CIVIL PROCEDURE NEWS

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CPR rr.26.5, 26.6, 44.3, 44.4, 44.5 and 46.2. Claim for personal injury suffered at work allocated to multi-track. At two-day trial, at which liability and quantum contested, county court judge finding (1) that claimant (C) was 25 per cent responsible for his own injuries, and (2) that C's claim of £18,325 for future losses should be rejected, but he should be awarded £9,300 for other losses. As to costs, defendant (D) alleging and submitting to judge that C's failure to negotiate, his exaggeration of his claim, and his unreasonable conduct in relation to the agreement of the joint experts, should be taken into account. Judge ordering that D should pay C's costs of the action, to be assessed on the standard basis if not agreed. C's solicitors lodging bill of costs for £78,500, including 100 per cent CFA uplift. Costs judge (1) finding that, as from a particular pre-trial date, it should have been apparent to the parties that this was a case that should have been pursued on the fast track, and restricting C's costs to fast track costs from that date, and (2) awarding C costs of £41,800. Circuit judge upholding costs judge's decision. **Held**, allowing C's appeal and remitting the matter to the costs judge for re-consideration, (1) rr.44.3 and 44.5 are intended to work in harmony, and it is intended that the parties' conduct (for example) may have to be considered under both, (2) it is open to the costs judge to disallow costs relating to an issue on the grounds that the costs were unreasonably incurred, (3) a trial judge may be in a good position to help a costs judge on such a point, but the fact that it was not raised with the trial judge should not preclude a party from raising the matter with the costs judge, (4) in this case, C did not seek to obtain from the trial judge (a) an order that costs should be limited to those recoverable on a fast track basis, and (b) in particular, a ruling that only one day's trial costs should be allowed, even though the case had gone into a second day, (5) but the fact that such submissions were not made did not prevent D from raising them before the costs judge, whose duty to consider "all the circumstances of the case" included considering the question whether the case was in reality a fast track case, (6) D did submit to the trial judge that C's claim had been exaggerated, but failed to obtain from the judge a special order in relation to that submission, (7) nevertheless, the costs judge was entitled to consider how, if lawyers had been properly instructed, the case should have been fought and in particular whether it would have ended up as a fast track case, (8) however, the costs judge was not entitled to, in effect, rescind the judge's order by ruling that the trial costs should be assessed as if the case were on the fast track. ***Henderson v Henderson*** (1848) 3 Hare 100; ***Lownds v Secretary of State for the Home Department (Practice Note)*** [2002] EWCA Civ 365; [2002] 1 W.L.R. 2450, CA; ***Aaron v Shelton*** [2004] EWHC 1162; [2004] 3 All E.R. 561; ***Gray v Going Places Leisure Travel Ltd*** [2005] EWCA Civ 189, February 7, 2005, CA, unrep.; ***North Star Systems Ltd v Fielding*** [2006] EWCA Civ 1660; ***Lahey v Pirelli*** [2007] EWCA Civ 91; [2007] 1 W.L.R. 998, CA, ref'd to. (See ***Civil Procedure 2009*** Vol.1 paras 44.3.9, 44.3.10 and 44.5.1.)

FITZROY ROBINSON LTD v MENTMORE TOWERS LTD [2009] EWHC 3070 (TCC), November 26, 2009, unrep. (Coulson J.)

Quantum trial — late application for adjournment — matters to be considered

CPR rr.1.1, 3.1(2)(b), 29.2(2), 29.8 and 39.4, Practice Direction 29 (The Multi-Track) para.7, Practice Direction 35 (Experts and Assessors) para.19.2, Protocol for the Instruction of Experts para.19.2. On July 7, 2009, following liability trial of professional negligence claim in TCC, judge giving timetable directions leading up to four-day quantum trial fixed for December 7, 2009. The directions, insofar as they stipulated a meeting of experts, the exchange of their reports, and the production of a joint statement (pursuant to r.35.12), not complied with. In particular, defendant's (D) expert not instructed for meeting with claimant's (C) expert. At PTR hearing on November 20, 2009, D's application (intimated the day before) for adjournment of the trial opposed by C. **Held**, refusing the application but giving further pre-trial directions (including direction that trial start a week later on December 14), (1) in determining whether an application for an adjournment made at the eleventh hour should be granted or refused, the judge should take into account (a) the overriding objective, and (b) should have specific regard for (i) the parties' conduct and the reasons for the delays, (ii) the extent to which the consequences of the delays can be overcome before the trial, (iii) the extent to which a fair trial may have been jeopardised by the delays, (iv) specific matters affecting the trial, such as illness of a critical witness and the like, and (v) the consequences of an adjournment for the claimant, the defendant and the court. ***Boyd and Hutchinson v Foenander*** [2003] EWCA Civ 1516, October 23, 2003, CA, unrep., ref'd to. (See ***Civil Procedure 2009*** Vol.1 paras 3.1.3, 29.2.2, 29PD.7, 35.0.6, 35.5.1, 35.13.1 and 35.38.)

■ **G & G v WIKIMEDIA FOUNDATION INC** [2009] EWHC 3148 (QB), December 2, 2009, unrep. (Tugendhat J.)

Open justice — anonymity of parties — non-party access to court documents

CPR rr.5.4C(4), 25.3(2), 31.18 and 39.2(3), Practice Direction 25A paras 4.1, 5.1 and 5.2 and Annex, Human Rights Act 1998 s.12 and Sch.1 arts 6 and 10. Individuals (C) making without notice (but on notice) application for *Norwich Pharmacal* order requiring US company (D) to disclose network IP address of the registered user of a website over which D had limited control. Application made by C for purpose of identifying person who had put information on the website, being information which C alleged was private and confidential and whose further publication could be restrained by injunction. Following request to D from C, information removed from the website, but D unwilling to disclose IP address without court order. At hearing held in private (r.39.2(3)), judge (1) granting application, and, in addition, (2) making orders effective until further order (rather than to return date) (a) preventing disclosure of the identities of C, and (b) restricting the material on court file relating to the proceedings that should be accessible to non-parties (r.5.4C(4)). Judge explaining (1) there were reasons for granting anonymity to C but no reason for giving anonymity to D, (2) hearings in private under r.39.2(3) and orders under r.5.4C(4) are derogations from the principle of open justice and must be ordered only when it is necessary and proportionate to do so, with a view to protecting the rights which claimants (and others) are entitled to have protected by such means, (3) orders which may interfere with freedom of expression should only be granted in circumstances which provide maximum protection for the person against whom the order is to be made, and the least interference with the right of freedom of expression necessary to protect the claimant's rights, (4) where applications are made for subsidiary orders with terms that will have the effect of derogating from the principle of open justice it is important that any such terms should be adapted to no more than is necessary and proportionate in the circumstances of the particular case, (5) in particular, applicants seeking a departure from paras 5.1 and 5.2 should explain in evidence or skeleton argument why it is sought, (6) applicant's drafts for such orders should include an undertaking to provide full notes of the hearing with all expedition to any party that would be affected by the relief sought, (7) the preparation and provision of such notes are important, not only to inform anyone notified of the order of what evidence was put before the court (in addition to that which is in the witness statements), but also to inform them of any points or queries that may have been raised by the judge. ***Thane Investments Ltd v Tomlinson*** [2003] EWCA Civ 1272, July 29, 2003, CA, unrep.; ***Memory Corp v Sidhu (No.2)***, [2000] 1 W.L.R. 1443, CA, ref'd to. (See ***Civil Procedure 2009*** Vol.1 paras 5.4C.10, 25.3.5 and 31.18.2 and Vol.2 para.15–40.)

■ **O'BEIRNE v HUDSON** [2010] EWCA Civ 52, February 9, 2010, CA, unrep. (Waller, Hooper and Etherton L.JJ. and Senior Costs Judge Hurst)

Costs assessment — consent order before allocation

CPR rr.27.14, 44.5, 45.5 and 45.9. Following rear-end car accident, one driver (C), after recovering from the other (D) costs of repairs to his vehicle, issuing claim form claiming from D general damages in excess of £1,000. Before case allocated to any case management track, parties agreeing settlement on basis that D paid £400 general damages and £720 car hire charges. Consent order carrying into effect this agreement also stating that D should pay C's reasonable costs and disbursements on the standard basis, to be subject to detailed assessment if not agreed. D disputing C's bill of costs. On the detailed assessment, D submitting that, as the case would have been allocated to the small claims track had it gone to the allocation stage, C could not recover costs other than those fixed costs permitted by Pt 27 and Pt 45. Costs judge rejecting this submission, and assessing C's costs at £4,000. Circuit judge allowing D's appeal, not on basis of D's submission to the costs judge, but on the broader submission that, in the circumstances, the court had a discretion (which was not fettered by the terms of the consent order) whether or not to assess costs by reference to the small claims track. **Held**, dismissing C's appeal, (1) the consent order for costs in this case provided for costs to be assessed on the standard basis, and it followed from that that the costs judge was not free to rule that the costs should be assessed on the small claims basis, (2) however, in making an assessment, a costs judge is entitled to take account of all the circumstances, and that includes taking into account the fact that a case would almost certainly have been allocated to the small claims track, if it had been allocated, (3) if that were the fact, it was a highly material circumstance in considering what, by way of assessment, should be payable, (4) there is a real distinction between (a) directing at the outset that nothing but small claims costs will be awarded, and (b) giving items on a bill very anxious scrutiny to see (i) whether costs were necessarily or reasonably incurred, and thus (ii) whether it is reasonable for the paying party to pay more than would have been recoverable in a case that should have been allocated to the small claims track, (5) where a claim should have been allocated to the small claims track, such scrutiny would include asking, for example, whether it was reasonable for the paying party to have to pay for the receiving party's lawyers. ***Lownds v Secretary of State for the Home Department (Practice Note)*** [2002] EWCA Civ 365; [2002] 1 W.L.R. 2450, CA; ***Voice and Script International Ltd v Alghafar*** [2003] EWCA Civ 736, May 8, 2003, CA, unrep., ref'd to. (See ***Civil Procedure 2009*** Vol.1 para.44.5.1.)

OCEANBULK SHIPPING AND TRADING SA v TMT ASIA LTD [2010] EWCA Civ 79, February 15, 2010, CA (Ward, Longmore and Stanley Burnton L.JJ.)

Construction of settlement agreement — evidence of without prejudice communications

CPR rr.31.3 and 32.1. Two companies (C and D) entering into forward freight agreements providing for monthly settlements during 2008. D negotiating terms for payment by them of US$45 owing to C under the agreements as at the end of May, and parties reaching written settlement agreement. Subsequently, parties disagreeing as to interpretation of clause in that agreement taking effect if D failed to exercise options open to them under the agreement. On ground that D had not complied with agreement, C bringing claim for damages against D. Before trial, C (1) applying to strike out part of D's pleading, contending that it was based on without prejudice exchanges between the parties during the negotiations for settlement, (2) opposing a proposed amendment to the pleading whereby D would introduce allegations of estoppel, and (3) seeking declaration that evidence of the negotiations was inadmissible (absent mutual waiver). Judge ruling that such evidence could be introduced in evidence by D on the issue of the proper construction and meaning of the disputed clause ([2009] EWHC 1946 (Comm); [2009] 1 W.L.R. 2416). **Held**, allowing C's appeal (Ward L.J. dissenting), (1) the main issue on this appeal was whether without prejudice discussions can be given in evidence in support of arguments about construction if they arguably establish a fact which is arguably part of the background to or the matrix of the contractual agreement, (2) evidence from without prejudice exchanges is admissible in order to identify what the terms of a settlement agreement were, but this exception does not extend to evidence about the proper construction and meaning of a settlement agreement reached after without prejudice exchanges, (3) in this case, there was no difficulty in identifying the disputed contractual clause or its terms, (4) it did not follow that because, in rare but obvious cases, courts may imply terms into a contract, evidence of what occurred in without prejudice negotiations should be admitted as an exception to the general exclusionary rule where issues as to the interpretation of contractual terms arose, (5) in serving the policy of promoting settlements, in a given case the without prejudice rule can have the effect of excluding relevant evidence, (6) however (as recent high authorities indicate), the policy should trump the more general policy of enabling the court to have the maximum possible assistance in ascertaining the parties' (objective) intentions. Reasons for general rule excluding evidence of without prejudice communications and discussions, and for permitted exceptions thereto, analysed and explained. ***Rush and Tompkins v Greater London Council*** [1989] A.C. 1280, HL; ***Chartbrook Ltd v Persimmon Homes Ltd*** [2009] UKHL 38; [2009] A.C. 1101, HL; ***Unilever Plc v Procter and Gamble*** [2000] 1 W.L.R. 2436, CA; ***Ofulue v Bossert*** [2009] UKHL 16; [2009] 1 A.C. 990, HL; ***Admiral Management Services Ltd v Para-Protect Europe Ltd*** [2002] EWHC 23 (Ch); [2002] 1 W.L.R. 2722, ref'd to. (See ***Civil Procedure 2009*** Vol.1 paras 31.3.40 and 32.1.4.)

RINIKER v EMPLOYMENT TRIBUNALS AND REGIONAL CHAIRMEN [2009] EWCA Civ 1450, December 4, 2009, CA, unrep. (Smith and Pill L.JJ.)

Judicial review — respondent's entitlement to costs

CPR rr.23.11, 44.3, 54.8, 54.9 and 54.12, Practice Direction 54A (Judicial Review) para.8.6. Former employee (C), having engaged in employment tribunal proceedings with former employer, issuing claim form bringing claim for judicial review against tribunal (D) challenging a case management decision. C (acting in person throughout) serving claim form on D on January 21, 2008. Acknowledgment of service filed by D on February 18, three days after the time limit fixed by r.54.8. On February 25, High Court judge, without a hearing, refusing C permission to proceed. C requesting that that decision be reconsidered at a hearing. Before hearing, by letter D asking for court's permission under r.54.9(1) to take part in the hearing and to defend the proceedings on the basis set out in the acknowledgment of service, and informing C that at the hearing they would be seeking an order for costs of the acknowledgment of service and of attendance at the hearing. Because of illness, C unable to attend the hearing. Judge (1) proceeding in C's absence and allowing D to participate, and (2) refusing C permission to proceed. Judge also making costs order against C (summarily assessed at £4,700) and giving C 14 days in which to object to that order in writing. C objecting to costs order and, for purpose of challenging the judge's decision to proceed in her absence and the outcome of the hearing, as well as the costs order, making an application under r.23.11 for the permission application to be re-listed. A third High Court judge considering C's objection to the costs order, but confirming the order. Upon court officer advising C that the r.23.11 application was inappropriate, C applying to Court of Appeal for permission to appeal. On December 5, 2008, at oral hearing, Court granting C permission to appeal against the costs order, but refusing permission on all other grounds. (In doing so, Court stating that C's r.23.11 application should have been put before a judge.) On hearing of appeal, **held**, allowing appeal, (1) it was not open to the judge to order C's payment of D's costs of attending the hearing without considering whether the circumstances were exceptional, (2) further the judge did not consider whether the usual order that the defendant should be entitled to the costs of preparation of the acknowledgment of service ought to apply in a case where that document had been filed out of time, (3) these matters were relevant and important to the exercise of the court's discretion as to costs, (4) in considering the discretion afresh (and confining attention to the matters that were available to the judge at the time), D should not be awarded any

costs. Court stating that a court may informally, in response to an informal application, give a respondent permission under r.54.9 to take part in a hearing, and that a formal application under Pt 23 is not necessary. ***R. (Mount Cook Land Ltd) v Westminster City Council*** [2003] EWCA Civ 1346; [2004] C.P. 12, CA; ***R. (Leach) v Commissioner for Local Administration*** [2001] EWHC 455 (Admin); [2001] C.P. Rep. 97; ***R. (Ewing) v Office of the Deputy Prime Minister*** [2005] EWCA Civ 1583; [2006] 1 W.L.R. 1260, CA, ref'd to. (See ***Civil Procedure 2009*** Vol.1 paras 23.0.3, 23.11.3, 44.3.7, 48.12.5, 54.8.2 and 54.12.5.)

- **SUCDEN FINANCIAL LTD v FLUXO-CANE OVERSEAS LTD** [2009] EWHC 3555 (QB), December 4, 2009, unrep. (Teare J.)

Stay of execution — order for judgment debtor's oral examination

CPR r.71.2. In proceedings brought by a company (C) against another company (D1) and the proprietor thereof (D2), order granting C summary judgment for a large sum of money containing term staying enforcement of the judgment until December 4, to give D2 opportunity to apply to Court of Appeal for permission to appeal and a further stay. On November 25, Master granting C's ex parte application under r.71.2 for order requiring D2 to attend court to provide information about his means. D2 applying to judge to set aside the order. **Held**, dismissing the application, (1) the stay in the judgment order was not a bar to C's obtaining of the order, (2) an order under r.71.2 is made for the purpose of enabling a judgment creditor to enforce a judgment order against a judgment debtor (r.71.1), (3) such an order is anterior to the enforcement process, (4) though C were not yet entitled to enforce their judgment, they had obtained judgment and were therefore "a judgment creditor" within the meaning of the rule. ***White, Son and Pill v Stennings*** [1911] 2 K.B. 418, CA, ref'd to. (See ***Civil Procedure 2009*** Vol.1 paras 71.0.2 and 71.2.7.)

Practice Directions

- **PRACTICE DIRECTION 5C—ELECTRONIC WORKING SCHEME** (TSO CPR Update 51 (forthcoming))

Supplements CPR rr.5.5 and 7.12. Replaces with amendments Practice Direction (Electronic Working Pilot Scheme); see *White Book* 2009 Supplement para.5CPD.0, p.7). Amends and puts scheme on permanent basis in the courts to which it applies. In force April 6, 2010. See further CPR Update section of this issue of *CP News*.

- **PRACTICE DIRECTION 8B—PRE-ACTION PROTOCOL FOR LOW VALUE PERSONAL INJURY CAIMS IN ROAD TRAFFIC ACCIDENTS—STAGE 3 PROCEDURE** (TSO CPR Update 51 (forthcoming))

Supplements r.8.1(6). Sets out procedure for a claim where the parties have followed the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents but are unable to agree the amount of damages at the end of Stage 2 of that Protocol. Also sets out procedure for approval by the court of settlements where parties have followed the Protocol (the RTA Protocol) and the claimant is a child. In force April 6, 2010. (The RTA Protocol will be published in TSO CPR Update 51 (forthcoming).) (Necessary amendments to the CPR to accommodate the Stage 3 procedure, and implementing fixed costs regime for that procedure, will be included in a statutory instrument expected to be enacted in March, 2010.)

Statutory Instruments

- **COURT FUNDS (AMENDMENT) RULES 2010** (SI 2010/172)

Court Funds Rules 1987. Amend r.19 (Payment of money into a District Registry or county court), r.57 (Unclaimed funds) and r.60 (Disposal of unclaimed securities). For purpose of enabling Accountant General to transfer money held on a special account to a basic account when person ceases to be under a disability, inserts r.45A. In force April 1, 2010. (See ***Civil Procedure 2009*** Vol.2 paras 6A–93, 6A–106, 6A–121 and 6A–122.)

CPR Update

AMENDMENTS TO CPR RULES

The Civil Procedure (Amendment No.2) Rules 2009 (SI 2009/3390) were issued on December 30, 2009. They amend various CPR Parts. Some of the amendments came into effect on February 1 and 15, and were referred to in the CPR Update sections of Issue 2/2010 of *CP News* (February 12, 2010).

Most of the amendments coming into effect on April 6 are consequences for CPR rules of the introduction of a new scheme for the naming of CPR Practice Directions. As from that date, the name of each practice direction will have included in it the number of the Part that it supplements, and where there is more than one supplementing practice direction for a Part, a letter (A, B, C, etc.) to distinguish them. Thus, for example, in CPR Pt 23 (General Rules about Applications, etc.), Practice Direction—Applications, and Practice Direction—Applications under Particular Statutes, are re-named Practice Direction 23A—Applications, and Practice Direction 23B—Applications under Particular Statutes. And wherever these practice directions are referred to in particular CPR rules, or in other practice directions, they are referred to as Practice Direction 23A and Practice Direction 23B. This is all very neat and tidy, but introducing the new system involves an enormous number of amendments to CPR rules (provisions in 50 Parts are affected) and to supplementing practice directions.

Other amendments to the CPR, introduced by the Civil Procedure (Amendment No.2) Rules 2009, and coming into effect on April 1 and 6 (excluding some that make very minor and obvious corrections, not affecting sense), are set out below.

The amendments made to CPR Pt 6 (Service of Documents) are apparently made for the purpose of providing for service on a solicitor within any EEA state so as to ensure that the rules comply with EC Directive 2006/123/EC (the Services Directive). Whether the existing rules are non-compliant may be doubted, and it may be argued that the new rules will create practical difficulties.

Paragraph and page references are to the *White Book* 2009, and are to Vol.1 except where otherwise indicated.

PART 2—APPLICATION AND INTERPRETATION OF RULES

Paragraph 2.8, p.36

In r.2.8(5), for "When the period specified —" substitute "Subject to the provisions of Practice Direction 5C, when the period specified —".

PART 6—SERVICE OF DOCUMENTS

Paragraph 6.6, p.160

In r.6.6(1), after "rule" insert "6.7(2) or".

Paragraph 6.7, p.162

For r.6.7, substitute:

"**Service of the claim form on a solicitor within the jurisdiction or in any EEA state**

6.7—(1) Subject to rule 6.5(1), where—

(a) the defendant has given in writing the business address within the jurisdiction of a solicitor as an address at which the defendant may be served with the claim form; or

(b) a solicitor acting for the defendant has notified the claimant in writing that the solicitor is instructed by the defendant to accept service of the claim form on behalf of the defendant at a business address within the jurisdiction,

the claim form must be served at the business address of that solicitor.

('Solicitor' has the extended meaning set out in rule 6.2(d).)

(2) Subject to rule 6.5(1) and the provisions of Section IV of this Part, where—

(a) the defendant has given in writing the business address within any EEA state of a solicitor as an address at which the defendant may be served with the claim form; or

(b) a solicitor acting for the defendant has notified the claimant in writing that the solicitor is instructed by the defendant to accept service of the claim form on behalf of the defendant at a business address within any EEA state,

the claim form must be served at the business address of that solicitor.

('Solicitor' has the extended meaning set out in rule 6.2(d).)"

Paragraph 6.23, p.187

In r.6.23(2)(a), after "address" insert "either", and after "United Kingdom" insert "or any other EEA state".

PART 7—HOW TO START PROCEEDINGS—THE CLAIM FORM

Paragraph 7.12, p.290

After r.17.12, insert:

"(Practice Direction 5C deals with electronic issue of claims started or continued under the Electronic Working scheme.)"

PART 9—RESPONDING TO PARTICULARS OF CLAIM—GENERAL

Paragraph 9.2, p.342

Omit the parenthesis below r.9.2(c).

PART 63—INTELLECTUAL PROPERTY CLAIMS

Volume 2 para.2F–4, p.613

In r.63.1(2) omit sub-para.(i).

PART 67—PROCEEDINGS RELATING TO SOLICITORS

Paragraph 67.3, p.1807

For the second parenthesis below r.67.3(1), substitute:

"(Provisions about the venue for detailed assessment proceedings are contained in rule 47.4 and Section 31 of the Costs Practice Direction.)"

PART 74—ENFORCEMENT IN DIFFERENT JURISDICTIONS

Paragraph 74.1, p.1897

In the parenthesis below r.74.1(5), omit "European Enforcement Orders".

AMENDMENTS TO CPR PRACTICE DIRECTIONS

As was explained in the CPR Update sections in the January and February issues of *CP News* (Issues 01/2010 and 02/2010), unpublished amendments to several practice directions came into effect in February 1 and 15. Further amendments coming into effect on April 1 and 6 have also been made. At the time of going to press, the date of publication of these amendments was unknown but it is anticipated that they will be published in forthcoming TSO CPR Update 51.

A number of amendments are made to the Costs Practice Direction, most of them implementing recommendations made by a sub-committee set up to review the operation of that practice direction and making important practical improvements.

Paragraph and page references are to the *White Book* 2009, and are to Vol.1 except where otherwise indicated.

PRACTICE DIRECTION—ELECTRONIC WORKING PILOT SCHEME

Supplement 2, paras 5CPD.0 to 5CPD.17, pp.7 to 16

This practice direction is superseded by Practice Direction 5B—Electronic Working Scheme (supplementing rr.5.5 and 7.12); see further below.

PRACTICE DIRECTION 6B—SERVICE OUT OF THE JURISDICTION

Paragraph 6BPD.7, p.261

In para.7.1 omit "or order" after "application notice".

PRACTICE DIRECTION 23A—APPLICATIONS

Paragraph 23PD.4, p.582

In para.4.1, after "paragraph 3" insert "or paragraph 4.1A"; and after "at least 3" omit "clear".

After para.4.1 insert:

"**4.1A** Where there is to be a telephone hearing the application notice must be served as soon as practicable after it has been issued and in any event at least 5 days before the date of the hearing."

After para.4.2 insert:

"(Rule 2.8 explains how to calculate periods of time expressed in terms of days.)"

Paragraph 23PD.6, p.584

For paras 6.11 and 6.12, substitute:

"**6.11** Where a document is required to be filed and served the party or the designated legal representative must do so no later than 4pm at least 2 days before the hearing.

6.12 A case summary and draft order must be filed and served in—

(a) multi-track cases; and
(b) small and fast track cases if the court so directs.

6.13 Any other document upon which a party seeks to rely must be filed and served in accordance with the period specified in paragraph 6.11.

(Rule 2.8 explains how to calculate period of time expressed in terms of days.)"

The above amendments to paras 4 and 6 of PD 23A, do not apply to a telephone hearing listed before April 14, 2010. Paragraphs 4 and 6 in force immediately before April 6, 2010 will continue to apply to such telephone hearings.

PRACTICE DIRECTION 27—SMALL CLAIMS TRACK

Paragraph 27PD.7, p.733

In the parenthesis at the end of para.7.3, for "paragraph 5.1(3)" substitute "paragraph 15.1(3)".

PRACTICE DIRECTION 40B—JUDGMENTS AND ORDERS

Paragraph 40BPD.15, p.1111

In the notes following para.14.4, omit note (4) and re-number note (5) as (4).

PRACTICE DIRECTION 41B—PERIODICAL PAYMENTS UNDER THE DAMAGES ACT 1996

Paragraph 41BPD.5, p.1133

In para.5, for "2004" substitute "2005".

PRACTICE DIRECTION 42—CHANGE OF SOLICITOR

Paragraph 42PD.5, pp.1141 and 1142

For para.5.1, substitute:

"New address for service where order made under rules 42.3 or 42.4

5.1 Where the court has made an order under rule 42.3 that a solicitor has ceased to act or under rule 42.4 declaring that a solicitor has ceased to be the solicitor for a party, the party for whom the solicitor was acting must give a new address for service to comply with rules 6.23(1) and 6.24.

(Rule 6.23 provides that a party must give an address for service within the United Kingdom or where a solicitor is acting for a party, an address for service either in the United Kingdom or any other EEA state.)

(Until such time as a new address for service is given rule 6.9 will apply.)"

COSTS PRACTICE DIRECTION (PART 43)

Paragraph 43PD.4, pp.1154 and 1155

The following changes are made to paragraphs in Section 4 (Form and Contents of Bills of Costs).

In para.4.7, in sub-para.(1), after "letters out", insert "e-mails out"; and in sub-para.(3), for "should", substitute "must".

In para.4.16, in sub-para.(1):

(i) after "letters out" where it first occurs, insert "routine e-mails out";

(ii) after "letters out" where it occurs for the second time, insert "and e-mails out";

(iii) after "relevant letters in", insert "or e-mails in";

(iv) before "no separate charge", insert "accordingly";

(v) after "no separate charge", for "should" insert "is to"; and

(vi) at end, insert "or e-mails".

In para.4.16, for sub-para.(2), substitute:

"(2) The court may, in its discretion, allow an actual time charge for preparation of electronic communications other than e-mails sent by solicitors, which properly amount to attendances provided that the time taken has been recorded."

In para.4.16, in sub-para.(6), for "a principal solicitor and his agent", substitute "principal solicitors and their agents"; and for "should", in both places where it occurs, substitute "must".

Paragraph 43PD.6, p.1160

The following changes are made to paragraphs in Section 6 (Estimates of Costs).

In para.6.4(1), in sub-para.(1):

(i) in (a), for "the small claims track" substitute "either the small claims track or the fast track";

(ii) in (b), delete ", or under Part 8,";

(iii) before "must also file", for "he", substitute "that party";

(iv) before "legal representative", for "the" substitute "that party's"; and

(v) for "an estimate on the party he represents", substitute "a copy of the estimate on that party".

In para.6.4, in sub-para.(2):

(i) before "is required", insert "who";

(ii) after "Rule 44.15(3)", delete ", if that party";

(iii) after "is represented", insert ","; and

(iv) for "the party he represents", substitute "that party".

COSTS PRACTICE DIRECTION (PART 44)

Paragraph 44PD.5, p.1225

The following changes are made to a paragraph in Section 11 (Factors to be taken into account in deciding the amount of costs: Rule 44.5).

In para.11.7, for "Subject to para.17.8(2), when", substitute "When".

Paragraph 44PD.7, p.1227

The following changes are made to paragraphs in Section 13 (Summary assessment: general provisions).

In para.13.5(2), for "the costs he intends to claim", substitute "those costs".

In para.13.5(3), for "his", substitute "the party's".

In para.13.5(4), for the second sentence substitute:

"The statement of costs must be filed and the copies of it must be served as soon as possible and in any event—

(a) for a fast track trial, not less than 2 days before the trial; and

(b) for all other hearings, not less than 24 hours before the time fixed for the hearing."

Paragraph 44PD.11, p.1231

The following changes are made to a paragraph in Section 17 (Costs-only proceedings: Rule 44.12A).

In para.17.8, delete sub-para.(2).

Paragraph 44PD.17, p.1243

In para.23.2A(1), after "Clerkenwell" insert "and Shoreditch"; and after "Romford,", delete "Shoreditch,".

COSTS PRACTICE DIRECTION (PART 45)

Paragraph 45PD.6, p.1276

In para.25A.6, after "Clerkenwell" insert "and Shoreditch"; and after "Romford,", delete "Shoreditch,".

COSTS PRACTICE DIRECTION (PART 47)

The following changes are made to a paragraph in Section 31 (Venue for detailed assessment proceedings: Rule 47.4.

Paragraph 47PD.4, p.1313

In para.31.1A, in sub-para.(1), after "Clerkenwell" insert "and Shoreditch"; and

(ii) after "Romford,", delete "Shoreditch,".

In para.31.1A, for sub-para.(2) substitute—

"(2) Where this paragraph applies:—

(i) the receiving party must file any request for a detailed assessment hearing in the Costs Office and, for all purposes relating to that detailed assessment (other than the issue of default costs certificates and applications to set aside default costs certificates), the Costs Office will be treated as the appropriate office in that case;

(ii) default costs certificates should be issued and applications to set aside default costs certificates should be issued and heard in the relevant county court; and

(iii) unless an order is made under rule 47.4(2) directing that the Costs Office as part of the High Court shall be the appropriate office, an appeal from any decision made by a costs judge shall lie to the Designated Civil Judge for the London Group of County Courts or such judge as he shall nominate. The appeal notice and any other relevant papers should be lodged at the Central London Civil Justice Centre."

Paragraph 47PD.5, pp.1314 and 1315

The following changes are made to paragraphs in Section 32 (Commencement of detailed assessment proceedings: Rule 47.6).

In para.32.3, for "£250", substitute "£500".

For para.32.5, substitute:

"**32.5** The relevant details of an additional liability are as follows:

(1) In the case of a conditional fee agreement with a success fee:

(a) a statement showing the amount of costs which have been summarily assessed or agreed; and the percentage increase which has been claimed in respect of those costs;

(b) where the conditional fee agreement was entered into before 1st November 2005, a statement of the reasons for the percentage increase given in accordance with regulation 3(1)(a) of the Conditional Fee Agreements

Regulations 2000 or regulation 5(1)(c) of the Collective Conditional Fee Agreements Regulations 2000 [Both sets of regulations were revoked by the Conditional Fee Agreements (Revocation) Regulations 2005 but continue to have effect in relation to conditional fee agreements and collective conditional fee agreements entered into before 1st November 2005.];

(c) where the conditional fee agreement was entered into on or after 1st November 2005 (except in cases where the percentage increase is fixed by CPR Part 45, sections II to V), either a statement of the reasons for the percentage increase or a copy of the risk assessment prepared at the time that the conditional fee agreement was entered into;

(d) if the conditional fee agreement is not disclosed (and the Court of Appeal has indicated that it should be the usual practice for a conditional fee agreement, redacted where appropriate, to be disclosed for the purpose of costs proceedings in which a success fee is claimed), a statement setting out the following information contained in the conditional fee agreement so as to enable the paying party and the court to determine the level of risk undertaken by the solicitor—

(i) the definition of 'win' and, if applicable, 'lose';
(ii) details of the receiving party's liability to pay costs if that party wins or loses; and
(iii) details of the receiving party's liability to pay costs if that party fails to obtain a judgment more advantageous than a Part 36 offer.

(2) If the additional liability is an insurance premium, a copy of the insurance certificate showing—

(a) whether the policy covers—

(i) the receiving party's own costs;
(ii) the receiving party's opponent's costs;
(iii) the receiving party's own costs and opponent's costs; and

(b) the maximum extent of that cover; and

(c) the amount of the premium paid or payable.

(3) If the receiving party claims an additional amount under section 30 of the Access to Justice Act 1999, a statement setting out the basis upon which the receiving party's liability for the additional amount is calculated."

Paragraph 47PD.12, p.1319

The following changes are made to paragraphs in Section 39 (Optional reply: Rule 47.13).

In para.39.1, in sub-para.(1), for "Where the receiving party wishes to serve a reply, he", substitute "A receiving party wishing to serve a reply to some or all of the points of dispute".

In para.39.1, in sub-para.(2), for "(i)" and "(ii)" respectively substitute "(a)" and "(b)"; and for "his", substitute "the receiving party's".

In para.39.1, in sub-para.(3), for "his" substitute "that party's".

After para.39.1 insert:

"**39.2** Where there is a dispute about the insurance premium in a staged policy (which has the same meaning as in paragraph 19.4(3A)) it will normally be sufficient for the receiving party to set out in any reply the reasons for choosing the particular insurance policy and the basis on which the insurance premium is rated whether block rated or individually rated."

Paragraph 47PD.16, p.1325

The following changes are made to paragraphs in Section 43 (Detailed assessment procedure where costs are payable out of the community legal service fund: Rule 47.17).

In para.43.3, renumber the existing text as sub-para.(1) and, in sub-para.(e), for "£250" substitute "£500".

In para.43.3(1), for sub-paras (f) to (h), substitute:

"(f) the legal aid certificates, LSC certificates, any relevant amendment certificates, any authorities and any certificates of discharge or revocation; and

(g) a statement signed by the solicitor giving the solicitor's name, address for service, reference, telephone number, fax

number, e-mail address where available and, if the assisted person has a financial interest in the detailed assessment and wishes to attend, giving the postal address of that person, to which the court will send notice of any hearing. "

After para.43.3(1) insert:

"(2) The relevant papers in support of the bill as described in paragraph 40.12 must only be lodged if requested by the costs officer."

PRACTICE DIRECTION 52—APPEALS

Paragraph 52PD.60, pp.1555 and 1556

For para.15.5 substitute:

"Master in the Court of Appeal, Civil Division

15.5 The Master of the Rolls may designate an eligible officer to exercise judicial authority under rule 52.16 as Master. Other eligible officers may also be designated by the Master of the Rolls to exercise judicial authority under rule 52.16 and shall then be known as Deputy Masters."

Paragraph 52PD.121, p.1580

For para.22.6B substitute:

"Appeals from decisions of the Law Society or the Solicitors Disciplinary Tribunal to the High Court

22.6B (1) This paragraph applies to appeals from the Law Society or the Solicitors Disciplinary Tribunal ("the Tribunal") to the High Court under the Solicitors Act 1974, the Administration of Justice Act 1985, the Courts and Legal Services Act 1990, the European Communities (Lawyer's Practice) Regulations 2000 or the European Communities (Recognition of Professional Qualifications) Regulations 2007.

(2) The appellant must file the appellant's notice in the Administrative Court.

(3) The appellant must, unless the court orders otherwise, serve the appellant's notice on—

(a) every party to the proceedings before the Tribunal; and

(b) the Law Society."

PRACTICE DIRECTION 66—CROWN PROCEEDINGS

Paragraph 66PD.4, p.1801

In Annex 2, the list of authorised government departments issued by the Cabinet Office on February 19, 2009, is replaced by an updated list issued on September 23, 2009.

PRACTICE DIRECITON 67—PROCEEDINGS RELATING TO SOLICITORS

Paragraph 67PD.2, p.1810

"**2.2A** Where a claim under section 70 or 71 of the Act is made by Part 8 claim form in the Costs Office, the court will fix a date for the hearing of the claim when the claim form is issued."

PRACTICE DIRECTION 70—ENFORCEMENT OF JUDGMENTS AND ORDERS

Paragraph 70PD.4, p.1837

In para.4.1, after "Form N322B" insert "or, where paragraph 4.1A applies, in practice form N471".

After para.4.1, insert:

"4.1A This paragraph applies, and practice form N471 is to be used, where—

(a) the decision to be enforced is a decision of an employment tribunal in England and Wales; and

(b) the party seeking to enforce the decision wishes to enforce by way of a writ of *fieri facias*."

AMENDMENT TO PRE-ACTION PROTOCOL

PRE-ACTION PROTOCOL FOR POSSESSION CLAIMS BASED ON MORTGAGE OR HOME PURCHASE PLAN ARREARS IN RESPECT OF RESIDENTIAL PROPERTY

Volume 2 para.C12–004, p.2447

In para.4.1, delete "and" at the end of sub-paragraph (3), and at the end of sub-para.(4) insert:

"; and

(5) "Mortgage Rescue Scheme" means the shared equity and mortgage to rent scheme established either—

(a) by the UK Government to help certain categories of vulnerable borrowers avoid repossession of their property in England, announced in September 2008 and opened in January 2009; or

(b) by the Welsh Assembly Government to help certain categories of vulnerable borrowers avoid repossession of their property in Wales, first announced in June 2008."

Volume 2 para.C12–006, p.2448

In para.6.1, for sub-para.(1), substitute:

"(1) submitted a claim to —

(a) the Department of Works and Pensions (DWP) for Support for Mortgage Interest (SMI); or

(b) and insurer under a mortgage protection policy; or

(c) a participating local authority for support under a Mortgage Rescue Scheme,

and has provided all the evidence required to process a claim;"

In para.6.1, in sub-para.(2), after "insurer" insert "or support from the local authority".

In para.6.1, in sub-para.(3), after "insurer" insert "in relation to a claim under paragraph 6.1(1)(a) or (b)".

PRACTICE DIRECTION 5C—ELECTRONIC WORKING SCHEME

By TSO CPR Update 49, Practice Direction Electronic Working Pilot Scheme (supplementing CPR r.5.5), made under r.51.2, was introduced. That practice direction is printed in the Second Supplement of *White Book* 2009 (pp.7 to 16). It applies to claims started on or after April 1, 2009, and provides for a pilot scheme to operate from April 1, 2009, to March 31, 2010, initially in the Admiralty Court, the Commercial Court and the London Mercantile Courts of the High Court at the Royal Courts of Justice. (The scheme was extended to other courts during 2009.)

With effect from April 1, 2010, this pilot scheme is replaced by a permanent scheme contained in Practice Direction 5C—Electronic Working Scheme. That practice direction will be published in forthcoming TSO CPR Update 51. (The likely date for the publication of this Update is unknown.)

The scheme for electronic working in Practice Direction 5C operates in the courts referred to above and in the Technology and Construction Court and the Chancery Division of the High Court at the Royal Courts of Justice, including in the Patents Court and the Bankruptcy and Companies courts. The scheme will apply to claims started on or after April 1, 2010, and to claims started or continued electronically under the Pilot Scheme between April 1, 2009 and March 31, 2010.

An Annex to Practice Direction 5C lists and contains relevant forms.

Where there is conflict, the provisions of Practice Direction 5C take precedence over the provisions of Practice Direction 5B (Electronic Communication and Filing of Documents) (see *White Book* 2009 Vol.1 para.5BP.1).

Practice Direction 5C will be included in the 2010 edition of the *White Book* as a further practice direction supplementing CPR Pt 5.

The provisions of Practice Direction 5C are largely the same as those in the pilot scheme practice direction, but there are some differences in detail (some more important than others). The provisions of immediate relevance to practitioners on April 1, 2010 will be those that deal with the starting of claims, as contained in paras 6.1 to 6.6, and with the Electronic Working response, as contained in paras 7.1 to 7.4. These provisions differ in certain respects

from those in the pilot scheme. They are set out immediately below.

Starting a claim

6.1 A claimant may request the issue of a claim form by—

(a) obtaining the electronic claim form from Her Majesty's Courts Service in the following manner:

(i) typing in the form number the claimant requires in the subject line of an e-mail; and
(ii) sending the e-mail to getform@justice.gsi.gov.uk;

(b) completing and sending the electronic claim form and such other forms or documents as may be required to start the claim by e-mail to *submit@justice.gsi.gov.uk*; and

(c) paying the appropriate issue fee.

(The Annex to this Practice Direction lists and contains relevant forms)

6.2 The particulars of claim may be included in or attached to the electronic claim form, or may be filed separately in accordance with rules 58.5, 59.4, 61.3 or 7.4, where applicable, by attaching the particulars of claim to the electronic multi purpose form.

6.3 When a claim form is received electronically at the address provided by the court —

(1) subject to the automated validation referred to in paragraph 3.3, the claim form will be issued, sealed and returned to the claimant for service; but

(2) if the form fails the automated validation it will be returned to the claimant together with notice of the reasons for failure.

6.4 (1) The court will accept receipt of claim forms filed through Electronic Working out of normal court office opening hours. Claim forms received by the court up to midnight will bear the date they are received as the issue date.

(2) When the court issues a claim form through Electronic Working following a validated request under paragraphs 6.1 and 6.3 —

(a) the court will seal the claim form with the date on which the claim form was received by the court through Electronic Working and this shall be the issue date; and

(b) the court will keep a record of when claim forms filed through Electronic Working are received.

(Paragraph 1.2(2) contains provisions about system "down-time" which may prevent immediate issue of claim forms.)

6.5 (1) When the court issues a claim form through Electronic Working the court will—

(a) return an electronic sealed version in PDF format for service by the claimant; and

(b) return a further electronic version in PDF format which must be retained by the claimant in case the form needs to be amended.

(2) It is a party's responsibility to print and serve any form requiring service by that party unless the party or parties to be served have agreed to accept service by email or other electronic means.

(Paragraph 1.6(2) contains provisions for service by email and paragraph 1.8 contains provisions about the service of forms and documents.)

6.6 A document key or electronic link will be printed on the sealed claim form and this will allow the party by whom it is served to obtain and file the acknowledgment of service through Electronic Working, together with other document keys or electronic links which will then allow the parties to obtain other forms required for the purposes of the proceedings.

Electronic Working response

7.1 A party wishing to file—

(a) an acknowledgment of service under Part 10;

(b) an admission or part admission;

(c) a defence or defence and counterclaim under Part 15;

(d) a Part 20 claim; or

(e) any other document, may obtain the Electronic Working version of the following documents or forms—

(i) requests for judgment on acceptance of an admission of the whole of the amount claimed;
(ii) statements of case and any amended statements of case;
(iii) requests for further information and any replies;
(iv) applications for an order, whether before or after the start of proceedings;
(v) witness statements or affidavits and exhibits;
(vi) draft orders and orders for sealing;
(vii) case summaries, lists of issues, chronologies, skeleton arguments, case management information sheets, progress monitoring information sheets, allocation questionnaires where appropriate and pre-trial checklists;
(viii) statements of costs;

by using the document keys referred to in paragraph 6.6 and file the same electronically.

7.2 Where a party files a form or document through Electronic Working—

(a) the form or document is not filed until it is acknowledged as received by the court, notwithstanding when it may have been sent;

(b) the defendant may file forms and documents electronically through Electronic Working out of normal court office opening hours; and

(c) a form acknowledged as received electronically out of normal court office opening hours but before midnight will be treated as having been filed the same day.

7.3 When a document is issued or filed electronically by a party an automated response will be sent to acknowledge receipt.

7.4 (1) The electronic copy must:

(a) be filed electronically by email;

(b) be formatted as one PDF document with bookmarks for each document and where appropriate with section headings within the document;

(c) not exceed such size in megabytes as HMCS may from time to time specify.

(2) In the event that the bundle exceeds the maximum limit in 1(c) it shall be filed on CD Rom, DVD, or such other removable storage media as may be acceptable to HMCS.

COURT FUNDS RULES

The following amendments are made to the Court Funds Rules 1987 (see *White Book* 2009 Vol.2 Sect.6A) by the Court Funds (Amendment) Rules 2010 (SI 2010/172) with effect from April 1, 2010.

Volume 2 para.6A–66, p.1768

In r.19, after para.(1), insert:

"(1A) The following persons may pay money into the Mayor's and City of London Court in accordance with paragraph (2):

(a) a litigant in person without a current account who is involved in a claim proceeding at the Royal Courts of Justice; and

(b) a person who is required by or under any enactment to give security for costs in respect of proceedings for an election petition."

In r.19(2), after "paragraph (1)" insert "or paragraph (1A)".

Volume 2 para.6A–93, p.1774

In r.40(9)(i), omit "Court Funds Office or".

Volume 2 para.6A–106, p.1782

Immediately before r.46, insert:

"Transfer of funds from a special account to a basic account

45A. When the Accountant General is notified, or becomes aware, that a person on whose behalf money is held in a special account ceases to be a person under a disability, the Accountant General shall transfer the balance of the special account to a basic account from the date the disability ceased."

Volume 2 para.6A–121, p.1786

Rule 57 is amended as follows:

(a) at the beginning of paragraph (2) insert "Subject to paragraph (3),";

(b) in paragraph 2(i) omit "subject to paragraph (3),"; and

(c) for paragraph (3) substitute—

"(3) Where a fund was lodged in court for the benefit of a child and:

(a) the child's date of birth is known, the rules mentioned in paragraphs 2(i) and (ii) shall not apply until the child's 18th birthday;

(b) the child's date of birth is not known, the rules mentioned in paragraphs 2(i) and (ii) shall apply from the date on which the fund is lodged in court."

Volume 2 para.6A–122, p.1787

In r.58(1) omit ", which may be inspected at the Court Funds Office during normal office hours".

Volume 2 para.6A–124, p.1787

Rule 59 (Disposal of unclaimed effects in court) is now omitted.

Volume 2 para.6A–25, p.1788

For r.60 (Disposal of unclaimed securities in court) substitute:

"Disposal of unclaimed securities or effects in court

60. (1) Where any securities (including common investment fund units) or effects are carried over under rule 57, the Accountant General may sell the securities or effects and pay the proceeds into the account of unclaimed balances.

(2) The Accountant General shall write off any securities or effects carried over under rule 57 which have no value.

(3) Where any sum carried over under rule 57 stands to an interest bearing account, the Accountant General hall withdraw the sum and place it to the account of unclaimed balances."

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