

arguments and a bundle and set the matter down for a final hearing. I heard the matter on 7th March 2008.

21. The application raised a number of legal and factual issues.
22. It was common ground that the only basis upon which I could have jurisdiction to hear the application was if such jurisdiction was conferred by CPR 3.1(7).
23. CPR Part 3 bears the heading "THE COURT'S CASE MANAGEMENT POWERS" CPR 3.1 bears the heading "**The court's general powers of management**" 3.1(1) reads: *The list of powers in this rule is in addition to any powers given to the court by any other rule or practice direction or by any other enactment or any powers it may otherwise have.* The powers then set out particularly at paragraph (2) are clearly case management powers. 3.1(7) reads as follows: *A power of the court under these Rules to make an order includes a power to vary or revoke the order.*
24. Mr Curwen says that this power is limited to case management decisions and cannot enable a party to use it as a backdoor appeal, which he says is what Mr Poultney is doing.
25. Mr Curwen lays some store by the fact that the rule refers to orders not judgments and says that there is a distinction. To support that proposition he cites paragraph 49 of the judgment of Mr Justice Aikens in *Enron (Thrace) Exploration and Production BV v Clapp and ors* [2005] EWCH 401 (COMM). *I note that CPR Pt 3.1.(7) refers to "orders", but not to 'judgments or orders' which is a formulation used elsewhere in the Rules permitting revocation and variations. In this case there was a default judgment, which was confirmed, in part, by a judgment of Langley J after a consideration of the merits of certain proposed defences. In my view CPR Pt 3.1(7) Does not embrace the current situation. Even if it does, for the reasons I set out in the next paragraph, I would not exercise my jurisdiction under that Rule.*

26. Unfortunately the judgment does not expand on that view in a way that would be helpful in this case and as a bald statement cannot be said to be laying down a point of principle to be followed.
27. The notes to CPR Part 40 in the White Book discourse on this issue and point to a time when the distinction between judgments and orders were important under the CCR and SCR. It seems that the point had particular importance in relation to methods of enforcement. One view appears to be that the authors of the CPR used the words “judgment” and “order” dependant on the terminology of the original rule that was being replaced without realising the distinction. I cannot find and Mr Curwen was unable to assist with any definitive answer to the reason for a distinction now if indeed one exists. I do not think there is a distinction under the CPR. Even if there were I would conclude that Mr Poultney is applying to set aside an Order namely the order that he had to pay Mrs Poultney £9000 in costs. The same order that Mrs Poultney is trying to enforce.
28. I do not think that 3.1(7) is limited to changing case management decisions of the type illustrated in 3.1(2). It is notable that when it refers to the Rules it uses a capital letter, which to my mind means the civil procedure rules as a whole not just Part 3. Further as will be apparent from the case analysis which follows that is not a distinction taken up by any of the judgments. Those cases do deal with the circumstances in which this rule may be used.
29. Mr Curwen relied on a number of cases. The first in time is *Paragon Finance Plc v Pender* [2003] EWHC 2834 (CH) a decision of Mr Justice Peter Smith. Being a High Court decision it is binding on me. These were possession proceedings. An order for possession had been made against the Defendants who appealed and applied to set it aside. At first instance before the circuit judge the appeal and application was dismissed. On appeal the High Court took a different view to the judge as to the powers of the court and in particular at paragraph 74 of his judgment said:
Her Honour Judge Mayer (paragraph 33) accepted Mr Wulwik's submissions that she had no jurisdiction to entertain an application under order 37.

Nevertheless, she quite properly went on to consider the merits in case she was wrong. Regrettably, I have come to the conclusion that she was wrong in respect of CCR order 37. I suspect that this does not actually matter, because it seems to me that the court had a power to revoke the order under CPR 3.1(7) "A power of the court under these rules to make an order includes a power to vary or revoke the order". In my judgment this gives the court an exceptional power to revoke an order. It is not limited as to the type of particular orders and it is strongly analogous to judgments of the Court of Appeal in re RS and M Engineering to which I have already made reference above. It should not generally be used as a back door appeal. However, it does confer on the court a power in appropriate circumstances to revoke an order.

75. I conclude therefore, that Her Honour Judge Mayer had a power under CPR order 37 and CPR 3.1(7) to consider revoking the possession order 5th January 1995.

30. The reference to the judgments of the Court of Appeal in re RS and M Engineering reflect the view of that court that where there has been a clear injustice that cannot be rectified by appeal because no further appeal is possible under the rule the Court of Appeal can revoke its own order to see justice done.

31. The matter was visited again by the High Court in Lloyds Investment (Scandinavia) Limited v Christen Ager-Hanssen [2003] EWHC 1740 (Ch). At paragraph 7 of his judgment Mr Justice Patten said this:

"It seems to me that the only power available to me on this application is that contained in CPR Part 3.1(7), which enables the Court to vary or revoke an order. This is not confined to purely procedural orders and there is no real guidance in the White Book as to the possible limits of the jurisdiction. Although this is not intended to be an exhaustive definition of the circumstances in which the power under CPR Part 3.1(7) is exercisable, it seems to me that, for the High Court to revisit one of its earlier orders, the Applicant must either show some material change of circumstances or that the judge who made the earlier order was misled in some way, whether innocently

or otherwise, as to the correct factual position before him. The latter type of case would include, for example, a case of material non-disclosure on an application for an injunction. If all that is sought is a reconsideration of the order on the basis of the same material, then that can only be done, in my judgment, in the context of an appeal. Similarly it is not, I think, open to a party to the earlier application to seek in effect to re-argue that application by relying on submissions and evidence which were available to him at the time of the earlier hearing, but which, for whatever reason, he or his legal representatives chose not to employ.

32. This passage is cited with approval by the Court of Appeal in *Collier v Williams* [2006] EWCA Civ 20. Quoting the same passage Lord Justice Dyson giving the judgment of the court said at paragraph 40:

"We endorse that approach. We agree that the power given by CPR 3.1(7) cannot be used simply as an equivalent to an appeal against an order with which the applicant is dissatisfied. The circumstances outlined by Patten J are the only ones in which the power to revoke or vary an order already made should be exercised under 3.1(7)."

33. I am clear that 3.1(7) can be used by me to revoke the costs order of December 2004 provided the application is not being used as an equivalent to an appeal and provided one of the circumstances suggested by Mr Justice Patten applies to the facts of this case. But I think that there are further constraints because every rule in the CPR must be interpreted by reference to the overriding objective at Part 1.1 and similarly any exercise by the court of the powers granted by the rules must take account of overriding objective.

34. Part 1.1 states:

(1) *These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly*

(2) *Dealing with a case justly includes, so far as is practicable –*

(a) *ensuring that the parties are on an equal footing;*

(b) *saving expense;*

(c) *dealing with the case in ways which are proportionate –*

- (i) to the amount of money involved;*
- (ii) to the importance of the case;*
- (iii) to the complexity of the issues; and*
- (iv) to the financial position of each party;*
- (d) ensuring that it is dealt with expeditiously and fairly; and*
- (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases*

35. Part 1.2 states:

The court must seek to give effect to the overriding objective when it –

- (a) exercises any power given to it by the Rules; or*
- (b) interprets any rule subject to rule 76.2.*

36. Having concluded that I have the power and the parameters of that power I need to consider the evidence to decide whether it justifies the use of the power. Because I must not treat the application as equivalent to an appeal my principal task must be to examine new evidence not previously before the court to decide whether it justifies use of this exceptional power. Of course consideration of any evidence necessitates also a view of the witnesses.

The Witnesses

Mr Poultney

37. Mr Poultney swore an affidavit in support of his application on 25th April 2007. He made a second statement on the 5th December 2007 pursuant to the directions that I gave in October 2007. He attended court and confirmed that evidence on oath. He was not cross examined. I have nevertheless had significant opportunity to form a view of Mr Poultney's character from the substantial paperwork that he has generated in relation to this case and from the very serious allegations that he has been free with in the course of that paperwork particularly charged against Miss Wayman. I have also seen him in court as an advocate for his cause on two occasions. My impression is that Mr Poultney is a man absolutely convinced as to his rectitude in this case and all matters pertaining to it. That conviction can be seen in the dogged way in