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IN BRIEF

Cases

■ AUSTIN v. NEWCASTLE CHRONICLE & JOURNAL LTD.,[2001] EWCA Civ 834, May 18, 2001, CA, unrep. (Aldous & Judge L.JJ. and Cresswell J.)
CPR rr. 3.1(2)(a), 7.4(1)(b) & 7.5(2)—C bringing defamation claim against D—C failing to serve amended particulars in time—C applying for extension of time under r. 3.1(2)(a)—district judge granting application—judge allowing appeal and striking out action—on further appeal to Court of Appeal, held, allowing appeal, the judge failed to take into account matters that he should have done, in particular, the relative prejudice to the parties—*Biguzzi v. Rank Leisure Plc.*, [1999] 1 W.L.R. 1926, CA, ref'd to (see *Civil Procedure*, Spring 2001, Vol. 1, paras 3.1.2 & 7.6.3)

■ CONNOLLY v. TAYLOR, May 11, 2001, unrep. (Judge Wilkie QC)
CPR r. 31.22—solicitor (C) ceasing to act for client (D) in D's action against X—subsequently, action by D against X settled and detailed assessment of costs ordered—in claim by C against D, on D's application, held (1) that C and D should give one another standard disclosure of documents, and (2) that D should have permission pursuant to r. 31.22(1)(b) to use the documents for the purpose of the detailed assessment proceedings between him and X (see *Civil Procedure*, Spring 2001, Vol. 1, para. 31.22.1, and Vol. 2, para. 7C-227)

■ HOLMES v. S.G.B. SERVICES PLC., [2001] EWCA Civ 354, February 19, 2001, CA, unrep. (Henry, Buxton & Arden L.JJ.)
CPR rr. 1.1 & 3.1(2)(b), Practice Direction (The Multi-Track) para. 7—in personal injuries case, report from single joint expert received shortly before trial date—on C's application, judge (1) vacating trial date, (2) giving C leave to amend his particulars of claim, and (3) permitting parties to re-instruct the expert on particular issues—judge granting D permission to appeal on ground that there is a tension between rules emphasising the maintaining of trial dates and the interests of justice in achieving a fair trial—held, dismissing D's appeal, the judge had not erred in principle—Court commenting on judge's reasons for granting permission to appeal (see *Civil Procedure*, Spring 2001, Vol. 1, paras 1.3.2, 1.3.7 & 29PD-007)

■ RALL v. HUME, [2001] EWCA Civ 146; [2001] 3 All E.R. 248, CA (Potter & Sedley, L.JJ.)
CPR rr. 1.1, 1.3, Pt. 31 & r. 32.1, Practice Direction (Applications) para. 2.7—in personal injuries claim, at case management conference district judge refusing D's application to adduce video evidence—judge dismissing D's appeal—held, allowing D's second appeal, (1) a party wishing to adduce film or video evidence to attack an opponent's case is subject to all the rules as to disclosure and inspection of documents contained in Pt. 31, (2) in the interests of case management, and in discharge of the duty arising under r. 1.3, the party should raise the matter with the procedural judge at the first practicable opportunity (see also para. 2.7), (3) in exercise of his powers to control evidence at trial (r. 32.1) it would have been appropriate for the judge to give directions requiring D to give notice in advance of those parts of the video footage relied on (see *Civil Procedure*, Spring 2001, Vol. 1, paras 1.3.8, 23.0.8 & 31.4.1)

■ ARKIN v. BORCHARD LINES LTD., 151 New L.J. 970 (2001) (Colman J.)
CPR r. 44.8—C entering into conditional fee agreement (CFA) with his solicitors (S)—S entering into conditional retainer agreement (CRA) with counsel—after proceedings commenced, in pre-trial applications a number of summarily assessed costs orders made both for and against C, leaving D with a net liability to C—held, (1) C was entitled to payment of the orders in his favour subject to set-off in respect of the amount of the orders in D's favour, (2) the CFA and CRA did not have the effect of postponing C's liability to S and counsel (and, therefore, D's liability to indemnify C for pre-trial costs) until he was ultimately successful in the proceedings, (3) the crucial questions were the meaning of "winning" in the CFA and "in the event of the client making monetary recoveries" in the CRA (see *Civil Procedure*, Spring 2001, Vol. 1, paras 44.8.1 & 48.8.3)

■ COOKE v. SECRETARY OF STATE FOR SOCIAL SECURITY, April 25, 2001, CA, unrep. (Clarke & Hale L.JJ. and Butterfield J.)
CPR rr. 52.3 & 52.13, Supreme Court Act 1981, s. 15, Access to Justice Act 1999, s. 55(1), Social Security Act 1980, s. 14—C appealing to Disability Appeal Tribunal from decision of adjudication officer reducing benefit on ground of change of circumstances—Tribunal upholding officer's decision—Social Security Commissioner dismissing C's appeal from the Tribunal—Commissioner refusing C permission to appeal to the Court of Appeal—held, granting C's application for permission to appeal but dismissing appeal, (1) many of the considerations underlying the stricter approach to the granting of permission to appeal in "second appeals" found in s. 55(1) (and r. 52.13) apply with equal, if not stronger force, in appeals of this type, (2) although s. 55(1) does not apply to these appeals, a robust attitude to the "prospect of success" criterion (r. 52.3(6)) should be adopted in these cases—Court observing that such

attitude may be appropriate for appeals from similar tribunal structures (see *Civil Procedure*, Spring 2001, Vol. 1, paras 52.3.9 & 52.3.19, and Vol. 2, paras 9A-47 & 9A-865)

■ CORNWALL GARDENS PTE. LTD. v. R.O. GARRARD & CO. LTD.,*The Times*, June 19, 2001, CA (Lord Phillips MR, Pill & Chadwick L.JJ.)
CPR r. 16.4—C bringing claim against D for malicious falsehood and wrongful interference with rights—judge ruling that claim was time barred by Limitation Act 1980, s. 4A—in dismissing C's appeal, Court of Appeal stating (1) counsel should not draft any pleading containing an allegation of fraud without clear instructions and reasonably credible admissible evidence establishing a prima facie case of fraud, (2) the same applied to an allegation of malicious falsehood—Court referring to and endorsing guidance issued by Bar Council following decision of Court in *Medcalf v. Mardell*, *The Times*, January 2001, CA (see *Civil Procedure*, Spring 2001, Vol. 1, paras 16.4.1)

■ DELOS LTD. v. C.A.E. ELECTRONICS LTD., February 21, 2001, unrep. (Eady J.)
CPR rr. 1.1 & 3.4(2) (b) & (c), 16.4 & 32.4—in breach of contract claim (commenced in 1989), on D's application master striking out C's statement of claim under paras (b) & (c), of r. 3.4(2) partly on ground that, although C had been given disclosure, his claim remained unparticularised—C appealing to judge on grounds that master (1) paid insufficient regard r. 1.1(2)(a) ("equal footing"), (2) had too little regard to C's financial weakness for which D was responsible, and (3) had misdirected himself as to the effect of his order for specific discovery—long witness statement of S, a witness for C, served on D—held, dismissing appeal, (1) the master had not erred in the exercise of his discretion, (2) C's pleading did not meet even the basic requirements of a statement of case (i.e. identifying the facts giving rise to the cause of action), (3) in the circumstances no other remedy less Draconian than striking out would give D adequate protection—judge referring to practice of permitting party to supplement a pleaded case by a witness statement (*e.g. McPhilemy v. Times Newspapers*, [1999] 3 All E.R. 775, CA), instead of ordering further information by way of pleading, but concluding that the deficiencies in C's pleading were not rectified by the service of the "prolix and undisciplined" witness statement from S (see *Civil Procedure*, Spring 2001, Vol. 1, paras 16.4.1 & 32.4.5)

■ HERTFORD MANAGEMENT LTD. v. MASTORAKIS, March 22, 2001, unrep. (Judge Heppel QC)
CPR rr. 13.3, 16.3 & 40.12(1), Form N1, Practice Direction (Statements of Case) para. 10.1—D guarantor for 50% of loan of US$1billion—C bringing claim for a sum of money expressed in a foreign currency (US$486.5 million)—after C had refused to accept tender, D paying sterling sum into court in satisfaction of the judgment debt and interest—C applying to amend judgment to one expressed in US dollars—held, dismissing C's application, (1) because C had not complied with para. 10.1(3) & (4) the court had no jurisdiction under r. 13.3 (based on former RSC Ord. 13, r. 9) to entertain the application, and (2) the judgment could not be amended under r. 40.12(1) (the slip rule) (judge explaining purpose of para. 10.1 and observing that it refers to the particulars of claim as opposed to the claim form) (see *Civil Procedure*, Spring 2001, Vol. 1, paras 13.3.1, 40.12.1 & 16PD-010)

■ MCPHILEMY v. TIMES NEWSPAPERS LTD., (NO. 3), *The Times*, June 19, 2001, CA (Simon Brown, Chadwick & Longmore L.JJ.)
CPR rr. 1.1 & 52.10—journalist responsible for TV programme (C) bringing claim against newspaper (D) claiming that in article on the programme published by D he had been defamed—at trial by judge and jury, D inviting judge to leave a specific question to the jury and C submitting that that question should be treated as resolved in D's favour—in event, judge leaving that question (and others) to jury—jury answering questions in C's favour and judgment and damages given for C—on appeal, D acknowledging that he was wrong to have urged upon judge that the specific question be left to the jury but contending that the answer to that question was perverse—held, dismissing D's appeal, (1) a party's failure to invite the judge to withdraw an issue from the jury did not preclude the Court of Appeal from subsequently holding that the issue could only properly have been decided one way and that the jury's verdict upon it was perverse, but (2) it was an abuse of process for a party at whose invitation a question was left to the jury to seek to complain to the Court that the jury's answer was perverse (*Banbury v. Bank of Montreal*, [1918] A.C. 626, ref'd to) (see *Civil Procedure*, Spring 2001, Vol. 1, paras 1.3.2 & 52.10)

■ MCPHILEMY v. TIMES NEWSPAPERS LTD., (NO. 4) [2001] EWCA Civ 933, *The Times*, July 3, 2001, CA (Simon Brown, Chadwick & Longmore L.JJ.)
CPR r. 36.21—journalist (C) bringing claim against newspaper (D) for defamation—before trial, C's Pt. 36 offer rejected by D—at trial by judge and jury, C awarded damages in excess of the amount stated in C's offer—judge refusing C's application for enhanced interest on damages (r. 36.21(2)) and indemnity costs (r. 36.21(3))—held, allowing C's appeal, (1) in the circumstances of this case, the judge was required to make orders under paras. (2) and (3) of r. 36.21 unless satisfied that it was unjust to do so, (2) the judge was wrong in concluding that an order for indemnity costs under r. 36.21(3) implied disapproval by the court of D's conduct in continuing the litigation, or carried some stigma, or could properly be regarded as punitive, (3) the power under r. 36.21(2) should not be used in a case where it had to be assumed that the anxiety, inconvenience and distress of defamation proceedings had already been taken into account by the jury in

reaching their award—basis of court's power to award interest on indemnity costs under r. 36.21(3)(b) explained—*Petrotrade Inc. v. Texaco Ltd., The Times*, June 14, 2000, CA, ref'd to (see *Civil Procedure*, Spring 2001, Vol. 1, paras 36.21.1 & 36.21.3)

■ MERRETT v. BABB, [2001] EWCA Civ 214; [2001] 3 W.L.R. 1, CA (Aldous & May L.JJ. and Wilson J.)
CPR r. 19.5, Limitation Act 1980, s. 35(5)(b) & (6)(b)—P and X purchasing house jointly—P and X relying on survey report prepared for mortgage lenders by D—defects in property requiring repair becoming apparent—P bringing action in negligence claiming entire loss against D—limitation period expiring before trial—judge awarding P damages for loss—held, adding X as claimant and dismissing appeal (Aldous LJ diss), (1) D owed a duty of care to P and X, (2) the claim in the original action was for the full amount of the loss, (3) as that claim was, or included, a joint claim, it could not be properly maintained or carried on unless X was party, accordingly (4) the addition of X was "necessary for the determination of the original action" (s. 35(5)(b)) as the original claim could not be maintained against D unless X was joined (s. 35(6)(b)), (5) the expression "cannot properly be carried on" in r. 19.5(3)(b) is to be taken as meaning the same as "cannot be maintained" in s. 35(6)(b) (see *Civil Procedure*, Spring 2001, Vol. 1, para. 19.5.1 and Vol. 2, para. 8-86)

■ R. (WESTMINSTER CITY COUNCIL) v. SECRETARY OF STATE FOR THE ENVIRONMENT TRANSPORT AND THE REGIONS, April 2, 2001, unrep. (Jackson J.)
CPR r. 52.13, Sched. 1 RSC Ord. 94, r. 13, Town and Country Planning Act 1990, s. 289—appeal by local authority to High Court against decision of Secretary of State (S) quashing a planning enforcement notice and a listed building enforcement notice—judge allowing appeal (principally on ground that important recent Court of Appeal decision not drawn to attention of planning inspector) and remitting matter to S under r. 13—counsel for S indicating that S may wish to apply to the Court of Appeal for permission to appeal under r. 52.13 and requesting judge to indicate whether he was of the opinion that permission might be given—held, refusing the request, (1) as the appeal would be a second appeal permission could be granted only by the Court of Appeal, (2) in accordance with the emerging practice, it would not be inappropriate for a judge to give an indication as to whether he feels that the issues are ones which raise an important point of principle or practice within r. 52.13(2)(a), however, (3) the issues in this case were not in that category (see *Civil Procedure*, Spring 2001, Vol. 1, para. 52.3.19)

Statutory Instruments

■ DAMAGES (PERSONAL INJURY) ORDER 2001 (S.I. 2001 No. 2301)
Damages Act 1996, s. 1—provides that the rate of return referred to in s. 1(1) of the Damages Act 1996 (i.e. the rate of return which courts are required to take into account when calculating damages for future pecuniary loss in an action for personal injury claims) shall be 2.5 per cent.—in force June 28, 2001

IN DETAIL

Video evidence casting doubt on claim

In *Rall v. Hume*, [2001] EWCA Civ 146, decided by the Court of Appeal in February and now reported at [2001] 3 All E.R. 248, CA, the Court of Appeal gave guidance on the practice to be followed where a defendant wishes to deploy video evidence at the trial of a personal injuries claim for the purpose of casting doubt upon the claim made by the claimant.

In this case the facts were that the claimant (C) was injured in a road accident. On the basis of the expert evidence a substantial claim for future loss was maintained. On December 6, 1999, C obtained judgment for damages to be assessed. By May 2, 2000, the solicitors for the defendant (D) were in possession of a covertly taken video film containing footage relating to C's movements on February 8, 2000 and February 15, 2000. The video evidence showed C going about her daily tasks without any apparent difficulty. The video evidence was not disclosed at that stage as it was clear from the medical reports previously relied on that C was going through a continuing process of improvement and it would not be clear before the up-to-date reports were available whether what was shown on the video was at odds with her case as it would be advanced at trial. However, when the updated medical evidence was obtained from C's medical expert, D's insurers instructed D's solicitors to disclose the video to C's solicitors, which they did on June 21, 2000. A second video was obtained by D's solicitors on September 11, 2000, containing footage of the claimant. Again it appeared to show C having a normally active life without difficulty. Instructions were obtained that the video should be disclosed and it was disclosed to C's solicitors on October 10, 2000.

At a hearing on November 6, 2000, which D's solicitors did not attend (because it was believed it was not nec-

essary for them to do so) the district judge ordered that the case be listed for a case management conference on December 13, 2000. He also took the opportunity, on the basis of the case as he then understood it, to list the case for trial on January 22, 2001, with an estimate of four hours. On receipt of the order, D's solicitors resolved that at the case management conference on December 13 they would apply for permission to rely upon the video evidence. At this hearing, the district judge refused D's application. He stated that the application was made too late. He said that, if D wished to adduce the video evidence, they should have made application to that effect at the first directions hearing on May 2, 2000, in relation to the first video and that, in relation to the second video, further application could have been made at the hearing held on November 6, 2000, when the district judge was likely to take the opportunity to give directions for trial. The district judge indicated that, in principle, he would have allowed the application for video evidence to be introduced (save for certain footage showing C within her own home and inside a nursery with her child, on the basis that it was an intrusion into her privacy). However, as a result of the delays of D, the position had been reached whereby a date for trial had been fixed with an estimate of four hours. That was already a tight estimate and, if the videos were shown, it was a certainty that the case would not be disposed of within the four-hour period. The district judge added that C was anxious and entitled to have her case disposed of expeditiously and she did not want the delay and anxiety which would be involved if a new date were fixed. Furthermore, it would be unfair and an inconvenience to C for rushed arrangements to have to be made over the Christmas period for C and her experts to view the video and make their comments upon it. Accordingly, so the district judge ruled, the balance of justice fell in favour of excluding the video evidence. The district judge gave leave to appeal. D appealed to the judge. On January 3, 2001, the judge confirmed the district judge's decision for much the same reasons as those given by the district judge. The Court of Appeal gave D permission to appeal (this being a "second" appeal) and allowed the appeal.

Potter L.J. explained that, for the purposes of disclosure, a video film or recording is a document within the extended meaning contained in CPR r. 31.4. A defendant who proposes to use such a film to attack a claimant's case is therefore subject to all the rules as to disclosure and inspection of documents contained in Part 31. Equally, if disclosure is made in accordance with that Part, whether as part of standard disclosure under r. 31.6 or the duty of continuing disclosure under r. 31.11, the claimant will be deemed to admit the authenticity of the film unless notice is served that the claimant wishes the document to be proved at trial. If the claimant does so, the defendant will be obliged to serve a witness statement by the person who took the film in order to prove its authenticity. If the claimant does not challenge the authenticity of the film, however, it is, in the absence of any ruling by the court to the contrary, available to the defendant for the purposes of cross-examining the claimant and the claimant's expert medical witnesses at court.

Having stated these general points Potter L.J. then noted certain practical considerations which arise when video evidence is to be used. Arrangements have to be made to ensure that video equipment is available in the court in which the evidence is to be used. Further, it has to be anticipated that the showing of the video evidence will add significantly to the length of the trial; hence, when fixing a trial date with an estimate of time, it is necessary for the managing judge to make proper allowance for this. His lordship said it is therefore necessary in the interests of proper case management and the avoidance of wasted court time that the matter be ventilated with the judge managing the case at the first practicable opportunity once a decision has been made by a defendant to rely on video evidence obtained.

On turning to the decisions of the district judge and the judge in this case, Potter L.J. said these decisions may have been based on a misunderstanding. His lordship said that it was apparent from the terms of their judgments, that the district judge and the judge throughout proceeded upon the assumption that the application was an application by D to adduce the video evidence as part of his own case, in respect of which leave was required under the r. 32.1, and that the entire video would need to be played for the purposes of admission in evidence and (it might well be) again for the purposes of cross-examination, whereas, the authenticity of the video not having been challenged, the issue was whether or not D should be prevented from exercising what prima facie was his right to cross-examine C by putting to her for her comment such parts of the video as D thought appropriate for the purposes of undermining C's case. Had the matter been dealt with on that basis, a different result might have followed and that justice could have been done by a form of order tailored to the realities of the position. His lordship said that D's error in not making an appropriate application as the first practicable opportunity was not a sufficient ground for shutting out D from all opportunity to cross-examine C on the contents of the videos. This was not an "ambush" case. C had already had an opportunity to view and comment upon the contents of the videos following their disclosure (an opportunity of which she had availed herself), and there was no reason to suppose that her medical witnesses would not themselves be able to view the videos in the three weeks remaining between the appeal before the judge and the date fixed for hearing. Further, there was no reason why the judge, in exercise of his powers to control the evidence given at trial (see r. 32.1) and, in particular, to limit cross-examination under r. 32.1(3), should not have made appropriate directions for D to give notice in advance of those parts of the video footage relied on, coupled with a limitation on the time permitted for cross-examination at trial. By such means, even if the four-hour estimate for the trial was exceeded, all the evidence and cross-examination of C and the medical witnesses

could be completed upon the day fixed, thus ensuring that the C's part in the trial (and her consequent anxiety) would be over and unnecessary experts' costs avoided.

The Court of Appeal ruled that the trial date fixed for January 22, 2001, should stand and directed that copies of the videos be viewed by C and her medical experts prior to trial, with permission to D to cross-examine upon the content of footage totalling not more than 20 minutes running time, such footage (which should not include any footage of C within her own home or within the nursery visited with her child) to be identified and communicated to the C's solicitors by 1 pm on January 19, 2001.

Service of particulars of claim

In *Austin v. Newcastle Chronicle & Journal Ltd.*, [2001] EWCA Civ 834, May 18, 2001, CA, unrep., the facts were that, in February 1999, a newspaper published an article prima facie defamatory of the claimant (C). Shortly before the expiry of the one-year limitation period, C wrote a letter before action to D and followed this up by issuing a claim form claiming damages for libel and an injunction. The claim form was served shortly after issue, and well within the four month period stipulated by CPR r. 7.5(2). The particulars of claim were not served with the claim form. The claim form named the editor of the newspaper as defendant. Solicitors for the newspaper (D) quickly realised that this was a mistake, as the editor was not the author, the publisher or the printer of the article, and indicated that they would not oppose an application by C to amend the claim form so as to identify correctly the intended defendant. The parties agreed that the 14 day time limit for the service of the particulars (stipulated by r. 7.4(1)(b)) should be extended by seven days, that is to say, to March 16, 2000 (see r. 2.11). In the event, it was not until July 27, 2000, that the amended claim form and the particulars of claim were served by C on the solicitors for D. The solicitors responded by saying that they were unable to accept service because the period for applying for an extension of time, the time limit for service of a claim form stipulated by r. 7.6 had expired.

In the light of this objection C applied to the court for permission to amend the name on the original claim form and, in so far as it might be necessary, an extension of time to serve the particulars of claim. On September 20, 2000, the district judge granted this application and ordered that C should file and serve an amended claim form and amended particulars of claim by October 18, 2000.

D appealed to a judge. The judge agreed with the district judge that, as the original claim form had been served within the four-month period stipulated by r. 7.5(2), the court had jurisdiction to grant C an extension of time for serving the amended claim form naming the proper defendant. However, the judge differed from the district judge on the question whether C should be granted an extension of time for serving the particulars of claim. The judge noted that under r. 7.4(1)(b) C was required to serve particulars of claim within 14 days of the service of the claim form. It was accepted that that had not been done. Therefore, C had to apply for an extension of time under r. 3.1(2)(a). The judge ruled that such an extension should not be granted and dismissed C's claim with costs.

In giving his reasons the judge said that defamation claims should be prosecuted with urgency and that the delays attributable to C were inexcusable. In addition the judge noted that C was pursuing a claim against another newspaper for, in effect, the same libel. Further use of the court's resources by the pursuit of the instant action could not be easily justified.

C determined to appeal to the Court of Appeal. As this was a "second" appeal, the permission of the Court of Appeal was required. Rule 52.13 states that permission should not be given unless the Court considers that the appeal would raise an important point of principle or practice, or there is some other compelling reason for the Court to hear the appeal. The Court granted permission (but on what basis is not clear). On the appeal, the Court accepted that the Court should not interfere with the judge's exercise of discretion unless he had failed to take into account matters that he should have done, or had taken into account matters which were not relevant, or he was plainly wrong. The Court held that the judge had fallen into error in two respects. First, the judge relied upon the existence of the other defamation proceedings brought by C against another newspaper and (for reasons that were not clear) was not told that that action had been concluded by a settlement following payment into court and an arrangement under which C was allowed the opportunity to have his version of the facts published in the relevant newspaper (thus there was no duplication). Secondly, the judge failed to take into account the relative prejudice to the parties.

Thus the Court felt able to consider afresh whether C should, by exercise of the powers given to courts by r. 3.1(2)(a), be granted an extension of time for service of the particulars of claim. Aldous L.J. (with whom Judge L.J. and Cresswell J. agreed) quoted substantial passages from *Biguzzi v. Rank Leisure Plc.*, [1999] 1 W.L.R. 1926, CA and *Johnson v. Coburn*, November 24, 1999, CA, unrep., and said that many of the matters that needed to be taken into account in applications for extension of time made before the CPR came into effect remain relevant. For example, considerations such as detriment to the person seeking the indulgence and to other parties, the need to dispose of actions (including actions for defamation) with expedition, and the principle enshrined in the common law and in art. 6 of the European Convention of Human Rights that a party should be afforded the right to determination of his claim by an independent tribunal. His lordship added that "there is added emphasis in the CPR for the court to pay attention to the need for the proper administration of justice and importantly to do justice between

the parties". Judge L.J. said that, in this area of the law, each decision is fact-specific and "references to earlier authorities and the decisions in other cases, whether before or after the introduction of the CPR, are likely to obscure, rather than illuminate, the argument and subsequent decision".

On the matter of prejudice to the parties, the Court noted that it was not suggested that C's delays caused D any prejudice. D knew in outline the case against them from the time they received C's letter before action and they never complained of prejudice. On the other hand, dismissal of the action would undoubtedly cause prejudice to C.

Permission to use disclosed documents

The general rule is that a document disclosed in proceedings may only be used for the purpose of the proceedings in which it is disclosed. That rule is now stated in CPR r. 31.22(1). There are exceptions to this restriction on the use of documents. The exceptions stated in r. 31.22(1) are (1) where the party who disclosed the document and the person to whom the document belongs agrees that it should not apply (r. 31.22(1)(c)), (2) where the document has been read to or by the court at a hearing which has been held in public (r. 31.22(1)(a)) (an exception has created its share of difficulties), and (3) where the court gives permission (r. 31.22(1)(b)).

In *Connolly v. Taylor*, May 11, 2001, unrep., the last of these three exceptions was relevant. The facts were that a solicitor (C) acted for a client (D) in proceedings brought by the client against his former employers (X) arising out of the termination of his employment. C ceased to act for D and brought proceedings against D for unpaid interim bills rendered whilst acting for D in his claim against X. In his defence D said that the costs bills submitted by C and paid amounted to the entirety of his obligation to C and that the bills remaining unpaid were not in respect of costs reasonably incurred. In the proceedings by C against D the master ordered (1) that C and D should give one another standard disclosure of documents 14 days after the date of the order, and (2) that D should have permission pursuant to CPR r. 31.22(1)(b) to use the documents for the purpose of a detailed assessment in the proceedings between him and X (those proceedings having been terminated by D's acceptance of X's payment into court). C had resisted these orders, principally on the ground that, as a solicitor claiming against former clients for unpaid fees, and in the circumstances of the termination of the retainer between them, he had an absolute lien over the documents in question not capable of being overridden by the orders made by the master. D's position was that, without the documents, he would not be able to put in train the detailed assessment of the costs in the proceedings between him and X.

C appealed to the judge against these orders. In the course of the appeal, C abandoned his objections to the first of the orders. Consequently, attention was focussed on the whether the court should permit D to use the documents in the detailed assessment proceedings in the other litigation.

On the basis of *Ismail v. Richards Butler*, [1996] Q.B. 711, the parties agreed that (1) if D had terminated the retainer then an absolute lien would arise in favour of S for unpaid fees, but (2) if C had terminated the retainer then the normal position was that D's new solicitors would be entitled to a mandatory order obliging C to hand over D's papers against an undertaking by the new solicitors to preserve C's lien. In the latter situation, it might be proper for the court (in exceptional circumstances) to require D to lodge a security with C as a condition for C's handing over of the documents to D's new solicitors (see *Civil Procedure*, Spring 2001, Vol. 2, para. 7C-227). The parties were also agreed that there is a third proposition to be derived from *Ismail v. Richards Butler* and that is that, if the true position was that the occasion for the termination of the retainer was S's refusal to continue to act unless D put him in funds, then that should be treated by the court as the effective discharge of the retainer by C.

Obviously, therefore, the terms of the retainer, the circumstances in which it was terminated, and by whom, were crucial to the argument before the master and before the judge. Before the master the evidence on these matters was sketchy. By the time the matter came before the judge the picture had been made clearer by agreement between the parties and by further evidence. The judge had little difficulty in concluding that it was C who had terminated the retainer and therefore the lien which arose was not absolute. The judge pointed out that, in the circumstances and in accordance with the second of the propositions in *Ismail v. Richards* Butler stated above, D's new solicitors could have secured the hand-over of the documents held by C against an undertaking by them to preserve C's lien. However, they chose not to do that but rather to proceed under CPR Pt. 31.

A curious feature of this case was that, presumably, in the detailed assessment proceedings D would be claiming as against X for costs he had paid or was obliged to pay to C, whereas in the proceedings between C and D, D was disputing the extent of his liability to C. The judge was attracted to the argument that the court should order disclosure but not give D permission to use the documents disclosed in the detailed assessment proceedings until they had been looked at by the court. However, the judge concluded that such a course would incur further costs and would create further delay in the detailed assessment proceedings. The judge dismissed the appeal, taking the view that, in exercising his discretion, the master had not exceeded the generous ambit within which a reasonable disagreement is possible.

FEATURE

Fair trial and case management

In *Holmes v. S.G.B. Services Plc.*, [2001] EWCA Civ 354, February 19, 2001, unrep., in October 1998, C commenced a county court claim against his employers (D) for personal injuries suffered at work. D's case was that the accident never happened; alternatively, that it could not have happened in the way the claimant asserted. Trial was fixed for September 7, 2000. However, through oversight no directions for expert evidence were made until shortly before trial when the court directed that a joint single expert engineer should be appointed and instructed to answer certain questions. In the event, the expert delivered a report within three weeks of the trial date. C saw the report and made an application to vacate the date of trial, for the reason, in short, that the expert did not support his version of events but suggested another possible case. On September 5, the judge granted C's application and further ordered that C should have leave to amend his particulars of claim to put an alternative case, and that the parties should have permission to re-instruct the expert on particular issues. The judge gave D permission to appeal.

The Court of Appeal dismissed the appeal. The Court emphasised that the judge was exercising a discretion and was making a case management decision, very much one to be taken by a judge who was seized of the conduct of the case and who was aware of its history. The significance of this case lies, not in the question whether the judge exercised his case management powers properly, but in the reasons given by the judge for granting permission to appeal and the comments made by Buxton L.J. and Arden L.J. on those reasons. In granting permission to appeal the judge contrasted the modern position with the pre-CPR practice under which the courts readily allowed a party's application for an adjournment to permit amendments to pleadings or the obtaining of further evidence, provided any disadvantage to the other party could be compensated by orders as to costs and interest. The judge referred to the tension between, on the one hand, the emphasis in the CPR on maintaining trial dates and, on the other, the need to ensure in the interest of justice that cases are tried on a true and fair basis. The judge gave permission to appeal on the basis that, as it was possible that the Court of Appeal might resolve the tension by deciding that the CPR emphasis on maintaining trial dates should prevail, D's appeal had a real prospect of success (see r. 52.3(6)).

In responding to what the judge had said in this respect Arden L.J. was content to say that is has to be remembered that the CPR constitute a new procedural code which has to be construed in its own right, without reference back to prior practice, unless there is some compelling reason for looking at the prior practice. So the function of the judge in this situation is to look at the overriding objective and to consider how the case can be dealt with justly in the light of the circumstances placed before the court. The response of Buxton L.J. was rather more fulsome. His lordship said an objective of the CPR, and the assumption of the statute that introduced them, was that in future the court was going to play a much more extensive role in the management of cases. Nowadays, it is simply not good enough to say that it is sufficient to grant an adjournment or sufficient to interrupt a process already on hand because the matter can be compensated in costs or by interest or the like. Quite often the matter cannot be compensated fairly in costs. But whether or not that was so, in his lordship's opinion such an attitude is quite inconsistent at least with CPR r. 1.1(2)(e), which is concerned with allocating to cases an appropriate part of the court's resources. The proper management of the court's timetable and resources is just as important as the possibility of compensating the parties should that timetable be disrupted.

In dealing specifically with the judge's expressed view that there was a potential tension between, on the one hand, the need to maintain trial dates and, on the other hand, the need to deal with cases justly Buxton L.J. said that, in looking at CPR Pt. 1, it is important to note that r. 1.1(1) says that the overriding objective is to enable the court to deal with cases justly; but then in r. 1.1(2) it explains that just dealing with a case includes not only matters such as the parties being on an equal footing but also, much more directly, management questions such as saving expense, dealing with the case in a proportionate way and ensuring that it is dealt with expeditiously. In making a decision under the overriding objective the court has to balance all those considerations that are set out under that heading without giving one of them undue weight. It is essentially a matter for the judge's management, and it would be wrong for the Court of Appeal to give, or for judges to seek, any direction suggesting that one or other of those criteria was more or less important. His lordship added that that is particularly the case with regard to the possibility of adjournments. In a case that is properly managed (which this case was not) there is clear guidance given in paragraph 7 of Practice Direction (The Multi-Track) (see *Civil Procedure*, Spring 2001, Vol. 1, para. 29PD-007) as to the appropriateness of permitting an adjournment. That paragraph deals with failure to comply with case management directions and gives very firm guidance indeed that it is only going to be in the most exceptional case where there has been failure to comply with CPR directions that it will be permitted to allow that failure to be rectified by way of adjourning the trial.

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