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IN BRIEF

Cases

■ ANGLO-EASTERN TRUST LTD. v. KERMANSHAHCHI [2002] EWCA Civ 198; February 22, 2002, CA, unrep. (Brooke & Mance L.JJ. and Park J.)
CPR rr.3.1(3), 24.2, 24.6 & 52.11(2)(b), Practice Direction (The Summary Disposal of Claims) paras 4, 5.1 & 5.2, Human Rights Act 1998, Sched. 1, Pt. I, art. 6—judge refusing claimant's application for summary judgment but making conditional order requiring defendant (D) to pay £1m into court—D given no notice as to likelihood of such order being made and no evidence as to his means before the judge—on D's appeal held, reducing the sum to £75,000, although it is common practice for a conditional order to be made on an application for summary judgment, an order requiring a payment into court should not be perfected before the defendant has had an opportunity to place before the court evidence of his means (see *Civil Procedure*, Autumn 2001, Vol. 1, paras 24.2.3, 24.6.6, 24PD-004, 24PD-005 & 52.11.2)

■ DUNNETT v. RAILTRACK PLC. [2002] EWCA Civ 302; *The Times*, April 3, 2002, CA, unrep. (Brooke, Walker Sedley L.JJ.)
CPR rr.1.3, 1.4(2)(e) & 44.3—at trial, judge giving judgment for defendants (D) on claimant's (C's) claim in negligence—in granting C permission to appeal, single Lord Justice advising C to explore possibility of ADR—D rejecting ADR when this suggested by C—Court of Appeal dismissing C's appeal—held, in the circumstances, the appropriate order was that there should be no order for costs (see *Civil Procedure*, Autumn 2001, Vol. 1, paras 1.3.8, 1.4.11 & 44.3.6)

■ A HEALTH AUTHORITY v. DR.X *The Times*, February 1, 2002, CA (Thorpe & Laws L.JJ. and Harrison J.)
Supreme Court Act 1981, ss.5 & 19, Family Proceedings Rules 1991, r.4.23—after trial in Family Division of proceedings under the Children Act 1989, third party applying for order authorising disclosure of relevant case papers and medical records of patient to medical discipline tribunal—application granted by a judge who was not the trial judge ([2001] Lloyd's Rep. Med. 349)—Court of Appeal dismissing appeal by health authority—Court observing that, absent exceptional circumstances, in order to ensure that such applications were considered in their concrete context, they should be heard by the trial judge (see *Civil Procedure*, 2001, Vol. 2, para. 9A-60)

■ ABBEY NATIONAL PLC. v. JOHN PERRY [2001] EWCA Civ 1630; October 24, 2001, CA, unrep. (Aldous & Chadwick L.JJ. and Sir Murray Stuart-Smith)
CPR rr.17.1 & 17.4, Limitation Act 1980, s.35—mortgage lenders (C) bringing claim for professional negligence against solicitors (D) and alleging breach of trust—after expiry of relevant limitation period, judge granting C's application to amend statement of claim—judge finding that (1) proposed amendments added a new claim, but (2) it arose out of substantially the same facts as a claim already made, and (3) the amendments should be permitted under s.35(5) and r.17.4(2)—held, dismissing D's appeal, (1) the amended statement of claim alleged a breach of an implied, rather than a constructive, trust, (2) whether the trust is referred to as constructive or implied is not a matter of substance, (3) the further allegations added by the amendment were amplifications of the allegations pleaded and the facts contained in those allegations could be derived from the pleading before amendment, consequently (4) the proposed amendments pleaded no new cause of action and could be allowed under r.17.1(2)(b) (see *Civil Procedure*, Autumn 2001, Vol. 1, para. 17.4.4, and Vol. 2, para. 8-85)

■ ADMIRAL MANAGEMENT SERVICES LTD. v. PARA-PROETCT EUROPE LTD. [2002] EWHC 233 (Ch); 152 New L.J. 518 (2002)
CPR r.44.3, Supreme Court Act 1981, s.51(1)—company (C) bringing abuse of confidential information claim against D seeking an account of profits—C's employees undertaking expert work of investigating, formulating and presenting the claim—on trial of preliminary issue, held, (1) the general rule in that the costs incurred by a successful party's employees in undertaking such work are not recoverable, however, (2) such reasonable costs may be recoverable in patent proceedings, and (3) that exception to the general rule is applicable to all litigation involving claims of wrongful use of intellectual property—*In re Nossen's Letter Patent* [1969] 1 W.L.R.638, ref'd to (see *Civil Procedure*, Autumn 2001, Vol. 1, para. 44.3.5 and Vol. 2, para. 9A-164)

■ J.S.BLOOR (MEASHAM) LTD. v. CALCOTT November 23, 2001, unrep. (Hart J.)
developer (C) buying from W agricultural land with vacant possession and benefit of planning permission—on ground that he was W's tenant, D bringing county court claim against C for (1) damages for injury to his crops, and (2) injunction to restrain C from continuing work on the land—C counterclaiming for rescission of agreement between D

and W for mutual mistake—at trial, judge (1) finding that C was an annual tenant, and (2) giving judgment (a) awarding D damages, but (b) because of D's deceit in his dealings with W, dismissing claim for injunction—C then commencing High Court claim against D—C pleading that, under doctrine of proprietary estoppel, D's conduct had given rise to an equity in their favour—C claiming declarations that (1) they were entitled to occupy the land, and (2) any tenancy D might have was unenforceable against them—D counter-claiming for damages for breach of covenant and trespass—held, in the circumstances, the award of damages to D did not operate as a bar to C's claim to an equity by way of proprietary estoppel, either on ground of issue estoppel or of *Henderson v. Henderson estoppel* (see *Civil Procedure*, 2001, Vol. 2, paras 9A-160 & 9A-168)

■ BOWN v. LAS DIRECT LTD. [2001] EWCA Civ 1798; October 10, 2001, CA, unrep. (Sir Andrew Morritt V-C, Buxton & Arden L.JJ.)
CPR rr.1.1 & 3.1(2)(b)—former employee (C) of company (D) operating in financial services industry receiving conditional offer of employment with another company (X) selling insurance—in reference relating to C sent by D to X, information given of C's indebtedness to D—on strength of reference, X withdrawing offer—C bringing claim for damages against D for loss of chance of employment—C alleging that D negligent in over-stating his indebtedness in the reference—in schedule of loss, C calculating his losses on basis of what he would have earned had he continued to work for D—at trial, judge (1) holding (a) that D were liable to C, but (b) that the basis upon which C had founded his claim for quantum was mis-conceived, and (2) against wishes of parties adjourning trial for further evidence on quantum, in particular expert evidence as to what C might have earned in alternative employment—held, allowing D's appeal, (1) the judge was plainly wrong to permit a new basis for quantum to be introduced after there had been a full trial in which that basis had been deliberately not adopted, and (2) in any event, there was no evidence upon which the judge could have reached the conclusion that D's negligence caused C's loss—*Ketteman v. Hansel Properties Ltd.* [1987] A.C. 189, H.L.; *Allied Maples Group Ltd. v. Simmons & Simmons* [1995] 1 W.L.R.1602, CA; *Stewart v. Engel* [2000] 1 W.L.R.2268, CA, ref'd to [Ed: *cf. Atkinson v. McIntosh* April 14, 2000, CA, unrep.] (see *Civil Procedure*, Autumn 2001, Vol. 1, paras 3.1.3, 17.3.5 & 40.2.1)

■ CLIBBERY v. ALLAN [2002] EWCA Civ 45; [2002] 1 All E.R.865, CA (Dame Elizabeth Butler-Sloss P., Thorpe & Keene L.JJ.)
CPR r.39.2, Human Rights Act 1998, Sched. 1, Pt. I arts.8 & 10, Administration of Justice Act 1960, s.12, Family Law Act 1996, s.36, Family Proceedings Rules 1991, r.3.9(1)—C unsuccessful on application under s.36 heard in private for an occupation order in respect of flat owned by D's company—D granted *ex parte* injunction prohibiting C from making disclosures as to the failed proceedings—on C's application, judge refusing to continue the injunction (see 152 New L.J. 269 (2001))—held, dismissing D's appeal, (1) in holding that proceedings in the Family Division not involving children are no more subject to confidentiality requirements than proceedings in any other Division, the judge stated the law too widely, (2) family courts are able to hear cases in private and exclude the public where the 1991 Rules permit (almost always in proceedings involving children and ancillary relief cases), (3) a hearing in private does not of itself have the consequence of imposing a permanent ban on later publication restraining the parties from making disclosures about the case, (4) in deciding whether confidentiality was applicable the court should look to see whether the application came within (a) the ambit of s.12, (b) the recognised categories of children and ancillary relief cases, or (c) contained other factors that might make disclosures prejudicial to the administration of justice, (4) a balance has to be struck between the right to family life (art. 8) and freedom of expression (art. 10) (see *Civil Procedure*, Autumn 2001, Vol. 1, para. 39.2.1, and Vol. 2, paras 3D-36, 3D-38 & 9B-24)

■ JOLLY v. JAY [2002] EWCA Civ 277; *The Times*, April 3, 2002, CA (Brooke, Sedley, & Arden L.JJ.)
CPR Pt. 52, Practice Direction (Appeals) paras 4.14 to 4.16, Access to Justice 1999 (Destination of Appeals) Order 2000, arts. 2, 4 & 5—Master striking out C's claim against D for rectification of the land register—C refused permission to appeal on paper—subsequently, D appearing by counsel at oral hearing before judge of C's renewed application for permission to appeal against the Master's decision—in refusing C's application, judge noting that the position of a respondent in these circumstances is unclear but, nevertheless, making order for costs against C in favour of D—C applying for permission to appeal to Court of Appeal—held, dismissing application, (1) the Court has no jurisdiction to entertain an application for permission to appeal from a decision of an appeal court refusing permission to appeal, (2) where a circuit judge refuses an application for permission to appeal and makes an order for costs, appeal lies, not to the Court of Appeal, but to a High Court judge as such an appeal is a "first appeal" within art. 2 of the 2000 Order, not excluded from the ordinary appeal rules by art. 5 or 6—in addition, Court (a) stating that, in a number of respects, the provisions of Pt. 52 and the supplementing practice direction are inconsistent and

uncertain in their treatment of respondents to appeals, (b) identifying the problems and explaining reasons for practice by which, in advance of determining applications for permission to appeal, appeal courts serve respondents with copies of notices and requests filed by appellants, and (c) observing that the resolution of these problems is a matter for those responsible for preparing the rules and the directions (see *Civil Procedure*, Autumn 2001, Vol. 1, paras 52.4.1, 52PD-008 & 52PD-009, and Vol. 2, para. 9A-885)

■ JURGENS v. TSN KUNSTSTOFFRECYCLING GMBH [2002] EWCA Civ 11; *The Times*, February 20, 2002, CA (Robert Walker, Rix & Dyson L.JJ.)
CPR Sched. 1, RSC O.71, Pt. III, Civil Jurisdiction and Judgments Act 1982, Sched. 1 (Brussels Convention), art. 27(2) [see now Judgments Regulation art. 34(2)]—in proceedings between C and D in German court, C obtaining judgment in default of D's appearance—judge making order to enforce that judgment—held, dismissing D's appeal, (1) under art. 27(2) the judgment could not be recognised if D did not have "sufficient time to enable him to arrange for his defence", (2) this requirement is not a question of form but of fact to be decided in the circumstances, (3) time is to be assessed over the whole period, starting with service of process and ending with the entering of the judgment (see *Civil Procedure*, Autumn 2001, Vol. 1, para. sc71.28.3, and Vol. 2, para. 5-89)

■ KIAM v. M.G.N. LTD. (NO. 2) [2002] EWCA Civ 66; [2002] 2 All E.R.242, CA (Simon Brown, Mummery & Sedley L.JJ.)
CPR rr.36.21, 44.3 & 44.4—in March 2000, in libel trial before judge and jury, claimant (C) awarded damages of £105,000—in June 2001, pending appeal by defendant (D), C offering to accept £75,000 and to return to D £30,000 (plus appropriate interest)—offer ignored by D—in January 2002, D's appeal on ground that award was excessive dismissed (see [2002] EWCA Civ 43)—C applying for his costs of the appeal on indemnity basis—held, refusing application and awarding C his costs on a standard basis, (1) a party against whom an order for costs is made may be ordered to pay those costs on an indemnity basis where his conduct, though not deserving of moral condemnation, is unreasonable, however (2) such conduct needs to be unreasonable to a high degree, and (3) in this context, conduct that was wrong or misguided in hindsight would not be unreasonable in this sense—Court observing that an indemnity costs order made under Pt. 44 (unlike one made under Pt. 36) does carry some stigma, as it is of its nature penal rather than exhortatory—*Reid Minty v. Taylor* [2001] EWCA Civ 1723; [2002] 2 All E.R.150, CA, ref'd to (see *Civil Procedure*, Autumn 2001, Vol. 1, paras 44.3.6 & 44.4.2)

■ KIRIN-AMEGEN INC. v. TRANSKARYOTIC THERAPIES INC. September 13, 2001, unrep. (Neuberger J.)
CPR r.52.7—C bringing proceedings for injunction and other relief against D for infringement of patent including two claims—D counterclaiming for a declaration that patent invalid—trial judge holding (1) that D infringed one of the claims, (2) that most of D's attacks on the validity of the patent failed, but one succeeded (albeit that it might be rendered valid by amendment in proceedings that are pending)—judge giving D permission to appeal, and C permission to cross-appeal—common ground (1) that, absent the appeal, C would be entitled to a general, unqualified injunction restraining D, and (2) that, pending the appeal, the injunction should be stayed on terms involving undertakings by D and cross-undertakings by C—on the question of the relief to be granted C pending the appeal, held (1) where an injunction is the appropriate form of remedy for a successful claimant, his entitlement to his remedy cannot be regarded as certain until the appeal has been disposed of, (2) the guiding principle must be that the trial court should arrange matters so that, if the appeal is dismissed, C will be in the same position as if there had been no appeal, and so that, if the appeal succeeds, D will be in the same position as if they had succeeded at first instance (see *Civil Procedure*, Autumn 2001, Vol. 1, para. 52.7, and Vol. 2, para. 9A-161)

■ LOWNDS v. SECRETARY OF STATE FOR THE HOME DEPARTMENT [2002] EWCA Civ 365; *The Times*, April 5, 2002, CA (Lord Woolf LCJ, Laws & Dyson L.JJ and Master Hurst)
CPR r.44.5, Practice Direction Costs) para. 11.2—C bringing clinical negligence action against D—action settled for £3,000—district judge assessing costs payable by D to C at £16,784 —D's appeal against costs order dismissed by judge—held, dismissing D's further appeal, (1) it is essential that courts should attach the appropriate significance to the requirement of proportionality when making orders for costs and when assessing costs, (2) if the appropriate conduct of the proceedings made costs necessary then the requirement of proportionality does not prevent all the costs being recovered, (3) a two-stage (global followed by item-by-item) approach is required—Court explaining how two-stage approach to be applied (if total costs proportionate, reasonable amounts reasonably incurred would be allowed; if disproportionate only a reasonable amount for necessary costs would be allowed; no greater sum could be recovered than would have been recoverable item by item if litigation conducted proportionately) (see *Civil Procedure*, Autumn 2001, Vol. 1, paras 44.5.1 & 44PD-005)

■ R.(G.) v. EALING LONDON BOROUGH COUNCIL *The Times*, March 18, 2002 (Munby J.)
CPR rr.8.6, 32.1 & 54.16—in judicial review proceedings, brought under the alternative procedure for claims (Pt. 8), held (1) r.8.6(2), which provides that the court may require or permit a party to give oral evidence at the hearing, is in terms disapplied by r.54.16(1), however (2) it remains the case that the court has power, either under r.32.1 or the inherent jurisdiction, to hear oral evidence and to order the cross-examination of witnesses on their statements and affidavits, and (3) in some instances, cross-examination may be not only appropriate but essential (see *Civil Procedure*, Autumn 2001, Vol. 1, para. 32.2.1 & 54.16.2)

■ REID MINTY v. TAYLOR [2001] EWCA Civ 1723; [2002] 2 All E.R.150, CA (Ward, May & Kay L.JJ.)
CPR rr.1.1, 36.21, 44.3 & 44.4—in libel proceedings, parties making offers and counter-offers but no settlement arrived at—at trial by judge and jury, each party alleging the other was dishonest—judge ruling that the publication was on an occasion of qualified privilege—jury finding in favour of defendant on issue of justification—defendant inviting judge to make indemnity costs order in his favour—judge, taking view that some disgraceful conduct deserving moral condemnation was necessary to justify costs being awarded on indemnity basis—held, allowing appeal and remitting matter to the judge, if one party has made a real effort to find a reasonable solution and the other party has resisted that sensible approach, then the latter puts himself at risk that the order for costs may be on an indemnity basis (see *Civil Procedure*, Autumn 2001, Vol. 1, para. 44.4.2)

■ TILBY v. PERFECT PIZZA LTD. 152 New L.J. 397 (2002) (Senior Costs Judge Hurst)
CPR r.44.12A, Access to Justice Act 1999, s.29—C entering into conditional fee agreement with her solicitors for purpose of bringing personal injuries claim against D—in addition, P taking out ATE insurance policy, under which she was not liable to pay the premium until the insured risk had arisen—claim settled but parties unable to agree costs—in costs only proceedings, D arguing that as a matter of law the premium was not recoverable from them by C—held, the combination of the fee agreement and the insurance did not necessarily constitute a credit agreement for the purposes of the Consumer Credit Act 1974—*Callery v. Gray* (No. 2) [2001] EWCA Civ 1246; [2001] 1 W.L.R. 2142, CA, ref'd to (see *Civil Procedure*, Autumn 2001, Vol. 1, para. 44.12A.1, and Vol. 2, para. 9A-862)

■ WILLIAMS CORPORATE FINANCE PLC. v. HOLLAND [2001] EWCA Civ 1526; October 22, 2001, CA, unrep. (Brooke & Hale L.JJ.)
CPR rr.3.3, 3.10 & 44.3—company (C) bringing High Court action against former director and major shareholder (D) and other defendants—on July 17, 2000, after three days of trial (the parties having estimated that two days would be sufficient), judge adjourning trial and directing parties (in lieu of final speeches) to file and serve their submissions by particular date—subsequently, judge sending copy of his judgment to parties (finding for C on some issues and D on others) and saying they should treat it as a handed down judgment—judgment highly critical of manner in which litigation conducted and leaving it to parties to agree interest and costs—despite further exchanges between judge and parties by fax and letter, parties unable to agree costs—eventually, judge notifying parties by faxed letter that unless objection was made by November 28, 2000, he would order that D should pay C's costs—upon no objection being received, order to this effect made and perfected—in event, judge's fax not reaching D—consequently, D applying to challenge the costs order against him, on ground that judge had failed to take into account sufficiently or at all the extent to which he had succeeded in the case both in terms of the issues and the financial value of the claims—judge's clerk writing to D saying (1) that the judge's costs order was not a draft but a final order, (2) that he doubted whether he had power to vary its terms and, in any event, he was not prepared to do so—single Lord Justice granting D permission to appeal (1) against the judge's refusal to hear him on the question of costs, and (2) against the order for costs—held, allowing D's appeal, (1) in the circumstances, the Court had jurisdiction to determine on the merits what order for costs should have been made, (2) the appropriate order was that, as between C and D before the judge, there should be no order as to costs, (3) the costs order was not an order made by the judge on his own initiative under r.3.3, (4) if it had come to the judge's attention soon after the event that he had made his order of November 28 in ignorance of the fact that D had never received his faxed letter, then he would have had power pursuant to r.3.10 to remedy the error of procedure and direct that his order be set aside and the matter listed for an oral hearing (see *Civil Procedure*, Autumn 2001, Vol. 1, para. 3.10.2)

■ WOODHOUSE v. CONSIGNIA PLC. [2002] EWCA Civ 275; 152 New L.J. 517 (2002), CA (Brooke, Laws & Dyson L.JJ.)
CPR rr.1.1, 3.9 & 51.1, Practice Direction (Transitional Arrangements) para. 19, Human Rights Act 1998, Sched. 1, Pt. I art. 6—county court action started on November 3, 1995—on August 21, 1996, judgment given for C on liability with damages to be assessed—proceedings not coming

before judge at a hearing or on paper between April 26, 1999, and April 25, 2000—as a result, by operation of para. 19(1) proceedings stayed automatically—on August 4, 2000, district judge treating application by C for directions as an application to lift stay and refusing it on ground that it was not supported by any evidence—judge dismissing C's appeal—on January 17, 2001, C making application expressly under para. 19(2)—district judge refusing application, principally on ground that it had been made previously and unsuccessfully—judge dismissing C's appeal—held, allowing C's appeal, (1) where proceedings are stayed automatically by operation of para. 19(1), within the meaning of r.3.8 a "sanction" imposed for failure to comply with a practice direction has taken effect, therefore (2) an application to lift the stay is an application for relief from a sanction and r.3.9 applies, (3) in considering such an application, the court must consider all the circumstances of the case and, in particular, the nine circumstances listed in r.3.9(1), insofar as they are relevant, (4) where (as was not the case here) a sanction was imposed in circumstances where a claimant had intentionally failed to comply with a rule, practice direction, court order or pre-action protocol, such failure may tend to incline a court in an appropriate case to bar a claimant from pursuing a case, or from pursuing a chosen course of acting within a case, (5) where a party, having made an unsuccessful interlocutory application, makes a subsequent application for the same relief, based on material which was not, but could have been, deployed in support of the first application, the application may be refused on abuse of process grounds, however (6) the overriding objective of dealing with cases justly (CPR r.1.1(2)) and art. 6 considerations may demand that the second application should succeed—*Bansal v. Cheema* March 2, 2000, CA, unrep.; *Henderson v. Henderson* [1843] 3 Hare 100, ref'd to (see *Civil Procedure*, Autumn 2001, Vol. 1, paras 3.9.1 & 51PD-001)

Practice Directions

■ PRACTICE DIRECTION (ADMIRALTY CLAIMS) HMSO CPR 27th Supplement February 2002
supplements CPR Pt. 58 (Commercial Claims) and applies to Admiralty claims except where it is inconsistent with Pt. 61 (Admiralty Claims) or this practice direction—case management—claims in rem—collision claims—arrest—cautions against arrest—release and cautions against release—judgment in default—sale by the court and priorities—limitation claims—International Oil Pollution Compensation Fund proceedings—other claims—reference to the Registrar—undertakings—Forms—in effect March 25, 2002

■ PRACTICE DIRECTION (APPLICATION FOR WARRANT UNDER THE COMPETITION ACT 1998) HMSO CPR 27th Supplement February 2002
application for warrant—confidentiality of court documents—contents of claim form etc—listing—hearing of application—the warrant—execution of warrant—application to vary or discharge—form of warrant—explanatory note to warrant—in effect March 25, 2002

■ PRACTICE STATEMENT (ADMIRALTY AND COMMERCIAL COURTS : PROCEDURE)
The Times, April 2, 2002 (Moore-Bick J.)
CPR Pts.58, 61 & 62, Commercial Court Guide (2002 Edition)—issued by judge in charge of Commercial List—explains relationship between (1) new Parts added to CPR and their supplementing practice directions (coming into effect on March 25, 2002) and (2) new edition of Commercial Court Guide—in relation to matters not covered by CPR, procedures in Guide should be followed (*Civil Procedure*, 2001, Vol. 2, paras 2C-15 to 2C-290 ref'd to)

Statutory Instruments

■ CIVIL PROCEDURE (MODIFICATION OF ENACTMENTS) ORDER 2002 (S.I. 2002 No. 439)
Civil Procedure Act 1997, s.4(1)—amends Debtors Act 1869, ss.5 & 10, Charging Orders Act 1979, s.5, Supreme Court Act 1981, s.40A, County Courts Act 1984, ss.109, 110 & 147(1), County Court Remedies Regulations 1991, reg. 3, High Court and County Courts (Allocation of Arbitration Proceedings) Order 1996, art. 4, Access to Justice Act 1999 (Destination of Appeals) Order 2000, art. 4(b)—amendments made to facilitate the making of Civil Procedure Rules, in particular, the substitution of new CPR Parts 70 to 73 dealing with enforcement of judgments etc., replacing Schedule rules and coming into effect on March 25, 2002 (see *Civil Procedure*, Autumn 2001 Vol. 2, paras 2B-357, 9A-127, 9A-717, 9A-720, 9A-802, 9A-885, 9B-82 & 9B-222)

IN DETAIL

Payment into court as condition for defending

In the commentary to CPR Pt. 1 found in *Civil Procedure*, Autumn 2001, Vol. 1, at para. 1.4.14, it is explained that the furthering of the overriding objective (of enabling the court to deal with cases justly) by "actively managing cases", includes "dealing with as many aspects of the case as is practicable on the same occasion" (r.1.4(1)(i)). The objective here is to avoid successive applications and hearings (and the costs, delays and waste of court resources involved) where one would suffice. Various provisions in the CPR illustrate this policy in operation. One is r.24.6 which states that, when the court determines an application for summary judgment it may (a) give directions to the filing of and service of a defence, and (b) may give further directions about the management of the case.

Since the CPR came into effect, on occasion the courts have been keen to point out that parties coming to court for the hearing of pre-trial applications, case management conferences and pre-trial reviews, should come prepared to deal with any orders and directions that the court may be minded to make. And it has been held that an application under r.3.4 to strike out a statement of case may be treated by the court as an application for summary judgment under r.24.2 and dealt with accordingly (*Taylor v. Midland Bank Trust Co. Ltd.* July 21,1999, CA, unrep.; see also *S. v. Gloucestershire County Council* [2000] 3 All E.R.346, CA, at p. 372 per May L.J.).

The limits of the policy underlying r.1.4(1)(i) were tested in the recent case of *Anglo-Eastern Trust Ltd. v. Kermanshahchi* [2002] EWCA Civ 198; February 22, 2002, CA, unrep. In this case C brought a claim against D for the repayment of loan. It was alleged that the debt approached £1.4m. C made an application for summary judgment and an interim payment.

CPR r.24.2(a)(ii) states that the court may give summary judgment against a defendant if it considers that the defendant "has no real prospect of successfully defending the claim". Rule 3.1(3) states that, when the court makes an order it may (a) make it subject to conditions, including a condition to pay a sum of money into court, and (b) specify the consequence of failure to comply with the order or a condition (a "conditional order"). Practice Direction (The Summary Disposal of Claims), para. 4 states that, where it appears to the court that it is "possible that a defence may succeed but improbable that it will do so", the court may, instead of giving summary judgment, make a conditional order.

In this case, at the oral hearing of D's applications the judge (being satisfied that it could not be said that D had no real prospect of successfully defending) refused to grant summary judgment but (it appearing that it was possible that D's defence may succeed but improbable that it would do so) made a conditional order by which he ordered D to pay into court £1m, and further ordered that, if he did not make the payment within 28 days, his defence would be struck out and C would be at liberty forthwith to enter judgment in default of a defence. There was no evidence before the judge as to D's means and ability to make the payment in and no representations were made to the judge by counsel for D on that point.

C did not appeal against the judge's refusal to grant their application. However, D was granted permission by the single Lord Justice to appeal against the conditional order. Subsequently, witness statements containing evidence about D's ability to pay were exchanged by the parties. On the appeal, the Court of Appeal held that D should not be allowed to defend without putting up some money which (a) it was realistic to believe he would be able to raise, and (b) would demonstrate that he was serious in his defence. The Court exercised its powers under r.52.11(2) to receive the evidence of D's means or want of them as contained in the witness statements (being evidence which was not before the judge) and held that the sum required to be paid into court should be reduced from £1m to £75,000.

On the appeal, the main judgment was given by Park J., Brooke L.J. gave a short judgment limited to an important point of practice, also dealt with by Park J. (and Mance L.J. concurred). D's main complaint in this case was that the judge had made the order requiring him to pay £1m into court in the absence of any evidence as to his ability to pay. On the appeal, in answer to D's submission that the Court of Appeal should exercise its power under r.52.11(2) to receive evidence in witness statement form on this issue, C contended that, as that evidence could have been produced to the judge, but was not produced then, D should not be allowed to introduce it on the appeal. Counsel for C explained that, in cases where an application notice applies only for summary judgment, it is common practice for the applicant to request the judge at the hearing to make a conditional order instead and argued that D and his advisers ought to have understood this and should have been prepared at the hearing to produce evidence as to his ability to pay. In effect, C relied on the policy (explained above) underlying r.1.4(1)(i).

This was the point of practice on which Park J. and Brooke L.J. joined forces. Their lordships rejected C's argument. Brooke L.J. noted that C did not suggest, whether in their formal application, or in the evidence it served, or in any solicitors' letter sent to D's solicitors pending the hearing, that if the application for summary judgment failed they would nevertheless be

inviting the judge to make a conditional order of the type mentioned in para. 5.1(4) of the Practice Direction, let alone an order requiring D to pay £1m into court, subject to the sanction that his statement of case would be struck out if he did not comply with the order within a set time. Brooke L.J. explained that it has been a feature of the summary judgment procedure (both before and after the CPR came into effect) that the claimant is unlikely to want to refer to the possibility of a conditional order being made, and the defendant is unlikely, unless pressed, to want to refer to any lack of means when asserting that its defence has a real prospect of success. The former would regard any reference to a conditional order as a sign of weakness because its desire is to persuade the court that the defendant has no real defence. The latter is unlikely to wish to parade its lack of means when contesting the merits of the claim, because this might encourage the court to look more critically into the merits of the defence it wishes to put forward in response to a claim which it knows it cannot pay.

Brooke L.J. said in these circumstances a court should not as a general rule make an order of the type made by the judge in this case in the absence of any evidence about the defendant's means unless it is satisfied that the defendant has been given appropriate prior notice. His lordship suggested that notice may be given informally by letter (as opposed to a formal application) and be to the effect that if the summary application fails the claimant will be seeking a conditional order along the lines set out in the letter. The defendant can then prepare a witness statement as to its means, for production at the stage of the proceedings when the court says it intends to make a conditional order. However, his lordship added that it would be wrong for the Court of Appeal to prescribe any particular procedure which might avoid the problem that arose in this case, given that the rules and the practice directions are silent and circumstances may vary so much from case to case. What is important "is that if a claimant is seeking a conditional order that is out of the ordinary if a summary judgment application fails ... the judge should not allow any order of that kind to be perfected immediately if the defendant seeks an opportunity to place evidence before him to the effect that the order will stifle its defence completely because it does not have the means to pay".

In conclusion it may be noted that Park J. said that a conditional order requiring payment of a sum into court is a limitation on a party's right of access to the court, but such limitation does not contravene art. 6 of the European Convention on Human Rights where the party can comply with the order or if it is reasonable to believe that he will be able to comply with it. It would be a wrong exercise of discretion to order, as a condition of permitting a defendant to make his defence, the payment of a sum which the defendant would never be able to pay. His lordship added that this was established by the decisions of the Court of Appeal and the House of Lords in *Yorke* (M.V.) *v. Edwards* [1982] 1 W.L.R. 444, H.L., and it was held in *Chapple v. Williams* December 8, 1999, CA, unrep., that the principles of that case apply under the CPR. These principles are soundly based as a matter English law and need no further support from the art. 6 jurisprudence.

Supply of documents from court records

CPR r.5.4 is concerned with the supply of documents from court records. The scope, purpose and provenance of this rule are explained in the commentary relating to it found in *Civil Procedure*, Autumn 2001, Vol. 1, para. 5.4.1, and in the up-dating of that commentary found in the First Supplement to the 2001 edition (p. 5).

Rule 5.4 deals, first, with the supply of documents to "any party to proceedings", and then with supply to "any other person". Accordingly, r.5.4(1) states that any party to proceedings may be supplied from the records of the court with a copy of any document relating to those proceedings (including documents filed before the claim was commenced), provided that the party seeking the document (a) pays any prescribed fee, and (b) files a written request for the document. And r.5.4(2) states that any other person who pays the prescribed fee may, during office hours, search for, inspect and take a copy of the following documents, namely (a) a claim form which has been served, (b) any judgment or order given or made in public, (c) any other document if the court gives permission (r.5.4(2)).

It is expressly provided that neither r.5.4(1) nor 5.4(2) applies in relation to any proceedings in respect of which a practice direction makes different provision (r.5.4(4)). For example, in proceedings brought by the Director General of Fair Trading to which Practice Direction (Application for a Warrant under the Competition Act 1989) relates, r.5.4 is disapplied and paras 3.3 and 3.4 of that practice direction have effect in its place.

Another example of the disapplication of r.5.4 by practice direction is provided by para. 5.1 of Practice Direction (Arbitration) supplementing Pt. 62 (added to the CPR with effect from March 23, 2002). The explanation for this is as follows. Former RSC O.63, r.4(1A) provided an exception to the rule now stated in CPR r.5.4(2)(a) by stating that the right of "any person" to make a copy of originating process did not apply to any originating process by which an arbitration application was begun. This exception was introduced to reflect the privacy of arbitration proceedings and to preclude investigation into the existence of such proceedings by anybody who had not been served with them. Rule 4(1A) was inserted in the RSC by the Rules of the Supreme Court (Amendment) Rules 1998 (S.I. 1998 No.

1898). The rule came into effect on September 28, 1998, when the drafting of the CPR was well-advanced, and was not reflected in CPR r.5.4. It would seem that this omission was inadvertent. Subsequently, advantage was taken of r.5.4(4) and the pre-CPR position was restored by para. 5.1 of Practice Direction (Arbitration). This paragraph states that an arbitration claim form may only be inspected with the permission of the court, and draws no distinction between a claim form that has been (a) issued and served or (b) issued and not served. In para. 5.4.1 to the commentary on r.5.4 the practice note issued by Colman J. in *Advance Specialist Treatment Engineering Ltd. v. Cleveland Structural Engineering* (Hong Kong) Ltd. [2002] 1 W.L.R.558, is noted. This case was decided on October 28, 1999, and is to an extent overtaken by para. 5.1.

In the First Supplement to the 2001 edition it is noted that, since October 15, 2001, express limits on the inspection by a party of testamentary documents or written evidence lodged or filed by any other party in probate claims have been imposed by CPR r.57.5(5). Before that date a similar restriction was imposed by Practice Direction (Contentious Probate Proceedings) para. 5.4. Thus, what was (consistent with r.5.4(4)) a different provision made by practice direction is now made by rule.

Court encouragement of ADR and costs

According to CPR r.1.4(2)(e), the furthering of the overriding objective (of enabling the court to deal with cases justly) by "actively managing cases", includes encouraging the parties to use alternative dispute resolution (ADR) procedure "if the court considers that appropriate" and facilitating the use of such procedure.

In the commentary on r.1.4(2)(e) in para. 1.4.11 of *Civil Procedure*, Autumn 2001, Vol. 1, it is stated as follows. "The encouragement and facilitating of ADR by the court is an aspect of active case management which in turn is an aspect of achieving the overriding objective. The parties have a duty to help the court in furthering that objective (r.1.3) and, therefore, they have a duty to consider seriously the possibility of ADR procedures being utilised for the purpose of resolving their claim or particular issues within it when encouraged by the court to do so. The discharge of the parties' duty in this respect may be relevant to the question of costs because, when exercising its discretion as to costs, the court must have regard to all the circumstances, including the conduct of all the parties (r.44.3(4), see r.44.5)."

This passage of commentary was quoted and approved by the Court of Appeal in *Dunnett v. Railtrack plc*. [2002] EWCA Civ 303; February 22, 2002, CA; *The Times*, April 3, 2002, CA. In this case, at trial the judge gave judgment for the defendants (D) on the claimant's (C's) claim for negligence and breach of statutory duty, holding that they were not liable for C's loss. C's claim had included a claim for damages for post-traumatic stress disorder. Pending the determination of C's application for permission to appeal, D offered to pay C £2,500 in full settlement of her claim. This offer was rejected by C. In granting permission to appeal and extending time for appealing, the single Lord Justice advised C to explore the possibility of ADR. When C put this to D, D rejected it.

On the appeal, the Court of Appeal held that, given the manner in which C's case had been pleaded, there was no material on which the judge could have made a finding in her favour on liability. The Court expressed some surprise at the narrow basis on which C's case had been pleaded at trial, raising the suspicion that C might have succeeded had her case been pleaded differently. Having prevailed on the appeal, D applied for their costs of the appeal.

In dealing with this application, the Court concluded that, in the circumstances of this case, the appropriate order was that there should be no order for costs of the appeal. Brooke L.J. (with Walker & Sedley L.JJ. concurring) said that, when the single Lord Justice's suggestion that ADR might be considered was put to D by C, they instructed their solicitors to "turn it down flat"; they were "not even willing to consider it". His lordship added that parties have a duty to help the court in furthering the overriding objective and, therefore, they have a duty to consider seriously the possibility of resolving claims by ADR procedures when encouraged to do so by the court. Parties who fail in this duty may have to face "uncomfortable costs consequences". He hoped that any publicity given to this case would draw this to the attention of lawyers. It perhaps should be noted that C was a person of limited means, who had acted in person at various stages of the litigation, and whose representation on the appeal was provided through the Bar's pro bono scheme.

It may be commented that, as it is the case (1) that the duty of the courts to further the overriding objective appears to include (a) the duty to encourage parties to use ADR and, (b) if they think it appropriate, to facilitate the use of ADR procedures, and (2) that parties and lawyers who, in a given case, fail to take seriously such curial encouragement when offered at an interlocutory hearing may face "uncomfortable costs consequences", it is to be hoped that judges will not too readily jump to the conclusion that they should recommend ADR. Unfortunately, not all judges are adept at spotting those cases that may be ripe for ADR and those that are not; indeed many judges have a very limited understanding of what ADR involves. Further, the picture that a judge may get of the merits and procedural history of a case at an interlocutory hearing may be a distorted one. There is a tendency for judges (even judges of the Court of Appeal) to suggest ADR whenever it looks to them as if the costs of the case are becoming disproportionate to the claim.

CPR UPDATE

HMSO CPR Update 27, February 2002, contained (1) amendments to existing CPR practice directions, (2) additions to practice directions supplementing new CPR Parts 58, 59, 60 & 62 (and published in CPR Update 26, January 2002), and (3) two new practice directions.

These amendments and additions came into effect on March 25, 2002, and are explained below. Page and paragraph references are to Civil Procedure, Autumn 2001, Vol. 1.

AMENDMENTS TO EXISTING CPR PRACTICE DIRECTIONS

Practice Direction (Production Centre)

p 196 *para*. 7CPD-005

For para. 5.1(3), substitute

> "(3) an order to transfer a case to another county court for enforcement or for a judgment debtor to attend court for questioning."

This follows the revoking of CCR O.25, r.2 and the enactment of CPR Pt. 70, in particular r.70.3 and Practice Direction (Enforcement of Judgments and Money Orders for the Payment of Money), paras 2.1 & 2.2.

Practice Direction (Statements of Truth)

p 377 *para*. 22PD-003

After para. 3.6A, insert new para. 3.6B as follows:

> "3.6B If insurers are conducting proceedings on behalf of many claimants or defendants a statement of truth in a statement of case may be signed by a senior person responsible for the case at a lead insurer, but -
>
> (1) the person signing must specify the capacity in which he signs;
>
> (2) the statement of truth must be a state ment that the lead insurer believes that the facts stated in the document are true; and
>
> (3) the court may order that a statement of truth also be signed by one or more of the parties."

Practice Direction (Interim Injunctions)

Heretofore, the Annex to this Practice Direction has contained two Freezing Injunction forms, one freezing assets in England and Wales, and the other freezing assets worldwide (see p 466, para. 25PD-014 and p 472, para. 25PD-015). These two forms are now replaced by a single form. In addition, the Annex has contained a Search Order form (see p 477, para. 25PD-016). This form is also replaced. As a result of these changes, some amendments are made to paras 4.5, 6. 8.4 and 8.6, as explained immediately below.

p 462 *para*. 25PD-004

In sub-paras (1) and (2) of para. 4.5, for the Royal Courts of Justice telephone number given as "0171 936 6000", substitute as new number "020 7947 6000"

p 463 *para*. 25PD-007

For para. 6, substitute new paras 6.1 and 6.2 as follows:

> "6.1 An example of a Freezing injunction is annexed to this practice direction.
>
> 6.2 This example may be modified as appropriate in any particular case. In particular, the court may, if it considers it appropriate, require the applicant's solicitors, as well as the applicant, to give undertakings."

p 465 *para*. 25PD-013

Para. 8.4 is amended and now reads:

> "8.4 There is no privilege against self-incrimination in Intellectual Property cases (see the Supreme Court Act 1981, section 72) therefore in those cases any references to incrimination in the Search Order should be removed."

At the end of para. 8.6 add the following sentence:

> "This example may be modified as appropriate in any particular case."

Practice Direction (Written Evidence)

p 631 *para*. 32PD-027

After para. 28.4 (formerly para. 27.4), add the following heading and new paragraph:

> "**Video Conferencing**
>
> 29.1 Guidance on the use of video conferencing in the civil courts is set out at Annex 3 to this practice direction."

p 632 *para*. 32PD-030

CPR r.32.3 states that the court may allow a witness to give evidence through a video link. After Annex 2, a new annex entitled "Video Conferencing Guidance" is added as Annex 3, and supplements r.32.3. This new

Annex appears to have been inadvertently omitted from HMSO Update 27, February 2002, as published, but is included in the digital edition issued with that Update. In part Annex 3 is based, with permission, upon the protocol of the Federal Court of Australia. It is intended to provide a guide to all persons involved in the use of video conferencing (VCF), although it does not attempt to cover all the practical questions which might arise.

Annex 3 is too long to be explained here. However, one particular matter may be noted. In the First Supplement to *Civil Procedure*, 2001, in an addition to para. 32.3.1 (p 21), it is explained that the question whether a witness may be permitted to give evidence from a foreign country by a video link may be affected by the law of that country. Instances have arisen in which a party, having obtained the permission of the English court under r.32.3 for evidence to be given by these means by a witness situated in a foreign country, apparently has been prevented from doing so by the law of that country. Para. 4 of Annex 3 acknowledges this problem and provides as follows:

> "4. It should not be presumed that all foreign governments are willing to allow their nationals or others within their jurisdiction to be examined before a court in England or Wales by means of VCF. If there is any doubt about this, enquiries should be directed to the Foreign and Commonwealth Office (International Legal Matters Unit, Consular Division) with a view to ensuring that the country from which the evidence is to be taken raises no objection to it at diplomatic level. The party who is directed to be responsible for arranging the VCF (see paragraph 8 below) will be required to make all necessary inquiries about this well in advance of the VCF and must be able to inform the court what those inquiries were and of their outcome."

Practice Direction (Costs)

p 849 *para*. 46PD-001

Para. 26.1 of this practice direction states that Part 46 applies to the costs of an advocate for preparing for and appearing at the trial of a claim in the fast track. The first sentence in para. 26.2 states that Part 46 applies only where, at the date of the trial, the claim is allocated to the fast track. Heretofore, the second sentence in para. 26.2, which also appears to qualify para. 26.1, has been incomprehensible (apparently as a result of a type-setting error) and it was not possible to guess its meaning. The problem has been rectified. In its entirety, para. 26.2 now reads as follows:

> "26.2 It applies only where, at the date of the trial, the claim is allocated to the fast track. It does not apply in any other case, irrespective of the final value of the claim."

Practice Direction (Appeals)

p 1021 *para*. 52PD-090

After para. 21.10, insert the following new para. 21.11:

> **"Appeal from Proscribed Organisations Appeal Commission**
>
> 21.11 (1) The appellant's notice must be filed at the Court of Appeal within 14 days after the date when the Proscribed Organisations Appeal Commission -
>
> (a) granted; or
>
> (b) where section 6(2)(b) of the Terrorism Act applies, refused permission to appeal."

It may be noted that, although this addition is expressed as sub-para. (1), there are no further sub-paras to para. 21.11.

PRACTICE DIRECTIONS SUPPLEMENTING CPR PARTS 58, 59, 60 & 62

In HMSO Civil Procedure Rules Update 26, January 2002, practice directions accompanying new CPR Parts 58, 59, 60 and 62 were included.

Each of these Practice Directions makes mention of appendices or annexures. In Update 26 they were not published in complete form but (as was promised in the notes accompanying that Update) they are included in Update 27, February 2002. The contents of the appendices and annexures are indicated immediately below.

Practice Direction (Commercial Court) (Pt. 58)

Appendix A to this Practice Directions contains the following:

> Procedure for issue of claim form when Registry is closed—paragraph 2.2
>
> N1(CC) Claim form (CPR Part 7)
>
> N9(CC) Acknowledgment of service
>
> N208(CC) Claim form (CPR Part 8)
>
> N210(CC) Acknowledgment of service (CPR Part 8)
>
> N211(CC) Claim form (CPR Part 20)
>
> N213(CC) Acknowledgment of service (CPR Part 20)

Practice Direction (Mercantile Courts) (Pt. 59)

In the text of this Practice Direction, "Appendix A", "Appendix B" and "Appendix C" are referred to in, respectively, paras 7.7(1)(a), 7.7(2)(b), and 8.2. As published, these additions are referred to as "Annex A",

"Annex B", and "Annex C", and contain the following:

Annex A: Case Management Information Sheet—Mercantile Courts

Annex B: Standard Directions in Mercantile Courts

Annex C: Pre-trial Check List—Mercantile Courts

Practice Direction (Technology and Construction Court) (Pt. 60)

In the text of this Practice Direction, para. 8.2 refers to Appendixes A and B, and para. 9.1 to Appendixes C and D. These four appendices contain the following (as published, the headings "Appendix A" and "Appendix C" have been omitted):

Appendix A: Case management information sheet

Appendix B: Case management conference directions form (referred to in para. 8.2 as "Case management directions form")

Appendix C: Pre-trial review questionnaire

Appendix: Pre-trial review directions form

Practice Direction (Arbitration Claims) (Pt. 62)

In para. 2.2 of this Practice Direction states that an arbitration claim form "must be substantially in the form set out in Appendix A". No heading for such an appendix appears in the Practice Direction, but the following four forms have been added at the end and, presumably, are meant be included in Appendix A:

N8 Claim form (arbitration)

N8A Arbitration claim—notes for claimant

N8B Arbitration claim—notes for defendant

N15 Acknowledgment of Service (arbitration)

NEW PRACTICE DIRECTIONS

In HMSO CPR Update 27, February 2002, Practice Direction (Admiralty Claims), supplementing Pt. 61, and Practice Direction (Application for a Warrant under the Competition Act), were published. (The latter is not a supplementing but an "other" practice direction.)

For indication of matters dealt with in these practice directions, see references to them in the "In Brief" section of this edition of CP News.