Litigation e-alert

Welcome to the eighth issue of the Civil Litigation Section's e-alert. Each month we aim to bring you a selection of features, press releases, cases, articles, Statutory Instruments (SIs), Acts and other relevant civil litigation information. For details about anything in the contents list, click on the hyperlinked title. To return to the contents list, simply click the ▲ icon at the end of each article.

NEWS AND FEATURES

CALL FOR PROPER COMPENSATION FOR CRIME VICTIMS

A solicitor is calling for an urgent review of the government scheme which awards compensation to victims of criminal injury after a young boy, who was left severely disabled after being attacked as a baby by his mother's boyfriend, received just £500,000 compensation. Michael Laffey, a solicitor at the trade union firm Thompsons, makes the case for reform.

The boy, Evan, now aged seven, was injured at just six months old when his mother left him with her boyfriend for an hour. He needed an emergency brain operation and is now virtually paralysed down the right side of his body, blind in one eye, cannot read or write and has severely impaired speech. The boyfriend served 21 months in prison for wounding Ewan and also for attacking a pensioner with a crooklock. He was not sued because he had no assets.

The family recently received £500,000 compensation which is the maximum that the Home Office-run scheme, the Criminal Injuries Compensation Authority (CICA), is able to award. Mr Laffey argues that the award "could have been three times higher if the case had been brought as a personal injury claim in the civil courts".

"Innocent victims of crime like Ewan receive a lot less than people with similar injuries who can make a civil claim against an insurance company after say an accident at work or a road accident," he says.

Thompsons recently represented a fire fighter who received terrible injuries very similar to Ewan's in a car crash. "He received £1.3 million, yet at the age of 50 he had a much shorter life span ahead of him than Ewan," the solicitor points out. "The CICA estimates that Ewan will need at least £30,000 a year to pay for his care. What happens when the £500,000 runs out?"

He points out that the Conservative government introduced CICA's rigid tariff system in 1996 which was condemned by the opposition at the time. "When New Labour was elected in 1997 they did nothing about the scheme and eight years later we are left in an unsatisfactory position where we have an artificial scheme. It simply is not acceptable." The CICA scheme was also under fire recently after lawyers criticised it in relation to possible payments for the victims of the London bombing. It was recently announced that the scheme would offer only £11,000 to families that lost loved ones in the attack.

As the lawyer points out not only is there a £500,000 cap in compensation, but pay-outs are subject to a range of deductions including welfare benefits, pension and death in service payments. There is no provision made for legal costs. Thompsons waived their fees because the child's grandfather was a member of the National Union of Mineworkers.

"You can't ever adequately compensate people in a situation like this but it helps," says Mr Laffey. "It isn't about £500,000 but 500,000 care vouchers. If the NHS was in a position where they could adequately help look after Ewan then they wouldn't need this money, but in the last few years he has had virtually no help whatever from social services."

(26/09/05)
Legal News Analysis
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IS OFT RIGHT BODY TO PROBE PAYMENT PROTECTION INSURANCE MIS-SELLING?

Calls for the Office of Fair Trading (OFT) to investigate the £5 billion industry of selling payment protection insurance are to be welcomed, says Adam Samuel, a former assistant Ombudsman at the Personal Investment Authority.

The charity Citizens Advice has just lodged a “super complaint” with the OFT, alleging widespread mis-selling of payment protection Insurance – often sold, as it claims, to people who do not need it or who are excluded in the fine print. The policies are usually sold to cover repayments on loans but the self-employed, depressed and others can find themselves excluded.

Adam Samuel, who qualified as a barrister before becoming Assistant Ombudsman at the Personal Investment Authority (a forerunner of the Financial Services Authority – FSA), welcomes the call despite wondering how the OFT will perform. "The OFT has a very mixed record, ranging from the positively useful to the outrageously awful," he says. But, on the plus side, it has expressed concern about "hiding things in the small print" and has usually been "quite good" at dealing with obscurity in policy wordings.

But while the OFT has a record in looking at the structure of financial products, the FSA has the greater role in looking at how products are sold. The problem, after all, is not necessarily that the product is bad: it can be, for instance, that good products are sold to the wrong people. Samuel says: "The logical people really to have a go at payment protection insurance are the FSA. Even if you say that the OFT should have an interest in the product structure, it makes much more sense for the same person who regulates sales practices to be regulating product structure. If you have a slightly wobbly product structure, you can to some extent put that right through very careful selling procedures."

A particular concern for Mr Samuel – a consultant to the financial services industry – is the sale of payment protection insurance products which rule out from claiming someone who loses their job and becomes depressed as a result. Careful wording of policies often excludes people who are unable to work – even if it was the loss of the job that made them so depressed that they could no longer face a working day.

Mr Samuel would like to see numerous changes to products and sales procedures and the overall relationship with the customer. So, for instance, he would like "a clear definition of the sort of events that give rise to a claim"; policies to be written in plain English; up front notification on which types of customers would not benefit (the self-employed, for instance, if a claim can only be made if someone has lost their job); and "a claims process which needs to be sensitive and imaginative" in allowing customers to make successful claims even if their circumstances do not fit 100 per cent with the conditions of the small print but if it was reasonable for them to expect their claim to succeed.

The FSA is getting closer, in some ways, to the sort of regime which Mr Samuel suggests – not least because of a document it issued earlier this year which lays out for the industry the fundamental importance of treating its customers fairly.

(16/09/05)
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CAN OVERSEAS GAY MARRIAGES RECEIVE UK RECOGNITION?

A British couple who were legally married in Vancouver in 2003 have asked the UK courts to recognise their marriage under the Family Law Act 1986, section 55.

For an overseas marriage to be recognised in the UK it must be shown that the marriage was legal, recognised in the country in which it was executed, and that nothing in the country's law restricted their freedom to marry. The case is expected to be heard early next year. Kitzinger, a professor of sociology at the University of York, and Wilkinson, an academic psychologist at Loughborough University, will argue that their marriage fulfils these requirements even though people cannot legally enter into same-sex marriages in the UK.

"Our clients entered into a legal marriage in Canada. It is a matter of fairness and equality that they should be treated the same way as any other couple who marries abroad – their marriage should be recognised here," says James Welch, legal director of civil rights group Liberty. "They shouldn't have to settle for the second-best option of a civil partnership." According to Mr Welch, as "a matter of principle" the couple believed that they should be able to marry in the same way as heterosexual couples. British Columbia was the first place in the world to allow same-sex citizens and non-citizens to marry. Until recently same-sex marriage was only legal in eight out of the 10 Canadian provinces, and one out of Canada's three territories, but in June the Canadian Parliament approved a Bill to legalise same-sex marriage throughout Canada. Under the new Civil Partnerships Act 2004, which comes into effect in December, gay and lesbian couples will be able to register their partnership and receive many of the legal benefits available to heterosexual married couples. Kitzinger and Wilkinson argue that civil partnership "to be both symbolically and practically a lesser substitute". They want the court to recognise their overseas marriage in the same way that it would recognise that of a heterosexual couple and they claim a failure to do so would constitute a breach of their human rights to privacy and family life and their right to marry as well as being discriminatory on the basis of their sexuality.

Kitzinger and Wilkinson said that their case was "fundamentally about equality". "We want our marriage to be recognised as a marriage - just like any other marriage made in Canada," they said. "It is insulting and discriminatory to be offered a civil partnership instead. Civil partnerships are an important step forward for same-sex couples, but they are not enough. We want full equality in marriage." Liberty point out that marriage automatically grants a couple important legal and financial rights. Mr Welch says: "The couple have had to put a number of piecemeal legal arrangements into place in the UK to ensure that they have the benefit of these safeguards, despite the fact that they married in Canada."

(14/09/05)
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CAN INSURERS FORCE BUSINESSES TO SUE DEBTORS?

Trade credit insurance covers businesses against the risk of bad debt, including those due to the insolvency or protracted default of their buyers. Policies can be written on a "whole turnover" or a "specific account" basis. Insurers are entitled to subrogation rights as a matter of English law but they commonly insert a subrogation clause in a contract of insurance, which entitles them to be substituted to the rights of the policyholder after meeting a claim. The insurer can then decide whether to pursue a third party in the policyholder's name. However, a judgment handed down in the Commercial Court recently – *Euler Hermes UK plc v Apple Computers BV* – concerned the issue of how far underwriters of trade credit insurance could require the policyholder to pursue a debtor to recover payment after the insurer has met the policyholder's protracted default claim.

Apple had an export credit “whole turnover” policy with Euler Hermes, which protected it against standard trade credit risks, including buyer insolvency and protracted default. On ending a distribution agreement with its agent in Saudi Arabia, JeraisyTech, it sought payment from that company of outstanding debts in excess of $500,000. JeraisyTech acknowledged liability but counter-claimed for losses flowing from Apple’s termination of the agency agreement, and refused to pay the outstanding sums owed.

Apple notified Euler Hermes of a claim under the ”protracted default” provisions of its policy, and said it intended to sue JeraisyTech for the debts. Euler met the claim, but required Apple to undertake to “continue to take action” against the debtor to recover the outstanding debt in full. Apple signed an undertaking to this effect and its claim was paid. Subsequently, Apple met and corresponded with the debtor but did not begin legal proceedings. This prompted Euler to seek a return of the claim payment from Apple, insisting that the terms of the undertaking obliged Apple to sue JeraisyTech and recover the sums paid out. Alternatively, it claimed that Apple was in breach of the policy terms requiring it to take all reasonable, prudent and practicable measures to recover the debts.

So how onerous was this clause? David Breslin, a partner at Lawrence Graham, comments: “The insurer was perfectly entitled to exercise its subrogation rights and take over Apple's claim against the Saudi debtor but it does not need to exercise that right. The court had to consider in this case whether the insurer, having not exercised that right, could force Apple to go so far as to sue its debtor”. He asks “Was it unreasonable for Apple to say to the insurers ‘we have tried on many occasions to negotiate without success but we take the view that it is not in our interests to sue the debtor?" This was broadly speaking the point the court had to consider when construing the policy obligation.

Mr Breslin explained: “In deciding whether the undertaking required Apple to take legal action to recover the debt, the judge had to construe the meaning of ”continue to take action”. The judge noted that credit risk insurers do not usually require the insured to take legal action against a debtor but generally impose an obligation on the insured to take all reasonable steps to collect and to allow the underwriter to take, or take over litigation if it wishes. “Against this familiar background”, observed the judge, “it would be surprising and tough for the insurer to require as a condition of payment legal as opposed to other action to be taken to judgment”. Mr Breslin said: “The judge concluded that the undertaking to take ‘action’ in this context meant no more than agreeing to continue to take steps to collect as envisaged by the policy”.

As to the policy requirement to take all reasonable, prudent and practicable measures to collect the debt after a claim, Mr Breslin said that Euler had argued that Apple was obliged to go further than negotiate and threaten legal action against JeraisyTech. “It contended that the policy obliged Apple to sue because it was reasonable to do so, especially since Apple had obtained a favourable Saudi legal opinion on the prospects of success”.

Apple was concerned about the commercial damage caused in suing an influential Saudi businessman for a relatively small debt, especially with the Sheikh Jeraisy’s counter-claim. It was also concerned that enforcement outside the jurisdiction would be a problem, but Euler argued that commercial considerations should not have prevailed when Apple was deciding whether or not to sue its debtor.

However, the judge observed that it was easy to lose sight, in the context of the clever legal arguments in court, of quite what trade credit insurance covered. Polices did not cover bona fide disputes between trading parties, but insured against protracted default as well as insolvency. The policies recognised that collection of debts from abroad was more complex than at home. It involved broad assumptions and big risks, however good the prospects of success appeared to be in theory.

Mr Breslin pointed out that the judge took account of Apple's commercial considerations and deliberations in deciding whether it had taken reasonable, prudent and practicable steps in pursuit of the debtor. "This will be of particular interest to insurers of trade credit risks and the buyers of this type of policy. It shows that the courts will look carefully at the steps actually taken by the insured in similar cases in deciding whether the insured has done enough to satisfy the "reasonable steps" obligation in the policy. Insurers must be aware that they cannot ask their insured to do more than they would do themselves in seeking recoveries under trade credit insurance."

Mr Breslin concluded: "So long as the insured can show that the decision he made was reached after sensible internal debate, and taking into account reasonable considerations, he will not be held in breach of that policy term."

(12/09/05)
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PLANS TO MAKE CONDITIONAL FEE DEALS "SIMPLER"

Ministers have recently unveiled their plans for simplification of conditional fee regulations. Andrew Twambley, partner of the leading claimant firm Amelans, explains why such a move is to be welcomed.

The removal of unnecessary regulation is to apply to all Conditional Fee Agreements (CFAs) which are used across the range of civil cases and will put into place the government's commitment "to strip out unnecessary legislation". The existing CFA and collective CFA regulations will be revoked from the beginning of November.

"CFAs play a valuable role in helping people with valid claims obtain access to justice. For many consumers and businesses this provides the only means of obtaining appropriate redress. A regime that is complex and opaque puts the consumer at a disadvantage," commented the parliamentary under secretary of state Baroness Ashton of Upholland. "Revoking the existing regulations will help make CFA agreements a simpler product and in particular will help consumers to better understand the agreements they enter into and the risks they could face in contemplating litigation."

"The simplification of the mass of complex regulation has to be a good thing in principle," comments Mr Twambley. "Primarily, it will make the whole matter of CFAs much simpler for the client and thus less time consuming for the solicitor to explain." Since the introduction of CFAs the average length of the first client-solicitor interview has increased in length from 30 minutes to one hour 30 minutes. "The solicitor will now be able to finish the explanation before the attention span of the client has expired," he adds.

According to the government, consumer safeguards would be improved as responsibility for proper advice falls on the solicitor. Regulation of solicitors involved in CFA cases will remain the responsibility of the Law Society. "They will be required to ensure that clients are fully informed about the strength of their case and prospects of success in clear, simple terms," it says. "This will help to ensure that only well-founded claims proceed and benefit both claimants and defendants who will be spared the stress of avoidable court hearings."

The transfer of responsibility from government to the Law Society "should cause no problem", says Mr Twambley. The Department of Constitutional Affairs (DCA) has been working with the Law Society on improving its guidance and rules. The Law Society's amended rules are awaiting approval and are due to come info force on 1 November. It has published new model agreements to coincide with the regulatory changes. Details are available at www.lawsociety.org.uk.

"What must be a concern is how the new CFA and guide notes will be viewed by insurers and the claimant industry alike," the solicitor continues. "It must not be seen as a launch pad for a new spate of satellite litigation. I can imagine certain individuals cancelling their holidays to study the new agreement for loopholes. This must not happen and it is likely that the district judges will give them short shrift."

(01/09/05)
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ARTICLES

THE DAM DEBATE

Journal: *Legal Week*
Author: James Howells
Citation: 15 September 2005, 30
Relevant legislation: Arbitration Act 1996
Relevant cases: *Lesotho Highlands Development Authority v Impreglio SpA and others (HL)* BLD 0107052859
Summary: Examines the provisions of the Arbitration Act 1996 which came into effect in 1997 and considers the House of Lords' decision in *Lesotho Highlands Development Authority v Impreglio SpA and others.* It also discusses the far-reaching ramifications of the case.

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SEALING THE VICTORY

Journal: *Legal Week*
Author: William Godwin
Citation: 15 September 2005, 32
Relevant legislation: Arbitration Act 1996, ss 67–69
Relevant cases: *Peterson Farms Inc v CandM Farming Ltd* BLD 0502040405
Summary: Examines the provisions of the Arbitration Act 1996, ss 67, 68, 69. Discusses the outcome of *Peterson Farms Inc v C&M Farming Ltd* and looks at how English law can protect the interests of a winning party to an arbitration.

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BUNDLES OF JOY

Journal: *New Law Journal*
Issue date: 9 September 2005
Author: Richard Harrison
Citation: 155 NLJ 1323
Summary: Provides a critical assessment of the rules for presenting evidence in court. Looks at the various requirements for court evidence and where to find them and examines the need to satisfy the "overriding objective" and asks whether this simply increases litigant costs.

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ARKIN... AGAIN

Journal: *New Law Journal*
Issue date: 9 September 2005
Author: John Peysner
Citation: 155 NLJ 1326

Relevant cases: *Arkin v Borchard Lines Ltd and others (CA)* BLD 2705052349
Summary: Questions whether *Arkin* – which establishes for the first time a rational regime for third party funders of litigation – could, or should, be extended to make lawyers pay. Asks whether lawyers can fall into the definition of third party funders and concludes that *Arkin* leaves considerable room for interpretation and challenge.

NLJ back issues and subscriptions
The full text of this article is available on the online subscription version of Legal Updater.

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LEGAL LIES AND FALSE TRADE DESCRIPTIONS

Journal: *Justice of the Peace*
Issue date: 3 September
Author: Victor Smith
Citation: (2005) 169 JPN 688
Relevant legislation: Trade Descriptions Act 1968, s 3
Summary: Discusses recent developments in trade descriptions law. Considers the application by the courts of the Trade Descriptions Act 1968, s 3 and examines recent case law.

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PRE-ACTION PROTOCOL COSTS: SETTLE OR FIGHT?

Journal: *New Law Journal*
Issue date: 2 September 2005
Author: Simon Cavender
Citation: 155 NLJ 1275
Relevant cases: *McGlinn v Waltham Contractors Ltd and others* BLD 1407053061
Summary: Discusses why defendants may not be able to recover the costs incurred by following pre-action protocols, even where they successfully defeat claims at protocol stage. Takes a look at the impact of the *McGlinn* decision and considers lessons to be learned.

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EXECUTION OF INSANE PRISONERS IN THE UNITED STATES

Journal: *European Human Rights Law Review*
Issue date: 1 September 2005
Author: Ian Loveland
Citation: [2005] EHRLR 363
Summary: Examines the decision of the Court of Appeal in the state of Arkansas in *Singleton v Norris*, which explored the legitimacy of administering compulsory medication upon mentally ill prisoners in order to restore their mental competence to face execution. It considers previous and contemporary Supreme Court and other State court decisions surrounding the issue of medicating mentally ill prisoners. Discusses how medication deemed to be in the "prisoner's best interests" can facilitate the death sentence to fundamentally challenge the Hippocratic Oath.

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PRESS RELEASES, CONSULTATION AND GUIDANCE

CONSULTATION PAPER: CIVIL AND FAMILY COURT FEE INCREASES

Issuing department: Department for Constitutional Affairs
Issue date: 26 September 2005
Summary: Seeks to identify whether the package of proposed increases is the most suitable given the financial imperatives it seeks to meet. Also seeks views on whether a particular increase in an individual fee might have specific, untoward consequences. The consultation ends on **18 November 2005**.
Details

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HUGE TAX RISES FOR PEOPLE USING FAMILY AND CIVIL COURTS

Issuing department: The Law Society
Issue date: 26 September 2005
Summary: Announces that people on low and middle incomes, already abandoned by the law and the legal aid system, will be hit hard by massive rises in family and civil court fees.

The government has announced proposals that would mean people will face fee increases of 650 per cent if they need to go to court to recover debt, obtain child contact orders and sort out financial payments following divorce. The government hopes to raise an additional £50 million from court users so that the family and civil courts are self-financing. For instance, the fee for parents wishing to seek contact with their child will rise from £30 to £175.

Janet Paraskeva, Law Society Chief Executive, said: "The government is proposing additional rises in fees for the family and civil courts when the latest increases were only implemented earlier this year. The continual rise in court fees is pricing people out of the family and civil justice system. Justice should not be restricted only to those who can afford it. Thousands of people will face serious hardship if they are asked to fund cases because of swingeing cutbacks to eligibility and funding of civil legal aid.

"The government should consider ways of making efficiency savings. We have long argued for a single civil court and single family court. This would allow the court service to manage resources more efficiently, reduce costs and save money.

"The Law Society agrees that court users should pay a contribution towards the cost of running the family and civil courts. But these fee increases will place an unfair burden on people on low and middle incomes in society. The government must recognise that courts provide an important public service and taxation should help to pay for some of the cost of running the courts."
Details

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CHANGING THE LAW AFFECTS LEGAL AID

Issuing department: The Law Society
Issue date: 19 September 2005
Summary: Announces that the Law Society has written to the Lord Chancellor urging government departments to consider more rigorously how proposed legislation will affect the legal aid budget. It also sets out a copy of the Law Society's letter.
Details

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CONSULTATION RESPONSE: CIVIL WARRANT PERFORMANCE INDICATORS

Issuing department: Department for Constitutional Affairs
Issue date: 16 September 2005
Summary: Summarises the responses received to the consultation *Civil Warrants Performance Indicators—Information for Customers*, published July 2004, including how the consultation process has influenced the final shape of the policy and the conclusions that have been reached on some of the proposals, in particular the warrant returns performance indicators.
Details

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INCREASE THE CIVIL FAST TRACK LIMIT TO £25,000?

Issuing department: The Law Society
Issue date: 14 September 2005
Summary: The Association of District Judges (ADJ) is proposing that the civil case fast track financial limit be increased to £25,000. The current limit is £15,000, introduced with the Civil Procedure Rules (CPR) in 1999. The Law Society says it needs solicitors to comment before responding to the proposal.

The ADJ points out that cases under the new proposed £25,000 limit can still be transferred to the multi track if they are of exceptional complexity or a conflict of evidence exists.

Increasing the fast track financial limit will:

- result in fewer matters being allocated to the multi track; and
- reduce the number of cases where currently the full cost of advocacy can be claimed. CPR parts 46 and 44.10 deal with trial costs in fast track cases and sets out the maximum amount of advocacy costs recoverable from an unsuccessful opponent.

Details

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JUSTICE MUST NOT DEPEND ON THE SIZE OF YOUR WALLET, WARNS LAW SOCIETY

Issuing department: The Law Society
Issue date: 14 September 2005
Summary: The Law Society is warning that unless the government makes a real commitment to legal aid, the legal and democratic rights of many thousands of people and families will be seriously undermined across England and Wales.

It predicts that if the legal aid system continues to deteriorate that for millions of poor and vulnerable people, justice will depend on the depth of their wallet rather than the merits of their case. To improve the legal aid system, the Society urges the government to: ring-fence the civil legal budget from the criminal budget; invest more money in legal aid and target resources more effectively; reward and retain those who work within the legal aid system; and encourage and support young solicitors so that they feel positive about choosing to be part of the legal aid system of the future.
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MONEY LAUNDERING – ESSENTIAL NEW GUIDANCE

Issuing department: The Law Society
Issue date: 14 September

Summary: Guidance on the case of *Bowman v Fels* has been finalised by the Law Society's Money Laundering Task Force, which includes essential guidance for solicitors conducting contentious and non contentious work. This is essential reading for money laundering reporting officers in law firms, and supersedes various previously-issued guidance.
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CONSULTATION RESPONSE: ORAL HEARINGS IN ADMINISTRATIVE TRIBUNALS

Issuing department: The Law Society
Issue date: 14 September 2005
Summary: Sets out the Law Society's response to the Council on Tribunals' consultation paper on the use and value of oral hearings and the use of alternative dispute resolution in tribunals.
Details

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CROWN AND COUNTY COURT ANNUAL REPORTS 2004/05

Issuing department: Department for Constitutional Affairs
Issue date: 13 September 2005
Summary: Announces the publication of the Crown and County Court Annual Reports for England and Wales covering April 2004 to March 2005. The reports confirm that the number of ineffective trials in the Crown court has reduced by five per cent in the last reporting year. The number of ineffective Crown Court trials reduced to 15 per cent in 2004-05 from 20 per cent in 2003-04, against the annual target of 18.4 per cent for 2004-05.

The reports also confirm that in the Crown court, 26 courtrooms now have remote video links facilities allowing video conferencing between various buildings, giving witnesses more flexibility of places to give evidence from.
Details

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CONSULTATION PAPER: PROPOSED CHANGES TO CIVIL APPEAL RULES

Issuing department: Department for Constitutional Affairs
Issue date: 9 September 2005
Summary: Seeks views on proposed changes to the civil appeal rules in two areas. Proposes to restrict the current automatic right of renewal to an oral rehearing in the Court of Appeal where permission has already been refused on paper. Also proposes to cap costs in appeals and transfers from the small claims track to higher tracks. The consultation ends on **2 December 2005**.
Details

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GUIDANCE: NEW GUIDE TO TECHNOLOGY AND CONSTRUCTION COURT

Issuing department: Her Majesty's Court Service
Issue date: September 2005
Summary: The second edition of the *Technology and Construction Court (TCC) Guide*, which is intended to provide straightforward, practical guidance to the conduct of litigation in the TCC, takes effect from 3 October 2005. Copies may be downloaded from either the Society for Computers and Law website at www.scl.org or Her Majesty's Court Service website at www.hmcourts-service.gov.uk.

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COSTS ON SMALL CLAIMS APPEALS TO BE LIMITED

Issuing department: Department for constitutional Affairs
Issue date: 9 September 2005
Summary: People appealing against small claims cases will be protected from having to pay legal costs under proposals published recently by the Department for Constitutional Affiars (DCA). A consultation paper, *Changes to Civil Appeal Rules*, proposes that protection against high legal costs should be extended to small claims cases on appeal.

The small claims court provides a straightforward and informal way of resolving disputes of less than £5,000. Normally, parties to the case do not use a solicitor and each is responsible for their own costs.

When a small claim goes to appeal, however, the winning party is able to claim costs, including solicitors' costs. This can discourage people from bringing small claims to court. For example, if someone sues a multinational corporation for defective goods and wins, they could face the possibility of an appeal with the prospect of having to pay full legal costs against them, if they lose.

The consultation makes alternative proposals:

- cost protection in small claims cases be extended to cover appeals, or
- a cap of £1,000 on all costs between parties at appeal is introduced.

A second section of the consultation covers proposed changes to the way appeal applications from any type of civil case are dealt with in the Court of Appeal. Currently, an applicant has the right to request an oral hearing before a Court of Appeal judge, if the written application has been rejected.

The consultation paper proposes a Court of Appeal Court judge should be able to rule an application is hopeless or totally without merit by studying the application on paper only. There need not be a further oral hearing unless the judge specifically allows it. This proposal is made to produce savings in time and costs for applicants, defendants and the courts.
Details

CASES

WOLTERS KLUWER (UK) LTD (TRADING AS CCH) V REED ELSEVIER (UK) LTD (TRADING AS LEXISNEXIS BUTTERWORTHS) – trade marks

Cite: BLD 2009053859
Court: Chancery Division
Judge: Mann J
Hearing date: 16 September 2005
Summary: *Trade mark—Infringement—Advertisement—Claimant seeking to restrain alleged infringement of its trade mark—Whether defendant's advertisements identifying claimant's goods and services for comparison purposes—Whether claimant entitled to injunction—Trade Marks Act 1994, ss 10(3), 10(6)*

Section 10(3) of the Trade Marks Act 1994 provides: 'a person infringes a registered trade mark if he uses in the course of trade [in relation to goods or services] a sign which (a) is identical with or similar to the trade mark … where the trade mark has a reputation in the United Kingdom and the use of the sign, being without due cause, takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark'. Section 10(6) of the 1994 Act provides:

'nothing in the preceding provisions of this section shall be construed as preventing the use of a registered trade mark by any person for the purpose of identifying goods or services as those of the proprietor or a licensee'.

The claimant and defendant companies were both publishers of professional works. The claimant had been the only market entrant for online and face to face seminars in the fields of tax and accountancy. In July 2005, the relationship between the claimant and OT Ltd, a company that had worked in conjunction with the claimant in the development of its seminar programme, was terminated and OT Ltd became engaged by the defendant. Subsequently, the defendant began advertising its seminars in the fields of tax and accountancy, declaring the providence of its seminar programme, namely OT Ltd's successful affiliation with the claimant, and offering existing subscribers of the claimant use of its services, free of charge for the remainder of the client's subscription to the claimant, in return for switching their allegiance to its new services. The claimant objected to the defendant's advertising and two correction notices were subsequently issued to clarify the parties' positions. Despite the correction notices the claimant issued proceedings alleging, inter alia, malicious falsehood and trade mark infringement contrary to s 10 of the Trade Marks Act 1994, and seeking to restrain the defendant from infringing its trade mark.

The claimant contended, inter alia, that the defendant's advertising prima facie infringed its mark and took unfair advantage of it with the intention of diverting its subscribers. The defendant did not accept it had infringed the claimant's mark and submitted that its use of the claimant's mark had been within s 10(6) of the 1994 Act.

The application would be dismissed.

Case annotations in other services: *Cable and Wireless plc v British Telecommunications plc* [1998] FSR 383; *Wolters Kluwer (UK) Ltd (trading as CCH) v Reed Elsevier (UK) Ltd (trading as LexisNexis Butterworths)* [2005] All ER (D) 96 (Sep)
Legislative annotations in other services: Trade Marks Act 1994, s 10(3), (6).

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AT THE RACES HOLDINGS LTD AND ANOTHER V RACE COURSE ASSOCIATION AND OTHERS – evidence

Cite: BLD 1909053851
Court: Queen's Bench Division (Commercial Court)
Judge: Christopher Clarke J
Hearing date: 16 September 2005
Summary: *Disclosure and inspection of documents—Disclosure against persons not parties to proceedings—Classes of documents—Whether documents sought relevant and necessary for fair disposal of action—Civil Procedure Rules 1998, SI 1998/3132, r 31.17*

The defendants licensed their media rights over horse-racing at their courses to the claimant under a contract that was due to last for 10 years. The agreement provided a mechanism for termination whereby the claimants would receive a rebate on the fees that they had paid, calculated by reference to the moneys received by the defendants from television broadcasting and media rights arrangements. It also provided that any such arrangements with third parties would be entered into in good faith and would be of a kind that would have been negotiated by parties who were at arms-length. The claimants sought to terminate the contract, and the defendants entered into new arrangements with a company, R, which was owned by another company of which they were the shareholders. The claimants brought proceedings, contending that the new arrangements had not been entered into in good faith, but rather in an attempt to minimise the rebate due to the claimants. They applied under CPR 31.17 for disclosure against R, as a non-party to the proceedings, of its management accounts and the arrangements between R and the defendants and R and third parties for the exploitation of the rights in question.

The court ruled:

In all the circumstances, the documents sought were relevant and necessary to resolve fairly the issue as to whether the new arrangements had been negotiated in good faith and at arms-length.

Case annotations in other services: *At the Races Holdings Ltd and another v Race Course Association and others* [2005] All ER (D) 88 (Sep)
Legislative annotations in other services: Civil Procedure Rules 1998, SI 1998/3132, r 31.17

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LAW DEBENTURE TRUST CORPORATION PLC V ELEKTRIM FINANCE BV AND OTHERS – judgments and orders

Cite: BLD 1509053836; [2005] EWHC 1999 (Ch)
Court: Chancery Division
Judge: Hart J
Hearing date: 14 September 2005
Summary: *Practice—Summary judgment—Entitlement to summary judgment—Whether defendants having real prospect of succeeding at trial*

Following the resolution of certain issues concerning the parties, ([2005] 1 All ER (Comm) 699), on 9 March 2005, the claimant, the trustee of a €15m bond issue, sought a declaration that certain defaults had occurred permitting it to accelerate the repayment date of the bonds to the date of the relevant acceleration notice. The due date for the repayment was to have been 15 December 2005. The first defendant was the issuer of the bond, the second defendant was the guarantor and the third defendant was a bondholder pursuant to the issue. The claimant relied on two acceleration notices dated 18 January 2005, setting out three alleged defaults, and 22 February 2005, setting out a further alleged default. On 23 June, the claimant applied for summary judgment on its claim. It was common ground that if any of the alleged defaults were established the repayment date would have been accelerated to the date of the relevant acceleration notice.

The defendants contended that there was a real prospect of successfully showing at trial that none of the alleged defaults occurred or that there was some other compelling reason why the matter should be disposed of at trial.

The application would be allowed.

The claimant was entitled to succeed in its application as the defendants had no real prospect of resisting the claims that the defaults had occurred.

Case annotations in other services: *Law Debenture Trust Corporation plc v Elektrim Finance BV and others* [2005] All ER (D) 73 (Sep), [2005] EWHC 1999 (Ch)

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SPORTWETTEN GMBH GERA V OFFICE FOR HARMONISATION IN THE INTERNAL MARKET (TRADE MARKS AND DESIGNS) (CASE T-140/02) – trade marks

Cite: BLD 1509053835
Court: Court of First Instance of the European Communities (Second Chamber)
Judge: Judges Pirrung (President), Meij and Pelikanova
Hearing date: 13 September 2005
Summary: *European community—Trade marks—Community trade mark—Application for declaration of invalidity—Figurative Community trade mark including word element 'INTERTOPS'—Whether mark contrary to public policy or accepted principles of morality—Council Reg 40/94/EC, arts 7(1)(f), 7(2), 51*

The respondent published the registration of a figurative sign including the word element 'INTERTOPS' as a Community trade mark, a registration which had been sought by the intervener under Council Regulation (EC) 40/94 (on the Community trade mark) in respect of services within class 42 (bookmakers and betting services of all kinds). The applicant applied for a declaration of invalidity concerning the trade mark in question under art 51(1)(a) of the regulation, which provided that a Community trade mark was to be declared invalid on application to the respondent where that trade mark had been registered in breach of the provisions of art 7 of the regulation. The applicant relied on the absolute ground for refusal under art 7(1)(f) and (2) of the regulation, which provided that trade marks which were contrary to public policy or to accepted principles of morality were not to be registered, notwithstanding that the grounds of non-registrability obtain in only part of the Community. The applicant was itself holder of a German trade mark covering the word sign 'INTERTOPS SPORTWETTEN' in respect of services within class 42. The respondent's Cancellation Division rejected the application on the ground that the Community trade mark in question was contrary neither to public policy nor to accepted principles of morality. The respondent's Board of Appeal dismissed the applicant's subsequent appeal against that decision. Thereafter, the applicant applied to the Court of First Instance of the European Communities seeking annulment of the contested decision, and a declaration that the Community trade mark in question was invalid.

The applicant alleged that the contested decision infringed art 51 of the regulation, read together with art 7(1)(f) and (2) of that regulation. It submitted that the legislation of numerous member states, in particular that of Germany, provided that only undertakings licensed by the national authorities in their respective territories were authorised to offer the services in question, and that since the intervener did not hold a licence to offer betting services in Germany, it was not authorised to offer those services or to advertise them. The intervener itself admitted, in a number of cases in Germany, that it would not obtain such a licence there. The applicant therefore contended that it followed that the Community trade mark in question was contrary to public policy or to accepted principles of morality in Germany and in other member states within the meaning of art 7(1)(f) of the regulation.

The court ruled:

In an application for a declaration of invalidity, it was the trade mark itself, namely the sign in relation to the goods or services as they appeared upon registration of the trade mark, which was to be assessed in order to determine whether it was contrary to public policy or accepted principles of morality. Article 7(1) of the regulation referred to the intrinsic qualities of the mark applied for and not to the circumstances relating to the conduct of the person applying for the trade mark.

In the instant case, the fact that the intervener was not authorised in Germany to offer the services in question or to advertise them in no way meant that the Community trade mark in question was contrary to art 7(1)(f) of the regulation. That fact was not relevant to the application of art 7(1)(f), and therefore could not have the effect of rendering the trade mark itself contrary to public policy or to accepted principles of morality.

There was, accordingly, no ground upon which the contested decision should be annulled, and it followed that there was no need to adjudicate on the application for a declaration of invalidity.

Case annotations in other services: *Sportwetten GmbH Gera v Office for Harmonisation in the Internal Market (Trade Marks and Designs)* (Case T-140/02) [2005] All ER (D) 72 (Sep)
Legislative annotations in other services: Council Reg 40/94/EC, arts 7(1)(f), 7(2), 51

B AND ANOTHER V UNITED KINGDOM (APP NO 36536/02) (ECHR) – marriage

Cite: BLD 1409053823
Court: European Court of Human Rights
Judge: Judge Casadevall (President), Judges Bratza, Bonello, Maruste, Pavlovschi, Garlicki and Borrego Borrego, and Mr M O'Boyle (Section Registrar)
Hearing date: 13 September 2005
Summary: *Human rights—Marriage—Whether prohibition on marriage between father-in-law and daughter-in-law violating right to marriage—European Convention on Human Rights, art 12.*

The first applicant and the second applicant were father-in-law and daughter-in-law. After each of their respective relationships ended in divorce a relationship developed between them. The first applicant wrote to the Superintendent Registrar of Deaths and Marriages at Warrington Register Office to inquire about whether he could marry the second applicant. The registrar stated that such a marriage was prohibited under the Marriage Act 1949 as amended by the Marriage (Prohibited Degrees of Relationship) Act 1986 unless both their former partners were dead. The only other way for such a marriage to be permitted was by a personal Act of Parliament. The applicants complained to the European Court of Human Rights alleging a violation of their right to marry, assured by art 12 of the European Convention on Human Rights.

The court ruled:

The inconsistency between the stated aims for preventing the applicants from marrying and the waiver applied in some cases undermined the rationality and logic of the measure. Furthermore, there was no indication of any detailed investigation into family circumstances in the Parliamentary procedure and, in any event, a cumbersome and expensive vetting process of that kind would not offer a practically accessible or effective mechanism for individuals to vindicate their rights. In the circumstances, there had been a violation of art 12 of the Convention.

Case annotations in other services: *B and another v United Kingdom* (App No 36536/02) [2005] All ER (D) 63 (Sep)
Legislative annotations in other services: European Convention on Human Rights, art 12

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SIVANANDAN V ENFIELD LONDON BOROUGH COUNCIL – employment tribunals

Cite: BLD 1309053814
Court: Employment Appeal Tribunal
Judge: Judge Peter Clark
Hearing date: 12 September 2005
Summary: *Employment tribunal—Striking out—Abuse of process—Re-litigation of same issue—Tribunal chairman permitting applicant to bring fresh proceedings—Whether chairman erring in law.*

Litigation between the parties began in March 1997. The applicant complained of sex and race discrimination, unfair dismissal, victimisation and breach of contract. On 21 November 1997, the employment tribunal dismissed the applicant's first proceedings. The applicant commenced further proceedings in the tribunal and in the High Court. The High Court action came to an end in January 2005, whereby it stood dismissed ([2005] All ER (D) 169 (Jan)). The instant proceedings arose out of a decision of a tribunal chairman to refuse the appellant authority's application to strike out part of a claim made by the applicant. The authority appealed.

The authority contended that the chairman should not have permitted the applicant to bring fresh tribunal proceedings raising a complaint that was, or should have been, raised in earlier tribunal proceedings that had been struck out.

The appeal would be allowed.

The applicant's complaint was an abuse of process and would be struck out as an attempt to re-litigate a decided issue. The applicant's complaint was, or should have been, raised in an earlier complaint that had been struck out.

Case annotations in other services: *Sivanandan v Enfield London Borough Council* [2005] All ER (D) 169 (Jan), [2005] EWCA Civ 10; *Sivanandan v Enfield London Borough Council* [2005] All ER (D) 57 (Sep)

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REPUBLIC OF ECUADOR V OCCIDENTAL EXPLORATION AND PRODUCTION COMPANY (CA) – arbitration and dispute resolution

Cite: BLD 1209053805; [2005] EWCA Civ 1116
Court: Court of Appeal, Civil Division
Judge: Lord Phillips MR, Clarke and Mance LJJ
Hearing date: 9 September 2005
Summary: *Arbitration—Agreement—Jurisdiction of court—Arbitration pursuant to bilateral investment treaty between states—Whether court having supervisory jurisdiction over arbitration between state and commercial party*

In 1993, Ecuador entered into a bilateral investment treaty (BIT) with the United States, which was intended to provide a defined and agreed basis for economic co-operation and investment. The defendant was a Californian corporation which had been engaged in the exploration of oil in Ecuador since 1985. Under a contract of May 1999 between the defendant and a state owned corporation of Ecuador, the defendant obtained the exclusive right to carry out hydrocarbon exploration and exploitation in a region of the Ecuadorian Amazon basin. The scheme of the contract was that the defendant assumed virtually all the costs of its exploration and exploitation activities. In return, it received a percentage of the oil produced which it was able to export. The formula which determined the percentage to which the defendant was entitled was known as 'factor x'. Until August 2001, the defendant claimed and was paid a refund on all VAT payments made when purchasing goods and services in Ecuador. On that date, however, a resolution was passed by the Ecuadorian revenue service which denied the defendant's claims for reimbursements. Subsequent resolutions were made to the same effect and also seeking repayment of VAT refunds already made. The defendant issued proceedings in Ecuador objecting to the resolutions. In 2002, it invoked the arbitration procedures provided for in the BIT and started an arbitration against Ecuador , alleging that the resolutions were a breach of Ecuador' s treaty and public international law obligations under the BIT. Ecuador objected to the tribunal's jurisdiction on the grounds (i) that the defendant had previously issued proceedings in the Ecuadorian courts and had thereby submitted to the jurisdiction of those courts; (ii) in any event, the claims were precluded by the BIT; and (iii) the claim was unarguable. The tribunal held that it had jurisdiction and went on to rule that the defendant was entitled to VAT refunds up to December 2003, together with interest. Ecuador applied to challenge the award under s 67(1) of the Arbitration Act 1996, on the ground that the arbitrators had exceeded their jurisdiction. The defendant issued a cross-examination, alleging that Ecuador's challenge to the award required the court to interpret provisions of an international treaty between two foreign states (ie the BIT), and contended that such a task of interpretation was not justiciable. That point was ordered to be tried as a preliminary issue. The defendant argued, inter alia, that if the court had to decide the merits of Ecuador' s s 67 challenge, it would involve a complete rehearing of the issues. The judge would have to interpret the BIT, rule on its scope, effect and application and so determine the jurisdiction of the arbitrators. That would be done in the absence of representation of the United States, which was one of the parties to the BIT. In those circumstances, the issue was non-justiciable. Ecuador argued that the two state parties to the BIT had expressly agreed that disputes between an investor and a state party to the BIT could be determined by arbitration proceedings in states that were party to the New York Convention 1958.

The judge ruled that the doctrine of non-justiciability did not prevent the court from entertaining Ecuador's application to challenge the substantial jurisdiction of the tribunal under s 67 of the 1996 Act. The defendant appealed.

The appeal would be dismissed.

Case annotations in other services: *Republic of Ecuador v Occidental Exploration and Production Company* [2005] All ER (D) 06 (May); *Republic of Ecuador v Occidental Exploration and Production Company* [2005] All ER (D) 48 (Sep), [2005] EWCA Civ 1116
Legislative annotations in other services: Arbitration Act 1996, ss 66, 67(1)

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FEA AND ANOTHER V ROBERTS – limitation of actions

Cite: BLD 1509053829
Court: Chancery Division
Judge: Hazel Williamson QC sitting as a deputy judge of the High Court
Hearing date: 9 September 2005
Summary: *Limitation of action—Postponement of limitation period—Action for relief from consequences of mistake—Executors of will paying beneficiary's interest to wrong person—Solicitor to executor admitting carelessness in transaction—Whether mistake could have been discovered earlier with due diligence—Limitation Act 1980, s 32(2)(c)*

The claimants were the executors of a will under which a party with a similar name to that of the defendant was a beneficiary. However, that party's interest in the deceased's estate was paid over to the defendant. More than six years after the payment of most of shares and monies concerned, the claimants brought proceedings for recovery.

The defendant asserted defences of limitation, estoppel and, so far as the claim was one in restitution, change of position. In relation to limitation, the claimants relied on s 32(2)(c) of the Limitation Act 1980 to extend time on the basis that, with due diligence, the mistake could not have been discovered sooner than it was. The defendant replied that the mistake could have been discovered sooner because the solicitor to the claimants who had handled the transaction had admitted carelessness in taking no steps to confirm the identity of the defendant.

In relation to the defences of estoppel and change of position, issues arose, respectively, as to whether the defendant had relied on representations that the inheritance was his in good faith, and whether it would not be unconscionable for him to retain the inheritance because he had changed his position, in good faith, on the basis of his entitlement thereto.

The court ruled:

(1) Section 32(2)(c) of the 1980 Act was concerned only with a failure to exercise due diligence, which would have led to the discovery of the relevant mistake, that occurred after the accrual of the cause of action. There was no question of time running at all before the cause of action arose and, since a cause of action for money paid under a mistake accrued regardless of whether the mistake had been made carelessly, it would be illogical for that fact then to affect limitation. Accordingly, the limitation defence would be rejected.

Scottish Equitable plc v Derby [2001] 3 All ER 181 applied.

(2) In all the circumstances, the defendant had not acted in good faith for the purposes of the change of position defence, nor had he relied on the representations that he was entitled to the inheritance in good faith.

On the evidence, the defendant had appreciated that there were unexplained and inexplicable features of the gift apparently being offered, and that their significance, namely that the gift might well not have been intended for him, was not entirely lost on him.

Case annotations in other services: *Scottish Equitable plc v Derby* [2001] 3 All ER 181; *Fea and another v Roberts* [2005] All ER (D) 69 (Sep)
Legislative annotations in other services: Limitation Act 1980, s 32(2)(c)

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STATUTORY INSTRUMENTS (SIs)

CIVIL PROCEDURE (AMENDMENT NO 3) RULES 2005

Number: SI 2005/2292
Enabling power: Civil Procedure Act 1997, s2
Commencement: As specified
Legislation affected: Civil Procedure Rules 1998, SI 1998/3132 amended

Summary: Amend SI 1998/3132 so as to add various new provisions. It comes into force partly on 6 April 2006; partly on 21 October 2005; and fully on 1 October 2005.
Legislative annotations in other services: Civil Procedure Act 1997, s 2; Civil Procedure Rules 1998, SI 1998/3132; Civil Procedure (Amendment No 3) Rules 2005, SI 2005/2292.

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INTERNATIONAL CARRIAGE OF DANGEROUS GOODS BY ROAD (FEES) (AMENDMENT) REGULATIONS 2005

Number: SI 2005/2456
Enabling power: Finance Act 1973, s 56(1), (2); Department of Transport (Fees) Order 1988, SI 1988/643
Commencement: 30 September 2005
Legislation affected: International Carriage of Dangerous Goods by Road (Fees) Regulations 1988, SI 1988/370 amended

Summary: Amend SI 1988/370 so as to make increases to the fees prescribed where an ADR certificate is applied for.
Legislative annotations in other services: Finance Act 1973, s 56(1), (2); Department of Transport (Fees) Order 1988, SI 1988/643; International Carriage of Dangerous Goods by Road (Fees) Regulations 1988, SI 1988/370; International Carriage of Dangerous Goods by Road (Fees) (Amendment) Regulations 2005, SI 2005/2456.

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SEMINARS, CONFERENCES AND EVENTS

CIVIL LITIGATION SECTION ANNUAL CONFERENCE 2005

Date: Wednesday, 9 November
Location: Renaissance Chancery Court, London
Cost: from £120 + VAT
CPD: 5.5 hours

Summary: The Section's inaugural annual conference will include a keynote address by the Lord Chancellor, with other speakers including Lord Justice Neuberger, District Judge Suzanne Burn, Tony Girling, Janet Paraskeva and Tim Wallis. The event will focus on major issues likely to affect you and your practice. Topics to be discussed will include funding, court structure, technology, procedural reform, costs and Alternative Dispute Resolution (ADR).

Information: email litigationsection@lawsociety.org.uk or call 020 7320 5873

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CIVIL LITIGATION SECTION REGIONAL FOCUS GROUPS

Date: October
Cost: free for members
CPD: 1.5 hours

Summary: The events are designed to give allow practitioners to have their say about major policy issues and contribute to shaping the future of litigation while having the unique opportunity to define key questions to pose to the Lord Chancellor and issues to discuss during the Section's annual conference on 9th November in London. Members of the Civil Litigation Section Executive Committee will be moderating the events. Topics to be discussed will include funding, court structure, technology, procedural reform, costs and Alternative Dispute Resolution (ADR).

The events will be held as follows:

Location	Date	Time
Leicester	4 October	5-6.30pm
London	5 October	5.30-7pm
Liverpool	6 October	5-6.30pm
Bristol	11 October	6-7.30pm
Newcastle	11 October	5-6.30pm
Cardiff	13 October	5.30-7pm

Information: email litigationsection@lawsociety.org.uk or call 020 7320 5873

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CROSS BORDER DISPUTE RESOLUTION – HOW TO…?

Date: Monday, 17 October
Location: The Law Society, London

Summary: The conference will mark EU Civil Justice Day. Expert practitioners will discuss how to bring a claim in a cross border case under existing procedures and how to seek enforcement of a judgment abroad. The European civil procedure proposals due to be effective as of next year will also be discussed.

Keynote speakers include Diana Wallis MEP and Jonathan Faull, Director General of the European Commission's Freedom, Security and Justice Directorate.

Information: email julia.bateman@lawsociety.org.uk

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MEDIATION WEEK

Cost: free
CPD: 2 hours

Summary: The Law Society has teamed up with the Department for Constitutional Affairs (DCA) to raise awareness about mediation. The Mediation Week seminars are aimed at civil litigators and family solicitors and will be held as follows:

Date	Location
17 October	London
19 October	Bristol
20 October	Cardiff
20 October	Leeds
2 November	Leicester

Information: email ashmita.shah@lawsociety.org.uk

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FAMILY LAW UPDATE

Date: Tuesday, 4 October
Location: central London
Cost: £399 + VAT

Summary: This annual conference will give you the knowledge and insight that you need to help ensure your success in current and future cases. Butterworths Family Law Service brings together an authoritative speaker panel to explore key developments that will affect you in 2005, and will examine the topical cases that have dictated change.

Information: LexisNexis Butterworths or telephone 020 7347 3500

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