#244

CIVIL PRACTICE AND PROCEDURE

FROM CASE MANAGEMENT TO TRIAL - CPR, 2002

SECTION 1.

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Introduction

In my early years of practice I was involved in a case in which I felt then, and always felt thereafter, that an order for discovery would have been invaluable to my opponent. In that case, I was introduced to legal factual research to an extent which has not since been repeated. I was led by eminent Counsel Ronald Williams Q.C., (now deceased), Joswyn Leo Rhynie Q.C. and Dr. Lloyd Barnett.

My Clients were absentee landowners. They were (and are still likely to be) wealthy United States Citizens who owned a company which was the registered proprietor of a parcel of beach lands in St. Ann. The land was valuable. It was the 1980's, and the desire on the part of our citizens to acquire a piece of such lands, without paying for it, was rife. A lone fisherman from Steer Town had sufficient ambition to try. He commenced an action in the Supreme Court, claiming that he had acquired an interest in the land, by adverse possession. I had no clients who could tell me the history of the acts of possession in relation to the land, so as to enable me to properly instruct my eminent Counsel in the defence of the action. As you could well imagine, an order for discovery against my fisherman opponent was unlikely to pay any dividends.

My eminent Counsel were most unsympathetic to hear this problem. Have you visited the property? Have you interviewed the people at the Beach Control Authority? What have you done to unearth the facts?

With this direction, I arranged to and interviewed an extremely helpful public servant at the Beach Control Authority. He was Mr. Jacob Taylor. Mr. Taylor produced his well maintained files which introduced me to the history of my client's acts of possession in relation to the land. By the time of the commencement of the Supreme Court action, the Principal of my Client was deceased. His surviving son had showed little interest in the land after his farther's death. The file contained letters which were written to the Authority, by the fisherman in relation to the land and in relation to my client. The file pointed me to the existence of legal proceedings, in trespass, which had been pursued in the St. Ann's Bay Resident Magistrates' Court against fishermen, in relation to the land. The file guided me to conduct a search of the records of that Court which, it showed, may reveal at least one action against the Plaintiff/Fisherman. The action should have been commenced and pursued to conclusion in the late 1950's or early 1960's.

I contacted the Clerk of Courts for St. Ann travelled to the St. Ann's Bay Court's office on a Saturday and, with handkerchiefs and face masks, we rummaged through old, dusty bundles and Judge's note books until we found some of the cases. One bundle was of particular interest. It was the case in which my client's Principal had sued the actual fisherman and, to my immense pleasure, we found the Judge's notes of the trial and the decision. The decision was not in favour of the fisherman.

Of course, as a young Attorney I was certain that a continued search of these archives would reveal an admission of the Perry Mason and Agatha Christie style. Something in the nature of an acceptance by the fisherman that he had received permission to traverse the land. The search continued in the offices of the Clerk of Courts and, on my enquiry for other records, I was directed to the records in the vault at the back of the building. The vault's heavy door was swung open to reveal stagnant water at least two feet deep at the foot of a large shelved room with decaying files

and huge rats scurrying along the shelves, amongst the files and in and out of the water. This brought the search to a dramatic end.

I returned to Kingston, prepared bundles of approximately three hundred pages for my Counsel and languished in a sense of achievement, that I had somehow contributed to the case. I had. I had found the evidence which would enable my Counsel to prepare, pursue, advance and argue the defence. Our opponents had no idea what was in those bundles. They never sought discovery. They were not prepared for the cross-examination. Neither, of course was their client and the outcome of the case was by then almost a foregone conclusion.

The case is **Dervent Taylor (Administrator of Estate Pearline Agatha Taylor dec'd) v Bruce Realty Company of Florida.(1986) 23 J.L.R. 290.** The case is not one which deals with discovery or inspection of documents. I raise it to pose to you certain questions. These are:

1. Had an order for discovery been made, what documents would I have been required to disclose at the time when the action was being pursued?

2. If an Order for discovery in a similar case is made today, how would I be required to discharge the duty of disclosure on behalf of my client?

3. How would a full and fair disclosure, again, in the circumstances of that case, facilitate a just resolution of the issues and possibly save judicial time?

Discovery and inspection of Documents - old proceedings

As I have already stated, there is no doubt in my mind that the Plaintiff, Dervent Taylor, would have benefited significantly from an order for discovery. Had there been such an order, I would have been obliged to comply with the principle laid down in the case of **Compagnie Financiere Du Pacifique v Peruvian Guano Co. (1882) Q.B.D. 55 (The Peruvian Guano Case)** regarding which documents should be disclosed, which principle was stated by Brett L.J. (Pages 62 and 63) , to be as follows:

> *"The party swearing the affidavit is bound to set out all documents in his possession or under his control relating to any matters in question in the action. Then comes the difficulty: What is the meaning of that definition? What are the documents which are documents relating to any matter in question in the action..... It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon an issue, but also which, it is reasonable to suppose, contains information which may - not which must - either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary. I have put in the words "either directly or indirectly," because, as it seems to me, a document can properly be said to contain information which may fairly lead him to a train of inquiry, which may have either of these two consequences."*

It can be seen therefore, that my obligation would be to disclose all of the documents which I had unearthed in all of my searches in the Dervent Taylor case, whether or not they would have assisted in advancing my client's case or in damaging that of my adversary. It is interesting to note that, in the Peruvian Guano Case, the Court held that documents which were the subject of negotiations for settlement which did not lead to an agreement, were to be disclosed, even though they may ultimately be rejected in evidence as arising out of such negotiations, and even though they may not be capable of inspection if a claim to privilege is sustained in relation thereto.

Disclosure and inspection of documents

The rule in the Peruvian Guano Case has been abrogated by **Rule 28.4** of the Civil Procedure Rules, 2002 (CPR) which limits the documents which, in standard disclosure, are to be disclosed, to "all documents which are directly relevant to the matters in question in the proceedings", and gives the Court or the parties power to dispense with or limit standard disclosure. It is clear therefore that, were I to make standard disclosure today in a case which is similar to the Dervent Taylor Case, I would be limited in the manner prescribed by the above Rules.

Additionally, by **Rule 28.6** of the CPR, the court may order specific disclosure of a class or classes of documents or may order a party to carry out a search for documents and disclose any documents located, either without notice or on an application for specific disclosure. In the event of an order for specific disclosure it is only documents which are directly relevant to one or more matters in issue in the proceedings which may be disclosed, in accordance with the guidelines set out in **Rule 28.7.**

The CPR, at **Rule 28.8**, also sets out a clear procedure for disclosure which is consistent with the overriding objective of the Rules and the onus it places on both litigants and attorneys to be open, accurate, truthful and fair in there dealings with the Court and with each other and to certify that they understand these duties. It requires the careful and properly organised preparation of lists of documents in accordance with its simply stated guidelines. By **Rule 28.9**, it places a duty on attorneys to explain the necessity of making full disclosure in accordance with the order and the Rules and the possible consequences of failing to do so, and to certify that the explanation has been given. Further, by **Rule 28.10**, it requires that the maker of the list of documents certify their understanding of the duty of disclosure.

Disclosure may be done in stages as is provided for by **Rule 21.11** and, as provided by **Rule 28.12**, inspection of documents is the right given to the person on whom a list of documents is served, with the exceptions stated therein and in accordance with the procedure which has been laid down. The duty to disclose continues throughout the proceedings until they are concluded as provided by **Rule 28.13**, and it must be noted that this Rule sets out a procedure for preparing and serving a supplemental list of the documents which come to a party's notice, during the proceedings.

The consequences of failing to make disclosure or to permit inspection, may include your client being barred from adducing at the trial evidence which has not been disclosed or inspected or your client's statement of case being stuck out, and an application for either of these consequences to occur may be granted without the attendance of the parties at Court. **Rule 28.14** empowering the court to impose these sanctions, at first glance, may appear to be harsh but, in my view, this power is consistent with the overriding objective and with the opportunities which **Rule 28.14(5)** gives to

the delinquent litigant to make good his default. It is also consistent with the provisions of **Rule 28.15** which enables a party, either in his list of documents or by an application to the Court, to claim a right to withhold disclosure or inspection of a document, class of document or part of a document. Once again, the procedure is clear.

Rule 28.16 of the CPR recognises that from time to time privileged documents may inadvertently be disclosed to an opponent, and provides that where a party inadvertently allows a privileged document to be inspected, the party who has inspected it may only use it or its contents with:

(a) the permission of the court; or

(b) the agreement of the party disclosing the document.

Does this mean that the party disclosing the document can obtain an injunction compelling the person to whom disclosure was made to return the document or restraining him from using it? This issue arose in the case of **Al Fayed & Ors v Commissioner of Police of the Metropolis & Ors [2002] EWCA Civ 780 (29th May, 2002).**

In that case, an appellant was ordered by a judge at first instance to return two written opinions to the respondents. The opinions had been made available to the appellants by the solicitor for the respondents when they gave inspection of documents. It was common ground that the opinions were included in the documents to be inspected by mistake and that the appellants' solicitors were not aware of any mistake until it was pointed out to them. The respondents applied for an order that the opinions be returned to them and that the appellant be restrained from making any use of them or their contents for the purposes of the trial. The judge granted those applications and the appellant appealed his order. The judge held that it would have been obvious to a reasonable solicitor in the position of appellant that the opinions had been made available to them by mistake or, put another way, that a reasonable solicitor in their position would have appreciated that the respondents' solicitor had made an obvious mistake in sending them copies of the opinions.

In reviewing this decision, the Court of Appeal reviewed a number of cases [**Guinness Peat Properties Ltd v Fitzroy Robinson Partnership [1987] 1 WLR 1027, Derby & Co Ltd v Weldon**

(No 8) [1991] 1 WLR 73, Pizzey v Ford Motor Co, The Times 8 March 1993 and International Business Machines Corporation v Phoenix International(Computers) Ltd [1995] 1 All ER 413 under the RSC and **Breeze v John Stacey and Sons Ltd, unreported, 21 June 1999**]and summarised the principles to be extracted from them to be as follows:

i) A party giving inspection of documents must decide before doing so what privileged documents he wishes to allow the other party to see and what he does not.

ii) Although the privilege is that of the client and not the solicitor, a party clothes his solicitor with ostensible authority (if not implied or express authority) to waive privilege in respect of relevant documents.

iii) A solicitor considering documents made available by the other party to litigation owes no duty of care to that party and is in general entitled to assume that any privilege which might otherwise have been claimed for such documents has been waived.

iv) In these circumstances, where a party has given inspection of documents, including privileged documents which he has allowed the other party to inspect by mistake, it will in general be too late for him to claim privilege in order to attempt to correct the mistake by obtaining injunctive relief.

v) However, the court has jurisdiction to intervene to prevent the use of documents made available for inspection by mistake where justice requires, as for example in the case of inspection procured by fraud.

vi) In the absence of fraud, all will depend upon the circumstances, but the court may grant an injunction if the documents have been made available for inspection as a result of an obvious mistake.

vii) A mistake is likely to be held to be obvious and an injunction granted where the documents are received by a solicitor and:

   a) the solicitor appreciates that a mistake has been made before making some use of the documents; or

   b) it would be obvious to a reasonable solicitor in his position that a mistake has been made;

   and, in either case, there are no other circumstances which would make it unjust or inequitable to grant relief.

viii) Where a solicitor gives detailed consideration to the question whether the documents have been made available for inspection by mistake and honestly concludes that they have not, that fact will be a relevant (and in many cases an important) pointer to the conclusion that it would not be obvious to the reasonable solicitor that a mistake had been made, but is not conclusive; the decision remains a matter for the court.

ix) In both the cases identified in vii) a) and b) above there are many circumstances in which it may nevertheless be held to be inequitable or unjust to grant relief, but all will depend upon the particular circumstances.

x) Since the court is exercising an equitable jurisdiction, there are no rigid rules.

Having regard to the circumstances of the case, the Court if Appeal concluded that the judge was wrong to grant the injunction which he did and to order the return of the opinions. It allowed the appeal and discharged the injunction. With respect to the judge's refusal of the appellants' application for permission to use the opinions under the CPR, the Court set aside the refusal and declared that the appellants should be permitted to make proper use of the documents on the basis that they are no longer the subject of privilege, as between the parties to the action.

You will note that the remaining provisions of the **Rule 28** of the CPR are very similar to the practice which previously existed, embodied in the simple style for which these new rules are best known. By **Rule 28.17** as in the previous rules, a party may inspect a document referred to in the other's statements of case, witness statement, affidavit or an expert's report by giving written notice to be complied with within 7 days and, upon giving an undertaking for payment of the costs, may obtain copies of the document. The difference is that **Rule 28.18** specifies the uses to which a document which has been disclosed may be put and empowers the court, by order, to restrict or prohibit the use of a document. Further, by **Rule 28.19** a party is deemed to admit the authenticity of a document which has been disclosed to him except where, not less than 42 days before the trial, he serves a notice that the document must be proved at trial. In addition, notice to admit or produce documents may be served consistently with the time periods set out in **Rule 28.20.** It is interesting to note that unless notice is given, stateing that the authenticity of a document is not admitted, the party on whom a notice to admit or produce a document is served is deemed to admit the authenticity of the document, unless the court otherwise orders.

Bearing all of this in mind, it should be remembered that **Rule 28.1** defines the scope of the rules relating to disclosure and provides that "document" means "anything on or in which information

of any description is recorded." The wide ambit of this definition and both the scope of the rule and the powers of the court, is demonstrated in the case of **RALL v. ROSS HUME [2001] EWCA Civ 146 (8th February, 2001).**

This case concerned a claim for damages for personal injury in which the claimant's particulars of claim alleged, among other things, that she suffered an injury to her neck, left shoulder and lower back causing immediate pain and stiffness. However, contemporary x-rays were normal. For a time after the accident the pain increased and the claimant suffered a number of unpleasant symptoms which then diminished to an extent but affected her sleep. She required physiotherapy for her physical symptoms and counselling from a psychologist to deal with travel anxiety and depression. She had to give up her active hobbies and had considerable difficulties in the tasks involved in caring for her baby following her pregnancy. It is said that she continues to suffer physical and psychological symptoms and that, having moved to Australia with her husband, it was necessary to return to Britain to live so that she could have the support of her family in various domestic tasks necessary to look after a young family.

The attorneys for the Defendant had secured two covertly obtained video films which appeared to show her having a normally active life. The remaining facts of the case are somewhat intricate but essentially, they reveal that, although both video films were disclosed as between attorneys, the second was, by error, not disclosed within the terms of the case management order, a mistake which the claimant's attorney did not seek to take advantage of. By a further error, neither of the attorneys attended the Directions hearing which was scheduled for the purpose of determining how disclosed material may be used at the trial and at that hearing, neither party appearing, the judge struck out the claim.

An application to re-list the claim was filed and the Defendant's attorney, not intending to take advantage of the error, simply sent a letter indicating his consent. The application was refused on the ground of delays on the part of the Claimant, and on the ground that those parts of the video

which showed the claimant in her home and with her child in the local nursery was an invasion of her privacy. Special permission to appeal was granted from this decision on a case management conference, in light of the fact that the UK CPR (in which the definition of document is similar to ours) does not contain any rule or particular direction as to the use of video evidence for the purpose intended in the case i.e. as material for cross-examination of the claimant in a personal injury action so as to cast doubt upon the claim.

In reversing the decision Potter LJ who delivered the judgment of the Court of Appeal said:-

> *"In principle, as it seems to me, the starting point on any application of this kind must be that, where video evidence is available which, according to the defendant, undermines the case of the claimant to an extent that would substantially reduce the award of damages to which she is entitled, it will usually be in the overall interests of justice to require that the defendant should be permitted to cross-examine the plaintiff and her medical advisors upon it, so long as this does not amount to trial by ambush. This was not an `ambush' case: there had been no deliberate delay in disclosure by the defendant so as to achieve surprise, nor was the delay otherwise culpable, bearing in mind the mutual muddle over the 9 October hearing date. Nor is this the comparatively rare kind of case in which the film has to be independently adduced because what it shows goes beyond what can be established by cross-examination, and where different directions may be needed...*
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> *...From what we have been told on this appeal, it is true that none of the individual activities of the claimant portrayed on the video is one which, according to the medical reports, it would be impossible for her to carry out; it is equally the case that the video cannot in itself attest to the genuiness of such pain or discomfort as the claimant may say that she felt. However, it is the contention of the defendant that the actions portrayed exhibit an overall level and freedom of activity which is inconsistent with the overall picture presented in the reports and the statement of claimant. In my view, in the circumstances described above, justice to the defendant requires that an opportunity to cross-examine on the content of the videos be afforded. Finally, so far as concerns those parts of the video*

which the claimant's counsel argued amounted to an invasion of her privacy, the parties have agreed before us that it is unnecessary for us to consider further argument in that respect because the defendant is content to abandon reliance upon the footage complained of."

I trust that I have done justice to the case by this summary of the facts and decision but, as I have said, the facts are more intricate, and the issues which were considered are more far reaching, including the question as to what directions may be given to facilitate the use of video films in the course of a trial.

Evidence

Upon reading **Rule 29** of the CPR, one may form the impression that, in so far as the trial process is concerned, the procedure which is promulgated represent a radical change from that which previously existed. In my view, this impression would be false since, at trial, the court has always had the power to control both documentary and oral evidence which it considered to be inadmissible or irrelevant but often declined to exercise that power in the laudable interest of the appearance of fairness and impartiality. It is my view that these need not be compromised by the application of the new and far reaching provisions of the CPR.

Rule 29.1 deals with the power of the court to control evidence at a case management conference and at the trial. The radical change arises from the fact that:

a) cases are now judge managed and the control may now be exercised from as early in the proceedings as the case management conference;

b) evidence may be given by video link (**Rule 29.3**) for which there was no previous provision;

c) witness statements have been introduced and are to be disclosed prior to the trial; and

d) witness statements are to be used at the trial in a manner which is intended to shorten the trial process.

It is this rule which enables the court, at the case management conference, to identify and narrow the issues on which it requires evidence, to direct the nature of the evidence which it requires to decide those issues, and to direct the way in which the evidence is placed before it. By **Rule 29.2** the court is empowered to exclude evidence that would otherwise be admissible, a necessary adjunct to the power to control evidence from the case management stage and a necessary element in advancing the overriding objective of the rules.

I need not say more than that **Rule 29.3** in introducing the facility for taking evidence by video link, recognises the impact which the communication revolution may have on the practice of the court and can be a useful tool for saving costs in appropriate cases.

A witness statement is defined as a written statement signed by the person making it and containing the evidence which that person will give orally - **Rule 29.4.** This being that witness' evidence in chief and, as such evidence is available by disclosure prior to the commencement of the trial, then at the trial, apart from identifying the witness and ensuring that he is the maker of the statement, it generally will only remain for the opposing party to cross-examine the maker of the statement. **Rule 29.10** enables cross-examination on the evidence set out in the witness statement, as well enables cross-examination on evidence given by a witness in writing, other than at the trial, upon permission to cross- examine being granted by the court. By **Rule 29.14**, where a witness statement stands as a party's evidence in chief, it is open to inspection during the course of the trial unless the court otherwise orders. A party may seek a direction that a witness statement is not open to objection and the court may so direct on various grounds, including the interest of justice, public interest, the nature of medical or confidential information and for the protection of minors.

The form which the witness statement should take is simply set out in **Rule 29.5** and it should be noted that, essentially it is the same as would be required by a witness in giving evidence in chief with power to the court to strike out inadmissible, scandalous or irrelevant material.

It can be seen therefore that here, as is the case with disclosure and inspection, the machinery exists prior to trial, to ensure that the evidence which is presented at the trial, is limited to that which is relevant to prove the issues which have been identified as being necessary to determine the questions in dispute between the parties.

Where a party is required to serve a witness statement but is unable to do so, **Rule 29.6** enables him to serve a witness summary in the terms prescribed. Where a party is willing to comply with an order to serve witness statements and the other party fails to make suitable arrangements to exchange statements, **Rule 29.7** provides that the willing party may file his witness statement in a sealed envelope at the registry by the date directed and give notice of his having done so to the other party. This being done the witness statement of the willing party cannot be disclosed until the previously unwilling party certifies that witness statements in respect of all witnesses upon whose evidence he intends to rely have been served. **Rule 29.11** sets out the sanctions for failure to serve a witness statement or witness summary. This will result in the inability of the party in default to call the witness at trial unless the court permits, and permission cannot be given at the trial in the absence of good reason for not previously making an application for relief from sanctions under **Rule 26.1** (Case Management - The Powers of the Court).

As provided for in **Rule 29.12** a witness statement may only be used in the proceedings in which it has been served, unless the witness consents to its use for some other purpose, the court gives that permission or the witness statement has been put into evidence.

Millett LJ in **MORTGAGE CORPORATION LIMITED v. SANDOES (An Unlimited Company); BLINKHORN & COMPANY (An Unlimited Company) Trading as SANDOES and BRIAN RONALD WEIR GIBSON [1996] EWCA Civ 1039 (26th November, 1996)** had this to say about the exchange of witness statements, which was introduced in the UK prior to the implementation of their CPR.

> *"The exchange of witness statements was originally introduced in 1986 and the rule has been in its present form since 1992. It introduced a fundamental change in the conduct of civil litigation as a result of which, and for the first time, a plaintiff was given the opportunity of seeing the substance of the defendant's oral evidence at the same time as the defendant saw the plaintiff's oral evidence and vice versa. Previously the plaintiff (though not the defendant) was at a disadvantage in this respect. The aims of the rule are stated in Supreme Court Practice at page 650. Its main object is to ensure that both parties are in possession of their opponent's complete oral and documentary evidence in advance of the trial. This enables, in some cases, pleadings to be amended and put in final form and fine adjustments to be made to the evidence. Settlement is encouraged so that the expense of a trial is often considerably reduced and may even be avoided.*
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> *The rule is said to be designed to achieve the fair and expeditious disposal of proceedings; the saving of costs; the elimination of any element of surprise; the promotion of a fair settlement between the parties; the avoidance of a trial, if possible; the identification of the real issues and elimination of unnecessary issues; and the encouragement of the parties to make admissions of fact."*

It is to be noted that this statement was not made without some criticism of the procedure, essentially from the point of vew of the proliferation of interlocutory applications relating thereto and the habitual failure to comply with the rules or orders arising therefrom.

The importance of being truthful in a witness statement and certifying the truth of its contents can never be over emphasized. In the case of **ODYSSEY RE (LONDON) LIMITED and ALEXANDER HOWDEN HOLDINGS LIMITED v. OIC RUN-OFF LIMITED (formerly**

ORION INSURANCE COMPANY PLC) [2000] EWCA Civ 71 (13th March, 2000) the issue was whether a witness had committed perjury when giving evidence. The case does not deal with procedure. It deals with the examination of the evidence at trial, including extensive scrutiny of witness statements in conjunction with other evidence, to determine not only whether there had been perjury but also the effect of the finding that perjury had been committed, on the case generally.

Affidavits

Rule 30 brings about little change to the form of Affidavits and does not affect the previous practice regarding their contents. The changes in form are significant. **Rule 30.2(c)** adds the need to state if any deponent is employed to a party to the proceedings which, although generally done in practice, was not to my knowledge previously specified in the rules. **Rule 30.2(e)** requires that, in the top right hand corner of the affidavit must be endorsed a note(in the form of the example given) the party on whose behalf the affidavit is being filed, the initials and surname of the deponent, the number of the affidavit in relation to the deponent where he/she has filed more than one affidavit, the identifying reference of each exhibit, the date when it is filed as well as the date when it is sworn.

Rule 30. 5 (2) specifies that where there are two or more documents to be exhibited to an affidavit they may be included in a bundle which is in date or some other convenient order and is properly paginated. **Rule 30.5(3)** authorises the use of "clearly legible" photocopies provided that the originals are made available for inspection by other parties "before the hearing and by the court at the hearing". Finally, **Rule 30.6** makes it clear that, except where the application is being made without notice, affidavits must be served upon all parties whether the affidavit being relied upon was made in the proceedings or in some other proceedings.

Miscellaneous Rules about Evidence

The case of **RALL v. ROSS HUME** which has previously been cited demonstrates the importance of disclosure, of being meticulous in your scrutiny of case management orders and of the need to

ensure that the time requirements of both the Rules and of those orders are adhered to. It reinforces the overriding objective namely, to deal with cases justly, and it indicates what can occur if a failure to disclose documents occurs.

Rule 31.1 of the CPR is essentially the Rule which led to the issues in that case namely, what evidence could be used at the trial, and, when preparing for the case management conference this provision should be reviewed together with the rules relating to disclosure and inspection of documents (**Rule 28**). **Rule 31.1** sets the stage for the evidence of fact which may be presented by the parties at the trial. It provides that where, at the trial, a party intends to rely on evidence which is not to be given orally and is not contained in a witness statement, affidavit or expert report, that party must disclose his intention to the other parties and give them an opportunity to inspect that evidence and to agree to its admission without proof. It sets out the time periods within which such disclosure must be made and it provides, quite clearly, that failure to disclose in accordance with its provisions results in the sanction that the evidence cannot be given at the trial.

Rule 31.3 makes similar provisions in relation to the intention of a party who intends to adduce evidence on a question of foreign law. Here also, notice must be given to the other party of such intention, in this case, 42 days prior to the hearing. The notice must specify the question on which the evidence is to be adduced and attach a document which forms the basis of the evidence. It is to be noted that no indication is given as to the nature of such a document. I would expect that this could be nothing more than the statute or other instrument of foreign law, on which reliance is being placed.

Experts and Assessors

Part 32 of the CPR introduces one of the many far reaching and fundamental changes in civil practice. It redesigns the whole concept of an expert witness from that of a witness who will give evidence, often of a technical nature, in support of a party's case or in contradiction of the expert evidence of an opponent, to that of a person whose primary duty is to the court and whose purpose is to further the overriding objective. **Rule 32. 2** expresses the expert witness' duty to the court as

being to give evidence which is restricted to that which is reasonably required to resolve the proceedings justly, and **Rule 32.3** emphasises that the duty is to help the court impartially on the matters which are relevant to the witness' expertise, which duty overrides any obligations to the person by whom the expert witness is instructed or paid.

This extremely vital witness, is no longer to be seen to be partial to the case of the person who retains him or her or to be interested in supporting the case of either party. Not only is the duty to the court but, as expressed in **Rule 32.4**, the expert witness must be independent, uninfluenced, objective, unbiased, thorough, sincere with respect to the extent of his/her expertise, and be prepared to indicate to all parties any changes in his opinion occurring after his/her report has been served.

There is no doubt that in theory, this new approach and the machinery which has been put in place by the CPR to heighten the quality of evidence which will be forthcoming from experts can be of invaluable assistance to judges, lawyers and litigants. In the past, judge's have had to decide difficult questions arising on technical and complex issues which are outside of the scope of their knowledge, outside the scope of the knowledge of the attorneys who present the case but which may be within the scope of knowledge of the disputants. Where such evidence is in conflict, such as where several experts are called by the parties, the judge must sift that evidence, determine issues of credibility and seek to resolve the dispute often by an acceptance of the evidence of one such witness in preference to that of another. What are the subjective influences which have influenced this choice in the past?

That the expert witness' responsibility is to the court; that he/she may apply directly to the court for directions under **Rule 32.5**; that the court's permission is required to call an expert witness under **Rule 32.6**; that the parties are served with expert reports and may put questions to an expert witness about his report under **Rule 32.8**, all prior to the trial is, in my view, an important mechanism for achieving fairness and in reducing the possibility that subjective influences may

taint the outcome of proceedings, in circumstances in which a decision on the facts, give rise to a limited right of appeal.

Adding to the foregoing is the procedure by which the court in the exercise of its powers under **Rule 32.14**, may direct a meeting of expert witnesses of like specialty to assist it in identifying issues. Further, it may direct expert witnesses to prepare "an agreed statement of the basic 'science' which applies to the matters relevant to their expertise." Finally, it may appoint an assessor to assist it in understanding technical evidence and in advising the judge at the trial with regard to evidence of expert witnesses called by the parties.

Conclusion

It is my wish that this general analysis of the above provisions of the CPR will provoke greater interest in my audience, to look more closely at the strength of the procedure it provides than to seek to find weaknesses, which I am certain we will ultimately be able to identify. I make this comment well knowing the difficulties which we will all face in coming to grips with the application of the new procedure. I find that my limited knowledge of the Rules in general is greatly assisted, at this early stage, by my reviewing each provision under which I must act repeatedly, in my efforts to improve my knowledge and comply with its requirements. If I tarry to look for its weaknesses, I may not benefit from its strength.

CHARLES E. PIPER

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