order pre-action disclosure after a claimant has issued a protective claim form, and in **Arsenal Football Club plc v Elite Sports Distribution Ltd** [2002] EWHC 3057 (Ch) an order for such disclosure by the defendant company was granted – for the source of photographs of footballers used without permission – on an unsuccessful application for a strike-out of the claim.

Also, can the court refuse to order pre-action disclosure even if the criteria in CPR 31.16 are met? **Merpro Group Ltd v Dynamic Processing Solutions** [2003] EWHC 119 (Ch), [2003] ^'' ER (D) 49, decided that orders ..uld not be made when the ..ther party has shown a willingness to comply voluntarily.

Other disclosure issues

Three Rivers DC v Bank of England (Disclosure) No 3 (2003) *Times* 19 April, decided that legal advice privilege did not extend to the bank's documents, which were used by a committee created to obtain legal advice relating to the inquiry into the collapse of the Bank of Credit and Commerce International.

Also, the court does have the power to order the disclosure of confidential information. In **Intel Corporation v VIA Technologies Inc** [2002] EWHC 1434, 'trade ..ets' were ordered to be dis..d to US lawyers to enable the claimant's English lawyers to prepare a request for further information, and **Premier Profiles Ltd v Tioxide Europe Ltd** 20 September 2002, QBD, was decided similarly on condition that the confidential documents were not to be disclosed to anyone other than the claimant's experts and ..egal advisers.

Service (Parts 6 and 7)

.. Lakah Group v Al Jazeera ..atellite Channel [2003] EWHC 231, leaving a claim form with a ..erson who has a senior position .. a company was not valid ser..e, and neither was posting the ..me to an address which was ..t a defendant's place of busi..ss, under CPR 6.5(6).

In **Robert v Momentum Services Ltd** [2003] EWCA Civ 299, the district judge gave the claimant an extension of time to serve particulars in a personal injury case when he was waiting for a medical report. The circuit judge conducted a rehearing and granted the defendant's appeal, because the district judge had not applied the CPR 3.9 relief from the sanctions checklist. The Court of Appeal said that the circuit judge was wrong, as this type of application required a swift decision. A rehearing was inappropriate and r3.9 did not apply, as time to file particulars had not expired.

Patients and capacity (Part 21)

In **Masterman-Lister v (1) Brutton & Co (2) Jewell/Home Counties Dairies** [2002] EWCA Civ 1889, which is going to the House of Lords, the test of mental capacity applies in relation to the particular transaction in litigation based on whether a party is capable of understanding – with advice from his/her solicitors – the matters to be decided in the proceedings, not whether a patient can manage all his/her affairs. If there is doubt, the district judge should see the 'patient' and order a medical report. While heavily criticised by some commentators, as there are now different tests of capacity for various situations, the Court of Appeal was clearly unwilling to see a very old case (an allegedly undersettled personal injury claim) reopened.

Case management, sanctions and striking out (Parts 1 and 3)

The continued message from the senior courts is that strike outs are only justifiable in very extreme situations, usually when a party has blatantly disregarded court directions and orders as in **Nutrinova v Arnold SUHR** [2002] EWHC 1729 (Ch). Here, the defendants were guilty of a number of significant breaches regarding disclosure and inspection, so that a fair trial was no longer possible, and it was appropriate to strike out the defence.

But all the other recent reported cases have been more lenient to a party in default. In **James v Baily Gibson & Co** [2002] EWCA Civ 1690, a professional negligence claim arising from a personal injury claim which had been struck out, the claimant failed to attend several appointments with a psychiatrist. The judge stayed the action. The Court of Appeal overturned this, as it did not achieve the just objective under CPR Part 1 or Human Rights Act 1998 Sch 1 article 6.

Taylor v Anderson [2002] EWCA Civ 1680, (2002) WL 31523201, concerned an accident which occurred in 1990. A writ was issued in 1994, and the claim was automatically stayed in 2000. The district judge struck the claim out as a fair trial would be very difficult. But the Court of Appeal said this was not the right test – there needs to be a substantial risk that a fair trial of the issues will be impossible. **Fay v the Chief Constable Of Bedfordshire** 6 February 2002, QBD, was decided similarly.

On a different theme, in **Khiaban v Beard** [2003] EWCA Civ 358, the Court of Appeal said the district judge was wrong to strike out a road traffic accident dispute relating to the driver's insurance excess when the real value of the claim was greater, as parties could agree to limit the claim's value to be decided by the court (the parties' motives in this situation are often to restrict the court fees payable).

Jones v University of Warwick [2003] EWCA Civ 151, is a particularly clever judgment of the Court of Appeal that aimed to 'balance the interests'. The court disapproved of the defendant's surreptitious methods in a personal injury action – its agent, posing as a market researcher, gained access to the claimant's home and used a hidden camera to film her. The evidence was allowed to be adduced in the interests of justice, but because there had been a breach of article 8 of the European Convention on Human Rights, the costs of arguing about the evidence were to be borne by the defendant. The Court of Appeal also said that the trial judge should consider the defendant's conduct further when deciding on the costs of the whole claim.

Expert evidence (Part 35)

The main issue continues to be the independence of experts and their duty to the court. In **Helical Bar plc v Armchair Passenger Transport Ltd** [2002] EWHC 367 (QB), an expert was allowed to give evidence – even though he had worked previously for a company closely involved in the action – as he had the relevant expertise and was aware of, and willing to comply with, his duty to the court.

In **Colt Telecom Group plc** [2002] EWHC 2815 (Ch), an accountant insolvency practitioner from a 'Big Five' firm was criticised for giving expert evidence for one company which was petitioning for another's administration because his practice had acted recently for the 'defendant' company, and particularly because the firm would greatly profit if his evidence was accepted, as it was the proposed administrator. The judge concluded that the accountant expert witness had 'espoused his client's cause' and dismissed the petition which, he said, should never have been brought.

Watson v North Tyneside (2003) CL March 47, decided that the value of the claim is not the predominant factor in whether each party might have its own expert. Here, the claimant and the first defendant had instructed a medical single joint expert; the second defendant, who had become a party later, wanted its own expert – the court said the minor nature of the injury, a fractured wrist, did not justify additional medical evidence.