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CIVIL PROCEDURE NEWS

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IN BRIEF

Cases

■ BLACK v. SUMITOMO CORPORATION [2001] EWCA Civ 1819, December 3, 2001, CA (Ward, May & Rix L.JJ.)
CPR r. 31.16, Supreme Court Act 1981, s. 33(2), County Courts Act 1984, s. 52(2)—B contemplating substantial claim against S for unlawful conspiracy to manipulate copper markets and breaches of articles 81 and 82 of the Treaty of Rome (anti-competitive behaviour)—B applying to judge under s. 33(2) and r. 31.16 for pre-action disclosure of documents by S—judge granting application—held, allowing B's appeal, (1) although the jurisdictional conditions in r. 31.16(3) were met, (2) in the circumstances of this case, in the exercise of discretion it was not desirable to make an order (see *Civil Procedure*, Autumn 2001, Vol. 1, para. 31.16.1)

■ BANK OF CREDIT AND COMMERCE INTERNATIONAL S.A. v. ALI & KHAN [2001] EWCA Civ 1438, September 20, 2001, CA, unrep. (Chadwick L.J.)
CPR rr. 3.1(1)(i), 9.12 & 52.10—several claims brought by company (C) against its former employees and vice versa—judge ordering that certain issues raised in claims involving C and some employees (including D1 and D2) should be tried and determined as test cases—(before Pt. 19, Sect. III in effect) judge further ordering that any determinations and findings made at the trial of the test cases should be binding on the parties to all the claims ("binding order")—at trial, judge finding in favour of C and rejecting claims of D1 and D2 and other employee parties to the test cases—Court of Appeal granting D1 and D2 permission to appeal limited to certain issues—C applying to single Lord Justice for order binding all parties to all claims to any determinations and findings made on the appeal—held, refusing the application, (1) such a binding order would not serve any useful purpose and would tend to impose a degree of inflexibility on the appeal hearing without any compensatory benefit, (2) it is unlikely that the Court will have to make any findings of fact in order to give effect to its decision, (3) if the Court does have to make such findings it would not make them binding on all parties without being satisfied that it had heard full argument from all parties, including the non-test case employees, accordingly (4) arrangements should be made to ensure legal representatives of the non-test case employees are present in court during the hearing of the appeal (see *Civil Procedure*, Autumn 2001, Vol. 1, paras 19.0.10 & 19.12, and Vol. 2, para. 9A-168)

■ BENTLEY v. JONES HARRIS & CO. [2001] EWCA Civ 1724, November 2, 2001, CA, unrep. (Latham L.J. & Burton J.)
CPR rr. 1.1, 24.2 & 32.19, C bringing professional negligence claim against his former accountants (D)—at trial, at end of C's case D submitting that there was no case to answer—C conceding that D need not be put to his election—judge acceding to submission and dismissing C's claim—in doing so, judge relying in part on D's attendance note in finding that D had not given the advice of which C complained—held dismissing C's appeal, (1) the "no case" test is whether realistically there is no basis upon which a jury could, properly directed, find in favour of the claimant on the evidence that he had adduced, (2) by operation of r. 31.19, D was deemed to have admitted the authenticity of the attendance note as a contemporaneous record, (3) it was plain from C's own evidence that his claim was bound to fail, (4) the judge was entitled to conclude that nothing in D's evidence could affect the view he had taken—"If a judge concludes at the end of a claimant's evidence, whether on the application of the defendant or of his own motion, that the claimant ... is bound to fail he is ... entitled to give judgment for the defendant, in the same way as if there had been an application at an earlier stage in the proceedings for summary judgment" *per* Latham L.J.—*Boyce v. Wyatt Engineering The Times*, June 14, 2001, CA, ref'd to [this case tried before Boyce case decided] (for discussion of no case point, see Note 19 C.J.Q. 114 (2000)) (see *Civil Procedure*, Autumn 2001, Vol. 1, paras 1.3.2, 32.19.1)

■ COMMERCE AND INDUSTRY INSURANCE COMPANY OF CANADA v. CERTAIN UNDERWRITERS OF LLOYDS OF LONDON August 1, 2001, unrep. (Moore-Bick J.)
CPR r. 34.8, Sched. 1, RSC Ord. 70, Evidence (Proceedings in Other Jurisdictions) Act 1975, ss. 1, 2 & 6, Arbitration Act 1996, ss. 2, 44 & 82—in New York arbitration proceedings, C seeking to recover from underwriters sums due under re-insurance contract—in accordance with relevant law, arbitrators directing that discovery be given and witnesses be deposed by particular date—on C's application without notice, judge making order under s. 2(2)(a) requiring R (resident in England and not a party to the arbitration) to give evidence before an examiner on issues relevant to the arbitration—held, granting R's application to set aside order, "tribunal" within the meaning of s. 1(a) does not include a private arbitral body—C making further application (with notice) for order under s. 44(2)(a) (by analogy with r. 34.8) for the examination of R in order to provide evidence in the form of a deposition—held, dis-

missing the application, (1) where appropriate, the court has jurisdiction to make an order for the examination of a witness in order to provide evidence in the form of a deposition for use in a foreign arbitral hearing where (as here) the conditions of s. 44(5) are met, (2) in the exercise of discretion it may be appropriate to make the order (see s. 2(3)(b)) where (unlike the position here) the procedures of the foreign arbitration were similar to those in English law, (3) discovery of information by pre-trial deposing of witnesses, merely for purpose of enabling opponent to find out whether he had information which may assist him in advancing his case, is not a procedure known to English law [Ed.: see also *Refco Capital Markets Ltd. v. Credit Suisse (First Boston) Ltd. The Times*, December 7, 2001, CA] (see *Civil Procedure*, Autumn 2001, Vol. 1, paras 34.8.1, sc70.6.1 & sc70.6.6, and Vol. 2, paras 2B-195, 9B-400 & 9B-402)

■ D. v. C. [2001] EWCA Civ 1511, October 17, 2001, CA, unrep. (Simon Brown, Mance & Latham L.JJ.)
CPR Pt. 35—C contemplating claims for constructive dismissal and/or damages for personal injuries against former employers (E)—C's solicitors instructing forensic psychiatrist (D) to give report on C—D recommending treatment for C and, on assumption that C had consented, referring C to consultant—D sending copy of his medical report (before C had seen it) to C's solicitors, to C's GP and to consultant—C denying any consent to referral and bringing claim against D for (1) defamation (to which D pleaded justification) and (2) breach of confidence (to which D pleaded consent)—at trial, judge (1) giving judgment for C on the breach of confidence claim but (2) dismissing C's defamation claim—held, dismissing D's appeal, (1) the judge erred in holding that C had not consented to the referral, but (2) D's sending of his medical report (prepared for the contemplated litigation against E) to the GP and the consultant was done without C's consent and amounted to breach of confidence—court observing that the transmission of the report to any third person required the express written consent of C (see *Civil Procedure*, Autumn 2001, Vol. 1, paras 31.3.19 & 35.2.1)

■ ELVEE LTD. v. TAYLOR *The Times*, December 18, 2001, CA (Sir Andrew Morritt & Chadwick L.J.)
CPR rr. 25.1(1)(h) & 30.5, Supreme Court Act 1981, s. 61 & Sched. 1, para. 1(1), Practice Direction (Interim Injunctions) para. 8.5—in copyright claim, C applying to Queen's Bench judge for ex parte search order and interim injunction restraining D from making use of C's property and confidential information—judge granting application and transferring proceedings to Chancery Division—in judgment delivered 11 weeks after full hearing in that Division, deputy judge continuing the search order—held, dismissing D's appeal, (1) it is important, both for the protection of defendants and for the proper administration of justice, that applications for search orders in intellectual property cases should be made in the Chancery Division, as required by para. 8.5, (2) C had not taken the decision to proceed in the Queen's Bench Division with the intention of obtaining an advantage by putting the application to a judge not experienced in intellectual property cases, (3) the Queen's Bench judge had jurisdiction to deal with C's application without notice, but C should have drawn para. 8.5 to the judge's attention and explained why there was good reason for not following it in the particular case, (4) in the circumstances the failure of C to do so was not a material non-disclosure sufficient to require the discharge of the order—Vice-Chancellor observing that, if events occur that delay the delivery by a deputy judge of a reserved judgment, that should be explained in the judgment (Ed. the cases on delayed judgments are summarised in *Cobham v. Frett* [2001] 1 W.L.R. 1775, P.C.) (see *Civil Procedure*, Autumn 2001, Vol. 1, paras 23.2.1, 25.3.5 & 25PD-013)

■ HANLEY v. STAGE AND CATWALK LTD. [2001] EWCA Civ 1739, November 7, 2001, CA (Simon Brown & Buxton L.JJ.)
CPR rr. 35.4 & 52.11(3)—C bringing claim against D for very serious injuries—by orders made during 2000, court permitting C and D to adduce evidence of medical experts on various issues—on issue of C's life expectancy, C permitted to adduce evidence of X and D evidence of Y—following settlement of liability claim, trial of quantum fixed for November 12—in August, D instructing expert statistician (Z) on life expectancy issue and receiving his report on September 17—on October 26, after medical experts instructed to attend forthcoming trial, judge granting applications for permission (1) by C to adduce further evidence of X (increasing his earlier estimate of C's life expectancy), and (2) by D to adduce evidence of Z—judge also granting C permission to call expert statistician if so advised and giving him leave to apply to vacate the trial date if need be—judge granting C permission to appeal—held, dismissing the appeal, (1) the facts were unusual as both sides sought to improve their position on the central issue at a late stage in the process, (2) the rules as to late service of evidence, or the introduction at late stages of new issues, or at least new approaches to existing issues, should be applied by the courts, however (3) cases can arise where justice and the fair trial of difficult and very important issues require a wider range of evidence to be considered than was originally available in the exchanges between the parties, (4) the judge's decision was not plainly wrong as he had not exceeded the generous ambit within which a

reasonable disagreement is possible—*Tanfern Ltd. v. Cameron-MacDonald* [2000] 1 W.L.R. 1311, CA; *Croft v. Jewell* (1993) PIQR 270, CA, ref'd to [Ed.: see also *Holmes v. S.G.B. Services Plc.* [2001] EWCA Civ 354, February 19, 2001, CA, unrep.] (see *Civil Procedure*, Autumn 2001, Vol. 1, paras 35.4.2 & 52.11.7)

■ LLOYD v. JOHN LEWIS PARTNERSHIP [2001] EWCA Civ 1529, October 9, 2001, CA, unrep. (Aldous & Chadwick L.JJ. and Sir Murray Stuart-Smith)
CPR 1.1— at trial of personal injuries claim brought by C against D, at end of C's case D submitting that there was no case to answer—judge acceding to submission and dismissing C's claim —in doing so, judge finding that C had failed to prove on a balance of probability that D's negligence had caused the accident—held allowing C's appeal and ordering a re-trial, (1) in coming to his conclusions on the issue of causation the judge had not addressed the correct question, (2) the general rule is that, as a condition to listening to a submission of no case to answer a judge is required to put D to his election whether or not to call evidence—*Boyce v. Wyatt Engineering The Times*, June 14, 2001, CA, ref'd to (see *Civil Procedure*, Autumn 2001, Vol. 1, para. 1.3.2)

■ PARAGAON FINANCE PLC. v. NOUEIRI (PRACTICE NOTE) [2001] EWCA Civ 1402, *The Times*, October 4, 2001, CA (Brooke, Tuckey & Laws, L.JJ.)
Courts and Legal Services Act 1990, ss. 27 & 28—private person (C) bringing claim against company (D)—C making applications to Court of Appeal—at hearing, in exercise of discretion under s. 27(2)(c), X (who was bankrupt) given permission to address Court as C's representative—subsequently, Court determining that X was not a proper person to act in such capacity and making banning order preventing him from conducting litigation on behalf of persons other than himself—in making order, Court holding, (1) the discretion to grant rights of audience under s. 27(2)(c) should only be exercised in exceptional circumstances, (2) similar considerations apply to the grant of a right to conduct litigation under s. 28(2)(c)—Court stating that court staff should be vigilant to ensure that formal documents are signed either by litigant himself or by person having right to conduct litigation on his behalf—need for administrative systems to help court identify lay persons holding themselves out to act for others on a regular basis referred to [Ed.: see also *Izzo v. Philip Ross & Co. The Times*, August 9, 2001 (Neuberger J.)] (see *Civil Procedure*, Vol. 2, paras 1-117, 9A-612 & 9B-458)

■ PEROTTI v. WATSON September 26, 2001, unrep. (Neuberger J.)
CPR rr. 3.4(2) & 24.2—beneficiary (C) bringing action against administrator of estate (D)—in March 1997, trial judge giving judgment largely against C, and Court of Appeal dismissing C's appeal—subsequently, as litigant in person, C bringing another action against D, claiming that D (1) failed to invest estate property properly (*Nestlé v. National Westminster Bank Plc.* [1993] 1 W.L.R. 1260, CA), and (2) was guilty of fraud—on D's application, Master striking out these claims—Master finding (1) both claims should have been pleaded and pursued in the earlier action, and (2) in any event, the first stood no chance of success, and the second was inadequately pleaded—C applying to judge for permission to appeal—held, refusing permission, although (1) it would require an exceptional case before an administrator could be liable on the basis of the Nestlé case, C's first claim should not be struck out on that ground alone (especially in light of *Royal Brompton Hospital NHS Trust v. Hammond The Times*, May 11, 2001, CA), and (2) it would be harsh to strike out a litigant in person's claim on ground that it was inadequately pleaded, nevertheless (3) in the circumstances, the second action involved abuse of process and represented oppression on D, (4) the fact that C was unaware of the Nestlé case until after the trial of the first action was a factor of little weight, (5) C had alleged fraud throughout and the alleged new grounds for the allegation were insubstantial—*Henderson v. Henderson* (1843) 3 Hare 100; *Johnson v. Gore Wood & Co.* [2001] 2 W.L.R. 72, H.L., also ref'd to (see *Civil Procedure*, Autumn 2001, Vol. 1, para. 3.4.3)

■ R. (ASHWORTH HOSPITAL AUTHORITY) v. THE MENTAL HEALTH REVIEW TRIBUNAL FOR WEST MIDLANDS AND NORTH-WEST REGION [2001] EWHC Admin 901, November 9, 2001, unrep. (Stanley Burnton J.)
CPR rr. 25.1(1)(a) & 54.10—Mental Health Review Tribunal (T) directing immediate discharge of patient (P) detained at secure hospital (H) under Mental Health Act 1983, s. 3—doctor (X) and social worker (Y) immediately, respectively, recommending (s. 3) and applying for (s. 13), P's detention for treatment under ss. 3 & 13—H acting on X's recommendation and continuing to detain P under s. 3—judge granting H permission to apply for judicial review of T's decision and (1) staying T's decision (r. 54.10(2)) and (2) restraining P's release by interim injunction—subsequently, P granted permission to apply for judicial review of X's recommendation, Y's application and H's decision to detain—held, (1) T's decision should be quashed because (a) it was unreasonable, as it was one which no sensible tribunal acting with due appreciation of its responsibilities would have made, and (b) the reasons given for it were inadequate, (2) P's continued detention under s. 3 was lawful, but (3) the stay of T's decision granted by the judge was of no effect because, by the time it was ordered, the decision of T had had effect, and (4) the interim injunction should not have been granted because, except in the most exceptional cases, the court should not deprive a person of his liberty or compel him to submit to treatment (see *Civil Procedure*, Autumn 2001, Vol. 1, paras 25.1.8 & 54.10.2, and Vol. 2, para. 9A-161 & 9A-165)

■ SECRETARY OF STATE FOR TRADE AND INDUSTRY v. EASTAWAY [2001] EWCA Civ 1595, September 13, 2001, CA, unrep. (Chadwick & Laws L.JJ. and Sir Philip Otton)
CPR r. 3.1(2)(f), Company Directors Disqualification Act 1986, ss. 1A, 6(1), 7(2A) & 20(1), Practice Direction (Directors Disqualification Proceedings) Pt. 2, Human Rights Act 1998, s. 3 and Sched. 1 Pt. I art. 6—in disqualification proceedings brought by Secretary of State (S), former director (E) giving undertaking to sign a Carecraft statement in form agreed and to agree to summary disposal of those proceedings—after introduction of disqualification undertaking procedure, E seeking release from that undertaking and offering to give disqualification undertaking under s. 7(2A)—S prepared to accept this arrangement provided (in accordance with his practice) the undertaking contained a schedule setting out the grounds of unfitness—judge refusing E's application for stay of the proceedings made on ground that S could not impose that proviso—held, dismissing E's appeal, (1) a stay should not be granted unless S's practice was both *ultra vires* and unlawful, (2) the power conferred on S by the 1986 Act to accept a disqualification undertaking is circumscribed by s. 7(2A), (3) the Act contains no provision which requires that a disqualification undertaking must be offered, or can only be accepted, on the basis of a scheduled statement of unfit conduct, however (4) as a matter of law, S may take the view, for the purposes of s. 7(2A), that it is inexpedient in the public interest to accept a disqualification undertaking without a schedule of unfit conduct which will not be disputed thereafter for the purposes of the 1986 Act and other consequential matters, (5) such a schedule is not a statement which may be used in evidence under s. 20(1) because it is not made "in pursuance of any requirement imposed by or under" s. 7(2A) or any other section of the 1986 Act, and there was no violation of E's rights under art. 6(1) on this ground—Chadwick L.J. explaining (1) history and purpose of the undertakings procedure, and (2) the practical effects of a statement of unfit conduct (see *Civil Procedure*, Autumn 2001, Vol. 1, para. B2-004, and Vol. 2, paras 3D-9.1 & 3D-34)

■ SOCIÉTÉ ERAM SHIPPING CO. LTD. v. COMPAGNIE INTERNATIONALE DE NAVIGATION [2001] EWCA Civ 1317, [2001] 2 Lloyd's Rep. 627, CA (Schiemann, Mance & Keene L.JJ.)
CPR Sched. 1, RSC Ord. 49, rr. 1, 3 & 8—C obtaining judgment against D in French court—C registering judgment in England under Civil Jurisdiction and Judgments Act 1982—C believing that D maintained accounts with bank (H) in Hong Kong—H having place of business in England with person authorised to accept service within jurisdiction—C obtaining against H a garnishee order to show cause—alternative remedy available to C in Hong Kong—C's application to make the order absolute transferred (on application of D) to Commercial Court—judge dismissing C's application, principally on ground of double jeopardy risk to H ([2001] 2 Lloyd's Rep. 394)—held, allowing C's appeal and making garnishee order absolute, (1) the test is whether there is, as a practical matter, a real risk of H having to pay twice, (2) the exercise of the discretion to grant garnishee relief should not in respect of a foreign debt be confined by the answer to the question whether the law of the *situs* of that debt would recognise the English order or its characteristics under English law (see *Civil Procedure*, Autumn 2001, Vol. 1, para. sc49.1.12, sc49.2.3 & sc49.8.1)

■ SPHERE DRAKE INSURANCE LTD. v. EUROINTERNATIONAL UNDERWRITERS LTD. July 27, 2001, unrep. (Langley J.)
CPR rr. 3.1(2)(h) & 19.2(2)—insurance company (C) giving binding authority to underwriters (D)—reinsurance contracts written by D under the binder including contract with A (the "A contract"), for whom W were the brokers—C bringing claim against D alleging that binder operated fraudulently—W commencing proceedings against D for declaration that D liable to indemnify them insofar as D may be found to have defrauded C in respect of the A contract—W applying to be joined in the claim by C against D, or for order that their claim against D should be tried together with C's claim against D—W's application supported by D but opposed by C—held, dismissing the application, (1) r. 19.2(2)(a) is wide enough to permit joinder where the court considers that the existing dispute can better be resolved by adding a new party with a sufficient interest, whether because (a) the issue may otherwise go by default, or (b) the new party has a particular interest in its resolution which would otherwise be unrepresented, however (2) in the instant case, it was not desirable that W should be added as a party to assist the court in resolving the issue of fraud between C and D, because (3) C was not making any allegation of fraud against W, either expressly or impliedly, in respect of the A contract, and W were not directly affected by C's claim (see *Civil Procedure*, Autumn 2001, Vol. 1, paras 1.4.15 & 19.2.3, and Vol. 2, para. 9A-160)

■ UTTLEY v. UTTLEY July 8, 2001, unrep. (Hallett J.)
CPR rr. 36.11 & 36.20—following road accident, in December 1998, passenger (C) bringing personal injuries claim against driver (D)—D's insurers disputing C's claims for damages for inability to work and future loss of earnings—on November 24, 1999, D making payment into court—in June 2000, court fixing January 24, 2001, as trial date—on December 12, 2000, C serving up-dated witness statement (for which D had pressed periodically from August 2000 onwards) and schedule of loss—on December 20, 2000, D disclosing to C video surveillance evidence obtained on July 18, 2000—as a

result, on January 17, 2001, after some trial costs incurred, C accepting payment in—master making costs order requiring (1) D to pay C's costs up to 21 days after payment in and (2) C to pay D's costs from that date—held, dismissing C's appeal, (1) the master's decision was not plainly wrong, (2) it was not unjust that the normal costs consequences stated in r. 36.20 should apply, (3) in the circumstances of this case, D were entitled to delay disclosure of the video evidence for a reasonable time, sufficient to enable them to assess it in the light of any assertions as to his ability to work that C might have made in his up-dated witness statement and other evidence, (4) C should have served such statement much earlier than he did (see *Civil Procedure*, Autumn 2001, Vol. 1, para. 36.20.1)

■ WHITTAKER v. SOPER [2001] EWCA Civ 1462, September 28, 2001, CA, unrep. (Aldous & Rix L.JJ.)
C.P.R rr. 3.1(3), 3.9 & 35.4—C and D shareholders in company—C bringing claim against D on agreement for distribution of company's profits—shortly before trial date (a previous date having been lost), D applying under r. 35.4 for permission to adduce evidence of new expert witness—procedural judge granting permission and vacating trial date (1) subject to condition (a) that D execute charge to secure any monies hereafter adjudged to be owed, and (b) that, pending registration of that charge, D execute no other charge, and (2) specifying that D should be "debarred from defending" should they fail to comply by April 6 (r. 3.1(3))—subsequently, charge executed, but not in terms agreed by C to be adequate, and not registered—further, D executing another charge in favour of a bank—at start of trial (two prior trial dates now having been lost), on C's application trial judge ruling that, (1) by operation of the procedural judge's order, and (2) on the ground that D had executed a further charge, D respectively (a) had been automatically debarred from defending from after April 6, and (b) in any event, should now be barred from defending—judge refusing D's application under r. 3.9 for relief from the sanction as imposed by the procedural judge—judge giving judgment for C for £241,000, plus interest and costs—held, granting D's application for permission to appeal and allowing the appeal, (1) it was now clear, contrary to what the trial judge believed, that the charge had been executed in time, however (2) it was technically defective and not an adequate compliance with the procedural judge's order, but (3) in itself, this would not justify a refusal to grant D relief under r. 3.9, (4) the defect was not intentional (r. 3.9(1)(c)), it was not D's personal fault (r. 3.9(1)(f)), it was apparent to C but C did not pursue the matter until after costs of trial were incurred, further (5) D's failure did not prejudice the trial date (r. 3.9(1)(g)), as the trial judge could have granted relief in terms which would have protected C without penalising D with the loss of his defence, (5) D's execution of the second charge, though a deplorable breach of the procedural judge's order, did not prejudice C and it would be unjust to prevent D from defending on that ground, (6) the judge should not have barred the defence on the day of trial itself, unless he felt that C could not have a fair trial on that occasion or was otherwise prejudiced in ways that he could not correct by the use of powers at his disposal—*Biguzzi v. Rank Leisure Plc.* [1999] 1 W.L.R. 1926, CA; *Keith v.* C.P.M. *Field Marketing Ltd The Times*, September 29, 2000, CA, ref'd to (see *Civil Procedure*, Autumn 2001, Vol. 1, paras 3.1.4 & 3.9.1)

Practice Directions

■ PRACTICE NOTE (RESERVED JUDGMENTS : HANDING DOWN) [2002] 1 All E.R. 160, CA
CPR Pt. 52, Practice Direction (Appeals) paras 15.12 to 15.14—revised arrangements for handing down of reserved judgments—apply where appeal need attract no special degree of confidentiality or sensitivity—copies to be provided on confidential basis, generally two days before handing down—where consequential orders agreed, no obligation on parties to be represented by advocates—where Court considers attendance not necessary, costs may be disallowed—practice for faxing and filing draft orders—applications for permission to appeal to House of Lords may be dealt with on written submissions where agreed (see *Civil Procedure*, Autumn 2001, Vol. 1, para. 40.2.6 & 52PD-056)

Statutory Instruments

■ CIVIL PROCEDURE (AMENDMENT NO. 5) RULES 2001 (S.I. 2001 No. 4015)
amend Civil Procedure Rules 1998 (S.I. 1998 No. 3132)—add Pts. 58 to 62 (superseding relevant Pt. 49 practice directions for "specialist proceedings")—fixed costs awarded in enforcement proceedings and possession proceedings—service out of jurisdiction—enforcement of judgments—judgment summonses in county courts—experts' discussions and court directions—minor amendments—in force January 14, 2002, March 1 & 25, 2002 (see *Civil Procedure*, Autumn 2001, Vol. 1, *seriatim*)

■ CIVIL PROCEDURE (AMENDMENT NO. 6) RULES 2001 (S.I. 2001 No. 4016)
CPR Sched. 1, RSC Ord. 115, rr. 24, 26 & 27, Terrorism Act 2000 (c. 11), Anti-terrorism, Crime and Security Act 2001 (c. 24)—make amendments consequential upon amendments made to Sched. 4 to the 2000 Act by the 2001 Act—those amendments extend circumstances in which a prosecutor may apply to the High Court for a restraint order—in effect on same date as 2001 Act in force (see *Civil Procedure*, Autumn 2001, Vol. 1, paras sc115.26 & sc115.27)

■ CIVIL JURISDICTION AND JUDGMENTS ORDER 2001 (S.I. 2001 No. 3929)
European Communities Act 1972, s. 2, Civil Jurisdiction and Judgments Act 1982—implements Council Regulation (EC) No. 44/2001 of 22nd December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters—Sched. 1 applies certain provisions of the 1982 Act with modifications—Sched. 2 amends 1982 Act—Sched. 3 makes consequential amendments—in force January 25 and March 25, 2002

IN DETAIL

Pre-action disclosure

The power of the High Court to order pre-action disclosure of documents arises out of the Supreme Court Act 1981, s. 33(2), as amended by the Civil Procedure (Modification of Enactments) Order 1998 pursuant to the Civil Procedure Act 1997 so as to extend the power from cases in respect of personal injury or death to all cases. (For the comparable power of county courts, see County Courts Act 1984, s. 52(2).) This extension was recommended in the Access to Justice Final Report (July 1996) (Sect. II paras 47 to 52). (Section 33(2) was originally enacted as the Administration of Justice Act 1970, s. 31.) In *Bermuda International Securities Ltd. v. K.P.M.G.* [2001] EWCA Civ 269, *The Times*, March 14, 2001, CA, the relationship between the statutory scheme for pre-action disclosure and the requirements for disclosure stipulated in the pre-action protocols was discussed.

The procedure for an application under s. 33(2) is governed by CPR r. 31.16. Rule 31.16(3) states that the court may make an order pre-action disclosure "only if" certain conditions exist. The first two are obvious enough and reflect the terms of s. 33(2): it must be the case that (a) the respondent to the application likely to be a party to "subsequent proceedings", and (b) the applicant is also likely to be a party to those proceedings. The next condition is (c) if proceedings had started, the respondent's duty by way of standard disclosure (set out in r. 31.6) would extend to the documents or classes of documents of which the applicant seeks disclosure. The final condition is that (d) disclosure before proceedings have started is desirable in order to (i) dispose fairly of the "anticipated proceedings", (ii) assist the dispute to be resolved without proceedings, or (iii) save costs.

In *Black v. Sumitomo Corporation* [2001] EWCA Civ 1819, December 3, 2001, CA, unrep., there was the prospect of heavy litigation in the Commercial Court involving a claim by B against S for unlawful conspiracy to manipulate copper markets and breaches of articles 81 and 82 of the Treaty of Rome (anti-competitive behaviour). B claimed that he had suffered losses amounting to at least $126m from trading in copper. B applied to the High Court for pre-action disclosure. The deputy judge granted the application and made an order requiring S to make certain disclosures. S appealed to the Court of Appeal.

Put shortly, the essential difference between the parties on the appeal was that S submitted that the judge had never really stood back to take account of the circumstances of the case for the purpose of the exercise of his discretion, whereas B submitted that the judge had taken everything into account and thus his decision on what in the end was a matter for his discretion was unassailable. S's appeal was allowed by the Court of (Ward, May & Rix L.JJ.).

Rix L.J. explained that, before it was amended in 1998, s. 33(2) spoke of the application of a person who appears to the High Court to be likely to be a party to subsequent proceedings in that court "in which a claim in respect of personal injuries to a person or in respect of a person's death is likely to be made". The expression "likely to be made" included in this phrase fell to be considered by the courts on a number occasions (most recently in *Burns v. Shuttlehurst Ltd.* [1999] 1 W.L.R. 1449, CA). However, as the phrase was deleted entirely by the 1998 amendment, these cases cease to be binding. Nevertheless, Rix L.J. examined them carefully to see whether they had any value in the circumstances presented by the instant case. His lordship concluded that those cases reveal, and usefully reveal, the following. First, that at any rate in its origin the power to grant pre-action disclosure was not intended to assist only those who could plead a cause of action to

improve their pleadings, but also those who needed disclosure as a vital step in deciding whether to litigate at all or as a vital ingredient in the pleading of their case. Secondly, that it was highly relevant in those cases that the injury was clear and called for examination of the documents in question, the disclosure was narrowly focused and bore directly on the injury complained of and responsibility for it, and the documents would be decisive on the conduct or even the existence of the litigation. Thirdly, that on the question of discretion, it was material that a prospective claimant in need of legal aid might be unable to commence proceedings without the help of the pre-action disclosure.

With this background, Rix L.J. proceeded to examine carefully r. 31.16 and the deputy judge's approach to the problems presented in this case. In effect, the Court differed from the judge on the need to keep separate the question whether the Court is satisfied as to the jurisdictional thresholds imposed by r. 31.16 and which have to be passed ("only where"), and the question whether in the exercise of the court's overall discretion an order for pre-action disclosure should be made. His lordship said that the jurisdictional thresholds were not intended to be high. In any given case, the real question is likely to be one of discretion, and answering the jurisdictional questions in the affirmative "is unlikely in itself to give the judge much a steer as to the correct exercise of his power". His lordship found that, because of the way in which he proceeded, the deputy judge decided the question of discretion even before considering the breadth of the disclosure requested or the allegation of oppression made by S. Therefore, the Court was entitled to exercise its discretion anew.

Handing down reserved judgments

In April 1998, Practice Statement (Supreme Court : Judgments) [1998] 1 W.L.R. 825; [1998] 2 All E.R. 667, made new arrangements for the delivery of judgments in the High Court and the Court of Appeal, particularly for the availability of (a) judgments handed down in advance of hearing, (b) approved versions of handed down judgments, (c) uncorrected copies of handed down judgments, and (d) approved versions of *ex tempore* judgments. Subsequently, these arrangements were modified by Practice Statement (Supreme Court : Judgments) (No. 2), [1999] 1 W.L.R. 1. Later on, when Pt. 52 (Appeals) was inserted in CPR further directions for the handing down of judgments in the Court of Appeal were included in Practice Direction (Appeals) paras 15.12 to 15.14 (see Civil Procedure, Autumn 2001, Vol. 1, paras 52PD-056).

On December 19, 2001, the Master of the Rolls issued Practice Note (Reserved Judgments : Handing Down), [2002] 1 All E.R. 160, CA (Lord Phillips M.R.), giving further directions concerning the handing down of reserved judgments in the Court of Appeal (Civil Division) in proceedings where the result of the appeal "need attract no special degree of confidentiality or sensitivity" (para. 1).

It is provided that the copy of the judgment supplied to the parties' legal advisers before handing down can be shown, in confidence, to the parties but only for the purpose of obtaining instructions and on the strict understanding that the judgment, or its effect, is not to be disclosed to any other person (para. 2). Any proposed correction to the draft judgment should, as at present, be sent to the clerk to the judge who prepared the draft, with a copy to any other party (para. 6).

Where any consequential orders are agreed there will be no obligation on the parties to be represented by their advocates on the occasion of the handing down of the judgment (para. 4). (Specific directions are given as to the filing by the parties of draft orders.) Where the court considers that there has been attendance at hand down which was not necessary the costs of such attendance may be disallowed (*ibid.*).

Where a party wishes to apply for permission to appeal to the House of Lords pursuant to the Administration of Justice (Appeals) Act 1934, s. 1, the court will be prepared, if all parties agree, to deal with the application on the basis of written submissions made by all parties to the appeal as to why such permission should, or should not, be granted (para. 5). (Specific directions are given as to the filing by the parties of such submissions.)

Council Regulation

Council Regulation (EC) No. 44/2000 of 22nd December 2000, that is to say, the Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, comes into force on March 1, 2002. The Regulation replaces, for those EC States that are bound by it, the well-known Brussels Convention, brought into force in England by the Civil Jurisdiction and Judgments Act 1982. The Brussels Convention made necessary numerous changes to the former Rules of the Supreme Court (and to a lesser extent the County Court Rules), most notably in relation to those court rules dealing with service out of the jurisdiction and the recognition and enforcement of judgments. The Council Regulation has made it necessary for numerous further amendments to be made to CPR provisions dealing with these matters.

The Council Regulation was made possible by the Treaty of Amsterdam which inserted a new art. 65 into the E.C. Treaty, making it possible for future European initiatives in the field of private international law to be taken in the form of Regulation (or Directive). (For a very useful account of the Regulation, see *Prof. Jonathan Harris, "The Brussels Regulation"* 20 Civil Justice Quarterly 218 (2001)).

The legislative changes needed as a consequence of the coming into force of the Council Regulation are contained in the Civil Jurisdiction and Judgments Order 2001 (S.I. 2001 No. 3929). Schedule 1 to this Order applies certain provisions of the 1982 Act with modifications for the purposes of the Council Regulation, Schedule 2 makes amendments to the 1982 Act, and Schedule 3 contains consequential amendments. The Civil Jurisdiction and Judgments (Authentic Instruments and Court Settlements) Order 2001 (S.I. 2001 No. 3928), applies provisions of the Civil Jurisdiction and Judgments Order 2001 to authentic instruments (e.g. notarised agreements containing obligations) and court settlements (i.e. court approved settlements enforceable without having to be drawn up as judgments) from other Member States bound by the Council Regulation, and which by virtue of Chapter IV of the Regulation are enforceable in the same manner as judgments.

The necessary amendments to the CPR required to bring into effect the Council Regulation as implemented in England by the Orders in Council referred to above are contained in the Civil Procedure (Amendment No. 5) Rules 2001 (S.I. 2001 No. 4015). As would be expected, these amendments principally affect CPR Pts. 6, Sect. III(Special Provisions About Service Out of the Jurisdiction), and Sched. 1, RSC Ord. 71 (Reciprocal Enforcement of Judgments, Etc.) and Sched. 2, CCR Ord. 35 (Enforcement of County Court Judgments Outside England and Wales).

CPR UPDATE

Civil Procedure (Amendment No. 5) Rules 2001

Important additions and amendments have been made to the CPR by the Civil Procedure (Amendment No. 5) Rules 2001 (S.I. 2001 No. 4015). A few quite minor amendments came into effect on January 14, 2002; they are explained immediately below. But the rest of the changes do not come into effect until March 1 and 25, 2002; some of them are explained below (others will be dealt with in later issues of CP News).

Minor CPR amendments in effect on January 14, 2002

The following changes have been made to the CPR by the Civil Procedure (Amendment No. 5) Rules 2001 (S.I. 2001 No. 4015) rr. 37, 38 and 40, and took effect on January 14, 2002. (Except where otherwise indicated, paragraph and page references are to *Civil Procedure*, Autumn 2001, Vol. 1.)

Pages 1364 & 1369 *to* 1370—*Sched.* 1, RSC *Ord.* 92, *r.* 3A, *and Ord.* 93, *rr.* 22 *and* 23

CPR Sched. 1, RSC Ord. 92, r. 3A contains provisions dealing with the preparation and filing of witness statements or affidavits where the proceeds of sales of shares under the Banking Act 1987, s. 26 were paid into court (see para. sc92.3A, 1364). CPR Sched. 1, RSC Ord. 93, r. 23 is concerned with applications to the High Court under certain sections of the Banking Act 1987 (see para. sc93.23, p 1370). Following changes in the primary legislation referred to, both of these rules are now omitted from the CPR.

CPR Sched. 1, RSC Ord. 93, r. 22 is concerned with applications to the High Court under certain sections of the Financial Services Act 1986 (see para. sc93.22, p 1369). This rule is now amended by substituting, in the heading and in para. (1), for the words "the Financial Services Act 1987", the words "the Financial Services and Markets Act 2000", and in para. (3) by substituting for the words "the Secretary of State or a designated agency under section 72" the words "the Financial Services Authority under section 367".

Page 1539—*Sched.* 2, CCR *Ord.* 34, *r.* 1

CPR Sched. 2, CCR Ord. 34, r. 1, deals with the issue and service of proceedings for the imposing of certain penalties under the County Courts Act 1984, s. 14 (penalties for assaulting officers), s. 92 (penalty for rescuing goods seized) and s. 124 (liability of bailiff for neglect to levy execution) (see para. cc35.1, p 1539). The text of this rule is now amended by adding to it a reference to s. 118 of the 1984 Act (power to commit for contempt) (see Vol. 2, para. 9A-740). Thus in para. (a) of r. 1, "section 14 or 92" now reads "section 14, 92 or 118", and, for the purpose of reflecting the text of s. 118(1)(a), after "seized in execution," the words "or by wilfully insulting a judge, juror, witness or any officer of the court," are inserted. (The draftsman appears to have forgotten to amend the title to the rule.)

Specialist proceedings

Under Part 49 of the CPR, (1) Admiralty proceedings, (2) arbitration proceedings, (3) commercial and mercantile actions, and (4) Technology and Construction Court business, are treated as "specialist proceedings" and are dealt with according to the relevant practice directions applicable to those proceedings.

By the Civil Procedure (Amendment No. 5) Rules 2001 (S.I. 2001 No. 4015), r. 29 and Scheds. 2 to 6, five new Parts are added to the CPR for the purpose of dealing with these four types of proceedings. The new Parts will come into effect on March 25, 2002, and the relevant practice directions will cease to apply. These Parts are: Pt. 58 (Commercial Court) (rr. 58.1 to 58.15), Pt. 59 (Mercantile Courts) (rr. 59.1 to 59.12), Pt. 60 (Technology and Construction Court Claims) (rr. 60.1 to 60.6), Pt. 61 (Admiralty Claims) (rr. 61.1 to 61.13), Pt. 62 (Arbitration Claims) (rr. 62.1 to 62.21).

Setting aside of interim injunction

Rule 25.10 states that, if the court has granted "an interim injunction" and the claim is stayed other than by agreement between the parties, then "the interim injunction shall be set aside" unless the court orders that it should continue to have effect even though the claim is stayed.

As is explained in *Civil Procedure*, Vol. 1, para. 25.10.1, an interim injunction is granted on the assumption that the claim will be actively pursued. It should not be continued for longer than is necessary.

In r. 25.1(1), the "interim injunction" is identified as one of the interim remedies that may be granted by the court and the "freezing injunction" is separately listed (see para. (a) and (f)). It is a matter for doubt whether this is meant to indicate that "interim injunction" and "freezing injunction" are meant to be treated as mutually exclusive categories of interim remedy for the purposes of the various rules in Pt. 25. If they are then the use of the words "an interim injunction" in r. 25.10 would indicate that that rule does not extend to pro-

ceedings in which the court has granted a freezing injunction. There are practical difficulties in including freezing injunctions within r. 25.10.

The doubt has been resolved in favour of this interpretation by an express amendment to r. 25.10 now made by the Civil Procedure (Amendment No. 5) Rules 2001 (S.I. 2001 No. 4015) r. 17, and to come into effect on March 25, 2002. As amended, the rule now states that where the court has granted "an interim injunction other than a freezing injunction", and the claim is stayed (otherwise than by a agreement between the parties), then the interim injunction shall be set aside unless the court orders that it should continue to have effect even though the claim is stayed.

A party who obtains an interim remedy in the form of a freezing injunction should promptly apply to the court or its discharge if the time comes when it is no longer necessary (see cases cited in para. 25.10.1).

Reciprocal enforcement of judgments

By rr. 35, 41 and Sched. 7 of the Civil Procedure (Amendment No. 5) Rules 2001 (S.I. 2001 No. 4015), a new Section V (rr. 45 to 47) on reciprocal enforcement of judgments is added to Sched. 1, RSC Ord. 71 (Reciprocal Enforcement of Judgments, Etc.), and amendments are made to rr. 32, 33 and 36 of Ord. 71 and to Sched. 2, CCR Ord. 35 (Enforcement of County Court Judgments Outside England and Wales). These additions and amendments come into effect on March 1, 2002, and provide for applications to the court for the enforcement of judgments under Council Regulation (EC) No. 44/2001 of 22nd December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (see further *In Detail* page). Amendments are made to CPR Pt. 6 (Service of Documents), specifically to rr. 6.18, 6.19, 6.22 and 6. 23, to provide for service out of the jurisdiction where the jurisdiction of the court is determined under the Council Regulation.

Transitional arrangements

Pt. 70 (General Rules About Enforcement of Judgments and Orders), Pt. 71 (Orders to Obtain Information From Judgments Debtors), Pt. 72 (Third Party Debt Orders), and Pt. 73 (Charging Orders, Stop Orders and Stop Notices) were introduced into the CPR by the Civil Procedure (Amendment No. 4) Rules 2001 (S.I. 2001 No. 2792) and come into force on March 25, 2002. And on that day, subject to the transitional provisions in r. 24 of that statutory instrument, the old rules as to enforcement found in CPR Sched. 1 and Sched. 2 cease to have effect. Rule 24 states that Pts. 70 to 73 shall not apply to certain specified enforcement proceedings issued before March 25, 2002, and the rules of court in force immediately before that date shall apply to those proceedings as if they had not been amended or revoked. The specified proceedings are: (a) an application for an oral examination, (b) an application for a garnishee order, (c) an application by a judgment creditor for an order for the payment to him of money standing in court to the credit of a judgment debtor, (d) an application for a charging order, (e) a claim for the enforcement of a charging order by sale of the property charged, and (f) an application for a stop order.

The Civil Procedure (Amendment No. 5) Rules (S.I. 2001 No. 4015) inserts into CPR Part 45 (Fixed Costs) a new rule (r.45.6) incorporating an additional table (Table 4: Fixed Enforcement Costs) out the amounts of fixed costs which may be awarded in enforcement proceedings under Pts.70 to 73. Rule 43 of that statutory instrument contains further transitional provisions and savings. Practitioners should take a deep breath and read the rule very carefully, and make sure that they keep a copy of it to hand.

The rule states as follows:

> (1) Where proceedings for the possession of land are issued before 25th March 2002, rule 42(b) shall not apply, and CCR Order 38 shall apply as if it had not been amended.
>
> (2) Where on or after 25th March 2002 fixed costs are to be awarded in enforcement proceedings which, pursuant to rule 24 of the Civil Procedure (Amendment No. 4) Rules 2001, continue to be governed by rules in Schedule 1 or Schedule 2 to the Civil Procedure Rules 1998 rather than rules in Parts 70 to 73, the rules governing enforcement costs in force immediately before 25th March 2002 shall continue to apply as if they had not been revoked.

It will be noted that r. 43(1) refers back to r. 42(b) in the statutory instrument, and also to r. 24 of a previous statutory instrument, the Civil Procedure (Amendment No. 4) Rules 2001 (S.I. 2001 No. 2792). What do r. 42(b) and r. 24 say?

First r. 42(b). Rule 42 amends Sched. 2, CCR Ord. 38, App B. This appendix (which follows O. 38, r. 18), has effect for the purpose of showing the total amount which shall be allowed to the solicitor for the claimant as fixed costs. The appendix is divided into three Parts, and the second relates to fixed costs on judgments in fixed date actions and contains a table (see *Civil Procedure*, Autumn 2001, Vol. 1, para. cc38.B.2, pp 1546 to 1547). By r. 42(b), the second item described in column

1 of the table is amended, as from March 25, 2002. (Other amendments to CCR Ord. 38, App B are made by r. 42(a) and r. 42(c).) In its unamended form, the description of this item opens with the words "possession of land suspended on payment of arrears of rent, whether claimed or not, in addition to current rent". These words are now amended and in its entirety the description of the item will read as follows as from March 25, 2002.

> "(ii) possession of land, where one of the grounds for possession is arrears of rent (whether or not the order for possession is suspended on terms) and the defendant has neither delivered a defence, admission or counterclaim, nor otherwise denied liability"

Secondly, r. 24 of the Civil Procedure (Amendment No. 4) Rules 2001 (S.I. 2001 No. 2792); what does it say? It is necessary to go back a bit. This statutory instrument added to the CPR new Parts dealing with enforcement of judgments and orders and, as a consequence made substantial repeals of RSC and CCR provisions presently found in Schedules 1 and 2 to the CPR. The new Parts are: Pt. 70 (General Rules About Enforcement of Judgments and Orders), Pt. 71 (Orders to Obtain Information from Judgment Debtors), Pt. 72 (Third Party Debt Orders), and Pt. 73 (Charging Orders, Stop Orders and Stop Notices). Rule 26 and Sched. 1 of the Civil Procedure (Amendment No. 5) Rules 2001 (S.I. 2001 No. 4015) have the effect of inserting in Pt. 45 (Fixed Costs) a new rule and table, r. 45.6 (Fixed enforcement costs) and Table 4. The rule simply states that Table 4 shows the amounts to be allowed in respect of solicitors' costs in the circumstances mentioned. (The amounts shown in Table 3, attached to r. 45.5 (Miscellaneous fixed costs), are to be allowed in addition, if applicable.)

The new Parts added by S.I. 2001 No. 2792 and r. 26 of S.I. 2001 No. 4015 are to come into effect on March 25, 2002. Rule 24 of S.I. 2001 No. 2792 contains transitional provisions (and, as already noted is referred to in r. 43 of S.I. 2001 No. 4015). Rule 24 states as follows:

> (1) Parts 70 to 73 shall not apply to any enforcement proceedings specified in paragraph (2) which are issued before 25th March 2002, and the rules of court in force immediately before that date shall apply to those proceedings as if they had not been made or revoked.
>
> (3) The enforcement proceedings to which this rule applies are -
>
> (a) an application for an order for oral examination;
>
> (b) an application for a garnishee order;
>
> (c) an application by a judgment creditor for an order for the payment to him of money standing in court to the credit of a judgment debtor;
>
> (d) an application for a charging order;
>
> (e) a claim for the enforcement of a charging order by sale of the property charged; and
>
> (f) an application for a stop order.

Obviously, for some time to come, practitioners will have to remain aware of the relationship between r. 24 of S.I. 2001 No. 2729 and rr. 42(b) and 43 of S.I. 2001 No. 4015. The moral is, don't throw away old editions of Civil Procedure!

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