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CIVIL PROCEDURE NEWS

- New CPR Sections and Parts
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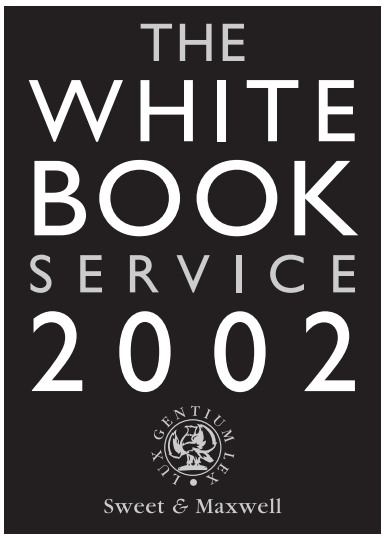

N BRIEF

Cases

■ MILLER v. CAWLEY [2002] EWCA Civ 1100; *The Times*, September 6, 2002, CA (Simon Brown & Mance L.JJ.)
CPR Pt 32—builder (C) bringing claim against householder (D) for work done—issue whether a contract existed between C and D ordered to be tried as preliminary issue—at trial, D submitting that there was no case to answer and electing to give no evidence—judge finding that there was a real prospect of C's claim succeeding and holding that C had proved the preliminary issue—held, allowing D's appeal and remitting case to judge for further consideration, (1) generally, such submission should be entertained only on the basis that the defendant elects to call no evidence, (2) where an election is made, the judge must determine whether or not the claimant had proved his case on the balance of probabilities (see *Civil Procedure*, Spring 2002, Vol.1, para. 32.1.6)

■ THREE RIVERS DISTRICT COUNCIL v. BANK OF ENGLAND [2002] EWCA Civ 1182; *The Times*, October 4, 2002, CA (Lord Phillips MR, Chadwick & Keene L.JJ.)
CPR rr.25.1(1)(j), 31.8, 31.12 & 31.17, Supreme Court Act 1981, s.34(2)—former customers (C) of failed bank (X) bringing claim against Bank of England (D) for misfeasance in public office on ground that D failed in their regulatory duties—judge granting C's application under r.31.17 for disclosure of material relating to public inquiry (some of which may be confidential and subject to PII) by HM Treasury (T) (not a party to the proceedings)—held, dismissing T's appeal, (1) in the context of r.31.17(3)(a), "likely" means, not "more probable than not", but "may well", (2) the test "likely to support ... or adversely affect" does not have to be applied to each individual document or (if the documents were to be described as a class) to each document in that class (see *Civil Procedure*, Spring 2002, Vol.1, paras 25.1.19 & 31.17.2, and Vol.2, para. 9A-98)

■ AOUN v. BAHRI [2002] EWCA Civ 1141; July 31, 2002, CA (Brooke L.J. & Wall J.)
CPR rr.52.3, 52.9 & 25.13(2)(g), Supreme Court Act 1981, ss.16(1) & 49.3—defendants (D) applying for orders under r.25.12 requiring claimant (C) to provide security for their costs of High Court proceedings for breach of contract etc. brought against them by C—judge finding that C had taken steps in relation to his assets making enforcement of an order for costs against him difficult (r.25.13(2)(g))—judge making orders requiring C by certain dates (1) to provide security for D in particular sum, otherwise the claim to be stayed, and (2) to make payments to D on account of their costs of the application (see [2002] EWHC 29 (Comm); [2002] 2 All E.R.182)—C not complying with orders with result that proceedings stayed—single lord justice granting C permission to appeal against the order for security, and imposing no conditions under r.52.3(7)(b)—D applying (1) under r.25.15(1) for order against C for security for their costs for the appeal, and (2) under r.52.9(1)(a) for order setting aside permission for appeal unless C complied with the judge's costs orders by certain date—held, dismissing D's application, (1) C should not be regarded as showing wholesale disregard for the judge's order simply because he chose not to provide security, (2) the Court of Appeal and the High Court are two different courts, each possessing their own inherent power to prevent their processes from being abused, (3) there was no compelling reason for, under r.52.9(1)(c), imposing on C's appeal a condition that he should give the security for the High Court proceedings ordered by the judge provided C (as he now agreed to do) gave security for D's costs of the appeal and paid the costs on account as ordered by the judge (see *Civil Procedure*, Spring 2002, Vol.1, paras 52.3.31 & 52.9.1 and Vol.2, para. 9A-165)

■ BUDGEN v. ANDREW GARDNER PARTNERSHIP [2002] EWCA Civ 1125; *The Times*, September 9, 2002, CA (Simon Brown, Mance & Latham L.JJ.)
CPR r.44.3—at trial of negligence claim, judge giving claimant (C) judgment for more than payment in made by defendant (D)—judge ordering D to pay C's costs on the standard basis, reduced by 25% because C had failed on one issue—held, dismissing C's appeal, (1) the judge had been furnished with imprecise information as to the costs of the issue on which C failed, (2) in the circumstances, the judge was right to make a percentage order under r.44.3(6)(f), and was not obliged to make an issue-based order under r.44.3(6)(a) (see *Civil Procedure*, Spring 2002, Vol.1, para. 44.3.7)

■ CARR v. BOWER COTTON [2002] EWCA Civ 789; May 9, 2002, CA, unrep. (Chadwick L.J. & Swinton Thomas J.)
CPR r.52.9—claimant (C) bringing claim against solicitors (D) for damages and restitution in

respect of own money and money held as trustee—at trial, judge dismissing C's claim—judge making order for costs against C and ordering payment on account of those costs pending detailed assessment—single lord justice granting C permission to appeal—D applying for order under r.52.9(1)(c) imposing condition that C's appeal should not be brought unless he gave satisfactory security within 21 days for the payment on account ordered by the trial judge—held, (1) it is permissible for the Court to impose such a condition, and (2) in the circumstances of this case, it was appropriate to impose it, (3) this was not a case in which the imposing of the condition would stifle the appeal, (4) C's appeal should be stayed unless he (a) complied with the condition, or (b) restricted his appeal to the judge's holding as to his personal claim—*Hammond Suddards v. Agrichem International Holdings Ltd.* [2001] EWCA Civ 1915; December 18, 2001, CA, unrep., ref'd to [Ed.: note also *Aoun v. Bahri* [2002] EWCA Civ 1141; July 31, 2002, CA, unrep.] (see *Civil Procedure*, Spring 2002, Vol.1, para. 52.9.2)

■ COMPAIGNE NOGA D'IMPORTATION ET D'EXPLORATION S.A. v. AUSTRALIA AND NEW ZEALAND BANKING GROUP LTD. [2002] EWCA Civ 1142; July 31, 2002, CA, unrep. (Waller, Tuckey & Hale L.JJ.)
CPR rr.1.1, 40.20, 52.3 & 52.5, Practice Direction (Appeals) paras 7.1 & 7.2—claimants (C) and defendants (D) entering into agreements to settle their several claims, but subsequently falling into dispute as to their effects—court directing that questions whether any claims had been settled and, if so, on what terms should be tried as preliminary issues—trial judge (1) finding that a settlement sum of $100m had been agreed, but (2) holding that there was no binding settlement—both finding and holding included in judge's order—judge granting C permission to appeal—D proposing to ask appeal court to uphold judge's holding for reason different from that given by judge—in particular, for reason that, contrary to judge's finding, a settlement sum had not been agreed—D contending that the inclusion of the finding in the order, which had the effect of requiring D to apply for permission to appeal (which otherwise, as "defensive respondents", they would not have required), was an improper exercise of discretion—held, upholding the judge's order (Waller L.J. dissenting), (1) the order reflected the issues before the judge, both as pleaded and presented in evidence and as argued, and the effect of the judge's resolution of those issues, (2) the finding of fact was not included in the order for the sole purpose of requiring D to apply for permission to appeal, (3) in including it, the judge was entitled to take into account the objectives of the permission to appeal regime and the overriding objective—observations on court's power to make declarations of fact (see *Civil Procedure*, Spring 2002, Vol.1, paras 1.3.2, 40.20.1, 52.3.1, 52.5.3 & 52PD.32)

■ CORNELIUS v. HACKNEY LONDON BOROUGH COUNCIL [2002] EWCA Civ 1073; *The Times*, August 27, 2002, CA (Waller & Laws L.JJ.)
CPR r.3.4(2)—claimant (C) bringing claim against local authority officer and councillors (D) for misfeasance in public office—C's statement of case alleging that D were abusing their positions but not specifically alleging that they were "exercising a power"—judge striking out C's claim—held, allowing C's appeal (1) the lack of the specific allegation was not an answer to C's claim, (2) the allegation of abuse was a question of fact which could not be answered without a full exploration of the facts—*Three Rivers District Council v. Bank of England (No. 3) [2000] 2 W.L.R.1220, HL; Calveley v. Chief Constable of the Merseyside Police* [1989] A.C. 1228, HL; *Elliott v. Chief Constable of Wiltshire, The Times*, December 5, 1997, ref'd to (see *Civil Procedure*, Spring 2002, Vol.1, para. 3.4.2)

■ FEDERAL BANK OF NIGERIA v. UNION BANK OF NIGERIA October 18, 2001, unrep. (Laddie J.)
CPR rr.3.1(2)(f) & 25.1(1)(f)—judge granting claimant's (C's) application for freezing injunction against defendant (D)—judge also (1) ordering D to disclose assets, and (2) extending time for filing of C's amended particulars of claim until four weeks after D's compliance with disclosure order—D applying to discharge freezing injunction—pending hearing of that application, D applying for (1) stay of disclosure order, and (2) variation of order as to C's amended particulars—held, dismissing application, (1) in the majority of cases, in the interests of avoiding prejudice to the defendant, it is likely to be important to arrange matters so that an application to discharge can be determined before the disclosure order is executed, however (2) in the circumstances of this case, and on balance, it would not be appropriate to delay D's compliance with the disclosure order, (3) the order as to the amended particulars was one of sensible case management, designed to avoid further amendment, and, as there had been no substantial change of circumstances, should not be varied [Ed.: see also later case of *Motorola Credit Corporation v. Uzan, The Times*, July 10, 2002, CA] (see *Civil Procedure*, Spring 2002, Vol.1, paras 3.1.7 & 25.1.23, and Vol.2, paras 9A-161 & 9A-167)

■ HALLORAN v. DELANEY [2002] EWCA Civ 1258; 152 New L.J. 1386 (2002), CA (Peter Gibson, Brooke & Tuckey L.JJ.)
CPR rr.44.5 & 44.12A, Practice Direction (Costs) Sect. 11.10, Access to Justice Act 1999, s.29—

injured person (C) entering into conditional fee agreement with solicitors providing for 40% success fee and taking out ATE insurance to pursue claim against driver (D)—without need to commence proceedings, claim settled on basis that D should pay C's costs—in costs only proceedings commenced by C, parties agreeing as to amount of success fee (20%) and ATE premium recoverable by C—district judge holding that C was entitled to recover his costs of the costs only proceedings, including a 20% success fee—held, dismissing D's appeal (1) in the Law Society model CFA form, on its proper construction costs only proceedings are included within the "claim" for which coverage is provided, (2) the district judge's ruling as to the 20% success fee should stand, however (3) in the future it should be understood that in a simple case such as this the maximum uplift recoverable under a CFA entered into on and after August 1, 2001, should ordinarily only be 5% of the claimant's lawyer's costs unless a higher uplift was appropriate in the particular circumstances—*Tilby v. Perfect Pizza Ltd*. 152 New L.J. 397 (2002); *Callery v. Gray* (Nos.1 & 2) [2002] UKHL 28; [2002] 1 W.L.R.2000, HL (see *Civil Procedure*, Spring 2002, Vol.1, para. 44PD.5, and Vol.2, paras 7A-33.1 & 9A-862)

■ MACINTYRE v. PHILLIPS [2002] EWCA Civ 1087; *The Times*, August 30, 2002, CA (Brooke & Dyson L.JJ. and Wall J.)
CPR rr.3.1(2)(j), 17.1 & 29.3, Practice Direction para. 5.3 (2) & (7)—at case management conference in libel proceedings against police (D) proceeding on the multi-track, judge (1) refusing D application to amend defence to rely on similar fact evidence, and (2) rejecting D's suggestion that issue of qualified should be tried as a preliminary issue—held, dismissing D's appeal, there is no rule of practice to the effect that issues of qualified privilege should be heard in advance of the main trial (see *Civil Procedure*, Spring 2002, Vol.1, paras 29PD.5, 53PD.18)

■ MAGUIRE v. MOLIN [2002] EWCA Civ 1083; [2002] 4 All E.R. 325, CA (Brooke & Dyson L.JJ. and Wall J.)
CPR rr.26.6, 26.7, 26.8, 26.10 & 52.13, Practice Direction (Case Management—Preliminary Stage : Allocation and Re-Allocation) paras 11.1, 11.2, 12.2 & 12.10—county court claim commenced by claimant (C) for damages for personal injuries limited to £15,000 allocated to fast track—trial by district judge of liability as a preliminary issue adjourned part heard—at resumption, district judge refusing C's application for permission to delete the limitation of £15,000 and to serve an updated schedule of special damages, increasing the total amount claimed to £80,000—after district judge had given judgment for C on liability, C appealing to circuit judge against district judge's refusal to allow amendment—circuit judge dismissing appeal, but single lord justice granting C permission to make second appeal—held, dismissing appeal, (1) the courses open to the district judge were not confined to (a) granting C's application and aborting the hearing on liability and, under r.26.10, re-allocating the claim to the multi-track for trial by a circuit judge, or (b) refusing it and continuing with the hearing on the fast track, (2) the judge had jurisdiction to allow the amendment and continue with the hearing of the issue of liability in the fast track, because a claim properly allocated to the fast track in the first place does not cease to be in that track simply because its financial value has been increased beyond the £15,000 limit, (3) the considerations that arise in these circumstances as to whether the claim should be re-allocated to the multi-track under r.26.10 are not the same as those arising when the initial allocation decision under r.26.5 is made, (4) under r.26.10 the court has an unfettered discretion and there is no reason to interpret the rule as excluding jurisdiction to continue to hear a claim where it is amended so that its financial value exceeds £15,000, if in all the circumstances it is appropriate to do so (see *Civil Procedure*, Spring 2002, Vol.1, paras 26.10.1, 26PD.11, 26PD.12 & 28.0.2)

■ MALKINSON v. TRIM [2002] EWCA Civ 1273; 152 New L.J. 1484, CA (Potter & Chadwick L.JJ. and Wall J.)
CPR rr.38.6(1) & 48.6, Practice Direction (Costs) para. 52.5—beneficiary (C) bringing claim against solicitors' firm acting for estate and against a former member of the firm (D)—D's new firm (T) going on record as D's solicitors—C serving notice of discontinuance against D—T lodging for assessment bill of costs for £15,000—costs judge rejecting C's submission that, by virtue of T's partnership deed (which applied where the firm acted for a partner) D had not incurred any costs recoverable from C—held, dismissing C's appeal (1) the principle is that, where a solicitor against whom proceedings are brought defends them in person and obtains judgment, he is entitled upon assessment to the same costs as if he had employed a solicitor, except in respect of items which the fact of his acting directly rendered unnecessary, (2) that principle survives under the CPR, further (3) where a litigant solicitor carries on practice in a partnership, the principle extends to work done on his behalf by the partnership—*London Scottish Benefit Society v. Chorley Crawford and Chester* (1885) 13 Q.B.D. 872, ref'd to (see *Civil Procedure*, Spring 2002, Vol.1, paras 48.6.6 & 48PD.3)

■ OLATAWURA v. ABILOYE [2002] EWCA Civ 998; 152 New L.J. 1204 (2002), CA (Simon Brown & Dyson L.JJ.)
CPR rr.3.1(3), 3.1(5), 24.6 & 25.12, Practice Direction (Summary Judgment) paras 4 & 5.2—district judge dismissing defendant's (D) application for summary dismissal of claimant's (C) claim against him, but ordering C to give security for D's costs in sum of £5,000—district judge finding that (1) C's claim had only limited prospects of success, (2) C had conducted the proceedings in a wholly unreasonable way, and (3) because C was not permanently resident within the jurisdiction, the enforcement of any costs order against him was likely to prove more than usually difficult—circuit judge dismissing C's appeal and C giving security by paying money into court—Court of Appeal giving C permission to make second appeal—held, dismissing C's appeal, (1) when determining an application for summary judgment the court has power to make an order tantamount to an order for security for costs against a party, whether claimant or defendant, (2) this power lies outwith Pt 25, Sect. II, (3) when exercising the power the court should be alert to the risk of denying a party's right of access to the court, (4) the district judge's findings amply justified the order (see *Civil Procedure*, Spring 2002, Vol.1, paras 3.1.5, 24.6.2, 24PD.5 & 25.12.4)

■ PETERS v. COMMISSIONER OF CUSTOMS AND EXCISE [2002] EWHC 1951 (QB); July 4, 2002, unrep. (Butterfield J.)
CPR rr.32.1, 35.1 & 35.4, Civil Evidence Act 1972, s.3—in course of VAT fraud investigation, Customs and Excise (D) executing search warrant of businessman's (C) premises—C bringing claim against D for damages for losses incurred as a result of the search—at case management conference, judge directing that each party should be permitted to adduce evidence of expert on accountancy, limited to one expert per party—C producing expert report of chartered accountant (X)—master dismissing D's application for deletion of certain parts of X's report—on appeal, D contending that X should not be permitted to give his opinion on the issue of the reasonableness of D's suspicion that C was seeking to evade VAT—held, dismissing appeal, in the circumstances a court would plainly be assisted by an expert's views on the issue—principles on which expert evidence may be admitted explained (see *Civil Procedure*, Spring 2002, Vol.1, para 35.4.1 and Vol.2, para. 9B-261)

■ ROWLAND v. BROCK [2002] EWHC 692 (QB); [2002] 4 All E.R. 370 (Newman J.)
CPR rr.1.1, 1.4(2)(k), 32.3 & 52.11(3), Practice Direction (Written Evidence), para. 29.1 & Annex 3, Human Rights Act 1998, Sched. 1, Pt . I, art.6—claimants (C1 and C2) bringing claim against businessman (D) and company for the recovery of debt—C1 a foreign businessman and at risk of being arrested on extradition warrant upon entering UK—C1 therefore applying under r.32.2 for court's permission to give his evidence at trial by way of video link—master finding that the circumstances preventing C1 from attending the trial in person did not outweigh the disadvantages to D were he required to cross-examine C1 by video link (it being "a second class way of conducting a trial") and refusing application—judge granting C1 permission to appeal—held, allowing C1's appeal, (1) the master had misdirected himself and his decision was "wrong" within the meaning of r.52.11(3)(a), (2) in particular, he had failed to give sufficient regard to the emphasis placed in the CPR on the use of technology in furthering the overriding objective and on the need to ensure, so far as is practicable, that the parties were on an equal footing, (3) no defined limit or set of circumstances should be placed upon the exercise of discretion under r.32.3 (see *Civil Procedure*, Spring 2002, Vol.1, paras 1.3.6, 1.4.13, 32.3.1 & 52.11.9 and Vol.2, para. 3D-3)

■ SEECHURN v. ACE INSURANCE S.A.-N.V. [2002] EWCA Civ 67; [2002] 2 Lloyd's Rep. 390, CA (Ward, Thorpe & Keene L.JJ.)
Limitation Act 1980, s.5—in 1988, claimant (C) injured in accident—in 1990, C submitting claim to his insurers (D) on disability policy for continuing and permanent injuries attributable to the accident—C rejecting D's offer—subsequent correspondence between C and D inconclusive—in 1998, C commencing proceedings against D—D contending that, as claim had not been commenced within 6 years of accident, it was statute barred (s.5)—at trial, judge finding that D had led C to believe that they were willing to continue considering the claim and holding that D were estopped from relying on the limitation defence (promissory estoppel)—held, allowing D's appeal, on the facts (occurring both before and after the expiry of the limitation period) there was nothing to enable C to establish a clear, unequivocal, unconditional promise by D not to rely on their right to plead limitation (see *Civil Procedure*, Spring 2002, Vol.2, para. 8-9)

■ SENGUPT A v. HOLMES [2002] EWCA Civ 1104; *The Times*, August 19, 2002, CA (Laws, Jonathan Parker & Keene L.JJ.)
Human Rights Act 1998, Sched. 1, Pt . I, art. 6.1—on judicial review application, judge holding that complaints by patient (H) against doctor (S) should proceed to a disciplinary hearing—on paper, single lord justice (X) refusing S permission to appeal—subsequently, on renewed application two lords justices granting permission—for hearing of substantive appeal, Court of Appeal constituted by X and two other lords justices—S chal-

lenging the constitution of the Court—held, in this situation, in the absence of special circumstances there was no reason as matter of principle to regard X as being anything other than a proper and impartial member of the tribunal (see *Civil Procedure*, Spring 2002, Vol.2, para. 9A-44.1)

■ TAYLOR v. WILLIAMSONS [2002] EWCA Civ 1380; *The Times*, August 9, 2002, CA (Ward, Tuckey & Clarke L.JJ.)
CPR Pt 40, Practice Statement (Supreme Court : Judgments) [1998] 1 W.L.R. 825—at end of evidence at trial of claimant's (C) professional negligence claim, judge directing parties to submit their closing submissions to him in writing by particular date—before he had received those submissions, judge circulating to parties his draft judgment, giving judgment for defendant (D)—upon being notified of his error, judge (1) recalling his judgment for reconsideration, and (2) refusing C's application for a re-trial before a different judge—held, dismissing C's appeal, in these circumstances a fair-minded observer would not find a real possibility or danger of bias (see *Civil Procedure*, Spring 2002, Vol.1, paras 40.2.1 & B5-001 and Vol.2, para. 9A-44.1) [Ed.: other recent cases on judicial bias are *Berg v. I.M.L. London Ltd.* [2002] 4 All E.R. 87 (master sighting without prejudice correspondence); *Hart v. Relentless Records Ltd.* 152 New L.J. 1562 (2002) (judge and counsel discussing case informally)]

■ YENULA PROPERTIES LTD. v. NALDU *The Times*, August 29, 2002 (Lloyd J.)
CPR r.8.1(3), Practice Direction (Alternative Procedure for Claims), para. 1.6, Access to Justice Act 1999 (Destination of Appeals) Order 2000, arts.3 & 4—county court proceedings between landlord (C) and tenant (D) commenced under Pt 8 procedure—issue arising whether tenancy agreement between C and D was for an assured shorthold tenancy—as issue involved question of fact, court ordering D to serve defence, but failing to order (1) that the claim should continue as if the Pt 8 procedure had never been used (r.8.1(3)), and (2) that the claim be allocated to a particular case management track (para. 1.6)—at trial, judge holding that the agreement was not for an assured shorthold tenancy—in allowing C's appeal, judge explaining (1) in county court claims allocated to the multi-track in the circumstances provided for by art. 4, appeals lie to the Court of Appeal, (2) as C's claim was not expressly allocated to the multi-track, but only deemed to have been allocated to that track, his appeal lay to the High Court (art. 3)—judge drawing practitioners' attention to importance of requesting court to make express allocation order where r.8.1(3) and para. 1.6 apply (see *Civil Procedure*, Spring 2002, Vol.1, paras 8.1.1, 8PD.1 & 52.0.15 and Vol.2, paras 9A-886 & 9A-885.1)

Practice Directions

■ PRACTICE DIRECTION (TRAFFIC ENFORCEMENT) HMSO CPR Update 29, October 2002
supplements CPR Pt 75 (Traffic Enforcement), added to CPR by Civil Procedure (Amendment) Rules 2002 (S.I. 2002 No. 2058)—replaces Practice Direction (Enforcement of Traffic Penalties) which supplemented Sched. 2, CCR O.48B, now revoked—in force October 1, 2002 (see *Civil Procedure*, Spring 2002, Vol.1, para. ccpd48B.1)

Statutory Instruments

■ CIVIL PROCEDURE (AMENDMENT) RULES 2002 (S.I. 2002 No. 2058)
makes amendments to CPR—adds r.5.5 (Filing and sending documents), r.19.7A (Representation of beneficiaries by trustees etc.)—inserts Pt 6, Sect. IV (Service of Foreign Process), Pt 34, Sect. II (Evidence for Foreign Courts), Pt 55, Sect. III (Interim Possession Orders), Pt 57, Sect. IV (Claims under the Inheritance (Provision for Family and Dependants) Act 1975)—adds Pt 64 (Estates, Trusts and Charities), Pt 68 (References to the European Court), Pt 69 (Court's Power to Appoint a Receiver), Pt 74 (Enforcement of Judgments in Different Jurisdictions), Pt 75 (Traffic Enforcement)—amends r.19.8A (Power to make judgments binding on non-parties), r.48.6 (Litigants in person), r.48.7 (Wasted costs orders)—renames "listing questionnaire" (provided for by r.28.5) as "pre-trial checklist"—makes various other amendments—revokes several Sched. 1 and Sched. 2 provisions—in force on December 2, 2002, with exception of Pt 75 (which came into force on October 1, 2002)

■ COURT OF PROTECTION (ENDURING POWERS OF ATTORNEY NO. 2) RULES 2002 (S.I. 2002 No. 1944)
amend Court of Protection (Enduring Powers of Attorney) Rules 2001 (S.I. 2001 No. 825)—substitutes new version of Form EP2 (application to the court to register an enduring power of attorney)—also permit court to publish versions containing immaterial variations from those set out in Sched. 1 to the 2001 Rules—in force August 31, 2002 (see *Civil Procedure*, Spring 2002, Vol.2, para. 6B-226)

IN DETAIL

Submission of no case to answer

At the end of a claimant's case, a defendant may submit that there is no case to answer (see *Civil Procedure*, Spring 2002, Vol.1, para. 32.1.6). If the submission succeeds, judgment may be given for the defendant without requiring him to present his case. Generally, a trial judge should not entertain such a submission without first requiring the defendant to elect not to call evidence, whatever the outcome of the submission (see *Boyce v. Wyatt Engineering* [2001] EWCA Civ 692; *The Times*, June 14, 2001, CA).

In *Miller v. Cawley* [2002] EWCA Civ 1100; July 30, 2002, CA, unrep., a builder (C) brought a claim in a county court against a householder (D) for work done. The court directed that the question whether or not there was a contract between C and D should be tried as a preliminary issue. At the trial, at the conclusion of the evidence for C, counsel for D submitted that there was no case to answer. The judge put D to her election and she elected to call no evidence. There was some discussion between counsel and judge as to the correct test to be applied on a submission of no case to answer. It was agreed, on the basis of the decision of the Court of Appeal in *Bentley v. Jones Harris & Co.* [2001] EWCA Civ 1724; November 2, 2001, CA, unrep., (see *CP News*, Issue 10/2001), that the test is "whether realistically there is no basis upon which a jury could, properly directed, find in favour of the claimant on the evidence adduced", that being a question for a judge sitting alone to put to himself "wearing his jury hat".

Where a defendant making an application of no case to answer has not been required to elect not to call any evidence succeeds in his application (as in *Karia v. I.C.S.(Management) Services Ltd.*, see below), the proper course is for the judge to dismiss the claimant's claim and to give the defendant judgment accordingly. If, in these circumstances, the application does not succeed, then the defence evidence (if any) should be received and the trial completed in the normal way by the judge deciding on the basis of all the evidence whether on a balance of probabilities the claimant should succeed in his claim.

Where (as will be the more usual case) a defendant making an application of no case to answer has been required to elect not to call any evidence, in theory the position is that the judge should consider, first, whether (in accordance with the test referred to above) there is no case to answer. If he decides that there is a case to answer then he should consider, secondly, as no evidence remains to be received, whether on a balance of probabilities the claimant should succeed in his claim. But for obvious reasons, as a practical matter the first of these steps falls by the wayside and, although the formal position may be that the judge is being asked to consider a defendant's submission of no case to answer, the reality is that he is being asked to determine the ultimate issue in the light of the evidence. Conceivably, the judge may find "wearing his jury hat" that there is no basis upon which a jury could, properly directed, find in favour of the claimant on the evidence adduced, or may find that the claimant has no prospects of success. In either event, the claimant's case has not been established on a balance of probabilities and judgment for the defendant should follow accordingly. It is also conceivable that the judge may find, despite the defendant's contention that there is no case to answer, that the claimant's case has been established on a balance of probabilities, in which event judgment for the claimant would follow.

In *Miller v. Cawley*, the judge rejected D's submission of no case to answer. He found that there was a real prospect of C succeeding and ruled that there was a case to answer. But having done that, the judge said that C had proved the preliminary issue and that there was a contract between him and D. On the face of it, it seemed that the judge, having applied his mind to the question whether there was a case to answer (in the light of the appropriate test), and found that there was, had not applied his mind to the question whether it had been proved on a balance of probabilities that there was a contract between C and D (and not merely that there was a real prospect of C succeeding on that issue). Further, the judge had not made findings of fact sufficient to justify the conclusion that C should have judgment. D was given permission to appeal.

The Court of Appeal allowed the appeal and remitted the case to the judge for further consideration. Mance L.J. explained (para.11) that, where a defendant making a submission of no case to answer elects to call no evidence the issue for the judge is not whether there was any real or reasonable prospect that the claimant's case might be made out or any case fit to go before a jury or judge of fact. Rather, it is the straightforward issue, arising in any trial after all the evidence has been called, whether or not the claimant has established his or her case by the evidence called on the balance of probabilities.

Mance L.J. also explained (para.8) that suggestions have been made that it is open to a judge, at the close of a claimant's case, and without requiring any election by the defendant to call no evidence, to determine whether or not the claimant has on his own evidence made out his case on a balance of probabilities. His lordship doubted whether this was right, not only for the reasons given in the well-known case of *Alexander v. Rayson* [1936] 1 K.B. 178, CA, but also for those given in *Royal Brompton Hospital N.H.S. Trust v. Hammond, The Times*, May 11, 2001, CA.

In the earlier case of *Karia v. I.C.S. (Management) Services Ltd.* [2001] EWCA Civ 1025; June 21, 2001, CA, unrep., the facts were that an employee (C) brought a claim against her employers (D) for personal injuries. C alleged that discrimination and harassment at her work-place affected her working conditions and caused RSI. At trial, on the issue of liability D limited her case to the harassment allegation. On the first day of trial, after C's evidence on liability and evidence of her technical expert had been given, but before evidence of her medical expert received (it being agreed that all medical evidence should be heard on the second day), D submitted that there was no case to answer. The judge considered the application without requiring D to elect not to call evidence, and dismissed C's claim. The Court of Appeal dismissed C's appeal. The Court (Tuckey and Arden L.JJ.) said (1) the criticism that the judge had not decided the real issues in the case should be rejected, (2) the only basis on which the judge was invited to find liability was the case based on harassment, (3) having rejected that case, C's claim would have failed whatever the judge's conclusions on the other issues, (4) this was one of the rare cases in which the judge was entitled to rule on D's submission of no case to answer without requiring them to elect not to call evidence. Arden L.J. added that C was not denied a right of fair trial in respect of the determination of the arguments which were not put before the trial judge.

Disclosure by non-parties

Among the interim remedies that may be granted by the court listed in CPR r.25.1(1) is "an order under section 34 of the Supreme Court Act 1981 or section 53 of the County Courts Act 1984". These statutory provisions may be traced back to the Administration of Justice Act 1970. They state that the powers given by them should be exercised in accordance with rules of court, and it is important to note that they are supplemented by, respectively, s.35 of the 1981 Act and s.54 of the 1984 Act (see *Civil Procedure*, Spring 2002, Vol.2, paras 9A-98 and 9A-587).

As is explained in *Civil Procedure*, Spring 2002, Vol.1, para. 25.1.29, s.34(2) and s.53(2) deal with the disclosure of documents after proceedings have been commenced by a person who is not a party to the proceedings, a person described in r.25.1(1)(j) as "a non-party" and in r.31.17 as "a person not a party" (see below). Before 1970, lawyers were quite familiar with the requirements for disclosure of documents by parties (in accordance with the rules of court, now found in CPR Pt 31). Disclosure by non-parties was something new and, not surprisingly, was restricted to proceedings for personal injury and wrongful death. In the Access to Justice Final Report (p.127) it was recommended that the court should have power to make disclosure orders (1) before proceedings for personal injury and wrongful death were commenced against persons who were not likely to be parties to the proceedings, and (2) after proceedings of any variety had been commenced against non-parties. The latter, but not the former, of these recommendations was accepted. Accordingly, s.34(2) and s.53(2) were amended by the Civil Procedure (Modification of Enactments) Order 1998. (For the court's power in any proceedings to make disclosure orders against prospective parties before proceedings are commenced, see s.33(2) of the 1981 Act and s.52(2) of the 1984 Act, and CPR rr.25.1(1)(j) and 31.16 (noted in paras 25.1.26 and 31.16.1.)

Rules of court dealing with the court's power to make disclosure orders after proceedings have been commenced against non-parties, as extended by the 1998 Order, are found in CPR r.31.17. Rule 31.17(3) states that the court may make an order under this rule only where (a) the documents of which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings, and (b) disclosure is necessary in order to dispose fairly of the claim or to save costs. Rule 31.17(4) states that an order under this rule must (a) specify the documents or the classes of documents which the respondent must disclose, and (b) require the respondent, when making disclosure, to specify any of those documents (i) which are no longer in his control, or (ii) in respect of which he claims a right or duty to withhold inspection. Rule 31.17(5) states that such an order may (a) require the respondent to indicate what has happened to any documents which are no longer in his control, and (b) specify the time and place for disclosure and inspection.

In personal injury and wrongful death cases, the non-parties against whom orders for disclosure of documents may be sought after proceedings have been commenced fall into fairly predictable classes (*e.g.*, hospitals treating the injured or deceased). With the extension of the power to make such orders in other cases such prediction is not possible. It was perhaps inevitable that the extension of the court's

power to make disclosure orders against non-parties beyond proceedings for personal injury and wrongful death to all variety of proceedings would cause difficulties. It is not surprising therefore to find that the scope of the power and the manner of its exercise have attracted the attention of the courts, both at first instance and on appeal (see *In re Howglen Ltd.* [2001] 1 All E.R. 376; *Black v. Sumitomo Corporation* [2001] EWCA Civ 1819; [2001] 1 W.L.R. 1562, CA; *American Home Products Corporation v. Novartis Pharmaceuticals (U.K.) Ltd.* [2001] EWCA Civ 165, February 9, 2001, CA, unrep.; *Clark v. Ardington Electrical Services* [2001] EWCA Civ 585, unrep.; *Pride Valley Foods Ltd. v. Hall and Partners (Contract Management) Ltd.* May 8, 2002 (Judge Toulmin)).

A recent and significant case is the decision of the Court in *Three Rivers District Council v. Bank of England* [2002] EWCA Civ 1182; *The Times*, October 4, 2002, CA. In this case, former customers (C) of failed bank (X) brought a claim against the Bank of England (D) for misfeasance in public office on ground that D failed in their regulatory duties. In 1992, a report of a public inquiry into the failure of X was published (the Bingham Report). C sought disclosure of material collected in the course of that inquiry and now archived at the Public Record Office (and protected from public access for 30 years). A judge held that this material was not under control of D and set aside witness summonses requiring offices of D to produce it. C then applied under r.31.17 for disclosure of the material (some of which may have been confidential and subject to PII) by HM Treasury (T) (not a party to the proceedings). T accepted that they were the proper respondents for the application. Tomlinson J. held, (1) r.31.17(3)(a) may be satisfied where it is shown on the evidence that the likely subject matter of the document (or class of documents) sought is sufficiently closely connected with the issues in dispute to be regarded as potentially relevant, (2) the applicant is not required to show actual relevance, since that would usually be impossible without precise knowledge of the contents of the document (see [2002] EWHC 1118 (Comm); May 31, 2002, unrep.). The judge referred to the question whether a readily identifiable class of documents which can be expected to contain documents supportive of the applicant can be rendered not disclosable under r.31.17 by the presence therein of documents supportive of the case of his opponent. The judge also compared the power of the court to make disclosure orders against non-parties after proceedings have been commenced with the court's power to make disclosure orders against prospective orders before proceedings have been commenced (see s.33(2) of the 1981 Act and s.52(2) of the 1984 Act, and r.31.16).

T appealed. In the Court of Appeal (Lord Phillips MR, Chadwick and Keene L.JJ.), in essence T's argument was that the judge had been wrong to reach the conclusion that the threshold condition in para. (a) of r.31.17(3) was satisfied. As noted above, that paragraph states that the court may make an order only where the documents of which disclosure is sought "are likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings". In giving the judgment of the Court, Chadwick L.J. said there were two main submissions. First, there was the argument that the judge had misdirected himself in that he (a) had failed to give the word "likely" the meaning "more probable than not" which (so T contended) that word should bear in this context, and (b) had failed to appreciate that the test "likely to support ... or adversely affect" has to be applied to each individual document or (if the documents were to be described as a class) to each document in that class. Secondly, there was the submission that the judge had failed to recognise that the effect of r.31.17(2), which provides that an application for an order "must be supported by evidence", is to require an applicant to adduce evidence of the matters on which he relies to establish that the threshold condition in r.31.17(3)(a) is met. It was T's case that C had adduced no such evidence.

Chadwick L.J. dealt first with the second of these submissions. His lordship noted that Tomlinson J. had taken the view that, in the very unusual circumstances of this case, C were not required to go to the extremely time-consuming and costly lengths of demonstrating precisely how each and every document or class of documents of which they sought disclosure would support their case or damage that of D. In the Court's view, the judge (who had a detailed grasp of all aspects of the case) was entitled to approach the matter on that basis.

In dealing with the first aspect of the first submission, the Court rejected the argument that judge should have interpreted "likely" as meaning (as T contended) "more probable than not". Chadwick L.J. examined r.31.17 and other related rules and their statutory bases.His lordship noted that in paras (a) and (b) of r.31.16(3) the word "likely" has been interpreted as meaning "may well" (see *Black v. Sumitomo Corporation*, *op. cit.*) and concluded that in r.31.17 no higher test was desirable or necessary. However, in reaching this conclusion the Court should not be taken as accepting that the hurdle imposed by r.31.17(3) is, necessarily, as low as that which has to be surmounted when a court applies the "real prospect" test under other CPR provisions (*e.g.*, rr.24.2 and 52.3).

In dealing with the second aspect of the first submission, the Court reject the argument that the test "like-

ly to support ... or adversely affect" has to be applied to each individual document or (if the documents were to be described as a class) to each document in that class. Chadwick L.J. said that the matter was covered by the decision of the Court of Appeal in *American Home Products Corporation v. Novartis Pharmaceuticals (U.K.) Ltd.*, *op. cit.*, and held that Tomlinson J. had correctly directed himself in accordance with that decision. His lordship said (para. 38) that the *Novartis* case may be taken as authority for the following propositions.

First, the court has no power to order a non-party to disclose documents which do not meet the threshold condition in para. (a) of r.31.17(3) and that restriction on the court's powers cannot be circumvented by including documents which do not meet that threshold condition in a class which includes documents which do meet it.

Secondly, the test under the threshold condition is whether the document is likely to support the case for the applicant or adversely affect the case of one of the other parties.

Thirdly, when applying that test it has to be accepted (and is not material) that some documents which may then appear likely to support the case or adversely affect the case of one of the other parties will turn out, in the event, not to do so.

Fourthly, in applying the test to individual documents, it is necessary to have in mind that each document has to be read in context; so that a document which, considered in isolation, might appear not to satisfy the test, may do so if viewed as one of a class.

Fifthly, there is no objection to an order for disclosure of a class of documents provided that the court is satisfied that all the documents in the class do meet the threshold condition. In particular, if the court is satisfied that all the documents in the class (viewed individually and as members of the class) do meet that condition (in the sense that there are no documents within the class which cannot be said to be "likely to support ... or adversely affect") then it is immaterial that some of the documents in the class will turn out, in the event, not to support the case of the applicant or adversely affect the case of one of the other parties.

CPR UPDATE

AMENDMENTS TO CPR

The CPR were further amended by the Civil Procedure (Amendment) Rules 2002 (S.I. 2002 No. 2058) but, with the one exception of the insertion of Pt 75 (Traffic Enforcement) (not referred to further below), the changes made by this statutory instrument will not come into effect until December 2, 2002 (Pt 75 came into effect on October 1, 2002). All of the changes made to the CPR by this statutory instrument will be included in the next edition of *Civil Procedure*, Vol.1, due for publication in November. The new Parts, and the new Sections to existing Parts, added and inserted by the Civil Procedure (Amendment) Rules 2002 are supplemented by new practice directions or by additions to existing practice directions (see HMSO CPR Update 29, 2002, generally).

Addition of new Parts and Sections

As indicated immediately below, new Sections are added to existing Parts. Necessary consequential amendments made accordingly, mainly in the form of the revocation of RSC and CCR provisions presently found in Sched. 1 and 2.

Pt 6 (Service of Documents) Sect. IV (Service of Foreign Process)

The rules in this new Section (rr.6.32 to 6.35) provide for the service, in England and Wales, of foreign process. The principal Scheduled Rule revocation brought about by the addition of this Section is RSC O.69 (Service of Foreign Process) (see para. sc69.0.1).

Pt 34 (Depositions and Court Attendance by Witnesses) Sect. II (Evidence for Foreign Courts)

This Part is re-titled as "Witnesses, Depositions and Evidence for Foreign Courts" and the existing rules (rr.34.1 to 34.15) are placed in Sect. I (Witnesses and Depositions) (rr.34.16 to 34.21) and Sect. II (rr.34.16 to 34.21) is added. As a result of the insertion of Sect. II, Sched. 1, RSC O.70 (Obtaining Evidence for Foreign Courts, Etc.) is revoked (see para. sc70.0.1). Rule 12(d)(i) of the amending statutory instrument purport to omit the cross-reference after r.34.15. In fact, no such cross-reference has ever appeared in the CPR (though one was included in the HMSO version of the CPR)

Pt 55 (Possession Claims) Sect. III (Interim Possession Orders)

The principal Scheduled Rule revocation brought about by the addition of this Section (rr.55.20 to 55.28) is CCR O.24, rr.8 to 15 (see para. cc24.8). Various minor consequential amendments are made to r.55.2.

Pt 57 (Probate Claims, Rectification of Wills, Substitution and Removal of Personal Representatives) Sect. IV (Claims under the Inheritance (Provision for Family and Dependants) Act 1975)

The title to this Part is substituted "Probate and Inheritance", Sect. IV (rr.57.14 to 57.16) is added, and certain minor consequential amendments are made to r.57.1. The principal Scheduled Rule revocation brought about by the addition of Sect. IV is RSC O.99 (Inheritance (Provision for Family and Dependants) Act 1975) (see para. sc99.0.1).

Pt 64 (Estates, Trusts and Charities)

This new Part is divided into two sections: I. Claims relating to the administration of estates and trusts (rr.64.2 to 64.4) , and II. Charity proceedings (rr.64.5 and 64.6). The principal Scheduled Rules revocations brought about by the addition of this new Part and the practice directions which will supplement it include: RSC O.85 (Administration and Similar Actions) (see para. sc85.0.1), RSC O.93 (Applications and Appeals Under Various Acts to the High Court : Chancery Division) rr.6 and 21 (see paras sc93.6 & 93.21), and RSC O.108 (Proceedings relating to charities : the Charities Act 1993) (see para. sc108.0.1). Pt 64 is supplemented by Practice Direction (Estates, Trust and Charities) and Practice Direction (Applications to the Court by Trustees in Relation to the Administration of the Trust) (see HMSO CPR Update 29, 2002).

Pt 68 (References to the European Court)

The provisions of this new Part (rr.68.1 to 68.4) replace RSC O.114 (see para. sc114.0.1) and CCR O.19, r.15 (see para. cc19.15). This Part is supplemented by Practice Direction (References to the European Court) (see HMSO CPR Update 29, 2002).

Pt 69 (Court's Power to Appoint a Receiver)

The principal Scheduled Rules revocations brought about by the addition of this new Part (rr.69.1 to 69.11) and the practice directions which will supplement it include: RSC O.30 (Receivers) (see para. sc30.0.1), RSC O.51 (Receivers : Equitable Execution) (see para. sc51.0.1). This Part is supplemented by Practice Direction (References to the European Court's Power to Appoint a Receiver) (see HMSO CPR Update 29, 2002).

Pt 74 (Enforcement of Judgments in Different Jurisdictions)

This new Part is divided into four Sections as follows: (Sect. I (Enforcement in England and Wales of Judgments of Foreign Courts) (rr.74.2 to 74.11), Sect. II (Enforcement in Foreign Countries of Judgments of the High Court and County Courts) (rr.74.12 & 74.13), Sect. III (Enforcement of United Kingdom Judgments in Other Parts of the United Kingdom) (rr.74.14 to 74.18), Sect. IV (Enforcement in England and Wales of European Community Judgments) (rr.74.19 to 74.26). Consequential amendments are made to various existing CPR provisions, in particular r.62.21 (Registration of awards under the Arbitration (International Investment Disputes) Act 1966) and r.70.5 (Enforcement of awards of bodies other than the High Court and county courts).

The principal Scheduled Rules revocations brought about by the addition of this new Part and the practice directions which will supplement it are: RSC O.71 (Reciprocal Enforcement of Judgments etc.) (and the practice directions supplementing that Order) (see para. 71.0.1), and CCR O.35 (Enforcement of County Court Judgments Outside England and Wales) (see para. cc35.0.1).

This Part is supplemented by Practice Direction (Enforcement of Judgments in Different Jurisdictions) (see HMSO CPR Update 29, 2002).

Other Amendments

Rule 5.5 (Filing and sending documents) is added. It states that a practice direction may make provision for documents to be filed or sent to the court by (a) facsimile, or (b) other electronic means. This amendment paves the wave for changes likely to be implemented for the communications with court offices in the light of work done under the "Modernising Justice" initiative. (It may be noted that the draftsman has failed to add a reference to this new rule to the "Contents of this Part" at the beginning of Pt 5.) Rule 5.5 is supplemented by Practice Direction (Pilot Scheme for Communication and Filing of Documents by E-mail) which provides for a pilot scheme to operate from December 2, 2002 to January 31, 2004, permitting parties to claims in specified county courts (initially Walsall county court) to communicate with the court by e-mail and file specified documents by e-mail (see HMSO CPR Update 29, 2002).

Rule 19.7A (Representation of beneficiaries by trustees etc.) is added. It replaces Sched. 1 RSC O.15, r.14 (see para. sc15.14), which is revoked. The new rules states that a claim may be brought by or against trustees, executors or administrators in that

capacity without adding as parties any persons who have a beneficial interest in the trust or estate ("the beneficiaries"). Any judgment or order given or made in the claim is binding on the beneficiaries unless the court orders otherwise in the same or other proceedings.(It may be noted that the draftsman has failed to add a reference to this new rule to the "Contents of this Part" at the beginning of Pt 19.)

Rule 19.8A (Power to make judgments binding on non-parties) is amended to provide that, in High Court and county court claims relating to the estate of a deceased person, property subject to a trust, or the sale of any property, the court may direct that notice of a judgment or order be served on a person who is not a party, so that the judgment or order will bind that person. Sched. 1, RSC O.44, r.2 (Service of notice of judgment on person not a party) is revoked.

Rule 48.6 (Litigants in person) is amended to provide that the costs allowed to a litigant in person will be for the same categories of work and disbursements as would have been allowed if the work had been done or the disbursements made by a legal representative on behalf of the litigant in person, and to provide that where a litigant in person is able to prove financial loss, he will be allowed the amount he can prove he has lost for time reasonably spent doing the work (see remarks of Court if Appeal in *R.(Wulfsohn) v. Legal Services Commission* [2002] EWCA Civ 250; February 8, 2002, CA, unrep.). Rule 34 of the amending statutory instrument states that, where before December 2, 2002, proceedings have begun under r.47.6(1) for the detailed assessment of the costs of a litigant in person, r.48.6 shall continue to apply to those proceedings as if it had not been amended.

Rule 48.7 (Wasted costs orders) is amended to provide the court with an alternative when making a wasted costs order. The court can direct a costs judge or a district judge to decide the amount of costs to be disallowed or paid.

The "listing questionnaire" provided for by r.28.5, and referred to in a number of CPR provisions and supplementing practice directions, is renamed the "pre-trial checklist" and r.28.5 and r.29.6 are substituted. This change reflects more accurately the purpose of the document. The document is already referred to as such in some directions relating to particular proceedings (see e.g., Practice Direction (Mercantile Courts) para. 8.2). (It may be noted that although r.28.5 and r.29.6 are re-titled as "Pre-trial check list (listing questionnaire)" the draftsman has failed to reflect these change in the "Contents of this Part" sections at the beginning of Pt 28 and Pt 29.) Necessary amendments reflecting the change in nomenclature are made to Practice Direction (The Fast Track) and Practice Direction (The Multi-Track) (see HMSO CPR Update 29, October 2002)

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