CIVIL PROCEDURE NEWS

Issue 2/2013 February 28, 2013

CONTENTS

In Brief

Cases

B. (ALGERIA) v SECRETARY OF STATE FOR THE HOME DEPARTMENT [2013] UKSC 4, [2013] 1 W.L.R. 435, SC.

Committal for contempt – appeal court's powers to uphold sentence

CPR r.52.10 & Pt 81, Administration of Justice Act 1960 ss.1 & 13. During hearing of appeal, Special Immigration Appeals Commission making order, with penal notice attached, requiring appellant (C) to provide correct details of his identity. Upon C's not complying with order, on Secretary of State's application, for contempt of court SIAC committing C to prison for four months (suspended pending appeal). Court of Appeal (1) finding that, in evaluating the expert psychiatric evidence, relevant to the question whether a committal order should be made, SIAC erred in rejecting certain evidence concerning risk of C relapsing into paranoid psychosis if imprisoned, (2) holding (a) that the committal did not violate C's art.6 or art.8 rights, and (b) that the sentence was not manifestly excessive, (3) dismissing appeal, (4) certifying that point of law (going to the Court's exercise of jurisdiction) that ought to be considered by the Supreme Court was involved in their decision, but (5) refusing C permission to appeal ([2011] EWCA Civ 828). Supreme Court granting C permission to appeal. On appeal C contending, in particular, that in the circumstances the Court of Appeal, having found that SIAC erred in evaluating evidence, should have remitted the matter to SIAC for proper adjudication. **Held**, dismissing appeal, (1) where an appellate court has determined that the basis upon which the lower court imposed a sentence of imprisonment for contempt was wrong, a de novo assessment must be made in the light of a correct understanding of the material circumstances, (2) it is not essential that such re-assessment should be undertaken by the lower court, (3) if it is sufficiently clear to the appellate court that a sentence of imprisonment is appropriate in the light of its revised view of the relevant facts, such re-assessment may be undertaken by the appeal court, and remittal to the lower court is not essential, (4) where a fresh investigation of new facts is required and it is necessary or desirable that this be undertaken by the lower court, remittal will be suitable, (5) the length of sentence imposed by SIAC in the instant case was not influenced by the reasons (which the Court of Appeal found flawed in certain respects) for its concluding that a term of imprisonment was appropriate, (6) accordingly, it would not have been inappropriate for the Court of Appeal to consider the propriety of the sentence imposed solely by asking whether it was manifestly excessive, (7) a sentence imposed for contempt of court may be justified in the basis that it was necessary in order to punish the contemnor, even though it was unlikely to have any coercive effect. ***JSC BTA Bank v Solodchenko (No. 2)*** [2011] EWCA Civ 1241, [2012] 1 W.L.R. 350, CA, ref'd to. (See ***Civil Procedure 2012*** Vol.1 paras 52.1.2 & 52.3.2, and Vol.2 paras 3C–36, 3C–37, 3C–40 and 9B–18.)

BARNETT v NIGEL HALL MENSWEAR LTD [2013] EWHC 91 (QB), January 29, 2013, unrep. (Eady J.)

Striking out for abuse of process – attempt to re-litigate decided issues – appeal

CPR r.3.4, Human Rights Act 1998 Sch.1 Pt I art.6. Company (X) bringing claim against another company (D) alleging that D had no right to terminate a commercial agreement under which X was D's agent. In their defence (to which C served no reply), D asserting that X lacked any standing to bring the claim and on April 13, 2011. On that basis and without any hearing on the merits, judge dismissing claim and no appeal made. Six months' later, individuals and firm commencing fresh proceedings against D, based essentially on the same complaint made against D in the earlier proceedings and seeking similar relief. D applying to Master for order striking out the claimant's (C's) statement of claim under r.3.4(2)(b) on ground that it was an abuse of process. D submitting that C should have taken the opportunity to seek their remedies in the earlier proceedings, if necessary by way of an application in those proceedings to amend or substitute new claimant parties. Master granting D's application and striking out claim accordingly, but granting C permission to appeal. **Held**, dismissing appeal, (1) where an abuse of process application of this type is made it is necessary for the court to carry out a balancing exercise, having regard to all the circumstances, in order to decide whether it is just that the defendant should not be "vexed" twice by suffering the stress, inconvenience and expense of having to contend with a second set of proceedings, (2) that process is to be distinguished from that of exercising a discretion, (3) when reviewing a decision to strike out for abuse of process an appeal court will be reluctant to interfere and generally will do so only where the judge has taken into account immaterial factors, omitted to take account of material factors, erred in principle or come to a conclusion that was impermissible or not open to him, (4) in carrying out the balancing exercise the Master had not erred in any respect that would justify an appellate court's interfering with his decision on a review, (5) art.6 does not grant a party an unqualified right to a full trial on the merits and does not have the effect of making a party immune from the disciplines of civil procedure, whether arising under the CPR or under well-established common law principles, (6) it could not be contended that evidence tendered by

D (though untested) as to the financial stresses that would be placed upon their business if the second proceedings were continued was necessarily irrelevant, (7) it mattered not whether C or their legal advisers were responsible for the failure to amend the claim in the first proceedings, because generally the court draws no distinction when considering whether responsibility for the conduct of civil proceedings, or some particular strategy or tactic, lies with a party or their legal advisers. ***Johnson v Gore Wood & Co (No.1)*** [2002] 2 A.C. 1, HL, ***Aldi Stores Ltd v WSP Group Plc*** [2007] EWCA Civ 1260, [2008] 1 W.L.R. 748, CA, ***Stuart v Goldberg Linde*** [2008] EWCA Civ 2, [2008] 1 W.L.R. 823, CA, ***Koshy v DEG-Deutsche Investitions-und Entwicklungsgesellschaft mbH*** [2008] EWCA Civ 27, February 5, 2008, CA, unrep., ***Dexter Ltd v Vlieland-Boddy*** [2003] EWCA Civ 14, (2003) 147 S.J.L.B. 117, CA, ref'd to. (See ***Civil Procedure 2012*** Vol.1 paras 1.4.15, 3.4.3.2 & 52.11.4, and Vol.2 paras 3D–76 & 9A–175.)

■ **CUMMINGS v MINISTRY OF JUSTICE** [2013] EWHC 48 (QB), January 22, 2013, unrep. (Tugendhat J.)

Witness statements struck out at pre-trial review – order for costs

CPR rr.32.1 & 32.4, Practice Direction 32 para.1, Queen's Bench Guide para.7.10.4. Several prison inmates (C) bringing claim against Ministry of Justice (D) claiming, amongst other things, damages (including aggravated and exemplary damages) for assault for which D vicariously liable. C alleging that, during two separate prison disturbances, prison officers acted in a racist manner towards them. Particulars of claim including an allegation that the regime at the prison was such that racism on the part of prisoners was actively condoned by staff. C serving a large amount of evidence in 33 witness statements which they contended supported that allegation. D submitting that much of that evidence was irrelevant, principally on ground that it did not purport to relate to any of the officers whose acts or omissions were complained of in the action. At pre-trial review, adjourned to a judge by a Master, judge making various orders including orders directing (1) that all evidence relating to acts or omissions or other matters alleged to have occurred at any time other than the dates of the two disturbances should be struck out of the witness statements, (2) that in the case of those statements which contained nothing about the two disturbances, the witnesses should not be called at all, and (3) that the other witnesses could be called, but only to give evidence about the disturbances ([2013] EWHC 33 (QB)). On matter of costs of the pre-trial review, D submitting (1) that C should pay their costs of considering and preparing submissions on the evidence excluded by the judge, and (2) that C should not in any event recover costs incurred in preparing those witness statements, or parts of witness statements, containing the evidence excluded by he judge. **Held**, accepting those submissions and making order for costs accordingly, (1) a witness statement should be as concise as the circumstances allow and should not include inadmissible or irrelevant material, (2) the disclosure of witness statements which include matters that ought not to be included has a strong tendency to increase costs and delay. Observations on harmful effects on examination of witnesses at trial of modern pre-trial exchange of witness statements practice. (See ***Civil Procedure 2012*** Vol.1 paras 32.1.7 & 32.4.5, Vol.2 para.1B-50.)

■ **HENRY v NEWS GROUP NEWSPAPERS LTD** [2013] EWCA Civ 19, January 28, 2013, CA, unrep. (Moore-Bick, Aikens & Black L.JJ., and assessor)

Assessment of costs – successful defamation claimant exceeding approved costs budget

CPR r.44.3, Practice Direction 29 para.3B, Practice Direction 51D para.5.6, Costs Practice Direction para.6. Claimant (C) succeeding in defamation proceedings. C's solicitor's submitting bill for detailed assessment proceedings. Costs judge finding that C's bill exceeded their approved costs budget by approximately £250,000. C contending that the way in which the defendant (D) had chosen to conduct the proceedings had caused her to incur a substantial amount of costs that could not reasonably have been predicted at the time when the budget was prepared. In assessing costs on the standard basis, costs judge holding that there was no "good reason", within the meaning of para.5.6(2), for departing from the approved budget and allowing a greater sum. **Held**, allowing C's appeal, (1) when considering whether there is good reason to depart from the approved budget it is necessary to take into account all the circumstances of the case, but with particular regard to the objective of the costs budgeting regime, (2) the failure of C's solicitors to observe the requirements of the practice direction (e.g. by keeping D informed of the fact that her budget was being exceeded) did not put D at a significant disadvantage and did not seem likely to have led to costs being incurred that were unreasonable or disproportionate. Observations on differences between costs management scheme contained in PD 51D and scheme coming into effect on April 1, 2013. (See ***Civil Procedure 2012*** Vol.1 paras 51.2.7 & 51DPD.5.)

■ **LAZARI v LONDON AND NEWCASTLE (CAMDEN) LTD** [2013] EWHC 97 (TCC), January 31, 2013, unrep. (Akenhead J.)

Procedural failures – order for payment into court – security for costs

CPR rr.1.4, 3.1(3) & (5), 25.6 & 25.12. Leaseholders (D) engaging consultants and contractors to develop their property for residential luxury flat and social housing purposes. D entering into agreement with individual (C) to complete construction of a particular flat and to sell it to her on long lease. Lease granted on December 15, 2010,

but because of defects in the property, which D attempted to rectify, C not taking up occupation. C commencing proceedings against D alleging that flat remained defective and claiming for various losses. In the course of those proceedings, and before defence served, on October 24, 2012, judge making order requiring D to cooperate with C in the expert investigation of the continuing defects and the completion of an agreed remedial work scheme. After further pleadings, on ground that D had not complied with the order, C applying (1) for order that D should pay £100,000 into court, otherwise be debarred from defending the claim (r.3.1(5)), and (2) for order for interim payment. At hearing of these applications (but not in their filed defence) D accepting liability for the property defects. **Held**, making order, pursuant to both r.3.1(5) and r.25.6, requiring D to pay £30,000 into court, (1) the power of the court to make an order requiring a party to make a payment into court (referred to in r.3.1(5)) is in addition to the court's power to make an order for security for costs under r.25.12, (2) such a condition should not be included for the purpose of providing security for costs if its effect would be to stifle the respondent's pursuit of his case, (3) there are no hard and fast rules, however relevant considerations are (a) the respondent's conduct of the proceedings (including in particular his compliance or otherwise with any applicable rule, practice direction or protocol), and (b) the apparent strength of his case (be it claim or defence), (4) security should generally only be ordered where a respondent party has regularly flouted proper court procedures or otherwise is demonstrating a want of good faith, that is an unwillingness to litigate a genuine claim or defence as economically and expeditiously as reasonably possible in according with the over-riding objective, (5) the court should be slow to investigate the merits of a claim or defence and it is only in clear cases that an order should be made under r.3.1(5) for the purpose of proving security for costs. Court explaining that this was not a case in which an order imposing a payment into court as a condition under r.3.1(3) would be appropriate, because the court was not making an order to which such condition would be ancillary. ***Olatawura v Abiloye*** [2002] EWCA Civ 998, [2003] 1 W.L.R. 275, CA, ***Huscroft v P&O Ferries Ltd*** [2010] EWCA Civ 1483, [2011] 1 W.L.R. 939, CA, ref'd to. (See ***Civil Procedure 2012*** Vol.1 paras 3.1.4, 3.1.5, 25.12.13)

■ **PAVLEDES v HADJISAVVA** [2013] EWHC 124 (Ch), January 31, 2013, unrep. (David Richards J.)

Declaratory judgment – whether imminent threat of infringement to rights necessary

CPR r.40.20, Senior Courts Act 1981 s.19. Property owners (D) obtaining permission to extend building. D's neighbours objecting that proposed extension would infringe their rights of lights. D asserting that C's property did not have the benefit of such rights over D's property, any such rights having been abandoned, and that, in any event, any loss of light would be negligible. D modifying their building plans and commencing work. Upon C intimating claim for an injunction, on January 12, 2012, D undertaking to suspend temporarily those aspects of the work likely to affect C's alleged rights and not to continue with such work without giving C 14 days' notice. On March 13, 2012, C's solicitors threatening to issue proceedings unless D acknowledged their rights of light claim, undertook not to proceed with the development and agreed to pay their legal and their surveyor's costs. D replying offering further expert investigation and negotiation, and a wider undertaking. On March 27, 2012, C issuing claim form claim for declaration as to the existence of the rights of light and an injunction to restrain D from interfering with them. In their defence, D, having then received their own expert's report, (1) making admission as to C's rights to light, (2) pleading (a) that they had no intention of proceeding with any development that would interfere with those rights, and (b) that, in the circumstances, there was no basis on which the court could properly make the declaration sought. **Held**, making a declaration (1) the High Court's jurisdiction to make declarations is statutory and is now derived from s.19, (2) there is nothing in the general statements found in the modern authorities as to the general principles applicable that requires an actual or imminent infringement of a legal right, (3) those authorities demonstrate a willingness by the courts in appropriate cases to make declarations as regards rights which may arise in the future or which are academic as between the parties, (4) the court may refuse a declaration on grounds of prematurity or because it would serve no useful purpose, (5) in the instant case, the terms of D's defence and their undertakings given before the issue of proceedings at best put the dispute into abeyance but did not resolve it as D reserved the right to revive it at their discretion, (6) in these circumstances, the making of a declaration would bring resolution and finality to the dispute and for that reason it would be just and would serve a useful purpose. ***Rolls-Royce Plc v Unite the Union*** [2009] EWCA Civ 387, [2010] 1 W.L.R. 318, CA, ***Milebush Properties Ltd v Tameside MBC*** [2011] EWCA Civ 270, [2012] P. & C.R. 3, CA, ***Financial Services Authority v Rourke*** [2002] C.P. Rep. 14, ***CIP Property (AIPT) Ltd v Transport for London*** [2012] EWHC 259 (Ch), January 25, 2012, unrep., ref'd to. (See ***Civil Procedure 2012*** Vol.1 para.40.20.2.)

■ **R. (PRUDENTIAL PLC) v SPECIAL COMMISSIONER OF INCOME TAX** [2013] UKSC 1, January 23, 2013, SC, unrep.

Legal advice privilege – professional advisers other than lawyers

Legal Services Act 2007 s.190, Taxes Management Act 1970 s.20. For purpose of investigating a commercially marketed tax avoidance scheme, Revenue (D) serving notices on company (C) under s.20 requiring the production of documents. C bringing judicial review claim to quash or limit the scope of the notices. C contending that they

were not obliged to disclose documents relating to obtaining advice from their accountants. Judge dismissing claim and Court of Appeal dismissing C's appeal, holding that legal advice privilege (LAP) was only available if the advice was sought from a lawyer ([2010] EWCA Civ 1094, [2011] Q.B. 669, CA). **Held**, dismissing C's appeal, (1) provisions of s.20 cannot be invoked to force anyone to produce documents to which LAP attached, (2) LAP (a) is entirely a creation of the common law, recognised by, and in some respects extended, by statute, (b) it applies to all communications passing between a client and its lawyers, acting in their professional capacity, in connection with the provision of legal advice, and (c) it is the client's privilege, (3) LAP should not be extended by judicial decision to communications in connection with advice given by professional people other than lawyers, even where that advice is legal advice which that professional person is qualified to give, (4) such extension would give rise to a significant risk of uncertainty and no pressing need for it had been demonstrated, (5) accordingly, LAP does not attach to attach to communications passing between chartered accountants and their client in connection with expert tax advice given by the accountants to their client. ***R. (Morgan Grenfell & Co. Ltd) v Special Commissioner of Income Tax*** [2002] UKHL 21, [2003] 1 A.C. 563, HL, ref'd to. (See ***Civil Procedure 2012*** Vol.1 para.31.3.19, and Vol.2 para.9B-546.)

Statutory Instruments

CIVIL PROCEDURE (AMENDMENT) RULES 2013 (SI 2013/262)

CPR Pts 1, 3, 21, 26, 29, 31, 32, 35, 36, 43 to 48, 52 & 54. Revoke Pt 43 and substitute Pts 44 to 48 (Costs), principally for implementing recommendations following upon the costs review, including the changes to litigation funding effected by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 Pt 2. Insert in Pt 3 Section II (Costs management) and II (Cost capping) (formerly rr.44.18 to 44.20). In addition, for those and other reasons: amend r.1.1 (overriding objective), r.3.9 (relief from sanctions), r.21.12 (recoverability of litigation friend's expenses), r.26.3 (case allocation), r.26.6 (raising small claims limit to £10,000), r.29.4 (multi-track directions), r.31.5 (standard disclosure), r.32.2 (directions as to evidence), r.35.4 (directions as to expert evidence and estimates of costs), r.36.14 (recovery of additional amount as costs consequence where claimant's offer rejected), r.54.6 (reflecting provisions about costs in Aarhus Convention cases in rr.45.41 to 45.44); insert r.52.9A (limiting recoverability of costs of an appeal). Make consequential amendments and minor corrections. Contain transitional provisions. In force April 1, 2013. (See further "CPR Update" section of this issue of CP News.) (See ***Civil Procedure 2012*** Vol.1 seriatim.)

CONDITIONAL FEE AGREEMENTS ORDER 2013

Courts and Legal Services Act 1990 ss.58 & 58A as amended by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 s.44. Effect of amendments is that a success fee payable under a CFA may no longer be recovered by a lawyer for a losing party, but subject to additional conditions under s.58(4A) and (4B), will be recoverable by a lawyer from his successful client. This Order makes provision as to how a success fee so recoverable should be calculated and comes into effect on April 1, 2013, subject to the transitional and saving provisions in art.6 (reflecting s.48 of the 2012 Act and art.4 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (Commencement No. 5) Order 2013 (SI 2013/77.) In force April 1, 2013 (See ***Civil Procedure 2012*** Vol.2 paras 7A–21 & 9B–138+.)

DAMAGES-BASED AGREEMENTS REGULATIONS 2013

Courts and Legal Services Act 1990 s.58AA as amended by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 s.45. As amended, s.58AA, subject to exceptions, permits the use of DBAs in all civil proceedings, enabling person providing litigation services (and others) to recover an agreed percentage of a client's damages if the case is won. These Regulations specify the requirements of a DBA and regulates the maximum amounts payable from damages recovered. Revoke, subject to transition provisions, Damages-Based Agreements Regulations 2010 (SI 2010/1206), which applied only to employment matters. In force April 1, 2013. (See ***Civil Procedure 2012*** Vol.2 para.9B–141.1+.)

RECOVERY OF COSTS INSURANCE PREMIUMS IN CLINICAL NEGLIGENCE PROCEEDINGS REGULATIONS 2013 (SI 2013/92)

Courts and Legal Services Act 1990 s.58C (as inserted by Legal Aid, Sentencing and Punishment of Offenders Act 2012 s.46(1)). Recoverability of insurance premiums by way of costs in clinical negligence proceedings. New limitations on such recoverability, in particular as to part of premium relevant to certain types of expert report. Do not apply to costs orders made in favour of a party to proceedings who took out a costs insurance policy before April 1, 2013 (s.46(3) & reg.1). (See further "In Detail" section of this issue of CP News.)

In Detail

PRE-COMMENCEMENT FUNDING ARRANGEMENTS

The Civil Procedure (Amendment) Rules 2013 alter the "Costs Parts" of the CPR (Pts 43 to 48) in significant respects. Part 43 is revoked and Pts 44 to 48 are substituted. By forthcoming CPR Update 60, the existing Costs Practice Direction will be omitted and five new practice directions supplementing Pts 44 to 48 will be made.

As the titles to new Pts 44 to 47 suggest, the territory they cover is similar to that covered by existing Pts 43 to 48. Those new Parts are as follows: Pt 44 General Rules about Costs; Pt 45 Fixed Costs; Pt 46 Costs – Special Cases; Pt 47 Procedure for Detailed Assessment of Costs and Default Provisions.

New Pt 48 is rather different. It bears the cumbersome title of "Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 Relating to Civil Litigation Funding and Costs: Transitional Provision in Relation to Pre-Commencement Funding Arrangements". The 2012 Act makes significant changes to the law relating to funding arrangements and this is reflected in the new Costs Parts inserted in the CPR by the statutory instrument. (In particular, ss.44 and 46 state that a costs order may not require one party to pay another a success fee under a CFA or a costs insurance premium.)

However, by operation of provisions in the 2012 Act and in one of the commencement orders for that Act (SI 2013/93), certain funding arrangements are excepted in significant respects from the effects of the new legislation with the result that existing Pts 43 to 48 and related provisions in the existing Costs Practice Direction will continue to apply to them after the commencement date (April 1, 2013) and will so apply whether the arrangement was entered into before or after that date. Put shortly, such funding arrangements are those relating to insolvency-related proceedings, publication and privacy proceedings, or to a mesothelioma claim. (It is anticipated that the exception of such proceedings from the new law as to funding arrangements will be temporary.)

Part 48 also contains transitional provisions that are to apply where a funding arrangement was entered into before April 1, 2013, but does not fall within one of the excepted categories. Existing Pts 43 to 48 and related provisions in the existing Costs Practice Direction will continue to apply to them after the commencement date.

So there are two types of funding arrangement described in r.48.1(1) as a "pre-commencement funding arrangement", (1) an arrangement, whether made before or after that date, made in relation to excepted proceedings, and (2) an arrangement entered into before that date in relation to proceedings that are not excepted. The two categories are defined in r.48.2 (in effect re-stating the exemptions made by provisions in the 2012 Act and in the commencement order referred to above).

This means that the procedural rules stated in existing Pts 43 to 48 as supplemented by the Costs Practice Direction cannot be wholly revoked but must remain in place for the purposes of both types of pre-commencement funding arrangements. Rule 48.1(1) states that existing provisions in Pts 43 to 48 and in the Costs Practice Direction will apply in relation to a pre-commencement funding arrangement as if they were in force before April 1, 2013, "with such modifications (if any) as may be made by a practice direction on or after that date". The practice direction referred to in r.48.1(1) is Practice Direction 48. It is expected that PD 48 will be published in TSO CPR Update 60.

Provisions in existing Pts 43 to 48 relevant to funding arrangements, and which will, for the purposes just mentioned, have continued effect after April 1, 2013, include: in Pt 43, paras (a), (k), (l), (m), (n) and (o) of r.43.2(3) and r.43.2(4); in Pt 44, rr.44.3A, 44.3B, 44.12B, 44.15 and 44.16; in Pt 45, rr.45.8, 45.10, 45.12, 45.13, Sections III to V, r.45.28, and rr.45.31 to 45.40; in Pt 46, r.46.3; and in Pt 48, r.48.8.

It may be noted that, among the provisions of the CPR relating to funding arrangements as in force immediately prior to April 1, 2013, which will continue to apply in relation to mesothelioma claims, whether commenced before or after that date, is included the provision for fixed recoverable success fees in respect of employers' liability disease claims in Section V of Pt 45 (rr.45.23 to 45.26), which will otherwise cease to apply other than to claims in which a CFA was entered into or a costs insurance policy taken out before April 1, 2013.

COSTS INSURANCE IN CLINICAL NEGLIGENCE CLAIMS

Section 46 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 enables the Lord Chancellor by Regulations to provide that a costs order may include provision requiring the payment of an amount in respect of all or part of the premium of a costs insurance policy, where (a) the order is made in favour of a party to clinical negligence proceedings of a prescribed description; (b) the party has taken out a costs insurance policy insuring against the risk of incurring a liability to pay for one or more expert reports in respect of clinical negligence in connection with the proceedings (or against that risk and other risks); (c) the policy is of a prescribed description; (d) the policy states how much of the premium relates to the liability to pay for such an expert report or reports, and the amount to be paid is in respect of that part of the premium.

The Regulations made under the power granted by s.46 are the Recovery of Costs Insurance Premiums in Clinical Negligence Proceedings Regulations 2013 (SI 2013/92). Those Regulations relate only to clinical negligence cases where a costs insurance policy is taken out on or after April 1, 2013. Consequently, provisions in force in the CPR prior to that date relating to funding arrangements will not apply where a party to a clinical negligence claim takes advantage of what s.46 and the Regulations now allow for the purpose of insuring against costs risks.

QUANTIFICATION OF COSTS IN ADVANCE

In the *Review of Civil Litigation Costs: Final Report (December 2010)* Ch.40 methods for controlling costs by enabling the courts "to undertake costs management in conjunction with case management" were canvassed. In that Report, Jackson L.J. recommended (amongst other things) that rules should set out a "standard costs management procedure", which judges would have a discretion to adopt if and when they see fit, either of their own motion or on application by one of the parties.

In the CPR Update section of this issue of CP News it is explained that by the Civil Procedure (Amendment) Rules 2013, a new Section is inserted in CPR Pt 3, that is Section II (Costs Management). The provisions therein and in the supplementing practice directions introduce a scheme based on this recommendation. Amongst other things, the scheme requires the parties and the courts in which their proceedings are pending to participate in the preparation, early in the proceedings, of costs budgets; in effect this means attempting "the quantification of costs in advance". That is not an expression currently used in procedural discourse, but 60 years ago it did commend itself to the Committee on Supreme Court Practice and Procedure (the Evershed Committee).

That Committee was appointed in April 1947 and published its Final Report in July 1953. Inevitably, the problem of controlling costs in civil proceedings figured prominently in the work the Committee undertook during that six-year period. In particular the Committee was concerned with the question "whether our present system, by allowing unrestricted freedom of solicitor and own client costs coupled with the right, subject to taxation, to recover inter partes upon an indemnity (or qualified indemnity) basis, does not of itself give rise to a tendency to incur costs upon an extravagant scale".

The Committee noted that it is "notoriously impossible to count the cost of litigation beforehand". It was difficult for either party to forecast what his own costs are likely to be, since much depended on the manner in which the other side conducted the case. It was "utterly impossible to forecast what the other side's costs will be, and this means that no litigant can have the least idea of what he will have to pay if he loses his case". The Committee wrestled with the question whether it was not possible to devise some means for tackling these difficulties. The evidence taken from the professional bodies was not encouraging. The Committee noted that the view from that quarter seemed to be that the impossibility of forecasting beforehand what the costs are likely to be is an inherent risk of litigation and must be accepted as such "in the same way that any government contemplating war against another government is necessarily unable to count the costs beforehand". The Committee thought that this was "surely a counsel of despair", and expressed the opinion that, although it may well prove impossible ever to achieve any high degree of accuracy in estimating costs beforehand "if a way could be found of reducing the margin of potential error and thus minimising the risk which every potential litigant must accept, some sensible progress would have been achieved".

In further investigation of the matter (and in accordance with the internationalist temper of the immediate post-War period) the Committee looked overseas for inspiration, considering the US system (abolition of cost inter partes), the Canadian system (scales of recoverable costs), and the German system (costs proportionate to the amount at stake) (but there is no evidence that any members of the Committee felt obliged to go abroad to have a closer look). The Committee also gave close attention to a home-grown scheme under which "the costs of every action should be quantified and fixed in advance, at some comparatively early stage in the action". The scheme was opposed by the professional bodies, on predictable grounds. (As any householder who has hired a painter and decorator knows, there is a difference between a "quote" and an "estimate" and, with the benefit of hindsight, it seems that the Committee's deliberations may have been made unnecessarily difficult by some deliberate obfuscation of the distinction.)

In the event the Committee drew back, taking the view that there were many other less radical reforms for controlling costs which should be attempted first. In their Final Report the Committee said:

"We feel the force of these practical objections, and while some of us at any rate cherish the hope that it may at some future date be possible to evolve some workable scheme for fixing costs in advance, we are not prepared at this date, and with the evidence now before us, to recommend such a radical departure from the present system."

Sixty years on, the problems considered by the Evershed Committee were faced by Lord Justice Jackson in the Costs Review. In the years in between, the question whether the English rules about the allocation of costs burdens and the assessment of costs "give rise to a tendency to incur costs upon an extravagant scale" never went away and became more urgent after it became possible for parties and lawyers to enter into conditional fee agreements. The costs management scheme now being introduced is much more sophisticated than that considered by the Evershed Committee. Whether it will turn out to be the "workable scheme", at least having the merit of minimising the costs risk "which every potential litigant must accept", that the Evershed Committee hoped might evolve, and overcoming the practical objections that they foresaw, only time will tell.

CPR Update

ADDITIONS AND AMENDMENTS TO RULES

The Civil Procedure (Amendment) Rules 2013 (SI 2013/262) were made on January 31, 2013, and laid before Parliament on February 12. They come into force generally on April 1, subject to transitional provisions having various effects. By this statutory instrument, following upon the Costs Review, the "Costs Parts" of the CPR are substantially amended; Pt 43 is omitted and Pts 44 to 48 are substituted entirely. Provisions dealing with costs capping orders, formerly found in Pt 44 and in Sections 23A and 23B of the Costs Practice Direction, are now inserted in Pt 3 (as Section III) and in a practice direction supplementing that Section.

Numerous other additions and amendments are made to the CPR by this statutory instrument, some following directly or indirectly upon the Costs Review and others having a separate provenance. The principal ones relate to: (1) the overriding objective (r.1.1), (2) relief from sanctions (r.3.9), (3) case management, preliminary stage (r.26.5) and multi-track (r.29.4), (4) standard disclosure (r.31.5), (5) factual and expert evidence (rr.32.2 & 35.4), (6) costs consequences of claimant's offer (r.36.5), (7) recoverable costs of an appeal, and (8) costs management (Pt 3 Section II).

These eight matters are explained in outline in what follows.

Forthcoming TSO CPR Update 60 (expected to be published some time during March 2013) will contain certain new practice directions, including new practice directions supplementing the Costs Parts and supplementing the new rules in Pt 3 on costs management and costs capping. It will also contain amendments to several existing practice directions, almost all of them consisting of amendments made necessary by amendments now made to rules by the statutory instrument referred to above. In addition, Update 60 will contain consequential amendments to the Pre-Action Protocol for Judicial Review and the RTA Protocol.

The 2013 edition of the White Book will be published on March 27, 2013. The Civil Procedure (Amendment) Rules 2013 and TSO CPR Update 60 were enacted and made well after the date on which material for 2013 edition had been completed by editors and the publication processes had commenced. Consequently, the new material contained in those sources could not be included. The new material will be included in a Special White Book Special Supplement.

1. OVERRIDING OBJECTIVE

As amended, r.1.1 states as follows (changes are in italics):

"**1.1**—(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly *and at proportionate cost*.

(2) Dealing with a case justly *and at proportionate cost* 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;

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and

(f) enforcing compliance with rules practice directions and orders."

The changes made to r.1.1 reflect the emphasis now placed on the concept of proportionality in the assessment of costs, and on the integration of "costs management" (see further below) with "case management".

2. RELIEF FROM SANCTIONS

Shortly after the CPR came into effect, in *Bansal v Cheema*, March 2, 2000, CA, unrep., the Court of Appeal stated that para.(1) of r.3.9 (Relief from sanctions) set out in clear form the matters that a court should consider when exercising its power to grant relief from a procedural sanction and explained that, as the nine particular circumstances then listed in that provision were derived from pre-CPR authorities, thereafter there was no need for a court "to go back to the substantial authorities decided under the old rules".

The objective of reducing to rule form the essence of a mass of case law was perhaps a laudable one. However, it did lead to a tendency amongst lawyers to treat the nine criteria as constituting a statutory code, complete with its own body of interpretative case law. In modern times, there has been increasing concern about the incidence of parties ignoring rules, practice directions and court orders and it has been argued that the relief from sanctions provisions are too generous.

By the Civil Procedure (Amendment) Rules 2013, r.3.9(1) is substantially re-cast. The nine criteria are removed and the rule simply states that the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need (a) for litigation to be conducted efficiently and at proportionate costs, and (b) to enforce compliance with rules, practice directions and orders. This amendment follows recommendations made in *Review of Civil Litigation Costs: Final Report (December 2009)* Ch.39 para.6.7 (p.397) and is made for the reasons given there.

As amended, r.3.9(1) applies to applications for relief from sanctions made on or after April 1, 2013, but not before. When the amended r.3.9(1) is read in conjunction with the contemporaneous amendments made to r.1.1 (overriding objective), it is clear that the intention is to encourage the courts to be less ready than previously to grant relief against sanctions for procedural defaults (see dictum of Jackson L.J. in *Fred Perry (Holdings) Ltd v Brands Trading Plaza Ltd* [2012] EWCA Civ 224, [2012] F.S.R. 807, CA, at paras 48 & 49). As was explained above, amended, r.1.1 states that dealing with a case "justly", now includes "enforcing compliance with rules, practice directions and orders" (r.1.1(2)(f)).

3. CASE MANAGEMENT

The Civil Procedure (Amendment) Rules 2013 amend rules in Pt 26 (Case Management – Preliminary Stage) and in Pt 29 (The Multi-Track).

(a) Preliminary stage

A number of amendments are made to r.26.3 (Allocation questionnaire), the cumulative effects of which are important as they change current case allocation practice.

As amended, r.26.3 is retitled "Directions questionnaire", reflecting the new practice, and provides that, upon the filing of a defence by the defendant, the court should make a provisional decision as to the allocation of the case to an appropriate case management track and should notify the parties accordingly by serving on them a notice of proposed allocation. (This function may be discharged by a court officer, but the allocation of cases to case management tracks remains a judicial function.) Upon receipt of such notice, the parties are required to file the documents required by the notice, in particular a completed "directions questionnaire".

The amendments apply where a defence is received by the court on or after April 1, 2013, but not before.

The text of the r.26.3, as amended, is set out below. By TSO CPR Update 60, consequential amendments will be made to Practice Direction 26, in particular to para.2.5 (Consequences of failure to file directions questionnaire).

"Allocation directions

26.3—(1) If a defendant files a defence—

(a) a court officer will—

(i) provisionally decide the track which appears to be most suitable for the claim; and

(ii) serve on each party a notice of proposed allocation; and

(b) the notice of proposed allocation will—

(i) specify any matter to be complied with by the date specified in the notice;

(ii) require the parties to file a completed directions questionnaire and serve copies on all other parties;

(iii) state the address of the court or the court office to which the directions questionnaire must be returned;

(iv) inform the parties how to obtain the directions questionnaire; and

(v) if a case appears suitable for allocation to the fast track or multi-track, require the parties to file proposed directions by the date specified in the notice.

(1A) [Omitted]

(1B) The court will always serve on any unrepresented party the appropriate directions questionnaire.

(2) Where there are two or more defendants and at least one of them files a defence, the court will serve a notice under paragraph (1)—

(a) when all the defendants have filed a defence; or

(b) when the period for the filing of the last defence has expired,

whichever is the sooner.

(Rule 15.4 specifies the period for filing a defence.)

(3) If proceedings are automatically transferred under rule 26.2 or rule 26.2A the court in which the proceedings have been commenced—

(a) will serve the notice of proposed allocation before the proceedings are transferred; and

(b) will not transfer the proceedings until all parties have complied with the notice or the time for doing so has expired.

(4) If rule 15.10 or rule 14.5 applies, the court will not serve a notice under rule 26.3(1) until the claimant has filed a notice requiring the proceedings to continue.

(5) [Omitted]

(6) If a notice is served under rule 26.3(1)—

(a) each party must file at court, and serve on all other parties, the documents required by the notice by no later than the date specified in it; and

(b) the date specified will be—

(i) if the notice relates to the small claims track, at least 14 days; or

(ii) if the notice relates to the fast track or multi-track, at least 28 days,

after the date when it is deemed to be served on the party in question.

(6A) The date for complying with a notice served under rule 26.3(1) may not be varied by agreement between the parties.

(7) The time when a court serves a directions questionnaire under this rule may be varied by a practice direction in respect of claims issued by the Production Centre.

(Rule 7.10 makes provision for the Production Centre.)

(Rules 6.14 and 6.26 specify when a document is deemed to be served.)

(7A) If a claim is designated a money claim and a party does not comply with the notice served under rule 26.3(1) by the date specified –

(a) the court will serve a further notice on that party requiring them to comply, within 7 days; and

(b) if that party fails to comply with the notice served under subparagraph (a), the party's statement of case will be struck out without further order of the court.

(8) If a claim is not a designated money claim and a party does not comply with the notice served under rule 26.3(1) by the date specified, the court will make such order as it considers appropriate, including—

(a) an order for directions;

(b) an order striking out the claim;

(c) an order striking out the defence and entering judgment; or

(d) listing the case for a case management conference.

(9) [Omitted]

(10) Where an order has been made under rule 26.3(7A)(b) or 26.3(8), a party who was in default will not normally be entitled to an order for the costs of any application to set aside or vary that order nor of attending any case management conference and will, unless the court thinks it unjust to do so, be ordered to pay the costs that the default caused to any other party."

(b) Multi-track cases

Rule 29.2 (Multi-track case management) states that, when the court allocates a case to the multi-track the court will give directions. An addition to the previous rule, r.29.1, now states that, when drafting case management directions both parties and the court should take "as their starting point" relevant model directions and standard directions (to be made available online) and adapt them "as appropriate to the circumstances of the particular case". Rule 29.4 (Steps taken by the parties) is substituted and now reads as follows:

"**29.4** The parties must endeavour to agree appropriate directions for the management of the proceedings and submit agreed directions, or their respective proposals to the court at least seven days before any case management conference. Where the court approves agreed directions, or issues its own directions, the parties will be so notified by the court and the case management conference will be vacated."

4. DISCLOSURE LIMITED TO STANDARD DISCLOSURE

The rule (now stated in r.31.5(1)) that an order to give disclosure is an order to give "standard" disclosure, that is to say, to give disclosure only to the extent provided for by r.31.6, was introduced when the CPR came into effect in April 1999. The rule was designed to reduce the costs of disclosure by restricting its scope, but allowing for specific disclosure by court order (r.31.12). It marked a significant departure from the earlier law. (The background to this reform and the reasons for it are fully explained in the *Access to Justice Interim Report* (June 1995) Ch.21 (p.136 et seq), and in the *Access to Justice Final Report* (July 1996) Ch.12 para.37 et seq (p.124 et seq).)

It remained the case that standard disclosure could impose considerable cost burdens on parties, in particular in the heavier cases. The problem was discussed and recommendations were made in the *Review of Civil Litigation Costs: Preliminary Report* (May 2009) Ch.41 (p.388 et seq), and in the *Review of Civil Litigation Costs: Final Report (December 2009)* Ch.27 paras 2.1 to 2.8 (pp.275 to 277) and Ch.37 paras 3.1 to 3.20 (pp.368 to 374). As a consequence, sub-rules (2) to (8) of r.31.5 were inserted by the Civil Procedure (Amendment) Rules 2013, as part of the major reforms as to costs now brought about by provisions in that statutory instrument and by other legislation. Those amendments to r.31.5, which are, in terms, restricted to multi-track claims (other than those which include a claim for personal injury), will come into force on April 1, 2013, and the relevant transitional provision in the statutory instrument (r.22(5)) states that they do not apply where the first case management conference "takes place or is due to take place" before April 16, 2013. Sub-rules (2) to (8) are intended to have the effect of restricting further (for the purpose of reducing costs) the scope of standard disclosure in the claims to which they apply (that is to say, further than the scope allowed by what is now r.31.5(1)).

It should be noted that the report which the parties are required to file under r.31.5(3) should be one which, amongst other things, "estimates the broad range of costs that could be involved in giving standard disclosure in the case, including the costs of searching for and disclosing any electronically stored documents". Further, the court, in deciding which type of disclosure order to make under r.31.5(7) will do so "having regard to the overriding objective and the need to limit disclosure to that which is necessary to deal with the case justly". The overriding objective, as now defined, includes the objective, not only of dealing with the case "justly", but also "at proportionate cost".

As amended, r.31.5 (Disclosure limited to standard disclosure) states as follows:

"**31.5.**—(1) In all claims to which rule 31.5(2) does not apply—

(a) an order to give disclosure is an order to give standard disclosure unless the court directs otherwise;

(b) the court may dispense with or limit standard disclosure; and

(c) the parties may agree in writing to dispense with or to limit standard disclosure.

(2) Unless the court otherwise orders, paragraphs (3) to (8) apply to all multi-track claims, other than those which include a claim for personal injuries.

(3) Not less than 14 days before the first case management conference each party must file and serve a report verified by a statement of truth, which—

(a) describes briefly what documents exist or may exist that are or may be relevant to the matters in issue in the case;

(b) describes where and with whom those documents are or may be located;

(c) in the case of electronic documents, describes how those documents are stored;

(d) estimates the broad range of costs that could be involved in giving standard disclosure in the case, including the costs of searching for and disclosing any electronically stored documents; and

(e) states which of the directions under paragraphs (7) or (8) are to be sought.

(4) In cases where the Electronic Documents Questionnaire has been exchanged, the Questionnaire should be filed with the report required by paragraph (3).

(5) Not less than seven days before the first case management conference, and on any other occasion as the court may direct, the parties must, at a meeting or by telephone, discuss and seek to agree a proposal in relation to disclosure that meets the overriding objective.

(6) If—

(a) the parties agree proposals for the scope of disclosure; and

(b) the court considers that the proposals are appropriate in all the circumstances,

the court may approve them without a hearing and give directions in the terms proposed.

(7) At the first or any subsequent case management conference, the court will decide, having regard to the overriding objective and the need to limit disclosure to that which is necessary to deal with the case justly, which of the following orders to make in relation to disclosure—

(a) an order dispensing with disclosure;

(b) an order that a party disclose the documents on which it relies, and at the same time request any specific disclosure it requires from any other party;

(c) an order that directs, where practicable, the disclosure to be given by each party on an issue by issue basis;

(d) an order that each party disclose any documents which it is reasonable to suppose may contain information which enables that party to advance its own case or to damage that of any other party, or which leads to an enquiry which has either of those consequences;

(e) an order that a party give standard disclosure;

(f) any other order in relation to disclosure that the court considers appropriate.

(8) The court may at any point give directions as to how disclosure is to be given, and in particular—

(a) what searches are to be undertaken, of where, for what, in respect of which time periods and by whom and the extent of any search for electronically stored documents;

(b) whether lists of documents are required;

(c) how and when the disclosure statement is to be given;

(d) in what format documents are to be disclosed (and whether any identification is required);

(e) what is required in relation to documents that once existed but no longer exist; and

(f) whether disclosure shall take place in stages.

(9) To the extent that the documents to be disclosed are electronic, the provisions of Practice Direction 31B – Disclosure of Electronic Documents will apply in addition to paragraphs (3) to (8)."

5. FACTUAL AND EXPERT EVIDENCE

Rule 32.1 states that the court "may control the evidence" by giving, amongst other things directions "as to the issues on which it requires evidence" (r.32.1(a)). Rule 32.1 is now amplified and particularised by the addition to r.32.2 of a new provision, sub-rule (3), which states that the court may give certain directions. They include directions "identifying the witnesses who may be called or whose evidence may be read" (r.32.2(3)(b)); this enables the court to restrict witnesses as to factual evidence. They also include directions identifying or limiting issues to which factual evidence may be directed (r.32.2(3)(a)) and limiting the length or format of witness statements (r.32.2(3)(c)). These provisions build on case management powers that are referred to expressly or by implication in other CPR provisions (e.g. r.32.1(1)(a)). The addition of sub-rule (3) to r.32.2 is a consequence of problems exposed and recommendations made in the *Review of Civil Litigation*

Costs: Final Report (December 2009) Ch.38 paras 2.1 to 2.9 (pp.376 to 379), where it was stated that, for the purpose of avoiding wastage of costs occurring as a result of lengthy and irrelevant witness statements, the court should, in appropriate cases, hear argument at an early case management conference about what matters need to be proved and then should give, in relation to witness statements, specific directions of the type referred to in the new sub-rule.

Sub-rule (1) of r.35.4 (Court's power to restrict expert evidence) states that no party may call an expert or put in evidence an expert's report without permission. Amendments are now made sub-rules (2) and (3) of r.35.4 having the effects (1) of requiring an applicant for permission (a) to provide an estimate of costs of the proposed expert evidence, and (b) to identify, not merely "the field" in which expert evidence is required, but, more particularly, "the issues which the expert evidence will address", and (2) of enabling the court, in granting permission, "to specify the issues which the expert evidence should address".

In civil proceedings, the parties present their cases sequentially with, generally, the claimant or applicant presenting his or her case first, and the defendant or respondent second. Normally, a party's presentation of his or her case will involve, in addition to legal submissions and argument, the presentation of evidence (either in writing or orally) of witnesses, either factual or expert opinion or both. Generally, subject to any direction that the judge may give, the order in which a party's factual or expert witnesses give their evidence and are examined will be a matter for the party producing them to decide.

A significant exception to these normal arrangements for the course of evidence is provided by para.11 of Practice Direction 35 (Experts and Assessors) which states that the court may direct that opposing parties' expert witnesses should "give their evidence concurrently" and sets out a procedure for enabling this to be done. This paragraph is to be added to PD 35 by TSO CPR Update 60 (expected to be published sometime during March 2013) and comes into effect on April 1, 2013. It required no amendment to Pt 32 and Pt 35, and may be regarded as simply an elaboration of the court's general power to "control the evidence". The addition was made in the light experience gathered in a pilot scheme initiated to test recommendations made in the *Review of Civil Litigation Costs: Final Report (December 2009)* Ch.38 paras 3.23 and 3.24 (p.384). This alternative procedure for the presentation of expert evidence is similar to procedures found in some other common law jurisdictions and which appear to have the effect of reducing the areas of conflict in expert evidence, providing better assistance for judges faced with the task of determining contested issues to which such evidence is directed, and reducing costs.

6. COSTS CONSEQUENCES OF CLAIMANT'S OFFER

In the *Review of Civil Litigation Costs: Final Report (December 2009)*, Ch.41 paras 3.1 to 3.16 (pp.423 to 426), it was noted that the costs sanctions against a defendant (D) for failing to accept a claimant's offer to settle generally amount to considerably less than the sanctions against a claimant (C) for failing to beat a D's offer to settle; consequently, there was less incentive for D to accept a reasonable offer from C than for C to accept a reasonable offer by D. It was concluded that C's reward for making an adequate offer should be increased and recommendations for achieving that objective were made. Implementing the recommendations required legislation and, in the event, proved rather more complicated than might have been expected.

The necessary primary legislation is found in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 s.55. Section 55(1) states that rules of court may make provision for a court to order D in civil proceedings to pay "an additional amount" to C in those proceedings where "the claim is for (and only for) an amount of money" and s.55(3) states that "additional amount" means an amount not exceeding "a prescribed percentage" of the amount awarded to C by the court (excluding any amount awarded in respect of C's costs). In this context, "prescribed" means prescribed by Order made by the Lord Chancellor. Section 55(4) confers a power on the Lord Chancellor to provide that rules of court may make similar provision to that in s.55(1) in relation to civil proceedings where "the claim is or includes a non-monetary claim" (defined in s.55(11) as a claim for a benefit other than an amount of money), and s.55(5) makes provision as to how the amount to be paid by D must be calculated in such circumstances in any Order made by the Lord Chancellor.

The Offers to Settle in Civil Proceedings Order 2013 (SI 2013/93) was made by the Lord Chancellor in exercise of powers granted by s.55 and makes detailed provision for the manner in which additional amounts payable to C are to be calculated. The necessary amendments to the CPR required to carry into effect s.55 and the 2013 Order consisted of an addition to para.(3) to r.36.14 (Costs consequences following judgment) of sub-para.(d). That addition was made by the Civil Procedure (Amendment) Rules 2013. The amendment does not apply in relation to a claimant's offer which was made before April 1, 2013.It does not follow the terms of the 2013 Order in all respects. Doubtless, s.55, the 2013 Order and r.36.14(3)(d) should be read together.

In the 2013 Order, a clear distinction is drawn between the power of the court to order the payment of an additional amount in civil proceedings where "the claim is for (and only for) an amount of money" (art.2) and those where "the claim is or includes a non-monetary claim" (art.3). In the new sub-para.(d) now added to r.36.14(3) the two are run together and this creates some confusion.

Rule 36.14(3) applies where the judgment is at least as advantageous to C as C's Pt 36 offer and it provides that the court may order that C is entitled to certain interest on money awarded (sub-para.(a)), indemnity costs (sub-para.(b)), and certain interest of costs (sub-para.(c)). The new sub-para.(d) states that the court may order that C is entitled to "an additional amount" calculated as follows. Where the claim is or includes a money claim and "the sum awarded to the claimant by the court" is up to £500,000, the additional amount is 10 per cent of the award; where the award is "above £500,000 up to £1,000,000" it is 10 per cent of the first £500,000 and 5 per cent of any amount above that figure. However, in no circumstances shall the amount exceed £75,000. Where the claim is only a non-monetary claim, the same calculations apply "the sum awarded to the claimant by the court *in respect of costs*". Again, the top limit of £75,000 applies. The phrase "up to £1,000,000" in this context is odd and could give rise to the impression that no additional amount may be ordered by the court where the sum awarded by the court exceeds £1,000,000.

7. RECOVERABLE COSTS OF AN APPEAL

A party (P) engaged in first instance proceedings in a "no costs" jurisdiction, or in a jurisdiction in which recoverable costs against P are restricted, may, in the event of subsequent appeal proceedings, instigated either by P or by another party to the first instance proceedings, be exposed to substantial costs liability if the basic rule that costs should follow the event (the normal costs shifting rule) is applied by the appeal court in making a costs order. In principle it seems right that where it has been seen fit to design a particular first instance jurisdiction so that no costs are recoverable or recoverable costs are restricted, the normal costs shifting rule should not apply to appeals, at least not in its full rigour. Otherwise, the policies justifying costs protection by (what could be called) jurisdictional means (as distinct from protection by bespoke court orders in the form of protective costs orders (PCO) or costs capping orders (CCO) in individual cases) could be undermined. The problem of lack of congruence between rules as to first instance costs and rules as to appeal costs emerged in *Eweida v British Airways Plc* [2009] EWCA Civ 1025, where the appeal was brought from the EAT by the claimant. (In that case the Court of Appeal held that, in the circumstances, the Court of Appeal had no power to make a PCO and that a CCO should not be made.) It was recognised that the problem also arose in appeals from the Upper Tribunal and from the Patents County Court. The matter was discussed in the *Review of Civil Litigation Costs: Final Report (December 2009)* Ch.34 (p.337 et seq).

For the purposes of providing a solution to the problem, r.52.9A is now inserted in CPR Pt 52 by the Civil Procedure (Amendment) Rules 2013. It is likely that, in the future, the range of first instance proceedings "in which costs recovery is normally limited or excluded" will grow and that, therefore, r.52.9A will become increasingly significant.

The rule gives an appeal court a discretion, to be exercised in accordance with matters referred to in sub-rules (2) and (3), to make an order limiting the recoverable costs of an appeal. An application "must be made as soon as practicable" to (presumably) the appeal court (r.52.9A(4)); a requirement that has the merit of ensuring that the matter is considered before significant appeal costs are incurred. The rule came into effect on April 1, 2013, and was subject to no transitional provision; accordingly, in terms, it applies, not only to appeals lodged on or after that date, but also to appeals then pending. The rule is not directly supplemented by any practice direction provision.

8. COSTS MANAGEMENT

A new Section, Section II (Costs Management), is inserted in CPR Pt 3, and that Part is re-titled as "The Court's Case and Costs Management Powers". Further, as mentioned above, the present rules in Pt 44 dealing with costs capping (rr.44.18 to 44.20) are transferred to Pt 3 and inserted there as Section III (Costs Capping).

The new Section II consists of seven rules (rr.3.12 to 3.18). The Section is supplemented by Practice Direction 3E (Costs Management). It is expected that that Practice Direction will be published in TSO CPR Update 60, sometime in March.

Section II and Practice Direction 3E come into effect on April 1, 2013. They are based on recommendations made in the *Review of Civil Litigation Costs: Final Report (December 2010)* Ch.40. In that Report it was said that the time had come to strengthening the court's costs management powers, to "elevate" those powers to rule form, and the expressly use the term "costs management" for the purpose of recognising those powers as "a feature of or adjunct to" case management. The provisions in Section II and Practice Direction 3E build on experience gained in operating the defamation proceedings costs management pilot scheme (Practice Direction 51D) and the costs management in Mercantile Courts and Technology and Construction Courts pilot scheme (Practice Direction 51G). Proceedings within the scope of PD 51D or PD 51G as at the commencement date are to proceed and be completed in accordance with those pilot schemes.

Following the publication of the statutory instrument it was announced that it had been decided that, before the enforcement date, r.3.12(1) will be amended by a further statutory instrument so as to provide that the scope of the application of Section II may be affected by directions given by the Chancellor and the President of the QBD. That adjustment has been made in the text as presented below. It was also announced that the terms of those directions will be as follows:

"Pursuant to CPR rule 3.12(1)(b) and (c), the Chancellor of the High Court directs that in the Chancery Division and the President of the Queen's Bench Division directs that in the Technology and Construction Court and Mercantile Courts, Section II of CPR 3 and Practice Direction 3E shall not apply to cases where at the date of the first case management conference the sums in dispute in the proceedings exceed £2,000,000, excluding interest and costs, except where the court so orders."

The text of Section II (incorporating the anticipated amendment to r.3.12(1)) is set out below. That is followed by the text of the latest available version of Practice Direction 3E, excluding the two annexes (viz the costs budget form, i.e. Precedent H, and the Guidance Notes on Precedent H.

"Application of this Section and the purpose of costs management

3.12—(1) This Section and Practice Direction 3E apply to all multi-track cases commenced on or after 1st April 2013 except —

(a) cases in the Admiralty and Commercial Courts;

(b) such cases in the Chancery Division as the Chancellor of the High Court may direct; and

(c) such cases in the Technology and Construction Court and the Mercantile Courts as the President of the Queen's Bench Division may direct,

unless the proceedings are the subject of fixed costs or scale costs or the court otherwise orders. This Section and Practice Direction 3E shall apply to any other proceedings (including applications) where the court so orders.

(2) The purpose of costs management is that the court should manage both the steps to be taken and the costs to be incurred by the parties to any proceedings so as to further the overriding objective.

Filing and exchanging budgets

3.13 Unless the court otherwise orders, all parties except litigants in person must file and exchange budgets as required by the rules or as the court otherwise directs. Each party must do so by the date specified in the notice served under rule 26.3(1) or, if no such date is specified, seven days before the first case management conference.

Failure to file a budget

3.14 Unless the court otherwise orders, any party which fails to file a budget despite being required to do so will be treated as having filed a budget comprising only the applicable court fees.

Costs management orders

3.15—(1) In addition to exercising its other powers, the court may manage the costs to be incurred by any party in any proceedings.

(2) The court may at any time make a "costs management order". By such order the court will—

(a) record the extent to which the budgets are agreed between the parties;

(b) in respect of budgets or parts of budgets which are not agreed, record the court's approval after making appropriate revisions.

(3) If a costs management order has been made, the court will thereafter control the parties' budgets in respect of recoverable costs.

Costs management conferences

3.16—(1) Any hearing which is convened solely for the purpose of costs management (for example, to approve a revised budget) is referred to as a "costs management conference".

(2) Where practicable, costs management conferences should be conducted by telephone or in writing.

Court to have regard to budgets and to take account of costs

3.17—(1) When making any case management decision, the court will have regard to any available budgets of the parties and will take into account the costs involved in each procedural step.

(2) Paragraph (1) applies whether or not the court has made a costs management order.

Assessing costs on the standard basis where a costs management order has been made

3.18 In any case where a costs management order has been made, when assessing costs on the standard basis, the court will—

(a) have regard to the receiving party's last approved or agreed budget for each phase of the proceedings; and

(b) not depart from such approved or agreed budget unless satisfied that there is good reason to do so.

(Attention is drawn to rule 44.3(2)(a) and rule 44.3(5), which concern proportionality of costs.)"

The text of Practice Direction 3E (Costs Management) is as follows:

"**Budget format**

1 Unless the court otherwise orders, a budget must be in the form of Precedent H annexed to this Practice Direction. It must be in landscape format with an easily legible typeface. In substantial cases, the court may direct that budgets be limited initially to part only of the proceedings and subsequently extended to cover the whole proceedings. A budget must be dated and verified by a statement of truth signed by a senior legal representative of the party. In cases where a party's budgeted costs do not exceed £25,000, there is no obligation on that party to complete more than the first page of Precedent H.

(The wording for a statement of truth verifying a budget is set out in Practice Direction 22.)

Costs management orders

2.1 If the court makes a costs management order under rule 3.15, the following paragraphs apply.

2.2 Save in exceptional circumstances-

(1) the recoverable costs of initially completing Precedent H shall not exceed the higher of £1,000 or 1% of the approved budget;

(2) All other recoverable costs of the budgeting and costs management process shall not exceed 2% of the approved budget.

2.3 If the budgets or parts of the budgets are agreed between all parties, the court will record the extent of such agreement. In so far as the budgets are not agreed, the court will review them and, after making any appropriate revisions, record its approval of those budgets. The court's approval will relate only to the total figures for each phase of the proceedings, although in the course of its review the court may have regard to the constituent elements of each total figure. When reviewing budgets, the court will not undertake a detailed assessment in advance, but rather will consider whether the budgeted costs fall within the range of reasonable and proportionate costs.

2.4 As part of the costs management process the court may not approve costs incurred before the date of any budget. The court may, however, record its comments on those costs and should take those costs into account when considering the reasonableness and proportionality of all subsequent costs.

2.5 The court may set a timetable or give other directions for future reviews of budgets.

2.6 Each party shall revise its budget in respect of future costs upwards or downwards, if significant developments in the litigation warrant such revisions. Such amended budgets shall be submitted to the other parties for agreement. In default of agreement, the amended budgets shall be submitted to the court, together with a note of (a) the changes made and the reasons for those changes and (b) the objections of any other party. The court may approve, vary or disapprove the revisions, having regard to any significant developments which have occurred since the date when the previous budget was approved or agreed.

2.7 After its budget has been approved, each party shall re-file and re-serve the budget in the form approved with re-cast figures, annexed to the order approving it.

2.8 A litigant in person, even though not required to prepare a budget, shall nevertheless be provided with a copy of the budget of any other party.

2.9 If interim applications are made which, reasonably, were not included in a budget, then the costs of such interim applications shall be treated as additional to the approved budgets."

EDITOR: **Professor I. R. Scott**, University of Birmingham.
Published by Sweet & Maxwell Ltd, 100 Avenue Road, London NW3 3PF.
ISSN 0958-9821

Typeset by EMS Print Design
Printed by St Austell Printing Company, St Austell, Cornwall

584314