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IN BRIEF

Cases

■ FLIGHTWISE TRAVEL SERVICES LTD v. GILL [2003] EWHC 3082 (Ch); *The Times*, December 5, 2003 (Neuberger J.)
CPR, r.25.1(1)(f)—county court judge holding that several defendants (D) were liable to claimants (C) for £100,000—on basis of evidence given at trial, judge making freezing orders against persons (X) to whom it was alleged D had transferred assets for purpose of avoiding liability—in allowing appeals by X, judge explaining important points to be borne in mind by persons seeking freezing orders, especially where order sought immediately after judgment against a respondent who was not a party to the proceedings (see *Civil Procedure* 2003, Vol. 1, para. 25.1.27)

■ SOUTHERN AND DISTRICT FINANCE LTD v. TURNER [2003] EWCA Civ 1574; November 11, 2003, CA, unrep. (Brooke & Longmore L.JJ. and Sir Martin Nourse)
CPR, rr.1.1, 3.1(2)(a), 3.9, 3.10(1), 52.2, 52.4, 52.6, 52.9(1) & 52.14(1), Practice Direction (Appeals) para. 5.2, Supreme Court Act 1981, s. 9(1)(a)—at hearing of appeal by defendant (D) from district judge, circuit judge taking point that D had not obtained an extension of time for appealing and, though conceding that appeal had potential merit, dismissing appeal on that ground—held, allowing appeal (1) the circuit judge's order was not an order made by a judge on hearing an appeal, such that any appeal could only lie to the Court of Appeal as a second appeal, but was an order susceptible as a first appeal to the next higher court, therefore, (2) D's appeal lay to the High Court, but in the circumstances it was appropriate to transfer it to the Court of Appeal under r.52.14(1)(b), (2) under r.3.10, the circuit judge had power (a) to give D permission to amend her notice of appeal to include an application under r.3.1(2)(a) for an extension of time, and (b) to waive the requirement (imposed by r.3.9(2)) that such application should be supported by evidence (see *Civil Procedure* 2003, Vol. 1, paras 3.9.1, 3.10.2, 52.14.1 & 52PD.15, and Vol. 2, para. 9A-27)

■ WARDLAW v. FARRAR (NOTE) [2003] EWCA Civ 1719; [2003] 4 All E.R. 1358; *The Times*, December 5, 2003, CA (Dame Elizabeth Butler-Sloss P., Brooke & Latham L.JJ.)
CPR, rr.32.4 & 35.5, Practice Direction (The Multi-Track) paras 4.8 & 5.3—in dismissing C's appeal, Court stating that the directions as to the exchange of published and unpublished literature upon which experts propose to rely, as given in the standard form of order made by the High Court Masters in the QBD in clinical negligence cases (amended on June 1, 2003), should be followed in all courts (see *Civil Procedure* 2003, Vol. 1, paras 29PD.4, 29PD.5 & 32.4.10)

■ ARKIN v. BORCHARD LINES (NO. 2) [2003] EWHC 2844 (Comm); 153 New L.J. 1903 (2003) (Colman J.)
CPR, r.48.2, Supreme Court Act 1981, s.51—impecunious claimant company (C) entering into CFA—C retaining company (M) to provide support services for the litigation in return for M's receiving a proportion of the proceeds of the claim in the event of success—M instructing expert witnesses—C's claim failing and D applying for costs against M—held, dismissing the application, M did not have control of the litigation and was entitled to rely on counsel's advice regarding the action's likelihood of success (see *Civil Procedure* 2003, Vol. 1, para. 48.2.1, and Vol. 2, para. 9A-265A)

■ AVINUE LTD v. SUNRULE LTD [2003] EWCA Civ 1858; *The Times*, December 5, 2003, CA (Arden & Dyson L.JJ.)
CPR, rr.27.2 & 39.6, Practice Direction (Small Claims Track) paras 3.1 & 3.2—at trial of small claim, director of defendant company (D) applying for permission for D to be represented by lay person (X)—on ground that X not officer or employee of company, district judge refusing application—judgment entered against D and circuit judge dismissing appeal—held, allowing D's appeal and ordering re-trial, (1) at the trial of a small claim, r.39.6 is disapplied by r.27.2(1), and (2) in those circumstances paras 3.1 and 3.2 apply, with the result that (3) a lay representative may present a party's case for him (a) without permission at the trial, and (b) with permission on an appeal—Court explaining that para. 3.1(4) contains words of extension and does not exclude lay representation of companies (see *Civil Procedure* 2003, Vol. 1, paras 27.2.1, 27PD.3 & 39.6.1)

■ BENHAM LTD v. KYTHIRA INVESTMENTS LTD [2003] EWCA Civ 1794; 154 New L.J. 21 (2004), CA
CPR, Pt 32—property company (D) retaining estate agents (C)—C summarily dismissing employee (X) on ground that he took a secret profit on particular transaction involving D—C bringing claim against D for commission for that transac-

tion—D denying C's principal allegations—C's claim weakened by facts that (a) no agency agreement in writing for the transaction, and (b) C unable to call X as a witness—at close of C's evidence (on fourth day of trial), D submitting that there was no case to answer—judge (a) ruling that this was an exceptional case in which it was appropriate to rule on the submission without requiring D to elect not to call evidence, (b) acceding to D's submission, and (c) dismissing C's claim with costs—held, allowing C's appeal (1) rarely, if ever, should a judge trying a civil action without a jury entertain a defendant's submission of no case to answer without requiring the defendant to elect not to call evidence, (2) this was not an exceptional case as the judge was wrong to conclude that nothing in D's evidence (whatever it may be) would affect the view taken of C's case, because he should have recognised that, were their submission to fail, D might (a) call evidence that proved helpful to C's case, or (b) fail to call witnesses who might be expected to have material evidence thereby enabling the court to draw inferences in C's favour, and (3) even if it were an exceptional case, by holding that C had not established their case on a balance of probabilities, the judge had applied the wrong test—Court explaining test to be applied where D's witnesses clearly have material evidence to give on the critical issue in the action—*Alexander v. Rayson* [1936] 1 K.B. 169, CA; *Boyce v. Wyatt Engineering* [2001] EWCA Civ 692; *The Times*, June 14, 2001, CA; *Lloyd v. John Lewis Partnership* [2001] EWCA Civ 1529; October 9, 2001, CA, unrep.; *Bentley v. Jones Harris & Co.* [2001] EWCA Civ 1724; November 2, 2001, CA, unrep.; *Miller v. Cawley* [2002] EWCA Civ 1100; *The Times*, September 6, 2002, CA; *Wisniewski v. Central Manchester Health Authority* [1998] Lloyd's Rep. Med. 223, CA, ref'd to [Ed.: *Karia v. ICS (Management) Services Ltd* [2001] EWCA Civ 1025; June 21, 2001, CA, unrep., not ref'd to] (see *Civil Procedure* 2003, Vol. 1, para. 32.1.6)

■ CARLCO LTD v. CHIEF CONSTABLE OF THE DYFED POWYS POLICE [2002] EWCA Civ 1754; November 18, 2002, CA, unrep. (Simon Brown, May & Clarke L.JJ.)
CPR, rr.3.4(2)(c) & 22.1, Practice Direction (Statements of Truth) para. 3.4, Companies Act 1975, s.726(1)—company (C) bringing action against police (D) claiming damages for misfeasance in public office, defamation and breach of confidence—High Court judge concluding (1) that C had seriously failed to give proper disclosure to D in accordance with a peremptory order made at a case management conference in relation to disclosure order, and (2) that C's claim was highly speculative—after substantial witness statements had been exchanged, in purported compliance with the order, an individual (X) who was not an authorised officer of C, preparing and serving a statement—at further case conference, judge finding that C (1) had not properly complied with the disclosure order had and (2) were in gross breach of the peremptory order—on D's application, judge striking out C's claim and entering judgment for D—single lord justice granting C permission to appeal—held, allowing C's appeal on terms that £10,000 be paid into court as security for D's costs, (1) the judge had taken into account all relevant considerations and had applied the right principles, (2) X's statement was deficient in form and in certain material respects (especially as to issues of causation and quantum), however (3) it was not so deficient as to constitute a gross breach of the order and, in the circumstances, C's claim should not be struck out as that would be an unjust outcome, (4) it was not suggested that C's claim had no prospects of success—*Biguzzi v. Rank Leisure Plc* [1999] 1 W.L.R. 1926, CA; *Tanfern Ltd v. Cameron-MacDonald* [2000] 1 W.L.R. 1311, CA, ref'd to [Ed.: this was not a case where application was made under r.3.9 for relief from a procedural sanction] (see *Civil Procedure* 2003, Vol. 1, paras 3.4.4 & 22PD.3)

■ CEL GROUP LTD v. NEDLLOYD LINES UK LTD [2003] EWCA Civ 1871; *The Times*, January 2, 2004, CA (Waller, Hale & Carnwath L.JJ.)
CPR, rr.36.2(4)(b) & 36.21(3)—at trial, judge giving judgment for claimants on their claim for breach of contract—defendants (D) granted permission to appeal—in the appeal proceedings, C making Pt 36 offer to settle for sum slightly less than that to which they had become entitled—offer open until June 11, 2003, but not accepted by D —C having benefit of CFA covering their solicitors' fees—Court of Appeal dismissing D's appeal—C applying for costs of the appeal on indemnity basis and for interest on those costs at a rate above base rate—D resisting application on ground that discount offered by C so small as not to be a genuine and realistic offer to settle—held, (1) a respondent wishing to protect himself against costs of an appeal cannot rely on an offer to settle made before trial, (2) this appeal turned on a pure point of construction to which there could be only one answer, (3) in these circumstances, C could not be expected to have offered to give up a substantial part of their judgment, (4) C should have their costs on an indemnity basis from June 11, and interest at 2 per cent from September 1 (mid-point between lapse of offer and date of appeal hearing)—*East West Corporation v. DKBS 1912 (Costs)* [2003] EWCA Civ 174; [2003] 1 Lloyd's Rep. 265, CA, ref'd to (see *Civil Procedure* 2003, Vol. 1, paras 36.2.1, 36.21.1 & 44.3.6)

■ DAR INTERNATIONAL FEF CO. v. AON LTD [2003] EWCA Civ 1833; *The Times*, December 19, 2003 (Mance L.J.)
CPR, rr.25.12 & 52.10—in claim brought by foreign company (C), by consent order for security for defendant's (D's) costs made against C but order lapsing before judgment in favour of C handed down—trial judge refusing D's application to reinstate or extend the order—D obtaining permission to appeal against the substantive decision—D applying to single lord justice for order for security for trial costs against C—held, the Court of Appeal had jurisdiction to make such an order—*Stabilad v. Stephens and Carter Ltd* [1999] 1 W.L.R. 1201, CA, ref'd to (see *Civil Procedure* 2003, Vol. 1, para. 25.12.13)

■ DHL AIR LTD v. WELLS [2003] EWCA Civ 1743; *The Times*, November 14, 2003, CA (Ward, Scott Baker & Thomas L.JJ.)
CPR, rr.1.1 & 3.1(2)—company (C) bringing county claim against individual (D) to recover sums totalling £13,000—on application, judge exercising power to try liability issues first—on appeal, Court of Appeal noting that C's costs exceeded £20,000 and stating that, in acceding to this application, the judge had not dealt with the case in the spirit of the CPR, in particular, had failed to deal with it in ways that were proportionate (see *Civil Procedure* 2003, Vol. 1, paras 1.3.5 & 3.1.1)

■ DRINKALL v. WHITWOOD [2003] EWCA Civ 1547; *The Times*, November 13, 2003, CA (Simon Brown, Jonathan Parker & Thomas L.JJ.)
CPR, r.21.10 [RSC O.80, rr.11 & 12]—car driver (D) injuring infant cyclist (C)—before commencing proceedings, C making an offer to settle liability issue—offer complying with r.36.10(2)—D accepting offer, but withdrawing from it 18 months later—after attaining majority, C commencing proceedings against D—C pleading that, as to liability, D was bound by the accepted offer—at trial of a preliminary issue, district judge holding that there was a valid and binding compromise agreement—circuit judge dismissing D's appeal—held, allowing D's appeal, (1) the provisions of r.21.10(1) do not differ materially from those of former RSC O.80, r.11, and must be interpreted as in *Dietz v. Lemming Chemicals Ltd* [1969] 1 A.C. 170, HL, (2) r.21.10 provides that, where a claim is made by a child, no compromise is "valid" without the approval of the court, (3) in this context, "valid" relates to settlements reached before proceedings are commenced as well as to those reached after, (4) the agreement was only a proposed agreement until the court approved it, (5) the facts that the agreement (a) was reached pursuant to the express provisions of Pt. 36, and (b) was not a complete settlement of C's claim, made no difference (see *Civil Procedure* 2003, Vol. 1, paras 1.3.9, 2.3.1, 21.10.1 & 36.10.2, *Supreme Court Practice* 1999, Vol. 1, paras 17A-12 & 17A-23)

■ HILL v. BAILEY [2003] *The Times*, January 5, 2004 (Lightman J.)
CPR, r.44.3(9), Access to Justice Act 1999, s.11—defendant (D) defending claim brought against him by claimant (C) funded by LSC—following judgment, trial judge making costs orders in favour of both parties—in detailed assessment proceedings, costs judge ruling that, for purpose of reducing the costs that C might be ordered to pay to D to reasonable costs, D could not set-off costs payable by him to C—held, allowing D's appeal, although s.11 places restrictions on the making of orders against funded parties, there is nothing in that provision to prevent such a set-off—*Lockley v. National Blood Transfusion Service* [1992] 1 W.L.R. 492, CA; *Hicks v. Russell Jones & Walker*, October 27, 2000, CA, unrep. (Robert Walker L.J.), ref'd to (see *Civil Procedure* 2003, Vol. 1, paras 44.3.14, 47.1.1 & 48.13.0.8)

■ INDEPENDENTS' ADVANTAGE INSURANCE CO. LTD v. COOK [2003] EWCA Civ 1103; July 24, 2003, CA, unrep. (Potter & Chadwick L.JJ. and Cresswell J.)
CPR, rr.3.4 & 24.2, Practice Direction (Striking Out a Statement of Case) para. 4(2)—judge dismissing defendant's (D) application to strike out claimant's (C) statement of case and for summary judgment—held, dismissing appeal, the claim should proceed to trial so that a decision can be taken in the light of a full understanding of the facts—Court (1) explaining difference between r.3.4 and r.24.2, and (2) querying whether on an application to strike out under r.3.4(2)(a) an application for summary judgment under r.24.2(a) should have been joined, as (3) on the hypothesis that C would be able to establish the facts pleaded and in the absence or other facts to rebut the claim, (a) on a holding by the court that D had not shown (under r.3.4(2)(a)) that C's claim disclosed no reasonable grounds it would be impossible to hold (under r.24.2(a)) that C's statement of case discloses no reasonable grounds, but (b) where the court finds (under r.3.4(2)(a)) that C's statement of case discloses no reasonable grounds, then the court may strike it out (r.3.4(3)) and may enter judgment for D (para. 4(2)) without having recourse to r.24.2(a)—observations on difficulty of exercising powers of summary disposal where point of law raised in an area of law in a state of transition (see *Civil Procedure* 2003, Vol. 1, paras 3.4.2 & 3PD.4)

■ LAIB v. ARAVINDAN [2003] EWHC 2521 (QB); *The Times*, November 13, 2003 (Morland J.)
CPR, r.20.4—in 1995, bank (B) bringing possession proceedings against borrower (C)—Master making possession order and standing over money claim—in 1998, property sold and surplus paid to C and C applying for permission to make counterclaim against B for negligent advice—upon B's claim coming back before court, Master dismissing any remaining claim—in 2002, C issuing claim against his solicitors (D) for negligence in not pursuing the counterclaim—in striking out claim and granting D summary judgment, Master holding that C (1) had no right to make the counterclaim after the property was sold, and (2) no real prospect of showing that D was negligent before the sale—held, allowing C's appeal, (1) there is a difference between a satisfied judgment and a satisfied claim, (2) the satisfaction of a claim does not bring litigation to an end, (3) in this case there was no judgment in respect of the balance of money outstanding under the legal charge and there was some evidence of negligence after the date of sale—observations on applicability to actions for possession of land of rule that, once judgment has been obtained, there is then no action in which a counterclaim can be made—*CSI International Co. Ltd v. Archway Personnel (Middle East) Ltd* [1980] 1 W.L.R. 1069, CA, ref'd to (see *Civil Procedure* 2003, Vol. 1, para. 20.4.2)

■ LEIGH v. MICHELIN TYRE PLC [2003] EWCA Civ 1766; *The Times*, December 16, 2003, CA (Lord Phillips MR, Arden & Dyson L.JJ.)
CPR, rr.1.1 & 44.5, Practice Direction (Case Management-Preliminary Stage: Allocation and Re-allocation) para. 2.1, Practice Direction (The Multi-Track) para. 8, Practice Direction (Costs) paras 6.1 to 6.6, Civil Procedure Act 1997, s.2—claimant (C) bringing personal injuries claim against employers (D)—following filing of allocation questionnaire (Form 150) (AQ), claim allocated to multi-track—in AQ, in accordance with para. 6.4, C estimating likely overall costs at £6,000 (excluding VAT), including £3,000 for future solicitors' profit costs—subsequently, parties filing pre-trial check list (Form 170), but not attaching estimate of costs—claim settled before trial and C lodging bill of costs for £21,741, including £11,744 for solicitors' profit costs after filing of AQ—district judge assessing C's recoverable costs at £20,488—on appeal, judge rejecting D's submission that, either in the exercise of the power granted by para. 6.6 or otherwise, those costs should be reduced to reflect C's earlier and wholly inadequate estimate—D granted permission to appeal—held, dismissing appeal, (1) if (a) a paying party does not rely in any way on a costs estimate made by his opponent, and (b) the court concludes that, even if the estimate had been close to the figure ultimately claimed, its case management directions would not have been affected, and (c) the costs claimed are reasonable and proportionate, it would be wrong to reduce the costs simply because they exceeded the amount of the estimate, (2) in an assessment, a costs judge should determine how, if at all, to reflect a costs estimate before going on to decide whether, for reasons unrelated to the estimate, there were elements of the costs claimed which were unreasonably incurred or unreasonable in amount, (3) para. 6.6 does not (a) introduce costs assessment criteria which are in addition to or inconsistent with those contained in r.44.5, or (b) fetter the court's discretion in relation to costs—*C (Legal Aid: Preparation of Bill of Costs), Re* [2001] 1 F.L.R. 602, CA; *Godwin v. Swindon Borough Council* [2001] EWCA Civ 1478; [2002] 1 W.L.R. 997, CA; *Wong v. Vizards* [1997] 2 Costs L.R. 46, QB; *Jefferson v. National Freight Carriers Plc* [2001] EWCA Civ 2082; [2001] 2 Costs L.R. 313, CA; *Lownds v. Home Office* [2002] EWCA Civ 365; [2002] 1 W.L.R. 2450, CA, ref'd to (see *Civil Procedure* 2003, Vol. 1, paras 1.3.4, 2.3.4, 26PD.2, 29PD.8, 43PD.6 & 44.5.1, and Vol. 2, para. 9A-841.2)

■ POLANSKI v. CONDE NAST PUBLICATIONS LTD [2003] EWCA Civ 1573; 153 New L.J. 1760 (2003); *The Times*, November 18, 2003, CA (Simon Brown, Jonathan Parker & Thomas L.JJ.)
CPR, rr.32.1, 32.3, 32.7, 33.2 & 33.4, Practice Direction (Written Evidence) para. 29.1 & Annex 3 Civil Evidence Act 1965, ss.1 & 3—claimant (C), resident in France, bringing claim for libel against publishing company (D)—D pleading justification and matters in mitigation of damages—claim to be tried by judge and jury—C a fugitive from American justice—if found present in England, C at risk of being arrested and extradited crucial issue for trial likely to be C's character and reputation and his account of the event recounted in the publication alleged to be libellous—judge granting C's application to be allowed to give his evidence at trial through a video link from France judge assuming that, if VCF order not made, C's written statement could be put before the court as hearsay evidence—held, allowing D's appeal, (1) the procedural norm is for a witness to attend trial in person to give his evidence and (if appropriate) to be cross-examined on it, (2) a party seeking to depart from the norm is seeking an indulgence from the court, (3) sufficient reason must be shown, (4) the court should have regard to all the circumstances in deciding whether it is appropriate to make a VCF order specifically to

enable a witness to evade the ordinary processes of English criminal and extradition law under which he might lose his liberty, (5) in such circumstances there can be no absolute rule, (6) it is not the law than an order should be made, save in exceptional circumstances, (7) the lack of a provision in Pt 33 equivalent to r.32.7(2) (which is confined in its application to a hearing other than a trial) does not lead to the conclusion that the court cannot refuse to allow hearsay evidence, albeit not cross-examined, to be adduced, (8) the court has ample powers under r.32.1 to exclude a hearsay statement in these circumstances, and to do so would not offend s.1 of the 1995 Act because the evidence would be excluded not on the ground of hearsay but because the witness refused to attend for cross-examination—*Rowland v. Bock* [2002] 4 All E.R. 370, ref'd to (see *Civil Procedure* 2003, Vol. 1, paras 32.3.1, 33.7.1, 33.4.1 & 32PD.33)

■ POST OFFICE COUNTERS v. MAHIDA [2003] EWCA Civ 1583; *The Times*, October 31, 2003, CA (Hale & Kay L.JJ.)
CPR, r.32.1—employer (C) bringing county claim for debt against employee (D)—at early stage, D requesting from C sight of highly relevant documentary evidence held in records available to C—C unable fully to comply with this request because originals of documents relating to major item in C's claim destroyed—at trial, judge finding secondary evidence offered by C admissible and finding for C—held, allowing appeal in part, (1) C had not responded promptly to D's request and had not taken proper care of the documents, (2) there was substantial unfairness surrounding the process generally, (3) although the secondary evidence was rightly admitted, that unfairness went to the weight to be attached to it, (4) the secondary evidence was of insufficient weight to prove the precise amount of the major item in the claim (see *Civil Procedure* 2003, Vol. 1, para. 32.1.1)

■ PRUDENTIAL ASSURANCE CO. LTD v. PRUDENTIAL ASSURANCE CO. OF AMERICA [2003] EWCA Civ 327; [2003] 1 W.L.R. 2295, CA (Kennedy, Potter & Chadwick L.JJ.)
CPR, r.63.9, Civil Jurisdiction and Judgments Act 1982, Sched. 1, arts 16, 26 & 28, Council Regulation (EC) No. 40/94, arts 92 & 105—claimants (C) registering UK and Community trade marks in England—defendants (D) registering trade marks in France—French court rejecting C's opposition on ground of similarity to D's registration—C bringing action in English court for infringement—judge dismissing D's application to strike out C's claim ([2002] I.P. & T. 781)—held, dismissing D's appeal, the combined effect of arts 16(4) and 28 was that in proceedings concerned with the registration or validity of a national trade mark which was registered in the country where the proceedings were held, a prior judgment in another state on a similar or identical national trade mark is not to be recognised, since it would conflict with the provisions of art. 16(4) which granted exclusive jurisdiction in such proceedings to the courts of the country where the trade mark was registered (see *Civil Procedure* 2003, Vol. 2, paras 5-72, 5-88 & 5-90)

Practice Direction

■ PRACTICE DIRECTION (PILOT SCHEME FOR DETAILED ASSESSMENT BY THE SUPREME COURT COSTS OFFICE OF COSTS IN CIVIL PROCEEDINGS IN LONDON COUNTY COURTS) January 6, 2004, unrep.
CPR, r.47.4(1), Practice Direction (Costs) para. 31.1(1)—supplements r.47.4(1)—introduces pilot scheme providing that detailed assessments in civil proceedings in London county courts should be dealt with by the Supreme Court Costs Office—in effect January 6 to July 5, 2004 (see *Civil Procedure* 2003, Vol. 1, paras 47.4 & 47PD.4)

IN DETAIL

Rectifying errors of procedure

Among the sillier things that may be said about the CPR is that they constitute "a new procedural code". The bald assertion to the contrary in CPR, r.1.1(1) is clearly nonsense.

The CPR consists in the main of rules of court taken from the RSC and the CCR, usually re-written (not always to advantage) with a number of new rules drafted in for the specific purpose of implementing the case management and other reforms inspired by the Access to Justice Reports and for taking account of other developments.

Most sets of rules of court (and the RSC and the CCR were examples) attempt to tell a procedural story. They are structured in a linear way. They begin with provisions dealing with the manner in which proceedings may be started, go on through (what may be called) case development (pleadings, discovery, etc.) to trial, and then on to appeal, costs and enforcement of judgments. Sets of rules dealing with discrete topics tend to get tacked on at the end. The "audience" for rules of court are the parties and only indirectly the court.

When it is desired to introduce rules dealing with case management as it has come to be understood, the temptation is to do as the draftsman of the CPR did and simply to patch rules that have the effect of making the desired changes into received sets of rules structured in the traditional way. The inevitable result is a mess. The introduction of modern case management techniques requires a complete re-think of the structure and detail of sets of rules. Considerable intelligence has to be applied to the problem of maintaining the linear structure in these circumstances. The CPR is bedevilled by the "audience" problem. As a set of rules, the CPR cannot make up its mind whether it is talking to the parties or to the court (or, for that matter, to itself).

Many rules of court are examples of stable doors being shut after horses have bolted. That is to say, they are remedial. Such rules could never be understood by a person who did not appreciate the mischief. Sometimes the mischiefs protected against by particular remedial rules have long-since disappeared, or must necessarily have disappeared because of procedural reforms (*e.g.* case management innovations) or side winds, but yet the rules survive. The RSC and the CPR were replete with such rules, and many of them have been copied over into the CPR.

Lawyers are told that rules of court transplanted from the RSC and the CCR to the CPR must leave their pasts behind. Generally, case law interpreting and applying them or (where remedial) explaining their provenance is banned literature. Of course, some such rules may have a new lease on life and in terms turn out to be useful in a way that may not have been foreseen. That is to say, with luck it is possible that certain rules that once were remedial may have utility after the mischief has been overtaken. CPR, r.3.10 (General power of the court to rectify matters where there has been an error of procedure), a provision that fell for consideration in the recent case of *Southern and District Finance Ltd v. Turner* [2003] EWCA Civ 1574; November 11, 2003, CA, unrep. (see further below), may provide an example.

Rule 3.10 states that, where there has been an error of procedure such as a failure to comply with a rule or practice direction (a) the error or failure does not invalidate any step taken in the proceedings unless the court so orders otherwise; and (b) the court may make an order to remedy the error.

An intelligent stranger coming to this rule for the first time would ask, why is it necessary? Why should it be assumed that an "error or failure" should "invalidate any step"? Is there something elsewhere in this procedural "code" which suggests otherwise? If our intelligent stranger is to be given an honest answer he would have to be told that r.3.10 is a spruced up version of former RSC O.2, r.1 and former CCR O.37, r.5, copied into the CPR without any thought being given to their utility in the context of the CPR overall (or whether they were needed at all), and he would have to be given a lecture explaining how these rules were originally designed to get over nice distinctions between procedural nullity and procedural irregularity.

With the introduction of case management provisions, the opportunities for parties committing an error of procedure (whether or not it has the potential to "invalidate any step") by failing to comply with a rule or a practice direction are significantly enhanced. Commonly, the error will consist, not of the taking of a wrong procedural step (the classical error aimed at by former RSC O.2, r.1 and CCR O.37, r.5), but of a failure to take the right step within the prescribed time.

In *Southern and District Finance Plc v. Turner* [2003] EWCA Civ 1574, the defendant did not take a wrong (and potentially invalid) step but failed to take the right step at the right time. The facts were that, as long ago as 1993, a finance company (C) brought proceedings to recover a loan secured on the

defendant's (D) property. A district judge made a suspended possession order. Subsequently, a warrant for possession was issued but was suspended on terms under which D continued to make payments.

In 2001, a district judge dismissed D's application to set aside the possession order. However, the district judge granted D permission to make a limited counterclaim, apparently for the purpose of enabling D to contend that the loan agreement was an extortionate credit agreement but not to contend that the agreement had been improperly executed. A circuit judge granted D permission to appeal, but in doing so was apparently unaware that the appeal was out of time and that D had not applied for an extension of time for appealing. D's appeal notice made no mention of an application to extend time.

At the hearing of the appeal, the circuit judge took the point that D had not obtained an extension of time for appealing and, though conceding that the appeal had potential merit, dismissed the appeal on that ground. The circuit judge referred to *Sayers v. Clarke Walker* [2002] EWCA Civ 645; [2002] 1 W.L.R. 3095, CA, where it was held that, if an application is made for an extension of time for appealing after the prescribed period for appealing has expired (r.3.1(2)(a)), in cases of any complexity the court should follow the checklist contained in r.3.9(1) when deciding whether to exercise its discretion to grant an extension of time for appealing. The judge noted that r.3.9(2) states that an application for relief under r.3.9 must be supported by evidence. As there was no such evidence in this case D's appeal was bound to fail. The judge, by implication at least, rejected D's submission that her failure to file evidence in support of an application for extension of time could be treated under r.3.10 as "a failure to comply with a rule" and an order made to remedy the error.

The Court of Appeal granted D permission to appeal and allowed the appeal, permitting C to amend her original notice of appeal by adding an application for extension of time for appealing. The Court (Brooke & Longmore L.JJ. and Sir Martin Nourse) said (para. 32):

"In our judgment the judge was clearly wrong to hold that he had no power to correct the irregularity pursuant to CPR, r.3.10. He had clearly concluded that the appeal had potential merit, and r.3.10 unquestionably gave him power to give the defendant permission to amend her notice of appeal (to include an application for an extension of time) and to waive the requirement for evidence if he considered it just to do so. The defendant was at mercy, but if the judge had appreciated the extent of his powers, he would have appreciated not only that he had power to waive irregularities, but that if the point the defendant was raising was a good one to allow the appeal out of time might well lead to a much more expeditious outcome to the litigation than was otherwise in prospect."

The Court took the view that it was better that the "unenforceable credit agreement point" should be dealt with forthwith on D's counterclaim, rather than left to a time in the future when, in the possible event of D's stopping payment altogether, C moved to enforce their possession order.

In conclusion, it may be noted that the Court of Appeal, though granting D's appeal, exercised its power under r.3.1(3) to impose conditions for the purpose of mitigating potential injustice to C. Accordingly, the Court imposed a condition to the effect that D was not to be at liberty to claim on her counterclaim the recovery of any of the money she had paid to C in the past, even if the credit agreement were ultimately held to be unenforceable. The Court added that judges must keep in mind the overriding objective and be ready to recognise that the case where an appropriately drafted conditional order may achieve justice more effectively than merely saying "yes" or "no" to the application that is being made.

Freezing orders

The court's power to grant an order, referred to as a "freezing injunction" (CPR, r.25.1(1)(f)), has become a familiar one, and from time to time concern has been expressed when it appears that the proper procedure and practice has not been followed.

For example, in *Thane Investments Ltd v. Tomlinson* [2003] EWCA Civ 1272; July 29, 2003, CA, unrep., the Court of Appeal said great care should be taken in the presentation of evidence to the court so that the court can see, not only whether the applicant has a good arguable case, but also whether there is a real risk of dissipation of assets. Where the respondent is alleged to have been dishonest, the court should scrutinise with care whether what is alleged in itself really justifies the inference that he is likely to dissipate assets unless restricted.

And in *Rosen v. Rose* [2003] EWHC Civ 309 (QB); January 27, 2003, unrep., Fulford J. said the applicant should depose to objective facts from which it may be inferred that the respondent is likely to move assets or dissipate them; unsupported statements or expressions of fear have little weight (*O'Regan v. Iambic Productions Ltd*, 139 New L.J. 1378 (1998) (Sir Peter Pain)).

In the recent case of *Flightwise Travel Services Ltd v. Gill* [2003] EWHC 3082 (Ch); *The Times*, December 5, 2003, the facts were that a county court judge held that several defendants (D) were liable to the claimants (C) for £100,000. On basis of evidence given at trial, the judge making freezing orders in aid of enforcement of the judgment against persons (X) to whom it was alleged D had transferred assets for purpose of avoiding liability. In allowing appeals by X, Neuberger J. said that there are a several important points which must been borne in mind by persons seeking freezing orders, especially where order sought immediately after judgment against a respondent who was not a party to the proceedings.

His lordship said the respondent has to be fully informed of the case against him well in advance of the with-notice hearing. He must also be told of all the evidence and arguments raised by the applicant at the without-notice hearing and, where appropriate, the observations the judge made when the injunction was obtained. If a freezing order is sought immediately after judgment against a respondent who was not a party to the proceedings, particular care should be taken by the applicant to ensure that the respondent is fully informed of the facts and contentions that gave rise to the order.

The normal practice of the court is to require a sworn statement in support of an application for a freezing order. However, it is not a requirement in every case that an application be supported by a sworn statement as it is easy to imagine a set of facts where the balance of justice plainly requires an injunction to be granted before the applicant had had an opportunity to prepare a sworn statement. In such a case, it is important that the court require the applicant to confirm in the form of a sworn statement all the evidence on which he relied.

It is important to ensure that the freezing order is so framed as to result in minimum interference with the respondent's rights. The purpose of the injunction is not to punish the respondent but to protect the applicant. Accordingly, the court and the applicant should be astute that there is only the minimum necessary restraint on the respondent's freedom to give the applicant the protection to which he is entitled.

It is essential that the respondent is entitled to a proper opportunity to present his case at the with notice hearing. He therefore has to be supplied with all the evidence on which the applicant is going to rely.

In no case should a freezing order be granted unless the applicant establishes an appropriately strong case against the respondent, including that the respondent owns the assets concerned, or has some interest in them, and that there is a real risk of dissipation.

It is for the applicant to make out his case for a freezing order. An order will not be granted simply because the respondent cannot show any immediate and obvious prejudice. Of course, once the court considered that there is a case for granting an injunction the fact that it would cause no or little harm to the respondent is a factor that the applicant may pray in aid. However, of itself, it could not be a reason for granting an injunction.

Neuberger J. also said that it is important that undertakings given by the applicant, effectively in return for which the freezing order was granted, were complied with and if they were not, there was a good explanation as to why. The fact that there was a failure to comply with an undertaking is a potentially serious matter that might justify the injunction being discharged.

Expert evidence directions

In *Wardlaw v. Farrar (Note)* [2003] EWCA Civ 1719; [2003] 4 All E.R. 1358; *The Times*, December 5, 2003, CA, a husband (C), following the death of his wife, brought a Fatal Accidents Act claim against a doctor (D). The claim was allocated to the multi-track and proceeded in a county court. In their joint report, C's and D's experts gave differing views on causation. Unfortunately, the pre-trial exchange of scholarly literature relied on by the experts was incomplete.

At trial, the judge preferred the evidence of D's expert and awarded C only £1,000 damages. In dismissing C's appeal, the Court of Appeal (Dame Elizabeth Butler-Sloss P., Brooke & Latham L.JJ.) stated that the directions as to the exchange of published and unpublished literature upon which experts propose to rely, as given in the standard form of order made by the High Court Masters in the QBD in clinical negligence cases (amended on June 1, 2003), should be followed in all courts.

Those particular directions are found in a document entitled "Suggested Model Directions for Clinical Negligence Cases", available from Masters' Support Unit, Room E16, RCJ, and state as follows:

"Any unpublished literature upon which any expert witness proposes to rely shall be served at the same time as service of his statement together with a list of published literature and copies of any unpublished material. Any supplementary literature upon which any expert witness proposes to rely shall be notified to all other parties at least one month before trial. No expert witness shall rely upon any publications that have not been disclosed in accordance with this direction without leave of the trial judge on such terms as he deems fit ... Parties to agree the trial bundle ... not less than seven days before the hearing.

CPR UPDATE

NEW PRACTICE DIRECTION

para. 47PD.4, p.1096

Venue for detailed assessment proceedings

CPR, r.47.4(1) states the general rule that all applications and requests in detailed assessment proceedings must be made to or filed at the "appropriate office". Practice Direction (Costs) para. 31.1(1) states that, for the purposes of r.47.4(1), the "appropriate office" is the district registry or county court in which the case was being dealt with when the judgment or order was made or the event occurred which gave rise to assessment, or to which it has subsequently transferred (*Civil Procedure* 2003, para. 47PD.4). In all other cases, including Court of Appeal cases, the appropriate office is the Supreme Court Costs Office (SCCO) (para. 31.1(2)). (As this practice direction does not modify or disapply any provision the rules, it is not a pilot scheme within the meaning of Pt 51.)

A practice direction supplementing Pt 47 has been issued, to an extent suspending the operation of para. 31.1(1). The Practice Direction introduces a pilot scheme (coming into effect on January 6, 2004) under which detailed assessments of costs in civil proceedings in the London county courts will be undertaken by the SCCO, unless the court orders otherwise. The practice direction is set out below.

PRACTICE DIRECTION (PILOT SCHEME FOR DETAILED ASSESSMENT BY THE SUPREME COURT COSTS OFFICE OF COSTS IN CIVIL PROCEEDINGS IN LONDON COUNTY COURTS)

This Practice Direction supplements CPR Part 47

Contents of this Practice Direction

1. This practice direction applies, instead of paragraph 31.1 of the CPR Costs Practice Direction, to requests for a detailed assessment hearing which are filed between 6th January 2004 and 5th July 2004, pursuant to a judgment or order for the payment of costs by one party to another in civil proceedings in any of the following county courts: Barnet, Bow, Brentford, Central London, Clerkenwell, Edmonton, Ilford, Lambeth, Mayors and City of London, Romford, Shoreditch, Wandsworth, West London, Willesden and Woolwich.

2. Where this practice direction applies, unless the court orders otherwise—

(1) the receiving party must file any request for a detailed assessment hearing in the Supreme Court Costs Office, Cliffords Inn, Fetter Lane, London EC4A 1DQ, DX 44454 Strand; and

(2) the Supreme Court Costs Office is the appropriate office for the purpose of CPR 47.4(1), and therefore all applications and requests in the detailed assessment proceedings must be made to that Office.

AMENDMENTS TO PRACTICE DIRECTIONS

Practice Direction (Appeals)

The Extradition Act 2003 came into effect on January 1, 2004 and sets out new arrangements for extradition cases. As is explained below, with effect from that date this practice direction has been amended to provide a new appeals procedure (replacing the former procedure in these cases.

paras 52PD.79, p.1306

Paras 19.1 and 19.2 are omitted

para. 52PD.81, p.1306

In the part of the table headed "Appeals to the High Court" following para. 20.3, insert the following entry in the appropriate place:

"Extradition Act 2003 22.6A"

para. 52PD.100, p.1315

After para. 22.6, insert new para. 22.6A as set out below. (An interesting feature of this paragraph is that it imposes time limits, not only on actions that parties must take, but also on actions that the court must take.)

"Appeals under the Extradition Act 2003

22.6A(1) In this paragraph, "the Act" means the Extradition Act 2003.

(2) Appeals to the High Court under the Act must be brought in the Administrative Court of the Queen's Bench Division.

(3) Where an appeal is brought under section 26 or 28 of the Act—

(a) the appellant's notice must be filed and served before the expiry of 7 days, starting with the day on which the order is made;

(b) the appellant must endorse the appellant's notice with the date of the person's arrest;

(c) the High Court must begin to hear the sub-

stantive appeal within 40 days of the person's arrest; and

(d) the appellant must serve a copy of the appellant's notice on the Crown Prosecution Service, if they are not a party to the appeal, in addition to the persons to be served under rule 52.4(3) and in accordance with that rule.

(4) The High Court may extend the period of 40 days under paragraph (3)(c) if it believes it to be in the interests of justice to do so.

(5) Where an appeal is brought under section 103 of the Act, the appellant's notice must be filed and served before the expiry of 14 days, starting with the day on which the Secretary of State informs the person under section 100(1) or (4) of the Act of the order he has made in respect of the person.

(6) Where an appeal is brought under section 105 of the Act, the appellant's notice must be filed and served before the expiry of 14 days, starting with the day on which the order for discharge is made.

(7) Where an appeal is brought under section 108 of the Act the appellant's notice must be filed and served before the expiry of 14 days, starting with the day on which the Secretary of State informs the person that he has ordered his extradition.

(8) Where an appeal is brought under section 110 of the Act the appellant's notice must be filed and served before the expiry of 14 days, starting with the day on which the Secretary of State informs the person acting on behalf of a category 2 territory, as defined in section 69 of the Act, of the order for discharge. (Section 69 of the Act provides that a category 2 territory is that designated for the purposes of Part 2 of the Act).

(9) Subject to paragraph (10), where an appeal is brought under section 103, 105, 108 or 110 of the Act, the High Court must begin to hear the substantive appeal within 76 days of the appellant's notice being filed.

(10) Where an appeal is brought under section 103 of the Act before the Secretary of State has decided whether the person is to be extradited—

(a) the period of 76 days does not start until the day on which the Secretary of State informs the person of his decision; and

(b) the Secretary of State must, as soon as practicable after he informs the person of his decision, inform the High Court—

(i) of his decision; and

(ii) of the date on which he informs the person of his decision.

(11) The High Court may extend the period of 76 days if it believes it to be in the interests of justice to do so.

(12) Where an appeal is brought under section 103, 105, 108 or 110 of the Act, the appellant must serve a copy of the appellant's notice on—

(a) the Crown Prosecution Service; and

(b) the Home Office,

if they are not a party to the appeal, in addition to the persons to be served under rule 52.4(3) and in accordance with that rule."

Practice Direction (Traffic Enforcement)

para. 75PD.1, p.1557

As is explained in the *Second Supplement* at p.211, para. 1.1 was amended by TSO CPR Update 32 (see also *CP News* Issue 06/2003). It is now further amended, with effect from December 30, 2003, by the addition of the following sub-paragraph:

"(6) "the 2003" Act means the London Local Authorities and Transport for London Act 2003."

para. 75PD.5, p.1559

After para. 5.5, add new paragraph as follows:

"**5.6** Paragraphs 5.3 to 5.5 shall not apply where the court receives an application notice that is accompanied by a statutory declaration that is invalid by virtue of paragraph 8(2A) of Schedule 6 to the 1991 Act as inserted by section 15 of the 2003 Act."

para. 75PD.8, pp.1559 to 1560

For the cross-reference at the end of para. 8, substitute the following:

"(Rule 75.8(b) provides that, where a court order is deemed to have been revoked following the filing of a statutory declaration, any execution issued on the order will cease to have effect.)"

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