

some other person (see cases cited under 4 above and *Taylor v. Rundell* (1841) Cr. & Ph. 104; *Ba Cowan* (1870) L.R. 5 Ch.495).

The foregoing rules are subject to the overriding consideration that O.24 is concerned with physical possession or custody of documents, or the power to obtain such possession or custody. If such documents are not in the physical possession, etc., of a party, he may be ordered to give discovery if he has the right to control them personally or in the capacity in which he is sued. He may not be so ordered if his control of the documents is in another capacity, e.g. as a director of a company (*B. v. B. (Matrimonial Proceedings: Discovery)* [1978] Fam. 181; [1979] 1 All E.R. 801), or a question of fact whether the documents of a subsidiary company are within the power of the parent company (*Lonrho Ltd v. Shell Petroleum Ltd* [1980] Q.B. 358, affirmed [1980] 1 W.L.R. 62).

An employee is not acting within the course of his employment in giving evidence to a liquidator pursuant to s.236 of the Insolvency Act 1986 and thus the transcript of such evidence is not in the hands of the employee is not in the power, custody or control of the employer and so is not discoverable (*Macmillan Inc. v. Bishopgate Investment Trust (No. 2)* [1993] I.C.R. 385).

There is no jurisdiction to make an order against a party to use all reasonable means to obtain possession of documents so that an order for the discovery of those documents, which at the time was not possible, might then be made, see *Dubai Ltd v. Galadari (No. 6)* (1992) *The Times*, October 14, CA).

Documents of a company are not necessarily "in the power" of its majority shareholder. Shareholder dominance in the running of the company's business does not prove the requisite degree of control; it must be shown that the company is under the unfettered control of the shareholder (*Tecnon Investments Ltd* [1985] B.C.L.R. 434, CA).

The documents of an insolvent company, sorted and stored by company's receivers, held not to be within power of the Secretary of State who had instituted proceeding under Company Directors Disqualification Act 1986 to disqualify a former director whose application for discovery by Secretary of State was refused (see *Re Lombard Shipping and Forwarding Ltd* [1992] B.C.C. 700 (1992) *The Times*, July 29).

See too *Lewis v. Powell* [1897] 1 Ch. 678 and *Frogmore Estates Plc v. Berger*, July 20, 1992, (unrep.), Chancery Division, Knox J., both cases of documents in hands of former solicitors exercising lien over same.

Working notes of professional advisers are normally the property of the adviser (*Chantré v. Martin v. Martin* [1953] 2 Q.B. 286, CA (accountants)). If a party has no control over them, an opposite party may obtain inspection before trial by subpoena under *Khanna v. Lovell White Durrant* [1995] 1 W.L.R. 121.

24/2/9 Obligations of solicitors in respect of discovery by their clients—It is necessary for solicitors to take positive steps to ensure that their clients appreciate at an early stage of the litigation, promptly after the writ is issued, not only the duty of discovery and its width but also the importance of not destroying documents which might possibly have to be disclosed (*per Megarry J.* in *Rockwell Machine Tool Co. Ltd v. E.P. Barrus (Concessionaires) Ltd* [1968] 2 All E.R. 98). Moreover it is not enough simply to give instructions that documents be preserved. Steps should be taken to ensure that documents are preserved (*Infabrics Ltd v. Jaytex Ltd.* [1985] F.S.R. 75 where, because a defendant had not preserved documents affecting the quantum of damage, the maxim *omnia praesumuntur contra spoliatores* was applied against him).

"It cannot be too clearly understood that solicitors owe a duty to the court, as officers of the court, carefully to go through the documents disclosed by their client to make sure, as far as possible, that no relevant documents have been omitted from their clients' affidavit" *per Salmon J.* (as he then was) in *Woods v. Martins Bank Ltd* [1959] 1 Q.B. 55 at 60.

See too comments on duty to notify court and/or to withdraw in the event of client not complying with proper advice in respect of discovery in *Myers v. Elman* [1940] A.C. 282 at 293-4, 300-301 and 322-3.

See also para. 24/2/17, "Continuing obligation to give discovery."

24/2/10 Production and inspection—Until 1962 there was a distinction between the obligation to give discovery (*i.e.* to disclose the existence of documents) and the obligation to produce disclosed documents for inspection. A party was (and still is) obliged to disclose the existence of documents in his possession, etc., even though his possession may not be exclusive or may be only physical custody, e.g. as a servant; the obligation to produce documents was narrower and extended only to documents in the sole legal possession of the party giving discovery (see the notes to O.31, r.14, in editions of the *Annual Practice* prior to 1962).

Under the present rules the obligation to give inspection extends *prima facie* to all documents to which the obligation to give discovery extends (see r.2(1) (automatic discovery); r.3(1) (discovery by order); r.7(1) (discovery of specific documents); rr.9 to 11 (inspection) and *per Lord Cross* in *Alfred Crompton Amusement Machines Ltd v. Commissioners of Customs and Excise* [1974] A.C. 405 at 429; [1973] 2 All E.R. 1169 at 1180). But the Court has a discretion whether to order inspection, and it may be that, in the exercise of such discretion, it will have regard to any prejudice to persons having a right to the documents in question. Moreover, the Court will not make an order either for discovery or inspection which is premature or not necessary for disposing fairly of the cause or matter or for saving costs (rr.8, 13).

24/2/11 "Relating to any matter in question between them" (r.2(1))—These words refer, not to the subject-matter of an action, but to the questions in the action. So, in an action for possession of

established a third party was not entitled to discovery of the existence of insurance cover (*Nigel Upchurch Associates v. Aldridge Estates Investment Co.* [1993] 1 Lloyd's Rep. 535). Section 1 did not transfer to the third party any contractual right to seek declaratory relief before a specific liability had been established or any right to be indemnified contingent upon liability being established. See similarly *Woolwich Building Society v. Taylor* (1994) *The Times*, May 17.

See too *Chancery Guide*, Section 3.4(c) which indicates that parties should as a matter of good practice prepare and if possible agree a list of issues which are considered by either party to be essential to his case and further consider to which issues discovery should relate and in addition whether discovery should take place in stages.

24/2/12 "Third party proceedings" (r.2(1))—Automatic discovery does not apply in third party proceedings. Until the summons for directions in third party proceedings is heard there is no obligation to give discovery, and on that summons the Master orders whatever discovery is needed.

24/2/13 Running-down actions (r.2(2))—The Court does not order discovery against a defendant in a running-down action unless some issue in the action calls for it—e.g. an issue as to whether the driver of the vehicle was the defendant's servant, or whether a vehicle had been properly maintained.

24/2/14 "Action for the recovery of any penalty . . ." (r.2(3))—Section 16(1)(a) of the Civil Evidence Act 1968 abrogated the rule whereby a person cannot be compelled to answer any question or produce any document or thing if to do so would tend to expose him to a forfeiture. It remains, however, that, by virtue of the previous law, as amended by s.14 of the above Act, a party may, in his list of documents or answers to interrogatories, claim privilege from disclosure of particular documents or refuse to answer particular interrogatories on the ground that the documents or answers may expose him or his spouse to proceedings for a criminal offence under the law of any part of the U.K. or for the recovery of a penalty provided by that law (see notes to r.5 and O.26, r.1). But apart from this protection a defendant to an action in which the issue is as to his liability to a penalty is under no obligation to make discovery of documents under this rule, and the Court will not under r.3 order discovery of documents against him, or under O.26 allow interrogatories to be administered to him (*Martin v. Treacher* (1886) 16 Q.B.D. 507, CA; *Mexborough v. Whitwood* [1897] 2 Q.B. 111, CA; *Seddon v. Commercial Salt Co.* [1925] 1 Ch.187, CA). The words in the rule "recoverable by virtue of any enactment" mean penalties recoverable under a statute as distinct from sums recoverable under a contract and sums in the nature of compensation recoverable by statute (*Adams v. Batley and Cole v. Francis* (1887) 18 Q.B.D. 625—statutory penalty for infringement of copyright; *Hobbs v. Hudson* (1890) 25 Q.B.D. 232—action for double value for goods fraudulently removed by a tenant, held penal; *Colne Valley Water Co. v. Watford and St. Albans Gas Co.* [1948] 1 K.B. 500, CA—penalties for pollution of water supply; *Sanders v. Wiel* [1892] 2 Q.B. 321, CA—penalty for infringement of copyright. Contrast *Mayor etc., of Derby v. Derbyshire C.C.* [1897] A.C. 550, where the action was not for a penalty but for an order a breach of which might expose the defendant to a penalty in subsequent proceedings). A fine which might be imposed by the European Commission on an undertaking which intentionally breaches the provisions of Art. 81 of the Treaty of Rome is a "penalty" which would be recoverable under an English statute (*Re Westinghouse Electric Corp., Uranium Contract Litigation of M.D.L. Docket 235* [1978] A.C. 547; [1978] 1 All E.R. 434, HL(E)). A claim for conversion damages in respect of dealings in infringing copies pursuant to s.18 of the Copyright Act 1956 is not an action for the "recovery of any penalty recoverable by virtue of any enactment" (*Richmark Camera Services Inc. v. Neilson-Hordell Ltd* [1981] F.S.R. 413). See also para. 24/5/34, below, "Documents tending to criminate or expose to a penalty."

24/2/15 Limitation of automatic discovery (r.2(5) & (6))—Notwithstanding the provision in para. (1) for automatic discovery of documents within 14 days after close of pleadings, a party may apply under paras (5) and (6) to limit his obligation to make discovery. The application is by summons to be taken out within the 14 days, though the Court may extend the time for good reason. As a rule, no affidavit should be filed on the summons. The Court will not postpone discovery to a later stage under para. 5(b) unless, e.g. there is a preliminary issue to be tried (e.g., the issue as to liability) and the postponed discovery is likely to be heavy, or there is some other exceptional reason.

24/2/16 Form of affidavit (r.2(7))—See O.24, r.5.

24/2/17 Continuing obligation to give discovery—Although one reading of O.24, r.1 may suggest that discovery need be given only of documents which have come into a party's possession before the date of his list of documents, this is not the limit of a party's obligation to give discovery imposed by the rule. The obligation is general, and requires the disclosure of all relevant documents whenever they may come into a party's possession. This requirement is supported by the linked principle that a party must not seek to take his opponent by surprise (cf. O.18, rr.8 and 9), and that he must not, by withholding relevant documents, mislead his opponent or the Court into believing that the statement in his list that he has given full discovery continues to be true (*Mitchell v. Darley Main Colliery Co.* (1884) Cab. & Ell. 215). An obvious example is where a plaintiff, who is claiming damages for prospective loss of earnings, obtains new lucrative

land, where the plaintiff's title is in question, they refer to the title, not the land (*per* Lindley J. in *Philippis v. Philippis* (1879) 40 L.T. 815 at 821). They are not limited to documents which would be admissible in evidence (*Compagnie Financière du Pacifique v. Peruvian Guano Co.* (1882) 11 Q.B.D. 55, *per* Brett L.J. at pp.62, 63; *O'Rourke v. Darbishire* [1920] A.C. 581 at 630) nor to those which would prove or disprove any matter in question: any document which, it is reasonable to suppose, "contains information which may enable the party (applying for discovery) either to advance his own case or to damage that of his adversary, if it is a document which may fairly lead him to a train of inquiry which may have either of these two consequences" must be disclosed (*Compagnie Financière, etc.* (1882) 11 Q.B.D. 55 at 63). See also *The Captain Gregos* (1990) *The Times*, December 21, CA. Brett L.J.'s formulation of relevance for discovery purposes at p. 63 of the *Compagnie Financière* case was it appears approved by the Court of Appeal in *Taylor v. Anderton* [1995] 1 W.L.R. 447; [1995] 2 All E.R. 420. The formulation was stated to make it clear that the definition of relevance was framed in the widest possible terms. Compare the more restricted approach in *O Co. v. M. Co.* [1996] 2 Lloyd's Rep. 347, in which it appears *Taylor v. Anderton* was not cited. In *O Co. v. M Co.* the Court said that: "The principle was never intended to justify demands for disclosure of documents at the far end of the spectrum of materiality which on the face of it were unrelated to the pleaded case of the plaintiff or defendant and which were required for purely speculative investigation. The excessively wide application of Brett L.J.'s formulation of relevance has probably contributed more to the increase of the costs of English civil and commercial litigation in recent years than any other factor other than the development of the photocopying machine. That formulation must not, in my judgment, be understood as justifying discovery demands which would involve parties to civil litigation being required to turn out the contents of their filing systems as if under criminal investigation merely on the off-chance that something might show up from which some relatively weak inference prejudicial to the case of the disclosing party might be drawn. On the contrary, the document or class of documents must be shown by the applicant to offer a real probability of evidential materiality in the sense that it must be a document or class of which in the ordinary way can be expected to yield information of substantial evidential materiality to the pleaded claim and the defence to it in the broad sense which I have explained. If the document or class cannot be demonstrated to be clearly connected to issues which have already been raised in the course of the proceedings, or which would in the ordinary way be expected to be raised in the course of the proceedings, if sufficient information were available, the application should be dismissed." Parts of documents disclosed on discovery may be blanked out as irrelevant (*G.E. Capital Corporate Finance Group v. Bankers Trust Co.* [1995] 1 W.L.R. 172, CA; [1995] 2 All E.R. 993, CA). Documents required merely for the purpose of comparing handwriting, where the handwriting of another document is in issue, may be "relevant" (*Jones v. Richards* (1885) 15 Q.B.D. 439; interrogatories in a libel action). Any documents shedding light on the amount of the damages claimed must be disclosed, and written complaints from third persons as to a matter in question (see *Board v. Thomas Hedley & Co.* [1951] 2 All E.R. 431—complaints from later users of a product alleged to be dangerous; *Blakebrough v. British Motor Corp.* (1969) 113 S.J. 366, CA). Thus in a personal injury action an employee who claimed damages for loss of earnings or impaired earning capacity had if so requested by his employer to disclose general medical records of the whole of his medical history to his employer's medical advisers (*Dunn v. British Coal Corporation* [1993] I.C.R. 591; (1993) *The Times*, March 5; (1993) *The Independent*, March 10, CA. On the issue whether a party is a moneylender, discovery must be given of documents later as well as earlier than the transaction in question (*Marshall v. Goulston Discount (Northern) Ltd* [1967] Ch.72; [1966] 3 All E.R. 994, CA). Where defences of breaches of Arts 85 or 86 of the Treaty of Rome are pleaded, the Court will be concerned to prevent a wide-ranging fishing discovery based upon a pleading in general terms, especially where privilege from disclosure or production may be claimed (*British Leyland Motor Corp. Ltd v. Wyatt Interpart Co. Ltd* [1979] F.S.R. 39).

In proceedings for infringement of a patent, where the defendant seeks to attack its validity, discovery may be ordered of documents filed by the plaintiff in applications for patent protection in foreign jurisdictions, notwithstanding that such documents may be inconclusive of the issues in the action, if they assist the defendant by disclosing the line which may be taken by the plaintiff in resisting the attack on the validity of the patent (*Vickers Plc v. Horsell Graphic Industries Ltd* [1988] R.P.C. 421).

In an action brought by a plaintiff against a chief constable for damages for assault, unlawful arrest, false imprisonment and malicious prosecution by the police, the plaintiff is not entitled to discovery of documents containing adjudications of guilt in police disciplinary proceedings against police officers allegedly involved in the plaintiff's arrest and detention, since the documents are not probative of the conduct alleged; the Court should not order discovery on matters which go solely to cross-examination or as to similar fact transactions, where such discovery would be oppressive and where evidence of such transactions is not admissible (*Thorpe v. Chief Constable of Greater Manchester* [1989] 2 All E.R. 827, CA).

A plaintiff who brings a personal injury action against her former employer is entitled to discovery of the details of earnings of three comparative earners employed by the defendant, where the amount which the plaintiff would have earned if she had not had to leave her employment is in question in the action and the plaintiff has a claim for continuing loss; disclosure of such documents does not contravene the Data Protection Act 1984, because such disclosure is permitted by virtue of s.34(5) of that Act (*Rowley v. Liverpool City Council* (1989) *The Times*, October 26, CA).

Until a liability covered by s.1 of the Third Parties (Rights Against Insurers) Act 1930 had been