

ZUCKERMAN ON CIVIL PROCEDURE

PRINCIPLES OF PRACTICE

FIFTH EDITION

Sweet & Maxwell



TABLE OF CONTENTS

<i>Foreword</i>	vii
<i>Preface to the Fifth Edition</i>	xi
<i>Preface to the First Edition</i>	xv
<i>Table of Cases</i>	xliii
<i>Table of Statutes</i>	ccxxxvii
<i>Table of Practice Directions</i>	ccxlvii
<i>Table of Statutory Instruments</i>	ccxlix

CHAPTER 1

1 OVERRIDING OBJECTIVE

Revised by Juliet Wells

INTRODUCTION	1.1
DEFECTS OF THE PRE-CPR SYSTEM	1.5
Introduction	1.5
The emergence of the justice on the merits approach—a reaction against formalism	1.8
The court's approach under the RSC undermined the authority of rules and court orders	1.17
The court's limited case management role under the RSC	1.21
The problem of party control of the litigation process	1.23
THE CIVIL COURT PROVIDES A PUBLIC SERVICE OF ENFORCING CIVIL RIGHTS	1.26
The function of the civil court	1.26
A public service requires management	1.29
THE OVERRIDING OBJECTIVE—INTEGRATING JUSTICE AND MANAGEMENT	1.34
A multi-dimensional concept of justice	1.34
COMPONENTS OF THE OVERRIDING OBJECTIVE	1.41
The imperative of ascertaining the truth	1.43
Procedural fairness	1.45
Timely resolution	1.50
The right to adjudication within a reasonable time under ECHR art.6	1.52
Proportionality	1.59
The overriding objective—a matter of compromise	1.70
COURT'S DUTY TO FURTHER THE OVERRIDING OBJECTIVE	1.72
The overriding objective as a tool of interpretation	1.73
Case management objectives and powers—overview	1.75
THE PARTIES' DUTY TO FURTHER THE OVERRIDING OBJECTIVE	1.92
The duty to assist the court	1.92
The duty of the parties to co-operate with each other	1.94
Pre-action protocols	1.101
PROMOTING SETTLEMENT	1.111
Encouraging and directing alternative dispute resolution	1.112
Economic incentives for settlement	1.117

CHAPTER 2

2 RULE-MAKING AND PRECEDENT

Revised by John Sorabji

INTRODUCTION	2.1
THE CIVIL PROCEDURE RULES 1998	2.2
The legal standing of the CPR	2.2
The CPRC and the rule-making process	2.4
The scope of the rule-making power	2.8
Rules of court affecting the law of evidence	2.12
THE COURT'S INHERENT JURISDICTION TO REGULATE PRACTICE AND PROCEDURE	2.16
The jurisdiction to make practice directions following the CPA 1997	2.17
The power to issue rules and guidance outside the CPA 1997 and the Constitutional Reform Act 2005	2.31
The power to deviate from rules and practice directions in giving case management directions	2.48
THE ROLE OF PRECEDENTS IN PROCEDURAL DECISION-MAKING	2.53
“A new procedural code”—relevance of pre-CPR precedents	2.53
The role of CPR precedents	2.58
THE ONLINE PROCEDURE RULES	2.63

CHAPTER 3

3 FAIR TRIAL

Revised by Juliet Wells

INTRODUCTION	3.1
THE ROLE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS	3.2
The Human Rights Act 1998	3.2
Interpreting the CPR in the light of human rights	3.5
THE RIGHT OF ACCESS TO JUSTICE	3.21
The general principle	3.21
Access to court limited by rules	3.28
Access to court as a consideration in deciding forum	3.34
Waiver of the right of access to court	3.35
Vexatious litigants	3.40
Children and protected parties	3.49
Abuse of process	3.55
THE RIGHT TO AN INDEPENDENT AND IMPARTIAL TRIBUNAL	3.56
The general principles	3.56
Disclosure of possible grounds of bias and waiver of objection .	3.59
Disqualification for bias, actual or apprehended	3.64
Disqualification for interest	3.94
Judicial independence	3.103
THE PRINCIPLE OF PUBLICITY AND THE RIGHT TO A PUBLIC HEARING	3.107
The general principle	3.107
Derogations from the general principle	3.113

CONTENTS

The implications of the publicity principle	3.117
Hearings in private	3.123
Postponing reporting of proceedings	3.135
Restrictions on reporting of proceedings held in private	3.136
Anonymity orders	3.138
EQUALITY BEFORE THE LAW	3.154
The general principle	3.154
Minimising the consequences of resource inequality	3.159
Justified departures from the principle of equality	3.168
THE RIGHT TO REPRESENTATION IN LITIGATION	3.170
The right to self-representation and to legal representation	3.170
Representation by a McKenzie Friend	3.174
THE RIGHT TO BE HEARD	3.177
The general principle	3.177
Exceptions to the right to be heard—general requirements	3.186
Proceedings without notice	3.188
Partial denial of access to evidence or information	3.190
Holding a trial in absentia	3.193
Right to participation in non-adversarial proceedings	3.194
COURT ASSISTANCE TO SECURE EVIDENCE	3.203
Compulsory testimonial obligations	3.208
The obligation to testify truthfully	3.210
Witness immunity from suit	3.211
Exceptions	3.215
THE RIGHT TO A REASONED DECISION	3.216

CHAPTER 4

4 COMMENCEMENT

Revised by Olivia Morris

INTRODUCTION	4.1
COURT OF COMMENCEMENT	4.7
THE CLAIM FORM	4.13
Standard commencement process	4.13
Non-standard methods of commencement	4.16
Time of issue of the claim form	4.17
Issuing by electronic means	4.28
Fixed date and other claims	4.31
Damages Claims Pilot	4.32
Contents of the claim form	4.33
COUNTERCLAIMS AND OTHER ADDITIONAL CLAIMS	4.42
Introduction	4.42
Counterclaims	4.49
Set-off	4.55
Claims for contribution and indemnity	4.57
The court's power to refuse to deal with an additional claim in the main proceedings	4.60
Consequence of failure to respond to Part 20 claims	4.61
ALTERNATIVE PROCEDURE—CPR 8 CLAIMS	4.63
JUDICIAL REVIEW	4.69

CHAPTER 5

5 SERVICE

Revised by Samuel Walpole and Maura McIntosh

INTRODUCTION—THE FUNCTIONS OF THE SERVICE RULES	5.1
Notification—a fundamental requirement of justice	5.1
Provisions for meeting deadlines—the imperative of certainty ..	5.3
THE RULES OF SERVICE—PRELIMINARY MATTERS	5.13
Scope of the rules of service	5.13
Filing	5.14
SERVICE OF THE CLAIM FORM—WHAT MUST BE SERVED	5.17
Service must be intentional and unambiguous	5.17
Service of the original claim form or a sealed copy	5.19
SERVICE OF THE CLAIM FORM—BY WHOM	5.26
SERVICE OF THE CLAIM FORM—HOW, ON WHOM AND WHERE	5.28
Introduction	5.28
How to serve the claim form	5.29
Who must be served—service on the defendant’s solicitor under CPR 6.7	5.36
Where the claim form must be served	5.43
Service on particular individuals and entities	5.67
CERTIFICATE OF SERVICE, DEEMED SERVICE AND DEFAULT JUDGMENT	5.72
Certificate of service	5.72
Deemed service	5.73
Deemed service—and default judgment	5.78
EXTENDING THE PERIOD FOR SERVICE OF THE CLAIM FORM	5.90
Applications for extension after the expiry of the period for service of the claim form	5.94
Application for extension before the expiry of the period for service of the claim form	5.98
No escaping the requirements of CPR 7.6 via CPR 3	5.108
Procedure for applying to extend time for service	5.110
SERVICE OF THE CLAIM FORM BY AN ALTERNATIVE METHOD—CPR 6.15	5.115
Grounds for permitting service by alternative method—CPR 6.15(1)	5.117
Validating steps already taken—CPR 6.15(2)	5.122
Service on persons unknown under CPR 6.15(1)	5.131
Procedure for making an application under CPR 6.15	5.143
DISPENSING WITH SERVICE OF THE CLAIM FORM	5.145
DEFENDANT’S APPLICATION TO ACCELERATE SERVICE OF CLAIM FORM	5.155
SERVICE OF DOCUMENTS OTHER THAN THE CLAIM FORM	5.158
Service of other documents—by whom	5.159
Service of other documents—on whom, how and where	5.160
Service of other documents—on minors and protected parties ...	5.167
Deemed service of other documents	5.168
Service of other documents—alternative service and dispensing with service	5.170
Service of other documents—certificate of service	5.171
SERVICE OUT OF THE JURISDICTION	5.172
Law governing jurisdiction and service out of the jurisdiction ...	5.172

CONTENTS

Service out of the jurisdiction without need for court permission	5.181
Service out of the jurisdiction requiring court permission	5.185
Application procedure for permission to serve out of the jurisdiction	5.191
Method of service	5.196
Period for service	5.200
The power to cure defects	5.201
Responding to a claim served outside the jurisdiction	5.202
Judgment in default of response to service out of the jurisdiction	5.204
Disputing the jurisdiction	5.208
Staying proceedings in England on the grounds of forum non conveniens	5.213
Restraining foreign proceedings	5.217
SERVICE ON A FOREIGN STATE	5.220

CHAPTER 6

6 DEFENDANT'S RESPONSE

Revised by Olivia Morris

INTRODUCTION	6.1
ACKNOWLEDGMENT OF SERVICE	6.2
ADMISSIONS	6.7
The purpose of the admission procedure—early closure	6.7
Admissions made after commencement	6.13
Pre-action admissions	6.22
Withdrawal of admission	6.24
DISPUTING THE COURT'S JURISDICTION	6.41

CHAPTER 7

7 STATEMENTS OF CASE

Revised by John Lidbetter

INTRODUCTION	7.1
Functions of statements of case	7.1
Issues of content common to all statements of case	7.6
PARTICULARS OF CLAIM	7.16
General requirements	7.16
Content of the particulars of claim	7.17
DEFENCE	7.21
Filing a defence	7.21
Service of the defence	7.25
Content of the defence	7.26
REPLY AND FURTHER STATEMENTS OF CASE	7.31
FURTHER INFORMATION	7.34
AMENDMENTS—GENERAL PRINCIPLES	7.47
The pre-CPR approach to applications to amend	7.51
General approach to applications to amend under the CPR	7.52

Late applications to amend	7.59
Amendments after the expiry of the limitation period	7.63
CPR 17.4—Adding or substituting a new claim, correcting a mistake as to the name of a party, or altering capacity, after expiry of the limitation period	7.82
Introduction—questions of fact and of law	7.82
Newness and sameness	7.86
Correcting the name of a party	7.100
Altering the capacity of a party	7.104
CPR 19.6—ADDING OR SUBSTITUTING A PARTY AFTER THE EXPIRY OF THE LIMITATION PERIOD	7.105
The basic conditions	7.105
POWER TO DISPENSE WITH STATEMENTS OF CASE	7.125
VERIFICATION OF STATEMENTS OF CASE BY STATEMENT OF TRUTH	7.126
Documents that need to be verified	7.126
Nature of statement of truth	7.127
Persons required to sign the statement of truth	7.129
Verified statements of case as evidence	7.131
Failure to verify a statement of case	7.132
False statements of truth—proceedings for contempt of court	7.133

CHAPTER 8

8 INTERIM APPLICATIONS

Revised by John Lidbetter

INTRODUCTION	8.1
THE PROCEDURE FOR MAKING AN APPLICATION	8.5
Time and place for making an application	8.5
The application notice	8.7
Evidence in support of an application	8.10
APPLICATIONS MADE WITH NOTICE	8.11
DISPOSING OF APPLICATIONS WITH OR WITHOUT A HEARING	8.16
The decision whether to hold a hearing	8.16
Disposing of an application at a hearing	8.21
Challenging an order made without a hearing	8.22
Disposing of an application where a party fails to attend	8.26
Dismissing an application as totally without merit	8.29
APPLICATIONS MADE WITHOUT NOTICE	8.30
Types of without-notice applications	8.32
Safeguarding the respondent's rights	8.37
Procedure	8.43
Application to set aside or vary a without-notice order	8.44

CHAPTER 9

9 DISPOSAL WITHOUT TRIAL

Revised by Harry Stratton

INTRODUCTION	9.1
DEFAULT JUDGMENT	9.3

CONTENTS

General principles	9.3
Obtaining a default judgment	9.10
Setting aside a default judgment	9.25
STRIKING OUT A STATEMENT OF CASE WHICH DISCLOSES NO REASONABLE CLAIM OR DEFENCE	9.46
SUMMARY JUDGMENT	9.54
General principles	9.54
Scope of the summary judgment procedure	9.56
Grounds for summary judgment	9.60
Time for application	9.72
Summary judgment procedure	9.75
The court's powers at the summary judgment hearing	9.77
The relationship between striking out under CPR 3.4(2)(a) and summary judgment under CPR 24	9.85
Summary adjudication in defamation proceedings under the Defamation Act 1996: essentially defunct	9.90

CHAPTER 10

10 INTERIM REMEDIES

Revised by Christopher Stackpoole

RANGE OF INTERIM REMEDIES	10.1
NATURE AND JUSTIFICATION OF INTERIM INJUNCTIVE RELIEF	10.7
Basic features	10.7
Judicial discretion	10.9
The dilemma of interim relief	10.12
The approach to the dilemma—minimising harm	10.15
PRINCIPLES GOVERNING THE GRANT OF INTERIM INJUNCTIONS	10.16
Preservation of the status quo—an illusory quest	10.16
The balance of justice—likelihood of success and magnitude of harm	10.26
The requirement of irreparable harm	10.51
Harm which cannot be remedied by damages	10.55
Harm which the court is uncertain will be remedied by damages	10.60
Irreparable harm—the problem of comparison	10.69
Impecuniosity in the balance of justice	10.77
Relevance of human rights in the balance of justice	10.81
Public interest	10.82
APPLICATIONS FOR INTERIM INJUNCTIONS TO RESTRAIN PUBLICATION	10.88
The right to freedom of expression dimension	10.88
Effect of the Human Rights Act 1998	10.90
The Cream Holdings threshold test	10.95
Balancing of competing ECHR rights	10.99
Super-injunctions	10.108
Anonymity orders	10.114
Interim injunctions to restrain publication in defamation cases—the rule in <i>Bonnard v Perryman</i>	10.125
MANDATORY INTERIM INJUNCTIONS	10.128
RESPONDENT'S UNDERTAKING AS A SUBSTITUTE FOR AN INJUNCTION	10.136

APPLICANT'S UNDERTAKING AS TO DAMAGES	10.141
The entitlement to an undertaking in damages	10.141
Fortifying the undertaking	10.156
Dispensing with the undertaking in damages in law enforcement proceedings	10.162
Enforcement of the undertaking	10.178
The measure of compensation	10.186
The timing of the decision to enforce the undertaking	10.201
DURATION OF INTERIM INJUNCTIONS	10.204
INTERIM INJUNCTION WHERE THERE IS NO CAUSE OF ACTION ENFORCEABLE IN ENGLAND	10.207
PROCEDURE FOR APPLYING FOR AN INTERIM INJUNCTION	10.213
General requirements	10.213
Without-notice injunctions	10.216
SECURITY FOR COSTS	10.243
Introduction	10.243
Security for costs as a measure against evasion under CPR 25 ...	10.252
Security for costs against claimants resident outside the jurisdiction under CPR 25	10.254
Security for costs against companies	10.259
Security for costs against nominal claimants	10.269
Security for costs against claimants who have taken steps to make it difficult to enforce a costs order	10.273
Order of security for costs against a non-party under CPR 25.28	10.274
Security for costs outside CPR 25	10.275
INTERIM PAYMENT	10.282
Purpose of the procedure	10.282
Situations in which interim payment orders may be made	10.283
The test to be satisfied where the defendant's liability is still to be determined	10.285
Amount of interim payment	10.291
Procedure	10.295

CHAPTER 11

11 FREEZING INJUNCTIONS

Revised by Paul McGrath K.C.

GENERAL PRINCIPLES	11.1
Freezing Orders Distinguished from American Cyanamid Injunctions	11.9
Freezing Orders Distinguished from Proprietary Injunctions	11.12
Application for a Freezing Injunction	11.15
Criteria for Obtaining a Freezing Injunction	11.22
Worldwide Freezing Orders	11.60
Notification Order	11.67
Disclosure in aid of a Freezing Order	11.68
Assets which can fall within a freezing order	11.74
Effect of a Freezing Order	11.100
Safeguards To Protect Defendants	11.105

Ancillary and Related Orders	11.116
------------------------------------	--------

CHAPTER 12

12 CASE MANAGEMENT & ENFORCING PARTY COMPLIANCE

Revised by John-Patrick Asimakis and Juliet Wells

Part I—Techniques for Case Management	12.1
INTRODUCTION	12.1
CASE MANAGEMENT, PARTY AUTONOMY AND THE ADVERSARIAL SYSTEM	12.5
The civil court provides a public service which requires management	12.5
The impact of active case management on the adversarial system	12.7
USE OF TECHNOLOGY IN CASE MANAGEMENT	12.29
CASE MANAGEMENT OBJECTIVES AND POWERS	12.32
Two phases of dispute management	12.32
Case management objectives	12.33
Case management powers	12.36
CONDITIONAL AND UNLESS ORDERS AS A CASE MANAGEMENT TOOL	12.73
Conditional orders	12.77
Unless orders	12.85
THE CPR SYSTEM OF TRACKS	12.90
Introduction	12.90
The Four Procedural Tracks	12.95
Track Allocation and Assignment to Complexity Bands	12.108
Procedure for Allocation and Assignment	12.122
Procedure on the Four Tracks	12.133
SHORTER AND FLEXIBLE TRIALS SCHEMES	12.163
Shorter Trials Scheme	12.164
Flexible Trials Scheme	12.171
Part II—Enforcing Party Compliance	12.176
INTRODUCTION	12.176
CONSEQUENCES OF FAILURE TO COMPLY WITH PROCESS REQUIREMENTS	12.182
Pre-determined consequences take effect automatically, subject to relief from sanctions	12.183
Obtaining judgment following automatic strike-out ...	12.186
Consequences determinable after the default	12.191
Power to rectify procedural error	12.194
DISCRETIONARY RELIEF FROM THE CONSEQUENCES OF PARTY DEFAULT	12.196
Power to grant relief from sanctions on the court's own initiative	12.196
Scope of CPR 3.9	12.197
Proportionality, the right to fair trial and discretion in enforcing rules and orders	12.206
The defects of the old CPR 3.9 and reform in 2013 ...	12.213
The implementation of the revised CPR 3.9	12.222
Particular issues arising in applications under CPR	

3.9	12.237
COSTS CONSEQUENCES OF NON-COMPLIANCE	12.249
STRIKING OUT FOR ABUSE OF PROCESS	12.250
Introduction	12.250
General principles governing the exercise of the jurisdiction	12.253
Private and public dimensions of abuse of process	12.261
Founding abuse on disruptive consequences	12.263
Abuse resting on improper motive	12.265
Wholesale disregard of the rules	12.267
Abuse where fresh proceedings are brought following strike-out	12.279
Consequences following abuse of process	12.285
Tort of abuse of process	12.287
Tort of malicious prosecution of civil proceedings	12.290
COURT RESPONSE TO FRAUDULENT CLAIMS	12.292
Power to strike out fraudulent claims as abuse of process	12.292
Dismissal for fundamental dishonesty under statute ...	12.305
CONTEMPT INAPPROPRIATE FOR PUNISHING PROCEDURAL DEFAULT	12.312
Process duties compellable by contempt	12.315

CHAPTER 13

13 JOINING CLAIMS AND PARTIES

Revised by Andrew Higgins and Aoife Hogan

INTRODUCTION	13.1
ADDITION AND SUBSTITUTION OF PARTIES	13.5
General principles	13.5
Adding or substituting a party after the expiry of the limitation period	13.12
CONSOLIDATING AND TRYING TOGETHER DIFFERENT PROCEEDINGS	13.13
DERIVATIVE CLAIMS	13.15
Procedure to be followed in bringing a derivative claim	13.21
Legal professional privilege and derivative claims	13.27
COLLECTIVE REDRESS	13.29
Introduction	13.29
The representative action	13.35
Group Litigation	13.55
Collective Proceedings	13.83
Litigation funding	13.124
Litigation strategy & conflicts of interest	13.133

CHAPTER 14

14 DISCONTINUANCE AND STAYS

Revised by Harry Stratton

DISCONTINUANCE UNDER CPR 38	14.1
-----------------------------------	------

Introduction	14.1
How a claim is discontinued	14.7
When discontinuance requires court permission or party consent	14.8
Costs consequences of discontinuance	14.12
Setting aside discontinuance	14.28
Renewing the claim after discontinuance	14.31
STAY OF PROCEEDINGS	14.33
Jurisdiction to stay proceedings	14.33
The nature of a stay of proceedings	14.34
Stay distinguished from adjournment of a hearing or extension of deadlines	14.37
The wide-ranging uses of the power to stay	14.38

CHAPTER 15

15 DISCLOSURE

Revised by Jerome Squires

INTRODUCTION	15.1
The aims of the disclosure process	15.1
The problem of excessive disclosure and attempts at reform	15.5
Two disclosure regimes	15.12
DISCLOSURE UNDER PD 57AD	15.18
Application of PD 57AD	15.18
Duties of parties and their representatives	15.19
Initial disclosure	15.31
Extended disclosure	15.36
Production of documents and the right to withhold production ..	15.51
Copies of documents referred to in evidence	15.56
Disclosure review document	15.59
DISCLOSURE AND INSPECTION UNDER CPR 31	15.62
Disclosure	15.63
Inspection	15.94
Failure to give disclosure or inspection	15.106
Specific disclosure or inspection	15.108
E-DISCLOSURE	15.114
INADVERTENT DISCLOSURE OF PRIVILEGED DOCUMENTS	15.124
The general rule	15.124
Inadvertent disclosure of documents subject to public interest immunity	15.128
LIMITING DISCLOSURE IN ORDER TO PROTECT OTHER INTERESTS	15.130
Respect for confidentiality and privacy	15.132
Protection of journalistic sources of information	15.142
Protection of parties' commercially sensitive information	15.155
PRE-ACTION DISCLOSURE	15.159
The jurisdiction to order pre-action disclosure	15.159
The tension between "fishing" and legitimate disclosure	15.164
The jurisdictional conditions	15.167
Discretion to order pre-action disclosure	15.174
Costs of pre-action disclosure	15.181

DISCLOSURE OBTAINABLE FROM NON-PARTIES	15.183
Witness summons to produce documents	15.186
Disclosure orders directed to non-parties	15.191
Pre-action order to disclose the identity of a wrongdoer or missing assets—the Norwich Pharmacal rule	15.203
SEARCH AND IMAGING ORDERS	15.221
Jurisdiction to make a search order	15.221
Grounds for making a search order	15.222
Imaging Orders	15.224
Search Orders: Protections and Requirements	15.225
Application procedure	15.229
The applicant's undertakings	15.231
Execution of a search order	15.233
The respondent's options on being served	15.238
SUBSEQUENT USE OF DISCLOSED DOCUMENTS	15.239
The general principle	15.239
Documents may only be used "for the purpose of the proceedings" in which they were disclosed	15.247
The three exceptions to the general rule	15.262
Use in civil proceedings of documents disclosed in criminal proceedings	15.274
Arbitration proceedings	15.276

CHAPTER 16

16 LEGAL PROFESSIONAL PRIVILEGE

Revised by Andrew Higgins

INTRODUCTION	16.1
THE BASIS FOR PROTECTION	16.7
Advice privilege founded on rule of law considerations	16.9
Litigation privilege dictated by the right to a fair trial	16.14
Justification for both limbs of privilege founded on empirical assumption	16.19
The common basis for advice privilege and litigation privilege—a need for a private and secure sphere for communicating with one's lawyer	16.24
PRIVILEGE—A RULE OF IMMUNITY AND INADMISSIBILITY	16.27
BOUNDARIES OF LEGAL PROFESSIONAL PRIVILEGE	16.41
LPP belongs to the client	16.41
Only confidential communications protected	16.42
The professional relationships to which privilege attaches	16.47
Legal advisers who qualify for advice privilege	16.56
Corporate clients	16.60
Scope of advice privilege	16.75
Litigation privilege for communications with non-parties	16.81
The dominant purpose test regarding communications with non-parties	16.84
Actual or reasonably anticipated litigation	16.89
The need for limited protection of communications with non-parties	16.93

Copies of unprivileged documents submitted to lawyers	16.99
Joint privilege, joint interest privilege and common interest privilege	16.103
Admissibility of privileged material that has escaped the confidential relationship	16.106
PRIVILEGE PROTECTS ONLY LEGITIMATE COMMUNICATIONS	16.117
WAIVER	16.124
The general principle	16.124
“Waiver” in litigation between client and lawyer	16.127
Applicability of privilege as between clients who retain a joint solicitor	16.132
Applicability of privilege as between a company and its shareholders	16.134
Waiver by means of reference to privileged material	16.135
Waiver in respect of part of a document or a transaction	16.137
LIMITED WAIVER	16.138
The general principle against limited waiver	16.138
Detailed assessment proceedings	16.139
Limited waiver in other contexts	16.142
EXCEPTIONS TO THE LPP RULE	16.152
LPP and case management powers	16.156
Statutory exceptions	16.157
PROCEDURE FOR CLAIMING AND CHALLENGING PRIVILEGE	16.160

CHAPTER 17

17 WITHOUT PREJUDICE

Revised by Adrian Zuckerman

INTRODUCTION	17.1
THE RATIONALE OF THE WITHOUT PREJUDICE RULE	17.3
THE REACH OF THE WITHOUT PREJUDICE RULE	17.12
Invoking the without prejudice rule	17.12
Without prejudice protection only available where litigation is contemplated or pending	17.16
Application to foreign proceedings	17.21
Statements made by and to non-parties	17.22
Use by non-parties of without prejudice statements	17.26
PRE-ACTION PROTOCOLS AND THE WITHOUT PREJUDICE RULE	17.33
WAIVER	17.36
EXCEPTIONS	17.39
Proof of an agreed settlement, its validity and its interpretation .	17.40
Misrepresentation, fraud and undue influence	17.48
Estoppel	17.49
Unambiguous impropriety	17.50
Explaining delay in the proceedings	17.53
Establishing reasonable conduct	17.54
Proof of bankruptcy	17.55
“Without prejudice except as to costs”	17.56
MATRIMONIAL AND PARENTAL CONCILIATION PRIVILEGE	17.60

CHAPTER 18

18 SELF-INCRIMINATION

Revised by Adrian Zuckerman

INTRODUCTION	18.1
SCOPE OF THE PRIVILEGE	18.4
“Tending” to incriminate	18.4
Incrimination of another	18.7
Claiming the privilege	18.8
APPLICATION OF THE PRIVILEGE TO DISCLOSURE AND PRODUCTION OF	
DOCUMENTS	18.10
STATUTORY EXCEPTIONS	18.17
Fraud Act 2006 s.13	18.19
Theft Act 1968 s.31	18.21
Intellectual property infringements	18.22
Insolvency proceedings	18.25
Childcare and family proceedings	18.27
CONTEMPT PROCEEDINGS IN AID OF DISCLOSURE	18.29
APPLICABILITY OF THE PRIVILEGE TO CORPORATIONS	18.32

CHAPTER 19

19 PUBLIC INTEREST IMMUNITY AND CLOSED MATERIAL PROCEDURE

Revised by Dane Luo

PUBLIC INTEREST IMMUNITY	19.1
Introduction	19.1
The priority of access to evidence	19.6
Three cardinal principles	19.8
Elements of the balancing exercise	19.11
Procedure for claiming PII	19.43
Waiver of a PII claim	19.56
CLOSED MATERIAL PROCEDURE	19.59
Introduction	19.59
CMP under the Justice and Security Act 2013	19.82
CMP denies due process	19.105

CHAPTER 20

20 WITNESS STATEMENTS

Revised by Patrick Hall

INTRODUCTION	20.1
Origins and purposes of witness statements	20.1
Problems with witness statements and attempts at reform	20.5
COURT DIRECTIONS ABOUT EXCHANGE OF TESTIMONIAL INFORMATION	20.10
The court’s powers	20.10
Exchange of testimonial information governed by court directions	20.11

Order in which statements are to be served	20.13
Filing and service of witness statements	20.14
MODE OF TESTIMONIAL INFORMATION—WITNESS STATEMENTS AND WITNESS	
SUMMARIES	20.15
Witness statements	20.16
Subject and content of witness statements	20.20
Witness summaries	20.21
Witness Statements in the Business & Property Courts	20.26
Changes to witness statements	20.33
FAILURE TO SERVE WITNESS STATEMENT OR SUMMARY	20.34
USE OF WITNESS STATEMENTS AT TRIAL	20.38
Witness statements as testimonial evidence	20.39
Failure to call the witness to testify	20.48
RESTRICTION ON OTHER USES OF WITNESS STATEMENTS	20.57
Witness statements limited to use for the purpose of the proceedings	20.57
Witness immunity from suit and contempt of court	20.60

CHAPTER 21

21 EXPERTS

Revised by John Sorabji

EXPERT EVIDENCE	21.1
Introduction	21.1
Admissibility of expert opinion evidence	21.3
Court to decide the weight to be given to expert testimony	21.14
Experts' duties	21.17
The court's power over expert evidence	21.34
Disclosure of expert reports and instructions	21.66
Single joint expert	21.80
Experts' liability in negligence and in disciplinary proceedings ..	21.96
Form and content of expert evidence	21.102
Concurrent expert evidence	21.105
Experts' fees	21.107
Pre-action protocols regarding the use of experts	21.110
ASSESSORS	21.116
Introduction	21.116
Appointment	21.118
Role	21.121

CHAPTER 22

22 TRIAL AND EVIDENCE

Revised by Patrick Hall

INTRODUCTION	22.1
TRIAL PREPARATIONS	22.11
Trial timetable	22.13
Statement of issues and case summary	22.20
Skeleton arguments	22.21

Chronologies	22.22
Bundles of documents	22.23
Citation of authorities	22.24
THE CONDUCT OF THE TRIAL	22.29
Court directs the conduct of the trial	22.29
Order of presentation	22.31
BURDEN AND STANDARD OF PROOF	22.35
Burden of proof	22.35
Standard of proof	22.50
Presumptions	22.58
No case to answer	22.70
ADMISSIBILITY	22.76
Relevance	22.77
Exclusionary rules	22.78
Discretion concerning improperly obtained evidence	22.81
Proportionality—the requirement of sufficient probative utility ..	22.89
Similar fact evidence	22.94
JUDICIAL NOTICE—DISPENSING WITH PROOF ON MATTERS OF COMMON	
KNOWLEDGE	22.97
WITNESSES	22.103
Universal competence	22.103
Compellability	22.105
Witness immunity from suit	22.107
Witness testimony in court or by video link	22.108
Opinion	22.111
Hearsay	22.113
Examination of witnesses	22.123
Order of cross-examination at a hearing other than the trial	22.129
FAILURE TO ATTEND TRIAL OR HEARING	22.130
Introduction	22.130
Failure to attend a hearing other than the trial	22.133
Failure to attend the trial	22.136

CHAPTER 23

23 JUDGMENT AND ORDERS

Revised by Juliet Wells

INTRODUCTION	23.1
TYPES OF JUDGMENT AND THEIR EFFECT	23.3
The difference between judgments and orders	23.3
Effect of judgments generally	23.8
Judgments in personam and in rem	23.10
Declaratory judgments	23.12
Accounts and enquiries	23.16
Judgment not the only mode of final resolution of court	
proceedings	23.18
PRONOUNCING AND ENTERING JUDGMENT	23.19
Judgments have immediate effect	23.19
Ex tempore and reserved judgments	23.22
Making draft judgments available in advance of their	

pronouncement	23.23
Drawing up and sealing judgments	23.26
Service of judgments and orders	23.30
CORRECTING, VARYING, REVOKING AND SETTING ASIDE A JUDGMENT OR	
ORDER	23.31
Common law power to vary a judgment or order before it has been perfected	23.33
Common law power to vary a judgment or order after it has been perfected in care proceedings	23.40
Correcting superficial errors under CPR 40.12	23.42
The power to vary or revoke an order under CPR 3.1(7)	23.45
Application by a non-party to set aside a judgment or order under CPR 40.9	23.49
JUDGMENTS OBTAINED BY FRAUD AND PERJURY	23.52
Common law action to set aside judgment obtained by fraud or perjury	23.53
Appeal against a fraudulently obtained judgment	23.56
JUDGMENTS AND ORDERS BY CONSENT	23.58
Entering judgment and orders by consent	23.58
Tomlin Orders	23.61
Varying consent orders—consent orders founded on contract and consent orders representing submission	23.64
COURT'S POWER TO HAND DOWN JUDGMENT AGAINST THE PARTIES'	
WISHES	23.68
AWARDS OF PROVISIONAL DAMAGES AND PERIODICAL PAYMENTS	23.73
Awards of provisional damages	23.73
Directing periodical payments under the Damages Act 1996	23.83
JUDGMENT FOR INTEREST AND INTEREST ON JUDGMENT	23.91
Judgment for interest	23.92
Interest on judgment debts	23.101

CHAPTER 24

24 ENFORCEMENT

Revised by Stuart Sime

INTRODUCTION	24.1
THE COURT'S COERCIVE POWERS—COMMITTAL FOR CONTEMPT OF COURT ...	24.6
Introduction	24.6
Conduct punishable by committal	24.10
Procedure	24.17
OTHER COERCIVE POWERS—SEQUESTRATION, EXECUTION OF INSTRUMENTS ..	24.27
Sequestration	24.27
Execution of instrument by person nominated by High Court	24.30
ENFORCEMENT OF MONEY JUDGMENTS	24.31
Orders to obtain information from judgment debtors	24.34
Third-party debt orders	24.38
Order for payment out of money in court	24.47
Attachment of earnings	24.48
Charging orders	24.51
Writ or warrant of control	24.61

The appointment of a receiver	24.67
-------------------------------------	-------

CHAPTER 25

25 APPEAL

Revised by Sir Michael Burton

INTRODUCTION	25.1
The CPR appeal regime	25.1
Implications of the ECHR	25.12
WHAT MAY BE APPEALED	25.20
Permission to appeal an “order” and permission to appeal a “decision”	25.20
STANDING TO BRING OR PARTICIPATE IN APPEAL PROCEEDINGS	25.26
Appeal by a non-party	25.26
Interventions	25.30
ROUTES OF APPEAL	25.32
First appeals	25.33
Second appeals	25.37
Leapfrog appeals to the Court of Appeal	25.38
Leapfrog appeals to the Supreme Court	25.40
Routes of appeal against committal orders	25.46
NOTICE OF APPEAL	25.49
The need for appellants’ and respondents’ notices	25.49
Content of appellant’s notice	25.55
TIME LIMITS	25.58
Time limits for appealing	25.58
Extension of time to appeal	25.61
Extension of time in statutory appeals	25.78
THE REQUIREMENT OF PERMISSION TO APPEAL	25.80
Permission required as a general rule, subject to a few exceptions	25.80
The court to which the application for permission should be made	25.81
Applications for permission to appeal to the Supreme Court	25.84
Judicial review	25.88
Permission to appeal in statutory appeals	25.94
TEST FOR PERMISSION TO APPEAL AND RELATED MATTERS	25.104
The test for first appeals	25.104
The test for second appeals	25.108
The approach to applications for permission to appeal against case management decisions	25.126
Permission limited to certain issues	25.130
Permission subject to conditions	25.133
MODE OF DISPOSAL OF APPLICATIONS FOR PERMISSION TO APPEAL	25.151
Written and oral applications	25.151
Service and the respondent’s position	25.159
FINALITY OF DECISIONS IN APPLICATIONS FOR PERMISSION	25.162
No appeal against the grant or refusal of permission to appeal ...	25.162
Power to set aside permission to appeal	25.172
PREPARATION FOR APPEAL	25.179

THE EXERCISE OF APPELLATE JURISDICTION—REVIEW VERSUS RE-HEARING	25.184
The general structure—extensive appellate powers governed by a policy of restraint	25.184
Appeal by way of review or re-hearing—a jurisdictional limitation on appellate interference	25.188
Appeal by way of review—scrutiny of the lower court’s decision	25.190
Appeal by way of re-hearing	25.221
Exercise of appellate jurisdiction in appeals against case management decisions	25.227
CONDUCT OF APPEALS	25.236
Appeal court does not generally entertain fresh arguments or evidence on appeal	25.237
The appeal court will not normally rule on hypothetical or academic issues	25.255
Not following previous decisions of the Court of Appeal	25.262
COURT’S POWERS UPON DISPOSAL OF AN APPEAL	25.263
Powers identical whether the appeal is by review and by re-hearing	25.263
Affirming, varying or setting aside decisions of the lower court	25.264
Ordering new trial or remitting an issue	25.266
Orders to limit recoverable costs of appeal	25.270
DISPOSAL OF APPEALS BY ABANDONMENT OR CONSENT	25.271
Abandoning an appeal	25.271
Disposing of the appeal by consent	25.272
Part 36 Offers	25.275
STAY OF EXECUTION PENDING APPEAL ETC	25.276
ASSIMILATED LAW AND EU (WITHDRAWAL) ACT 2018	25.279
POWER TO REOPEN A FINAL APPEAL	25.281

CHAPTER 26

26 FINALITY OF LITIGATION

Revised by Christopher Stackpoole

INTRODUCTION	26.1
THE LIMITATION BAR TO COMMENCEMENT OF PROCEEDINGS	26.4
Introduction	26.4
The length of the limitation period and its consequences	26.11
The start of the limitation period	26.15
Discretion to disapply the limitation period in relation to defamation and judicial review	26.60
Meeting the limitation deadline	26.62
Reform	26.65
RES JUDICATA AND ABUSE OF PROCESS—INTRODUCTION	26.72
Rules and principles for avoiding re-litigation	26.72
Identifying the right ground for objecting to raising matters decided in previous proceedings	26.77
Waiver	26.82
Res judicata and abuse of process estoppel arise only from	

adversarial proceedings	26.84
Conclusiveness of judgments	26.85
Judgments as “evidence” of facts	26.87
RES JUDICATA	26.91
Cause of action estoppel	26.91
Issue estoppel	26.95
General principles applicable to cause of action and issue estoppel	26.100
ABUSE OF PROCESS ESTOPPEL	26.112
The nature of the jurisdiction	26.112
Disallowing matters that could have been raised in previous proceedings	26.114
Abuse where fresh proceedings are brought following strike-out	26.133
Collateral attack on previous court decisions	26.135
FOREIGN JUDGMENTS	26.152

CHAPTER 27

27 OFFERS TO SETTLE

Revised by Stuart Sime

INTRODUCTION	27.1
CPR 36 OFFERS AND CONTRACT RULES	27.10
THE DIFFERENCE BETWEEN SETTLEMENT OFFERS INSIDE AND OUTSIDE CPR 36	27.13
THE TIME FOR MAKING CPR 36 OFFERS	27.15
REQUIREMENTS THAT CPR 36 OFFERS MUST MEET	27.18
General conditions	27.18
Defendants’ CPR 36 offers	27.24
Provisional damages	27.25
Future pecuniary loss in personal injury claims	27.27
THE RELEVANT PERIOD	27.29
Definition of the relevant period	27.29
Start time	27.30
CLARIFICATION OF CPR 36 OFFERS	27.31
WITHDRAWAL OF CPR 36 OFFERS	27.33
Withdrawal during the relevant period	27.33
Withdrawal after the relevant period	27.37
ACCEPTANCE OF CPR 36 OFFERS	27.40
Form and time of acceptance	27.40
Costs consequences and the effect of acceptance	27.44
COSTS CONSEQUENCES OF NON-ACCEPTANCE	27.61
General principles	27.61
Consequences where claimant beats the defendant’s CPR 36 offer	27.64
Consequences where a party beats its own CPR 36 offer— ascertaining whether judgment is “more advantageous”	27.66
Consequences where claimant fails to beat defendant’s CPR 36 offer	27.71
Consequences where claimant equals or beats own CPR 36	

CONTENTS

offer	27.74
Discretion where the CPR 36 consequences would be unjust	27.83
Costs consequences where both parties fail to beat compromise offers	27.96
CPR 36 OFFERS TO SETTLE IN RTA PROTOCOL AND EL/PL PROTOCOL	
CLAIMS	27.97
RESTRICTIONS ON DISCLOSURE OF CPR 36 OFFERS	27.100
“OFFERS OF AMENDS” IN DEFAMATION CASES	27.105

CHAPTER 28

28 COSTS

Revised by Stuart Sime

BASIC CONCEPTS	28.1
Introduction	28.1
The court’s power to award costs	28.15
Applicability of the CPR costs rules	28.16
General Principles	28.17
Terminology	28.18
Types of costs orders	28.20
Determination of entitlement and criteria for quantification	28.25
Costs incidental to proceedings	28.27
Maintenance and champerty	28.31
GENERAL APPROACH TO MAKING COSTS ORDERS—THE COSTS-SHIFTING	
RULE	28.39
Costs follow the event	28.39
The indemnity principle	28.42
Justification of the rule that costs follow the event	28.46
Discretion to depart from the “costs follow the event” principle	28.54
Appellate supervision of costs orders	28.74
Discretion and predictability	28.76
CRITERIA OF ASSESSMENT	28.77
Introduction	28.77
Standard costs and indemnity costs	28.80
The reason for the distinction between standard and indemnity costs	28.83
The indemnity principle—a party is not entitled to recover more costs than they incurred	28.85
APPLICATION OF THE CRITERIA OF ASSESSMENT	28.86
Costs reasonably incurred	28.87
Costs reasonable in amount	28.88
Proportionality	28.91
Costs management	28.103
COSTS ON THE STANDARD BASIS	28.117
COSTS ON THE INDEMNITY BASIS	28.118
DECIDING THE AMOUNT OF COSTS	28.121
Summary determination	28.122
Summary assessment	28.123
Detailed assessment	28.128

Disclosure of privileged information in assessment proceedings	28.136
Interim payments on account of costs	28.138
Costs of the assessment	28.140
Routes and mode of appeal	28.142
Costs-only proceedings	28.143
SMALL CLAIMS COSTS	28.148
FIXED COSTS	28.149
Fixed costs for certain standard processes, such as commencement, default judgment and enforcement proceedings	28.149
Fixed costs in Revenue and Customs claims	28.150
Fixed costs in RTA Protocol and EL/PL Protocol claims	28.151
FAST TRACK AND INTERMEDIATE TRACK COSTS	28.153
Fast track FRC	28.156
Intermediate track FRC	28.158
FRC for interim hearings	28.161
Adjustments to FRC	28.162
Experts and FRC	28.163
Scale costs in intellectual property litigation	28.164
COSTS IN GROUP LITIGATION	28.165
QUALIFIED ONE-WAY COSTS SHIFTING	28.168
Introduction	28.168
Effect of QOCS	28.170
Circumstances where costs orders against QOCS claimants may be enforced without court permission	28.174
Circumstances where costs orders against QOCS claimants may be enforced with court permission	28.179
FUNDING ARRANGEMENTS AND COSTS	28.185
Introduction	28.185
Conditional fee agreements	28.186
Retained CFA recoverability and the ECHR	28.188
CFAs from April 2013	28.191
Damages-based agreements	28.197
Litigation funding agreements	28.204
COSTS ORDERS FOR AND AGAINST NON-PARTIES	28.205
The jurisdiction to make orders involving non-parties	28.205
Exercise of the jurisdiction to impose costs liability on non-parties	28.207
Procedure for making costs orders against non-parties	28.210
Ordering costs on grounds of control-benefit and funding	28.213
Costs orders against legal representatives on the grounds of control and contribution	28.217
Liability Insurers	28.223
Professional funders	28.226
Altruistic funders	28.230
Costs orders in favour of non-parties	28.233
PROTECTIVE COSTS ORDERS AND COSTS CAPPING ORDERS	28.234
Introduction	28.234
Friendly prospective costs orders	28.235
Hostile prospective costs orders	28.240
LITIGANTS IN PERSON	28.255

CONTENTS

McKenzie Friends	28.258
Pro bono costs orders	28.259
WASTED COSTS ORDERS	28.260
Introduction	28.260
“Improperly, unreasonably or negligently”—determining appropriate standards of representation	28.264
Causal connection	28.273
Collective responsibility for wasted costs	28.275
Wasted costs procedure	28.276
Evaluation of the jurisdiction	28.286
SOLICITOR AND CLIENT COSTS	28.288
Introduction	28.288
Solicitor’s duty to provide client with information	28.289
Client’s right to apply for assessment of solicitors’ bill	28.290
Rules governing the assessment of solicitor and client costs	28.292
PUBLICLY FUNDED LEGAL SERVICES	28.294
General features of legal aid	28.294
Costs orders in favour of publicly funded litigants	28.300
Costs orders against legally aided litigants	28.302
Costs orders against the Lord Chancellor	28.306
COSTS REFORM	28.307
The problem of high and unpredictable litigation costs	28.307
Abolition of the costs-shifting principle	28.313
Fixed recoverable costs	28.316
Costs management and the need for a robust and predictable approach to proportionality	28.318
<i>Index</i>	1539