Civil Procedure

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Foreword

by Lord Justice Brooke

This is a very important new book.

People expect – and our human rights law now requires – a modern state to provide them with arrangements for civil justice that are fair. But they also reasonably expect that if they have to go to law the arrangements should be efficient and affordable. For far too long too much emphasis has been placed in this jurisdiction on fairness, and too little on efficiency and affordability. This book gives proper place to all three of these attributes.

> 'I, too, went to law. I won. I, too, am bankrupt.'

When I was counsel to the Sizewell Inquiry, we were told by the Government that our electricity system had to be efficient, economic and safe, but that safety was paramount. I remember being pressed by our economics assessor to ask witnesses what they thought the word 'safety' meant, and how much we should pay for safety. Did the word mean super safe? Or super-super safe? Or super-super-super safe?

As we know, the generation of electricity by nuclear power seems to have been abandoned (or indefinitely postponed) because the requirements of super-super-super safety mean that it is no longer economic to produce. Over the years I have sometimes thought that our system of civil justice might be going the same way, so far as lower value claims are concerned, because of a concern for super-super-super fairness, regardless of time or cost. The final chapter of this book shows why it is right to continue to have these worries, despite all the improvements achieved by the Woolf reforms. In this context a major uplift in court fees across the board is surely now in prospect if the Treasury continues to regard civil justice as a service for which the litigants should pay in full: court buildings, judges, modern technology, the disentanglement of incomprehensible statutes or out of date caselaw and all.

The Preface identifies two aims for the book: to present an accessible account of

the system, now largely codified in the Civil Procedure Rules; and to draw attention to difficulties and to provide practitioners with the instruments for overcoming them. Both these aims are achieved magnificently, although sadly not all the difficulties can be overcome as things now stand. This, too, is apparent from the text.

The book describes our present procedures with clarity. It provides an accurate and often stimulating account of relevant law and practice, including such abstruse topics as disclosure of documents, legal professional privilege and public interest immunity, injunctive relief, limitation and, above all, costs. And it identifies with precision those areas (particularly in the field of costs) where there is still a good deal of unfinished business to complete before there could be any thought of awarding our civil justice system chartermarks for efficiency or affordability.

I would like to think that all the author's suggestions for reform could be collected together and sent to the Civil Justice Council for consideration. In particular the time must surely soon be coming when three, or four, or five wise people are mandated to consider the whole of our present arrangements for controlling and apportioning the costs of litigation, because we cannot go on for much longer as we are.

This work of meticulously accurate scholarship has been written by one who believes, as I do, that far too little attention has been paid in the past by legal scholars in this country to civil procedure as a topic for serious academic study and research. Perhaps the reason is that the groves of academe are too far removed from the hurly-burly of the litigation marketplace where I have spent the last 40 years of my working life. Perhaps the issues thrown up by a work like this straddle – or ought to straddle – too many different fields of learning to fit tidily into the constraints of a modern curriculum. Whatever the reason, we have all been the poorer for this past neglect, and it is this neglect that the author of this book bravely sets out to rectify.

During the last 40 years I have watched the Evershed reforms, the Winn reforms, the Cantley reforms, the Civil Justice Review reforms, and now the Woolf reforms attempt to tackle, to a greater or lesser degree, some of the central issues addressed in this book. I know all about the problems: ten years ago I told the Government that I did not think that the Law Commission was the right body to embark on yet another attempt (in the event undertaken by Lord Woolf) to search for better solutions.

I have also, by a set of curious chances, been the judicial author of more than 50 of the judgments cited in the text. Perhaps it was for this reason that I was invited to write this Foreword, and to go farther, if I wished, than the four corners of the book and express my own assessment of how things stand, where improvements can be made, and, above all, the role that the Court of Appeal has (or should play) in shaping and directing litigation practice.

I will address this last topic first. In *Callery v Gray* the House of Lords re-emphasised the primacy of the Court of Appeal in relation to matters of litigation practice. There are now 37 lords (or ladies) justices, supplemented by the Master of

the Rolls and the other three Heads of Division, the occasional High Court judge, and the retired judges (particularly retired lords justices) who are still qualified to sit. Nearly all of them bring to the court a lifetime of experience of civil procedure, whether as advocate or as judge. But what I do not think is so readily understood is that the experience of most of the members of the court stems from sophisticated High Court practice. In that forum highly-skilled practitioners and judges know the rules and the underlying caselaw, and there are not always the same financial constraints as confront those at the coalface in the county court. It is often tempting for a judge to speak in sophisticated shorthand to the High Court practitioner, forgetting that his words will be distributed more widely.

It is no longer permissible, if it ever was, to think of High Court practice alone. The Civil Procedure Rules govern practice in the county court too, and it is there that most of our civil litigation is conducted. Trials of small claims make up 90% of all the contested court business that goes to trial, and trials of contested fast track claims make up much of the balance. This means that the Court of Appeal must explain relevant points of litigation practice as simply and clearly as possible for the benefit of the judges and the lawyers – yes, and the litigants in person – who have to apply them on a daily basis at county court level.

It is the judges of the Court of Appeal who hog the limelight. The unsung heroes of the Woolf reforms are the trainers and staff of the Judicial Studies Board, the procedural judges at first instance (whether at county court or High Court level), and the lawyers and staff of the Civil Appeals Office. Too often in the past legislative or procedural reform has been stymied by an early judgment in the Court of Appeal delivered by judges who did not properly understand the purpose of the reform or the mischief at which it was aimed. The admirable residential seminars run by the Judicial Studies Board in 1997 and 1998, at which an experienced district judge might lead a workshop session peopled by two High Court judges and a lord justice of appeal, did much to prevent history from repeating itself. The loud, clear, message from those seminars was: 'Leave the first instance judge to get on with his job. If he is clearly wrong you must interfere, but don't tinker.'

Flowing from all this was the need to make explicit the matters that should be considered by a possibly inexperienced judge or deputy judge when there is a discretion to be exercised at first instance. In the early days of the reforms it was sometimes thought by judges that they could rely on a single feature of a case (such as inexcusable delay by a claimant, or prejudice to the other party) to provide a simple solution to a problem. I was sorry that judgments such as those in *Purdy v Cambran*, *Walsh v Misseldine* and *Bansal v Cheema* were left out of the mainstream law reports even though they represented early efforts by the Court of Appeal to correct the mistakes. As a result, mistakes continued to be made. The judgments in *Moy v Pettman Smith* afford a valuable illustration of the problems that may arise when important judgments of the Court of Appeal on matters of litigation practice do not reach the mainstream reports.

In this book a valuable distinction is made between the implementation of an express sanction ('you will not be allowed to defend the case if you do not serve your list of

documents within 28 days') and the unwelcome consequences of failing to obtain an extension of time, whether or not the application for an extension is made before the time originally permitted has expired. I share the author's view that another look at the language of CPR Part 3 would be a good thing, because procedural judges (and deputy procedural judges) need all the help they can get from the language of the relevant rules and practice directions without having to delve expensively into caselaw.

I also share his view that it is a good thing to provide codified guidelines to structure the thinking process that must go into many discretionary decisions: in this context I regret the fact that more help was not given by the draftsman of CPR Part 54 to the criteria to be satisfied when permission is granted for an application for judicial review. Where I think I depart from him is in relation to his belief that much more could be done to make the discretionary decision-making process predictable. In the last resort, the decision-maker must take into account all the circumstances of the case. What is very important on the facts of one case may be relatively insignificant on the facts of another. The decision-maker must make a rounded decision on what he thinks is fair in relation to the case before him.

This is where the work of the Civil Appeals Office is so important, particularly in identifying cases that illustrate, or could be grouped together to illustrate, problems that are causing contemporary difficulty. My experience with the CCR Ord 17, r 11 appeals in 1997 showed me what could be done in this connection. There were then over 100 appeals awaiting decision. A skilled judicial assistant analysed them all (and all the existing caselaw of the court) and identified a large number of different issues of law that still had to be determined by the court. Three of us were assigned a seven-week stint of duty to clear the list, and we could have achieved this if all the appeals had been ready to be heard. As it was, we gave one judgment on nineteen of these appeals (which covered the main outstanding points) at the end of the third week, circulated the judgment to everyone on the waiting list, gave them a few days to read it and consider it, and then listed six appeals for hearing on every day for the rest of the seven-week period. At the end of that time we gave another judgment deciding the final cases and summarising the results of the (very few) other cases we had had to decide after the first judgment had been circulated. After that, the only remaining cases requiring attention were the very few stragglers that raised new points, and a group of "automatic strike-out" cases under a different rule that we once again listed and heard together.

The value of this approach is not only that there is a better chance of seeing a judgment on an important point of practice reported in a mainstream report: there is also a better chance that the court can examine more facets of the difficulties caused by the wording of a rule than would be possible if a single appeal was heard on its own. We repeated the process with the six cases that culminated in the judgment in *Clark v Perks* a few months after the coming into force of CPR Part 52 and the early judgment in *Tanfern Ltd v Cameron-Macdonald*, although on that occasion some of the earlier judgments in that group, such as *Hyams v Plender* and *Riniker v University College London,* were also considered worthy of reporting in their own right. Other divisions of the court have used the technique more recently in relation to the

difficulties over the problematic rules on service which should surely, as the author suggests, warrant a revisit by the Rules Committee to the wording of the relevant rules.

But I would be worried if the new rules, like their predecessors, became barnacled in caselaw. This can be avoided if rules or practice directions pick up the points made by the court in caselaw, as happened in the case of *Jolly v Jay* (another case which was listed to enable us to deal with a point of contemporary difficulty), so that practitioners and judges need go no further than the rules and practice directions to ascertain the relevant principles to be applied.

On a quite different matter, I hope that more attention may be paid to the value of practical applications of modern technology in the next edition of this book. Video technology, which is already demonstrating its value in civil litigation, is not mentioned, and although the relevant practice direction rates a mention, the reader of this book will not be aware that 16,000 simple money claims were issued by individual litigants on-line last year, and that the facility to send a defence or other acknowledgment of such a claim on-line, available for the first time this year, is already proving very popular. I believe that only two or three of our county courts are now issuing more claims each month than this useful electronic facility, which is providing in embryonic form the makings of the future electronic court file.

When I see the hourly charges of different members of a solicitors' firm that appear on the schedules submitted to us for summary assessment, I often wonder about the savings that would be made if sensible use were made of simple applications of modern technology, thus removing the need for a lot of routine manual work. A few years ago the Society for Computers and Law gave its annual award to a four-partner firm of solicitors in the West Country who had entirely dispensed with the need for office staff through the help of the electronic systems they had devised. And a partner in a small firm of solicitors in Preston told me last autumn of the significant savings (and the enhanced quality of its service to its clients) his firm had been able to achieve by regular use of the electronic mail facility installed at the local county court on a pilot basis for simple applications to the district judges of the court.

Most of this, however, is for the future. For the present, I agree with the author that the distinction between appeals by way of review and appeals by way of a rehearing is worth another visit. I am intrigued by the distinction he makes between deemed service and the notification of a claim form, although how much scope there may be for making such a distinction on the wording of the present rule must await a judicial decision. And I share his view that it is lamentable that no time has yet been found for rationalising our limitation laws, nearly eight years after the Law Commission in my days as its chairman headed the Government of the day off the piecemeal reform it was then contemplating.

I have been asked to give my own assessment of how things now stand. The reforms have been good in part. Where they are good, as (by way of example only) with pre-action protocols, the enhanced authority given to the procedural judges, the introduction of the overriding objective, and many of the aspects of the modern

appeals process, they are very, very good. Where they are bad, as in many aspects of the situation relating to costs, they are horrid. And there are still many important issues relating to modern types of funding arrangement that await a much more satisfactory resolution than has been identified to date.

But one thing that is certainly very, very good is this book, and I commend it to its readers.

Henry Brooke

Royal Courts of Justice

21 August 2003

Preface

Civil procedure is both simpler and more complex than is usually assumed. The litigation process is basically straightforward. Issuing proceedings, drafting a statement of case, disclosing documents, or producing a witness statement do not normally make great intellectual demands on litigants or their legal representatives. In many cases these tasks can be adequately discharged with a modest knowledge of the rules and by using the relevant forms or by following easily accessible precedents.

However, although the basic rules are simple, litigation can give rise to intricate problems and generate considerable difficulties for a variety of reasons. The underlying facts of the dispute might be unclear; the pertinent law may be uncertain; a party may have encountered difficulty in fulfilling procedural requirements (due to unavoidable causes or neglect); the opponent might be uncooperative or downright obstructive; or the court may have mismanaged the timetable or failed to notify a litigant of a hearing. The rules seek to provide for some eventualities but they cannot supply ready-made solutions for all the problems that could arise in the course of litigation. Moreover, even where the rules indicate the consequences of procedural defects, these may not be adequate or just in all circumstances. For these reasons the system of rules is supplemented by judicial discretion, which is in turn guided by general principles that the court must use in devising case-based solutions.

The work has two objectives. First, it aims to present an accessible account of the rules, now mostly gathered in the Civil Procedure Rules 1998, and of the way in which the courts exercise their powers under the rules. Second, it draws attention to possible difficulties and offers solutions. The exposition is therefore designed to enable practitioners to inform themselves of the principles governing litigation, to acquire a sound grasp of complex procedural issues, and to equip themselves for tackling tricky situations in the maelstrom of litigation or for difficult applications.

The description of the system embodied in the CPR is as straightforward as the subject matter allows. Many of the rules do not require elaborate explanation, except for drawing attention here and there to uncertainties of operation or referring to

authoritative interpretation of particular aspects. Some processes, however, have proved troublesome in practice. The subject of service, for instance, has stimulated a great deal of litigation recently. A number of Court of Appeal decisions have sought to clarify the rules of deemed service. Yet some of these have thrown up further problems, which required yet more Court of Appeal attention. The treatment of service seeks to untangle the knot, to explain the effect of recent cases and to offer practical solutions through an interpretation of the rules that avoids most of the difficulties.

A similar approach is followed in relation to other thorny problems. In the chapter on disclosure, for instance, the effect of recent decisions on pre-commencement disclosure is outlined, and the rules concerning the use of disclosed documents in other proceedings are analysed. Attention is drawn to the fact that the right against self-incrimination offers a more limited immunity from disclosure than has been assumed. Another area calling for detailed attention is legal professional privilege. Problems that have recently cropped up are explored and practical solutions are offered. Considerable attention is devoted to the appeal rules, which are relatively new, and to the all-important distinction between appeal by way of review and appeal by way of rehearing, which is explained and illustrated by examples.

The court must ensure that litigation is conducted in accordance with the overriding objective of the CPR and in conformity with the principles of fair trial embodied in article 6 of the European Convention on Human Rights. These two relatively new factors can affect almost every aspect of litigation. Practitioners require, therefore, some familiarity with the implications of the overriding objective and of ECHR art 6. Chapters 1 and 2 outline the broad principles and their possible uses in the litigation process.

By far the greatest difficulties and uncertainties, however, are encountered in relation to the exercise of judicial discretion. The court has always had considerable discretion in matters of procedure, but under the CPR it is far more extensive due to its case management responsibilities. It has discretion, for example, whether to allow an extension of time for the performance of procedural requirements, or whether to grant relief from sanctions. Above all, it has discretion whether to make costs orders and on what terms.

Inevitably, the outcome of the exercise of discretion in such matters depends on the circumstances of each case. However, to be able to advise their clients in advance of any application to court, legal representatives need to know how discretion is generally exercised. An understanding of the judicial approach to the use of discretionary powers is therefore essential whenever a party is seeking relief from sanctions (or any other kind of indulgence in the performance of process requirements), whenever a litigant applies for an interim remedy, and whenever a litigant addresses an argument about costs.

The book exposes the judicial approach that has evolved in relation to discrete aspects of litigation and draws attention to the developing patterns of decision-making. The court's approach to relief from sanctions and, more generally, to accommodating defective compliance with rules and court orders, and to the imposition of conditions

(such as the provision of security for costs), is fluid and requires familiarity with recent court decisions. The governing principles are explained in Chapter 10, but their ramifications are evident throughout the book.

The exercise of discretion in relation to costs orders is for several reasons far more complex than it has ever been. The certainty of the old principles (eg that a successful party recovers costs from the unsuccessful party, or that a claimant who has failed to better the defendant's payment in must pay the latter's costs) has now been undermined by the rule that when making a costs order the court must take into account the litigants' conduct. The familiar rule that the litigant in whose favour a costs order is made is normally entitled to recover costs reasonably incurred and reasonable in amount has been supplemented by a requirement of proportionality, which has proved troublesome. Finally, the rules concerning conditional fees have added extra complications. Without an adequate understanding of the court's approach to costs, litigants run a serious risk of seeing their hard-fought victories eaten up by adverse costs orders.

The principles applicable to interim injunctions are well established, but their application has proved problematic in a number of areas. Given the importance of interim injunctions for protecting rights pending litigation and to their far-reaching consequences, the subject is given considerable attention.

It is not the purpose of the work to supplant time-honoured manuals of civil litigation, such as the *White Book* or the *Green Book*. Practitioners will still need to refer to such works on matters of detail, for forms or for obtaining precedents for particular applications; in short, for the nuts and bolts of practice. Rather, the present work is intended to supplement such manuals by providing sustained accounts of the principal areas of litigation and coherent explanations of the most significant problems that occur and which often merit more than a mere glancing comment or the mention of a reported case.

Every effort has been made to state the law as at 1 August 2003.

Adrian AS Zuckerman

19 August 2003

Acknowledgments

The law of civil procedure is largely moulded by judges who conduct trials or hear appeals. As well as profiting from the rich repository of judicial wisdom, I have received invaluable guidance from a number of judges, without whose help the resulting enterprise would have been poorer. My approach to the subject has been deeply influenced by Lord Woolf. This is of course true of anyone who writes on civil procedure or conducts litigation today, since he has played such a crucial role in devising and implementing the present system. I have been doubly privileged to have had the advantage of his views on the philosophy of the Civil Procedure Rules, which informs the entire work. I have derived much illumination on both matters of principles and detail from Lord Justice Brooke's wisdom and erudition, especially in relation to service and appeal. Mr Justice Hooper and Mr Justice Lightman have generously allowed me to draw on their extensive case management and trial experience.

I have obtained valuable comments, criticism and insights from practitioners. In particular, Ian Grainger, of 1 Essex Court, subjected the chapters on statements of case, disclosure, witness statements and experts to painstaking examination and suggested numerous improvements. Cyril Glasser, of Sheridans, shared with me his deep understanding of the subject of costs and his practical experience in this field. Simon Davis, of Clifford Chance, offered important advice on pre-action protocols. Professor J A Jolowicz's comments helped me work out the implications of the new appeal system, as did Professor Andrew Ligertwood's in relation to certain aspects of legal professional privilege.

In writing this book I have benefited from the assistance of many graduate students, both at Oxford and at University College London, who helped in different ways. They are too numerous to name but I hope I have left them in no doubt as to my gratitude. I should, however, like to give special thanks to Michalis Kyriakides, who has devoted a great deal of time and energy to commenting on argument, updating references and coming to my assistance whenever an obscure reference had to be found or checked. I must also state my indebtedness to Phillip Ashley, Dr Sue

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Table of Statutes

References to *Statutes* are to Halsbury's Statutes of England (Fourth Edition) where the annotated text of the Act may be found. References in the right-hand column are to paragraph number. Paragraph references printed in **bold** type indicate where the Act is set out in part or in full.

Access to Justice Act 1999 (11 *Statutes* 1483) 23.98, 26.232
Pt I (ss 1–26) 26.12
s 4 (1) 26.233
s 6 (3) 26.234
s 6 (8) 26.236
s 8 (5) (b) 26.236
s 10 (7) **26.241**
s 11 ..... 9.55, 26.10, 26.242, 26.243, 26.247
s 11 (4) (d) 26.246
s 22 (2) (b) 26.240
s 27 ..... 26.135
s 29 ..... 26.14, 26.151, **26.171**, 26.177, 26.180, 26.181
s 30 ..... 26.139
Pt IV (ss 54–73) 23.1
s 54 ..... 23.5
s 54 (1) 23.82
s 54 (4) 23.102
s 55 ..... 23.84, 23.86, 23.28
s 55 (1) 23.85, **23.137**
s 56 ..... 23.17
s 57 ..... 23.29, 23.30
Sch 2 ..... 26.235
Sch 6 ..... 2.124
Access to Personal Files Act 1987 ..... 2.113
Administration of Justice Act 1956 (22 *Statutes* 495) 9.4
Administration of Justice Act 1960 (11 *Statutes* 184)
s 12 ..... **2.105**
s 13 ..... 22.89, 23.36
Administration of Justice Act 1969 (11 *Statutes* 883)
ss 12–15 ..... 23.33
s 20 (1) **9.165**
s 21 (1) 14.71
Administration of Justice Act 1970 (31 *Statutes* 546)
s 31 ..... 14.76
s 44A 22.71
Administration of Justice Act 1982
s 6 (1) 22.56
Administration of Justice Act 1999
s 8 (5) (b) 26.236
s 27 ..... 26.135
s 29 ..... 26.14, **26.171**, 26.177
s 30 ..... 26.139
Administration of Justice (Appeals) Act 1934 (11 *Statutes* 869)
s 1 ..... 23.32
Administration of Justice (Miscellaneous Provisions) Act 1933 (13 *Statutes* 7)
s 7 ..... 26.190
Adoption Act 1976 (6 *Statutes* 211) 26.138
Arbitration Act 1996 (2 *Statutes* 566)
s 9 ..... 13.17
s 9 (1) 13.25
s 9 (4) 2.36
s 67 ..... 2.36
s 68 (2) **2.36**
s 69 (3) (a)–(d) 2.36
s 69 (5) 23.86
s 69 (8) **23.86**
Attachment of Earnings Act 1971 (22 *Statutes* 502) 22.101
Bankers' Books Evidence Act 1879 (17 *Statutes* 393)
s 6 ..... 21.88
Banking Act 1987 (4 *Statutes* 473)
s 82 ..... 2.93
Carriage by Air Act 1961 (4 *Statutes* 19)
Sch 1 ..... 24.11

Charging Orders Act 1979 (22 *Statutes* 538)
s 1 ..... 22.108
s 3 ..... 22.113
s 5 ..... 22.114
s 5 (5) 22.115
Children Act 1989 (6 *Statutes* 370) 2.143, 10.21, 15.91, 15.92
Pt I (ss 1–7) 26.138
Pt II (ss 8–16) 26.138
s 29 ..... 23.65
Pt IV (ss 31–42) 26.138
s 96 ..... 21.86
s 98 ..... **17.21**, 17.25
s 105 ..... 21.86
Civil Evidence Act 1968 (17 *Statutes* 447) 19.45
s 11 ..... **24.51B**
s 11 (2) 22.1
s 13 ..... 22.1, **24.51C**
s 14 ..... 17.1, 17.5
Civil Evidence Act 1972 (17 *Statutes* 463)
s 2 (3) **1.44**, 19.2
s 3 ..... 20.6
s 3 (3) **20.8**
s 4 (1) 20.10
Civil Evidence Act 1995 (17 *Statutes* 538) 19.21, 19.49, 21.23
s 1 (1) 21.93
s 1 (2) **21.93**
s 2 ..... 21.93
s 2 (1) 19.21
s 2 (4) 21.99
s 2 (4) (a), (b) 21.94
s 4 ..... 21.99
s 9 (5) 21.98
s 12 ..... 1.44
s 14 (1) 21.100
s 14 (3) 21.94
Civil Jurisdiction and Judgments Act 1982 (11 *Statutes* 1158) . 2.37, 4.92, 4.155, 8.9, 8.10, 24.88
s 1 (1) 9.153
s 25 (1) (a) **9.129**
s 33 ..... 5.16
ss 41–46 ..... 4.151
Sch 1 ..... 2.37, 4.149, 5.16
Sch 2 ..... 23.214
Sch 3C 3.1, 3.3, 4.7
Sch 4 ..... 4.151
Civil Jurisdiction and Judgments Act 1991 (11 *Statutes* 1410) 4.92, 4.149
Civil Liability (Contribution) Act 1978 (13 *Statutes* 604) 24.11
Civil Procedure Act 1997 (11 *Statutes* 1472) 1.38, 1.39, 1.46
s 1 ..... 1.38, 1.45
s 1 (3) **1.38, 1.41**
s 2 ..... 1.38, 1.45
s 4 ..... **1.38**, 14.94
s 7 ..... 2.163, **14.176**
s 7 (7) 17.6
s 7 (8) 14.181
s 8 ..... 14.72
Civil Procedure Act 1997 (11 Statutes 1472) – *contd*
Sch 1
para 4 ..... **1.45**
Companies Act 1948
s 473 (1) 4.13
Companies Act 1985 (8 *Statutes* 88) . 3.8, 4.60, 4.61, 4.64, 4.65, 9.162, 17.20, 24.42
s 432 ..... 17.19
s 434 ..... 17.19, 17.20
s 436 ..... 17.19
s 690A 4.63
s 690B 4.63
s 691 ..... 4.62, 4.63
s 694A 4.63
s 695 ..... 4.62
s 725 ..... 4.62
s 726 (1) 9.154, 9.156
Sch 21A 4.63
Company Directors Disqualification Act 1986 (8 *Statutes* 837)
s 6 ..... 10.35
s 8 ..... 24.83A
Consular Relations Act 1968 (10 *Statutes* 758) 21.87
Consumer Credit Act 1974 (11 *Statutes* 17) . 3.7, 8.4
Consumer Protection Act 1987 (39 *Statutes* 133) 24.11, 24.42, 24.46
Pt I (ss 1–9) 24.13, 24.29
s 6 ..... 24.13
s 50 (2) 24.13
Sch 1
para 1 ..... 24.13
Contempt of Court Act 1981 (11 *Statutes* 192)
s 2 ..... 22.91
s 3 ..... 22.91
s 4 (2) **2.108**
s 9 ..... 2.77
s 10 ..... **2.176, 14.59**, 14.60, 14.62, 14.63, 14.64, 14.67
s 11 ..... 2.102, **2.107**
s 14 ..... **22.83**, 22.90
s 14 (2) 22.90
Copyright, Designs and Patents Act 1988 (33 *Statutes* 285)
s 280 ..... 15.38
s 284 ..... 15.38
Sch 7
para 28 ..... 17.16
County Courts Act 1846 ..... 1.86
County Courts Act 1959
ss 19, 20 ..... 1.86
County Courts Act 1984 (11 *Statutes* 701)
s 14 ..... 22.85
s 23 ..... 3.7
s 38 ..... 14.181, 22.85
s 40 (1) (b) 3.10
s 42 (1) (b) 3.10
s 50 (1) 9.165
s 51 ..... 22.56
s 52 (2) 14.73
s 53 ..... 2.169, 14.95

County Courts Act 1984 (11 Statutes 701) – *contd*
s 55 ..... 2.169, 14.92
s 63 ..... 20.75
s 63 (5) 20.76
s 66 ..... 8.40
s 69 ..... 8.6
s 69 (1) **22.63**
s 69 (2) 22.63
s 69 (3) 22.64
s 70 ..... **22.34**
s 74 ..... 22.70
s 75 ..... 1.38
s 76 ..... 13.15
ss 77–84 ..... 23.1
s 81 ..... 23.177
s 118 ..... 22.85
Courts and Legal Services Act 1990 (11 *Statutes* 1293) 1.86, 26.147
s 1 ..... 3.4
s 4 ..... 26.251
s 4 (1) 10.191
s 5 ..... 1.44, 19.2
s 27 ..... 2.124
s 27 (2) (c) 2.127
s 58 ..... 26.26, 26.135, 26.145, 26.148
s 58 (1) **26.136, 26.149A**
s 58 (2) 26.14, 26.133, 26.136
s 58 (3) (c) 26.149B
s 58 (4) (c) 26.148
s 58A 26.135
s 58a (1) 26.138
s 58a (2) 26.138
s 58a (4) 26.138
s 58a (6) 26.136
s 63 ..... 15.38
ss 111, 112 ..... 26.255
Criminal Justice Act 1988 (12 *Statutes* 938)
ss 93A, 93B 15.95
s 93D 2.149
Criminal Justice Act 1993 (12 *Statutes* 1167) . 2.149
Criminal Law Act 1967 (12 *Statutes* 312)
s 13 (1) 26.23
s 14 (1) 26.23
s 14 (2) 26.23
Criminal Procedure Act 1856
s 3 ..... 19.45
Criminal Procedure and Investigations Act 1996 (12 *Statutes* 1500)
s 17 ..... 14.159
Crown Proceedings Act 1947 (13 *Statutes* 9) .. 2.113
Damages Act 1996 (13 *Statutes* 615)
s 3 ..... 22.58A
Data Protection Act 1998 ..... 14.67
Deeds of Arrangement Act 1914 (4 *Statutes* 680)
s 7 ..... 3.17
Defamation Act 1996 (24 *Statutes* 124) 8.54, 8.56
s 2 ..... 8.58
s 3 ..... 25.97A
s 8 ..... 8.55, 8.57, 8.58, 8.59, 8.60, 8.30
s 9 ..... 8.30
s 10 ..... 8.54
Defective Premises Act 1972 (31 *Statutes* 471)
s 1 (5) 24.11
Diplomatic and other Privileges Act 1971 (10 *Statutes* 805) 21.87
Diplomatic Privileges Act 1964 (10 *Statutes* 746) 21.87
Documentary Evidence Act 1868 (17 *Statutes* 388)
s 2 ..... 21.94
Documentary Evidence Act 1882 (17 *Statutes* 398)
s 2 ..... 21.94
Domestic Proceedings and Magistrates' Courts Act 1978 (27 *Statutes* 1041) 26.138
Drug Trafficking Act 1994 (12 *Statutes* 1234)
ss 50–52 ..... 15.95
Employment Rights Act 1996 (16 *Statutes* 582)
s 98 ..... 21.42
s 111 (2) 24.11
Environmental Protection Act 1990 (35 *Statutes* 729)
s 82 ..... 26.138
Evidence (Colonial Statutes) Act 1907 (17 *Statutes* 409)
s 1 ..... 21.94
Evidence (Foreign, Dominion and Colonial Documents) Act 1933 (17 *Statutes* 412)
s 1 ..... 21.94
Family Law Act 1996
Pt IV (ss 30–63) 26.138
Family Law Reform Act 1969 (17 *Statutes* 456)
s 26 ..... 21.50
Fatal Accidents Act 1976 (31 *Statutes* 477) . 22.58A, 24.11, 24.18, 24.29, 24.42
Financial Services Act 1986
s 187 (3) 9.121
Firearms Act 1968 (12 *Statutes* 409) 26.217
Foreign Judgments (Reciprocal Enforcement) Act 1933 (22 *Statutes* 482) 4.154
Housing Act 1988 (23 *Statutes* 1053)
s 34 ..... 26.261
s 35 ..... 8.30
Human Rights Act 1998 (7 *Statutes* 528) 2.25, 2.93, 3.28, 6.41, 9.69, 10.164, 15.95, 23.44
s 1 (1) 2.2
s 2 ..... 2.4
s 3 ..... 2.5
s 3 (1) 2.2, 2.6, 6.41
s 4 ..... 2.2
s 6 ..... 2.9, 2.85, 9.60
s 6 (1) **2.3**
s 6 (2) (b) **2.3**
s 6 (3) (a) 2.3
s 7 ..... **26.190A**
s 10 ..... 2.2
s 12 ..... 2.3, **9.60**
s 12 (3) 9.62, 9.63, 9.64
s 12 (4) 9.61
s 19 ..... 2.2
Sch 1
art 6 ..... 10.161
Sch 2 ..... 2.2
Inheritance (Family Provision) Act 1938 ..... 1.66