if proposals are to be made on this basis it must be done in advance of the hearing.

Guidance when applying for costs

When applying for costs it is essential to ensure that all relevant rules and practice directions are complied with, otherwise the claim may be significantly weakened. Especially if the conduct complained of relates to a non-compliance with an order, rule or practice direction. Therefore it is essential that:

- The Court and other side are on notice that you propose to apply for costs and the reasons why, this should ideally be set out in your skeleton argument.
- The Form H must be accurately completed and filed and served 14 days in advance of the hearing.
- Only the costs of the ancillary relief is included within the Form H
- A schedule of costs, akin to the schedule for civil proceedings, is available as it may prove essential in quantifying the costs claim.

Chris Brown is a civil and common law practitioner: with particular emphasis in family law, personal injury, housing and local authority law and proceedings under the Education Act 1996.

A word from the clerks:

A Chambers newsletter wouldn't be complete without a word from the Clerks Room.

For many of our clients, the Clerks Room is the first port of call, so it's important for us to make sure we continue to provide a well-organized and capable service. We encourage professional clients to make suggestions which would help us to improve any aspect of our administration.

Notwithstanding the thirty years of clerking experience we have between us we are both keen to improve our systems and we welcome feedback on all aspects of Chambers.

Our Chambers in Park Square has proved to be invaluable to our clients needing conference facilities in Leeds, either to meet before Court or for use on more substantial conferences. Members of Chambers are happy to hold conferences in either Leeds or Bradford – wherever is most convenient.

We hope to continue to assist you in finding the right Counsel for your client and effecting a professional and courteous service.

Robin Slade
Senior Civil & Family Clerk
David Rhodes
Senior Criminal Clerk

Chambers News

Our head of chambers **Graham Hyland QC** and **Ian Howard** have 'rejoined' chambers having finished a year long fraud in London.

We are pleased to announce that **Sharn Samra** and **Nigel Hamilton** have accepted offers of a tenancy in chambers. Sharn has joined our civil and family teams

while Nigel has joined our criminal team but is also practicing in general common law.

Rachael Mellor has joined chambers as a pupil under the watchful eye of Paul Wilson our employment and discrimination law specialist.

Joining the Criminal team under the care of Gerald Hendron is **Claire Larton.**

We wish both our new pupils well in the future.

Katie Tillet has joined the criminal clerking team. Katie is familiar with chambers having worked here as a secretary for the last 4 years. Leah Parry has taken over Katie's work in reception.

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