

**B E T W E E N :**

**THE QUEEN *on the application of***  
**(1) GINA MILLER**  
**(2) DEIR TOZETTI DOS SANTOS**

**Claimants**

**-and-**

**THE SECRETARY OF STATE FOR EXITING THE EUROPEAN UNION**

**Defendant**

**-and-**

**(1) AB AND A CHILD AND OTHERS**  
**(2) GRAHAME PIGNEY AND OTHERS**

**Interested Parties**

**-and-**

**GEORGE BIRNIE AND OTHERS**

**Intervener**

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**NOTE ON BEHALF OF THE 'PEOPLE'S CHALLENGE' (PIGNEY) INTERESTED PARTIES**

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**Introduction**

1. On the opening day of the hearing (13 October 2016) the Court asked for assistance concerning:
  - a. the status of litigation currently ongoing in Northern Ireland, which concerns the lawfulness (or otherwise) of notification to the European Council of the United Kingdom's intention to leave the EU without an Act of Parliament;
  - b. whether an appeal could be brought straight to the Supreme Court, following a hearing at first instance in Northern Ireland;
  - c. whose rights would be affected by withdrawal from the EU; and
  - d. the People's Challenge Interested Parties' approach to the revocability, or otherwise, of Article 50 once notification has been given.
2. In view of the limited time for oral submissions, this note sets out the Peoples' Challenge Interested Parties' position on these issues.

## The Northern Irish litigation

3. After the short adjournment on Thursday, Lord Pannick QC informed the Court that he had spoken to counsel for one of the parties in Northern Ireland and that *“the Northern Ireland proceedings have focused on the Good Friday Agreement and the Northern Ireland Act.”*<sup>1</sup>
4. Further enquiries have been made. The Northern Irish claims (*In the matter of an application by Raymond McCord and In the matter of an application by Stephen Agnew and others*) were heard before Mr Justice Maguire between 4-6 October 2016. Bindmans LLP’s Northern Ireland agent, KRW Law LLP, has been informed by Court staff that the judgment was being written last week. The view taken by the Claimants in Northern Ireland was that skeleton arguments were not public documents. On 14 October 2016, Mr Justice Maguire indicated he had no objection to the release of skeleton arguments in the case for the purpose of the hearing in London, but they should be treated as documents which are confidential and not published generally. They can be supplied to the Court and legal teams for the parties on that confidential basis, if necessary.
5. Meanwhile, the Secretary of State published his *McCord, Agnew and others* skeleton argument of 21 September 2016.<sup>2</sup> This explains (at §4) that Mr Justice Maguire stayed some of the grounds of challenge in both cases on the basis that they *“directly overlap”* with issues that are being litigated in the *Miller and others* proceedings. Those stayed grounds relate to the question of whether notification pursuant to Article 50 requires prior authorisation by Act of Parliament. The skeleton adds (at §5) *“[t]he remaining grounds of challenge are not directly raised in the pleadings and Skeleton Arguments in the Miller case although there may inevitably be some areas where similar lines of argument are developed in both cases.”*
6. Given the centrality of the Good Friday Agreement to the litigation in Northern Ireland, the People’s Challenge Interested Parties will not develop §44 of their skeleton argument before this Court.
7. However, the People’s Challenge Interested Parties’ submissions concerning the devolution settlements are advanced in a broader context (concerning the constitutional arrangements of Scotland and Wales, as well as that of Northern Ireland) and substance (focusing on the role of EU law in adding to and constraining the powers of the devolved legislatures and the rights of citizens). Accordingly, there is no reason for this Court to refrain from determining those aspects of the People’s Challenge Interested Parties’ case.

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<sup>1</sup> Transcript p. 59 lines 5-6.

<sup>2</sup> <https://www.gov.uk/government/publications/skeleton-argument-of-the-secretary-of-state-for-northern-ireland-and-secretary-of-state-for-exiting-the-european-union>

### Whether an appeal in *McCord, Agnew and others* could be heard together with this claim before the Supreme Court

8. It was suggested by Leveson P, at the 19 July 2016 Case Management Conference, that the current claims are likely to leap-frog to the Supreme Court. Leap-frog provisions exist in Northern Ireland also. The statutory position is that appeals may proceed directly from the High Court in Northern Ireland to the Supreme Court of the United Kingdom, subject to certain conditions.
9. That appeal route (both in Northern Ireland and England and Wales) is established by Part II of the Administration of Justice Act 1969 (“AJA 1969”), which sets the mechanism for a ‘leapfrog appeal’ at ss. 12-15. S.16(1A) clarifies that Part II will apply in Northern Ireland, subject to the modification that the “*alternative conditions*” in ss.12(3A) will not apply in Northern Ireland and that all parties must consent to the ‘leapfrog’ procedure.
10. That is confirmed by s.43 of the Judicature (Northern Ireland) Act 1978 which clarifies that nothing in that Act will affect the operation of Part II of the AJA 1969 in Northern Ireland. S.2.1.2.3 of Practice Direction 1 of the Supreme Court also confirms that “[t]he principal provisions relating to civil appeals from Northern Ireland are in section 42 of the Judicature (Northern Ireland) Act 1978 as amended by the [Constitutional Reform Act 2005]. See also sections 43 (preserving leapfrog appeals), 44 (contempt) and 45 (habeas corpus), as amended.”
11. The relevant provisions from Part II of the 1969 Act and Practice Direction are appended. As a courtesy, a copy of this note has also been sent to Mr Justice Maguire and the parties in *McCord, Agnew and others*.

### Whose rights would be removed by leaving the EU

12. The Lord Chief Justice asked whose rights would be affected by an Article 50 notification. These are submissions which will be developed by the AB Interested Parties and the Birnie and others interveners.
13. In short, there are two groups:
  - a. The first is anyone within the jurisdiction of the United Kingdom who relies on rights conferred by EU law, including any cross-border rights. This group consists not only of UK citizens who lose their status as EU citizens and the rights which flow from that, but also other EU citizens resident in the UK, and any other person within the jurisdiction reliant on EU law. One example of a person in that final group would be a third country national who is a close family member of an EU citizen and resides lawfully in the UK on the basis of derived rights set out in the Citizens’ Rights Directive 2004/38/EC [C/44/379].

- b. The second is UK citizens who have exercised, or wish to exercise, free movement rights and will lose their rights as EU citizens in the Member States in which they live, trade, study or work, or wish to in the future. Their EU and third country family members will also be affected.
14. The People's Challenge Interested Parties adopt the examples of rights which could not be preserved in their skeleton argument at §72, the categories of rights developed in Mr Chambers' submissions, and Lord Pannick's examples of rights which could not be restored in §11 of his note of 14 October 2016. Other examples of particular public and private law rights, in particular in Scotland, that will be lost as a result of notification of the UK's intention to leave the EU, will be addressed in oral submissions on Monday 17 October.

#### Article 50

15. For the avoidance of doubt, the People's Challenge Interested Parties do not dissent from the answer given by Lord Pannick QC to the Lord Chief Justice's question concerning whether an Article 50 notification, once triggered, can be unilaterally withdrawn by a Member State.
16. No party, including the Defendant, has argued that an Article 50 notification can be made conditionally or can be unilaterally withdrawn. The People's Challenge Interested Parties specifically asked the Defendant whether this was his position in pre action correspondence<sup>3</sup>. The Defendant has not stated that it is, either in response to that letter or in his pleading or skeleton argument. As noted in the People's Challenge Interested Parties' skeleton argument at §§ 18-19, there is a debate on this question, and the prudent approach is to proceed on the basis of irreversibility.
17. In any event, even a real risk that notification is irreversible would mean that if, contrary to the Claimants' case, any prerogative power subsists, it could not lawfully be used in a way which would create a real risk of: (a) extinguishing so broad a range of statutorily conferred fundamental rights; (b) suspending or displacing statutory law contrary to the Bill of Rights 1689; or (c) abrogating, by necessary implication, a range of constitutional statutes such as the ECA 1972 and the devolution statutes.

**HELEN MOUNTFIELD QC**

**GERRY FACENNA QC**

**TIM JOHNSTON**

**JACK R. WILLIAMS**

**JOHN HALFORD**

*Bindmans LLP*

16 October 2016

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<sup>3</sup> Paragraph 17 of the pre-action letter dated 8 July 2016.

# Administration of Justice Act 1969

## 1969 CHAPTER 58

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An Act to increase the jurisdiction of county courts and to amend the County Courts Act 1959; to make further provision for appeals from the High Court (whether in England and Wales or in Northern Ireland) to the House of Lords; to enable wills and codicils to be made for mentally disordered persons; to make provision for interim payments to be made where proceedings are pending, and for conferring powers to be exercisable by the court before the commencement of an action, and to make further provision with respect to interest on damages; to enable any jurisdiction of the High Court to be assigned to two or more Divisions concurrently; to enable the Appeal Tribunals under the Patents Act 1949 and the Registered Designs Act 1949 to consist of two or more judges; to change the title and qualification of clerks to registrars of the Chancery Division; to make further provision with respect to miscellaneous matters, that is to say, certain employments in the offices of the Supreme Court, records of grants of probate and grants of administration and the making of second and subsequent grants, admission as a public notary, pension rights and related matters in connection with certain judicial offices, and the stipend and fees of the Chancellor of the County Palatine of Durham; to extend the legislative power of the Parliament of Northern Ireland with respect to grand juries and indictments; and for purposes connected with the matters aforesaid.

[22nd October 1969]

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### Extent

Preamble: England, Wales

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## PART I

**R** Repealed

1. [...] <sup>1</sup>

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### Notes

<sup>1</sup> Repealed by County Courts Act 1984 (c.28), s. 148(3), Sch. 4

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**R** Repealed

## 8. [...] <sup>1</sup>

### Notes

<sup>1</sup> Repealed by County Courts Act 1984 (c.28), s. 148(3), Sch. 4

**R** Repealed

## 9. [...] <sup>1</sup>

### Notes

<sup>1</sup> Repealed by County Courts Act 1984 (c.28), s. 148(3), Sch. 4

**R** Repealed

## 10. [...] <sup>1</sup>

### Notes

<sup>1</sup> Repealed by Administration of Justice Act 1982 (c.53), s. 75, Sch. 9 Pt. I

**R** Repealed

## 11. [...] <sup>1</sup>

### Notes

<sup>1</sup> Repealed by County Courts Act 1984 (c.28), s. 148(3), Sch. 4

## PART II

### [ Appeal from High Court to Supreme Court ] <sup>1</sup>

### Notes

<sup>1</sup> Words substituted by Constitutional Reform Act 2005 c. 4 Sch.9(1) para.20(2) (October 1, 2009)

**✓** Law In Force

## 12.— Grant of certificate by trial judge.

(1) Where on the application of any of the parties to any proceedings to which this section applies the judge is satisfied—

- (a) that the relevant conditions are fulfilled in relation to his decision in those proceedings [ or that the conditions in subsection (3A) (“the alternative conditions”) are satisfied in relation to those proceedings ]<sup>1</sup> , and
- (b) that a sufficient case for an appeal to the [ Supreme Court ]<sup>2</sup> under this Part of this Act has been made out to justify an application for leave to bring such an appeal, [...]<sup>3</sup>
- (c) [...]<sup>3</sup>

the judge, subject to the following provisions of this Part of this Act, may grant a certificate to that effect.

(2) This section applies to any civil proceedings in the High Court which are either—

- (a) proceedings before a single judge of the High Court [...]<sup>4</sup> , or
- (b) [...]<sup>5</sup>
- (c) proceedings before a Divisional Court.

(3) Subject to any Order in Council made under the following provisions of this section, for the purposes of this section the relevant conditions, in relation to a decision of the judge in any proceedings, are that a point of law of general public importance is involved in that decision and that point of law either—

- (a) relates wholly or mainly to the construction of an enactment or of a statutory instrument, and has been fully argued in the proceedings and fully considered in the judgment of the judge in the proceedings, or
- (b) is one in respect of which the judge is bound by a decision of the Court of Appeal or of the [ Supreme Court ]<sup>2</sup> in previous proceedings, and was fully considered in the judgments given by the Court of Appeal or the [ Supreme Court ]<sup>2</sup> (as the case may be) in those previous proceedings.

[ (3A) The alternative conditions, in relation to a decision of the judge in any proceedings, are that a point of law of general public importance is involved in the decision and that—

- (a) the proceedings entail a decision relating to a matter of national importance or consideration of such a matter,
- (b) the result of the proceedings is so significant (whether considered on its own or together with other proceedings or likely proceedings) that, in the opinion of the judge, a hearing by the Supreme Court is justified, or
- (c) the judge is satisfied that the benefits of earlier consideration by the Supreme Court outweigh the benefits of consideration by the Court of Appeal.

] <sup>6</sup>

(4) Any application for a certificate under this section shall be made to the judge immediately after he gives judgment in the proceedings:

Provided that the judge may in any particular case entertain any such application made at any later time before the end of the period of fourteen days beginning with the date on which that judgment is given or such other period as may be prescribed by rules of court.

(5) No appeal shall lie against the grant or refusal of a certificate under this section.

(6) Her Majesty may by Order in Council amend subsection (3) of this section by altering, deleting, or substituting one or more new paragraphs for, either or both of paragraphs (a) and (b) of that subsection, or by adding one or more further paragraphs.

(7) Any Order in Council made under this section shall be subject to annulment in pursuance of a resolution of either House of Parliament.

(8) In this Part of this Act “civil proceedings” means any proceedings other than proceedings in a criminal cause or matter, and “the judge”, in relation to any proceedings to which this section applies, means the judge [...] <sup>7</sup> referred to in paragraph (a) [...] <sup>8</sup> of subsection (2) of this section, or the Divisional Court referred to in paragraph (c) of that subsection, as the case may be.

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#### Notes

- <sup>1</sup> Words inserted by Criminal Justice and Courts Act 2015 c. 2 Pt 3 s.63(2)(a) (April 13, 2015: insertion has effect as SI 2015/778 subject to transitional provisions specified in SI 2018/778 art.4 and Sch.2 para.2)
- <sup>2</sup> Words substituted by Constitutional Reform Act 2005 c. 4 Sch.9(1) para.20(3) (October 1, 2009)
- <sup>3</sup> Repealed by Criminal Justice and Courts Act 2015 c. 2 Pt 3 s.63(2)(b) (April 13, 2015: repeal has effect as SI 2015/778 subject to savings specified in SI 2018/778 art.4 and Sch.2 para.2)
- <sup>4</sup> Words repealed by Supreme Court Act 1981 (c. 54), s.152(4), Sch. 7
- <sup>5</sup> Repealed by Courts Act 1971 (c. 23), Sch. 11 Pt. IV and with saving by Judicature (Northern Ireland) Act 1978 (c. 23) s. 122(1)(2), Sch. 6 para. 13, Sch. 7 Pt. I
- <sup>6</sup> Added by Criminal Justice and Courts Act 2015 c. 2 Pt 3 s.63(3) (April 13, 2015: insertion has effect as SI 2015/778 subject to transitional provisions specified in SI 2018/778 art.4 and Sch.2 para.2)
- <sup>7</sup> Words repealed by Courts Act 1971 (c. 23), Sch. 11 Pt. IV
- <sup>8</sup> Words repealed by Courts Act 1971 (c. 23), Sch. 11 Pt. IV and with saving by Judicature (Northern Ireland) Act 1978 (c. 23), s. 122(1)(2), Sch. 6 para. 13, Sch. 7 Pt. I

#### Commencement

Pt II s. 12: January 1, 1970 (SI 1969/1607 art. 3, Sch. 2 para. 1)

#### Extent

Pt II s. 12(1)-(8): England, Wales

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Law In Force

### 13.— Leave to appeal to [Supreme Court] <sup>1</sup> .

(1) Where in any proceedings the judge grants a certificate under section 12 of this Act, then, at any time within one month from the date on which that certificate is granted or such extended time as in any particular case the [Supreme Court] <sup>1</sup> may allow, any of the parties to the proceedings may make an application to the [Supreme Court] <sup>1</sup> under this section.

(2) Subject to the following provisions of this section, if on such an application it appears to the [Supreme Court] <sup>2</sup> to be expedient to do so, the [Supreme Court] <sup>2</sup> may grant leave for an appeal to be brought directly to the [Supreme Court] <sup>2</sup> ; and where leave is granted under this section—

- (a) no appeal from the decision of the judge to which the certificate relates shall lie to the Court of Appeal, but
- (b) an appeal shall lie from that decision to the [Supreme Court] <sup>2</sup> .

(3) Applications under this section shall be determined without a hearing.

(4) [...] <sup>3</sup>

(5) Without prejudice to subsection (2) of this section, no appeal shall lie to the Court of Appeal from a decision of the judge in respect of which a certificate is granted under section 12 of this Act until—



- (a) the time within which an application can be made under this section has expired, and  
 (b) where such an application is made, that application has been determined in accordance with the preceding provisions of this section.

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#### Notes

- <sup>1</sup> Words substituted by Constitutional Reform Act 2005 c. 4 Sch.9(1) para.20(4)(a) (October 1, 2009)  
<sup>2</sup> Words substituted by Constitutional Reform Act 2005 c. 4 Sch.9(1) para.20(4)(b) (October 1, 2009)  
<sup>3</sup> Repealed by Constitutional Reform Act 2005 c. 4 Sch.18(5) para.1 (October 1, 2009)

#### Commencement

Pt II s. 13: January 1, 1970 (SI 1969/1607 art. 3, Sch. 2 para. 1)

#### Extent

Pt II s. 13(1)-(5)(b): England, Wales

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 Repealed

#### 14. [...] <sup>1</sup>

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#### Notes

- <sup>1</sup> Repealed by Constitutional Reform Act 2005 c. 4 Sch.18(5) para.1 (October 1, 2009)
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 Law In Force

#### 15.— Case excluded from s. 12.

(1) No certificate shall be granted under section 12 of this Act in respect of a decision of the judge in any proceedings where by virtue of any enactment, apart from the provisions of this Part of this Act, no appeal would lie from that decision to the Court of Appeal, with or without the leave of the judge or of the Court of Appeal.

(2) No certificate shall be granted under section 12 of this Act in respect of a decision of the judge where—

(a) [...] <sup>1</sup>

(b) by virtue of any enactment, apart from the provisions of this Part of this Act, no appeal would (with or without the leave of the Court of Appeal or of the [Supreme Court] <sup>2</sup>) lie from any decision of the Court of Appeal on an appeal from the decision of the judge.

(3) Where by virtue of any enactment, apart from the provisions of this Part of this Act, no appeal would lie to the Court of Appeal from the decision of the judge except with the leave of the judge or of the Court of Appeal, no certificate shall be granted under section 12 of this Act in respect of that decision unless it appears to the judge that apart from the provisions of this Part of this Act it would be a proper case for granting such leave.

(4) No certificate shall be granted under section 12 of this Act where the decision of the judge, or any order made by him in pursuance of that decision, is made in the exercise of jurisdiction to punish for contempt of court.

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**Notes**

<sup>1</sup> Repealed by Administration of Justice Act 1977 (c. 38), Sch. 5 Pt. IV

<sup>2</sup> Words substituted by Constitutional Reform Act 2005 c. 4 Sch.9(1) para.20(6) (October 1, 2009)

**Commencement**

Pt II s. 15: January 1, 1970 (SI 1969/1607 art. 3, Sch. 2 para. 1)

**Extent**

Pt II s. 15(1)-(4): England, Wales

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Law In Force

**16.— Application of Part II to Northern Ireland.**

(1) In the application of this Part of this Act to Northern Ireland—

“the Court of Appeal” means Her Majesty's Court of Appeal in Northern Ireland;

“the High Court” means the High Court of Justice in Northern Ireland;

“statutory instrument” includes an instrument made under an enactment of the Parliament of Northern Ireland;

for the references in section 12(2) to [ section 3 of the Judicature Act 1925 there shall be substituted a reference to sections 6 and 7 of the Judicature (Northern Ireland) Act 1978 ]<sup>1</sup>; and

for the reference in section 15(2)(a) to the Matrimonial Causes Act 1965 there shall be substituted a reference to the Matrimonial Causes Act (Northern Ireland) 1939 or any enactment re-enacting that Act (whether with or without modifications).

[ (1A) In the application of this Part of this Act to Northern Ireland, section 12 has effect as if—

(a) in subsection (1)(a) there were omitted “or that the conditions in subsection (3A) (“the alternative conditions”) are satisfied in relation to those proceedings”;

(b) after subsection (1)(b) there were inserted

“, and

(c) that all the parties to the proceedings consent to the grant of a certificate under this section,”;

(c) subsection (3A) were omitted.

] <sup>2</sup>

(2) [...] <sup>3</sup>

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**Notes**

<sup>1</sup> Words substituted by Judicature (Northern Ireland) Act 1978 (c. 23), s. 123(2), Sch. 5

<sup>2</sup> Added by Criminal Justice and Courts Act 2015 c. 2 Pt 3 s.63(4) (April 13, 2015: insertion has effect as SI 2015/778 subject to transitional provisions specified in SI 2018/778 art.4 and Sch.2 para.2)

<sup>3</sup> S. 16(2) repealed by Judicature (Northern Ireland) Act 1978 (c. 23), s. 123(2), Sch. 7

**Commencement**

Pt II s. 16: January 1, 1970 (SI 1969/1607 art. 3, Sch. 2 para. 1)

## Section 2: The Jurisdiction of the Supreme Court

### Civil Appeals

1.2.1 The key provisions in relation to civil appeals are subsections (2) and (3) of section 40 of the Act:

(2) An appeal lies to the Court from any order or judgment of the Court of Appeal in England and Wales in civil proceedings.

(3) An appeal lies to the Court from any order or judgment of a court in Scotland if an appeal lay from that court to the House of Lords at or immediately before the commencement of this section.

1.2.2 The principal provisions relating to civil appeals from Scotland are in section 40 of the Court of Session Act 1988 as amended by the Act. (But see also sections 24, 27 (5), 32(5), 41, 42, 43 and 52(3) as amended for further matters of detail and paragraph 1.2.25<sup>1</sup>.)

1.2.3 The principal provisions relating to civil appeals from Northern Ireland are in section 42 of the Judicature (Northern Ireland) Act 1978 as amended by the Act. See also sections 43 (preserving leapfrog appeals), 44 (contempt) and 45 (habeas corpus), as amended.

1.2.4 Schedule 9 to the Act also amends a large number of statutes which gave rights of appeal (often limited to issues of law) to the House of Lords; these are replaced by corresponding rights of appeal to the Supreme Court.

1.2.5 Section 40(6) of the Act provides:

An appeal under subsection (2) lies only with the permission of the Court of Appeal or the Supreme Court; but this is subject to provision under any other enactment restricting such an appeal.

The most important general restriction on rights of appeal is section 54(4) of the Access to Justice Act 1999<sup>2</sup>. The effect of this provision is that the Supreme Court may not entertain any appeal against an order of the Court of Appeal refusing permission for an appeal to the Court of Appeal from a lower court.

1.2.6 Where the Supreme Court does not have jurisdiction, the Registrar will inform the appellant in writing that the Supreme Court does not have jurisdiction.

### Other statutory restrictions

1.2.7 There are other statutory restrictions on the Court's jurisdiction. The following are excluded from the Court's jurisdiction and are inadmissible

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<sup>1</sup> September 2015

<sup>2</sup> Section 54 of the Access to Justice Act 1999 does not extend to Northern Ireland and the Civil Procedure Rules do not apply there, but the rule in *Lane v Esdaile* (see *Lane v. Esdaile* [1891] AC210) applies to Northern Ireland.