PART 25

Interim Remedies and Security for Costs

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25.0.1

Editorial introduction (Section I: Interim Remedies)

25.0.2 The rules in the first section of this Part deal with two matters: (1) the granting of orders for interim remedies (including interim injunctions) and (2) the granting of orders for interim payments. General rules about applications for court orders, including orders for interim remedies and interim payments, are found in Pt 23. Detailed procedures applicable on applications for interim remedies and interim payments are found in this Part.

Extended commentary is available in Vol.2, Section 15. Rule 27.2(1)(a) states that Pt 25 does not apply to small claims "except as it relates to interim injunctions".

Editorial introduction (Section II: Security for Costs)

25.0.3 This section was added by the Civil Procedure (Amendment) Rules 2000 (SI 2000/221) which came into force on May 2, 2000. It does not apply to small claims, see r.27.2(1)(a). As to the purpose and effect of an order for security for costs, see below para.25.12.2. The provisions of Section II of Pt 25 are applied with modifications to certain proceedings under Pt 74 (Enforcement of Judgments in Different Jurisdictions) (see r.74.5). By the Civil Procedure (Amendment No.2) Rules 2002 (SI 2002/3219) r.3, with effect from April 2003, para.(2)(a) of r.25.13 was amended. This provision deals with the conditions to be satisfied where the court makes an order for security for costs where the claimant is resident out of the jurisdiction and not in a Convention State and the amendment ensures that the rule complies with the decision of the Court of Appeal in *De Beer v Kanaar & Co (No.1)* [2001] EWCA Civ 1318, CA.

Practice Directions

25.0.4 The provisions of this Part are supplemented by two practice directions: Practice Direction 25A (Interim Injunctions) relates to some of the orders for interim remedies listed in r.25.1(1) and contains examples of a freezing injunction and a search order (see para.25APD.1), and Practice Direction 25B (Interim Payments) relates to r.25.6 (see para.25BPD.1).

Forms

25.0.5

- **N244** Application notice

The following county court forms in use before the CPR came into effect on April 26, 1999, continue in use (see Practice Direction (Forms) Tables 1 and 3):

- **N16A** (General form of application for injunction)
- **N361** (Notice of application for relief in pending action)

Examples of a freezing injunction, and of a search order are annexed to Practice Direction 25A (Interim Injunctions). See further paras 25.1.13 and 25.1.27.3 below.

See also Admiralty and Commercial Court Guide Appendix 5 (forms of freezing injunction and search order) (see Vol.2, para.2A–162 below).

The following Queen's Bench Master Practice Forms are relevant to section II (security for costs): See Practice Direction supplementing Pt 4, para.4PD.1.

- **PF43** Application for security for costs
- **PF44** Order for security for costs

Court Guides and interim remedies procedure

25.0.6 Where applications are made in accordance with the Pt 23 procedure in proceedings in the Commercial Court, and in proceedings in the Queen's Bench and Chancery Division of the High Court, the provisions of Pt 23 and the practice directions supplementing that Part must be read in conjunction with, respectively, the Queen's Bench Guide, para.7.13 (Vol.2, para.1B–53), the Admiralty and Commercial Court Guide, Section F (Vol.2, para.2A–85), and the Chancery Guide, Chap.5 (Vol.2, para.1A–27), and the practice directions referred to there. Generally, these Guides repeat, in narrative form, provisions found in Pt 25 and the practice directions supplementing that Part. However, in some respects, the modifications to Pt 23 practice made by these Guides are significant.

As is explained below (para.25.2.1), when an application is made for an interim remedy, the provisions of Pt 23 and the practice directions supplementing that Part are subject to the provisions of Pt 25 and supplementing practice directions. It should also be noted that the Court Guides referred to above deal specifically with applications for certain kinds of interim remedies, in particular, interim injunctions, freezing injunctions and search orders; see the Queen's Bench Guide, para.7.13 (Vol.2, para.1B–53), the Admiralty and Commercial Court Guide, Section F, paras F15 et seq. (Vol.2, para.2A–99) and the Chancery Guide Chap.5, para.5.18, see (Vol.2, para.1A–34). For information concerning communications with the court where an interim injunction or a search order has been made, paras 25.1.25.12 and 25.1.27.4 below.

For guidance on practice and listing of interim applications before Masters and judges in the Queen's Bench Division at the RCJ, see Queen's Bench Guide Sections 6 and 9 (Vol.2 paras 1B–29 and 1B–60).

Interim remedies in support of arbitral proceedings

25.0.7 The Arbitration Act 1996 s.44(1) states that, unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about certain matters as it has for the purposes of and in relation to legal proceedings (see Vol.2, para.2E–193). The matters referred to are listed in s.44(2) and to an extent coincide with the interim remedies listed in CPR r.25.1(1). Paragraph 8.1 of Practice Direction (Arbitration), supplementing CPR Pt 62, states that an application for an interim remedy under s.44 must be made, not by application notice, but in an arbitration claim form (see Vol.2, para.2E–50).

Powers of Masters and district judges in relation to interim remedies

25.0.8 Masters and district judges may exercise any function of the High Court or county courts respectively except where an enactment, rule or practice direction provides otherwise (r.2.4). The circumstances in which Masters and district judges may exercise

the jurisdiction of the High Court and of the county courts (which jurisdiction is more limited than that of the High Court) in relation to the interim remedies listed in r.25.1(1) are restricted by Practice Direction 2B (Allocation of Cases to Levels of Judiciary), paras 2.1 et seq. (see para.2BPD.1 above).

Paragraph 1.2(1) of Practice Direction 25A (Interim Injunctions) (see para.25APD.1 below) refers to the powers of masters and district judges in High Court proceedings to grant injunctions (1) by consent, (2) in connection with charging orders and appointments of receivers by way of equitable execution, and (3) in aid of execution of judgments.

Paragraphs 2.3 and 2.4 of Practice Direction 2B (Allocation of Cases to Levels of Judiciary) (see para.2BPD.2 above) recite various circumstances in which a Master or a district judge may "make an injunction" and para.2.2 states that, otherwise, injunctions and orders "relating to injunctions" must be made by a judge. In *Richmond v Burch* [2006] EWHC 921 (Ch); [2007] 1 All E.R. 658, an interim injunction was made final upon judgment in default of acknowledgment of service being granted to the claimant, but subsequently, on the application of the defendant, the judgment was set aside by order of a Master and the final injunction continued as an interim injunction. On appeal to a judge by the claimant (where, in the event, the injunction was continued by order of the judge) it was held that the Master by his order had either discharged the injunction or varied it, and in either event had made an order "relating to" an injunction within the meaning of para.2.2, and therefore had acted without jurisdiction.

Paragraphs 8.1 to 8.3 of Practice Direction 2B (Allocation of Cases to Level of Judiciary) recite circumstances in which (subject to the restrictions in para 3.1) district judges sitting in county court proceedings may grant injunctions and other orders, including interim injunctions and orders for other interim remedies (see para.2BPD.8 above). Generally, the granting of such jurisdiction is based on express statutory provisions.

Written evidence in applications for interim remedies

25.0.9 Evidence at a hearing other than the trial should normally be given by witness statement. However, affidavits must be used as evidence, not only where sworn evidence is required by an enactment, statutory instrument, rule, order or practice direction, but also in any application for a search order, a freezing injunction, or an order requiring an occupier to permit another to enter their land (Practice Direction 32 (Evidence) para.1.4, see para.32PD.1 below).

I. Interim Remedies

Orders for interim remedies[1]

25.1—(1) The court may grant the following interim remedies— 25.1

(a) an interim injunction(GL);

(b) an interim declaration;

(c) an order—

(i) for the detention, custody or preservation of relevant property;

(ii) for the inspection of relevant property;

(iii) for the taking of a sample of relevant property;

(iv) for the carrying out of an experiment on or with relevant property;

(v) for the sale of relevant property which is of a perishable nature or which for any other good reason it is desirable to sell quickly; and

[1] Amended by the Civil Procedure (Amendment) Rules 2000 (SI 2000/221), the Civil Procedure (Amendment) Rules 2002 (SI 2002/2058) and the Civil Procedure (Amendment No.4) Rules 2005 (SI 2005/3515).

(vi) for the payment of income from relevant property until a claim is decided;

(d) an order authorising a person to enter any land or building in the possession of a party to the proceedings for the purposes of carrying out an order under sub-paragraph (c);

(e) an order under section 4 of the Torts (Interference with Goods) Act 1977[1] to deliver up goods;

(f) an order (referred to as a "freezing injunction(GL)")—

(i) restraining a party from removing from the jurisdiction assets located there; or

(ii) restraining a party from dealing with any assets whether located within the jurisdiction or not;

(g) an order directing a party to provide information about the location of relevant property or assets or to provide information about relevant property or assets which are or may be the subject of an application for a freezing injunction(GL).

(h) an order (referred to as a "search order") under section 7 of the Civil Procedure Act 1997[2] (order requiring a party to admit another party to premises for the purpose of preserving evidence, etc.);

(i) an order under section 33 of the Senior Courts Act 1981 or section 52 of the County Courts Act 1984 (order for disclosure of documents or inspection of property before a claim has been made);

(j) an order under section 34 of the Senior Courts Act 1981 or section 53 of the County Courts Act 1984 (order in certain proceedings for disclosure of documents or inspection of property against a non-party);

(k) an order (referred to as an order for interim payment) under rule 25.6 for payment by a defendant on account of any damages, debt or other sum (except costs) which the court may hold the defendant liable to pay;

(l) an order for a specified fund to be paid into court or otherwise secured, where there is a dispute over a party's right to the fund;

(m) an order permitting a party seeking to recover personal property to pay money into court pending the outcome of the proceedings and directing that, if he does so, the property shall be given up to him;

(n) an order directing a party to prepare and file accounts relating to the dispute;

(o) an order directing any account to be taken or inquiry to be made by the court; and

(p) an order under Article 9 of Council Directive (EC)

[1] 1977 c.32; s.4 was amended by the Senior Courts Act 1981 (c.54), s.152(1), Sch.5; by the County Courts Act 1984 (c.28), s.148(1), Sch.2, Pt V, para.64 and by SI 1980/397 (N13).

[2] 1997 c.12.

2004/48 on the enforcement of intellectual property rights (order in intellectual property proceedings making the continuation of an alleged infringement subject to the lodging of guarantees).

(Rule 34.2 provides for the court to issue a witness summons requiring a witness to produce documents to the court at the hearing or on such date as the court may direct.)

(2) In paragraph (1)(c) and (g), "relevant property" means property (including land) which is the subject of a claim or as to which any question may arise on a claim.

(3) The fact that a particular kind of interim remedy is not listed in paragraph (1) does not affect any power that the court may have to grant that remedy.

(4) The court may grant an interim remedy whether or not there has been a claim for a final remedy of that kind.

Effect of rule

25.1.1 In r.25.1(1) an attempt is made to list all of the interim remedies for which a party may wish to apply (including some available before proceedings are commenced) and which the court, in the exercise of discretion, may be prepared to grant. Rule 25.1(3) states that the fact that a particular kind of interim remedy is not listed in para.(1) does not affect any power that the court may have to grant that remedy. Sub-paragraph (o) was added to r.25.1(1) by the Civil Procedure (Amendment) Rules 2002 (SI 2002/2058) (see further para.25.1.38 below). Sub-paragraph (p) was added to r.25.1(1) by the Civil Procedure (Amendment No.4) Rules 2005 (SI 2005/3515). In certain circumstances, some of the remedies listed in r.25.1, and described as "interim", may be granted after final judgment (r.25.2(1)(b)). Thus the power to grant "a freezing injunction" after judgment is preserved.

Some of the remedies listed in r.25.1 derive their source from statute (which may be but is not always mentioned), e.g. the source of the court's jurisdiction to grant an interim injunction (r.25.1(1)(a)) is the Senior Courts Act 1981 s.37 (see Vol.2 para.9A–128), whilst others have sprung from common law or from the CPR themselves, and the source of the court's jurisdiction to grant them may not be found in r.25.1. Some interim remedies were developed to regulate the parties' dealings exclusively during the period prior to the trial, and not as interim versions of final remedies.

Depending on the remedy sought, the grant of interim remedies pursuant to r.25.1 may raise issues under ECHR art.8 (the right to respect for private life) or under ECHR Protocol 1 art.1 (the right to peaceful enjoyment of possessions). In cases involving alleged misuse of private information and breaches of confidentiality, especially where the disclosure has been to the press, issues under ECHR art.10 (the right of freedom of expression) may also arise. Guidance on reconciling these apparently conflicting rights, and on the appropriateness of derogating from the principles of open justice can be found in *Terry v Persons Unknown* [2010] EWHC 119 (QB); [2010] 2 F.L.R. 1306 (Tugendhat J.).

Detailed guidance on injunctions restraining misuse of private information and breaches of confidentiality is to be found in Vol.2 Section 15 at para. 15–40 et seq.

The grant of freezing injunctions and search orders is considered in more detail in paras 25.1.27 and 25.1.29 below.

Jurisdiction of county courts to grant interim relief

25.1.2 The County Courts Act 1984 s.38 (as amended in 1990) (see Vol.2, para.9A–468+) provides that, generally, in any proceedings in a county court the court may make any order (final or interlocutory and absolute or conditional) which could be made by the High Court if the proceedings were in the High Court (see also *Burris v Azadani* [1995] 1 W.L.R. 1372, CA). The circumstances in which county courts may grant relief in the form of freezing injunctions and search orders (see, respectively paras 25.1.23 and 25.1.25 below) are restricted by the County Court Remedies Regulations 1991 made under s.38(3)(b) of the 1984 Act (see Vol.2, para.9B–77). However, to compensate for

this, art.3 of the High Court and County Courts Jurisdiction Order 1991 provides that the High Court shall have jurisdiction to hear an application for an injunction made in the course of or in anticipation of proceedings in a county court where a county court may not, by virtue of regulations under s.38(3)(b) or otherwise, grant an injunction (see Vol.2, para.9B–933).

Interim remedies and the overriding objective

25.1.3 The court must seek to give effect to the overriding objective stated in r.1.1 when it "exercises any power given to it by the Rules" or when it "interprets the meaning of any rule" (r.1.2). Interim remedies are discretionary and the discretion is exercised judicially within a framework of case law. Both before the coming into effect of the CPR and after, the courts have from time to time expressed concern about (1) the making of unnecessary applications for interim remedies, (2) the making of repeat applications where there has been no material change in the relevant circumstances, (3) the incidence of appeals where an interim remedy is made or refused, (4) the costs and delays involved in making such applications, and (5) the waste of court resources caused thereby. The case management scheme under the CPR seeks to ensure that control is exercised (either directly by the court, or indirectly by rules and directions) in a manner that reduces the impact of these mischiefs and ensures that "interlocutory warfare" between the parties does not overwhelm the proceedings. In attacking these problems the Court of Appeal has called in aid the overriding objective, in particular, the objective of dealing with the case in ways which are proportionate to the amount of money involved, the importance of the case, the complexity of the issues, and the financial position of each party. A good example is provided by *A v B (A Company)* [2002] EWCA Civ 337; [2002]; 2 All E.R. 545, CA, where the Court set down guidelines for the handling of applications for interim injunctions restraining publication in breach of confidence cases designed to ensure that such applications are dealt with expeditiously and in a proportionate manner.

Successive applications for interim remedy

25.1.4 There is a public interest in discouraging a party who makes an unsuccessful application for interim relief from making a subsequent application for the same relief, based on material which was not, but could have been, deployed in support of the first application (*Woodhouse v Consignia Plc* [2002] EWCA Civ 275; March 7, 2002, CA at [55] per Brooke L.J.). The same principle applies on an application to vary an order for an interim remedy made on an inter partes basis (*Willetts v Alvey* [2010] EWHC 155 (Ch); January 21, 2010, unrep. (Norris J.)). It is expressly provided that a claimant may make more than one application for an interim payment (r.25.6(2); note also para.25.6.7 below). See further "Successive applications for same relief", para.23.0.14 above.

Inherent jurisdiction

25.1.5 It is expressly provided that the fact that a particular kind of interim remedy is not listed in r.25.1(1) does not affect any power that the court may have to grant that remedy (r.25.1(3)). This provision was inserted principally for the purpose of making it clear that the court's inherent jurisdiction is not limited by r.25.1 but it also has the effect of ensuring that it does not cast doubt on the powers derived from statute (e.g. the power to appoint a receiver derived from the Senior Courts Act 1981 s.37(1)). The expression "interim remedy" is not a term of art and doubts may arise as to whether or not a particular power of the court is properly described as such.

The High Court's inherent jurisdiction to make an order for the purpose of preventing abuse of its procedures is now typically exercised by an order to strike out the defaulting party's statement of case (r.3.4). In extreme cases, a litigant may be made the subject of a civil restraint order under r.3.11, and see the Senior Courts Act 1981 s.42.

The inherent jurisdiction of the court to stay the whole or part of any proceedings (recited in r.3.2(f)) may perhaps in certain circumstances be regarded as an interim remedy (see Vol.2, para.9A–178 ("Stay under the CPR")).

Interim remedies in cases of doubtful jurisdiction or invalidity

25.1.6 The Civil Jurisdiction and Judgments Act 1982 s.24(1)(a) (see Vol.2, para.5–24) states that the power of any court in England and Wales to grant "interim relief" pending trial, or pending the determination of an appeal, shall extend to a case where

the issue to be tried, or which is the subject of the appeal, relates to the jurisdiction of the court to entertain the proceedings (e.g. where there is a question whether the court has jurisdiction under the Brussels Convention) or to entertain the application for the interim relief itself (note also s.24(1)(b)). As defined by s.25(7), in this context "interim relief" would appear to include all of the forms of relief listed as "interim remedies" in r.25.1(1).

See also, para.25.4.2 "Interim remedy order in support of foreign proceedings" below.

Where, in a claim brought challenging provisions in UK Regulations implementing EU Directives, a question is referred to the ECJ, the court may make an interim order suspending the operation of the provisions in the UK Regulations pending final determination of the reference. For an explanation of the basis of the jurisdiction, see *R. (Abna Ltd) v Secretary of State for Health* [2003] EWHC 2420 (Admin), October 6, 2003, unrep. (Davis J.), and note para.54.3.7 "Interim relief to give effect to European Union law" below.

When a defendant against whom a freezing order has been made fails to make disclosure as ordered, the court is not prevented from making an "unless" order debarring (if there is further default) the defendant from defending merely because there is a pending challenge by that defendant to the jurisdiction of the court (*JSC BTA Bank v Ablyazov* [2010] EWHC 2219 (QB), August 28, 2010, unrep. (Christopher Clarke J.)).

Interim remedies in judicial review

25.1.7 Rules for applications for judicial review are found in CPR Pt 54, supplemented by Practice Direction 54A (Judicial Review). Pt 54 replaced RSC Ord.53. Rule 3(10) of that Order stated that, where permission to apply for judicial review was granted, then, depending on the relief sought, the court may at any time grant in the proceedings "interim remedies in accordance with CPR Pt 25". No such express provision appears in Pt 54 because none is necessary. Rule 54.6 states that an applicant for judicial review must state in their claim form any remedy they are claiming, including any interim remedy, and a cross-reference in r.54.6(c) draws attention to Pt 25. For commentary on interim remedies in judicial review proceedings, in particular interim injunctions, see commentary in paras 54.3.4 to 54.3.7 below, and Vol.2, para.15–49 et seq.

Interim powers to preserve assets in civil recovery proceedings

25.1.7.1 Provisions in Pt 5 of the Proceeds of Crime Act 2002 enable the High Court to make "a property freezing order". Further, that statute gives the High Court power to make "an interim receiving order" providing for the detention, custody or preservation of assets and the appointment of a receiver. These interim remedies are similar in some respects to remedies referred to in r.25.1 (*Director of Assets Recovery Agency v Creaven* [2005] EWHC 2726 (Admin); [2006] 1 W.L.R. 622 (Stanley Burnton J.)). Practice and procedure provisions dealing specifically with them are found in Practice Direction (Civil Recovery Proceedings); see para.3K–1 below.

Interim orders under CPR Part 65 Sections IV and VIII

25.1.7.2 In proceedings to which Section IV (anti-social behaviour orders) and Section VIII (injunctions to prevent gang-related violence) of CPR Pt 65 apply, applications for interim orders must be made in accordance with Pt 25 (see rr.65.26(1) and 65.36(1)).

Proceedings under CPR Part 76

21.1.7.3 There is no express provision in the Prevention of Terrorism Act 2005, and there are no rules in CPR Pt 76 (Proceedings Under the Prevention of Terrorism Act 2005), enabling an application for interim relief by a party in proceedings to which that Part relates. In principle there is no reason why a claimant subject to a non-derogating control order should not make such an application in the course of an appeal under s.10 of the 2005 Act, whether that claimant is seeking a pre-emptive injunction or an order that the status quo ante be restored, by inviting the court under CPR Pt 25 to exercise its power to grant an interlocutory injunction given by the Senior Courts Act 1981 s.37 (*BX v Secretary of State for the Home Department* [2010] EWCA Civ 481, May 4, 2010, unrep. CA (where held that it would rarely be appropriate for the claimant to institute parallel judicial review proceedings for this purpose)).

Interim remedy not limited by claim form (r.25.1(4))

25.1.8 Interim remedies are of two broad varieties (but some are a mixture). First there

are those which are temporary versions of final remedies. In the interests of fairness and justice they are granted pending trial; e.g. a claimant issues a claim for an injunction and is granted a temporary injunction to the same or similar effect. Secondly, there are those which are purely interlocutory; e.g. an order permitting one party to inspect relevant property in the possession of another party. The effect of r.25.1(4) is to make clear that a party may apply for an interim remedy falling in the first category even though they have made no claim in their claim form for a final remedy of that kind.

Interim injunction (r.25.1(1)(a))

25.1.9 *Introduction* —Paragraph (1)(a) of r.25.1 refers to the court's jurisdiction to make an order granting an applicant an interim injunction. The Glossary attached to the CPR (see para.G1.1 below) explains that an injunction is "a court order prohibiting a person from doing something or requiring a person to do something".

For extended commentary on interim injunctions, see Vol.2, Section 15 Interim Remedies para.15–2.

An injunction granted by judicial decision at trial after the claimant has established the existence of their right in law and the fact that the defendant has infringed it or is about to do so may be described as a *perpetual injunction*. An order other than a final judgment, whether such order be made before judgment or not, may properly be described as an interlocutory order. Under the CPR, "interim" is preferred to "interlocutory". Consequently, an injunction granted by interlocutory order as so defined is an *interim injunction*.

A claim form must specify the remedy the claimant seeks (r.16.2) and therefore should include any claim for an injunction as a final order. However, an application for the grant of an interim injunction may be made by any party, whether or not a claim for an injunction was included in that party's claim form or Part 20 claim (e.g. counterclaim), as the case may be (r.25.1(4)). Where the defendant is the applicant the relief sought need not necessarily arise in respect of the claimant's claim. An interim injunction may be in terms which would not be appropriate, or given the nature of the parties' allegations, possible, at the final trial (*Fresh Fruit Wales Ltd v Halbert The Times*, January 29, 1991, CA).

In a claim in which a party (D) is acting as a representative party under r.19.6, an interim injunction granted against D is binding on all persons represented in the claim, but may only be enforced against a person who is not a party to the claim with the permission of the court (r.19.6(4)). Such an injunction may not include a term enabling the applicant to enforce the injunction against unidentified persons represented by D without first obtaining such permission (*Smithkline Beecham Plc v Avery* [2007] EWHC 948 (QB), April 27, 2007, unrep. (Teare J.)); *AGC Chemicals Europe Ltd v Stop Huntingdon Animal Cruelty*, June 10, 2010, unrep., (Mr D Pittaway Q.C.)).

Where an interim injunction is sought on a without notice application (see para.23.4.1 above) with incomplete evidence, it is a basic requirement that there has to be a real urgency for the injunction, particularly where an early effective hearing date is available (*Mayne Pharma (USA) Inc v Teva UK Ltd (Interim Applications: Costs)* [2004] EWHC 2934, December 3, 2004, unrep. (application refused in patent claim where no threat and damage requiring immediate intervention of court)).

Subject to certain limits, an interim injunction may be granted at any time (r.25.2) (see further paras 25.2.3 et seq. below).

For "freezing injunctions" (formerly *Mareva* injunctions) see para.25.1.25 below.

The applicant is under a duty to make full, fair and accurate disclosure of material information to the court and to draw the court's attention to significant factual, legal and procedural aspects of the case when applying without notice for an interim injunction, see para.25.3.5, "Applicant's duties where application made without notice to respondent" below.

As to the usual requirement that an applicant offers a cross-undertaking in damages, see para 25.1.25.10 below.

25.1.10 *Jurisdiction* —The Senior Courts Act 1981 s.37 (see Vol.2, para.9A–128) states that the High Court may by order, whether interlocutory or final, grant an injunction in all cases in which it appears to the court to be just and convenient to do so (s.37(1)). Any such order may be made either unconditionally or on such terms and conditions as

the court thinks just (s.37(2)). Where the court has in personam jurisdiction over the person against whom an injunction whether interlocutory or final, is sought, the court has jurisdiction to grant it (*Fourie v Le Roux* [2007] UKHL 1; [2007] 1 W.L.R. 320, HL, per Lord Scott at para.25). Generally, there is no jurisdiction to grant an interim injunction against the Crown (Crown Proceedings Act 1947 s.21); but see para.25.1.17.

The County Courts Act 1984 s.38 (see Vol.2, para.9A–468+) provides that, generally, in any proceedings in a county court, the court may make any order (final or interlocutory and absolute or conditional) which could be made by the High Court if the proceedings were in the High Court (see also *Burris v Azadani* [1995] 1 W.L.R. 1372, CA). Regulations made under s.38 impose certain restrictions on the jurisdiction of county courts in this respect. Where the jurisdiction of a county court to grant injunctions is restricted, the circumstances may be such as to enable a party to invoke the jurisdiction of the High Court under the High Court and County Courts Jurisdiction Order 1991 art.3 to grant injunctions incidental to and in support of county court proceedings; see para.25.1.2 above, and paras 25.1.27 and 25.1.29 below.

See also Civil Jurisdiction and Judgments Act 1982 s.25 (see Vol.2, para.5–27) explained in para.25.4.2 "Interim remedy order in support of foreign proceedings" below.

For the infrequent circumstances in which Masters in the High Court and district judges in county courts may exercise jurisdiction in relation to interim injunctions, see para.25.0.8 above.

25.1.11 *Principles and guidelines to be applied* —For information on the principles and guidelines to be applied in applications for interim injunctions generally and in particular proceedings, see the extended commentary in Vol.2, Section 15 Interim Remedies para.15–2

Attention is drawn to the requirements for a cross-undertaking in damages (see para.25.1.25.5 below), to the restricted circumstances in which applications for interim injunctions may be made without notice (see para.25.1.25.4 below), and for the duties of full and frank disclosure (see para.25.3.5 below).

The apparent greater reluctance of the courts to grant mandatory injunctions (or injunctions carrying the same risk of injustice as mandatory injunctions) as opposed to prohibitory injunctions (see, for example *SAB Miller Africa BV v East African Breweries Ltd* [2009] EWHC 2140 (Comm), August 18, 2009, unrep. (Christopher Clarke J.)) is not the application of a different principle but is because a mandatory injunction is often more likely to cause irremediable prejudice than cases in which a defendant is merely prevented from taking or continuing with some course of action (*National Commercial Bank Jamaica Ltd v Olint Corpn Ltd (Practice Note)* [2009] UKPC 16; [2009] 1 W.L.R. 1405, PC).

25.1.12 *How to make the application* —See also "Relationship between Pt 23 and rr.25.2 to 25.5", (para.25.2.1 below) and "Court Guides and interim remedies procedure", para.25.0.6 above. In the Chancery Division, the application needs to be delivered to the Chancery Judges' Listing Office (Room WG 4). See the Chancery Guide Vol.2 para.1A–30, and para.1A–42 for out-of-hours arrangements.

In Queen's Bench proceedings at the RCJ, an application notice for an interim injunction should be filed in the Listing Office, Room WG5 (Queen's Bench Guide para.7.13.2, see Vol.2, para.1B–53).

25.1.12.1 *Practice* —An application for an interim injunction is made by an application notice in accordance with the provisions of Pt 23 (General rules about applications for court orders) (see para.23.0.1). The practice and procedure to be followed is as stated in the rules of that Part and the provisions of the practice direction supplementing that part (see 23APD.1) as complemented and modified by rules in Pt 25. Despite its title, this last-mentioned Practice Direction is concerned, not merely with applications for interim injunctions (r.25.1(1)(a)), but also with applications for "freezing injunctions" (r.25.1(1)(f)) and "search orders" (r.25.1(1)(g)) (see further, respectively, paras 25.1.20 and 25.1.22 below). Indeed, in terms, the Practice Direction appears to regard "freezing injunctions" and "search orders" as forms of interim injunction.

For practice where an application is made in the High Court in accordance with Pt 23 for a freezing injunction in support of county court proceedings, see para.25.1.27 below.

The principal modifications and additions to the Pt 23 provisions made by the Pt 25 provisions, in so far as they relate to the applications for interim injunctions (and for freezing injunctions and search orders), are (1) those concerning applications made without notice to the respondent, and made either before or after the issue of a claim form, and (2) those concerning evidence in support of applications. The principle that the other side should be heard is so important that a judge should not entertain a without notice application unless either giving notice would enable the defendant to take steps to defeat the purpose of the injunction or where there has been literally no time to give notice, but even in this latter, rare, category of cases, the applicant should give shorter notice at least by telephone (*National Commercial Bank Jamaica Ltd v Olint Corp Ltd (Practice Note)* [2009] UKPC 16; [2009] 1 W.L.R. 1405, PC). An application may be made without notice if it appears to the court that there are good reasons for not giving notice (r.25.3(1)). Except in cases where secrecy is essential, the applicant should take steps to notify the respondent informally of the application (PD 25 para.4.3(3)). It follows from r.25.2(2)(b) that an application should not be made before a claim has been made unless (i) the matter is urgent, or (ii) it is otherwise necessary to do so in the interests of justice.

The significant modifications and additions made by Pt 25 provisions relating to evidence in support of applications for interim injunctions (and for freezing injunctions and search orders) include provisions relating to the filing and serving of evidence (see PD 25 paras 2.2 and 2.3). Further, it is provided that an application must be supported by evidence unless the court orders otherwise (r.25.3(2)). Where an application is made without notice to the respondent, the evidence must set out why notice was not given (PD 25 para.3.4). In certain circumstances the evidence should be in affidavit form (PD 25 paras 3.1 and 3.2). The evidence must set out the facts on which the applicant relies for the claim being made against the respondent, including all material facts of which the court should be made aware (PD 25 para.3.3) (see further "Applicant's duties where application made without notice to respondent" para.25.3.5 below).

In some of the statutory proceedings governed by CPR Pt 65 (Proceedings Relating to Anti-Social Behaviour and Harassment), the relevant legislation confers on the court jurisdiction to grant interim injunctions and to make orders for particular interim remedies (and to vary or discharge). The practice and procedure to be followed where applications for such relief are made is found in the legislation and in the rules of court stated in the appropriate Section of Pt 65, some of which expressly incorporate Pt 23 or Pt 25.

Amongst other things, para.5.1 of PD 25A states that, unless the court orders otherwise, any order for an injunction must contain, if made without notice to the other party, a return date for a further hearing at which the other party can be present, and para.5.2 states that, if made in the presence of all the parties to be bound or if made at a hearing of which they have notice, an order may state that it is effective until trial or further order. These provisions seek to ensure that interim injunctions take effect for no longer than is necessary or proportionate. Applicants seeking a departure from paras 5.1 and 5.2 should explain in evidence or skeleton argument why it is sought. This is particularly important where terms in the order sought derogate from the principle of open justice; for example, terms granting anonymity to a party or restricting freedom of expression by preventing access by non-parties to relevant documents in court records (*G v Wikimedia Foundation Inc* [2009] EWHC 3148 (QB), December 2, 2009, unrep. (Tugendhat J.)).

It seems that an action may be properly constituted, even though a defendant is not named, but merely described, in the claim form. It follows from this that an interim injunction may be granted against a defendant joined in proceedings by description (*Bloomsbury Publishing Group Ltd v News Group Newspapers Ltd* [2003] EWHC 1205 (Ch); [2003] 1 W.L.R. 1633 (Sir Andrew Morritt V.-C.); distinguishing *Friern Barnet UDC v Adams* [1927] 2 Ch. 25, CA). See also *South Cambridgeshire District Council v Persons Unknown* [2004] EWCA Civ 1280, September 17, 2004, unrep., CA. As to applications for injunctions against persons unknown under the Town and Country Planning Act 1990, see CPR Sch.2 CCR Ord.49 r.7 (para.cc49.7.1 below).

The key principles applied when an application is made for an anti-suit injunction on the grounds of forum non conveniens where there is a non-exclusive jurisdiction clause were set out by the Court of Appeal in *Highland Crusader Offshore Partners L.P. v Deutsche Bank AG* [2009] EWCA Civ 725; [2009] All E.R. (Comm) 987. It is incumbent on a party seeking an anti-suit injunction to do so promptly and before the foreign

proceedings are too far advanced: see, for example, *Rec Wafer Norway AS v Moser Baer Photo Voltaic Ltd* [2010] EWHC 2581 (Comm), October 15, 2010, unrep. (Blair J.).

Where a defendant has misused confidential information in order to gain an illegitimate competitive advantage (the so-called "springboard doctrine"), the court will not restrain use of the information once it has ceased to be confidential, but will grant an interim injunction for a limited period if the information is to a limited degree confidential and the defendant is still using it. In general, the remedy for past misuse of confidential information is financial (*Vestergaard Frandsen A/S v Bestnet Europe Ltd* [2009] EWHC 1456 (Ch), June 26, 2009, unrep. (Arnold J.)).

In *Terry v Persons Unknown* [2010] EWHC 119(QB); [2010] 2 F.L.R. 1306 (Tugendhat J.) , the court considered how to reconcile the apparently conflicting ECHR art.8 and 10 rights (freedom of expression and privacy), and the appropriateness of derogating from the principles of open justice, in a case involving a claim for an injunction intended to be served on media organisations to prevent alleged misuse of private information and breaches of confidentiality.

For further commentary in relation to injunctions in confidential information cases, see Vol.2, Section 15 Interim Remedies para.15–43.

25.1.13 *Form of order for interim injunction* —For forms for orders for "freezing injunctions" and "search orders", see paras 25APD.13et seq.; note also Commercial Court Guide Appendix 5 (Vol.2, para.2A–162).

The following county court forms in use before the CPR came into effect on April 26, 1999, continue in use (see Practice Direction (Forms), Table 3):

- **N16** General form of injunction
- **N16(1)** General form of injunction (formal parts only)
- **N138** Injunction orders

25.1.14 *Discontinuance of claim* —Although, generally, a claimant may discontinue all or part of a claim at any time, they must obtain the permission of the court if they wish to discontinue all or part of a claim in relation to which the court has granted an interim injunction or any party has given an undertaking to the court (r.38.2(2)).

Interim declaration (r.25.1(1)(b))

25.1.15 It is clear that the court has jurisdiction to grant a declaration as a final remedy at trial, including at the trial of a preliminary issue. It is also clear that in interlocutory proceedings the court may grant a declaration as a final remedy. Further, in judicial review proceedings a declaration may be granted as provided by the Senior Courts Act 1981 s.31 and the Crown Proceedings Act 1947 s.21 provides that, in proceedings against the Crown, in certain circumstances the court shall not grant relief by way of injunction or specific performance but shall in lieu thereof "make an order declaratory of the rights of the parties".

For circumstances in which court may grant a declaration, see r.40.20 and commentary following.

As a practical matter, in most instances an interim injunction will achieve the same objective as an interim declaration (e.g. *R. v Secretary of State for Transport, Ex p. Factortame Ltd (No.2)* [1991] 1 A.C. 603, HL (interim injunction in effect declaring Act of Parliament ineffective pending reference to ECJ)). Rule 25.1(1)(b) may prove to be of greatest importance in those cases where the court cannot grant an interim injunction (e.g. where the Crown Proceedings Act 1947 s.21 applies). In any event, the particular problems that arise where a declaration is sought as a final remedy (e.g. whether there is a real question and whether the applicant has standing) will also apply where a declaration is sought as an interim remedy.

In *Bank of Scotland v A. Ltd* [2001] EWCA Civ 52; [2001] 1 W.L.R. 751, CA, it was explained that the court's power to grant interim declarations may prove useful where a financial institution, cooperating with law enforcement authorities in circumstances where "tipping off" legislation may apply (e.g. where money laundering is suspected), was concerned that it should not be affected adversely unnecessarily by the existence of the police powers.

In *ABC v CDE*, [2010] EWCA Civ 533, April 26, 2010, unrep., CA, the judge at first instance exercised the power for the purpose of granting a declaration to the effect that a particular transaction by which a contemnor was seeking to purge their contempt would not be a further breach of the freezing order that still bound them (ibid., at paras 26 and 29).

As to whether declarations, whether interlocutory or final, may be granted by consent, and as to the court's jurisdiction to grant a declaration as a final (rather than as an interim) remedy in interlocutory proceedings, see notes following r.40.20.

As to interim declarations in judicial review proceedings, see para.54.3.4 below.

Orders in relation to relevant property (r.25.1(1)(c))

25.1.16 The court (this would normally be a Master or district judge; see r.2.4) may grant as interim remedies a number of different orders relating to "relevant property". (For other orders as to property, see r.25.1(1)(g), (i) and (j).) In r.25.1(1)(c), relevant property means "property (including land) which is the subject of a claim or as to which any question may arise on a claim" (r.25.1(2)). Where the court is making an order for delivery up or preservation of evidence or property, the court has to consider whether to include in the order similar provisions as are specified for injunctions or search orders (see para.25APD.8 below).

25.1.17 *Detention, custody or preservation of relevant property (r.25.1(1)(c)(i))* —The court may grant an interim remedy in the form of an order for the detention, custody or preservation of relevant property (r.25.1(1)(c)(i)).

25.1.18 *Inspection of relevant property (r.25.1(1)(c)(ii))* —The court may grant an interim remedy in the form of an order for the inspection of relevant property (r.25.1(1)(c)(ii)). One circumstance in which an order may be made under this provision is where a party wishes to introduce evidence in the form of a plan, photograph or model (r.33.6).

25.1.19 *Taking of a sample of relevant property (r.25.1(1)(c)(iii))* —The court may grant an interim remedy in the form of an order for the taking of a sample of relevant property (r.25.1(c)(iii)).

25.1.20 *Carrying out of an experiment on or with relevant property (r.25.1(1)(c)(iv))* —The court may grant an interim remedy in the form of an order for the carrying out of an experiment on or with relevant property (r.25.1(1)(c)(iv)).

25.1.21 *Sale of property where desirable to sell quickly (r.25.1(1)(c)(v))* —The court may grant an interim remedy in the form of an order for the sale of relevant property which is of a perishable nature or which for any other good reason it is desirable to sell quickly (r.25.1(1)(c)(v)). "Relevant property" in this context includes land (r.25.1(2)). For examples of "good reasons", see *On Demand Information plc v Michael Gerson (Finance) plc* [2002] UKHL 13; [2003] 1 A.C. 368, HL; *Bank of Scotland v Neath Port Talbot CBC* [2006] EWHC 2276 (Ch), August 11, 2006, unrep (David Richards J.). In considering the balance of disadvantage for the purposes of deciding whether to order a sale the court should consider prejudice in relation to the assets in question, and may take into account any collateral considerations, but the weight to be given to the latter will depend on the circumstances of the individual case. Satisfying the court that there is good reason for an order for sale is no more than the threshold issue; it is only then that the question arises as to whether the discretion to order the sale should be exercised (*Bank of Scotland v Neath Port Talbot CBC* op cit.).

25.1.22 *Payment of income until a claim is decided (r.25.1(1)(c)(vi))* —The court may grant an interim remedy in the form of an order for the payment of income from relevant property until a claim is decided (r.25.1(1)(c)(vi)). This is based on former RSC Ord.29 r.8 (Allowance of income of property pendente lite). That rule stated that, where any real or personal property formed the subject-matter of any proceedings, and the court was satisfied that it would be more than sufficient to answer all the claims thereon for which provision ought to be made in the proceedings, "the Court could at any time allow the whole or part of the income of the property to be paid, during such period as it may direct, to any or all of the parties who have an interest therein or may direct that any part of the personal property be transferred or delivered to any or all of such parties".

Order authorising entry on land for carrying out interim remedy orders as to relevant property (r.25.1(1)(d))

25.1.23 Where the court grants an interim remedy in the form of any of the orders listed in r.25.1(1)(c) the court (this would normally be at the same judicial level as that granting

the primary interim remedy) may grant a further interim remedy in the form of an order authorising a person to enter any land or building in the possession of a party to the proceedings for the purposes of carrying out the first order (r.25.1(d)). Rule 25.1(1)(c)(v) includes the making of a supplementary order authorising the entry on any land in the possession of a party for the purpose of enabling the order for sale to be carried out (see para.25.1.20 above).

An order granting an interim remedy of this type may be made only by a judge (Practice Direction (Allocation of Cases to Levels of Judiciary), para.2.1, see para.2BPD.1 above).

Order for delivery up of goods under Torts (Interference with Goods) Act 1977, section 4 (r.25.1(1)(e))

25.1.24 The court may grant an interim remedy in the form of an order under s.4 of the Torts (Interference with Goods) Act 1977 to deliver up goods (r.25.1(1)(e)). An application for an interim remedy of this type may be made either before or after a claim is started. Section 4(2) of the 1977 Act states that, in proceedings for wrongful interference, the court shall have power to make an order "providing for the delivery up of goods which are or may become the subject-matter of subsequent proceedings". Rule 25.1(1)(e) contains no definition of goods. Where the court is making an order for delivery up or preservation of evidence or property, the court has to consider whether to include in the order similar provisions as are specified for injunctions or search orders (see para.25APD.8 below).

Freezing injunction (formerly Mareva injunction) (r.25.1(1)(f))

25.1.25 The court may grant an interim remedy in the form of an injunction (i) restraining a party from removing from the jurisdiction assets located there, or (ii) restraining a party from dealing with any assets whether located within the jurisdiction or not (r.25.1(1)(f)). Before the CPR came into effect, such a remedy was described as a "Mareva" injunction. In r.25.1(1)(f) and r.25.1(1)(g) it is described as a "freezing" injunction. An order granting such an injunctive remedy would properly be described as a "freezing" order. In modern legal parlance the expressions "freezing order" and "freezing injunction" tend to be used indiscriminately.

Practice Direction 25A (Interim Injunctions), supplements Pt 25 (see para.25APD.13 below), and contains provisions dealing with applications for interim injunctions generally and for freezing injunctions in particular.

The commentary following outlines the bases for the court's jurisdiction to make orders for freezing injunctions and concentrates on matters of practice and procedure. For more detailed commentary on freezing orders, see Vol.2, Section 15, Interim Remedies, subs.B para.15–54.

25.1.25.1 *Jurisdiction—generally* —In a claim in which the claimant seeks to recover their own property, the court has jurisdiction to order an interim injunction restraining the disposal of property over which the claimant has a proprietary claim. Such an injunction is based on the claimant's ownership of the relevant assets and the approach of the court is different (being founded on the equitable jurisdiction) from an injunction of the Mareva type, which seeks to prevent the risk of dissipation to avoid a judgment (*Cherney v Neuman* [2009] EWHC 1743 (Ch), July 22, 2009, unrep. (Judge Waksman Q.C.)). A freezing injunction can cover both proprietary claims and can restrain the defendant from disposing of or dealing with their own assets, being assets over which the claimant asserts no proprietary claim so that those assets are preserved and are available to satisfy a money judgment (*Ostrich Farming Corp Ltd v Ketchell*, December 10, 1997, CA, unrep.).

The court will in an appropriate case, grant relief ancillary to a freezing order against the primary defendant by joining a third party as a defendant (even though there is no cause of action against it) and granting a freezing injunction against it to support the claimant's claim against the primary defendant: this is the so-called Chabra jurisdiction. See commentary in Vol.2, para.15–63.

An order granting an interim remedy of this type may be made only by a judge (Practice Direction (Allocation of Cases to Levels of Judiciary), para.2.1, see para.2BPD.1 above).

25.1.25.2 *Jurisdiction—county courts* —The general rule is that a county court may not grant a freezing injunction; see para.25.0.8 above. However, there are exemptions. Further,

the High Court has jurisdiction to grant freezing injunctions incidental to and in support of county court proceedings. For an explanation of the exemptions and of the High Court's support jurisdiction, see Vol.2, Section 15 Interim Remedies subs.B para.15–59.

25.1.25.3 *Making an application* —An application for a freezing injunction is made by filing an application notice in accordance with the provisions of Pt 23 (General rules about applications for court orders) as modified by the provisions of Practice Direction (Interim Injunctions) (see para.25APD.3 below). The modifications are substantial. Note also "Court Guides and interim remedies procedure", para.25.0.6 above.

Generally, and for obvious reasons, in the first instance an application for a freezing injunction is likely to be made without notice and if necessary before a claim form has been issued. In such circumstances, the applicant must either undertake to issue a claim form immediately, or the Court will give directions for the institution of proceedings by the applicant for substantive relief: see para.5.1(5)(b) and para.25APD.5, and where possible, the claim form should be served with the injunction: para.4.4(2)25APD.4.

The general rule is that court hearings, including hearings of applications for interim remedies, are to be in public (r.39.2(1)), but in particular proceedings a hearing, or any part of it, may be in private "if publicity would defeat the object of the hearing" or "if it involves confidential information" (r.39.2((3)(a) and (b)). Hearings relating to applications for freezing injunctions may fall into these exceptional categories.

When granted, the order is of immediate effect and it does not depend for its activation on the institution of proceedings for substantive relief. If proceedings for substantive relief are not instituted the order may lapse in accordance with it own terms or, on application by the respondent, may be discharged (*Fourie v Le Roux* [2007] UKHL 1; [2007] 1 W.L.R. 320, HL, per Lord Scott at paras 32, 33 and 37).

See further, Practice Direction (Interim Injunctions) para.2 (Making an application) and para.4 (Urgent applications and applications without notice) (see paras 25APD.2 and 25APD.4 below).

25.1.25.3.1 *Subsequent amendment of particulars of claim* —Where a claimant applies for and obtains from the court an order for a freezing injunction on the basis that they have a particular claim (claim 1) against the defendant, but subsequently amend their particulars of claim to allege another claim (claim 2), the claimant bears the risk that if the amendment constitutes a new cause of action, and at trial they succeed on claim 2 but fail on claim 1, the freezing order may be discharged and the cross-undertaking enforced (*Dadourian Group International Inc v Simms* [2009] EWCA Civ 169; [2009] 1 Lloyd's Rep. 601, CA). In such circumstances, when the amendment is made the claimant ought to go through the process of establishing before the court that the freezing order is properly made in support of claim 2 as well as claim 1 (ibid. at para.191).

25.1.25.4 *Applicant's duties* —As to applicant's duty to make full and frank disclosure when applying without notice for interim injunction and other duties, see para.25.3.5, "Applicant's duties where application made without notice to respondent" below.

Applicants for an injunction made without notice to the respondent must explain in the evidence in support, why notice was not given: see para.3.4 of the Practice Direction (para.25APD.3 below). A judge should not entertain a without notice application unless either giving notice would enable the defendant to take steps to defeat the purpose of the injunction or where there has been literally no time to give notice, but even in this latter, rare, category of cases the applicant should give shorter notice at least by telephone (*National Commercial Bank Jamaica Ltd v Olint Corp Ltd (Practice Note)* [2009] UKPC 16; [2009] 1 W.L.R. 1405, PC).

Applicants for any form of relief "without notice" to the respondent, and for freezing injunctions in particular, are under a duty to provide full notes of the hearing with all expedition to any party that would be affected by the relief sought (*Interoute Telecommunications (UK) Ltd v Fashion Gossip Ltd*, *The Times*, November 10, 1999 (Lightman J.)). Where a freezing order is granted, the duty to provide the respondent with a full note arises whether or not the respondent asks for it (*Thane Investments Ltd v Tomlinson*, *The Times*, December 10, 2002 (Neuberger J.)). If a freezing order is sought immediately after judgment against a respondent who was not a party to the proceedings, particular care should be taken by the applicant to ensure that the respondent is fully

informed of the facts and contentions which gave rise to the order (*Flightwise Travel Service Ltd v Gill* [2003] EWHC 3082 (Ch); *The Times*, December 5, 2003 (Neuberger J.)). For practice in family proceedings in this respect, see *S (A Child) (Family Division: Without Notice Orders)* [2001] 1 W.L.R. 211; *Tchenguiz v Imerman* [2010] EWCA Civ 908, July 29, 2010, unrep., CA, at para.127 et seq. (freezing injunctions and search orders in financial relief proceedings).

Good practice requires that, at a return date hearing, the applicant should draw to the attention of the court and the respondent the respects (if any) in which the draft order prepared by them differs from the original order made without notice (*JSC BTA Bank v Ablyazov* [2009] EWHC 3267 (Comm), December 11, 2009, unrep. (Teare J.)).

As to applicant's duties where freezing injunction affects a third party, see Practice Direction (Interim Injunctions) para.9 (para.25APD.9 below).

25.1.25.5 *Evidence* —Applications for freezing injunctions must be supported by written evidence in the form of an affidavit (Practice Direction 25A (Interim Injunctions), para.3.1, see para.25APD.3 below, and note commentary in para.25.3.3). As to whether the affidavit in support or in reply should be the affidavit of the party or the party's solicitor, see "Contents of witness statements", para.32.4.5 below. However it is not a requirement in every case that an application must be supported by a sworn statement, because it is easy to imagine circumstances where the balance of justice would plainly require an injunction to be granted before the applicant had had an opportunity to prepare a sworn statement. However, in such a case it is important that the court should require the applicant to confirm in the form of a sworn statement all the evidence on which they rely (*Flightwise Travel Service Ltd v Gill* [2003] EWHC 3082 (Ch); *The Times*, December 5, 2003 (Neuberger J.)).

The claimant should depose to objective facts from which it may be inferred that the defendant is likely to move assets or dissipate them; unsupported statements or expressions of fear have little weight (*O'Regan v Iambic Productions* (1989) 139 N.L.J. 1378 (Sir Peter Pain); *Rosen v Rose* [2003] EWHC 309 (QB); January 27, 2003, unrep. (Fulford J.)). Great care should be taken in the presentation of evidence to the court so that the court can see, not only whether the applicant has a good arguable case, but also whether there is a real risk of dissipation of assets.

A freezing order should not be granted unless the applicant has established an appropriately strong case showing, amongst other things, that the respondent owns the assets concerned or has some interest in them. It is for the applicant to make out their case. An order should not be granted simply because the respondent cannot show any immediate and obvious prejudice (*Flightwise Travel Service Ltd v Gill* [2003] EWHC 3082 (Ch); *The Times*, December 5, 2003 (Neuberger J.)). Where the respondent is alleged to have been dishonest, the court should scrutinise with care whether what is alleged in this respect in itself really justifies the inference that they are likely to dissipate assets unless restricted (*Thane Investments Ltd v Tomlinson* [2003] EWCA Civ 1272; July 29, 2003, CA, unrep.). The source of the assets to be frozen, whether legitimate or not, is relevant to the exercise of the discretion to grant an order (*Dakers v Phipps* [2005] EWHC 3391 (Ch), December 1, 2005, unrep. (Judge Hawksworth Q.C.)). Where an application is made without notice to the respondent, the evidence must state why notice was not given (Practice Direction (Interim Injunctions) para.3.4, see para.25APD.3 below). It is essential that the respondent is entitled to a proper opportunity to present their case at the with notice hearing. They therefore have to be supplied with all the evidence on which the applicant is going to rely (*Flightwise Travel Service Ltd v Gill* [2003] EWHC 3082 (Ch); *The Times*, December 5, 2003 (Neuberger J.)).

Where an applicant for a freezing order in their evidence deploys evidence of discussions between the parties covered by without prejudice privilege, it may be unjust to prevent the respondent from deploying the same evidence in an attempt to defeat the applicant's case against them at trial (*Somatra Ltd v Sinclair Roche & Temperley* [2000] 1 W.L.R. 2453, CA).

Information obtained from a prosecuting authority by a party to civil proceedings is admissible in proceedings for a freezing injunction and a disclosure order, although it has been acquired by the authority as a result of letters of request under the Criminal Justice International Co-operation Act 1990 s.3(7), as the restrictions in that Act on the use of material obtained in response to a letter of request apply only to use in criminal investigations and proceedings (*BOC Ltd v Barlow* [2001] EWCA Civ 854; *The Times*, July 10, 2001, CA).

25.1.25.6 *Example of order to restrain disposal of assets* —The example of an order for a freezing injunction annexed to Practice Direction 25A (Interim Injunctions) (see para.25APD.13 below) may be adapted for either worldwide or domestic relief. The content of the example may be modified as appropriate in any case. Any departure from the standard wording must be drawn to the attention of the judge hearing the without notice application. It is expressly provided that the court may, if it considers it appropriate, require the applicant's solicitors, as well as the applicant, to give undertakings (ibid. paras 6.1 and 6.2). The examples, modified in certain respects, are also contained in App.5 to the Admiralty and Commercial Courts Guide (see Vol.2, para.2A–162).

The clauses in the example reflect the case law as it has developed since the 1970s and provide judges and practitioners with a useful guide to the matters that have to be dealt with on an application for such an order. Before the current example was introduced, the freezing injunctions annexed to *Practice Direction (Mareva Injunctions and Anton Piller Orders)* [1994] 1 W.L.R. 1233 (see also [1996] 1 W.L.R. 1552) were described as "standard forms" and it was required that they should be used "save to the extent that the judge hearing a particular application considers there is good reason for adopting a different form". The change of status from "standard form" to "example" acknowledges the fact that, although it is desirable that a consistent approach should in general be adopted in relation to the forms and carrying out of freezing injunctions, it is important that they should be carefully tailored to meet the circumstances of each case. However, the terms of a freezing injunction are not at large and an injunction obtained without notice and omitting important terms may be set aside (*Bank of Scotland v A Ltd* [2000] Lloyd's Rep. Bank. 271; [2001] C.P. Rep. 14, Laddie J.). In *JSC BTA Bank v Ablyazov* [2009] EWHC 3267 (Comm), December 11, 2009, unrep. (Teare J.), it was held (on the claimant's application) that the circumstances justified a variation of the standard wording so as to restrain the respondent from disposing of or dealing with assets outside the jurisdiction so long as the value of all his assets "in England and Wales" (rather than "whether in or outside England and Wales") remained above the maximum sum.

The example form of a freezing order contains an undertaking by the applicant not without the permission of the court to seek to enforce the order outside England and Wales. In *Dadourian Group International Inc v Simms (Practice Note)* [2006] EWCA Civ 399; [2006] 1 W.L.R. 2499, CA, the Court of Appeal laid down guidelines as to the exercise of the discretion whether to grant permission to enforce a worldwide freezing order abroad. For further commentary, see Vol.2, para.15–87.

The example contains clauses stating that the terms in the order prohibiting the respondent from dealing etc. with their assets do not prohibit them from spending stipulated sums on living expenses or on legal advice and representation. It has been held that these clauses in combination do not prohibit the respondent from borrowing money to meet living and legal expenses, even though the result is that the amounts then spent on these matters exceed the sums stipulated (or, in relation to legal expenses, a reasonable amount) (*Cantor Index Ltd v Lister*, November 22, 2001, unrep. (Neuberger J.)). Further, the clause allowing expenditure "on legal advice and representation" may permit such expenditure in relation to legal matters unconnected with the proceedings in which the freezing injunction is granted (ibid.).

In *Linsen International Ltd v Humpuss Sea Transport Pte Ltd* [2010] EWHC 303 (Commercial Court) (Christopher Clarke J.), it was pointed out that the wording of the exception permitting limited expenditure on legal advice would allow a series of payments each below the stated maximum, and a provision was added that if the money spent by the defendants on legal advice exceeded a particular sum, or thereafter, any whole number multiple of that sum, the defendants were required to tell the claimants where the money had come from, and the amount expended.

Difficulties can arise where the injunction is of a proprietary nature (so that the assertion is that the frozen monies belong to the claimant), and the defendant wishes to draw on these funds for its legal costs or to enable it to honour pre-existing contractual obligations. In such a case, four questions fall to be asked (1) has the claimant an arguable proprietary claim to the money? (2) if yes, does the defendant have arguable grounds for denying that claim? (3) if yes, has the defendant demonstrated that, without the release of the funds in issue, it cannot effectively defend the proceedings? (4) if yes, where does the balance of justice lie? (*Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2009] EWHC 161 (Ch), January 26, 2009, unrep. (Lewison J.)).

Also, the example envisages that notice of the order should be given to third parties

handling the respondent's assets (e.g. accountants, lawyers, banks). By this device, where money is, or assets are, passed to or held by a third party, the applicant is afforded protection without implicating the third party (who may or may not also turn out to be liable, but who at the time of application cannot be shown in any way to be implicated). Such third parties should not be made defendants unnecessarily. The reason why a bank is sometimes joined as a defendant is that the claimant wishes to have information about money in accounts of the defendant held at the bank (*Mirchandani v Bannerjee*, December 19, 2000, unrep. (Neuberger J.)).

The example refers to assets held by a defendant as "his assets". Where, in relation to the assets sought to be frozen, the defendant is as a bare trustee and has no beneficial interest in them, they are not "his assets" in this sense and therefore do not come within the scope of a freezing injunction made in the standard form; orders made in a more specific terms might cover bank accounts in which a defendant had no beneficial interest but which were in their name and under their control (*Federal Bank of the Middle East v Hadkinson* [2000] 1 W.L.R. 1695; [2000] 2 All E.R. 395, CA). In terms, the description of "assets" covered by a freezing order given in para.6 of each of the examples is more expansive in the versions in App.5 to the Admiralty and Commercial Courts Guide than in the versions annexed to PD 25A. This difference was noted by the Court of Appeal and regarded as significant in *JSC BTA Bank v Kythreotis* [2010] EWCA Civ 1436, December 14, 2010, unrep., CA (where held that the former versions include assets held by the defendant as a trustee or nominee for a third party) (see further Vol.2, para.15–68). As a consequence, those versions were amended for the purpose of making it clear that, whether the wider wording should be included in an order, will be considered by the Commercial Court on a case by case basis.

25.1.25.7 *Term requiring respondent to provide information about assets* —Normally, an interim order in the form of a freezing injunction will contain an order requiring the defendant to provide information about their assets (see r.25.1(1)(g)). Paragraph 9 of the example of a freezing injunction annexed to Practice Direction (Interim Injunctions) is an order to that effect, and it includes a passage notifying the respondent of their privilege not to incriminate themselves (see para.25APD.10 below). (As to such privilege, see commentary in CPR Pt 31.)

It is not incumbent on a company ordered to give information as to its assets for the purposes of a freezing order to give details of the assets of its subsidiaries since they are not its assets: *Linsen International Ltd v Humpuss Sea Transport Pte Ltd* [2010] EWHC 303 (Commercial Court) (Christopher Clarke J). In a proper case, it may be appropriate, once their identities have been disclosed, to join the subsidiaries as parties.

25.1.25.8 *Commencement and duration of order* —A freezing injunction takes effect at the very moment it is pronounced, even though the order has not been drawn up and even though it has not been served on the defendant (*Z Ltd v A-Z and AA-LL* [1982] Q.B. 558 at 572, CA, per Lord Denning M.R.).

The example of an order for a freezing injunction annexed to Practice Direction (Interim Injunctions), supplementing Pt 25, contains standard terms as to the duration of an order. They provide that the injunction will remain in force up to and including a return day when the application shall come back to the court for further hearing. This will be appropriate where the injunction is granted ex parte. The injunction should be granted for a few days until the defendant can be served and the bank or other third party can be given notice if necessary by telephone or telex (or by fax or other means of electronic communication) (*Z Ltd v A-Z and AA-LL* [1982] Q.B. 558, CA; sub nom. *Z Ltd v A* [1982] 1 All E.R. 556, CA). The date should be the earliest practicable return date. Following an inter partes hearing, it may be provided that the injunction will remain in force until judgment in the action. Both situations are subject to the contingency that the injunction may be varied or discharged before trial by a further order of the court. In addition, the specimen order annexed to the Practice Direction contains terms stating that the injunction should cease to have effect (1) if the claimant does not, within a particular date, provide a guarantee to support their undertakings to the court, or (2) if the defendant provides security in the manner stipulated in the injunction.

Where a claimant obtained judgment by consent and, subsequently the Master refused the claimant's application for a third party debt (garnishee) order, but ordered that certain of the respondent's monies should be paid into court, it was held at first

instance that the freezing injunction did not come to an end either (a) when judgment was obtained, or (b) when the money was paid into court (*Cantor Index Ltd v Lister*, November 22, 2001, unrep. (Neuberger J.); see also *Halvanon Insurance Co Ltd v Central Reinsurance Corp* [1988] 1 W.L.R. 1122 (Hobhouse J.)).

It has been said that post-judgment worldwide freezing injunctions should be of limited duration and the judgment creditor should be encouraged to proceed with proper methods of execution (*Republic of Haiti v Duvalier* [1990] 1 Q.B. 202; [1989] 1 All E.R. 454 at 465, CA, per Staughton L.J.).

Note also r.25.11 (Interim injunction to cease after 14 days if claim struck out).

25.1.25.9 *Varying or revoking order* —The court may vary or revoke a freezing injunction (r.3.1(7)) and a person who is not a party but who is directly affected by such injunction may apply to have it set aside or varied (r.40.9). Paragraph 13 of the example of a freezing order annexed to Practice Direction (Interim Injunctions) is directed expressly at anyone served with or notified of an order and indicates how such a person should proceed should they wish to apply to the court for the order to be varied or discharged (see para.25PFD.10 below). A person who disobeys a freezing injunction may be dealt with by contempt proceedings (Practice Direction (Judgments and Orders), para.9.1, see para.40BPD.9 below). A party's contempt is not a complete bar to an application for a variation of the terms of a freezing injunction; in such circumstances, the court should exercise its discretion in the best interests of justice (*Federal Bank of the Middle East v Hadkinson*, *The Times*, December 7, 1999 (Arden J.)). For the principles to be applied by the court in dealing with an application to vary a freezing order, see *Compagnie Noga D'Importation et D'Exportation SA v Australian and New Zealand Banking Group* [2006] EWHC 602 (Comm), March 24, 2006, unrep. (Christopher Clarke J.) (at para.9), applied in *Abbey Forwarding Limited v Hone* [2010] EWHC 1532 (Ch), May 14, 2010, unrep. (Morgan J.). See further, Vol.2 para. 15–71.

25.1.25.10 *Cross-undertaking in damages* —Given the serious damage that can be done to a respondent's business and reputation by an interim injunction, and especially by a freezing order which is usually served on third parties including the respondent's bank, a cross-undertaking in damages must normally be offered by the applicant. This general requirement is recited in para.5 of Practice Direction—Interim Injunctions, where it is further stated that the court should consider whether undertakings to protect persons other than the respondent should be required (see para.25APD.5 below). In the example of a freezing order annexed to that Practice Direction, undertaking clauses are included in Schedule B.

Whilst the court retains a discretion not to order a cross-undertaking in damages, it would have to be "in the most extraordinary circumstances, other than in Crown proceedings, for it not to do so": *RBG (Resources) plc v Rastogi* [2002] B.P.I.R. 1028 (Laddie J.).

The cross-undertaking is given in return for the court making an interim order without having determined the facts or the claimant's entitlement to it. It is given, not to identified respondents, but to the court to enable the court, if it thinks fit, to compensate any innocent sufferer from an interim injunction which ought not to have been granted (*Harley Street Capital Ltd v Tchigirinski* [2005] EWHC 2471 (Ch), May 24, 2005, unrep. (Michael Briggs Q.C.)).

The cross-undertaking should usually be offered in the affidavit in support, which should contain evidence of the applicant's ability to meet the cross-undertaking if called upon to do so (*Staines v Walsh* [2003] EWHC 1486 (Ch), June 10, 2003, unrep. (Laddie J.); *Sinclair Investment Holdings S.A. v Cushnie* [2004] EWHC 218 (Ch), February 12, 2004, unrep. (Mann J.)). In some cases, the applicant may be called on to fortify the cross-undertaking by making a payment into court or otherwise providing security. On an application for fortification, a likelihood of a significant loss arising as a result of the injunction and a sound basis for belief that the undertaking will be insufficient must be shown (*Bhimji v Chatwani (No.2)* [1992] 1 W.L.R. 1158 (Knox J.). Any estimate of the likely financial loss resulting from the grant of the injunction can be reviewed from time to time, and further fortification required if necessary. It is for the defendant to put forward in evidence a credible estimate of its future losses: *RBG (Resources) plc v Rastogi* [2002] B.P.I.R. 1028 (Laddie J). See further Vol.2 para.15–32.

Undertakings, if not in the order itself, should be in or recorded in writing, and where the terms of an undertaking are ambiguous, it is the narrower scope which must prevail (*Zipher Ltd v Markem Systems Ltd* [2009] EWCA Civ 44, February 10, 2009, CA, unrep.).

Where the claimant is not seeking a personal benefit (such as a liquidator), it may be appropriate to limit the cross-undertaking (*Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2009] EWHC 161 (Ch), January 26, 2009, unrep. (Lewison J.)) However, a shareholder bringing a derivative claim does have a personal interest and therefore (if they seek an injunction) may be required to give a personal cross-undertaking (*Iesini v Westrip Holdings Ltd* [2009] EWHC 2526 (Ch), October 16, 2009, unrep., at [133] (Lewison J.)).

The usual consequence where an injunction has been wrongly granted, even without fault on the part of the claimant, is for an inquiry to be ordered into the damages suffered by the defendant. On making application for an inquiry, the defendant must adduce some credible evidence of loss (*Yukong Line Ltd v Rendsburg Investment Corp* [2001] 2 Lloyd's Rep. 113, CA). See further, Vol.2 para.15–33.

See further, Vol.2 Section 15 (Interim Remedies), subsection 9 (Undertaking as to damages), paras 15–25 to 15–38.

Obligations of claimant after grant of freezing injunction

25.1.25.11 A freezing injunction is an adjunct to a claim and not a substitute for the relief to be obtained at the trial. Therefore a claimant applying for and granted such injunction should press on quickly with their action. It as an abuse of process for a litigant to obtain a freezing injunction and then not to prosecute the action; a litigant is under a duty either to proceed with their claim or to apply, on their own motion, to have the injunction discharged (*Town and Country Building Society v Daisystar Ltd* 139 N.L.J. 1563 (1989); *The Times*, October 16, 1989, CA; *Comdel Commodities Ltd v Siporex Trade SA* [1997] 1 Lloyd's Rep. 424, CA; *Lloyds Bowmaker Ltd v Britannia Arrow Holdings Plc* [1988] 1 W.L.R. 1337; [1988] 3 All E.R. 178, CA). Failure to progress the action, wherever it is taking place, is a ground upon which a court may discharge an injunction previously granted (*Walsh v Deloitte & Touche Inc* [2001] UKPC 58, December 17, 2001, unrep., PC).

A party who obtains the grant of a freezing injunction should promptly apply to the court for the discharge of the injunction if the time comes when it is no longer needed; the injunction ought not to be maintained against an individual any longer than is strictly necessary (*Detect Sea Enterprises Ltd v O'Connor* October 14, 1997, unrep., Sir Richard Scott, V.-C.).

It is the duty of the party having the benefit of a freezing order to ensure that it does no more than is necessary to protect the claim which that party has. If it later appears that the claim is in a lower amount than is covered by the freezing order, the claimant should agree to reduce the amount: *Willetts v Alvey* [2010] EWHC 155 (Ch), January 21, 2010, unrep. (Norris J.).

25.1.25.12 *Communications with the court* —At the end of the clauses in the body of the example of a freezing order annexed to Practice Direction (Interim Injunctions) there is a section headed "Communications with the court" in which practitioners and persons affected are given useful information about contact room numbers and telephone numbers where the order is made at the Royal Courts of Justice. It should be noted that these details may be amended from time to time and there may be some considerable delay before the version of the order as annexed to the Practice Direction (and as published elsewhere) is updated accordingly. As a result of amendments made to those details in October 2006 and again in March 2010, communications about an order (quoting the case number) should be addressed to the appropriate court at the Royal Courts of Justice, Strand, London WC2A 2LL, as follows: where the order is made in the Chancery Division, to Room TM5.07 (tel. 020 7947 6322); in the Queen's Bench Division, to Room WG08 (tel. 020 7947 6010); in the Commercial Court, to Room EB09 (tel. 020 7947 6826).

Order to provide information about property or assets (r.25.1(1)(g))

25.1.26 The court may grant an interim remedy in the form of an order directing a party to provide information about the location of relevant property or assets or to provide information about relevant property or assets which are or may be the subject of an application for a freezing injunction (r.25.1(1)(g)). This interim remedy complements that stated in r.25.1(1)(f) and in terms is restricted to "freezing injunctions" as defined there. An interlocutory injunction, even when seeking preservation of relevant property only, may not have such an order attached unless such a power could be invoked under r.25.1(3).

In an appropriate case, a respondent may be cross-examined on their disclosure affidavit.

An order may be made under this provision before normal disclosure under Pt 31. An order may be made, not only where the property or assets are, but also where they "may be", the subject of an application for a freezing injunction. In the latter event, there must be some credible evidence and grounds upon which to base the application for an order, and an applicant may not use the rule as a fishing expedition to find out whether they had such grounds (*Parker v C.S. Structured Credit Fund Ltd* [2003] EWHC 391 (Ch); [2003] 1 W.L.R. 1680 (Mr Gabriel Moss Q.C.)). A reasonable possibility (not necessarily amounting to a likelihood on the balance of probabilities), based on credible evidence, should be sufficient to satisfy the jurisdictional requirement. Once the court is so satisfied it has to decide whether, in the exercise of discretion, it was just and convenient in all the circumstances to make the order sought (*Lichter & Schwarz v Rubin*, [2008] EWHC 450 (Ch), *The Times* April 18, 2008 (Henderson J.)).

In preparing an affidavit in response to a disclosure order accompanying a freezing injunction a defendant is under a duty, not only to give a truthful answer, but also to take reasonable steps to investigate its truth (*Bird v Hadkinson*, *The Times*, April 7, 1999 (Neuberger J.)).

Normally, a freezing order cannot properly be policed and rendered effective unless the respondent party against whom it is made complies with the terms of the accompanying disclosure order. Where a respondent makes an application to set aside a freezing order (or makes an appeal for the same purpose), the freezing order remains in effect in the meantime; further, the respondent is not entitled to a stay of the disclosure order pending the determination of the application (or the appeal) (*Motorola Credit Corporation v Uzan* [2002] EWCA Civ 989; *The Times*, July 10, 2002, CA; *Federal Republic of Nigeria v Union Bank of Nigeria* October 18, 2001, unrep. (Laddie J.)). A defendant must comply with a disclosure order even if it has a pending challenge to the court's jurisdiction, and that challenge does not prevent the court from making an "unless" order debarring (if there is further non-compliance) the defendant from defending (*JSC BTA Bank v Ablyazov* [2010] EWHC 2219 (QB), August 28, 2010, unrep. (Christopher Clarke J.)).

In certain circumstances, a party may refuse to provide information on grounds of privilege, see *Den Norske Bank ASA v Antonatos* [1999] Q.B. 271; see further Pt 31.

In r.25.1(1)(g), relevant property means "property which is the subject of a claim or as to which any question may arise on a claim" and includes land (r.25.1(2)).

As to the power of the court to make against a third party order an order ancillary to an interim order against a party requiring the third party (e.g. the party's bank) to make disclosures, etc., e.g. a Bankers Trust order (*Bankers Trust Co v Shapira* [1980] 1 W.L.R. 1274; [1980] 3 All E.R. 353, CA or a Norwich Pharmacal order (*Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] A.C. 133, HL)), see Pt 31.The Norwich Pharmacal principle has been extended to include contractual as well as tortious wrongdoing, where the claimant is missing crucial information, and the person against whom the relief is sought may be a wrongdoer himself. The principles were summarised in *Mitsui & Co Ltd v Nexen Petroleum UK Ltd* [2005] EWHC 625 (Ch); [2005] 3 All E.R. 511 (Lightman J.).

As to the practice to be followed where a third party had reported information regarding money laundering and is restrained by "tipping-off" provisions of relevant legislation from disclosing information to an applicant for a freezing injunction, see *C v S (Money Laundering: Discovery of Documents)* [1999] 1 W.L.R. 1551, and see further notes to Pt 31.

Search order (formerly Anton Piller order) (r.25.1(1)(h))

25.1.27 Paragraph (h) of r.25.1(1) recites that the court may grant an interim remedy in the form of an order requiring a party to admit another party to premises "for the purpose of preserving evidence, etc." Such an order, formerly known as an Anton Piller order, is now referred to in that provision as a "search order".

Practice Direction (Interim Injunctions), supplements Pt 25 and contains provisions dealing with applications for interim injunctions generally and for search orders in particular. See para.25APD.7 below.

A person who disobeys a search order may be dealt with by contempt proceedings (Practice Direction (Judgments and Orders), para.9.1, see para.40BPD.9). However, where the defendant is in technical breach of a complex search order, in circumstances where the breach is trivial and non-blameworthy, an application to commit

them may be dismissed with costs on the ground that it is a disproportionate response to the breach (*Adam Phones Ltd v Goldschmidt* [1999] 4 All E.R. 486).

The commentary following outlines the bases for the court's jurisdiction to grant search orders and concentrates on matters of practice and procedure. For more detailed commentary on search orders, see Vol.2, Section 15 Interim Remedies subs.C para.15–89.

25.1.27.1 *Jurisdiction—generally* —The jurisdiction of the High Court to grant a search order was put on a statutory basis by the Civil Procedure Act 1997 s.7 (see Vol.2, para.9A–756).

An order granting an interim remedy of this type may be made only by a judge exercising the jurisdiction of the High Court (Practice Direction (Allocation of Cases to Levels of Judiciary), para.2.1, see para.2BPD.1 above). Applications in intellectual property cases should be made in the Chancery Division (Practice Direction (Interim Injunctions) para.7.10, see para. 25APD.7 below); see further *Elvee Ltd v Taylor* [2001] EWCA Civ 1943; *The Times*, December 18, 2001, CA (failure to draw this to the attention of the judge may amount to material non-disclosure).

25.1.27.2 *Jurisdiction—county courts* —In any proceedings in a county court the court may make an order which could be made by the High Court if the proceedings were in the High Court (County Courts Act 1984 s.38 (see Vol.2, para.9A–468). However, the power of county courts to grant search orders is restricted by the County Court Remedies Regulations 1991 (see Vol.2, para.9B–77) made under s.38 (as amended in 1990). The general rule is that a county court may not grant a search order. Exemption from this restriction is enjoyed by a nominated circuit judge sitting in a patents county court and by a High Court judge sitting as judge for any county court district (ibid., reg.3(2)). A county court may not vary or revoke a search order granted by the High Court but may vary (but may not revoke) such an order where all the parties are agreed on the terms of the variation (reg.3(1) and (4)(b)).

25.1.27.3 *Terms of example of search order* —An example of a search order is annexed to Practice Direction 25A (Interim Injunctions), supplementing Pt 25 (see para.25APD.13 below). Paragraph 7.11 of the practice direction provides that this example may be modified as appropriate. The example of the search order is printed in the *Civil Procedure Forms Volume* and may also be found in Appendix 5 to the Admiralty and Commercial Courts Guide.

25.1.27.4 *Communications with the court* —At the end of the clauses of the body of the example of a search order annexed to Practice Direction (Interim Injunctions) there is a section headed "Communications with the court" in which practitioners and persons affected are given useful information about contact room numbers and telephone numbers where the order is made at the Royal Courts of Justice. A similar section is included in the example of a freezing order attached to that practice direction. For further information, relevant to both search orders and freezing orders, see para.25.1.25.12 above.

25.1.27.5 *Making an application* —An application for a search order is made by filing an application notice in accordance with the provisions of Pt 23 (General rules about applications for court orders) as modified by the provisions of Practice Direction (Interim Injunctions) (see para.25APD.3 below). The modifications are substantial.

Generally, and for obvious reasons, applications for search orders are made without notice.

The general rule is that court hearings, including hearings of applications for interim remedies, are to be in public (r.39.2(1)), but in particular proceedings a hearing, or any part of it, may be in private "if publicity would defeat the object of the hearing" (r.39.2((3)(a)). Hearings relating to without notice applications for search orders will often fall into this exceptional category.

25.1.27.6 *Evidence* —Applications for search orders must be supported by written evidence in the form of affidavit (Practice Direction (Interim Injunctions), para.3.1, see para.25APD.3 below). As to whether the affidavit in support or in reply should be the affidavit of the party or the party's solicitor, see "Contents of witness statements", para.32.4.5.

25.1.27.7 *Varying or revoking order* —The court may vary or revoke a search order (r.3.1(7))

and a person who is not a party but who is directly affected by such order may apply to have it set aside or varied (r.40.9). ECHR art.6(1) does not necessarily require the court to vary a freezing order to enable a party to pay for their defence (*Re Kingsley Healthcare Ltd*, September 25, 2001, unrep. (Ch D)).

Where a search and seizure order is made upon an application which materially departs from the requirements of the Practice Direction (Interim Injunctions) and the recommended form of order, the order may be set aside: *Gadget Shop Ltd v Bug.Com Ltd*, *The Times*, June 28, 2000 (Rimer J.) (see further, "Applicant's duties where application made without notice to respondent", para.25.3.5 below).

Order for disclosure before claim made of documents by prospective party (r.25.1(1)(i))

25.1.28 The court may grant an interim remedy in the form of an order under the Senior Courts Act 1981 s.33(2) or the County Courts Act 1984 s.52(2) (r.25.1(1)(i)). These subsections, which were amended by the Civil Procedure (Modification of Enactments) Order 1998 (SI 1998/2940) art.5 (see Vol.2 paras 9A–110 and 9A–500), deal with disclosure of documents before proceedings are commenced by "a person who appears to the court to be likely to be a party to the proceedings". For disclosure orders made after proceedings are commenced against "non-parties" (or "third parties"), see s.34(2) of the 1981 Act and s.53(2) of the 1984 Act and CPR r.25.1(1)(j) as explained in para.25.1.33 below. In *Burrells Wharf Freeholds Ltd v Galliard Homes Ltd* [2000] C.P. Rep. 4, the submission that art.5 was ultra vires was rejected.

In their amended form, s.33(2) of the 1981 Act and s.53(2) of the 1984 Act state that, on the application of a person who appears to the court to be likely to be a party to any subsequent proceedings, the court shall have power (in such circumstances as may be specified in the rules) to order a person who appears to the court to be likely to be a party to the proceedings and to be likely to have or to have had in their possession, custody or power any documents which are relevant to an issue arising or likely to arise out of that claim to disclose whether those documents are in their possession, custody or power. Further, the court may order that person to produce such of those documents as are in their possession, custody or power to the applicant or, on such conditions as may be specified in the order (i) to the applicant's legal advisers, or (ii) to the applicant's legal advisers and any medical or other professional adviser of the applicant, or (iii) if the applicant has no legal adviser, to any medical or other professional adviser of the applicant.

Rules of court supporting s.33(2) of the 1981 Act and s.52(2) of the 1984 Act are to be found in rr.25.2 et seq., and also in r.31.16. Note in particular r.25.4(b) and para.25.4.3 "Interim remedy order for disclosure, inspection, etc., before a claim started" and para.25.2.2 "Disclosure of documents by interim remedy order".

Application should be made under Pt 23 (r.25.4) and be supported by evidence (r.31.16(2)). As to the circumstances in which an order may be made and the terms of the order, see r.31.16(3) to (5).

Rule 31.16(3) states (amongst other things) that the court may make an order only where (a) the respondent is likely to be a party to subsequent proceedings, and (b) the applicant is likely to be a party to those proceedings. The applicant and respondent may agree that these conditions are satisfied (as in *Bermuda International Securities Ltd v K.P.M.G.* [2001] EWCA Civ 268; *The Times*, March 15, 2001, CA). Where they are not, the words of the rule should be given their ordinary meaning (*Burrells Wharf Freeholds Ltd v Galliard Homes Ltd* [2000] C.P. Rep. 4 (Dyson J.)). If there is anything approaching a real issue between the parties, and the parties show by their attitude that they intend to fight it (and to do so perhaps even regardless of the merits), then the court is likely to find paras (a) and (b) of r.31.16(3) satisfied (*Medisys Plc v Arthur Anderson*, October 26, 2001, unrep. (Cooke J.)). It would not be desirable to order disclosure in relation to a claim which was demurrable or doomed to failure, not because the parties were not likely to be parties to proceedings within the meaning of paras (a) and (b) or r.31.16(3), but because other criteria in that sub-rule would not then be met (ibid.)

In *Arsenal Football Club Plc v Elite Sports Distribution Ltd* [2002] EWHC 3057 (Mr Geoffrey Vos Q.C.), in dismissing the defendant's application to strike out the claimant's statement of case under r.3.4, the judge noted that the circumstances were that the claimants might have taken advantage of r.25.1(1)(j) and r.31.16 before proceedings were commenced but did not do so, and ordered that the defendants should give specific disclosure under r.31.12 and be at liberty after such disclosure to re-apply under r.3.4.

The regulation of disclosure of documents by prospective parties is not confined to the statutory provisions and rules of court referred to above. Pre-action protocols (see Practice Direction (Protocols), para.C1–001 below) routinely provide for the disclosure of documents before claims are started by prospective parties (see *Bermuda International Securities Ltd v KPMG* [2001] EWCA Civ 269; *The Times*, March 14, 2001, CA).

Disclosure of documents in advance of the commencement of proceedings in effect may be required under other provisions apart from those explained above. For example, provisions in the Third Parties (Rights against Insurers) Act 2010 confer on third parties rights to obtain information about insurance policies of insured parties (s.11 and Sch.1) enabling them to make an informed decision about whether or not to commence or continue litigation (rectifying a weakness in the law identified in *Re O T Computers Limited* [2004] EWCA Civ 653; [2004] Ch. 317, CA).

Order to inspect, etc., and to take samples, etc., of property before claim made (r.25.1(1)(i))

25.1.29 The court may grant an interim remedy in the form of an order under the Senior Courts Act 1981 s.33(1) or the County Courts Act 1984 s.52(1) (r.25.1(1)(i)).

These subsections state that on the application of any person the court has power to make an order providing for (a) the inspection, photographing, preservation, custody and detention of property which appears to the court to be property *which may become the subject-matter of subsequent proceedings in the court*, or as to which any question may arise in any such proceedings, and (b) the taking of samples of any such property and the carrying out of any experiment on or with any such property (see Vol.2, paras 9A–110 and 9A–500).

In effect, these subsections enable the court to make orders similar to those referred to in r.25.1(1)(c)(i) to (iv). The significant feature of the subsections is that they specifically empower the court to make such order before proceedings are commenced. It may be noted that r.25.2(1)(a) states that an order for an interim remedy, including the remedies referred to in paras (i) to (iv) of r.25.1(1)(c), may be made before proceedings are started (that is to say, before the court issues a claim form).

Rules of court supporting s.33(1) of SCA 1981 and s.52(1) of CCA 1984 are to be found in rr.25.2 et seq. and notes following those rules.

Order to inspect, etc., and to take samples, etc., of non-party's property after claim made (r.25.1(1)(j))

25.1.30 The court may grant an interim remedy in the form of an order under the Senior Courts Act 1981 s.34(3) or the County Courts Act 1984 s.53(3) (r.25.1(1)(j)).

These subsections state that in any proceedings on the application of a party the court has power to make an order providing for (a) the inspection, photographing, preservation, custody and detention of property which appears to the court to be property *which is not the property of, or in the possession of any party to the proceedings* but which is the subject-matter of the proceedings or as to which any question may arises in the proceedings, and (b) the taking of samples of any such property and the carrying out of any experiment on or with any such property (see Vol.2, paras 9A–115 and 9A–506).

In effect, these subsections enable the court to make orders similar to those referred to in r.25.1(1)(c)(i) to (iv). The significant feature of the subsections is that they specifically empower the court to make such orders after proceedings are commenced against persons who are not parties to the proceedings.

Rules of court supporting s.34(3) of the SCA 1981 and s.53(3) of the CCA 1984 are to be found in rr.25.2 et seq. and notes following those rules.

Order for disclosure of documents by non-party after claim (r.25.1(1)(j))

25.1.31 The court may grant an interim remedy in the form of an order under the Senior Courts Act 1981 s.34(2) or the County Courts Act 1984 s.53(2) (r.25.1(1)(j)). These subsections deal with disclosure of documents after proceedings are commenced by a person who is not a party to the proceedings (i.e. a "non-party" or "third party"). For disclosure orders against prospective parties (as distinct from non-parties) before proceedings are commenced, see s.33(2) of the 1981 Act and s.52(2) of the 1984 Act and CPR r.25.1.1(i) as explained in para.25.1.28 above.

In the Final Report (pp.127–128) it was recommended that the court should have power to make disclosure orders (1) before proceedings for personal injury and

wrongful death were commenced against persons who were not likely to be parties to the proceedings and (2) after proceedings of any variety had been commenced against persons who were not parties to the proceedings. The latter, but not the former, of these recommendations was accepted. Accordingly, s.34(2) of the 1981 Act and s.53(2) of the 1984 Act were amended by the Civil Procedure (Modification of Enactments) Order 1998 (SI 1998/2940) art.5 (see Vol.2, paras 9A–115 and 9A–506).

In their amended form, these subsections state that, on the application of a party to any proceedings (not only, as previously, proceedings in which a claim is made in respect of personal injuries or death), the court shall (in such circumstances as may be specified in the rules) have power to make a disclosure order against a person who is not a party to the proceedings and who appears to the court to be likely to have in their possession, custody or power any documents "which are relevant to an issue arising, out of the said claim". (The expression "said claim" referred back to s.34(1) and s.53(1), but both of these subsections are now repealed.) Further, the court may order that person to produce such of those documents as are in their possession, custody or power to the applicant or, on such conditions as may be specified in the order (i) to the applicant's legal advisers, or (ii) to the applicant's legal advisers and any medical or other professional adviser of the applicant, or (iii) if the applicant has no legal adviser, to any medical or other professional adviser of the applicant.

Rules of court supporting s.34(2) of the SCA 1981 and s.53(2) of the CCA 1984 are to be found in rr.25.2 et seq. and commentary following those rules. Note in particular r.25.4(b) and para.25.4.3 "Interim remedy order for disclosure, inspection etc. before a claim started" and para.25.2.2 "Disclosure of documents by interim remedy order".

Application should be made under Pt 23 (r.25.4) and be supported by evidence (r.31.17(2)). As to the circumstances in which an order may be made and the terms of the order, see r.31.17(3) to (5). The leading authority on the operation of r.31.17 is *Three Rivers District Council v Bank of England (No.4)* [2002] EWCA Civ 1182; [2002] 4 All E.R. 881, CA.

Interim payment order (r.25.1(1)(k))

25.1.32 The court (normally a Master or district judge) may grant an interim remedy in the form of an order (referred to as an order for interim payment) under r.25.6 for payment by a defendant on account of any damages, debt or other sum (except costs) which the court may hold the defendant liable to pay (r.25.1(1)(k)).

See the commentary following rr.25.6 to 25.9 below.

Order for securing of specified fund (r.25.1(1)(l))

25.1.33 The court (normally a Master or district judge) may grant an interim remedy in the form of an order for a specified fund to be paid into court or otherwise secured, where there is a dispute over a party's right to the fund (r.25.1(1)(l)).

The question of what is meant by "a specified fund" in this context was considered in *Myers v Design Inc (International) Ltd* [2003] EWHC 103 (Ch); [2003] 1 All E.R. 1168, where a claimant suing for the repayment of a loan, instead of applying for an interim remedy in the form of a freezing order, sought an order under this provision requiring the alleged debt to be paid into court. Lightman J. refused the application on the ground that, whatever may have been the position previously, at the time when the application was made there was no "fund" in the defendant's hands and no dispute as to a party's proprietary right or entitlement to or interest in a fund; any debt owed by the defendant to the claimant was a chose in action vested in the claimant.

Order for recovery of personal property subject to lien, etc. (r.25.1(1)(m))

25.1.34 The court (normally a Master or district judge) may grant an interim remedy in the form of an order permitting a party seeking to recover personal property to pay money into court pending the outcome of the proceedings and directing that, if they do so, the property shall be given up to them (r.25.1(1)(m)).

It would seem that the purpose of the form of interim remedy stated in r.25.1(1)(m) is to alleviate difficulties caused by the exercise of possessory liens in general. It does not affect the jurisdiction of the court to grant relief in equity against the exercise of a solicitor's lien (see *Ismail v Richards Butler* [1996] Q.B. 711, where the authorities are examined). In *Paragon Finance Plc v Rosling King*, May 26, 2000, unrep (Hart J.), an order sought by a client against his solicitor for delivery up of documents subject to lien was refused.

Order directing a party to prepare and file accounts (r.25.1(1)(n))

25.1.35 The court may grant an interim remedy in the form of an order directing a party

to prepare and file accounts relating to the dispute (r.25.1(1)(n)), e.g. where a mortgagor applies for an order that an account of the mortgagee's costs be taken. This power should be distinguished from the power of the court to grant an interim remedy in the form of an order directing an account to be taken or an inquiry to be made by the court (r.25.1(1)(o)) (see para.25.1.38 below).

Order directing account or inquiry (r.25.1(1)(o))

25.1.36 Sub-paragraph (o) of r.25.1(1) was added by the Civil Procedure (Amendment) Rules 2002 (SI 2002/2058) with effect from December 2, 2002 and states that the court may grant (on application or on its own initiative under r.3.3) an interim remedy in the form of an order directing any account to be taken or inquiry to be made by the court. Historically, inquiries before a master were an important feature of the old Chancery procedure. It has always been clear that the court could order an interim remedy of this type.

The power of the court to order summarily that an account be taken in cases where a party made a claim for an account, or made a claim which necessarily involved taking an account, is quite distinct from the power of the court to grant such remedy on the claimant's application for summary judgment under Pt 24. The Practice Direction supplementing that Part provides that, if a remedy sought by a claimant in their claim form, includes, or necessarily involves, taking an account or making an inquiry, "an application can be made under Part 24" by any party to the proceedings for an order directing any necessary accounts or inquiries to be taken (Practice Direction (The Summary Disposal of Claims) para.6; see para.24PD.6).

Subject to important exceptions, generally an order for an interim remedy, including an order for an account or inquiry, may be made at any time, including after judgment (see r.25.2). However, it should be noted that provisions as to the court's power to order any account to be taken or any inquiry to be made under a judgment or order (i.e. not at the interlocutory stage) are found in Practice Direction (Accounts, Inquiries Etc.), supplementing Pt 40 (see paras 40PD.1 et seq. below).

Continuation of infringement subject to guarantees in intellectual property cases

25.1.37 Sub-paragraph (p) of r.25.1(1) states that the court may grant an interim remedy in the form of an order under art.9 of Council Directive 2004/48. The purpose of this Directive is to harmonise the measures, procedures and remedies under the law of member States in relation to intellectual property rights. It deals with such matters as the parties entitled to bring proceedings, evidence and its preservation, interim and final remedies including injunctions and damages. The implementation of the Directive in UK jurisdictions has necessitated various amendments to existing statutory provisions (see Intellectual Property (Enforcement, etc.) Regulations 2006 (SI 2006/1028)). Sub-paragraph (o) was added to r.25.1(1) by the Civil Procedure (Amendment No.4) Rules 2005 (SI 2005/3515) and came into effect on April 6, 2006.

Article 9 carries the heading "Provisional and precautionary measures" and has a number of elements to it. Most of them are catered for by provisions found elsewhere in Pt 25, and also by provisions found in Pt 23 (notably rr.23.6, 23.9 and 23.10). Amongst other things, art.9 requires Member States to ensure that, at the request of an applicant, judicial authorities may issue against the alleged infringer an interlocutory injunction intended to forbid, on a provisional basis (and subject where appropriate to a recurring penalty payment where provided for by national law), the continuation of the alleged infringements of that right, or "to make such continuation subject to the lodging of guarantees intended to ensure the compensation of the rightholder". This last-mentioned aspect of art.9 appears to require that the court should have the power to order security for damages against an alleged infringer whilst permitting the infringement to continue. It is clear that the court has a discretion to award damages in lieu of an injunction, but it will not normally exercise this discretion to sanction future infringements. It would seem that sub-para.(p) was added to r.25.1(1) for the purpose of making it clear that the court has jurisdiction to make an interim order permitting the continuation of alleged infringement subject to the lodging of guarantees. Article 9 expressly states that where an interim remedy is granted before proceedings have been commenced, the procedural law of Member States shall ensure that upon the request of the defendant such remedy shall be revoked or cease to have effect if the applicant does not institute within a reasonable period proceedings leading to a decision on the merits (see further para.25.2.6 below).

Time when an order for an interim remedy may be made[1]

25.2 **25.2—(1) An order for an interim remedy may be made at any time, including—**

(a) before proceedings are started; and

(b) after judgment has been given.

(Rule 7.2 provides that proceedings are started when the court issues a claim form.)

(2) However—

(a) paragraph (1) is subject to any rule, practice direction or other enactment which provides otherwise;

(b) the court may grant an interim remedy before a claim has been made only if—

(i) the matter is urgent; or

(ii) it is otherwise necessary to do so in the interests of justice; and

(c) unless the court otherwise orders, a defendant may not apply for any of the orders listed in rule 25.1(1) before he has filed either an acknowledgement of service or a defence.

(Part 10 provides for filing an acknowledgment of service and Part 15 for filing a defence.)

(3) Where it grants an interim remedy before a claim has been commenced, the court should give directions requiring a claim to be commenced.

(4) In particular, the court need not direct that a claim be commenced where the application is made under section 33 of the Senior Courts Act 1981 or section 52 of the County Courts Act 1984 (order for disclosure, inspection, etc., before commencement of a claim).

Relationship between Pt 23 and rr.25.2 to 25.5

25.2.1 Under the CPR, application for court orders, including orders for interim remedies, are to be made in accordance with the general rules found in Pt 23. Further, they apply when an application is made for an interim remedy before a claim is made (see r.25.4 and notes following). Provisions in Pt 23 provide, generally, that an applicant must file an application notice (r.23.3(1)), that the notice must state (a) what order the applicant is seeking, and (b) briefly, why the applicant is seeking the order (r.23.6). (Note also the rules as to service and notice, rr.23.4 and 23.9, and as to where applications should be made, r.23.2.) In relation to applications for certain interim remedies, the provisions of Parts other than Pts 23 and 25 are important. For example, rr.31.16 and 31.17 apply to applications for orders for disclosure of documents before proceedings are started and against non-parties (r.25.1(i) and (j)). In some instances, such provisions significantly alter or enhance provisions found in Pts 23 and 25 (and their supplementing Practice Directions) which would otherwise apply unalloyed, but in other instances they do little more than repeat them.

Rule 25.2 and r.25.3 apply where an application for an interim remedy is made. Particular rules as to certain interim remedies are found in rr.25.4 and 25.5. All of these provisions have to be read against the background of the rules found in Pt 23. An application for an interim payment order is an application for an interim remedy (r.25.1(k)). In terms, rr.25.2 and 25.3 would apply to an application for an interim payment order. However, particular rules for such an application are found in rr.25.6

[1] Amended by the Civil Procedure (Amendment) Rules 2000 (SI 2000/221) and the Civil Procedure (Amendment No.4) Rules 2005 (SI 2005/3515).

to 25.9 and, presumably, those provisions would prevail in the event of any inconsistency between them and rr.25.2 and 25.3.

Disclosure of documents by interim remedy order

25.2.2 The court may grant an interim remedy order in the form of an order requiring the disclosure of documents before a claim has been made by a prospective party or by a "non-party" (under the Senior Courts Act 1981 s.33(2), or the County Courts Act 1984 s.52(2)), or for an order requiring disclosure by a non-party after a claim has been made (under, respectively, s.34(2) and s.53(2) of these Acts). See paras 25.1.28 and 25.1.31 above. Detailed provisions for such applications are found in Pt 31 (Disclosure and inspection of documents) (see rr.31.16 and 31.17). Note also r.25.4(1)(b) and r.25.4(2). The advantages of a *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] A.C. 133, HL, order (identifying the proper defendant to an action) may now be obtained by an application in an action without the need to join the proposed information provider or bring separate proceedings for this purpose. Norwich Pharmcal relief may be sought against a defendant in the proceedings at the same time as an application for a freezing order (*JSC BTA Bank v Ablyazov* [2010] EWHC 2219 (QB), August 28, 2010, unrep. (Christopher Clarke J.)). See further Vol.2, para.15–75.

Effect of r.25.2

25.2.3 Generally speaking, an interim remedy is a remedy applied for and granted to cover the intervening period between the commencement of the proceedings and final judgment or order, and having effect for the duration of that period and no longer. The purpose of an interim remedy is to improve the chances of the court being able to do justice after a determination of the merits at the trial (*National Commercial Bank Jamaica Ltd v Olint Corp Ltd (Practice Note)* [2009] UKPC 16; [2009] 1 W.L.R. 1405, PC). However, in some instances it may be possible for a party to apply for, and appropriate for the court to grant, before proceedings are started or after judgment has been given, one or other of the remedies listed as "interim remedies" in r.25.1(1). Whether or not any one of those remedies may be applied for and granted before proceedings are started or after judgment has been given depends primarily on the law relating to the jurisdiction of the court to grant the remedy. Rule 25.2(1) should not be interpreted as meaning that, subject only to the constraints imposed by r.25.2(2), the court has jurisdiction to grant all of the interim remedies listed in r.25.1(1) at any time. This is acknowledged by r.25.2(2)(a) which states that r.25.2(1) is "subject to any rule, practice direction or other enactment which provides otherwise". (It may be noted that r.23.5 states that, where an application must be made within a specified time, it is so made if the application notice is received by the court within that time).

An application made before a claim is commenced should be made under Pt 23 (Practice Direction 23A (Applications), para.5, see para.23APD.5) and, generally, should be made to the court where it is likely that the claim to which it relates will be started (r.23.2(4)).

Practice Direction 59 (Mercantile Courts), paras 3.1 and 3.2 apply where it is proposed to make an application to the court for an interim remedy before the making of a mercantile claim in a mercantile court or a county court business list (see Vol.2, para.2B–16).

Interim remedy granted before claim made—urgency and the interests of justice (r.25.2(2)(b))

25.2.4 The general rule is that an order for an interim remedy may be made at any time; but the court may grant an interim remedy before proceedings have been started only if (i) the matter is urgent, or (ii) it is otherwise necessary to do so in the interests of justice (r.25.2(2)(b)). The court should not entertain an application of which no notice has been given unless either giving notice would enable the defendant to take steps to defeat the purpose of the application or there has been literally no time to give notice before the remedy is required (*National Commercial Bank Jamaica Ltd v Olint Corp Ltd (Practice Note)* [2009] UKPC 16; [2009] 1 W.L.R. 1405, PC).

Some interim remedies have been designed specifically for use before a claim has been made (cf. "before proceedings are started" in r.25.2(1)(a)). A good example is an interim remedy in the form of an order under the Senior Courts Act 1981 s.33(1) or the County Courts Act 1984 s.52(1) (Order to inspect, etc., and to take samples, etc., of property before claim made) (see r.25.1(1)(i)). Former rules of court did not suggest

that orders granting such remedies could only be made on a showing that the matter was "urgent". It may be said that they could not be granted unless "necessary to do so in the interests of justice". To that extent the former practice and r.25.2(2)(b) are in accord.

Strictly speaking, timing and urgency are quite separate matters (and both are separate from the question whether application should be made on notice or not). However, it is not surprising that, at least in relation to some interim remedies, they should be mixed. Circumstances can arise when it is in the interests of justice that a person should be able to obtain an order for an interim remedy before beginning their claim, even though that remedy is not specifically designed for use before a claim has been made.

In terms, a finding of urgency is no longer essential for the granting of an interim injunction. Further, other forms of interim relief can be denied on the ground that they are not urgent. It could be argued that no harm would be done if the urgency rule were deleted entirely from r.25.2(2)(b), since if the claims are urgent, it is in the interests of justice that they should be granted.

When an application for an injunction is made before the claim form has been issued, the applicant will be required to undertake to the court to issue a claim form immediately (see para.25APD.4 (4.4(1)) below). The obligations of counsel and solicitors on a without notice application to see that there has been full disclosure and that the correct legal procedures are used (as to which see paras 25.3.5 and 25.3.6 below) apply equally in cases where the interests of the public are also involved, because derogations from the principle of open justice (such as anonymisation or restrictions on reporting) are sought. The court's obligation to ensure open justice is a continuing one, so such derogations, if granted, must be reviewed on the return date (*Gray v UVW* [2010] EWHC 2367 (QB), October 21, 2010, unrep. (Tugendhat J.)).

When an undertaking given to the court (for example to issue a claim form) is not complied with, there must be an enquiry by the court as to why that happened and what, if any, sanction or consequential order should be imposed (see *Gray v UVW* op cit.).

No application by defendant before acknowledgment of service or defence (r.25.2(2)(c))

25.2.5 Rule 25.2(1) states the general rule that an order for an interim remedy may be made at any time. However, r.25.2(2)(c) states that a defendant may not apply for any of the orders listed in rule 25.1(1) before they have responded to the claim by filing either an acknowledgment of service or a defence. This rule has a limited application because most of the interim remedies are remedies available to the claimant. Should a defendant wish to apply for an interim injunction they will be subject to r.25.2(2)(c). However, it will be easy to obtain leave so as to disapply the operation of the rule where the defendant can show a sufficiently strong case for obtaining relief. Although r.25.2(2)(c) speaks of "orders" listed in r.25.1(1) it seems clear that what is intended is that, generally, a defendant should not be able to apply for any of the interim remedies listed there, whether described as "orders" or not, before they have filed either an acknowledgment of service or a defence.

Directions requiring claim to be commenced (r.25.2(3) and (4))

25.2.6 Rule 25.2(3) applies to all interim remedies that may be granted before claim is made. Where an application is made before proceedings have been started for an interim injunction, r.25.2(3) is supplemented by Practice Direction (Interim Injunctions) para.4.4 (see para.25APD.4). Rule 25.2(3) states that "the court should give" directions requiring a claim to be commenced. This lack of compulsion recognises that there may be cases where starting a claim will be inappropriate, for example where, following an application for pre-action disclosure, the applicant decides not to start proceedings. The formulation that the court "should give" directions is in line with the general scheme of the CPR that whilst mandatory rules ("must") may be made requiring the parties to do something, such rules are not generally made as against the court. As is explained above (see para.25.1.37) art.9 of Council Directive 2004/48 on the enforcement of intellectual property rights stipulates that certain interim remedies should be available in proceedings for the enforcement of intellectual property rights but, if granted before proceedings have been commenced, should cease to have effect if the applicant does not institute within a reasonable period proceedings leading to a decision on the merits.

How to apply for an interim remedy[1]

25.3—(1) The court may grant an interim remedy on an application made without notice if it appears to the court that there are good reasons for not giving notice. **25.3**

(2) An application for an interim remedy must be supported by evidence, unless the court orders otherwise.

(3) If the applicant makes an application without giving notice, the evidence in support of the application must state the reasons why notice has not been given.

(Part 3 lists general powers of the court.)

(Part 23 contains general rules about making an application.)

Effect of rule

Note commentary at para.25.2.1—"Relationship between Pt 23 and rr.25.2 to 25.5" following r.25.2 (Time when an order for an interim remedy may be made). **25.3.1**

This rule modifies and amplifies provisions found in Pt 23 (General rules about applications for court orders) in two respects. The general rule is that an application for a court order must be made to the court where the claim was started (or is likely to be started) (r.23.2), it must generally be made by filing an application notice (r.23.3(1)), and the notice must state (a) what order the applicant is seeking, and (b) briefly, why the applicant is seeking the order (r.23.6). The two modifications made in the rule relate to notice and evidence.

(For special rules as to notice and evidence on applications for interim remedy order for disclosure of documents, see rr.31.16 and 31.17, and note "Disclosure of documents by interim remedy order" at para.25.2.2.)

Notice

Rule 25.3(1) is an example of a rule providing an exception to the general rule (stated in r.23.4(1)) that a copy of the application notice must be served on each respondent (see further para.23.4.1 above). For practice as to urgent applications and applications made notice to which Pt 25 applies, see Practice Direction 25A (Injunctions) paras 4.1 to 4.5 (para 25APD.4 below). See also para.25.2.4 above (Interim remedy granted before claim made). **25.3.2**

An application for a court order in the form of an order for an interim remedy may be made without notice "if it appears to the court that there are good reasons for not giving notice" (r.25.3(1)) (i.e. serving a copy of the notice of application under Pt 23). If the applicant makes an application without giving notice (i.e. without serving a copy of the notice of application under Pt 23), the evidence in support of the application (see further below) must state the reasons why notice was not given (r.25.3(3)). The court should not entertain an application of which no notice has been given unless either giving notice would enable the defendant to take steps to defeat the purpose of the injunction (as in the case of a freezing or search order) or there has been literally no time to give notice before the injunction is required to prevent the threatened wrongful act (*National Commercial Bank Jamaica Ltd v Olint Corp Ltd (Practice Note)* [2009] UKPC 16; [2009] 1 W.L.R. 1405, PC).

Mandatory requirements as to notice are retained by r.25.5 in relation to the interim remedies specifically referred to in that rule.

Evidence

An application for an interim remedy must be supported by evidence unless the court orders otherwise (r.25.3(2)). **25.3.3**

Rule 32.6(1) states that the general rule is that evidence "at hearings other than the trial" (e.g. proceedings for an interim remedy before or after trial) is to be by witness statement (rather than by affidavit) unless the court, a practice direction or any other enactment requires otherwise.

However, at such hearings a party may, if they wish, in support of their application

[1] Amended by the Civil Procedure (Amendment) Rules 2000 (SI 2000/221).

rely solely on the matters set out in (a) their statement of case, or (b) their application, provided that the statement of case or application is verified by a statement of truth (r.22.1(1) and (3) and r.32.6(2)). Proceedings for contempt of court may be brought against a party if they make or cause to be made a false statement in an application verified by a statement of truth without an honest belief in its truth (r.32.14(1)).)

Special requirements as to evidence are imposed by r.25.5 in relation to the interim remedies specifically referred to in that rule.

For particular requirements as to evidence on applications for interim injunctions, freezing injunctions and search orders, see Practice Direction (Interim Injunctions), para.3 (para.25APD.3).

For commentary on whether written evidence may be by applicant's solicitor rather than by applicant, see "Preparation and content of witness statements", para.32.4.5 below.

Interim remedy order hearings in private

25.3.4 Rule 39.2(1) states that the general rule is that a hearing (including a hearing other than at trial) is to be in public. However, a hearing, or any part of it, may be in private in the circumstances listed in r.39.2(3); see commentary following r.39.2 below. Exceptional circumstances which may be particularly apposite to the hearing of an application for an order for an interim remedy are: that publicity would defeat the object of the hearing; that it is a hearing on an application without notice and it would be unjust to any respondent for there to be a public hearing; that the hearing involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality. In certain circumstances, the important thing is that what transpires at a hearing for an interim order, whether held in public or in private, should not be revealed, either by publicity or otherwise, at least for the time being (e.g. *Bank of Scotland v A. Ltd* [2001] EWCA Civ 52; [2001] 1 W.L.R. 751, CA (application by financial institution where money laundering suspected)). That objective may be achieved by the court's sitting in private, but that cannot be assured. The court has an inherent power to order that information should not be disclosed and certain rules of court are to similar effect (see r.25.9; this imposes a restriction on disclosure of an interim payment). Each derogation from ECHR art.6 (the right to a public hearing) and open justice must be justified on the particular facts of the case, by a process of intense scrutiny of the countervailing factors (*Terry v Persons Unknown* [2010] EWHC 119 (QB); [2010] 2 F.L.R. 1306 (Tugendhat J.)). See also "Hearing of application 'in public' or 'in private'", para.23.0.10 above.

Where an application for an interim remedy is made by way of an arbitration claim, the question whether the court should sit in public or in private is governed, not by Pt 39, but by r.62.10 (see Vol.2, para.2E–18).

Applicant's disclosure duties where application made without notice

25.3.5 As a matter of principle no order should be made in civil proceedings without notice to the other side unless there is a very good reason for departing from the general rule that notice must be given (e.g. where to give notice might itself defeat the ends of justice). To grant an interim remedy in the form of an injunction without notice "is to grant an exceptional remedy" (*Moat Housing Group-South Ltd v Harris* [2005] EWCA Civ 287; [2006] Q.B. 606, CA, at paras 63 and 71). The court should not entertain an application of which no notice has been given unless either giving notice would enable the defendant to take steps to defeat the purpose of the injunction (as in the case of a freezing or search order) or there has been literally no time to give notice before the injunction is required to prevent the threatened wrongful act (*National Commercial Bank Jamaica Ltd v Olint Corp Ltd (Practice Note)* [2009] UKPC 16; [2009] 1 W.L.R. 1405, PC).

It is well-established that an applicant who applies for an interim remedy without notice to the respondent is under a duty to investigate the facts and fairly to present the evidence on which they rely. (This duty is obliquely referred to in Practice Direction (Interim Injunctions), para.3.3, but in terms which are misleading and not confined to applications without notice.) The applicant must disclose fully to the court all matters relevant to the application, including all matters, whether of fact or of law, which are, or may be, adverse to it (Chancery Guide para.5.16, see Vol.2, para.1–33). In *Memory Corporation Plc v Sidhu* [2000] 1 W.L.R. 1443, CA, Mummery L.J. said (at p.1459) it is a "high duty" and requires the applicant to make full, fair and accurate disclosure of material information to the court and to draw the court's attention "to

significant factual, legal and procedural aspects of the case". See also *Fitzgerald v Williams* [1996] Q.B. 657, CA, at p.667 per Sir Thomas Bingham M.R.

The duty has always been important. The emergence and development of freezing injunctions and search orders as forms of interlocutory relief has given the courts occasion to re-affirm it. Most of the modern case law arises out of applications for relief of this kind, but the principles relating to the duty are fundamental to the proper functioning of the court's process on any application without notice, since other parties do not have the opportunity to correct or supplement the evidence which has been put before the court (*Ghafoor v Cliff (Practice Note)* [2006] EWHC 825, Ch; [2006] 1 W.L.R. 3020 (David Richards J.)). The principles were reviewed by Ralph Gibson L.J. in *Brink's MAT Ltd v Elcombe* [1988] 1 W.L.R. 1350 at 1356, CA. The reason for the requirement of full and frank disclosure is because the court is wholly reliant on the information provided by the claimant. Moreover, it is not only the duty of the claimant to disclose material facts: they must also present fairly the facts which they do disclose (*The Arena Corporation Ltd v Schroeder* [2003] EWHC 1089 (Ch), May 15, 2003, unrep.(Alan Boyle Q.C.)).

In *Marc Rich & Co Holding GmbH v Krasner* [1999] C.L.Y. 487, the Court of Appeal said the duty was clearly described on the basis of the principal authorities by Bingham J. in *Siporex Trade SA v Comdel Commodities* [1986] 2 Lloyd's Rep. 428 at 437. (1) The applicant must show the utmost good faith and disclose their case fully and fairly. (2) They must, for the protection and information of the defendant, in the evidence in support of the application summarise their case and the evidence on which it is based. (3) They must identify the crucial points for and against the application, and not rely on general statements and the mere exhibiting of numerous documents. (4) They must investigate the nature of the claim asserted and the facts relied on before applying and must identify any likely defences. (5) They must disclose all facts which reasonably could or would be taken into account by the judge in deciding whether to grant the application. It is the particular duty of the advocate to see that the correct legal procedures and forms are used; that a written skeleton argument and a properly drafted order are personally prepared and lodged with the court before the oral hearing; and that at the hearing the court's attention is drawn to unusual features of the evidence adduced, to the applicable law, and to the formalities and procedures to be observed (*Memory Corporation Plc v Sidhu* [2000] 1 W.L.R. 1443, CA per Mummery L.J., above). The duty is not restricted to matters of fact, and no clear distinction between non-disclosure of facts for which the litigant has to bear responsibility and breaches of the advocate's duty to the court can be maintained as these duties often overlap (*Memory Corporation v Sidhu (No.2)* [2000] 1 W.L.R. 1443, CA). Overseas lawyers, seeking world-wide asset freezing orders in English courts should note that practitioners within the jurisdiction carry a heavy responsibility to the court and should not be encouraged to make ill-prepared applications (*Lewis v Eliades (No.1)* [2002] EWHC 335, McCombe J.). For application of these principles in the Family Division, see *Re S (A Child) (Family Division: Without Notice Orders)* [2001] 1 W.L.R. 211.

Where there have been without prejudice communications, it may be necessary to refer to the fact of such communications, and even to the effect of them, if without such a reference, the court may be misled. Thus in *Linsen International Ltd v Humpuss Sea Transport Pte Ltd* [2010] EWHC 303 (Commercial Court), Christopher Clarke J. discussed the situation where a claimant gives the impression that the defendant was being evasive, when a reference to the fact that there had been without prejudice correspondence would not have misled the court.

Discharge of injunction for material non-disclosure

25.3.6 In an interim injunction case, if the duty of full and fair disclosure is not observed, the court may discharge the injunction. It is no excuse for an applicant to say that they were not aware of the importance of the matters they omitted to state. Further, where the duty is not observed, the court may discharge the injunction even if after full inquiry the view is taken that the order made was just and convenient and would probably have been made even if there had been full disclosure. This last proposition was authoritatively restated by Scrutton L.J. in *R. v Kensington Income Tax Commissioners Ex p. de Polignac* [1917] 1 K.B. 486, CA (at 514) (the authorities were reviewed by Jacob J. in *OMV Supply &Trading AG v Clarke* [1999] C.L.Y. 435, January 14, 1999, unrep.). This rule has a two-fold purpose. It deprives the wrongdoer of an advantage improperly obtained. Further, it serves as a deterrent to ensure that persons who make applications without notice realise that they have this duty and the consequences

(which may include a liability in costs) if they fail (see *Brink's-MAT Ltd v Elcombe* [1988] 1 W.L.R. 1350.

The obligation of full disclosure is an obligation owed to the court itself, which exists in order to secure the integrity of the court's process and to protect the interests of those potentially affected by whatever order the court makes. The court's ability to set its order aside, and to refuse to renew it, is the sanction by which that obligation is enforced and others are deterred from breaking it. Such is the importance of the duty that, in the event of any substantial breach, the court strongly inclines towards setting its order aside and not renewing it, so as to deprive the defaulting party of any advantage that the order may have given them (*Re OJSC Ank Yugraneft* [2008] EWHC 2614 (Ch); [2009] 1 B.C.L.C. 298 (Christopher Clarke J.)).

In deciding what should be the consequences of any breach of duty it is necessary for the court to take account of all the relevant circumstances, including the gravity of the breach, the excuse or explanation offered, and the severity and duration of the prejudice occasioned to the defendant, including whether the consequences of the breach were remediable and had been remedied; above all, the court has to bear in mind the overriding objective and the need for proportionality (see r.1.1) (*Memory Corporation v Sidhu (No.2)* [2000] 1 W.L.R. 1443, CA). For summary of the authorities on the exercise of the court's discretion to continue or re-grant the order, notwithstanding serious non-disclosure, see *Alphasteel Ltd v Shirkhani* [2009] EWHC 2153 (Ch), July 30, 2009, unrep (Teare J.) (where the freezing order was limited to assets within the jurisdiction).

However discharge of the order is not automatic on any non-disclosure being established of any fact known to the applicant which is found by the court to have been material. The law as to the discharge of freezing orders and the enforcement of undertakings where there has been material non-disclosure (whether innocent or not) was explained at first instance and on appeal in *Dadourian Group International Inc. v Simms* [2007] EWHC 1673 (Ch), July 11, 2007, unrep (Warren J.) at paras 29 to 32 and [2009] EWCA Civ 169; [2009] 1 Lloyd's Rep. 601, CA, at paras 167 to 210. It should be remembered that the borderline between material facts and non-material facts may be a somewhat uncertain one, particularly in heavy commercial cases. Further, by their very nature, applications without notice usually necessitate the dealing with and taking of instructions and the preparation of the requisite drafts in some haste (*Brink's-MAT Ltd v Elcombe*, op. cit., at 1359 per Slade L.J.).

Applications to set aside for material non-disclosure not to be made without proper reason

25.3.7 In some modern cases judges have been critical of a growing tendency among litigants against whom interim injunctions had been granted "to allege material non-disclosure on rather slender grounds" (*Brink'sMAT Ltd v Elcombe* [1988] 1 W.L.R. 1350 at 1359, above per Slade L.J.) and to seek discharge "on the grounds of the most trifling errors" (*Worldcom International v Home Communications Ltd*, September 16, 1998, unrep., per Timothy Walker J.). Litigants who behave in this manner are likely to encounter the criticism that, whatever their means and the means of their opponents, they are not entitled to conduct proceedings in a disproportionate manner, and to find that judges are astute to prevent this happening. Further, circumstances can arise in which the conflict of evidence on an alleged issue of non-disclosure is of marginal relevance, or that the issue itself is going to be a contested issue in the trial and is best resolved there (*A v B (A Company)* [2002] EWCA Civ 337; [2002] 2 All E.R. 545, CA, paras 35 and 37).

The courts have expressed concern that applications to set aside freezing injunctions based on allegations of material non-disclosure should not turn into substantial "satellite litigation". Issues of non-disclosure or abuse of process in relation to a freezing order ought to be capable of being dealt with quite concisely. Generally, it is inappropriate to seek to set aside a freezing order for non-disclosure where proof of non-disclosure depends on proof of facts which are themselves in issue in the action, unless the facts are truly so plain that they can be readily and summarily established, otherwise the application to set aside the freezing order is liable to become a form of preliminary trial in which the judge is asked to make findings (albeit provisionally) on issues which should be more properly reserved for the trial itself (*Crown Resources A.G. v Vinogradsky* June 15, 2001, unrep. (Toulson J.)).

Discharge and re-grant of an injunction

25.3.8 Where serious and culpable non-disclosure sufficient to result in the court discharg-

ing an interim injunction granted without notice has been exposed and established, the question whether a fresh injunction should be granted is likely to arise. In these circumstances the judge has a balancing task to perform. On the one hand, if justice requires that a fresh injunction should be granted to protect the applicant from harm that might befall them, it might be thought unjust to refuse it on the ground of non-disclosure ("this judge made rule cannot be allowed itself to become an instrument of injustice") *Brink's-MAT Ltd v Elcombe*, op. cit., at p.1358, per Balcombe L.J.).

On the other hand, such is the importance of the duty that, in the event of any substantial breach, the court strongly inclines towards setting its order aside and not renewing it, so as to deprive the defaulting party of any advantage that the order may have given them (*Re OJSC Ank Yugraneft* [2008] EWHC 2614 (Ch), [2009] 1 B.C.L.C. 298 (Christopher Clarke J.)). Without this deterrent to others, the policy which has been adopted by the courts in this field would be undermined (*Dubai Bank v Galadari* [1990] 1 Lloyd's Rep. 120, CA, at 134 per Staughton L.J.; see also *Behbehani v Salem (Note)* [1989] 1 W.L.R. 723, CA, at 734 per Woolf L.J.). Discharge and re-grant may not be a futile exercise: for example, in *Re OJSC Ank Yugraneft* op cit an injunction would (if not previously discharged for other reasons) have been discharged for material non-disclosure against a defendant who was alleged to have been resident in England at the time the injunction was granted. By the time of the discharge and application for a re-grant, that defendant might have reorganised his affairs so that (if he ever had been) he was no longer amenable to the jurisdiction of the court.

Duty to serve the proceedings and the injunction on the respondent

25.3.9 Practice Direction (Interim Injunctions) para.5.1(2) (see paras 25APD.5 below) provides than any order for an injunction, unless the court orders otherwise, must contain, if made without notice to any other party, an undertaking by the applicant to the court to serve on the respondent as soon as practicable the application notice, the evidence in support, and any order made. The example of a freezing injunction annexed to Practice Direction (Injunctions) (see paras 25APD.13 et seq. below) contains forms of undertakings to be given to the court by the applicant. The applicant is required, amongst other things, as soon as practicable (a) to issue and serve on the respondent a claim form in the form of the draft produced to the court, (b) cause an affidavit to be sworn and filed substantially in the terms of the draft affidavit produced to the court or, as the case may be, confirming the substance of what was said to the court by the applicant's counsel or solicitors, (c) serve on the respondent (i) copies of the evidence and other documents provided to the court on the making of the application and (ii) an application notice for continuation of the order.

The responsibilities so imposed on an applicant in relation to evidence reflect the general principle (now underpinned by ECHR art.6 and subject to narrow exceptions, e.g. *Re Murjani (A Bankrupt)* [1996] 1 W.L.R. 1498) that applications for interim injunctions have to be decided solely on the basis of evidence which is known to both parties and it is not right for an applicant to give a judge information in a without notice application which cannot at a later stage be revealed to a party affected by the result of the application (*WEA Records Ltd v Visions Channel 4 Ltd* [1983] 1 W.L.R. 721, CA; *Pamplin v Express Newspapers Ltd* [1985] 1 W.L.R. 689).

Normally, interim orders made without notice to the respondent (especially interim injunctions) will be for a limited period and will have to be continued by further order. Where an application to continue an interim injunction is met by an application to discharge the injunction forthwith on the ground of material non-disclosure, normally the two applications will be heard together (consistent with the court's duty under r.1.4(2)(i) to deal with "as many aspects of the case as it can on the same occasion"). However the balance of prejudice and particular facts and circumstances may dictate a different approach (e.g. where the allegations of non-disclosure are serious, and where the applications raise quite distinct issues) (*Network Multimedia Television Ltd v Jobserve Ltd*, *The Times*, January 25, 2001 (Neuberger J.)).

Duty to provide notes of the without notice hearing

25.3.10 Applicants without notice for relief are under a duty to provide full notes of the hearing with all expedition to any party that would be affected by the relief sought; a failure to do so may result in an award of indemnity costs in favour of the party affected (*Interoute Telecommunications (UK) Ltd v Fashion Gossip Ltd The Times*, November 10, 1999 (Lightman J.)). The allegations made against the respondent should be comprehensively set out in a witness statement which should be served as soon as

practicable on the respondent. Counsel and solicitors have responsibility for taking full notes of what was said at the hearing and they should not expect that a transcript of the hearing would be available or would suffice if it were (*Cinpres Gas Injection Ltd v Melea Ltd* [2005] EWHC 3180 (Pat), December 14, 2005, unrep. (Pumfrey J.) (setting aside interim injunction made without notice restraining threats against witnesses)). Where the order sought by the applicant contains terms that derogate from the principle of open justice, the draft order should include an undertaking by the applicant to provide full notes of the hearing with all expedition to any party that would be affected by the relief sought. The preparation and provision of such notes are important, not only to inform anyone notified of the order of what evidence was put before the court (in addition to that which is in the witness statements), but also to inform them of any points or queries that may have been raised by the judge (*G v Wikimedia Foundation Inc* [2009] EWHC 3148 (QB), December 2, 2009, unrep. (Tugendhat J.)). Where a freezing order is granted, the duty to provide the respondent with a full note arises whether or not the respondent asks for it (*Thane Investments Ltd v Tomlinson* [2003] EWHC 2972 (Ch), December 6, 2002, unrep., at [18] (Neuberger J.)). For practice in family proceedings in this respect, see *W v H (Family Division: Without Notice Orders)* [2001] 1 All E.R. 300; *Re S (A Child) (Family Division: Without Notice Orders)* [2001] 1 W.L.R. 211; and *Kelly v BBC* [2001] 1 All E.R. 323.

Application for an interim remedy where there is no related claim[1]

25.4 **25.4—(1) This rule applies where a party wishes to apply for an interim remedy but—**

(a) the remedy is sought in relation to proceedings which are taking place, or will take place, outside the jurisdiction; or

(b) the application is made under section 33 of the Senior Courts Act 1981 or section 52 of the County Courts Act 1984 (order for disclosure, inspection, etc., before commencement) before a claim has been commenced.

(2) An application under this rule must be made in accordance with the general rules about applications contained in Part 23.

(The following provisions are also relevant—

Rule 25.5 (inspection of property before commencement or against a non-party)

Rule 31.16 (orders for disclosure of documents before proceedings start)

Rule 31.17 (orders for disclosure of documents against a person not a party).)

Effect of rule

25.4.1 An application for an interim remedy order may be made in circumstances "where there is no related claim". Two circumstances are identified in paras (a) and (b) of r.25.4(1). Where either of those circumstances exists "an application under this rule" must be made in accordance with the general rules about applications for court orders contained in Pt 23. The general rules in Pt 23 proceed on the assumption that a claim has been commenced or will be commenced (as did former CCR Ord.13 (Applications and orders in the course of proceedings)). This rule makes it clear that those rules apply when an application for an interim remedy is made before a claim is made in the two circumstances stated in paras (a) and (b) of r.25.4(1). The particular significance of this is that these remedies are to be applied for by notice of application without the prior issue of a claim form.

Interim remedy order in support of foreign proceedings (r.25.4(1)(a))

25.4.2 The Civil Jurisdiction and Judgments Act 1982 s.25 (see Vol.2, para.5–27) enables

[1] Amended by the Civil Procedure (Amendment) Rules 2000 (SI 2000/221).

the High Court to grant "interim relief" in cases proceeding in courts other than the courts of England and Wales. (For further commentary on s.25, see Vol.2, Section 15 Interim Remedies subs.A.1 para.15–5.) In such circumstances, an order is sought "where there is no related claim" in the sense that there is no claim made over which the English court has jurisdiction. The court's permission is required for service out of jurisdiction of process seeking such relief (see r.6.36 and para.6.37.33 above). As to the meaning of foreign "proceedings" in s.25(1) of the 1982 Act, see *Fourie v Le Roux*, [2005] EWCA Civ 204, *The Times* April 25, 2005, CA, affirming [2004] EWHC 2260; *The Times* October 8, 2004, (Ch D), (Mr. John Jarvis Q.C.).

As defined by s.25(7), in this context "interim relief" would appear to include all of the forms of relief listed as "interim remedies" in r.25.1(1), including "freezing injunctions" (cf. *Mercedes-Benz AG v Leiduck* [1996] A.C. 284, PC). Initially, s.25 was confined to cases proceeding in courts in jurisdictions within other constituent parts of the UK and within the EC., but was subsequently extended, notably by the Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997 (SI 1997/302) (see Vol.2, para.5–161). For general principles to be applied by a court when granting a freezing injunction under s.25, see *Ryan v Friction Dynamics Ltd* [2001] C.P. Rep. 75 (Neuberger J.).

Section 25(2) of the 1982 Act states that, on an application for interim relief under this jurisdiction, the court may refuse to grant relief if in the opinion of the court, the fact that the court has no jurisdiction apart from s.25 in relation to the subject-matter of the proceedings in question "makes it inexpedient for the court to grant it" (on this aspect of s.25, see *Credit Suisse Fides Trust SA v Cuoghi* [1997] 3 W.L.R. 871, CA; [1997] 3 All E.R. 724, CA, and *Refco Inc v Eastern Trading Co* [1999] 1 Lloyd's Rep. 159, CA). No criterion or guideline is provided by s.25(2) as to the test to be applied by the court in considering whether it is expedient to grant an order, but the authorities show that there are certain particular considerations which the court should bear in mind. These considerations are explained by the Court of Appeal in *Motorola Credit Corp v Uzan (No.2)* [2003] EWCA Civ 752; [2004] 1 W.L.R. 113, CA.

Where a foreign judgment has been registered in England for enforcement, the court does not have jurisdiction under art.47(1) of the Judgments Regulation (44/2001) to grant a worldwide freezing order in support (*Banco Nacional de Comerico Exterior SNC v Empresa de Telecommunicaciones de Cuba SA* [2007] EWCA Civ 662, July 4, 2007, CA, unrep. (court further holding that in the circumstances it was not expedient to make such order under s.25)).

Rule 25.2(3) states that, where the court grants an interim remedy before a claim has been commenced, "it should give directions requiring a claim to be commenced". In terms this rule applies where the court grants an interim remedy in support of foreign proceedings yet to be commenced (perhaps on the undertaking recited in the order that proceedings will be commenced in the foreign jurisdiction). See para.25.2.6 above.

A claimant applying for relief under s.25 of the 1982 Act must use the Pt 8 claim form and follow the Pt 8 procedure (see para.8BPD.1 above). It is likely that the applicant will wish to serve this claim form on the respondent out of the jurisdiction and in accordance with CPR r.6.36 will require the permission of the court to effect such service. Application for permission is made by application notice and the Pt 23 procedure should be followed subject to the express terms of r.6.37 (cf. former RSC Ord.11 r.8A).

See further para.6.33.30 above.

Interim remedy order for disclosure, inspection etc. before claim commenced (r.25.4(1)(b))

25.4.3 Some interim remedy orders may be sought before a claim has been issued. In this circumstance, an order is sought "where there is no related claim" in the sense that, as yet, no claim has been made. An interim remedy may be applied for before proceedings are started (r.25.2(1)(a)). Two particular interim remedies orders are referred to in r.25.4(1)(b). They are (1) an order to inspect, etc., and to take samples, etc., of property before claim made under the Senior Courts Act 1981 s.33(1) or the County Courts Act 1984 s.52(1) and (2) an order for disclosure before claim made of documents by a prospective party under s.33(2) or s.52(2) of those Acts respectively (see r.25.1(1)(i)). The distinguishing feature of these two remedies is that they cannot be granted after the claim has been started (but other remedies are available having that effect). Rule 25.4(1)(b) states that, where an application is made for one or other of these interim remedies, the general rules in Pt 23 apply. Thus the remedies are

sought by an application. The provisions in rr.25.2 to 25.5 are also relevant to such applications (see para.25.2.1 "Relationship between Pt 23 and rr.25.2 to 25.5" and note r.31.16). For obvious reasons, where the court grants the interim remedy applied for it is not required to give directions "requiring a claim to be commenced" (see r.25.2(3) and (4)).

Inspection of property before commencement or against a non-party[1]

25.5 **25.5—(1) This rule applies where a person makes an application under—**

(a) section 33(1) of the Senior Courts Act 1981 or section 52(1) of the County Courts Act 1984 (inspection, etc. of property before commencement);

(b) section 34(3) of the Senior Courts Act 1981 or section 53(3) of the County Courts Act 1984 (inspection, etc., of property against a non-party).

(2) The evidence in support of such an application must show, if practicable by reference to any statement of case prepared in relation to the proceedings or anticipated proceedings, that the property—

(a) is or may become the subject matter of such proceedings; or

(b) is relevant to the issues that will arise in relation to such proceedings.

(3) A copy of the application notice and a copy of the evidence in support must be served on—

(a) the person against whom the order is sought; and

(b) in relation to an application under section 34(3) of the Senior Courts Act 1981 or section 53(3) of the County Courts Act 1984, every party to the proceedings other than the applicant.

Effect of rule

25.5.1 General rules as to the giving of notice of applications for court orders and for the providing of evidence on such applications are found in Pt 23. The effect of these rules on applications for court orders in the form of interim remedies is modified by r.25.3 and it is further modified by this rule in relation to applications for the particular remedies mentioned in r.25.5(1). They are: an order to inspect etc. and to take samples, etc., of property before claim made (s.33(1) of SCA 1981 or s.52(1) of CCA 1984), and (2) an order to inspect etc. and to take samples etc. of non-party's property after claim made (s.34(3) or s.53(3)). The provisions in this rule are based on former RSC Ord.29 r.7A and CCR Ord.13 r.7(3)(4).

The making of the orders referred to in r.25.5(1) may raise issues under ECHR art.8 or ECHR Protocol 1, art.1. The court may require more by way of justification under either Article where orders are sought against a non-party.

Interim payments—general procedure[2]

25.6 **25.6—(1) The claimant may not apply for an order for an interim payment before the end of the period for filing an acknowledgement of service applicable to the defendant against whom the application is made.**

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[1] Amended by the Civil Procedure (Amendment) Rules 2000 (SI 2000/221).
[2] Amended by the Civil Procedure (Amendment) Rules 2000 (SI 2000/221).

(Rule 10.3 sets out the period for filing an acknowledgement of service.)

(Rule 25.1(1)(k) defines an interim payment.)

(2) The claimant may make more than one application for an order for an interim payment.

(3) A copy of an application notice for an order for an interim payment must—

(a) be served at least 14 days before the hearing of the application; and

(b) be supported by evidence.

(4) If the respondent to an application for an order for an interim payment wishes to rely on written evidence at the hearing, he must—

(a) file the written evidence; and

(b) serve copies on every other party to the application,

at least 7 days before the hearing of the application.

(5) If the applicant wishes to rely on written evidence in reply, he must—

(a) file the written evidence; and

(b) serve a copy on the respondent,

at least 3 days before the hearing of the application.

(6) This rule does not require written evidence—

(a) to be filed if it has already been filed; or

(b) to be served on a party on whom it has already been served.

(7) The court may order an interim payment in one sum or in instalments.

(Part 23 contains general rules about applications.)

Effect of rule

25.6.1 For extended commentary on interim payments, see Vol.2, Section 15 Interim Remedies, subs.D, para.15–94.

The statutory bases for rules of court as to interim payments are the Senior Courts Act 1981 s.32 and the County Courts Act 1984 s.50 (see Vol.2, paras 9A–103 and 9A–494).

The interim payment rules do not apply to cases on the small claims track (r.27.2(1)(a)).

Contrary to what is said in this rule, "interim payment" is not defined by r.25.1(1)(k). That paragraph merely repeats part of the definition of interim payment given by the Senior Courts Act 1981 s.32(5) and leaves out the final phrase "to or for the benefit of another party to the proceedings" (cf. RSC Ord.29 r.9), a part of the definition that was crucial to the decision in *Securities and Investments Board v Scandex Capital Management A/S* [1998] 1 W.L.R. 712; [1998] 1 All E.R. 514, CA.

Under the Civil Legal Aid (General) Regulations 1989 reg.94(a) interim payments were expressly exempted from the statutory charge, but see now Community Legal Service (Financial) Regulations 2000 reg.44.

Until April 1, 2005, it was expressly provided in r.41.3(6) that rules in Pt 25 about the making of interim payments should apply when, following the making of an order for an award for provisional damages under r.41.2, an application was made for further damages under r.41.3 (see para.41.3.3 below).

As to interim payment order applications in cases where, in the event, the question whether all or part of the award should be made payable by periodical payments under the Damages Act 1996 s.1 will arise, see commentary in para.25.7.1 below and Vol.2, para.15–110.1.

Application for an order for interim payment

25.6.2 Rule 25.6 has to be read in conjunction with Pt 23 (see also notes following r.25.3 (How to apply for an interim remedy)) and with the provisions of Practice Direction (Interim Payments), one of the Practice Directions supplementing Pt 25 (see para.25BPD.1 below).

In Queen's Bench proceedings at the RCJ, the application notices for an interim payment should be filed in the Masters' Support Unit, Room E16 (Queen's Bench Guide para.7.13.6, see Vol.2, para.1B–53).

Time of application

25.6.3 Every application, whether made for an interim remedy or for some other purpose, should be made as soon as it becomes apparent that it is necessary or desirable to make it (Practice Direction (Applications), para.2.7; see para.23APD.1). The general rule is that, subject to any limiting provisions, an application for an interim remedy may be made at any time r.25.2(1) and r.25.6(1) states that the claimant may not apply for an order for an interim payment before the end of the period for filing an acknowledgment of service applicable to the defendant against whom the application is made. It is not necessary to wait until all defendants have been served. Rule 25.6(1) is copied from former RSC Ord.29 r.10(1) and fails to take account of the fact that, under the CPR, the function of the acknowledgment of service is changed. The period within which a defendant should file an acknowledgment of service, if they are going to do so (taking advantage of r.10.1(3)), is calculated in accordance with r.10.3. Where the Pt 8 procedure is being used, r.8.3 applies. (A claimant may not apply for summary judgment until the defendant has filed an acknowledgment of service or defence; r.24.4.)

Evidence

25.6.4 As to evidence in applications for interim orders generally, note, in addition to r.25.6(4)(5), rr.22.1(3) and r.32.6.

As to the service and filing of evidence, see, in addition to r.25(3) to (6), Practice Direction (Applications), paras 9.1 to 9.7 (see para.23APD.2).

The application notice must be supported by evidence (r.25.6(3)). The evidence should be by witness statement (r.32.6(1)), but may be by affidavit, subject to r.32.15(2). The claimant may, in support of their application, rely on the matters set out in their statement of case or their application notice, if they are verified by a statement of truth (rr.25.6(3) and 32.6(2)). The evidence should deal with the matters listed in Practice Direction (Interim Payments), para.2 (see para.25BPD.1).

Prerequisite orders

25.6.5 No special preliminary orders require to be obtained if the application for an interim payment for damages or some other sum of money is based on an admission of liability (r.25.7(1)(a)), or on the likelihood of recovery of a substantial sum of money (r.25.7(1)(c)) or a sum of money in a possession case (r.25.7(1)(d)). If it is desired to apply on the ground that the claimant has obtained judgment for damages to be assessed or a sum of money to be assessed (r.25.7(1)(b)), the claimant must obtain the judgment or order before the hearing. It is possible to do this at the same appointment but immediately before the hearing. Thus, in the one application the claimant may apply for (1) summary judgment, and (2) interim payment of part of that judgment, ahead of the assessment of damages.

Payment by instalments (r.25.6(7))

25.6.6 The court may order an interim payment in one sum or in instalments (r.25.6). Where an interim payment is to be paid in instalments, the order should set out the matters listed in Practice Direction 25B (Interim Payments), para.3 (see para.25BPD.3).

"claimant may make more than one application"

25.6.7 Rule 25.6(2) states that a claimant may make more than one application for an order for interim payment. Obviously, where there are several defendants it may prove to be necessary for the claimant to make more than one application. However, successive applications should not be made against the same defendant unless the circumstances have changed materially; for instance because of unexpected delay in bringing the case to trial, underestimation of the claimant's needs, or some special expense. The witness statement in support of the further application should bring the story up

to date, and a copy of any relevant prior witness statement should be contained in any bundle of documents prepared for the subsequent hearing.

Hearing of application

25.6.8 Applications for interim payments are heard by a Master or a district judge. The Senior Master has expressed the view that the assigned Master who heard an application for an interim payment which may result in a substantial award of damages (albeit of an interim nature) should not, as a general practice, hear the final assessment.

Interim payments—conditions to be satisfied and matters to be taken into account[1]

25.7 **25.7—(1) The court may only make an order for an interim payment where any of the following conditions are satisfied—**

(a) the defendant against whom the order is sought has admitted liability to pay damages or some other sum of money to the claimant;

(b) the claimant has obtained judgment against that defendant for damages to be assessed or for a sum of money (other than costs) to be assessed;

(c) it is satisfied that, if the claim went to trial, the claimant would obtain judgment for a substantial amount of money (other than costs) against the defendant from whom he is seeking an order for an interim payment whether or not that defendant is the only defendant or one of a number of defendants to the claim;

(d) the following conditions are satisfied—

(i) the claimant is seeking an order for possession of land (whether or not any other order is also sought); and

(ii) the court is satisfied that, if the case went to trial, the defendant would be held liable (even if the claim for possession fails) to pay the claimant a sum of money for the defendant's occupation and use of the land while the claim for possession was pending;

(e) in a claim in which there are two or more defendants and the order is sought against any one or more of those defendants, the following conditions are satisfied—

(i) the court is satisfied that, if the claim went to trial, the claimant would obtain judgment for a substantial amount of money (other than costs) against at least one of the defendants (but the court cannot determine which); and

(ii) all the defendants are either—

(a) a defendant that is insured in respect of the claim;

(b) a defendant whose liability will be met by an insurer under section 151 of the Road Traf-

[1] Amended by the Civil Procedure (Amendment) Rules 2000 (SI 2000/221) and the Civil Procedure (Amendment No.4) Rules 2004 (SI 2004/3419).

fic Act 1988 or an insurer acting under the Motor Insurers Bureau Agreement, or the Motor Insurers Bureau where it is acting itself; or

(c) a defendant that is a public body.

(2) […]

(3) […]

(4) The court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment.

(5) The court must take into account—

(a) contributory negligence; and

(b) any relevant set-off or counterclaim.

Effect of rule

25.7.1 The jurisdiction to order an interim payment is an exception to the general principle that a defendant has a right not to be held liable to pay until liability has been established by a final judgment and is subject to the strict restrictions stated in r.25.7. The court may make an order for an interim payment in the several circumstances listed in r.25.7(1), but not otherwise. With effect from April 1, 2005, para.(1) of r.25.7 was amended for the purpose of revising the categories of defendant against whom an interim payment order may be made. Rule 25.7(4) has not been amended in the light of the introduction by the Damages Act 1996 s.2 and CPR Pt 41 Section II of the court's jurisdiction to order that all or part of an award of damages in respect of personal injury is to take the form of periodical payments. So, in personal injury cases where a periodical payments order is likely to be made, the notional capitalised value of that order is excluded, and the interim payment can only be a reasonable proportion of the capital sum expected to be awarded on final judgment (*Eeles v Cobham Hire Services Ltd* [2009] EWCA Civ 204; March 13, 2009, unrep., CA, at [30] and [31]). Interim payment orders can be made under this rule pending the taking of an account: in *Pfizer Inc. v Mills* May 10, 2010, unrep. (Vos J.) an order was made for an interim payment of 75 per cent of the estimated profits made by the defendant by infringing the claimant's trade marks.

For an elaboration of the points made immediately above, and for further information on the several circumstances in which an order for an interim payment may be made (judgment obtained, liability admitted, judgment predicted, personal injuries claims, and grounds for contesting payment), and on the exercise of the court's discretion in this context, see Vol.2, Section 15 Interim Remedies, subs.D, paras 15–94 to 15–126.

Powers of court where it has made an order for interim payment[1]

25.8 **25.8—(1) Where a defendant has been ordered to make an interim payment, or has in fact made an interim payment (whether voluntarily or under an order), the court may make an order to adjust the interim payment.**

(2) The court may in particular—

(a) order all or part of the interim payment to be repaid;

(b) vary or discharge the order for the interim payment;

(c) order a defendant to reimburse, either wholly or partly, another defendant who has made an interim payment.

(3) The court may make an order under paragraph (2)(c) only if—

(a) the defendant to be reimbursed made the interim pay-

[1] Amended by the Civil Procedure (Amendment) Rules 2000 (SI 2000/221).

ment in relation to a claim in respect of which he has made a claim against the other defendant for a contribution(GL), indemnity(GL) or other remedy; and

(b) where the claim or part to which the interim payment relates has not been discontinued or disposed of, the circumstances are such that the court could make an order for interim payment under rule 25.7.

(4) The court may make an order under this rule without an application by any party if it makes the order when it disposes of the claim or any part of it.

(5) Where—

(a) a defendant has made an interim payment; and

(b) the amount of the payment is more than his total liability under the final judgment or order,

the court may award him interest on the overpaid amount from the date when he made the interim payment.

Effect of rule

25.8.1 This rule provides for the adjustment of interim payment orders in the light of subsequent events, particularly, final judgment or discontinuance.

For extended commentary on matters that may arise where, upon final judgment or order, consideration has to be given to the adjustment of an order for an interim payment, including any adjustment between co-defendants, see Vol.2, Section 15 Interim Remedies, subs.D, paras 15–122 to 15–126.

Discharge, variation, repayment

25.8.2 The court has wide powers to discharge or vary an interim payment order, including the power to order any money paid repaid. Further, in certain circumstances the court may order a defendant to reimburse, either wholly or partly, another defendant who has made an interim payment (r.25.8(3)). The court may adjust an order that has been made but not yet paid.

The court may make an order under this rule without an application by any party if it makes the order when it disposes of the claim or any part of it (r.25.8(4)) by final judgment or grant of leave to discontinue. Otherwise an application for the relief permitted under this rule may be made by any party at any time.

Interest

25.8.3 It is clear that, where, following final judgment or order, the court orders that part of the interim payment should be repaid to the defendant, the court may award them interest on the overpaid amount from the date when they made the interim payment (r.25.8(5)); that is to say, when their "total liability" is less than the interim payment. Presumably, where a defendant is found not liable at all they would be entitled to interest on the full amount of the interim payment. The court may award interest on an interim payment made voluntarily as well as under an order of the court.

Adjustment on final judgment or order or on discontinuance

25.8.4 *Final judgment* —Where an action proceeds to trial either on the issue of liability or of damages or both after the defendant or one of two or more defendants has made an interim payment whether voluntarily or pursuant, to order, the court may, before the final judgment or order is given or made, make such adjustments with respect to the interim payment as may be necessary, for the purpose of giving effect to its determination of that defendant's liability. Such adjustments may become necessary (a) as between the claimant and that defendant, and (b) as between that defendant and any co-defendant of theirs (r.25.8(2)(b) and (c)).

As between the claimant and the defendant, the first and obvious adjustment that needs to be made is that the amount of the interim payment should be deducted from the amount of the total award of damages, and subject to any further adjustment with regard to the interest on the damages (see para.25.8.3) judgment should be entered

for the claimant only for the difference between these two amounts. The form of the judgment should recite the amount of the final judgment or the assessment of the damages and should further recite the order for interim payment and payment made thereunder or the amount paid voluntarily. The judgment or order should then provide for entry of judgment and payment of the balance (see Practice Direction (Interim Payments), paras 5.2 and 5.3 (para.25BPD.5) and, to same effect, Practice Direction (Judgments and Orders), paras 6.1 and 6.2 are to same effect (para.40BPD.6)).

Where the claimant has invested interim payments received from the defendant and earned interest, that accrued interest should not be deducted from the sum allowed for interest in the final determination of *quantum* (*Parry v North West Surrey Health Authority*, *The Times*, January 5, 2000).

In the unlikely event that the amount of the interim payment should exceed the amount of the final award for damages, debt or other sum, the court will order the claimant to repay the difference to the defendant who made the payment (see r.25.8(2)(c)). In addition, the court may award the defendant interest on the overpaid amount in accordance with r.25.8(5) (putting into legislative form *Mercers Co v New Hampshire Insurance Co* [1991] 1 W.L.R. 1173; [1991] 4 All E.R. 542). For form of judgment in this event, see Practice Direction (Interim Payments), paras 6.3 and 6.4 (para.25BPD.5 below) and, to same effect, Practice Direction (Judgments and Orders), paras 5.4 and 5.5 (see para.40BPD.6 below).

25.8.5 *Discontinuance* —The court's power to adjust an interim payment may also be exercised where the court grants leave to the claimant to discontinue their action or to withdraw the claim in respect of which the interim payment was made. Rule 38.2(2)(b) states that where the claimant has received an interim payment, whether voluntarily or pursuant to order, in relation to the whole or part of their claim they may discontinue that claim or that part of it only if (1) the defendant who has made the payment consents in writing, or (2) the court gives permission. It should be noted that leave to discontinue is required when the claimant "has received an interim payment", and not where such payment has been ordered but not paid, and leave may be dispensed with where the "defendant who has made the payment" consents, and the consent of all other parties is not required. Presumably, "has received an interim payment" includes having received any instalment where the interim payment was to be paid by instalments.

Adjustment between co-defendants

25.8.6 As between the defendant who makes the interim payment and their co-defendants, the court may order any defendant to pay the whole or part of the interim payment to the defendant who made it.

The effect of r.25.8 in this context is as follows. Where (1) a defendant has been ordered to make an interim payment, or has in fact made an interim payment (either voluntarily or under an order), and (2) they made that payment in relation to a claim or part of a claim in respect of which they have made a claim against the co-defendant for a contribution, indemnity or other relief (former RSC Ord.29 r.17 added here "relating to or connected with the plaintiff's claim"), then (3) the court may order the co-defendant to reimburse them either wholly or partly. Obviously, such an order is likely to be made on or after final judgment or discontinuance of the claim or the part of the claim to which the interim payment related. However, subject to r.25.8(3)(b), such order for reimbursement may be made at an earlier stage in the proceedings.

Restriction on disclosure of an interim payment[1]

25.9 **25.9 The fact that a defendant has made an interim payment, whether voluntarily or by court order, shall not be disclosed to the trial judge until all questions of liability and the amount of money to be awarded have been decided unless the defendant agrees.**

Effect of rule

25.9.1 Formerly, the chances of prohibited disclosures being made by any person, whether

[1] Amended by the Civil Procedure (Amendment) Rules 2000 (SI 2000/221).

advertently or inadvertently, were restricted by the fact that most orders were made in chambers and therefore in private. However, now that the general rule is that, subject to exceptions, the hearing of applications is to be in public, the chances of prohibited disclosures being made inadvertently are enhanced (see r.39.2, and Practice Direction (Miscellaneous Provisions Relating to Hearings), para.1.5 (para.39APD.1 below)).

This creates a risk that the fact that the defendant has made an interim payment may come to the attention of the judge. Circumstances may arise in which a judge would be entitled to make public their reasons for granting an interim payment order for a large amount (*British & Commonwealth Holdings Plc v Quadrex Holdings Inc* [1989] Q.B. 842; [1989] 3 All E.R. 492, CA).

Where a Master or district judge makes an order for an interim payment at the same time as any other order, the order for the interim payment should be sealed as a separate order. This order must not be included in the trial bundle.

By way of exception, disclosure may be made if the party that has made the interim payment agrees. However, where liability is contested, it is unlikely that a claimant would agree to disclosure of an interim payment to the trial judge.

Obviously, once the court has decided all questions of liability, and the amount of money to be awarded, the fact that an order for interim payment has been made, what its amount was, the date it was paid and by which of two or more defendants, and all other relevant facts, should be communicated to the court immediately, and before the judgment is perfected by entry, so as to enable the court to make any necessary adjustments under r.25.8, including interest, and to deal with the question of costs.

Interim injunction to cease if claim is stayed[1]

25.10 If— **25.10**

(a) the court has granted an interim injunction(GL) other than a freezing injunction; and

(b) the claim is stayed(GL) other than by agreement between the parties,

the interim injunction(GL) shall be set aside(GL) unless the court orders that it should continue to have effect even though the claim is stayed.

Effect of rule

25.10.1 An interim injunction (see r.25.1(1)(a)) is granted on the assumption that the claim will be actively pursued. It should not be continued for longer than is necessary. This rule provides that an interim injunction "shall be set aside" where a claim is stayed (other than by agreement between the parties) unless the court orders otherwise. It would seem that what is intended is that, where the court orders the stay of a claim, it should turn its attention to the question whether any interim injunction should be continued and, on its own initiative, should set it aside if it should not be continued. (For explanation of "stay", see Glossary.) In terms, the rule is confined to an interim remedy in the form of an interim injunction and does not extend to other forms of interim remedy as listed in r.25.1(1). For the purpose of making it clear that the rule does not extend to freezing injunctions, the words "other than a freezing injunction" were added to para.(a) by the Civil Procedure (Amendment No.5) Rules 2001 (SI 2001/4015). A party who obtains an interim remedy in the form of a freezing injunction should promptly apply to the court for its discharge if the time comes when it is no longer needed (*Detect Sea Enterprises Ltd v O'Connor* October 14, 1997, unrep., per Sir Richard Scott V.-C.). Circumstances may arise in which a claimant, after securing an interim injunction, may feel that that remedy is adequate for the purpose of protecting their interests and may be tempted, with the consent of the defendants (either express or implied), to take no further steps in the action, apart from occasional applications to continue the injunction, unless the behaviour of the defendant forces them to do so. Under the case management provisions of the CPR, claimants cannot proceed in this way. An application to continue an interim injunction, if granted,

[1] Amended by the Civil Procedure (Amendment) Rules 2000 (SI 2000/221), and the Civil Procedure (Amendment No.5) Rules 2001 (SI 2001/4015).

should be accompanied by directions for the further progress of the case (*Heathrow Airport Ltd v Gross*, January 13, 1999, unrep. (Burton J.)).

A claimant needs permission from the court if they wish to discontinue all or part of a claim in relation to which the court has granted an interim injunction (r.38.2(2)(a)(i)).

Interim injunction to cease after 14 days if claim struck out[1]

25.11 **25.11—(1) If—**

(a) the court has granted an interim injunction(GL); and

(b) the claim is struck out under rule 3.7 (sanctions for non-payment of certain fees),

the interim injunction shall cease to have effect 14 days after the date that the claim is struck out unless paragraph (2) applies.

(2) If the claimant applies to reinstate the claim before the interim injunction ceases to have effect under paragraph (1), the injunction shall continue until the hearing of the application unless the court orders otherwise.

Effect of rule

25.11.1 This rule provides for the special situation where an interim injunction is in place, whether in favour of the claimant or the defendant, but the claim is struck out automatically (not merely stayed) for non-payment of certain court fees by the claimant under r.3.7(4)(b)(i). The rule provides that, in that event, after a period the interim injunction will cease to have effect. Where, within the period, a claimant applies under r.3.9 for re-instatement of their claim (see para.3.7.2) by operation of the rule that interim injunction remains in effect beyond the period until the hearing of the application. If, at the hearing, the claim is not re-instated, the interim injunction lapses; if the claim is re-instated the interim injunction (whether in favour of the claimant or the defendant) will not continue unless the court orders that it should. Practice Direction (Sanctions for Non-payment of Fees) supplements r.3.7 and states that, if a claim is struck out under that rule, the court will send a notice to the defendant explaining the effect of r.25.11 (see para.3BPD.1 above).

II. Security for costs

Security for Costs[2]

25.12 **25.12—(1) A defendant to any claim may apply under this Section of this Part for security for his costs of the proceedings. (Part 3 provides for the court to order payment of sums into court in other circumstances. Rule 20.3 provides for this Section of this Part to apply to Part 20 claims).**

(2) An application for security for costs must be supported by written evidence.

(3) Where the court makes an order for security for costs, it will—

(a) determine the amount of security; and

(b) direct—

(i) the manner in which; and

(ii) the time within which

the security must be given.

Editorial introduction, Related sources and Forms

25.12.1 See paras 25.0.3, 25.0.5 and 25.0.7 respectively.

[1] Amended by the Civil Procedure (Amendment) Rules 2000 (SI 2000/221).
[2] Amended by the Civil Procedure (Amendment) Rules 2000 (SI 2000/221).

Security for costs

25.12.2 The purpose of an order for security for costs is to protect a party in whose favour it is made against the risk of being unable to enforce any costs order they may later obtain. The order, if complied with, will provide the party in whose favour it is made with a fund normally held by the court against which he can enforce any award of costs they may later obtain.

In CPR r.3.1 (The court's general powers of case management) it is stated that, in certain circumstances (see paras (3) and (5) of the rule), the court may order a party to pay a sum of money into court. Money paid into court in such circumstances shall be security for "any sum payable" by that party to any other party in the proceedings (r.3.1(6A)). Presumably, "any sum payable" would include a sum payable under an order for costs. Therefore, the exercise by the court of its powers under r.3.1(3) and (5) may in effect amount to an order for security for costs (see para.3.1.5 above).

Security for costs may also be ordered as a result of an application for summary judgment where the party against whom the application is made (whether claimant or defendant) is advancing a case which is improbable (*Olatawura v Abiloye* [2002] EWCA Civ 998; [2003] 1 W.L.R. 275, noted in para.24.6.6 above).

Who can apply for security for costs

25.12.3 Rule 25.12 provides for applications by a "defendant to any claim", as to the meaning of which, see para.25.12.4. A marginal note to the rule confirms that it also covers application by persons served with "Part 20 Claims", i.e. counterclaims and other additional claims. Thus, a claimant may apply for security for costs of a counterclaim against the defendant who brought that counterclaim and, similarly, a third party may apply for security for costs of the third party proceedings against the defendant who commenced those proceedings. However, save under r.3.1(5) or r.25.15, a third party cannot obtain an order for security for costs against the claimant whose claim lies solely against the defendant.

Rule 25.15 provides for applications for security for costs by a respondent to an appeal and by the appellant in respect of a cross-appeal, i.e. an appeal brought by the respondent.

Rule 3.1.(5) provides for applications for security for costs against any party, whether claimant, defendant, thirdly party or respondent to an appeal, who fails to comply with a rule, Practice Direction or a relevant Pre-action Protocol.

"A defendant to any claim may apply"

25.12.4 Rule 2.3(1) defines "defendant" as a person against whom a claim is made. The word "claim" is not defined. When used as a noun in other rules it usually refers to the whole of the case in question (see, for example, r.8.1 and r.26.2) or to a separate cause of action raised in proceedings (see, for example, r.7.3). It therefore appears that, under r.25.12, as under the pre-CPR provision (RSC Ord.23) a claimant is not entitled to apply for security for costs solely in respect of some interim application initiated by the defendant, for example an application under Pt 17 to amend their defence or under Pt 18 for further information as to the Particulars of Claim (for a case authority on the pre-CPR provision, see *B (Infants), Re* [1965] 1 W.L.R. 946; [1965] 2 All E.R. 651 (Note)).

A claimant can obtain an order for security of costs in respect of a counterclaim brought against him if the counterclaim raises issues which go beyond the defence of the claim (*Thistle Hotels Ltd v Gamma Four Ltd* [2004] EWHC 322; [2004] B.C.L.C. 174; and see further on this, para.25.13.1.1 "Discretionary factors where both claims and counterclaims are raised", below).

How to apply

25.12.5 The provisions in Pt 23 (General Rules about Applications for Court Orders) apply to an application under this Rule. For a form of application notice see **PF43** (see Practice Direction supplementing Pt 4). The application notice should state which of the grounds in r.25.13 applies and, if the Order is sought under an enactment, should state the enactment authorising the Court to make the Order.

Rule 25.12(2) states that the application must be supported by written evidence. That evidence should relate to the grounds for seeking security which are specified and the amount of security sought. Ideally it should also give details of the costs already incurred by the applicant and should estimate the likely figure for costs in the future. It is convenient to set out the details of costs substantially in the form of an Estimate of Costs (Costs Precedent H; see para.48PD.10).

The written evidence relied on may be set out in the applicant's Statement of Case, or application notice, or in a witness statement. Each item of written evidence relied on must contain a Statement of Truth as to which see further the Practice Directions supplementing Pt 22, see para.22PD.1, and the Practice Direction supplementing Pt 8 para.5.2, see para.8PD.5. An applicant may also rely on affidavit evidence if they so wish. However, if they do so, he may not recover any additional costs thereby incurred unless the court orders otherwise (r.32.15 and as to affidavits generally, rr.32.16 and 32.17 and the Practice Direction which supplements Pt 32 at para.32PD.1 below.)

Evidence relied on which is not set out in the application notice itself must be served with the application notice (unless already served) and must also be filed (Practice Direction supplementing Pt 23 para.9.3 and 9.6 respectively; see para.23APD.1). Where more than one ground is raised, the application and evidence should make clear which points of evidence are relied on in support of each ground (see further, *Somerset-Leeke v Kay Trustees (Security for Costs)* [2003] EWHC 1243; [2004] 2 All E.R. 406, (Ch) at paras 4 and 5).

If the application is intended to be made to a judge other than a Master or district judge, the application notice should so state (para.2.6 of the Practice Direction supplementing Pt 23 at para.23APD.2). The hearing of the application will normally take place before a Master or district judge. Applications under s.726(1) of the Companies Act 1985 are, in the first instance, listed by the Court as hearings in private under r.39.2(3)(c) (Practice Direction supplementing Pt 39 para.1.5(8), see para.39APD.1; as to the Companies Act 1985 s.726(1)).

Proof of one or more grounds for seeking security does not by itself ensure that an Order will be made. The Court has the widest possible discretion whether to award a security and, if so, in what amount; see further r.25.13 and the commentary thereto.

Where, in the Royal Courts of Justice, security for costs is sought for a sum exceeding £500,000 and the correct evaluation of that amount is disputed, the parties should consider whether it would be advantageous for the judge or Master hearing the application to sit with a costs judge as an informal assessor (cf. the Commercial Court Guide, Appendix 16, para.7; see para.2A–186).

Ideal time for applying

25.12.6 Although an application for an Order for security for costs may be made at any stage of the proceedings, it should be made promptly as soon as the facts justifying the Order are known. Delay in making the application is one of the circumstances to which the court will have regard when exercising its discretion to order security. The court may refuse to order security if the delay has deprived the claimant of time to collect the security, if it has led the claimant to act to their detriment, or may cause them hardship in the future conduct of the action. In other circumstances delay may deprive the applicant for security for some or all of the costs already incurred in the proceedings, security being given for future costs only.

Where time permits a written demand for security should be made to the Respondent's solicitor.

Amount of security

25.12.7 The amount of security awarded is in the discretion of the court, which will fix such sums as it thinks just, having regard to all the circumstances of the case (r.25.13(1)(a)). In some cases the amount of security may be limited to the extra burden or risk involved in seeking to enforce orders for costs subsequently obtained (see further, para.25.13.5). In other cases the amount of security may relate to the total costs likely to be incurred in opposing the claim or appeal but it is not always the practice to order security on a full indemnity basis. If security is sought, as it often is, at an early stage in the proceedings, the court will fix the amount having regard to the costs already incurred and the costs likely to be incurred in the future. At that stage one of the factors for the court to consider is the possibility that the proceedings may soon settle. In such a situation it may will be sensible to make an arbitrary discount of the costs estimated as likely future costs, but there is no hard and fast rule. Each case has to be decided on its own circumstances, and it may not always be appropriate to make such a discount. For a pre-CPR authority on this point, see *Procon (Great Britain) Ltd v Provincial Building Co Ltd* [1984] 1 W.L.R. 557, [1984] 2 All E.R. 368, CA.

The amount of security allowed often takes into account costs incurred in complying with a pre-action protocol. However, as to the costs of a failed mediation incurred pre-action, see *Lobster Group Ltd v Heidelberg Graphic Equipment Ltd* [2008] EWHC 413 (TCC).

Frequently the court will seek to estimate the likely costs up to a particular stage in the proceedings, e.g. the pre-trial checklist stage. As to the making of subsequent applications, see para.25.12.11.

In determining the amount of security, the court must take into account the amount which the respondent is likely to be able to raise. The court should not normally make continuation of their claim dependent upon a condition which it is impossible for them to fulfil (see further para.3.1.3 above). An impairment of their right of access to the courts which is disproportionate to the need to protect other parties is likely to be a breach of Article 6(1) ECHR. (see further para.3.1.4 above). On the other hand, where a respondent opposes the making of an Order for security or seeks to limit the amount of security by reason of their own impecuniosity, the onus is upon them to put proper and sufficient evidence before the court, and in doing so, they should make full and frank disclosure (*M.V. Yorke Motors (a firm) v Edwards* [1982] 1 W.L.R. 444; [1982] 1 All E.R. 1204, HL). If they give an incomplete or misleading account of their resources, the court may, in exercising its discretion, set an amount which represents the court's best estimate of what they can afford (*Al-Koronky v Time-Life Entertainment Group Ltd* [2006] EWCA Civ 1123; and see *Kuenyehia v International Hospitals Group Ltd* [2007] EWCA Civ 274; see also, paras 25.13.1 and 25.13.13).

The requirement to have regard to all the circumstances of the case (r.25.13(1)(a)) will often prevent the applicant obtaining complete security. For examples of the many circumstances which the court may have to take into account, see the commentary to r.25.13.

Manner and time within which security must be given

25.12.8 Rule 25.12(3)(b) requires a court which makes an Order for security for costs to direct the manner in which and the time within which security must be given. For a form of Order see **PF44** (see Practice Directions supplementing Pt 4) the body of which is as follows:

It is ordered that:

1. The Claimant gives Security for the Defendant's costs [of the Claim] [until *(specify stage in the claim)*] in the sum of £… [by paying the sum of £… into the Court Funds Office] by *(date)* [(by lodging with the Defendant's solicitors a bankers draft *(describe form of bankers draft)*] [in the following manner *(describe)*].
2. [All further proceedings be stayed until Security is given].
3. [Unless Security is given as ordered,
   (a) the claim is struck out without further order, and
   (b) on production by the defendant of evidence of default, there be judgment for the defendant without further Order with costs of the claim to be the subject of a detailed assessment].
4. The costs of this application are [summarily assessed in the sum of £…] [to be the subject of a detailed assessment] and to be paid by *(party)*.

DATED

In *Radu v Houston* [2006] EWCA Civ 1575 Waller L.J. doubted whether it was appropriate to make an order in that case in the unless form (see PF44, para.3 above). An Order for security is intended to give a claimant a choice as to whether they put up security and continue with their action or withdraw the claim. That choice is meant to be a proper choice. An order to raise a large sum of money should not be made subject to the "unless" sanction until the claimant has been given a real opportunity to find the money. Waller L.J. considered it preferable to adopt instead the practice of the Commercial Court (as to which, see para.25.12.10 below). If an unless order is made, the period for complying with it should be generous. "The making of an order for security is not intended to be a weapon by which a defendant can obtain a speedy summary judgment without a trial."

The directions as to the manner and time within which security must be given which are most frequently used are an Order for a specified sum to be paid into court by a specified date. Money paid into court on such terms should not be looked upon as property recovered or preserved, so as to enable the court to give the solicitor of the paying party a charging order upon it for the amount of their costs (*Wadsworth, Re* (1885) L.R. 29 Ch. D. 517). Nor do such monies in court secure any judgments subsequently obtained against the paying party in other actions (*Crescent Oil & Shipping Services Ltd v Importang UEE* October 20, 1999, unrep.). It is not possible to obtain a

third party debt order in respect of money in court. However, r.72.10 provides a procedure which may lead to an order similar to a third party debt order.

Alternative modes of giving security which may be ordered include payment to the applicant's solicitors to hold for the paying party subject to the Order of Security (as to which, see Form **PF44** which is set out above), security by a bank guarantee (as to which see *Rosengrens Ltd v Safe Deposit Centres Ltd* [1984] 1 W.L.R. 1334; [1984] 3 All E.R. 198; *Gulf Azov Shipping Co Ltd v Idisi* [2001] EWCA Civ 505, CA) and security by undertaking to pay costs (as to which see *Hawkins Hill Co v Want* (1893) 69 L.T. 297). Any expenses incurred by the respondent in arranging the guarantee or undertaking are recoverable (to the extent that they are reasonable) as costs should the respondent subsequently be awarded costs (cf. *Ene Kos v Petroleo Brasileiro SA ("The Kos")* [2009] EWHC 1843 (Comm); [2010] 1 Lloyd's Rep. 87 concerning security arranged to avoid the arrest of a ship). Security by way of a charge over real property is not commonly ordered since if the real property is valuable there should be no difficulty in providing security by way of a bank guarantee or some other alternative which would be simpler to enforce if necessary (*AP (UK) Ltd v West Midlands Fire and Civil Defence Authority* [2001] EWCA Civ 1917; [2001] L.T.L., November 16, CA).

In *Belco Trading Ltd v Kordo* [2008] EWCA Civ 205, an order for security was made specifying sums to be paid into court, or provided by an acceptable bank guarantee, or in the form of an after the event insurance policy subject to a proviso that the policy taken out would give the defendants "equal or better security" than would be afforded to them by a payment into court or bank guarantee: the claimant's appeal against the proviso was dismissed.

Procedure on payment of security into court

25.12.9 In a county court the money may be paid by post or otherwise into the Court Office and the proper officer shall give a receipt for it (Court Fund Rules 1987 r.19, see Vol.2, para.6A–66). In the High Court, Chancery Division, the paying party must prepare a lodgement schedule in **Form 101** signed by a Master or district judge which is then presented with the money to the Court Funds Office either directly or via a District Registry (Court Fund Rules 1987 rr.14 and 16; see Vol.2, paras 6A–44 and 6A–59. In the High Court, Queen's Bench Division, a request for lodgement in **Form 100** should be prepared and delivered, together with the money and a sealed copy of the Order to the Court Funds Office, either directly or via a District Registry (and Court Funds Rules 1987 rr.15 and 16; see Vol.2, paras 6A–52 and 6A–59. The forms relating to Court Funds are reproduced in the *Civil Procedure Forms Volume*).

Default in giving security

25.12.10 Paragraph 3 of Form **PF44** (the text of which is set out in para.25.12.8 above) makes provision for default; the claim is struck out and, on production of evidence of default, judgment can be entered for the defendant with costs of the claim to be the subject of a detailed assessment. If the Order made does not contain such provision, a party alleging default could apply under r.3.4(2)(c) for an Order striking out the opponent's Statement of Case and for consequential orders (*Meldex International Plc v Trevillion* [2010] EWHC 1342 (Ch); and see further, para.3.4.4, above).

Orders for security in the Commercial Court do not usually provide for the claim to be struck out without further order. Instead the other party is given liberty to apply to the court in the event of default. This enables the court to put the paying party to their election and then if appropriate to dismiss the claim.

Subsequent applications for security

25.12.11 Where a previous application was unsuccessful or resulted in an Order for security now said to be insufficient, the applicant may re-apply if they can prove some significant and relevant change of circumstances (*Kristjansson v R. Verney & Co Ltd* Transcript No.1154/1998). The court has a discretion to make such an order even where the previous order was made by consent, or where the security was provided by agreement without an order (*Republic of Kazakhstan v Istil Group Inc* [2005] EWCA Civ 1468; [2006] 1 W.L.R. 596). A relevant change of circumstance may be easily shown if the previous Order described the security as being in respect of costs up to a specified stage in the proceedings and that stage had now been reached (see Form **PF44**, the text of which is set out in para.25.12.8 above).

Alternatively the original Order may provide for separate payments at successive stages in the proceedings.

In *Vedatech Corp v Crystal Decisions (UK) Ltd (formerly Seagate Software IMG Ltd) (Appeal against Security for Costs)* [2002] EWCA Civ 356, CA, an application for further security was made some two months before a trial which was listed for 20 days. An order made just three weeks before that trial which dismissed the claim unless £200,000 was paid was reversed on appeal as oppressive in all the circumstances.

Rules 12 and 13 are wide enough to permit applications against a claimant for security for the costs of proceedings at first instance to be provided pending an appeal brought by the defendant even though the defendant will not be entitled to such costs unless the appeal is successful (*Dar International FEF Co v Aon Ltd* [2003] EWCA Civ 1833; compare *Stabilad Ltd v Stephens & Carter Ltd (No.1)* [1999] 1 W.L.R. 1201, noted in para.25.12.13, below). In *Dar International FEF Cov. Aon Ltd* the defendant obtained an order for security for costs pre-trial. Judgment was given against the defendant and the security (which took the form of a bank guarantee) expired a short time later. The trial judge refused to order reinstatement of the security pending the defendant's appeal. The Court of Appeal held that, although it had jurisdiction to make the order sought, in the circumstances, it was not appropriate to do so in this case.

Return of security

25.12.12 A party ordered to give security for costs cannot seek to have that Order varied or set aside merely by producing fresh evidence about their affairs at the date of the Order. If, however, they can show a material change of circumstances since the date of the Order, they may apply for variation or discharge of the Order. Whether such an application will be allowed depends on the circumstances and is a matter of discretion to be exercised by the Court (*Gordano Building Contractors v Burgess* [1988] 1 W.L.R. 890, CA). Under the previous Rules a party against to whom an Order for security had been made on account of their residence out of the jurisdiction (see now r.25.13(2)(a)) was allowed to get the Order discharged at their own expense on coming to reside within the jurisdiction if their return from abroad was bona fide and permanent (*Parkinson v Myer Wolff & Manley* April 23, 1985, unrep., CA). It is likely that similar principles will be applied today. However, a change of address with a view to evading obligations to give security may by itself justify an application for security under r.25.13(2)(d) (*Aoun v Bahri* [2002] EWHC 29 (Comm); [2002] 3 All E.R. 182).

Where a payment into Court was made by an associate of the paying party solely for the purpose of securing the opponent's costs, if the payment was no longer required for that purpose, the Court had power to order its repayment to the associate (*Crescent Oil & Shipping Services Ltd v Importang UEE* October 20, 1999, unrep.).

Similarly, where money paid into court as security was financed by a loan on terms creating a resulting trust in favour of the lender if the money is no longer required as security the court, on receiving notice of the trust, will give effect to it and will not make orders which could defeat it (*R. v Common Professional Examination Board Ex p. Mealing-McCleod*, *The Times*, May 2, 2000, CA).

Payment out of court

25.12.13 Court Funds Rules 1987 rr.8, 9, 40 and 50 enable payments out of court to be made when the court subsequently makes the order for costs for which security was given. The party entitled to the payment out may prepare a payment schedule in **Form 200** to be signed by a Master or district judge and to be submitted to the appropriate Court Office for authentication together with evidence of the amount of costs agreed or a final costs certificate, as the case may be. The payment schedule and other documentation will be sent to the Court Funds Office by the appropriate Court Office, never by the parties or their solicitors. Although r.8 requires preparation of a payment schedule by a party, in the County Court the payment schedules are usually prepared by the proper officer of the court.

Where the party ordered to give security later succeeds at trial, the primary rule is that they should not be deprived of the fruits of the action pending appeal. However, if the unsuccessful party brings an appeal against the order made at trial, an order staying payment out of court pending the outcome of that appeal is within the legitimate scope of the jurisdictional basis on which an order for security is made (*Stabilad Ltd v Stephens & Carter Ltd* [1999] 1 W.L.R. 1201; [1998] 4 All E.R. 129, CA). The court has a discretion whether to order a stay and the exercise of that discretion must always take account of the particular circumstances of the particular case. The fact that the successful party cannot fund the appeal out of its own resources and cannot obtain further funds from any one else will often be a weighty factor against the grant of a

stay. Whether or not the stay is granted the successful party may still seek the assessment and recovery of any costs awarded to them, unless of course that assessment of costs is also stayed.

Conditions to be satisfied[1]

25.13 **25.13—(1) The court may make an order for security for costs under rule 25.12 if—**

(a) it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and

(b) (i) one or more of the conditions in paragraph (2) applies, or

(ii) an enactment permits the court to require security for costs.

(2) The conditions are—

(a) the claimant is—

(i) resident out of the jurisdiction; but

(ii) not resident in a Brussels Contracting State, a State bound by the Lugano Convention or a Regulation State, as defined in section 1(3) of the Civil Jurisdiction and Judgments Act 1982;

(b) [omitted]

(c) the claimant is a company or other body (whether incorporated inside or outside Great Britain) and there is reason to believe that it will be unable to pay the defendant's costs if ordered to do so;

(d) the claimant has changed his address since the claim was commenced with a view to evading the consequences of the litigation;

(e) the claimant failed to give his address in the claim form, or gave an incorrect address in that form;

(f) the claimant is acting as a nominal claimant, other than as a representative claimant under Part 19, and there is reason to believe that he will be unable to pay the defendant's costs if ordered to do so;

(g) the claimant has taken steps in relation to his assets that would make it difficult to enforce an order for costs against him.

(Rule 3.4 allows the court to strike out a statement of case and Part 24 for it to give summary judgment.)

Discretionary power to order security for costs

25.13.1 There are two pre-requisites for an Order for security for costs. A party entitled to obtain such an Order (see paras 25.12.3 and 25.12.4) must satisfy the Court that:

(i) having regard to all the circumstances of the case, it is just to make an Order; and

[1] Amended by the Civil Procedure (Amendment) Rules 2000 (SI 2000/221), the Civil Procedure (Amendment No.5) Rules 2001 (SI 2001/4015), the Civil Procedure (Amendment No.2) Rules 2002 (SI 2002/3219) and the Civil Jurisdiction and Judgments Regulations 2009 (SI 2009/3131).

(ii) one or more of the conditions in r.25.13(2) applies, or an enactment permits the Court to require security for costs.

Thus, security cannot be ordered solely because, e.g. one or more of the conditions in r.25.13(2) applies, but only if having regard to all the circumstances of the case, the court is satisfied that it is just to make the Order. A circumstance of increasing importance today is the ability of the respondent to comply with any Order made. A requirement to raise funds which they are unable to raise may amount to a breach of ECHR art.6(1). This circumstance is considered more fully in para.25.12.7. For other circumstances which the court might take into account whether to order security for costs, see per Lord Denning M.R. in *Sir Lindsay Parkinson & Co v Triplan Ltd* [1973] Q.B. 609. See "Companies Act 1985 s.726", para.25.13.12. Another matter for consideration is the likelihood of the respondent's claim succeeding. The purpose of security for costs is to prevent injustice to the applicant but there is also a need to avoid injustice to a respondent who has a meritorious claim who would be prevented from pursuing it if required to provide security for costs. Although it is important to try to avoid a situation in which the merits have to be considered, the overall result requires that the Order should be just (*Fernhill Mining Ltd v Kier Construction Ltd* [2000] L.T.L., January 27, 2000). An application for security for costs should not be made the occasion for a detailed examination of the merits of the case. Parties should not attempt to go into the merits of the case unless it can be clearly demonstrated one way or another that there is a high degree of probability of success or failure. See *Porzelack KG v Porzelack (UK) Ltd* [1987] 1 All E.R. 1074; *Kufaan Publishing Ltd v Al-Warrak Publishing Ltd*, March 1, 2000, unrep., CA. However, a claimant will not be required to provide security for costs where, at the time of the application, the claim appears highly likely to succeed (*Keary Developments Ltd v Tarmac Construction Ltd* [1995] 3 All E.R. 534, 540, CA; *Al-Koronky v Time Life Entertainment Group Ltd* [2006] EWCA Civ 1123).

In considering an application for security for costs against a claimant, the court must take into account the claimant's prospects of success, admissions by the defendant, open offers and payments into court; but a defendant should not be adversely affected in seeking security merely because they have attempted to reach a settlement. Evidence of negotiations conducted "without prejudice" should not be admitted without their consent (*Simaan Contracting Co v Pilkington Glass Ltd (No.2)* [1988] 2 W.L.R. 761; [1987] 1 All E.R. 345; *Kristjansson v R. Verney & Co Ltd*, 1998, unrep., CA).

A claimant who has satisfactory legal expenses insurance may be able to resist an order for security for costs on the ground that their insurance cover gives the defendant sufficient protection (*Al-Koronky v Time Life Entertainment Group Ltd* [2006] EWCA Civ 1123; however, in that case, the appeal against an order for security was dismissed; the terms of the policy permitted the insurers to avoid any liability for costs which was consequent upon their not having been told the truth. As the claim was for defamation in respect of which the defendants were relying upon a defence of justification, the outcome of the case depended entirely upon which side was telling the truth). See, further, *Belco Trading Ltd v Kordo* [2008] EWCA Civ 205, noted in para.25.12.8, above.

As to the effect of delay in applying for security on the exercise of discretion, see "Ideal time for application", para.25.12.6.

On the question whether an order for security for costs may infringe a party's right to a fair trial under ECHR art.6(1), see para.3.1.5 above and para.25.13.4 below. A claimant who alleges that an order for security will stifle the claim must adduce satisfactory evidence that they do not have the means to provide security and that they cannot obtain appropriate assistance to do so from any third party, such as a relative or friend, who might reasonably be expected to provide such assistance if they could (*Al-Koronky v Time Life Entertainment Group Ltd* [2005] EWHC 1688). On the question whether an order for security of costs may infringe the prohibition of discrimination set out in ECHR art.14, para.25.13.6 below and *Vedatech Corp v Crystal Decisions (UK) Ltd (formerly Seagate Software IMG Ltd) (Appeal against Security for Costs)* [2002] EWCA Civ 356.

Discretionary factors where both claims and counterclaims are raised

25.13.1.1 The court may, in its discretion, refuse to order security for costs in respect of a claim where the same issues arise on a counterclaim in the same proceedings. If security were to be ordered in such a case and was not paid, the claim would be struck out but the same issues may be litigated anyway in respect of the counterclaim. The order for security may therefore serve no purpose other than to prevent the claimant from

obtaining compensation or other remedies in excess of the remedies, if any, to which the counterclaimant may be entitled (*B.J. Crabtree (Insulation) v GPT Communications Systems* (1990) 59 B.L.R. 43, CA). The same principles may apply when security is sought by a claimant in respect of a counterclaim which raises no issues additional to those raised by the claim (Park J. in *Anglo Petroleum Limited v TFB Mortgages Ltd* [2004] EWHC 1177 (Ch)).

There is, however, no rule of thumb as to the refusal of an order for security where both claims and counterclaims are raised. The purpose of granting security for costs is to give costs protection to a defendant (or a claimant placed in a similar position by a counterclaim) who is forced into litigation at the election of someone else, Thus, a counterclaiming defendant who would not himself have commenced litigation against the claimant should neither be ordered to give security (*Hutchinson Telephone (UK) Ltd v Ultimate Response Ltd* [1993] B.C.L.C. 308) nor be deprived of an order for security against the claimant (*Autoweld Systems Ltd v Kito Enterprises LLC* [2010] EWCA Civ 1469) if, in substance, his position remains that of a defendant. The court should consider whether his counterclaim goes beyond self defence and involves a cross-claim which has "an independent vitality of its own" and whether it "has crossed the boundary which divides an aggressive defence from an independent counterclaim" (Bingham L.J. in *Hutchinson*, cited above).

Several cases have indicated other factors justifying an order for security where both claims and counterclaims are raised. An order for security of the costs of a claim may be appropriate where the claim raises substantial factual inquiries which are not the subject of the counterclaim notwithstanding the fact that the claim provides a defence to the counterclaim (Shaw-Lloyd & Co v *ASM Shipping Ltd* [2006] EWHC 1958 (QB). The applicant for security may be entitled to such an order on other grounds, e.g., where the claim or cross claim in question has no reasonable prospects of success (*Newman v Wenden Properties Ltd* [2007] EWHC 336 (TCC); and see further, para.3.1.5, above). In cases in which grounds for security can be established against each side it may be appropriate to order each side to give security for costs to the other (*Samuel J Cohl Co v Eastern Mediterranean Maritime Limited (The "Silver Fir")* [1980] 1 Lloyds Rep 371). A defendant may be allowed security for the costs of a claim on terms that, if the claim is struck out for non-compliance with the order, the counterclaim would be dismissed by consent (*Dumrul v Standard Chartered Bank* [2010] EWHC 2625 (Comm)).

"Resident out of the jurisdiction"

25.13.2 The words quoted form part of ground (a) set out in r.25.13.(2). "Jurisdiction" is defined in r.2.3(1). The burden of proof is on the applicant to show that the respondent is resident out of the jurisdiction. The question is one of fact and of degree.

As originally drafted ground (a) (and ground (b)) referred to "ordinary residence" rather than "residence". It appears unlikely that this change was intended to change the scope of ground (a).

In *R. v Barnet LBC Ex p. Shah (Nilish)* [1983] 2 A.C. 309; [1983] 2 A.C. 309, HL, it was held that, in the context of the Education Act, the term "ordinarily resident" should be construed according to its ordinary and natural meaning, and that a person is ordinarily resident in a place if they habitually and normally reside lawfully in such place from choice and for a settled purpose, apart from temporary or occasional absences, even if their permanent residence or "real home" is elsewhere. The relevant dicta in *Levene v I.R.C.*; *Inland Revenue Commissioners v Lysaght* [1928] A.C. 234; and *R. v Barnet LBC Ex p. Shah (Nilish)* [1983] 2 A.C. 309 were applied by the Court of Appeal to an application for security for costs under the previous Rules, RSC Ord.23 r.1 in *Parkinson v Myer Wolff & Manley* April 23, 1985, unrep., CA. A person who makes a provisional decision to go and live abroad is not "ordinarily resident" out of the jurisdiction, at any rate so long as they have not left the country (*Appah v Monseu* [1967] 1 W.L.R. 893; [1967] 2 All E.R. 583).

To find whether a claimant corporation was ordinarily resident out of the jurisdiction, the court has to locate its central management and control (*Little Olympian Each Ways Ltd, Re* [1995] 1 W.L.R. 560; [1994] 4 All E.R. 561).

The Brussels Convention and the Lugano Convention

25.13.3 These Conventions are part of UK law pursuant to the Civil Jurisdiction and Judgments Act 1991. The countries currently governed by the Conventions are the Member States of the European Community (EC) and the European Free Trade Area (EFTA), i.e. Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Iceland,

Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Spain, Sweden, Switzerland and the United Kingdom. Under the Conventions, the United Kingdom is itself divided into three constituent parts for certain purposes; England and Wales, Scotland and Northern Ireland.

All of the countries listed above are the Contracting States referred to in r.25.13(2)(a). As to the distinction between Brussels Contracting State and Regulation State, see Vol.2, para.5–9. The Brussels Convention has been superseded by EC Regulation No.44/2001 ("the Regulation"). However, Denmark has not ratified the Regulation and so remains subject to the Brussels Convention.

Human Rights Act

25.13.4 An order to pay sums ordered by way of security for costs which a litigant lacks the means to pay may amount to a breach of the ECHR art.6(1) right of access to a court: *Ait-Mouhoub v France* (2000) 30 E.H.R.R. 382, Reports of Judgments and Decisions, 1998–VIII, p.3214, ECtHR. See also *Federal Bank of the Middle East v Hadkinson*, *The Times*, December 7, 1999, CA (see transcript), *JR and WA v United Kingdom* 14551/89 December 4, 1989, unrep., EComHR, *Grepne v United Kingdom* 17070/90 October 1, 1990, unrep., EComHR, and *X v Sweden* 7973/77 February 28, 1979, EComHR. See, mutatis mutandis, *Kreuz v Poland* 28249/95 June 19, 2001, ECtHR, first section (excessive court fees unduly restricted right of access to court).

Claimants resident in an EU or EFTA Contracting State

25.13.5 The text of r.25.13(2)(a) as originally drafted (see earlier editions of this work) was unusually difficult and obscure. The current text derives from the Court of Appeal decision in *De Beer v Kanaar & Co (No.1)* [2001] EWCA Civ 1318 which solved the problems by construing the rule in a purposive manner in its historical context. The provision was originally introduced in order to eliminate any covert discrimination against nationals of states which were signatories to the Brussels Convention (see *Chequepoint SARL v McClelland* [1997] Q.B. 51 and the cases cited therein). It was therefore held that security for costs could be ordered against a claimant who was ordinarily resident in the USA, even though he was a Dutch national who had assets in Switzerland.

As presently drafted, ground (a) prevents the making of orders for costs against persons resident within the jurisdiction or resident within any other Convention state even if they also have one or more residences elsewhere in the world (*Tatnall v Longley Central London County Court* October 15, 2003, unrep., H.H. Judge Hallgarten Q.C., noted in *New Law Journal*, November 14, 2003, p.1710; and see *Somerset-Leeke v Kay Trustees* [2003] EWHC 1243; [2004] 2 All E.R. 406, (Ch) at para.1). As originally drafted ground (a) (and ground (b)) permitted the making of orders for costs against persons resident within the jurisdiction if they had two or more residences and none of the other residences were within a Convention state (i.e. within any EU or EFTA state other than the UK); see, for example, *Leyvand v Barasch*, *The Times*, March 23, 2000 (claimant resident in England and Israel). In most cases however, this point was of academic interest only because such a claimant's connection with this country usually led the court to refuse to order security on discretionary grounds.

No discrimination against claimants resident in other States

25.13.6 An order for security for costs cannot be made against a person or body ordinarily resident in England or in a country to which the Brussels convention or the Lugano Convention applies (r.25.13(2)(a)(ii)). Thus, in comparison with persons and bodies ordinarily resident elsewhere in the world, a sharp distinction is drawn. In *Nasser v United Bank of Kuwait* [2002] 1 W.L.R. 1868; [2002] 1 All E.R. 401, CA, the question whether the distinction has the potential of being discriminatory within ECHR art.14 was considered. It was held that where ground (a) (but no other ground) is established, the court should not exercise its discretion to order security for costs unless it does so on grounds relating to obstacles to or the burden of enforcement of a subsequent order for costs in the context of the particular foreign claimant or country concerned. It is discriminatory and wrong to take into account the impecuniosity of an individual foreign claimant.

> "In so far as impecuniosity may have a continuing relevance it is not on the ground that the claimant lacks apparent means to satisfy any judgment but on the ground (where this applies) that the effect of the impecuniosity would be either (i) to preclude or hinder or add to the burden of enforcement abroad against such assets as do exist abroad or (ii) as a practical matter, to make it more

likely that the claimant would take advantage of any available opportunity to avoid or hinder such enforcement abroad" (per Mance L.J., para.62).

In *Nasser* a reasonable estimate of the applicant's likely costs up to the end of the proceedings in question was £10,000. However, there was no obstacle to or difficulty about the enforcement of an order for costs other than impecuniosity. Therefore, it was appropriate to limit the amount of security to the amount needed to protect the applicant from the extra burden in terms of costs and delay which was likely to be involved in seeking to enforce an order for costs in the country in which the claimant resided (the USA). The costs of enforcement likely to be incurred in excess of the costs of equivalent steps taken in England or in another Convention country were assessed at £5,000 and that was the sum ordered as security.

If there is no obstacle to or difficulty about enforcement against a claimant who has substantial assets, the court should have regard to any possible increased costs in the country in which the claimant's assets are located, rather than the country in which the claimant resides (*Aims Asset Management SDN BHD v Kazakhstan Investment Fund Ltd* May 22, 2002, unrep., (Ch)). However, it is wrong to deduce from that case the proposition that any non-Brussels/Lugano resident must indicate assets in their place of residence (or within Brussels/Lugano) in order to prevent security being ordered (*Somerset-Leeke v Kay Trustees* [2003] EWHC 1243; [2004] 2 All E.R. 406, (Ch) at para.10).

In *De Beer v Kanaar & Co (No.1)* [2001] EWCA Civ 1318, CA (as to which, see further, para.25.13.5 above) a reasonable estimate of the applicant's costs up to the end of the proceedings in question was £130,000. There was evidence that the claimant had sufficient assets out of which he could pay such costs not only in Switzerland but also in the USA. However, the court was satisfied that (i) there was a lack of probity on the part of the claimant in these proceedings, (ii) the claimant's assets in Switzerland were assets which could easily be moved, and (iii) there was a risk that an order for costs against them would be difficult or even impossible to enforce in the USA. In all the circumstances, the amount of security which it was appropriate to award was £130,000.

In *Kahangi v Nourizadeh* [2009] EWHC 2451 (QB) full security for costs up to the pre-trial review was ordered in a libel action brought by claimants based in Iran. The defendant, a journalist, was an Iranian exile and dissident; there was evidence that Iranian government representatives had made threats or offered inducements to him with a view to preventing him publishing comments or criticisms of the claimants, and there was evidence that judges in Iran were not free from government influence and were required by the Iranian Constitution to function under the "absolute rule of the Supreme Leader".

Formal evidence is not always required in order to prove the obstacles or difficulties of enforcement which may arise. Whilst there must be a proper basis for considering that such problems exist, the court will take note of obvious realities (*Thistle Hotels Ltd v Gamma Four Ltd* [2004] EWHC 322; and see, further, *Kahangi v Nourizadeh* [2009] EWHC 2451 (QB)).

In *Texuna International Ltd v Cairn Energy Ltd* [2004] EWHC 1102 the court estimated the additional costs of enforcement in that case at £50,000 if enforcement took place in Hong Kong and also allowed a further £50,000 to cover the risk that enforcement would become more complex or that enforcement proceedings might have to be brought in another country; the claimant was ordered to provide security in the sum of £100,000.

Other International Conventions affecting security for costs

25.13.7 The following Conventions expressly forbid any requirement of security for costs, namely, Carriage of Goods by Rail (Berne) 1952 art.55(4); Carriage of Passengers by Rail (Berne) 1961 art.56(4); Carriage of Goods by Road (Geneva) 1956 art.31(5); Carriage of Passengers by Road Convention art.41(6). It should be noted, however, that these Conventions although ratified, have not yet been brought into force in England.

International carriage by rail is now governed by the Convention Concerning International Carriage by Rail Act 1980 (Cmd. 8335) given force of law in the UK by International Transport Conventions Act 1983 and brought into force in 1985 by SI 1985/612.

The following Conventions impliedly exclude requests for security for costs by non-discrimination clauses, i.e. the Convention on Third Party Liability in the Field of Nuclear Energy (the Paris Convention) 1960 art.14(a) as amended by the additional Protocol of 1964; Civil Liability for Nuclear Damage (Vienna) 1963 art.13; Convention for Liability in Nuclear Ships (Brussels) 1962 art.12(3) (not yet ratified).

On the other hand the Warsaw Convention on International Carriage by Air 1929 art.28, impliedly permits a requirement of Security for costs by providing that the procedure is to be governed by the lex fori.

Conventions with the following countries contain Articles relevant to Security for costs:

Czechoslovakia *	Cmd. 2637 (1926)
Czechoslovakia (supplementary) *	Cmd. 4980 (1935) art.3
Hungary	Cmd. 5190 (1936) art.12
Iraq	Cmd. 5369 (1937) art.12
Israel	Cmd. 3513 (1968) art.13
Turkey	Cmd. 4318 (1933) art.12
Yugoslavia*	Cmd. 5542 (1937) art.12

It would appear that the provisions of these Conventions do not involve any departure from the Rules and practices of the High Court or County Court. Further information regarding these Conventions can be obtained from the Foreign Process Section, Room E10, Royal Courts of Justice, Strand, London WC2A 2LL.

*It must be remembered that these states have subsequently been split into separate states and not all of these conventions may still apply.

Condition (a): individual or company resident abroad

25.13.8 Security for costs may be ordered against an individual who does not, or a company which does not, reside within the jurisdiction and does not reside within any other EU or EFTA State (see above, paras 25.13.2, 25.13.3 and 25.13.5). Condition (a) refers to a "claimant" as to which see above paras 25.12.3 and 25.12.4.

The Isle of Man and the Channel Islands are outside the jurisdiction and are not Member States of the European Community. Accordingly, security for costs may be ordered under condition (a) against a claimant resident in the Isle of Man (*Greenwich Ltd v National Westminster Bank Plc* [1999] 2 Lloyd's Rep. 308).

Security for costs is not ordered under Condition (a) as a matter of course; the power is discretionary (see para.25.13.1 above). For further commentary on individuals and companies resident abroad, see below "Foreign and English co-claimants", para.25.13.10, and "Foreign claimants with property in England", para.25.13.11.

Condition (b): (repealed)

25.13.9 As originally drafted paras (a) and (b) of r.25.13(2) dealt separately with individuals and companies. As from April 2003 the sub-rule has been amended so that para.(a) now applies to both individuals and companies and, accordingly, para.(b) has been omitted.

Foreign and English co-claimants

25.13.10 Where some claimants are resident out of the jurisdiction, but others are not, the court has jurisdiction to order security for costs if, having grant to all the circumstances of the case, the court thinks it just to do so. In deciding whether to order security, the court should take into account the likely prospect that, if the claim fails, an order for costs will be made which will be fully enforceable against the claimants within the jurisdiction. Another factor for consideration is whether any of the claimants has funds within the jurisdiction which are sufficient to meet any liability for costs (*Slazengers Ltd v Seaspeed Ferries Ltd*; *The Seaspeed Dora* [1988] 1 W.L.R. 221; [1987] 2 All E.R. 90, CA). Security may well be ordered if the English claimant is impecunious and is not a genuine claimant, but was joined merely in the hope of defeating any application for security for costs (*Jones v Gurney* [1913] W.N. 72).

Foreign claimants with property in England

25.13.11 The court, in exercising its discretion may consider whether the claimant has assets within the jurisdiction and also the fixity or permanence of those assets. The court will not infer the existence of a real risk that assets within this country will be dissipated or shipped abroad to avoid their being available to satisfy a judgment for costs unless there is reason to question the probity of the claimant. If there is reason to question the claimants probity, the character of their property within the jurisdiction is relevant in assessing the risk; the risk will be greater if the property is cash or is immediately

realisable or transportable (per Lightman J. in *Leyvand v Barasch*, *The Times*, March 23, 2000).

Where the subject matter of proceedings for breach of warranty was a Greek statue, it had been alleged that the statue was spurious, application was made that the claimant should give security for costs. The court had already made an order that the statue which was deposited within the jurisdiction, should not be removed without the consent of the defendants or an order of the court. It was held that as in the event of the claimant being unsuccessful in the proceedings, the value of the statue must be more than any order for costs that could be made against him, there ought to be no Order for Security (*Kevorkian v Burney* [1937] 4 All E.R. 468). A fortiori where the statue, the subject matter of the dispute, is said to be by Michelangelo (*De Bry v Fitzgerald* [1990] 1 W.L.R. 552; [1990] 1 All E.R. 560, CA).

Where a claimant seeks security for costs of a counterclaim brought by a defendant resident abroad, the court is likely to refuse to order security if the claimant has already obtained a freezing injunction against the defendant for a sum likely to exceed the amount of the costs of the counterclaim (*Hitachi Shipbuilding & Engineering Co Ltd v Viafel Compania Navieran SA* [1981] 2 Lloyd's Rep. 498, CA).

Condition (c): insolvent or impecunious company

25.13.12 Security for costs may be ordered against a company or other body (whether English or foreign) where there is reason to believe that it will be unable to pay the applicant's costs if ordered to do so. However, security is not ordered as of course against such companies: the court's power is discretionary, to be exercised having regard to all the circumstances of the case (see above para.25.13.1). Rule 25.13(2)(c) refers to a company which is a claimant. As to this, see further paras 25.12.3 and 25.12.4 above.

An applicant for security for costs relying on Condition (c) must show that the company would not (as opposed to may not) be able to meet its debts when an Order for Costs was made against it. This question has to be answered at the time of the application although the Court can take into account evidence of what is to be expected in the future before any Order would be made. *Unisoft Group (No.2), Re* [1993] B.C.L.C. 532, construing similar words in s.726(1) of the Companies Act 1985. A company with assets with a value exceeding its debts will nevertheless be unable to meet its debts if those assets are illiquid. Thus, a net asset balance is not determinative of the question whether a company can pay a costs liability when it falls due. That issue involves consideration of the nature and liquidity of the assets (*Thistle Hotels Ltd v Gamma Four Ltd* [2004] EWHC 322, (Ch); *Longstaff International Ltd v Baker & McKenzie* [2004] EWHC 1852; [2004] 1 W.L.R. 2917, (Ch)).

In order to establish ground (c) the applicant must show "there is reason to believe that it [i.e. the claimant company] will be unable to pay the defendant's costs if ordered to do so". The opening words "there is reason to believe" have the effect of watering down the obligation which follows, i.e., the obligation to prove the company's inability to pay costs if ordered to do so. The defendant does not have to show on a balance of probabilities that the claimant company "will be unable to pay" etc: the defendant may well be able to show that there is reason to believe that the company will not be able to pay even if the company can adduce substantial evidence to the contrary (see generally *Jirehouse Capital v Beller* [2008] EWCA Civ 908; [2009] 1 W.L.R. 751).

A liquidator or receiver bringing proceedings in the name of an insolvent company is not under any duty to ensure that the company has sufficient funds to pay any costs awarded to the defendant. The defendant's primary method of protection here is an application for security for costs against the company. A defendant who fails to make such an application will not normally be entitled to an order for costs payable by the liquidator or receiver personally (*Mills v Birchall* [2008] EWCA Civ 385).

Rule 25.13(2)(c) applies to all companies, whether limited or unlimited and whether incorporated in England and Wales or elsewhere (see generally *Jirehouse Capital v Beller* [2008] EWCA Civ 908; [2009] 1 W.L.R. 751). In times past the rule duplicated s.726(1) of the Companies Act 1985. However, as from October 1, 2009, s.726(1) was repealed and not replaced (Companies Act 2006 (Commencement No.8 Transitional Provisions and Savings) Order 2008 (SI 2008/2860).

Rule 25.13(2)(c) makes no provision for applications for security for costs against an unincorporated association.

Particular discretionary factors where condition (c) relied on

25.13.13 The Court has a discretion under r.25.13 whether to order security for costs having

regard to all the circumstances of the case. Among the circumstances which the court might take into account are the following:

(1) Whether the claimant's claim is bona fide and not a sham;
(2) Whether the claimant has a reasonably good prospect of success;
(3) Whether there is an admission by the defendants in their defence or elsewhere that money is due;
(4) Whether there is a substantial payment into court or an "open offer" of a substantial amount;
(5) Whether the application for security was being used oppressively, e.g. so as to stifle a genuine claim;
(6) Whether the claimant's want of means has been brought about by any conduct by the defendant, such as delay in payment or in doing their part of any work;
(7) Whether the application for security is made at a late stage of the proceedings.

(*Sir Lindsay Parkinson & Co v Triplan Ltd* [1973] Q.B. 609, CA, per Lord Denning M.R.)

In *Spy Academy Ltd v Sakar International Inc* [2009] EWCA Civ 985 an order for security for costs was set aside on appeal: whilst the pre-condition for the making of the order was satisfied (the claimant company had no assets) there were other factors to be taken into account that pointed away from the making of such an order. Those factors were as follows: (i) the claimant had a bona fide claim; (ii) there was no realistic chance that the claimant's directors would be able to raise security; (iii) it was arguable that the claimant's impecuniosity had been brought about by the conduct of the defendant; and (iv) the application for security had been made late in the proceedings.

The court may order a claimant company in liquidation to give security for costs, even though it is one of two or more claimants, especially where there is comparatively small overlap between its own claims and those of the other claimants (*John Bishop (Caterers) Ltd v National Union Bank Ltd* [1973] 1 All E.R. 707).

Where an order for security for costs against a claimant company might result in oppression in that the claimant company would be forced to abandon a claim which has a reasonable prospect of success, the court is entitled to refuse to make that order, notwithstanding that the claimant company, if unsuccessful, will be unable to pay the defendant's costs. (*Aquila Design (GRB) Products Ltd v Cornhill Insurance Plc* [1988] B.C.L.C. 134, CA). In this respect it is sufficient for the claimant to show that there is a probability that will be unable to pursue the action if the order is granted; it need not show with certainty that it will be unable to do so (*Trident International Freight Services Ltd v Manchester Ship Canal Co* [1990] B.C.L.C. 263, CA). Before the court refuses to order security on the ground that it would unfairly stifle a valid claim, the court must be satisfied that, in all the circumstances, it is probable that the claim would be stifled (*Keary Developments Ltd v Tarmac Construction Ltd* [1995] 3 All E.R. 534, CA). In considering this issue the court should consider, not only whether the claimant company can provide security out of its own resources to continue the litigation, but also whether it can raise the amount needed from outside sources, for example, its directors, shareholders or other backers or interested persons (including creditors) (ibid.). In all but the most unusual cases, the burden lies on the claimant company to show that, apart from the question whether the company's own means are sufficient to meet an order for security, there will be no prospect of funds being available and forthcoming from any outside source (*Kufaan Publishing Ltd v Al-Warrack Bookshop Ltd*, March 1, 2000, unrep., CA). In *Brimko Holdings Ltd v Eastman Kodak Company* [2004] EWHC 1343, the claimant successfully demonstrated that an order for security in the amount sought by the defendant would stifle its claim. Instead, the court made an order for security in a sum slightly larger than the sum which the claimant had volunteered to provide.

When considering the claimant's prospects of success, it is important to try to avoid a situation in which the merits have to be considered in detail (*Fernhill Mining Ltd v Kier Construction Ltd* [2000] C.P. Rep. 69).

Proving insolvency or impecuniosity

25.13.14 An applicant for security for costs who relies on r.25(13)(c) has to persuade the court that there is reason to believe that the company will not be able to pay costs if it is subsequently ordered to do so. It is not enough to show that the applicant has a reasonable belief to that effect: the court will take account of the evidence adduced by both sides (*Re Unisoft (No.2)* [1993] B.C.L.C. 532). However, the test to be applied is

lower than a balance of probabilities test: the court is not required to reach a conclusion as to whether or not the company will later be unable to pay such costs (*Jirehouse Capital v Beller* [2008] EWCA Civ 908; [2009] 1 W.L.R. 751, CA). In practice, the insolvency or impecuniosity may not be disputed. Alternatively, the fact that a company is in liquidation is prima facie evidence and that it is unable to pay the costs, unless evidence to the contrary is given (*Northampton Coal, Iron & Waggon Co v Midland Maggon Co* [1878] 7 Ch.D. 500, CA; *Pure Spirit Co v Fowler* (1890) L.R. 25 Q.B.D. 235: *Smith v UIC Insurance Co Ltd* [2001] B.C.C. 11). Apart from such a case the application for security must be supported by evidence which credibly and reasonably shows the inability of the company to pay the costs of the successful defendant. Often, insolvency is established by means of expert evidence of accounts. In an appropriate case, the Court will appoint a single expert to provide such evidence; *Guinle v Kirreh*; *Kinstreet Ltd v Balmargo Corporation Ltd* [2000] C.P. Rep. 62, August 3, 1999, unrep., Ch D.

Condition (d): change of address

25.13.15 Rule 25.13.2(d) empowers the court to order security for costs against a party who has changed their address since the claim was commenced with a view to evading the consequences of the litigation. The court's power is discretionary; it must be satisfied, having regard to all the circumstances of the case, that it is just to make the Order. Rule 25.13(2)(d) refers to a claimant as to the meaning of which see above paras 25.12.3 and 25.12.4.

In *Aoun v Bahri* [2002] EWHC 29 (Comm); [2002] 3 All E.R. 182 it was held obiter that "the consequences of the litigation" could include providing security for costs as well as the payment of costs at the end of the litigation: accordingly, a decision to take up residence in the UK which was motivated by a desire to avoid giving security might, if acted upon, provide justification for an application relying on ground (d).

Condition (e): withholding the correct address

25.13.16 Rule 25.13.2(d) empowers the court to order security for costs against a claimant who failed to give their address in the claim form, or gave an incorrect address in that form. The court's power to order security is discretionary; it must be satisfied, having regard to all the circumstances of the case, that it is just to make such an order. Rule 25.13(2)(e) refers a claimant and a claim form. Claimants may include a defendant who brings a Part 20 Claim (see above paras 25.12.3 and 25.12.4). Rule 20.8 (Service of a Part 20 Claim Form) refers to a counterclaim and a third Party Notice as a "Part 20 Claim Form".

Condition (f): nominal claimant

25.13.17 Rule 25.13(2)(f) enables the court to order security for costs against a claimant who is acting as a nominal claimant other than as a representative claimant under Pt 19, and there is reason to believe that they will be unable to pay the defendant's costs if ordered to do so. As to "nominal" some pre-CPR case examples of the meaning of this term are given below. Condition (f) refers to a "claimant" who is unable to pay the "defendant's costs". As to the use of this ground against a defendant in respect of a Pt 20 Claim, see above paras 25.12.3 and 25.12.4. Condition (f) does not apply to a representative claimant under Pt 19, which see especially, r.19.6 (representative parties with same interest), r.19.7 representation of interested persons who cannot be ascertained etc., r.19.8 (Death) and r.19.9 (Derivative Claims). The exception does not cover a litigation friend (formerly next friend) of a child or patient as to which see (Pt 21). However, as a matter of discretion, it seems unlikely that a litigation friend will be ordered to give security unless, perhaps, one or more of the other conditions in r.25.13(2) applies to them.

A trustee in bankruptcy suing as such is not a nominal claimant (*Cowell v Taylor* (1886) L.R. 31 Ch.D. 34). However, a trustee in bankruptcy who elects to continue a claim in the County Court commenced by the bankrupt may be ordered to give security under County Court Act 1984 s.49 (see Vol.2, para.9A–492, and see r.25.13(1)(b)(ii)). A claimant who has assigned the benefit of an action may be a nominal claimant (*Semler v Murphy* [1968] Ch. 183). So an insolvent claimant who assigned to a trustee for the benefit of their creditors or their estate, and covenants to prosecute the action is merely a nominal claimant (*Lloyd v Hathern Station Brick Co* [1901] 85 L.T. 158). If the assignment was made with a view to avoiding the possibility of a costs order being made against the creditors, and if the creditors have contributed or agreed to contribute to the claimant's costs, an order for security for costs may also be made against the creditors: see r.25.14.

A bankrupt to whom the trustee in bankruptcy has assigned the right to claim damages for negligence against his former accountants, who undertook to receive only 65 per cent or the net proceeds of the action and to pay to the trustee the remaining 35 per cent was held to be not a "nominal" claimant against whom an order for costs will be made and in any event as a matter of discretion on the grounds that negligence by the defendants had itself led or contributed to the bankruptcy, it was held manifestly unjust to order the claimant to give security for costs (*Ramsey v Hartley* [1977] 1 W.L.R. 686; [1977] 2 All E.R. 673, CA).

Under condition (f) the applicant is not required to prove that the respondent is insolvent or impecunious; it is sufficient to show that there is reason to believe that they will be unable to pay the applicant's costs if ordered to do so. However, in exercising its discretion towards the costs, the court must have regard to all the circumstances of the case. Unless insolvency or impecuniosity is proved (as to which see above para.25.13.14) the court may not be satisfied that it is just to make the order. As to the discretionary nature of the court's power to order security for costs, see further para.25.13.1.

Condition (g): taking steps as to assets which hinder enforcement

25.13.18 Under r.25.13(2)(g) security for costs may be ordered against a claimant who has taken steps in relation to their assets that would make it difficult to enforce an order for costs against them. Although Condition (g) refers to a "claimant" it may also apply to defendants in respect of a Pt 20 Claim (see above paras 25.12.3 and 25.12.4).

The purpose of condition (g) is to prevent injustice to a defendant where the assets available to enforce any order for costs they obtain have been or are being put beyond the reach of enforcement. The steps taken may be the dissipation of assets, their transfer overseas or into the names of third parties, or their transfer or removal to places unknown to the defendant. The defendant is not required to show that the steps were taken with the specific intention of defeating enforcement (*Aoun v Bahri* [2002] EWHC 29 (Comm); [2002] 3 All E.R. 182) or that those steps were taken during the litigation or in contemplation of it (*Harris v Wallis*, [2006] EWHC 630 (Ch); *The Times*, May 12, 2006). If all or most of the claimant's assets are put beyond the defendant's reach, the injustice to the defendant if no security is given may be just as great as it would be if it was the claimant who had transferred overseas or disappeared. That said, the proof a specific intent to stultify future orders for costs will generally increase the likelihood that an order for security will be made. The principles to be applied are, in some respects, analogous to the principles governing applications for freezing injunctions (as to which see above para.25.1.23) save that, in Condition (g) the applicant must also prove the taking of steps in relation to assets which will hinder enforcement (*Chandler v Brown* [2001] C.P. Rep. 103). The applicant may seek to prove a specific intent to stultify future orders for costs in a variety of ways, e.g. evidence of dishonest behaviour by the claimant, unreliability in the past, evasiveness in these proceedings and statements of intent by the claimant.

As to the discretionary nature of the court's power to order security for costs, see para.25.13.1.

Enactments permitting security for costs

25.13.19 The court may make an order for security for costs if it is satisfied, having regard to all the circumstances of the case, that it is just to do so and "an enactment permits the court to require security for costs" (r.25.13(1)(b)(ii)). Examples of such enactments include the Companies Act 1985 s.726(1) (now repealed, see further para.25.13.12) and the County Courts Act 1984 s.49 (security for costs where claimant's trustee in bankruptcy elects to continue the claim, see further, para.25.13.17).

Under s.70(6) of the Arbitration Act 1996 the High Court has power to order security for the costs of any application under s.67 of the Act (challenging the award; substantive jurisdiction), s.68 of the Act (challenging the award; serious irregularity) or s.69 of the Act (appeal on point of law). As to the jurisdiction of the High Court and county court under the sections see s.105 of the Act and the High Court and County Courts (Allocation of Arbitration Proceedings) Order 1996, Vol.2, para.2E–375. Section 70(6) expressly prohibits exercise of the power to order security on the ground that the applicant or the appellant is a foreign individual or corporation. On an application for security in respect of an application under s.67 of the Act, the relevant factors include the availability of assets for the satisfaction of any order for costs and the fact that the applicant under s.67 had already lost the arbitration and was ef-

fectively having a second bite at the same cherry; the first factor mentioned is significantly more important than the second, *Azov Shipping Co v Baltic Shipping Co* [1999] 2 Lloyd's Rep. 39.

Other circumstances in which security for costs may be ordered

25.13.20 The discretions and conditions set out in r.25.13 relate to applications for security for costs under r.25.12. There are also several other rules and provisions under which security for costs may be ordered; r.3.1(2)(f) (power to stay proceedings either generally or until a specified date or event); r.3.1(5) (sanction for failure to comply with a rule, practice direction or relevant pre-action protocol), Practice direction supplementing Pt 24 paras 4 and 5 (a conditional order on a summary judgment application where the Court considers that the respondent's case may succeed but it is improbable that it will do so) r.25.14 (security for costs other than from the claimant) and r.25.15 (security for costs of an appeal).

Arbitration proceedings

25.13.21 Unless otherwise agreed by the parties, an arbitral tribunal has power to order a claimant to provide a security for the costs of the arbitration (Arbitration Act 1996 s.38(3); Vol.2, para.2B–18D). The subsection expressly prohibits the exercise of this power on the ground that the claimant is a foreign individual or corporation. The power of an arbitral tribunal to order security for costs was new in 1996. Under the Arbitration Act 1950 the High Court had power to order security for costs of arbitrations (Arbitration Act 1950 s.12(6)).

As to the making of orders for security for costs in applications to the Court under ss.67, 68 or 69 of the Arbitration Act 1996, see para.25.13.19 above.

Security for costs other than from the claimant[1]

25.14 **25.14—(1) The defendant may seek an order against someone other than the claimant, and the court may make an order for security for costs against that person if—**

(a) it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and

(b) one or more of the conditions in paragraph (2) applies.

(2) The conditions are that the person—

(a) has assigned the right to the claim to the claimant with a view to avoiding the possibility of a costs order being made against him; or

(b) has contributed or agreed to contribute to the claimant's costs in return for a share of any money or property which the claimant may recover in the proceedings; and

is a person against whom a costs order may be made.

(Rule 48.2 makes provision for costs orders against non-parties.)

Scope of this rule

25.14.1 The subject matter of this rule is new. It supplies the *lacunae* in the previous rules which were identified in *Eurocross Sales Ltd v Cornhill Insurance Plc* [1995] 1 W.L.R. 1517; [1995] 4 All E.R. 950, CA and *Abraham v Thompson* [1997] 4 All E.R. 362, CA. This rule enables the defendant to obtain an order for security for costs against someone other than the claimant if:

(1) having regard to all the circumstances of the case it is just to make such an order (see para.25.13.1); and

(2) either or both of the following conditions applies;

(a) the respondent to the application has assigned the right to the claim to the

[1] Amended by the Civil Procedure (Amendment) Rules 2000 (SI 2000/221).

claimant with a view to avoiding the possibility of a costs order being made against them (see below para.25.14.2);

(b) the respondent to the application has contributed or agreed to contribute to the claimant's costs in return for a share of any money or property which the claimant may recover in the proceedings (see below para.25.14.3); and

(3) the respondent to the application is a person against whom a costs order may be made (see below para.25.14.5).

Rule 25.14 does not spell out the consequences if a person ordered to give security under this rule fails to do so. An order under this rule should not provide for the claim to be struck out if the order is not complied with since to do so would terminate the current claimant's claim. It would be wrong to impose upon a new claimant an obligation as to security for costs which could not otherwise be imposed upon them under other rules of court (*Investment Invoice Financing Ltd v Limehouse Board Mills Ltd* [2006] EWCA Civ 9; [2006] 1 W.L.R. 985; however, in that case the current claimant's claim was stayed until the payment of two adverse orders for costs which had been made against his predecessor in title; see further, para.3.4.8 above).

In many cases claims are assigned to new persons only because of the supervening impecuniosity of the original claimants and not with a view to avoiding any order for costs. In such cases an order under r.25.14 would not seem to be appropriate.

For a recent case illustration (in which it seems no application was made under r.25.14 expressly) see *Compagnie Noga d'Importation et Exportation SA v Australia and New Zealand Banking Group Ltd* [2004] EWHC 2601, (Comm), especially para.130 thereof.

Although r.25.14 refers to applications by a defendant against the person other than the claimant, applications can also be made by claimants and other persons in respect of a Pt 20 Claim (see paras 25.12.3 and 25.12.4).

Condition (a): Assignment so as to avoid costs liability

25.14.2 For this condition to apply it must be shown that the assignment was made with the specific intent of avoiding costs liabilities (see para.25.13.15). For pre-CPR cases in which assignments of causes of action were made see *Eurocross Sales Ltd v Cornhill Insurance Plc* [1995] 1 W.L.R. 1517; [1995] 4 All E.R. 950, CA and *John Ridley Construction Bucks Ltd v C. (a firm)* January 30, 1998, unrep., CA; in neither of those cases was there a finding that the assignment had been made with intent to avoid costs liabilities.

Condition (b): Financing claimant's costs in return for a share of any fruits of proceedings

25.14.3 For this condition to apply, it must be shown that the respondent to the application has made some contribution to the claimant's costs and/or has agreed to make such a contribution and has done so in return for a share of any recoveries the claimant may make in the proceedings. An agreement to fund litigation on such terms may well be champertous and, as such, may amount to an abuse of the process of the court. If so, the defendant may, as an alternative to an application for security for costs, apply for a stay of a proceedings. The court may grant such a stay if there are grounds to believe that the proceedings are being conducted by the claimants or by the funder in bad faith; the mere fact that the proceedings are being financed by a third party with no interest in the outcome, other than in relation to the prospects of repayment, may not be of itself sufficient abuse to justify a stay (*Faryab v Smyth (Stay of Appeal: Champerty)* [1998] C.L.Y. 411 and see also *Stocznia Gdanska SA v Latreefers Inc* [2000] C.P.L.R. 65, CA).

"A person against whom a costs order may be made"

25.14.4 The court's power to award costs is contained in SCA 1981 s.51(1) which is expressed in terms wide enough to permit costs being ordered to be paid by persons who are not parties to the proceedings (*Aiden Shipping Co Ltd v Interbulk Ltd: the Vimerion* [1986] A.C. 965; [1986] 2 All E.R. 409). Rule 48.2 (costs orders in favour or against non parties) provides that, where the court is considering whether to make a costs order against a person who is not a party to the proceedings that person must be added as a party to the proceedings for purposes of costs only and must be given a reasonable opportunity to attend a hearing at which the court will consider the matter further (for certain exceptional cases, see r.48.2(2)).

The application for security

25.14.5 If the person against whom security is sought is not already a party to the proceed-

ings, an application must be made joining them as a party (r.48.2). For the procedure to follow see r.19.3 and the commentary thereto. It would seem that an order for security under this rule is unlikely to contain provision for dismissal of the claim in the case of default. In other respects the procedure on an application for security under this rule is as set out in paras 25.12.7 to 25.12.12.

Disclosure in aid of applications under r.25.14

25.14.6 The court has an implied power to order a claimant to disclose to the defendant the name and address of a third party funder of the claim where such funding is admitted or proved. The court also has an implied power to order the claimant to disclose whether or not that third party funder falls within sub-para.(2) of r.25.14 (*Reeves v Sprecher* [2007] EWHC 3226 (Ch), Rattee J., relying upon a dictum of Ackner L.J. in *AJ Bekhor v Bilton* [1981] Q.B. 923 at 942, cited by Potter L.J. in *Abraham v Thompson* [1997] 4 All E.R. 362: "where the power exists to grant the remedy, there must also be inherent in that power the power to make ancillary orders to make that remedy effective"). In *Reeves*, the defendants also applied for an order compelling the claimant to disclose the terms of an admitted funding agreement. This application was held to be premature unless and until the funder under that agreement had been made a party. At that stage the funder would be able to make representations to the court on the question whether disclosure of the terms of the agreement ought to be ordered. It was not necessary to see the funding agreement in order to commence an application under r.25.14 in respect of it.

Security for costs of an appeal[1]

25.15 **25.15—(1) The court may order security for costs of an appeal against—**

(a) an appellant;

(b) a respondent who also appeals,

on the same grounds as it may order security for costs against a claimant under this Part.

(2) The court may also make an order under paragraph (1) where the appellant, or the respondent who also appeals, is a limited company and there is reason to believe it will be unable to pay the costs of the other parties to the appeal should its appeal be unsuccessful.

Scope of this rule

25.15.1 The rule replaces former RSC Ord.59 r.10(5). Rule 10(5) stated that the Court of Appeal "may, in special circumstances, order that such security shall be given for the costs of an appeal as may be just". Various categories of "special circumstances" were developed by case law (see S.C.P. 1999, Vol.1, paras 59.10.32 et seq.). The classes were not regarded as closed. Further, it was established that, if one of the special circumstances was made out, the court had a residual discretion to refuse an order where the appellant contended that security should not be awarded because it would prevent them from pursuing his appeal. In significant respects, the rules as to security for costs operated more severely against appellants on appeals than against claimants in first instance proceedings. (It could be argued that this is justified on the ground that a respondent to an appeal deserves additional protection because of the fact that they have already won in the court below.) In the Report of the Review of the Court of Appeal (Civil Division) (the Bowman Review) published in September 1997, it was said that this more stringent approach operated unfairly against appellants of limited means and it was recommended that the approach to security for costs in appellate proceedings should broadly accord with that employed at first instance. Consequently, in r.25.15 the grounds for security are the same as those set out in r.25.13, i.e.:

(1) the court must be satisfied having regard to all the circumstances of the case that it is just to make an order (as to which, see below para.25.15.2); and

[1] Amended by the Civil Procedure (Amendment) Rules 2000 (SI 2000/221).

(2) one or more of seven specified conditions applies or an enactment permits the court to require security for costs (as to which see para.25.15.3).

Rule 25.15 makes no provision for security for costs applications to an appeal court during the period before any necessary permission to appeal has been obtained. The need for security during such periods may be considerable, e.g. in cases in which an application for permission has been adjourned to an oral hearing with the appeal to follow immediately if permission is granted. In *Great Future International Ltd v Sealand Housing Corp.* [2003] EWCA Civ 682 it was held that this apparent gap in the CPR was in fact supplied by the general case management powers set out in Pt 3. In *Great Future International Ltd* an order was made staying the application for permission to appeal, and if permission was granted the appeal itself, unless by a specified date the intending appellant paid into court the sum of £1 million previously ordered to be paid in respect of costs in the lower court plus £80,000 as security for the respondents' costs in the Court of Appeal (as to further proceedings in this case, see [2003] EWCA Civ 1175).

Discretionary power to order security for costs

25.15.2 For a commentary upon the discretionary nature of the court's power to order security for costs, see above para.25.13.1. Security is unlikely to be ordered where the liberty of the subject is in question (*Hood Barrs v Heriot* [1896] 2 Q.B. 375, CA, applied in *Gulf Azov Shipping Co Ltd v Chief Idisi (Security for Costs)* December 19, 2000, unrep., CA). The correct approach is to have in mind whether it is appropriate for an appellant to pursue an appeal without the risk of paying the other side's costs if they were unsuccessful; it does not follow that, because permission to appeal has been granted, security for costs should not be ordered because the appeal has merit (*Federal Bank of the Middle East Ltd v Hadkinson*, *The Times*, December 7, 1999, CA; see also *Nasser v United Bank of Kuwait* [2001] EWCA Civ 556; [2002] 1 All E.R. 401, CA, and para.25.13.6).

The making of such an order may interfere with an appellant's ECHR art.6(1) right of access to a court: see further para.3.1.5 above. The court should not order security for the costs of an appeal if to do so would stifle the appeal. However, if grounds for security for costs appear to have been established, it is for the appellant to satisfy the court, by evidence, that the effect of ordering security will be to stifle the appeal; also, when deciding the matter, it is relevant to consider the possibility that third parties might provide financial support (*Hammond Suddard Solicitors v Agrichem International Holdings Ltd (Stay of Proceedings)* [2001] EWCA Civ 2065, December 18, 2001, unrep., CA).

Same grounds as for security against a claimant

25.15.3 Commentary upon the seven grounds specified in r.25.13(2) are set out above in paras 25.13.7 to 25.13.18. Rule 25.15(2) does not appear to add anything to ground (c) which it partially duplicates.

The application for security

25.15.4 The application may be made either in the respondent's notice or, subsequently, by a separate application notice. In other respects the procedure is substantially as set out in paras 25.12.6 to 25.12.12, above.

Other circumstances in which security for costs of an appeal may be ordered

25.15.5 In addition to an order under r.25.15, an appellant and a respondent who appeals may be put on terms requiring security for the costs of that appeal under various other rules: r.3.1(5) (sanction for failure to comply with a rule or practice direction), r.52.3(7) (conditions upon which permission to appeal is granted); r.52.9(1)(c) (an order of the appeal court imposing or varying conditions upon which an appeal may be brought).

Human Rights Act

25.15.6 For discussion of the human rights implications of orders for security for costs see generally paras 25.13.4 and 25.13.6 above. An order that an applicant provide security for the costs of an appeal is less likely to be held to breach ECHR art.6(1) than an order for security for costs at first instance: *Tolstoy Miloslavsky v United Kingdom* (A/323) [1996] E.M.L.R. 152, ECtHR.

PRACTICE DIRECTION 25A—INTERIM INJUNCTIONS

This Practice Direction supplements CPR Part 25

Jurisdiction

25APD.1 **1.1** High Court Judges and any other Judge duly authorised may grant "search orders"[1] and "freezing injunctions".[2]

1.2 In a case in the High Court, Masters and district judges have the power to grant injunctions:

(1) by consent,

(2) in connection with charging orders and appointments of receivers,

(3) in aid of execution of judgments.

1.3 In any other case any judge who has jurisdiction to conduct the trial of the action has the power to grant an injunction in that action.

1.4 A Master or district judge has the power to vary or discharge an injunction granted by any Judge with the consent of all the parties.

Making an application

25APD.2 **2.1** The application notice must state;

(1) the order sought, and

(2) the date, time and place of the hearing.

2.2 The application notice and evidence in support must be served as soon as practicable after issue and in any event not less than 3 days before the court is due to hear the application.[3]

2.3 Where the court is to serve, sufficient copies of the application notice and evidence in support for the court and for each respondent should be filed for issue and service.

2.4 Whenever possible a draft of the order sought should be filed with the application notice and a disk containing the draft should also be available to the court in a format compatible with the word processing software used by the court. This will enable the court officer to arrange for any amendments to be incorporated and for the speedy preparation and sealing of the order.

Evidence

25APD.3 **3.1** Applications for search orders and freezing injunctions must be supported by affidavit evidence.

3.2 Applications for other interim injunctions must be supported by evidence set out in either:

(1) a witness statement, or

(2) a statement of case provided that it is verified by a statement of truth,[4] or

(3) the application provided that it is verified by a statement of truth,

unless the court, an Act, a rule or a practice direction requires evidence by affidavit.

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[1] r.25.1(1)(h).
[2] r.25.1(1)(f).
[3] r.23.7(1) and (2) and see r.23.7(4) (short service).
[4] See Pt 22.

3.3 The evidence must set out the facts on which the applicant relies for the claim being made against the respondent, including all material facts of which the court should be made aware.

3.4 Where an application is made without notice to the respondent, the evidence must also set out why notice was not given.

(See Part 32 and Practice Direction 32 for information about evidence.)

Urgent applications and applications without notice

25APD.4

4.1 These fall into two categories:

(1) applications where a claim form has already been issued, and

(2) applications where a claim form has not yet been issued,

and, in both cases, where notice of the application has not been given to the respondent.

4.2 These applications are normally dealt with at a court hearing but cases of extreme urgency may be dealt with by telephone.

4.3 Applications dealt with at a court hearing after issue of a claim form:

(1) the application notice, evidence in support and a draft order (as in 2.4 above) should be filed with the court two hours before the hearing wherever possible,

(2) if an application is made before the application notice has been issued, a draft order (as in 2.4 above) should be provided at the hearing, and the application notice and evidence in support must be filed with the court on the same or next working day or as ordered by the court, and

(3) except in cases where secrecy is essential, the applicant should take steps to notify the respondent informally of the application.

4.4 Applications made before the issue of a claim form:

(1) in addition to the provisions set out at 4.3 above, unless the court orders otherwise, either the applicant must undertake to the court to issue a claim form immediately or the court will give directions for the commencement of the claim,[1]

(2) where possible the claim form should be served with the order for the injunction,

(3) an order made before the issue of a claim form should state in the title after the names of the applicant and respondent "the Claimant and Defendant in an Intended Action".

4.5 Applications made by telephone:

(1) where it is not possible to arrange a hearing, application can be made between 10.00am and 5.00pm weekdays by telephoning the Royal Courts of Justice on 020 7947 6000 and asking to be put in contact with a High Court Judge of the appropriate Division available to deal with an emergency application in a High Court matter. The appropriate district registry may also be contacted by telephone. In

[1] r.25.2(3).

county court proceedings, the appropriate county court should be contacted,

(2) where an application is made outside those hours the applicant should either—

(a) telephone the Royal Courts of Justice on 020 7947 6000 where he will be put in contact with the clerk to the appropriate duty judge in the High Court (or the appropriate area Circuit Judge where known), or

(b) the Urgent Court Business Officer of the appropriate Circuit who will contact the local duty judge,

(3) where the facility is available it is likely that the judge will require a draft order to be faxed to him,

(4) the application notice and evidence in support must be filed with the court on the same or next working day or as ordered, together with two copies of the order for sealing,

(5) injunctions will be heard by telephone only where the applicant is acting by counsel or solicitors.

Orders for injunctions

25APD.5 **5.1** Any order for an injunction, unless the court orders otherwise, must contain:

(1) an undertaking by the applicant to the court to pay any damages which the respondent sustains which the court considers the applicant should pay,

(2) if made without notice to any other party, an undertaking by the applicant to the court to serve on the respondent the application notice, evidence in support and any order made as soon as practicable,

(3) if made without notice to any other party, a return date for a further hearing at which the other party can be present,

(4) if made before filing the application notice, an undertaking to file and pay the appropriate fee on the same or next working day, and

(5) if made before issue of a claim form—

(a) an undertaking to issue and pay the appropriate fee on the same or next working day, or

(b) directions for the commencement of the claim.

5.1A When the court makes an order for an injunction, it should consider whether to require an undertaking by the applicant to pay any damages sustained by a person other than the respondent, including another party to the proceedings or any other person who may suffer loss as a consequence of the order.

5.2 An order for an injunction made in the presence of all parties to be bound by it or made at a hearing of which they have had notice, may state that it is effective until trial or further order.

5.3 Any order for an injunction must set out clearly what the respondent must do or not do.

Freezing Injunctions

Orders to restrain disposal of assets worldwide and within England and Wales

25APD.6 **6.1** An example of a Freezing Injunction is annexed to this practice direction.

6.2 This example may be modified as appropriate in any particular case. In particular, the court may, if it considers it appropriate, require the applicant's solicitors, as well as the applicant, to give undertakings.

Search Orders

25APD.7 **7.1** The following provisions apply to search orders in addition to those listed above.

The Supervising Solicitor

7.2 The Supervising Solicitor must be experienced in the operation of search orders. A Supervising Solicitor may be contacted either through the Law Society or, for the London area, through the London Solicitors Litigation Association.

Evidence:

7.3(1) the affidavit must state the name, firm and its address, and experience of the Supervising Solicitor, also the address of the premises and whether it is a private or business address, and

(2) the affidavit must disclose very fully the reason the order is sought, including the probability that relevant material would disappear if the order were not made.

Service:

7.4(1) the order must be served personally by the Supervising Solicitor, unless the court otherwise orders, and must be accompanied by the evidence in support and any documents capable of being copied,

(2) confidential exhibits need not be served but they must be made available for inspection by the respondent in the presence of the applicant's solicitors while the order is carried out and afterwards be retained by the respondent's solicitors on their undertaking not to permit the respondent—

(a) to see them or copies of them except in their presence, and

(b) to make or take away any note or record of them,

(3) the Supervising Solicitor may be accompanied only by the persons mentioned in the order,

(4) the Supervising Solicitor must explain the terms and effect of the order to the respondent in everyday language and advise him—

(a) of his right to take legal advice and to apply to vary or discharge the order; and

(b) that he may be entitled to avail himself of—

(i) legal professional privilege; and
(ii) the privilege against self-incrimination.

(5) where the Supervising Solicitor is a man and the respondent is likely to be an unaccompanied woman, at least one other person named in the order must be a woman and must accompany the Supervising Solicitor, and

(6) the order may only be served between 9.30am and 5.30pm Monday to Friday unless the court otherwise orders.

Search and custody of materials:

7.5(1) no material shall be removed unless clearly covered by the terms of the order,

(2) the premises must not be searched and no items shall be removed from them except in the presence of the respondent or a person who appears to be a responsible employee of the respondent,

(3) where copies of documents are sought, the documents should be retained for no more than 2 days before return to the owner,

(4) where material in dispute is removed pending trial, the applicant's solicitors should place it in the custody of the respondent's solicitors on their undertaking to retain it in safekeeping and to produce it to the court when required,

(5) in appropriate cases the applicant should insure the material retained in the respondent's solicitors' custody,

(6) the Supervising Solicitor must make a list of all material removed from the premises and supply a copy of the list to the respondent,

(7) no material shall be removed from the premises until the respondent has had reasonable time to check the list,

(8) if any of the listed items exists only in computer readable form, the respondent must immediately give the applicant's solicitors effective access to the computers, with all necessary passwords, to enable them to be searched, and cause the listed items to be printed out,

(9) the applicant must take all reasonable steps to ensure that no damage is done to any computer or data,

(10) the applicant and his representatives may not themselves search the respondent's computers unless they have sufficient expertise to do so without damaging the respondent's system,

(11) the Supervising Solicitor shall provide a report on the carrying out of the order to the applicant's solicitors.

(12) as soon as the report is received the applicant's solicitors shall—

(a) serve a copy of it on the respondent, and
(b) file a copy of it with the court, and

(13) where the Supervising Solicitor is satisfied that full compliance with paragraph 7.5(7) and (8) above is impracticable, he may permit the search to proceed and items to be removed without compliance with the impracticable requirements.

General

7.6 The Supervising Solicitor must not be an employee or member of the applicant's firm of solicitors.

7.7 If the court orders that the order need not be served by the Supervising Solicitor, the reason for so ordering must be set out in the order.

7.8 The search order must not be carried out at the same time as a police search warrant.

7.9 There is no privilege against self incrimination in—

(1) Intellectual Property cases in respect of a "related offence" or for the recovery of a "related penalty" as defined in section 72 Senior Courts Act 1981;

(2) proceedings for the recovery or administration of any property, for the execution of a trust or for an account of any property or dealings with property, in relation to—

(a) an offence under the Theft Act 1968 (see section 31 of the Theft Act 1968); or

(b) an offence under the Fraud Act 2006 (see section 13 of the Fraud Act 2006)or a related offence within the meaning given by section 13(4) of that Act—that is, conspiracy to defraud or any other offence involving any form of fraudulent conduct or purpose; or

(3) proceedings in which a court is hearing an application for an order under Part IV or Part V of the Children Act 1989 (see section 98 Children Act 1989).

However, the privilege may still be claimed in relation to material or information required to be disclosed by an order, as regards potential criminal proceedings outside those statutory provisions.

7.10 Applications in intellectual property cases should be made in the Chancery Division.

7.11 An example of a Search Order is annexed to this Practice Direction. This example may be modified as appropriate in any particular case.

Delivery-Up orders

25APD.8

8.1 The following provisions apply to orders, other than search orders, for delivery up or preservation of evidence or property where it is likely that such an order will be executed at the premises of the respondent or a third party.

8.2 In such cases the court shall consider whether to include in the order for the benefit or protection of the parties similar provisions to those specified above in relation to injunctions and search orders.

Injunctions against third parties

25APD.9

9.1 The following provisions apply to orders which will affect a person other than the applicant or respondent, who:

(1) did not attend the hearing at which the order was made; and

(2) is served with the order.

9.2 Where such a person served with the order requests—

(1) a copy of any materials read by the judge, including material prepared after the hearing at the direction of the judge or in compliance with the order; or

(2) a note of the hearing,

the applicant, or his legal representative, must comply promptly with the request, unless the court orders otherwise.

Editorial note

25APD.10 The following forms which are annexed to this PD can be found in the *Civil Procedure Forms Volume*:

- **Freezing Injunction**
- **Search Order**

See also App.5 of the Admiralty and Commercial Courts Guide, Section 2A, Commercial Court, Vol.2, para.2A–162.

PRACTICE DIRECTION 25B—INTERIM PAYMENTS

This Practice Direction supplements CPR Part 25

General

25BPD.1

1.1 Rule 25.7 sets out the conditions to be satisfied and matters to be taken into account before the court will make an order for an interim payment.

1.2 The permission of the court must be obtained before making a voluntary interim payment in respect of a claim by a child or protected party.

('Child' and 'protected party' have the same meaning as in rule 21.1(2).)

Evidence

25BPD.2

2.1 An application for an interim payment of damages must be supported by evidence dealing with the following:

(1) the sum of money sought by way of an interim payment,
(2) the items or matters in respect of which the interim payment is sought,
(3) the sum of money for which final judgment is likely to be given,
(4) the reasons for believing that the conditions set out in rule 25.7 are satisfied,
(5) any other relevant matters,
(6) in claims for personal injuries, details of special damages and past and future loss, and
(7) in a claim under the Fatal Accidents Act 1976, details of the person(s) on whose behalf the claim is made and the nature of the claim.

2.2 Any documents in support of the application should be exhibited, including, in personal injuries claims, the medical report(s).

2.3 If a respondent to an application for an interim payment wishes to rely on written evidence at the hearing he must comply with the provisions of rule 25.6(4).

2.4 If the applicant wishes to rely on written evidence in reply he must comply with the provisions of rule 25.6(5).

Interim Payment Where Account To Be Taken

25BPD.2A

2A.1 This section of this practice direction applies if a party seeks an interim payment under rule 25.7(b) where the court has ordered an account to be taken.

2A.2 If the evidence on the application for interim payment shows that the account is bound to result in a payment to the applicant the court will, before making an order for interim payment, order that the liable party pay to the applicant "the amount shown by the account to be due".

Instalments

25BPD.3

3. Where an interim payment is to be paid in instalments the order should set out:

(1) the total amount of the payment,
(2) the amount of each instalment,
(3) the number of instalments and the date on which each is to be paid, and
(4) to whom the payment should be made.

Compensation Recovery Payments

25BPD.4 **4.1** Where in a claim for personal injuries there is an application for an interim payment of damages—

(1) which is other than by consent;
(2) which either—
  (i) falls under the heads of damage set out in column 1 of Schedule 2 to the Social Security (Recovery of Benefits) Act 1997 ("the 1997 Act") in respect of recoverable benefits received by the claimant set out in column 2 of that Schedule; or
  (ii) includes damages in respect of a disease for which a lump sum payment within the definition in section 1A(2) of the 1997 Act has been, or is likely to be made; and
(3) where the defendant is liable to pay a recoverable amount (as defined in rule 36.15(1)(c)) to the Secretary of State,

the defendant should obtain from the Secretary of State a certificate (as defined in rule 36.15(1)(e)).

4.2 A copy of the certificate must be filed at the hearing of the application for an interim payment.

4.3 The order will set out the deductible amount (as defined in rule 36.15(1)(d)).

4.4 The payment made to the claimant will be the net amount but the interim payment for the purposes of paragraph 5 below will be the gross amount.

Adjustment of Final Judgment Figure

25BPD.5 **5.1** In this paragraph "judgment" means:

(1) any order to pay a sum of money,
(2) a final award of damages,
(3) an assessment of damages.

5.2 In a final judgment where an interim payment has previously been made which is less than the total amount awarded by the judge, the order should set out in a preamble:

(1) the total amount awarded by the judge, and
(2) the amounts and dates of the interim payment(s).

5.3 The total amount awarded by the judge should then be reduced by the total amount of any interim payments, and an order made for entry of judgment and payment of the balance.

5.4 In a final judgment where an interim payment has previously been made which is more than the total amount awarded by the judge, the order should set out in a preamble:

(1) the total amount awarded by the judge, and
(2) the amounts and dates of the interim payment(s).

5.5 An order should then be made for repayment, reimbursement,

variation or discharge under rule 25.8(2) and for interest on an overpayment under rule 25.8(5).

5.6 Practice Direction 40B provides further information concerning adjustment of the final judgment sum.