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# CIVIL PROCEDURE NEWS

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# N BRIEF

## Cases

■ ALI v. HUDSON [2003] EWCA Civ 1793; December 11, 2003, CA, unrep. (Ward, Potter & Clarke L.JJ.)
CPR, rr.1.1, 3.1, 3.2(2), 25.15 & 51.1A, Practice Direction (Transitional Arrangements) para. 19—claimant (C) bringing claim against former solicitors (D) for negligence—although claim apparently automatically stayed by para. 19(1), judge imposing stay pending payment into court by C of £1,750—held, allowing C's appeal and lifting automatic stay, an order for payment in should not ordinarily be made unless the party concerned can be shown to be regularly flouting proper court procedures or otherwise to be demonstrating a want of good faith (see *Civil Procedure* 2003, Vol. 1, paras 3.1.4, 3.2.5, 3.1.7, 51.1.4 & 51PD.19)

■ HANSOM v. MAKIN [2003] EWCA Civ 1801; December 18, 2003, CA, unrep. (Butler-Sloss P., Mance & Keene L.JJ.)
CPR, rr.1.1, 3.9 & 51.1A, Practice Direction (Transitional Arrangements) para. 19—claimant (C) bringing action for negligence against legal advisers (D)—Master dismissing C's application for stay to be lifted under para. 19(2)—held, allowing C's appeal, (1) an automatic stay imposed as a consequence of para. 19(1) is a "sanction" within r.3.9, (2) on an application under para. 19(2), the court is required under r.3.9 to consider all the circumstances, including those specified in that rule, (3) it does not follow that, where a fair trial is still possible, relief will necessarily be granted under that rule (see *Civil Procedure* 2003, Vol. 1, paras 3.9.1 & 51.1.4)

■ ARKIN v. BORCHARD LINES LTD (NO. 3) [2003] EWHC 3088 (Comm); 154 New L.J. 22 (2004) (Colman J.)
CPR, rr.20.6 & 44.3—individual (C) bringing claim against company (D) and other defendants alleging that they had abused their dominant position causing his company to collapse—on D's application, foreign entity (Z) joined as Pt 20 defendant—other Pt 20 defendants joined but taking no part in trial—several Pt 20 defendants co-participants in one or both of shipping conferences alleged by C to have abused their dominant postion—C's claim failing trial—C unable to satisfy any award of costs against him in favour of D or Z—Z applying for their costs against D—held, granting the application, (1) the claim by D against Z was quite distinct from the claim by C against D, (2) this was not a case where two defendants had been sued by an impecunious claimant, (3) in exceptional circumstances, an order effectively denying a successful Pt 20 his costs might be justified, but (4) in the circumstances of this case it was not appropriate to make such an unusual costs order—*Hamilton v. Al Fayed (No. 2)* [2002] EWCA Civ 665; [2002] 2 W.L.R. 128, CA; *Taylor v. U.K.F. Fertilizers*, November 1, 1988, CA, unrep., ref'd to (see *Civil Procedure* 2003, Vol. 1, paras 20.6.2 & 44.3.5)

■ BOURNEMOUTH & BOSCOMBE ATHLETIC FOOTBALL CLUB LTD v. LLOYDS TSB BANK PLC [2003] EWCA Civ 1755; December 10, 2003, CA (Thorpe & Jonathan Parker L.JJ.)
CPR, rr.3.1(2)(a), 3.4(2)(a) & 3.9—football club (C) and bank (D) entering into loan agreement—D demanding immediate repayment under default clause—C bringing claim against D for breach of contract, alleging that D's demand caused substantial loss and damage—C in breach of r.7.4(2) by serving particulars of claim 11 days after time limit fixed by that rule—D applying to strike out claim on grounds (1) that the statement of case disclosed no reasonable grounds for bringing the claim (r.3.4(2)(a)), and/or (2) that there had been a failure to comply with a rule (r.3.4(2)(c))—C applying under r.3.1(2)(a) for extension of time for serving their particulars of claim—judge (1) after considering r.3.9 criteria, refusing C's application (principally on ground that C's failure to comply with r.7.4(1) was deliberate), and (2) granting D's application under r.3.4(2)(a) and striking out C's action accordingly—single lord justice granting C permission to appeal—held, dismissing appeal, (1) C had no cause of action because, assuming that they were not in default, D's demand for re-payment was contractually ineffective and was not of itself a breach of the agreement, consequently, (2) the question whether an extension of time should be granted did not arise, however (3) the judge's exercise of discretion under r.3.1(2)(a) and r.3.9 was wrong in principle, as there was no satisfactory basis for the conclusion that C's failure was deliberate and the overwhelming probability was that it was due to a mistaken understanding of r.7.4—Court stating that, in the context of r.3.9, a finding of intentional failure to comply with a rule is a highly significant and may or may not be decisive, depending on the circumstances of the case (see *Civil Procedure* 2003, Vol. 1, paras 3.1.2, 3.9.1 & 7.6.3)

■ GROUPAMA INSURANCE CO. LTD v. OVERSEAS PARTNERS RE LTD [2003] EWCA Civ 1846; December 17, 2003, CA (Butler-Sloss P., Brooke & Latham L.JJ.)
CPR, r.44.3—insurers (C) bringing claim in Commercial Court against counterparty (D1) to a retrocession agreement—in their defence, D1 alleging that insurance brokers, by altering a draft fax, had acted negligently and without authority—C then joining the brokers (D2) as second defendants—at trial, judge (1) rejecting D1's defence and giving judgment for C in their claim against D1, but (2) dismissing their claim against D2—principally on ground that, by altering the fax, D2 had given rise to an argument (rejected at trial) without which the proceedings would never have been started, judge ordering D2 to bear their own costs—held, allowing D2's appeal (1) nothing in paras (4)(a) or (5)(a) of r.44.3 was meant to alter the general rules that, in exercising his discretion as to costs a judge is entitled to consider any relevant aspect of the conduct of the parties, including their conduct (a) in relation to the matters that gave rise to the litigation, as well as (b) in the period that led up to the issue of proceedings, or (c) in the proceedings themselves, thus (2) as a matter of law the judge was entitled to deny D2 their costs for the reason he gave, though (3) in doing so he acted inconsistently with contemporary practice in the Commercial Court, (4) the Court of Appeal should be very slow to interfere with an order for costs, in the absence of any variation of the substantive judgment in the court below, (5) the judge placed disproportionate weight on his anxiety to spare D1's having to pay both C's and D2's costs and wholly inadequate weight on the consideration that D2 were entitled to instruct lawyers to represent their interests, (6) in the circumstances, it was appropriate for the Court to interfere with the judge's order and to order that D1 should pay D2's costs, subject to a disallowance of 10 per cent because of the conduct of D2 to which the judge took exception—*Donald Campbell & Co. Ltd v. Pollak* [1927] A.C. 732, HL; *Hall v. Rover Financial Services (GB) Ltd* [2002] EWCA Civ 1514; *The Times*, November 8, 2002, CA; *Roache v. News Group Newspapers Ltd* [1998] E.M.L.R. 161, CA; *Adamson v. Halifax Plc* [2002] EWCA Civ 1134; [2003] 1 W.L.R. 60, CA, ref'd to (see *Civil Procedure* 2003 vol. 1 para. 44.3.1, 44.3.5, 44.3.6 & 44.3.6.1)

■ HAMILTON v. HEREFORDSHIRE COUNTY COUNCIL [2003] EWHC 3018 (QB); December 15, 2003, unrep. (Keith J.)
CPR, rr.1.1 & 14.1(5)—in April 2001, employer (C) bringing county court personal injury claim against local authority (D) following accident in May 1998—C funded by conditional fee agreement—previously, in January 2001, D admitting liability through insurers—admission made by D, not on basis of C's version of events, but on basis of alternative version which they, as then advised, believed to be accurate—in February 2002, partly on basis of witness statements provided by C's fellow employees, D applying under r.14.1(5) to withdraw admission on ground that their insurers had made a mistake of fact—circuit judge dismissing D's application—held, allowing D's appeal, the relevant considerations to the court's exercise of discretion in this context are (1) whether the issue to which the admission relates is one on which D has a realistic prospect of success, (2) whether D's application is made in good faith, and (3) whether the withdrawal of the admission would prejudice C—appeal judge observing that circumstances may arise where fact that, on basis of early admission by defendant, a claimant was funded by conditional fee agreement, was relevant to the issue of prejudice to the defendant—*Flaviis v. Pauley* [2002] EWHC 2886 (QB); October 29, 2002, unrep. (Nelson J.); *Gale v. Superdrug Stores Plc* [1996] 1 W.L.R. 1089, CA (see *Civil Procedure* 2003, Vol. 1, para. 14.1.8)

■ HANSEN v. GREAT FUTURE INTERNATIONAL LIMITED [2003] EWCA Civ 1646; November 11, 2003, CA unrep. (Sir Andrew Morritt V.-C. & Waller L.J.)
CPR,rr.25.15 & 52.16(6), Practice Direction (Appeals) para. 4.14—company (C) bringing claim against individuals (D)—at trial on liability, judge finding D liable for fraudulent misrepresentation in relation to C's investment in a company (X)—freezing order made against D—judge ordering D to pay costs of trial of that issue and later ordering D to make interim payment of £1m—judge and Court of Appeal refusing D permission to appeal—at trial of quantum, C contending that, because of D's fraud, the shares they had obtained in X were valueless—D contending that they were worth £70m—judge finding for C, holding (1) that the time for assessing C's loss was the time of their original investment, and (2) at that time, the shares were valueless—judge ordering D (1) to pay costs of quantum hearing, and (2) to make further interim payment of £1m—judge refusing D permission to appeal—on March 5, 2003, single lord justice ordering that there should be an oral hearing of D's application for permission to appeal, but refusing stay of execution—costs orders against D remaining unpaid—C applying (1) for order for security for costs, and (2) stay of D's application until D (a) gave security for costs, and (b) made both payments of the interim costs orders made by the judge—on May 1, 2003, Court of Appeal granting C's application, holding (1) that D should not be entitled to pursue their application unless, by June 30, 2003 (subsequently to July 31, 2003),

they paid £1m costs of the liability trial (this costs order not being appealable) and gave £80,000 security for costs, otherwise D's application should stand dismissed, and (2) that the Court had jurisdiction to make such an order—on July 11, Court consisting of two lords justices refusing D's application to vary their May 1 orders (in particular, refusing to accept D's alternative costs security proposals), but extending time to July 31 and directing (a) that any further application by D for an extension would have be made by July 25, and (b) would be dealt with on paper and possibly by only one of the two lords justices—on July 25, single lord justice refusing D's application to discharge freezing order—on July 29, Court (consisting of one only of the two lords justices sitting on July 11) refusing (on paper) D's application for further extension of time and for variation of the security for costs order made on May 1 and confirmed on July 11—throughout, D failing to comply with judge's direction to produce affidavit as to his assets—on D's initiative, his application for permission to appeal re-listed for November 11, 2003—on September 24, D requesting that, at the hearing of that application, the Court should re-consider the Court's order of July 29—in refusing permission Court holding (1) at the request of a party, a hearing will be held to re-consider a decision of a single judge made without a hearing (r.52.16(6)(a)), (2) any such request should be made within a reasonable time and, by analogy with para. 4.14, should be made within seven days (unless extended by the Court), (3) there was no justification for requiring C to accept either of the two alternative arrangements proposed by D for providing security for costs (see *Civil Procedure* 2003, Vol. 1, paras 25.15.2, 52.16.2 & 52PD.8)

■ HAYES v. TRANSCO PLC [2003] EWCA Civ 1261; September 17, 2003, CA unrep. (Brooke, Waller & Clarke L.JJ.)
CPR, rr.1.1, 1.2, 32.1 & 52.11—employees (C1 & C2) bringing claim against employers (D) under contract of employment for disturbance allowances—district judge refusing D's late application for permission to adduce supplementary witness statement made by their witness (X)—at commencement of projected three-day trial, C1 indicating for first time that he wished to rely on certain documents disclosed to him by D—with no objection from D, those documents referred to in examination and cross-examination of C1—at start of second day of trial, judge (1) refusing D's application (foreshadowed by D on the first day of trial) to adduce in evidence the supplementary witness statement made by X and excluded by the district judge, and (2) because he was concerned that trial would have to be adjourned part-heard, laying down strict timetable for examination of witnesses (including limiting to five minutes D's further cross-examination of C1)—much of evidence (bearing on questions of law and issues of fact) focussing on changes in working practices—trial judge giving judgment in favour of claimants—held, allowing D's appeal and ordering re-trial, (1) the judge's refusal of D's application and his restriction on D's further cross-examination of C1 were wrong in principle and amounted to a serious procedural irregularity within r.52.11(3)(b), (2) the excluded evidence and the cross-examination were directly relevant to the change in working practices issue (a key question in the case), (3) the court must seek to give effect to the overriding objective and to that end the court has wide powers of case management which includes the power (provided for by r.32.1) to limit cross-examination, (4) the Court will only interfere with a judge's decision to limit cross-examination if the decision is outside the acceptable range of decisions at which a judge can legitimately arrive—*Watson v. Chief Constable of Cleveland Police* [2001] EWCA Civ 1547; October 12, 2001, CA, unrep., ref'd to (see *Civil Procedure* 2003, Vol. 1, para. 32.1.5)

■ HORMEL FOODS CORPORATION v. ANTILLES LANDSCAPE INVESTMENT [2003] EWHC 1912 (Ch); July 7, 2003, unrep. (Lindsay J.)
CPR, r.8.3(1), Practice Direction (Alternative Procedure for Claims) para. 3.2—claimant (C) bringing trade mark claim against a one-man foreign company (D) under the Pt 8 procedure—D (apparently acting without the benefit of legal advice) not filing an acknowledgment of service in the relevant practice form as required by r.8.3(1), but a defence—C applying under r.3.4(2) to strike out D's defence on several grounds, including ground that, by failing to comply with r.8.3(1) (which is in mandatory terms), C had failed to comply with a rule (r.3.4(2)(c))—held, dismissing the application and ordering early merits hearing, (1) r.8.3(1) is supplemented by para. 3.2, which provides that, as an alternative to filing an acknowledgment of service in Form N210, a defendant can acknowledge service by an informal document such as a letter, (2) in the circumstances, and given the alternative allowed by para. 3.2, it would not be right to be critical of D for putting in a defence rather than a formal acknowledgment of service—observations on conflicts between rules and practice directions [Ed.: various practice directions supplementing particular rules provide that parties may take certain steps in proceedings by letter where the rules to not expressly permit or prohibit such informality (e.g. PD18 para 1.4); the interesting thing about r.8.3(1) is that it does state that the formal document should be used] (see *Civil Procedure* 2003, Vol. 1, paras 2.3.4, 8.3.1, 8.4.1 & 8PD.2)

■ NORWICH UNION LINKED LIFE ASSURANCE LTD v. MERCANTILE CREDIT COMPANY LTD [2003] EWHC 3064 (Ch); December 19, 2003, unrep. (David Richards J.)
CPR, rr.1.1, 1.4(2)(h), 3.4 & 24.2—sub-tenant (C) bringing claim against tenant (D) for damages on ground that D unreasonably witheld consent to sub-letting—D's defence including (amongst others) allegations (1) as to service of the request for consent, and (2) as to the effect of an implied term in the sub-lease—Master dismissing C's application to strike out those two particular allegations (r.3.4(2)), and for summary judgment on them (r.24.2)—held, allowing C's appeal in part, (1) D's implied term allegation should be struck out, (2) that allegation raised a short point of law and its early determination was appropriate because, if determined in favour of D, it would have saved the parties and the court the time and the costs of a trial, (3) D's allegation as to service should be determined on the basis of facts found at trial, (4) the Master had jurisdiction to dismiss C's application summarily on the ground that it was not an appropriate application to make because he concluded it was likely to add to the costs without any significant benefit to the conduct of the case, and was therefore contrary to the overriding objective, (5) if a court considers that an application made by a party in a case will delay resolution of the case or add to costs or take up court time, with no proportionate benefit to the conduct of the case, the court is fully justified in refusing to consider it, (6) whether this is an appropriate course in any case will depend on the particular circumstances of that case (see *Civil Procedure* 2003, Vol. 1, paras 1.3.4, 1.3.7, 1.4.10 & 23.0.2)

■ PADDICK v. ASSOCIATED NEWSPAPERS LTD [2003] EWHC 2991 (QB); December 10, 2003, unrep. (Tugendhat J.)
CPR, r.31.6—police officer (C) bringing claim against newspaper (D) for injunction and damages in respect of disclosure of private and confidential information—C alleging publication, regardless of truth or falsity, had infringed his right to respect for private life—in providing further information as to their defence, D pleading that information published, including that obtained from friend of C (X), was ostensibly credible—in his witness statement, C specifically rejecting D's "ostensibly credible" point—in giving standard disclosure, C listing a document said to be an extract from a statment made by X after the date of the publication complained of—D applying to court for order requiring C to disclose the whole of X's statement—held, dismissing the application (1) the case for each party for the purpose of standard disclosure under r.31.6 is to be found in that party's pleadings, (2) the truth or falsity of the information provided by X had not become an issue in the case, (3) the parts of X's statement not disclosed by C were irrelevant, and (4) C's statement to that effect was conclusive—judge further ordering that costs of providing a transcript of a poor quality sound tape disclosed by D should be costs in the case—*G.E. Capital Corporate Finance Group Ltd v. Bankers Trust Co.* [1995] 1 W.L.R. 172, CA; *Loutchansky v. Times Newspaper Ltd* [2002] EWCA Civ 536; [2002] Q.B. 321, CA; *Campbell v. M.G.N. Ltd* [2002] EWCA Civ 1373; [2003] Q.B. 633, CA, ref'd to (see *Civil Procedure* 2003, Vol. 1, paras 31.6.2 & 31.15.1)

■ PLACITO v. SLATER [2003] EWCA Civ 1863; *The Times*, January 29, 2004, CA (Potter, Laws & Arden L.JJ.)
CPR, rr.1.1, 3.4(2), 3.9 & 52.13—brother (A) of deceased (X) challenging validity of X's will—executors (D) of X's estate commencing proceedings with A as defendant and applying for permission to distribute the estate according to the will—at case management conference, these proceedings compromised—accordingly, Master making consent order in which, in order that he might give and be bound by his undertaking to the court, another brother (C) joined as second defendant—C's undertaking to effect that he would not challenge the validity of the will unless he had commenced proceedings to that end by June 5, 2002—on June 11, 2002 (6 days late), C commencing such proceedings against D—on August 7, 2003, Master (1) dismissing C's application for extension of time for commencing those proceedings and (2) under r.3.4(2)(b) striking out C's claim as an abuse of process—Chancery judge dismissing C's appeal—single lord justice giving C permission to make second appeal—held, dismissing C's appeal, (1) the consent order permitted D to distribute the estate unless C commenced proceedings by June 5, 2002, (2) it was not a conventional "unless" order, providing for a claim to be struck out in default of the issue of proceedings by a specified date, (3) C's undertaking went further than the order, (4) C's commencement of proceedings after June 5, 2002, was a breach of his undertaking and prima facie an abuse of the order of the court unless, in its discretion, the court saw fit to release C from the terms of his undertaking, (5) the court's task was not consider and apply the principles applicable to a retrospective extension of time under an "unless" order pursuant to r.3.9, (6) the onus was on C to establish special circumstances justifying release from his undertaking, having regard to the public interest in encouraging and enforcing the settlement of litigation by agreement, (7) because the corollary of the court's refusing to release C from his undertaking was that his claim would be struck out, the test of "special circumstances" fell to be considered within the overall

regime of the CPR and, in particular, subject to the overriding objective, (8) in the circumstances, the striking out of C's claim was not disproportionate—Court explaining matters of particular importance and principal considerations arising where party applying for release from undertaking not to commence proceedings—*Eronat v. Tabbah* [2002] EWCA Civ 950; July 10, 2002, CA, unrep., ref'd to (see *Civil Procedure* 2003, Vol. 1, paras 1.3.5, 3.4.3, 3.9.1 & 52.3.8)

■ R. (MURRAY) v. HAMPSHIRE COUNTY COUNCIL [2003] EWCA Civ 760; May 14, 2003, unrep. (Brooke, Carnwath L.JJ. and Nelson J.)
CPR, rr.1.1(2) & 1.3, Civil Legal Aid (General) Regulations 1989 reg. 70—Secretary of State agreeing with recommendation made by inspector following planning inquiry that local authority's planning application be granted subject to conditions—local authority (D) making decisions to comply with conditions—objector (C), who was publicly funded, challenging D's decisions by applying for judicial review, in part succesfully—in allowing D's appeal, Court stating that the obligation of a party to help the court to further the overriding objective, in particular to assist the court to save expense and to deal with the case proportionately, requires that a publicly funded party should meet his continuing obligation to keep the Legal Services Commission informed of any information which may be relevant to the continuance of his certificate or contract (see *Civil Procedure* 2003, Vol. 1, para. 1.3.8)

■ ROBINSON v. BIRD [2003] EWCA Civ 1820; *The Times*, January 20, 2004, CA (Peter Gibson, May & Mance L.JJ.)
CPR, r.40.7, Practice Statement (Supreme Court: Judgments) para. 2 [1998] 1 W.L.R. 825, Practice Statement (Supreme Court: Judgments) (No. 2) [1999] 1 W.L.R. 1—daughter (C) bringing claim for financial provision under Inheritance (Provision for Family and Dependants) Act 1975 against her nephew and executors of her mother's estate—in accordance with practice stated in para. 2, judge delivering to parties draft of judgment to be handed down—upon receiving written submissions from the parties, judge revising judgment and delivering draft to parties—judgment handed down as revised—revised judgment dismissing C's claim, whereas in first draft judge reaching conclusion that C entitled to further provision—held, dismissing C's appeal (1) until the order of a judge has been sealed he retains the ability to recall the order he has made, even if he has given reasons for that order by a judgment handed down or orally delivered, and to give a revised judgment and order accordingly, (2) this discretion should be exercised only in exceptional circumstances, but what is "exceptional" must depend on the circumstances of the particular case, (3) there is a material distinction between (a) a judgment that has been handed down, and (b) a draft judgment delivered to parties before handing down, (4) in the latter circumstance, in exceptional circumstances the judge may make material alterations, and where the judge himself has decided that the judgment is wrong, he is positively obliged to alter it, (5) the practice of supplying parties with copies of judgments to be handed down does not provide an opportunity for parties to re-open or add to contentious matters—*Royal Brompton Hospital N.H.S. Trust v. Hammond* [2001] EWCA Civ 778; May 23, 2001, CA, unrep.; *Prudential Assurance Co. Ltd v. McBains Cooper* [2000] 1 W.L.R. 2000, CA; *Compaigne Noga d'Importation et d'Exploration S.A. v. Abacha (No. 2)* [2001] 3 All E.R. 513, ref'd to (see *Civil Procedure* 2003, Vol. 1, paras 40.2.1, 40.7.1, B5-001 & B6-001)

■ SHIRAYAMA SHOKUSAN COMPANY LTD v. DANOVO LTD [2003] EWHC 3006 (QB); December 5, 2003, unrep. (Blackburne J.)
CPR, rr.1.1, 1.4(2)(e) & 26.4—lessor (C) bringing claim for injunction to prevent trespass by lessees (D) against displays and signage on property—C serving notice on D under Law of Property Act 1925, s.146 alleging breaches by D of profit-sharing agreement between C and D—D accusing of C dishonesty—D suggesing mediation of dispute—C applying for summary judgment—D applying for order for mediation of dispute—held, granting D's application, (1) the court has jusisdiction to make such an order notwithstanding that C were unwilling to mediate, (2) it was appropriate to make an order in the circumstances of this case (see *Civil Procedure* 2003, Vol. 1, para. 1.4.11)

■ TAYLOR v. NUGENT CARE SOCIETY [2004] EWCA Civ 51; *The Times*, January 28, 2004 (Lord Woolf L.C.J., Tuckey & Wall L.JJ.)
CPR, rr.3.4(2)(b) & 19.11, Practice Direction (Group Litigation) para. 19BPD.21—several claimants (C1) bringing claim for damages for sexual abuse suffered whilst in care home run by society (D)—in 1997, group litigation order (GLO) made in relation to these claims—subsequently, directions given under r.19.13(c) specifying May 31, 1999, as date after which no claim could be added to the group register—some of the several claimants (C2) having their claims struck out for failure to comply with GLO directions—in December 2001, another claimant (C3) bringing proceedings against D raising same issues—judge refusing C3's application for entry of his claim on the group register—D applying to strike out C3's claim as an abuse of process under r.3.4(2)(b) and/or the court's inherent jurisdiction—judge granting D's application—held, allowing C3's appeal but staying his claim pending direc-

tions by the court, (1) a claimant is perfectly entitled to bring an individual action and, where a GLO is in place, the court cannot require him to join the group, however, (2) in those circumstances, the court is fully entitled to manage those proceedings in a way that takes account of the position of those who had joined the group (*e.g.* by staying claim until completion of group action), (3) there is a significant distinction between C3 and C2, (4) striking out is a Draconian order that requires a clear case, (5) given the steps that the court could take to protect D's position, it would be disproportionate to strike out C3's claim (see *Civil Procedure* 2003, Vol. 1, paras 19.0.10 & 19.13.1)

■ YOUSIF v. JORDAN [2003] EWCA Civ 1852, *sub nom. Youssif v. Jordan, The Times*, January 22, 2004, CA (Ward L.J. & Wilson J.)
CPR, r.32.1—claimant (acting in person at trial) bringing county court claim against surgeon (D) for negligence following operation on nose—C alleging that, though he had specifically inquired about it, D had not warned him of risk of injury in form of long-term breathing difficulties—D denying that such inquiry was made but averring that he had advised C that such difficulties would be short-term—expert evidence limited to individual reports and joint report prepared by two experts, one (X) appointed by C and the other by D—experts largely, but not wholly in agreement—neither party proposing to call experts at trial for purpose of further examining the extent of their disagreement—at end of presentation of C's case, which included his evidence, the joint report and the individual report of X, judge (apparently without putting D to election) upholding D's submission that D had no case to answer because C failed on causation and dismissing claim—held, allowing C's appeal and remitting the matter to be reheard by a different circuit judge, (1) the judge did not have sufficiently in mind X's individual report and erred in finding that there was no evidence that injury suffered by C attributable to operation performed by D, (2) the fact that C might be in difficulty in discharging the burden of proof on causation would not be relevant to the question whether his claim should be dismissed on the ground that there was no case to answer [Ed.: this case decided shortly before *Benham Ltd v. Kythira Investments Ltd* [2003] EWCA Civ 1794; 154 New L.J. 21 (2004), CA] (see *Civil Procedure* 2003, Vol. 1, para. 32.1.6)

## Statutory Instruments

■ CIVIL PROCEDURE (AMENDMENT NO. 5) RULES 2003 (S.I. 2003 No. 3361)
amend Civil Procedure Rules 1998 (S.I. 1998 No. 3132) Pts 7, 21, 30, 34, 45, 52, 54, 57, 63 & 74—also amend CPR Sched.1, RSC Ords 17, 45, 46, 47, 52, 79 & 93, and Sched.2, CCR Ords 16, 29 & 49—a collection of generally unrelated amendments, some brought about by recent legislation including Proceeds of Crime Act 2002 and Courts Act 2003—includes specific provisons as to appeals, costs and enforcement—in force February 1, March 1, April 1 & May 1, 2004 (see *Civil Procedure* 2003, Vol. 1 & Vol. 2 seriatim)

■ CONDITIONAL FEE AGREEMENTS (MISCELLANEOUS AMENDMENTS) (NO. 2) REGULATIONS 2003 (S.I. 2003 No. 3344)
amend Conditional Fee Agreements Regulations 2000 reg. 3A and Collective Conditional Fee Agreements Regulations 2000 regs 4 & 5—adds to list of circumstances in which client may be liable to pay fees and expenses (a) the death of the client, and (b) his going bankrupt or into liquidation—in force February 1, 2004 (see *Civil Procedure* 2003, Vol. 2, paras 7A-14A & 7A-23)

# N DETAIL

## Security for costs of appeal

The facts of *Ali v. Hudson* [2003] EWCA Civ 1793; December 11, 2003, CA, unrep., were rather curious. As long ago as January 1997, the claimant (C) brought a county court claim against his former solicitors (D) for negligence. In July 1998, a district judge struck out the claim under CCR O.13, r.5 on the ground that it disclosed no reasonable cause of action and was frivolous and vexatious, and ordered C to pay D's costs subsequently taxed in the sum of £14,500. C promptly exercised his right of appeal under CCR O.13, r.1(10). However, C did not serve the appeal notice on D and took no further step to advance the appeal either before April 25, 2000, when the appeal proceedings were stayed automatically by operation of Practice Direction (Transitional Arrangements) para. 19(1), or for a considerable time after that date. C largely blamed solicitors who had acted for him for the lack of activity in that period. He also blamed the court, with some justice because, upon receiving C's notice of appeal, the court had not promptly fixed a date.

In December 2001, the county court concerned rumbled into life and informed the parties that a date for the hearing of C's appeal had been fixed. D (apparently not fully appreciating the effect of para. 19(1)) thereupon applied for a stay of the appeal. On the hearing of this application on April 12, 2002 (when C, who was impecunious, appeared in person), a circuit judge ordered that the CPR should apply to the proceedings but imposed a stay pending payment by C of the July 1998 costs order which by this time amounted to £20,000. In effect, the circuit judge, by order, imposed a stay on proceedings that were already, by operation of para. 19(1), automatically stayed. The judge observed that C would have to apply under para. 19(2) to have the automatic stay lifted before the appeal could be heard on a date then fixed (May 7, 2002). (It may be noted that at no point had C applied for a stay of the order as to payment of costs pending the appeal.)

C was granted permission to appeal against the circuit judge's decision. In dealing with the appeal, a High Court judge held that, though the circuit judge had jurisdiction to do so, it was not appropriate for the court to stay the action pending the payment of costs which were subject to appeal. However, the judge imposed a stay on the appeal pending payment into court by C of £1,750. That figure was arrived at as being the estimated sum that C would have to pay D by way of costs in any application under para. 19(2) to have the automatic stay removed.

The Court of Appeal granted C permission to make a second appeal. On this appeal, C was represented by the pro bono unit. The Court (Ward, Potter & Clarke L.JJ.) allowed C's appeal and lifted the automatic stay.

Clarke L.J. noted that the court has no power under r.25.13(2) to order security for costs on the ground of a claimant's inability to pay costs. Since r.25.15(1) provides that an appeal court has power to order security for costs on the same grounds as it may order security for costs against a claimant under r.24.13(2), it follows that an appeal court had no power to order C to provide security on the ground of his inability to pay costs. If a security for costs order was to be made against C, the power to do so had to be found elsewhere.

Clarke L.J. then turned to court's case management powers listed in r.3.1(2). His lordship said that, on the natural meaning of paras (f) and (m) of r.3.1(2), the court had jurisdiction to grant a stay on terms that C secured costs of future proceedings. Para. (f) says that the court has power to stay the whole or part proceedings, either generally or until a specified date or event. And para. (m) states that the court may take any other step or make any other order (in addition to those listed in r.3.1(2)) for the purpose of managing the case and furthering the overriding objective. His lordship added (and this is the interesting bit) that that jurisdiction is independent of the power conferred on the court by r.3.1(5), a power that is in terms limited to requiring a party who has, without good reason, failed to comply with a rule, practice direction or relevant pre-action protocol, to make a payment into court (see, too, r.3.1(6A)).

Clarke L.J. examined the authorities on the court's power to order security for costs (in particular *Reed v. Oury* [2002] EWHC 369 (Ch); March 14, 2002, unrep. (Field J.); *Olatawura v. Abiloye* [2002] EWCA Civ 998; [2003] 1 W.L.R. 275, CA, and *CIBC Mellon Trust Co. v. Mora Hotel Corporation NV* [2002] EWCA Civ 1688; [2003] 1 All E.R. 564, CA). His lordship drew the following conclusions.

The power of the court to order security for costs in a case of this kind should be exercised with caution. It would only be in an exceptional case (if ever) that a court would order security if the order would stifle a claim or an appeal. In any event (a) an order should not ordinarily be made unless the party concerned can be shown to be regularly flouting proper court procedures or otherwise to be demonstrating a want of good faith (good faith being understood to consist of a will to litigate a genuine claim or defence (or appeal) as economically and expeditiously as reasonably possible in accordance with

the overriding objective), and (b) an order will not be appropriate in every case where a party has a weak case, as the weakness of a party's case will ordinarily be relevant only where he has no real prospect of succeeding.

On turning to the facts of the instant appeal, Clarke L.J. said C's conduct during the considerable period between July 1998, when C's claim was struck out, and December 2001, when the county court fixed a date for the hearing of C's appeal, could not be categorised as regularly flouting proper court procedures or otherwise to be demonstrating a want of good faith. The dilatoriness of the county court in processing the appeal was a significant factor in considering the character of C's conduct.

In conclusion, Clarke L.J. said that, in the circumstances, it would not be right for the Court of Appeal to dismiss C's appeal on the basis that C had a case which is doomed to failure.

## Lifting automatic stay

By operation of CPR, r.51.1A and Practice Direction (Transitional Arrangements) para. 19(1), if any "existing proceedings" have not come before a judge, at a hearing on paper, between April 26, 1999 and April 25, 2000, "those proceedings shall be stayed". Such a stay may be described as an "automatic stay". Para. 19(2) states that any party to such proceedings may apply for the stay to be lifted. As is explained in para. 51.1.4 of the White Book, in *Audergon v. La Baguette Ltd* [2002] EWCA Civ 10; *The Times*, January 31, 2002, CA, the Court of Appeal held that the automatic stayed imposed by para. 19(1) falls to be treated as a sanction "imposed for a failure to comply with any rule, practice direction or court order" within the meaning of CPR, r.3.9 (see also *Woodhouse v. Consignia Plc* [2002] EWCA Civ 275; [2002] 1 W.L.R. 2558, CA). Rule 3.9 instructs the court, when dealing with an application "for relief from any sanction imposed", to consider all the circumstances of the case, including the nine particular circumstances listed in r.3.9(1).

On a number of occasions, appeals have gone to the Court of Appeal where judges have either granted or not granted an application by a party (usually a claimant) to exercise its jurisdiction under para. 19(2) to lift an automatic stay. Anyone contemplating making such an application would be well advised to study carefully the decision of the Court of Appeal in the recent case of *Hansom v. Makin* [2003] EWCA Civ 1801; December 18, 2003, CA, unrep., as it is likely to be regarded as the definitive authority on the subject.

Put briefly, the facts in this case were that, in 1993, several individuals (C) were advised by a firm of solicitors (D) that they could not pursue claims against local authority for child abuse. In 1999, C commenced an action against D for professional negligence in relation to that advice. With effect from April 25, 2000, those actions were stayed by operation of para. 19(1). In May 2002, a Master dismissed C's application for the stay to be lifted under para. 19(2). A judge dismissed C's appeal. A single lord justice granted C permission to appeal. The Court of Appeal (Butler-Sloss P., Mance & Keene L.JJ.) allowed the appeal, re-instating C's claim.

The key question in the appeal was: to what extent should the court, when considering the circumstances listed in r.3.9(1) and the requirement to "consider all the circumstances" on an application under para. 19(2) to lift an automatic stay, attach importance to the possibility that there could still be a fair trial? The decision of the Court of Appeal in *Taylor v. Anderson* [2002] EWCA Civ 1680; [2003] R.T.R. 21, CA, provided some authority for the proposition that that particular consideration was of crucial importance.

In giving the principal judgment of the Court, Mance L.J. reviewed the relevant law and confirmed that an automatic stay imposed as a consequence of para. 19(1) is a "sanction" within r.3.9, and that, on an application under para. 19(2), the court is required under r.3.9 to consider all the circumstances, including those specified in that rule. His lordship concluded that there will be many cases where the possibility or otherwise of a fair trial will be highly important to the exercise of discretion under r.3.9, but it does not follow that, where a fair trial is still possible, relief will necessarily be granted under that rule.

Mance L.J. further explained (para. 12) that r.3.9 was not specifically crafted for the purpose of dealing with applications to lift an automatic stay imposed by para. 19(1) as both the imposing of such a stay and the need for an application to lift it are transitional phenomena. In applications to lift an automatic stay, the circumstances listed in r.3.9(1) that focus on procedural "failures" have to applied with care. It is the effect of the sanction (that is, of the indefinite stay), as much as if not more than that of the "failure" that is likely to be of interest. His lordship added that the underlying situation after an automatic stay may be more akin to that which used to exist under the former rules where a plaintiff failed to prosecute his claim with due expedition. The length of the delay in applying to lift the stay and the effect of such delay (see paras (b) and (i) of r.3.9(1)) become of primary interest.

# CPR UPDATE

## AMENDMENTS TO CPR

### Civil Procedure (Amendment No. 4) Rules 2003

In previous issues of *CP News* it has been explained that some of the amendments to the CPR brought about by the Civil Procedure (Amendment No. 4) Rules 2003 (S.I. 2003 No. 2113), issued as long ago as August 2003, do not come into force until April 1, 2004 (see *CP News* issues 08/2003 and 10/2003).

The amendments coming into effect on April 1, 2004, relate to provisions in CPR Pt 20 (Counterclaims and Other Additional Claims) and Pt 34 (Witnesses, Depositions and Evidence for Foreign Courts).

The changes to the texts of particular provisions in these Parts are found in the *Second Supplement* to the 2003 edition of *Civil Procedure*.

In particular, the changes to Pt 20, which consist of amendments r.20.7 (Procedure for making any other Part 20 claim) and r.20.8 (Service of a Part 20 claim form) are found on pages 33 and 34 of that Supplement. Sub-rule (2) of r.20.7 states that a Part 20 claim is made when the court issues a Part 20 claim form. The amendment to r.20.7 consists of the insertion after this sub-rule of a cross-reference drawing attention to the fact that CPR, r.7.2(2) provides that a claim form issued on the date entered on the form by the court.

The amendment to r.20.8 is foreshadowed by the amendment to r.20.7, but is more substantial. Heretofore para. (a) of r.20.8(1) has stated that, where a Part 20 claim may be made without the court's permission, the Part 20 claim form must "in the case of a counterclaim", be served on every other party when a copy of the defence is served. The effect of the amendment is to substitute for "in the case of a counterclaim" the phrase "in the case of a counterclaim against an existing party only", thereby limiting the scope of para. (a) and widening the scope of para. (b).

And, heretofore para. (b) of r.20.8(1) has stated that, where a Part 20 claim may be made without the court's permission, the Part 20 claim form must, in the case of any other Part 20 claim (that is, any other than that provided for by para. (a)), be served on the person against whom it is made "within 14 days after the date on which the party making the Part 20 claim files his defence". It has become apparent that in certain circumstances para. (b) may be unworkable. So, the further effect of the amendment is to substitute for "within 14 days after the date on which the party making the Part 20 claim files his defence" the phrase "within 14 days after the date on which the Part 20 claim issued by the court".

The changes to Pt 34 include amendments to r.34.13 (Where a person to be examined is out of the jurisdiction etc.), the substitution of r.34.16 (now entitled Scope and Interpretation), and the addition at the end of that Part of a new Section III (Taking of Evidence—Member States of the European Union), consisting of rr.34.22 to 34.24. These amendments are found on pages 48 to 52 of the *Second Supplement*.

The Pt 34 amendments may be further briefly explained as follows.

The Evidence (Proceedings in Other Jurisdictions) Act 1975 (see White Book Vol. 2, para. 9B–398) makes provision for enabling the High Court to assist in obtaining evidence required for the purpose of proceedings in other jurisdictions. Section 7 of the Act states that the power to make rules of court shall include the power to make rules carrying the Act into effect. Those rules are found in Section II (Evidence for foreign courts) of Pt 34, that is to say, in rr.34.16 to 34.20.

As a result of the amendments to Pt 34 coming into effect on April 1, 2004, the scope of the provisions of Section II is restricted. Henceforward, they apply to an application for an order under the 1975 Act "other than an application made as a result of a request by a court in a Regulation State". For these purposes, a Regulation State is a Member State in Council Regulation (EC) No. 1206/2001 of 28 May 2001 on co-operation between the courts of the Member states in the taking of evidence in civil commercial matters (the "Taking of Evidence Regulation").

Rules of court applicable to applications under the 1975 Act made as a result of a request by a court in a Regulation State, that is to say, applications to which the Taking of Evidence Regulation applies, are now found in the new Section III to Pt 34 (rr.34.22 to 34.24).

The amendments to Pt 34 have required some amendments and substantial additions to one of the practice directions supplementing the Part, that is to say, to Practice Direction (Depositions and Court Attendance by Witnesses) (White Book para. 34PDF.1). These amendments and additions, which principally consist of the addition of paras 7 to 11 and the addition of Annex B, are found on pages 52 to 79 of the *Second Supplement*. Annex B consists of the Taking of Evidence Regulation referred to above (*ibid.*, pp.56 to 79). According to TSO CPR Update 33, issued in September 2003, the changes to this practice direction came into effect on January 1, 2004.

## Civil Procedure (Amendment No. 5) Rules 2003

This statutory instrument was laid before Parliament on January 7, 2004. Its various provisions come into effect on February 1, March 1, April 1 and May 1, 2004. The changes brought about by this statutory instrument and coming into effect on the last two-mentioned dates will be explained in the March issue of *CP News*. The changes coming into force on February 1, and March 1, 2004, may briefly be explained as follows. (Except where otherwise mentioned, the changes come into effect on February 1, 2004.)

In Pt 7 (How to Start Proceedings), a new rule is added at the end (as r.7.12 (Electronic issue of claims)) providing for a practice direction to make provision for claims to be started electronically. (The practice direction will provide for the continuation of the service known as Money Claim Online which is presently operating as a pilot scheme.)

In Pt 34 (Witnesses, Depositions and Evidence for Foreign Courts), a new rule is inserted (as r.34.13A (Letters of request etc.)) prescribing the procedure for applications to the High Court by a party to proceedings under Part 5 of the Proceeds of Crime Act 2002 for the issue of a letter of request for evidence to be taken abroad. A minor consequntial amendment is made to r.34.23.

In Pt 45 (Fixed Costs), r.45.10 is amended (with effect from March 1) to clarify that, in costs-only proceedings brought under Section II of Part 45 by a party funded by a body which indemnifies its members or other persons against liabilities for costs which they may incur in proceedings, the court may allow that party as a disbursement a sum not exceeding such amount as would be allowed under section 30 of the Access to Justice Act 1999.

Also in Pt 45, r.45.11 (recently added by Civil Procedure (Amendment No. 4) Rules 2003) is amended to specify the amount of the success fee which a claimant may recover in proceedings under Section II of Part 45 if he has entered into a conditional fee agreement or a collective conditional fee agreement which provides for a success fee.

In Pt 52 (Appeals), a new paragraph is inserted in r.52.16 (as para. (6A)) requiring any request by a party to an appeal to the Court of Appeal for the review or reconsideration of a decision of a single judge or a court officer to be filed within 7 days after the party is served with notice of the decision.

In CPR Sched.2, CCR O.49, r.17 (proceedings relating to discrimination) is amended to apply certain provisions of that rule to proceedings under the Employment Equality (Religion or Belief) Regulations 2003 and the Employment Equality (Sexual Orientation) Regulations 2003.

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