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CIVIL PROCEDURE NEWS

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N BRIEF

Cases

■ E.D. & F. MANN LIQUID PRODUCTS LTD. v. PATEL [2003] EWCA Civ 472; *The Times*, April 18, 2003, CA (Peter Gibson & Potter L.JJ.)
CPR, rr.12.3, 13.3(1)(a) & 24.2(a)(ii)—claimants (C) obtaining default judgments against two defendants (D1 & D2) under r.12.3 for their failures to file acknowledgments of service—judge refusing D1's application to set judgment aside under r.13.3—held, dismissing D1's appeal, subject to the differences in the burden of proof, the "real prospect of success" test in r.13.3(1)(a) is the same as that in r.24.2(a)(ii) (see *Civil Procedure*, 2003, Vol.1, paras 13.3.1 & 24.2.3)

■ ISTIL GROUP INC. v. ZAHOOR [2003] EWHC 165 (Ch); [2003] 2 All E.R. 252 (Lawrence Collins J.)
CPR, rr.31.20 & 32.1—claimants (C) communicating by e-mails with potential witness (X)—X voluntarily, and without knowledge of C, disclosing those e-mails to defendants (D)—identity of X unknown to both C and D—C applying for injunction restraining D from using the e-mails as evidence—held, dismissing the application, (1) where privilege is lost in confidential documents the court has jurisdiction to restrain the use of such documents, (2) generally, the normal rules relating to the grant of equitable remedies apply to the exercise of that jurisdiction (see *Civil Procedure*, 2003, Vol.1, paras 31.3.13 & 31.3.27)

■ THREE RIVERS DISTRICT COUNCIL v. BANK OF ENGLAND (NO. 5) [2003] EWCA Civ 474; *The Times*, April 19, 2003, CA (Lord Phillips M.R., Sedley & Longmore L.JJ.)
CPR, Pt 31—bank (D), with assistance of their solicitors (B), making submissions to, and responding to requests for information from, public inquiry into failure of financial institution (X) regulated by D—in course of this exercise D (1) communicating with B for the purpose of obtaining legal advice, and (2) sending documents to B—subsequently, former customers (C) of X bringing claim against D—judge refusing C's application for declaration that documents not subject to legal advice privilege—held, allowing C's appeal, the communications between D and B were covered by the privilege but the documents were not (see *Civil Procedure*, 2003, Vol.1, para. 31.3.5)

■ BARRETT v. UNIVERSAL-ISLAND RECORDS LTD. [2003] EWHC 625 (Ch); *The Times*, April 24, 2003 (Laddie J.)
CPR, rr.3.4(2) & 24.2—defendants (D) applying for (1) order striking out claimant's (C's) claim, and (2) an order for summary judgment—held, dismissing applications (1) neither r.3.4(2) nor r.24.2 draws a distinction between applications for summary relief on the ground of abuse of process and other summary applications, (2) in either instance, the court is being invited to deprive the respondent of a trial, (3) in order to do that at an early stage the court has to have a high degree of confidence that the claim or defence will not succeed, (4) in the instant case, the facts and issues were complicated and not suitable for summary determination, and it was not safe to strike the claim out—observations on avoidance of mini-trials (see *Civil Procedure*, 2003, Vol.1, para. 1.3.7, 3.4.6, 24.2.3 & 24.2.5)

■ COPPARD v. COMMISSIONERS OF CUSTOMS AND EXCISE [2003] EWCA Civ 511; *The Times*, April 11, 2003, CA (Thorpe, Sedley & Mance L.JJ.)
Supreme Court Act 1981, ss.9 & 68, Human Rights Act 1998, Sched.1, Pt I, art.6—in High Court proceedings, circuit judge making order requiring defendants (D) to pay nominal damages to claimant (C) for admitted breach of contract—judge authorised to sit in Technology and Construction Court (s.68) but not in High Court (s.9)—judge believing that, although he was not requested to sit in High Court under s.9, he had necessary judicial authority as he was authorised under s.68 to sit in the Technology and Construction Court—C appealing on ground that judge not authorised to hear the case—held, dismissing appeal, (1) the judge was a judge-in-fact of the High Court and his judgment therefore was a judgment of the High Court, (2) the judge constituted a tribunal established by law within the meaning of art.6, (3) the Convention does not require the disqualification of a judge purely because his authority was not formally established before he sat—*Fawdry & Co. v. Murfitt* [2003] EWCA Civ 643; [2003] Q.B. 104, CA, ref'd to (see *Civil Procedure*, 2003, Vol.2, paras 2C-2, 3D-34, 9A-30, & 9A-324)

■ DYSON APPLIANCES LTD. v. HOOVER LTD. (NO. 4) [2003] EWHC 624 (Ch); *The Times*, March 18, 2003 (Laddie J.)
CPR, rr.36.2, 44.3(8), 44.8 & 47.15—claimants (C) granted judgment for patent infringement and order made for inquiry into damages—shortly before hearing of inquiry, C accepting defendant's (D) Pt 36 payment—that payment more advantageous to C than offer made by C but rejected by D—judge awarding

C costs of the inquiry to be assessed on the standard basis (see *Dyson Appliances Ltd. v. Hoover* [2001] R.P.C. 473)—C applying for an order for an interim payment of the costs—held, dismissing the application, it is not appropriate for a court to grant such an order when it had not heard the full trial of the action and was, therefore, ignorant of the contested issues (see *Civil Procedure*, 2003, Vol.1, para. 44.3.13)

■ GEVERAN TRADING CO. LTD. v. SKJEVESLAND [2002] EWCA Civ 1567; [2003] 1 W.L.R. 912, CA (Schiemann, Arden & Dyson L.JJ.)
CPR, r.1.3, Code of Conduct for the Bar of England and Wales, paras 601 to 603—during hearing of bankruptcy petition, becoming apparent that counsel (C) for petitioner (P) known socially to respondent debtor's (R's) wife (W)—R applying to registrar for re-trial of petition on grounds that (1) C should not have accepted instructions, and/or (2) there might be an appearance of bias—registrar dismissing application and making bankruptcy order against R—judge dismissing R's appeal—single lord justice granting R permission to appeal—held, dismissing appeal, (1) in these circumstance the test for appearance of judicial bias does not apply, (2) a party has no right based on the Code of Conduct to prevent an advocate from acting, (3) as an officer of the court an advocate has a duty to the court which overrides his duty to his client, (4) in exceptional circumstances, in the exercise of inherent jurisdiction the court can prevent an advocate from acting, even if he had no relevant confidential information, if satisfied that there was a real risk that his continued participation would require the order made at the trial to be set aside on appeal, (5) a judge should not too readily accede to an application by a party to remove the advocate for the other party—duties of advocate to court and other parties where he is aware of personal factors on which objections to his acting might be taken explained, and practical illustrations of advocate's duty to court given (see *Civil Procedure*, 2003, Vol.1, para. 1.3.8, and Vol.2, para. 9A-59)

■ GREGORY v. TURNER [2003] EWCA Civ 183; *The Times*, February 21, 2003, CA (Brooke, Sedley & Carnwath L.JJ.)
Courts and Legal Services Act 1990, ss.27 & 28, Enduring Powers of Attorney Act 1985—held (1) s.27(2)(d) of the 1990 Act confers a right of audience on "a party" to the proceedings if he would have that right "in his capacity as such a party" if the Act had not been passed rights of audience of attorney, (2) this provision preserves the position before the 1990 Act which allowed an individual to appear in his own case in any court, regardless of his qualifications, (3) "party" in this context does not include a party's agent, therefore (4) a party may not by power of attorney confer on another the right to appear in court as his lay advocate (see *Civil Procedure*, 2003, Vol.2, paras 9A-612 & 9B-458)

■ LAKAH GROUP v. AL-JAZEERA SATELLITE CHANNEL *The Times*, April 18, 2003 (Gray J.)
CPR, rr.6.2 & 6.5, Companies Act 1985, s.695—Egyptian company (C1) and its founder (C2) bringing defamation claim against Qatar media company (D1) and journalist (D2)—D1 and D2 giving no address for service and no solicitor acting for them—for purpose of effecting service, claim form posted through letter box of London premises of company producing programmes for D1—D1 and D2 bringing claim for declaration that the claim form had not been validly served on them—held, giving judgment for the defendants, (1) an overseas company may be served by any method permitted by r.6.5(6) as an alternative to the method of service set out in s.695, (2) whereas s.695 permits service at the registered address in Great Britain of an overseas company (being a company with an established place of business within the jurisdiction), r.6.5(6) permits service at a non-registered company's place of business within the jurisdiction, (3) service on an address with which such company had no more than a transient or irregular connection would not be valid, (4) C1 and C2 had not proved that the company based in London was carrying on D1's business and/or activities within the meaning of r.6.5(6), still less that the defendants had established a place of business for the purposes of the 1985 Act (see *Civil Procedure*, 2003, Vol.1, paras 6.2.5 & 6.5.5)

■ MARTIN v. MCGUINESS *The Times*, April 21, 2003, Ct.Sess. (Lord Bonomy)
Human Rights Act 1998, s.6 & Sched.1, Pt I, art.8(1)—pursuer (C) bringing personal injury action against defender (D)—for purpose of gathering evidence, D engaging private investigator (X)—X's investigation including (1) going to C's house, (2) misrepresenting to C's spouse that he was former colleague of C, and (3) from adjacent property filming events in garden of C's house using telephoto lens—C making plea in law that evidence so gathered was inadmissible—held, repelling plea (1) evidence obtained in breach of a party's right to private and family life under art.8(1) might nonetheless be admissible under art.8(2), (2) in the circumstances, X's inquiries and surveillance (a) were reasonable and proportionate steps taken on behalf of D to protect his rights and as a contribution to the wider rights of the community, and (b) were therefore necessary in a democratic society [Ed.: see also *Jones v. University of Warwick* [2003] EWCA Civ 151; 153 New L.J. 230 (2003), CA] (see *Civil Procedure*, Autumn 2002, Vol.1, paras 1.3.3, 1.3.10 & 32.1.4, and Vol.2, para. 3D-36)

■ PHILLIPS v. COMMISSIONER OF POLICE OF THE METROPOLIS [2003] EWCA Civ 382; *The Times*, April 2, 2003, CA (Lord Phillips M.R., Rix & Scott Baker L.JJ)
CPR, rr.3.1 & 26.11, Supreme Court Act 1981, s.69, County Courts Act 1984, s.66—held, (1) generally, claims are tried by a judge sitting alone but (subject to exceptions) the court should order trial by judge and jury in the circumstances provided for by s.69 and s.66, (2) where appropriate, in the same proceedings the court may in the exercise of powers listed in r.3.1(2) order that certain issued be tried by judge alone and others by judge and jury (*ibid*. s.69(4), (3) however, where it is clear that some issues could not conveniently be tried with a jury it may be more appropriate for the whole case to be tried by judge alone (see *Civil Procedure*, 2003, Vol.1, paras 1.4.8 & 26.11, and Vol.2, paras 9A-325 & 9A-624)

■ TARLING v. WABARA [2003] EWHC 450 (QB); March 5, 2003, unrep. (Gray J.)
CPR, rr.1.1, 3.6 & 3.9, Human Rights Act 1998, Sched.1, Pt I, art.6—judge giving defendant (D) permission to re-amend defence and counterclaim on conditions—conditions including that D (1) pay claimant's (C's) costs of and occasioned as a result of the amendment, (2) pay £50,000 on account of costs, and (3) either (a) pay £250,000 into court, or (b) provide bank guarantee, by specified date—D complying with (1) and (2) but not with (3) with result that C entered judgment against D (r.3.5) for a substantial sum—Court of Appeal refusing D permission to appeal against imposition of third condition—D applying to judge to set judgment aside (r.3.6), stating that he was now in a position to make the £250,000 payment into court—held, granting the application, (1) although the conduct of D was thoroughly reprehensible, (2) if D were denied relief (a) he would be facing a judgment of up to £1.6m without being permitted to put forward his defence, and (b) his art.6 rights might be contravened, (3) weighing all of the circumstances, including those listed in r.3.9, the balance was in favour of setting aside the judgment—*Yorke Motors (M.V.) v. Edwards* [1982] 1 W.L.R. 444, HL, In *re Swaptronics Ltd.*, *The Times*, August 17, 1998, *Training in Compliance v. Dewes* [2001] C.P. Rep. 46, *Woodhouse v. Consignia plc.*, [2002] EWCA Civ 275; [2002] 1 W.L.R. 2558, CA, *Sayers v. Clarke Walker* (Practice Note) [2002] EWCA Civ 645; [2002] 1 W.L.R. 3095, CA, *CIBC Mellon Trust Company v. Stolzenberg* [2003] EWHC 13 (Ch); February 3, 2003, unrep., ref'd to (see *Civil Procedure*, 2003, Vol.1, para. 3.9.1)

■ WAGSTAFF v. COLLS [2003] EWCA Civ 469; *The Times*, April 17, 2003, CA (Ward, Buxton & Arden L.JJ.)
CPR, rr.3.1(2)(f) & 48.7, Supreme Court Act 1981, s.51—claim brought by claimant (C) against two defendants (D1 and D2) settled by agreement and stayed by a Tomlin order—subsequently, C applying for wasted costs order against D1's solicitors (X) on ground that they withheld certain facts from him during the litigation—county court judge (1) holding that, because of the stay, he had no jurisdiction to hear the application, and (2) refusing C's application to lift the stay—held, allowing C's appeal and remitting his wasted costs application to a county court, (1) following a stay a claim remains technically in being, (2) C's application for wasted costs against X (a) was wholly tangential to the stayed proceedings between him and D1 and D2 and did not affect the defendants' rights in any way, and (b) could be brought without the stay being lifted—*Rofa Sport Management A.G. v. D.H.L International (U.K.) Ltd.* [1989] 1 W.L.R. 902, CA, ref'd to (see *Civil Procedure*, 2003, Vol.1, paras 40.6.2 & 48.7.14, and Vol.2, paras 9A-165 & 9A-266)

Statutory Instruments

■ COUNTY COURT FEES (AMENDMENT NO. 2) ORDER 2003 (S.I. 2003 No. 718)
amend County Court Fees Order 1999, art.5 (Exemptions, reductions and remissions)—amend list of "qualifying benefits" to take account of coming into force (1) on April 6, 2003 of Tax Credits Act 2002 (substituting new varieties of tax credits), and (2) on October 6, 2003 of State Pensions Credit Act 2002 (introducing guarantee credit as an element of state pension credit)—transitional provision (see *Civil Procedure*, 2003, Vol.2, para. 10-18)

■ SUPREME COURT FEES (AMENDMENT NO. 2) ORDER 2003 (S.I. 2003 No. 717)
amend Supreme Court Fees Order 1999, art.5 (Exemptions, reductions and remissions) - amend list of "qualifying benefits" to take account of coming into force (1) on April 6, 2003 of Tax Credits Act 2002 (substituting new varieties of tax credits), and (2) on October 6, 2003 of State Pensions Credit Act 2002 (introducing guarantee credit as an element of state pension credit)—transitional provision (see *Civil Procedure*, 2003, Vol.2, para. 10-6)

IN DETAIL

Restraining use of disclosed privileged communications

In *ISTIL Group Inc. v. Zahoor* [2003] EWHC 165 (Ch); [2003] 2 All E.R. 252, the claimants (C) brought a claim against the defendants (D) alleging breaches of contractual and fiduciary duties.C obtained a world-wide freezing order and asset disclosure order against D. In advance of the hearing of the contested application for continuation of the order, an issue arose between the parties as to certain evidence which D proposed to adduce at that hearing and in the action. As a result, C applied for an injunction restraining D from using as evidence in the action C's e-mail correspondence with a third party (X). C said that they had been conducting privileged communications with X with a view to obtaining evidence for use in the claim. The communications came into D's hands because X chose to disclose them to them. Curiously, the identity of X was not known to either party.

Lawrence Collins J. noted that, in modern times, questions as to whether and to what extent remedies are available to a party to restrain the use of privileged communications with a witness, or potential witness, which have fallen into the hands of his opponent have arisen in a number of cases. Most of the cases are concerned with the situation where, by mistake, privileged documents have come directly from the solicitors of one party into the possession of the solicitors for the other party. CPR, r.31.20 states that, where a party inadvertently allows a privileged document to be inspected, the party who has inspected the document "may use it or its contents only with the permission of the court".

His lordship referred to several of the "mistake" cases, in particular *Pizzey v. Ford Motor Co. Ltd. The Times*, March 8, 1993, CA, *Guinness Peat Properties Ltd. v. Fitzroy Robinson Partnership* [1987] 1 W.L.R. 1027, CA, and *Derby & Co. Ltd. v. Weldon* (*No. 8*) [1997] 1 W.L.R. 73, CA, and said (para. 74) that the effect of these authorities may be summarised as follows (see also *Al Fayed v. Commissioner of Police of the Metropolis* [2002] EWCA Civ 780; *The Times*, June 17, 2002, CA).

"First, it is clear that the jurisdiction to restrain the use of privileged documents is based on the equitable jurisdiction to restrain breach of confidence. ... Second, after a privileged document has been seen by the opposing party, the court may intervene by way of injunction in exercise of the equitable jurisdiction if the circumstances warrant such intervention on equitable grounds. Third, if the party in whose hands the document has come (or his solicitor) either (a) has procured inspection of the document by fraud or (b) on inspection, realises that he has been permitted to see the document only by reason of an obvious mistake, the court has the power to intervene by the grant of an injunction in exercise of the equitable jurisdiction. Fourth, in such cases the court should ordinarily intervene, unless the case is one where the injunction can properly be refused on the general principles affecting the grant of a discretionary remedy, *e.g.* on the ground of delay."

The instant case was not a fraud case and it was not a party "mistake" case. X (a potential witness from C's point of view) chose to disclose to D communications that C claimed to be privileged. Lawrence Collins J. did not doubt that, in the hands of C and their solicitors, all of the e-mails were covered by litigation privilege. His lordship explained that the issues in this case related to the extent of the court's equitable jurisdiction to restrain the use of disclosed communications, and in particular, the extent to which the court may conduct a balancing exercise in the interests of justice and truth. Here his lordship had to deal with the fact that the authorities are not *ad idem*. In a scholarly review of the authorities his lordship concluded as follows (paras 89 to 94).

"89. First, the starting point is that the essence of legal professional privilege is that it entitles the client to refuse to produce documents which are covered by the privilege, or to answer questions about privileged matters. But it has been said that once a privileged document is disclosed, the privilege itself is lost: see *Guinness Peat Properties Ltd. v. Fitzroy Robinson Partnership* [1987] 1 W.L.R. 1027, 1044, *per* Slade L.J. accepting argument to this effect. In *Black & Decker Inc. v. Flymo Ltd.* [1991] 1 W.L.R. 753, Hoffmann J. said that once a privileged document was disclosed the question was one of admissibility, and not privilege.

90. Second, since the decisions from *Lord Ashburton (Lord) v. Pape* [1913] 2 Ch. 469, CA, to the modern decisions involve the equitable jurisdiction to grant injunctions to protect breach of confidence, it follows that the normal rules relating to the grant of equitable remedies apply. In *Goddard v. Nationwide Building Society* [1987] 1 Q.B. 670, CA, Nourse L.J. expressly mentioned (at 685) delay as a factor (and this was repeated by Slade L.J. in *Guinness Peat*, at 1046). It must also follow that other equitable principles on the grant of injunctions apply, such as consideration of the conduct of the party seeking the injunction, including the clean hands principle.

91. Third, in such cases the court should "ordinarily" intervene: *Guinness Peat* at 1046.

92. Fourth, Nourse L.J. was not saying in *Goddard* that the court should never apply the general princi-

ples relating to confidential information. What he was saying was that in this context (protection of privileged documents under the *Lord Ashburton v. Pape principle*) the court was not concerned with weighing the materiality of the document and the justice of admitting it. That was also the view of Vinelott J. and Dillon L.J. in *Derby v. Weldon* (*No. 8*) and of Mann L.J. in *Pizzey v. Ford Motor Co. Ltd*.

93. Fifth, there is nothing in the authorities which would prevent the application of the rule that confidentiality is subject to the public interest. In this context, the emergence of the truth is not of itself a sufficient public interest. The reason why the balancing exercise is not appropriate is because the balance between privilege and truth has already been struck in favour of the former by the establishment of the rules concerning legal professional privilege: see *The Aegis Blaze* [1986] 1 Lloyd's Rep. 203, 211; *R v. Derby Magistrates Court*, Ex p. B [1996] A.C. 487, HL, 508.

94. Sixth, other public interest factors may still apply. So there is no reason in principle why the court should not apply the rule that the court will not restrain publication of material in relation to misconduct of such a nature that it ought in the public interest to be disclosed to others."

Lawrence Collins J. applied these principles to the facts of the instant and concluded that C's application for an injunction should be refused in relation to the e-mails with which it was primarily concerned.

Tests for summary judgment and for setting aside default judgment

Rule 13.3 deals with circumstances in which the court may set aside a default judgment and r.24.2 states the grounds for summary judgment. According to r.13.3(1)(a), the court may set aside a default judgment where the defendant "has a real prospect of successfully defending the claim", and, according to r.24.2(a)(ii), the court may give summary judgment against a defendant where the defendant "has no real prospect of successfully defending the claim or issue". In *E.D. & F. Mann Liquid Products Ltd. v. Patel* [2003] EWCA Civ 472; April 4, 2003, CA, unrep., the Court of Appeal (Potter and Peter Gibson L.JJ.) had cause to consider the proper constructions of the affirmative phrase in r.13.3(1)(a), and the negative phrase in r.24.2(a)(ii).

In delivering the judgment of the Court, Potter L.J. referred to *Alpine Bulk Transport Co. Inc. v. Saudi Eagle Shipping Co. Inc. (The "Saudi Eagle")* [1986] 2 Lloyd's Rep. 221, CA, *Swain v. Hillman* [2001] 1 All E.R. 91, CA, and International *Finance Corporation v. Utexafrica S.p.r.l.* [2001] C.L.C. 1361, and said that in his opinion it is clear that, by adopting the phrase "real prospect of successfully defending the claim" for the purposes of both r.13.3(1) and r.24.2 the draftsman of the CPR may be taken to have contemplated, subject to the question of burden of proof, a similar test under each rule. His lordship added that he regarded the distinction between a realistic and fanciful prospect of success, brought out by Lord Woolf in *Swain v. Hillman*, as appropriately reflecting the observation in the *Saudi Eagle* case that the defence sought to be argued must carry some degree of conviction. Both approaches require the defendant to have a case which is better than merely arguable, as was formerly the case under former RSC Order 14.

Having dealt with the principal legal issues raised by this case, Potter L.J. then turned to matters of evidence and proof. His lordship said (para. 9):

"In my view, the only significant difference between the provisions of r.24.2 and r.13.3(1), is that under the former the overall burden of proof rests upon the claimant to establish that there are grounds for his belief that the respondent has no real prospect of success whereas, under the latter, the burden rests upon the defendant to satisfy the court that there is good reason why a judgment regularly obtained should be set aside. That being so, although generally the burden of proof is in practice of only marginal importance in relation to the assessment of evidence, it seems almost inevitable that, in particular cases, a defendant applying under r.13.3(1) may encounter a court less receptive to applying the test in his favour than if he were a defendant advancing a timely ground of resistance to summary judgment under r.24.2."

Potter L.J. further explained that where, in applications for summary judgment or to set aside a default judgment, there are significant differences between the parties so far as factual issues are concerned, the court is in no position "to conduct a mini-trial". However, that does not mean that the court has to accept without analysis everything said by a party in his statements before the court. His lordship said (paras 10 and 11):

"In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporary documents. If so, issues which are dependent upon those factual assertions may be susceptible of disposal at an early stage so as to save the cost and delay of trying an issue the outcome of which is inevitable. … [w]here there is a claim or judgment for monies due and issues of fact are raised by a defendant for the first time which, standing alone would demonstrate a triable issue, if it is apparent that, with full knowledge of the facts raised, the defendant has previously admitted the debt and/or made payments on account of it, a judge will be justified in taking such acknowledgements into account as an indication of the likely substance of the issues raised and the ultimate success of the defence belatedly advanced."

FEATURE

Legal advice privilege

In *Three Rivers District Council v. Bank of England* [2003] EWCA Civ 474; *The Times*, April 19, 2003, CA, the facts were that in 1992 the failure of a bank (X) regulated by the Bank of England (D) was investigated by a public inquiry. D, with the assistance of their solicitors (B), made submissions to, and responded to requests for information from, the inquiry. In the course of this exercise (1) D's employees prepared various documents, (2) D communicated with B for the purpose of obtaining legal advice and, in doing so, D sent some of the documents to B. Subsequently, former customers (C) of X commenced a claim against D for misfeasance in public office on the grounds that D had failed in their regulatory duties.

In December 2002, C's application for a declaration that the documents were not subject to legal advice privilege was refused by Tomlinson J. (152 New L.J. 1924 (2002)). The judge concluded that "an internal confidential document, not being a communication with a third party, which was produced or brought into existence with the dominant purpose that it or its contents be used to obtain legal advice is privileged from production". C appealed.

On the appeal, C submitted that (1) it is only communications between solicitor and client, and evidence of the content of such communications, that come within the ambit of legal advice privilege; (2) preparatory materials obtained before such communications, even if prepared for the dominant purpose of being shown to a client's solicitor, even if prepared at the solicitor's request, and even if subsequently sent to the solicitor, do not come within the privilege.

D submitted that (1) as a matter of general principle, any document prepared with the dominant purpose of obtaining the solicitor's advice upon it came within the ambit of the privilege, whether or not it was actually communicated to the solicitor; and (2) this general principle is subject to the exception that documents sent to or by an independent third party (even if created with the dominant purpose of obtaining a solicitor's advice) is covered by this privilege.

The Court (Lord Phillips M.R., Sedley & Longmore L.JJ.) allowed C's appeal. In a single judgment, their lordships reviewed the authorities on legal advice privilege, beginning with *Greenough v. Gaskell* (1833) 1 My. & K. 98, the first of the cases in which legal advice privilege, in the absence of pending or contemplated litigation, was unequivocally upheld, and ending with *R.(Morgan Grenfell & Co. Ltd.) v. Special Commissioners for Income Tax* [2002] 2 W.L.R.1299.

The Court concluded (paras 19 & 21) that, by the end of the nineteenth century it was clear that legal advice privilege did not apply to documents communicated to a client or his solicitor for advice to be taken upon them but only to communications passing between that client and his solicitor (whether or not through any intermediary) and documents evidencing such communications. Having reached this point, the question before the Court was whether it was persuaded by D's argument that the scope of legal advice privilege had been extended by developments in the law of discovery which occurred in the twentieth century. The Court referred to the modern controversy that has arisen in the context of litigation privilege as to whether the "sole purpose" test or the "dominant purpose" test is the right test to be applied to a document intended to be submitted to a solicitor for his consideration. The Court noted that, in English law, the "dominant purpose" test has prevailed (*Waugh v. British Railways Board* [1980] A.C. 521, HL) but concluded that the authorities that make this clear speak only to the situation where the use of the document is potentially a two-fold use, that is for obtaining advice in pending litigation or for conducting (or helping to conduct) litigation, and not for (as was the situation in the instant case) "the obtaining of legal advice in a free-standing situation" (para. 24). Thus the Court did not have to enter into the question whether the documents in issue in this case came into existence for the dominant purpose of obtaining legal advice. The Court expressed the view that, in any event, neither the internal documentation of D generated at the early stage of the public inquiry nor the material generated later on in response to requests from the judge conducting the inquiry was prepared with the dominant purpose of obtaining legal advice.

At first instance in this case, Tomlinson J. asked himself the following questions:

> (1) does legal advice privilege extend to documents prepared by the bank's (D's) employees, which were intended to be sent to and were in fact sent to their solicitors (B)?
> (2) does it extend to documents prepared by D's employees with the dominant purpose of the D's obtaining legal advice but not, in fact, sent to B (though, perhaps, their effect was incorporated into documents that were so sent)?
> (3) does it extend to documents prepared by D's employees, without the dominant purpose of obtaining legal advice, but in fact sent to B?
> (4) are the answers to (1), (2) and (3) above any different if the documents were prepared by D's employees who are now ex-employees of D?

The Court of Appeal concluded that D were not entitled to legal advice privilege in any of the documents in the four categories itemised by the judge.

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Patrick Allen, President of APIL (2002-3)
Michael Bacon, Legal costs consultant, Fellow of the Association of Law Costs Draftsmen
Jason Rowley, President of the Forum of Insurance Lawyers
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EDITOR: **Professor I. R. Scott**, University of Birmingham.
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