CIVIL PROCEDURE NEWS

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■ **BERNEY v SAUL** [2013] EWCA Civ 640, June 5, 2013, CA, unrep. (Moses, Rimer & Gloster L.JJ.)

Limitation – accrual of cause of action – professional negligence causing diminution of claim

CPR rr.3.4 & 7.4, Limitation Act 1980 s.2. On January 10, 2011, claimant (C) commencing professional negligence claim against solicitors (D) who had acted for her in early stages of a personal injury claim commenced on April 12, 2002. C alleging that because of D's negligence, the claim had to be compromised at less than full value on November 1, 2005. D pleading limitation, asserting that C had suffered damage, at the latest, on June 2, 2004, when C advised by new solicitors that her claim was vulnerable to a strike out application. On D's application under r.3.4, district judge dismissing C's claim on grounds (1) that it was time-barred, and (2) in light of amount recovered from X, had no prospect of success. Circuit judge dismissing C's appeal on former ground. Single lord justice granting C permission for second appeal. **Held**, allowing appeal (1) in cases of tort the cause of action accrues (within the meaning of s.2), not when the culpable conduct occurs, but when the claimant first sustains damage, (2) in the circumstances, C had not suffered actual damage prior to November 1, 2005, (3) it followed that C's claim, having been brought on January 10, 2011, had not been brought after six years from the date on which the cause of action accrued. ***Khan v RM Falvey & Co*** [2002] EWCA Civ 400, [2002] Lloyd's Rep. P.N. 369, CA, ***Hatton v Chafes*** [2003] EWCA Civ 341, [2003] P.N.L.R. 24, CA, ***Price v Price*** [2003] EWCA Civ 888, [2003] 3 All E.R. 911, CA, ref'd to. (See further, "In Detail" section of this issue of *CP News*.) (See ***Civil Procedure 2013*** Vol.1 paras 3.1.4 & 7.6.8, and Vol.2 para.8–5.)

■ **BUNGE SA v KYLA SHIPPING CO LTD** [2013] EWCA Civ 734, June 20, 2013, CA, unrep. (Longmore & Gloster L.JJ. and Sir Robin Jacob)

Arbitration claim – appeal on point of law to High Court – application for permission to appeal from Court's decision on the appeal

CPR r.52.3, Senior Courts Act 1981 s.16, Arbitration Act 1996 s.69. Judge granting charterer's application under s.69(1) for leave to appeal arbitrator's award on a point of law as to the effect of a particular clause (in a charterparty containing an express continuing warranty) on the doctrine of frustration. In doing so, judge finding that, on the basis of findings of fact in the award, the point was one of general public importance (s.69(3)(c)). At substantive hearing, judge: (1) holding, contrary to the arbitrator's decision, that the contract was not frustrated; and (2) refusing owners (D) permission to appeal. D applying to Court of Appeal for permission to appeal. **Held**, refusing permission to appeal and refusing to set aside judge's order refusing such permission, (1) s.69(8) states that an appeal on a point of law lies with the leave of the High Court where that Court considers that the question is one of general importance, or is one which for some other special reason should be considered by the Court of Appeal, (2) the Court of Appeal cannot entertain an application for permission to appeal from such refusal, however (3) the Court of Appeal has a residual jurisdiction to set aside a High Court judge's refusal of leave if the decision to refuse has come about as a result of unfair or improper process such that it cannot be categorised as a decision at all, (4) in the instant case, there were no bases for the exercise of the residual discretion. (Court expressly stating that this judgment may in future be cited before any court (*Practice Direction (Citation of Authorities)* [2001] 1 W.L.R. 1001, CA, para.6.1.) ***Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd*** [2001] Q.B. 388, CA, ***Athletic Union of Constantinople (AEK) v National Basketball Association*** [2002] EWCA Civ 830, [2002] 1 W.L.R. 2863, CA, ***Aden Refinery Co Ltd v Ugland Management Co Ltd (The Ugland Obo One)*** [1987] Q.B. 650, CA, ***CGU International Insurance Plc v AstraZeneca Insurance Co Ltd*** [2006] EWCA Civ 1340, [2007] Bus. L.R. 162, CA, ***North Range Shipping Ltd v Seatrans Shipping Corp (The Western Triumph)*** [2002] EWCA Civ 405, [2002] 1 W.L.R. 2397, CA, ref'd to. (See ***Civil Procedure 2013*** Vol.1 paras 52.3.8 & B3–001, and Vol.2 paras 9A–59, 2E–264, 2E–268 & 12–55.)

■ **D&G CARS LTD v ESSEX POLICE AUTHORITY** [2013] EWCA Civ 514, May 16, 2013, CA, unrep. (Leveson, Patten & Briggs L.JJ.)

Amendment to statement of case – after end of limitation period – new cause of action

CPR rr.16.7 & 17.4, Practice Direction 16 para.9.2, Limitation Act 1980 s.35, Public Contracts Regulations 2006 regs 23(4)(e) & 47(7)(a), Council Directive 89/665/EEC of 21 December 1989 art.1. In 2006, police authority (D), entering into contract with company (C) for vehicle recovery and disposal operations in particular district. In 2008, D, acting under 2006 Regulations, inviting C and other companies to tender for contract for similar operations in another district. Shortly afterwards, D conducting investigation of C's conduct in relation to the handling of a vehicle during 2007 and 2008 (the vehicle exchange incident) and concluding that they had acted contrary to their general obligations under

the 2006 contract. D then giving C notice of termination of that contract and notifying C that they had been excluded from the tender competition. C commencing two sets of proceedings against D, one for damages for breach of contract and the other for breach of the Regulations. In both proceedings, which were consolidated, C's particulars of claim, D's defences and C's replies dealing at length with the vehicle exchange incident, which C asserted was innocent and which D asserted was misconduct within reg.23(4)(e). Following disclosure, C applying to amend their particulars of claim to make allegations against D of dishonesty and bad faith, in effect to allege misconduct in public office and conspiracy to injure. On grounds that the application to amend came after the expiry of a period of limitation within r.17.4 (i.e. the three month period fixed by reg.47(7)(a)) and amounted to a new claim not arising out facts already in issue, Master and, on appeal, judge, refusing application. Single lord justice granting C permission for second appeal. **Held**, dismissing appeal (by majority), (1) D's defence to C's claim that their conduct in relation to the vehicle exchange incident did not justify D's decision to exclude them from the tender competition was that that the conduct amounted to grave misconduct within reg.23(4), (2) C's amended claim alleged that D had consciously and deliberately rigged the tendering process with the intention of preferring other tenderers to C, (3) both the original claim and the amended claim alleged the same type of cause of action (namely, breach by D of the statutory duty to conduct the tender process in accordance with the principles of equal treatment and non-discrimination), (4) the amended claim, by asserting for the first time intentional wrongdoing and bad faith, pleaded a "new claim" involving a "new cause of action" (within the meaning of s.35 and r.17.4), (5) it was not suggested that the new cause of action arose out of the same or substantially the same facts as the claim already pleaded. Observations on whether C's new allegations could be pleaded by way of reply to D's defence and on effect of pleading rule (para.9.2.) that a reply must not bring a new claim. [Ed.: PD 16 para.9.2. is to same effect as RSC Ord.18, r.10(1).] (See further "In Detail" section of this issue of *CP News*.) ***Steamship Mutual Underwriting Association Ltd v Trollope & Colls (City) Ltd.*** (1986) 33 B.L.R. 77, CA, ***Paragon Finance Plc v D.B. Thakerar & Co*** [1999] 1 All E.R. 400, CA, ref'd to. (See ***Civil Procedure 2013*** Vol.1 paras 16.7.3, 16PD.9 & 17.4.4, and Vol.2 para.8–110.)

■ **DE FERRANTI v EXECUZEN LTD** [2013] EWCA Civ 592, June 10, 2013, CA, unrep. (Rix & Ryder L.JJ. and Sir John Chadwick)

Application for default judgment – setting aside default judgment

CPR rr.3.10, 6.28, 12.3, 12.4, 13.3, 23.4 & 23.10. Recruitment consultancy company (C) commencing claim against former employee (D) for breach of contract of employment and fiduciary duty and against a company owned and controlled by D for dishonest assistance and knowing receipt. C alleging that D used her position to divert a business opportunity from C to her company and seeking various forms of relief (including remedies other than money or delivery of goods). On October 19, 2010, by application in accordance with Pt 23, C applying for judgment on their claim for damages, delivery up of documents, interest and costs in default of an acknowledgment of service. In breach of r.23.4(1), application not served on D. Nevertheless, on December 14, 2010, judge granting application, giving C judgment on their claim with damages to be assessed and giving directions for quantum trial. On December 17, 2010, copy of judge's order served on D. At quantum trial on February 23, 2011, of which D had notice, but which D did not attend and was not represented, judge awarding D damages of £716k and costs and making order for payment. By application notice, dated March 16, 2011, but not served on C until June 28, 2011, D applying (1) to set aside default judgment, and (2) to stay the enforcement of the award. On December 22, 2011, Master making order retrospectively dispensing with service of C's application notice of October 19, 2010. On January 19, 2012, on ground of delay, judge dismissing D's application. On renewed oral application, single lord justice granting D permission to appeal. D not appearing and not represented at the appeal hearing. **Held**, dismissing appeal, (1) before December 22, 2011, by operation of r.23.10, the procedural position was that D's application (made on March 16, 2011) to set aside the default judgment of December 14, 2010, being an order made against a person who had not been served with a copy of the application notice, was made out of time as it should have been made within seven days of service of the order, that is by December 25, 2010, (2) on December 22, 2011, when the Master dispensed with service of the application notice retrospectively, the procedural position changed as r.23.10 then ceased to apply and D's application to set aside the default judgment fell to be determined under r.13.3, (3) the judge had erred in not approaching that application with the provisions of r.13.3 in mind, however (4) on the material before the Court it was clear that this was not a case where the power to set aside a default judgment under r.13.3 should be exercised, (5) as D had notice of the quantum trial but did not attend and was not represented, the question whether enforcement of the award should be stayed fell to be determined under r.39.3, (6) the judge was entitled to take the view that the pre-conditions to the exercise of discretion under that rule had not been satisfied. ***Nelson v Clearsprings (Management) Ltd*** [2006] EWCA Civ 1252, [2007] 1 W.L.R. 962, CA, ref'd to. (See ***Civil Procedure 2013*** Vol.1 paras 3.10.3, 6.28.1, 12.4.6, 13.3.1, 23.4.1, 23.10.1 & 39.3.7.)

■ **FIRST SUBSEA LTD v BALLTEC LTD** [2013] EWHC 1033 (Pat), March 15, 2013, unrep. (Norris J.)

Court's power to control evidence – notice of intention to rely on hearsay evidence

CPR rr.32.1, 32.2 & 33.2, Practice Direction 32 para.27.2, Civil Evidence Act 1995 ss.2 & 4. Company (C)

bringing claim against individual (D1), their former employee, and another company (D2) for conspiracy to injure by unlawful means. C alleging that D1 solicited others by inducing them to breach their fiduciary duties or their contracts of employment to assist him in setting up a rival business (D2). Breaches of duty alleged against D1 including concealing that one of those solicited (X) (not a party to the action) was not acting in breach of contract when in fact he was. Breaches by X not particularised. Neither party intending to call X as a witness. C proposing to rely on witness statement given by X in support of D1 and D2 in previous proceedings involving the parties as evidence of X's wrongdoing. That witness statement disclosed and included in agreed bundle of documents for trial. In course of trial, D1 opposing that evidence on ground that C had not given him the notice of intention to rely on hearsay evidence required by s.2 and r.33.2. C thereupon applying for extension of time for serving the requisite notice. **Held**, granting application, (1) by their application, C had given notice (albeit belatedly) of their intention to rely on hearsay evidence, (2) the court's power under r.32.1(2) to exclude evidence "that would otherwise be admissible" includes power to exclude hearsay evidence of which notice of intention to rely on had been given, but it would rarely be proper to exercise it, (3) accordingly, the evidence should be admitted and given such weight as was right having regard to the circumstance in which, and the time at which, it had been introduced during the trial. Judge also considering, but not deciding, question (raised by C as an alternative submission) whether para.27.2 of PD 32, which states that all documents included in court bundles which have been agreed "shall be admissible at the hearing as evidence of their contents", overrides the notice requirements imposed by s.2 and r.33.2. ***Cottrell v General Cologne Re UK Ltd*** [2004] EWHC 2402 (Comm), October 20, 2004, unrep., ***Sunley v Gowland White (Surveyors & Estate Agents) Ltd*** [2003] EWCA Civ 240, [2004] P.N.L.R. 15, CA, ***Charnock v Rowan*** [2012] EWCA Civ 2, January 20, 2012, CA, unrep., ***Daltel Europe Ltd v Makki*** [2005] EWHC 749 (Ch), May 2, 2005, unrep., ref'd to. (See ***Civil Procedure 2013*** Vol.1 paras 32.1.4, 32.2.4, 32PD.27, 33.2.3, 33.3.1 & 33.4.1, and Vol.2 para.9B–1072.)

■ **NOVARTIS AG v HOSPIRA (UK) LTD** [2013] EWCA Civ 583, May 22, 2013, CA, unrep. (Lewison, Kitchin & Floyd L.JJ.)

Patent action – application for interim injunction pending appeal

CPR r.25.1(1). On December 20, 2011, generic medicine manufacturer and supplier (C) commencing proceedings for revocation of European patents owned by drug company (D) and covering use of particular chemical. D making no counterclaim for infringement. D also the proprietor of an earlier patent and corresponding SPC having effect of preventing anyone from selling the chemical before expiry of the SPC on May 15, 2013. In early December, 2012, after trial date fixed (for February 2013), D made aware that C had obtained authorisation to market the chemical for particular purposes. D thereupon seeking and C giving certain undertakings, including undertaking not to infringe the SPC. In judgment, handed down on March 15, 2013, trial judge holding that both patents were invalid. On April 12, 2013, trial judge granting D permission to appeal. C notifying D that they proposed to launch their product after May 15, 2013. D thereupon commencing infringement proceedings against C and applying for an interim injunction restraining C from launching pending the outcome of D's appeal in the revocation proceedings. On May 17, judge dismissing that application ([2013] EWHC 1285 (Pat)). Single lord justice granting D permission to appeal. **Held**, allowing appeal, (1) the court must be satisfied that the appeal has a real prospect of success, (2) the exercise of discretion should not be approached on the basis that the merits are clear in favour of one side or the other, (3) the court must assess all the relevant circumstances following judgment, including the period of time before any appeal is likely to be heard and the balance of hardship to each party if an injunction is refused or granted, (4) both parties were aware that litigation is not finally concluded until all appeals are disposed of, (5) there was no tacit understanding that D would not, in the event judgment going against them at trial, pursuing any avenue open to them to restrain the launch of C's product. Principles for the grant of interim injunction pending appeal explained. ***American Cyanamid v Ethicon*** [1975] A.C. 396, HL, ***Minnesota Mining & Manufacturing Co v Johnson & Johnson*** [1976] R.P.C. 671, CA, ***Ketchum International Plc v Group Public Relation Holdings Ltd*** [1997] 1 W.L.R. 4, CA, ***Guardian Media Group Plc v Associated Newspapers Ltd*** January 20, 2000, CA, ***Pozzoli v BDMO SA*** [2007] EWCA Civ 588, [2007] F.S.R. 37, CA, ***Virgin Atlantic Airways Ltd v Premium Aircraft Interiors Group*** [2009] EWCA Civ 1513, [2010] F.S.R. 15, CA, ref'd to. (See ***Civil Procedure 2013*** Vol.1 paras 25.1.10 & 25.2.3, and Vol.2 paras 2F–9.14 & 15–10.)

■ **J D WETHERSPOON PLC v HARRIS** [2013] EWHC 1088 (Ch), *The Times* June 13, 2013 (Sir Terence Etherton C.)

Witness statements – contents restricted to evidence that may be given orally

CPR rr.32.4 & 32.8, Practice Direction 32 para.18, Chancery Guide (7th edn, 2013) App.9 para.7. In claim for breach of fiduciary duty etc, based on disputes relating to property transactions, claimant company (C) seeking damages, equitable compensation, and an account of profits and interest against individual (D1) and companies (D2). D1 and D2 applying for summary judgment, and C applying to strike out all but seven paragraphs of 230-paragraph witness statement made by individual (X) on behalf of D2. **Held**, (1) dismissing the defendants'

applications, the applications were based on particular interpretations of disputed facts relating to fraud and dishonesty and inferences to be drawn from established facts, and were not suitable for determination on an application for summary judgment, (2) granting C's application on terms, (a) a witness statement should contain evidence that the maker would be allowed to give orally (r.32.4), (b) it should cover those issues, but only those issues, on which the party serving the witness statement wished the witness to give evidence in-chief, (c) the vast majority of X's witness statement fell outside that ambit and contained recitation of facts based on the documents, commentary on those documents, argument, submissions and expressions of opinion (in particular on the commercial property market), and was to that extent an abuse and should be struck out. Chancellor drawing attention to relevant rules and guidance in Chancery Guide on content of witness statements. (See further "In Detail" section of this issue of *CP News*.) (See ***Civil Procedure 2013*** Vol.1 paras 32.4.5, 32.8.2 & 32PD.18, and Vol.2 para.1A–220, and ***Cumulative Special Supplement*** para.1A–241.)

■ **UTOPIA TABLEWARE LTD v BBP MARKETING LTD** [2013] EWPCC 28, May 30, 2013, unrep. (Birss J.)

False statements – committal application – county court directing referral to Attorney General

CPR rr.1.1, 32.14, & 81.18, Practice Direction 81 para.5. In a design infringement claim proceeding in a patents county court, claimant (C) company's application for interim injunction supported by statement of two individual witnesses (X and Y). Judge granting application. Subsequently, X and Y (employees of C) admitting that the evidence they had given in those witness statements (signed with statements of truth) was deliberately fabricated to mislead the court in order to advance C's interests and that they had conspired together to present false evidence and to lie in their witness statements. Defendants submitting that court should direct under r.81.18(5) that the matter be referred to the Attorney General with a request that bringing proceedings against X and Y for contempt of court be considered. **Held**, directing that the matter be so referred, (1) a committal application in relation to a false statement made in connection with proceedings in a county court may be made by the Attorney General, otherwise such application may be made only with the permission of a single judge of the Queen's Bench Division (r.81.18(1) & (3)), (2) in r.81.18(5) the power given to "the court" to make a direction means the court in which the relevant proceedings were or had taken place, (3) the power given by that provision was not confined to a single judge of the Queen's Bench Division or the High Court, thus, (4) where, as here, the proceedings were in a county court that court had power to make a direction, (5) in the instant case there were good reasons why contempt proceedings could be appropriate in the light of the overriding objective. (See further "In Detail" section of this issue of *CP News*.) (See ***Civil Procedure 2013*** Vol.1 paras 32.14.2, 81.18.6 & 81PD.6.)

Statutory Instruments

■ **CIVIL PROCEDURE (AMENDMENT NO 4) RULES 2013** (SI 2013/1412)

CPR Pts 52 & 54. Amend r.52.15 (Judicial review appeals) and r.54.12 (Permission decision without a hearing) to provide that where an application for judicial review (where the claim form was filed after July 1, 2013) is recorded as totally without merit under r.23.12, the claimant will not be able to request an oral reconsideration of the refusal of permission, and that any appeal of that decision to the Court of Appeal is on the papers only. Also amend r.54.5 (Time limit for filing claim form) to reduce time limit for filing claim form for judicial review from three months to six weeks of decision under the several 1990 Planning Acts, and to 30 days of procurement decision regulated by the Public Contracts Regulations 2006 (in both instances where the grounds arose before July 1, 2013). By CPR Update 63, the Pre-Action Protocol for Judicial Review is amended to reflect the amendment to r.54.5. (See ***Civil Procedure 2013*** Vol.1 paras 23.12.1, 52.15.1, 54.5.1 & 54.12.1.)

■ **CIVIL PROCEDURE (AMENDMENT NO. 5) RULES 2013** (SI 2013/1571)

CPR rr.1.2, 12.3 & 30.3, Justice and Security Act 2013 Pt 2. Insert Pt 82 (Closed Material Procedure) containing rules for the "closed material procedure" in civil proceedings introduced by Pt 2 of the 2013 Act. Provide for the admission and hearing of, and argument in relation to, national security-sensitive material, and for the role of special advocates where such material is withheld from parties. Also provide for a process in which, if it appears that a party to proceedings may be required in the course of the proceedings to disclose sensitive material, the court may make a declaration that the proceedings are proceedings in which a "closed material application" may be made to the court. Modifiy and disapply other CPR provisions in various respects. Make consequential amendments. Rules made, not by Rule Committee, but by the Lord Chancellor in exercise of powers conferred by the 2013 Act. In force June 27, 2013 (See ***Civil Procedure 2013*** Vol.1 paras 1.2, 12.3 & 30.3.)

■ **CIVIL PROCEDURE (AMENDMENT NO. 6) RULES 2013** (SI 2013/1695)

CPR seriatim. As a consequence of the new Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims, and the revision and extension of the RTA Protocol, amend Section III of Pt

45 (fixed costs allowed where Protocol settlement) and insert in that Part Section IIIA (making provision for fixed recoverable costs where claim no longer continues under the relevant Protocol or the Stage 3 procedure in Practice Direction 8B). For same reason, also amend Pt 14, Pt 27 and Sections I and II of Pt 36. For unrelated reason amends RSC Ord.79 (Criminal Proceedings) r.9 (Bail). Amendments to Pt 36 and Pt 45 subject to transitional provision. In force July 31, 2013. (See further "CPR Update" section of this issue of *CP News*.) (See ***Civil Procedure 2013*** Vol.1 paras 14.1B.1, 27.14.6, 36.1, 36.16 & sc79.9, and ***Cumulative Special Supplement*** (May 2013) para.45n.9.)

■ CIVIL PROCEEDINGS FEES (AMENDMENT NO. 2) ORDER 2013 (SI 2013/1410)

Civil Proceedings Order 2008. Substitutes entirely Sch.1 (fees to be taken in Court of Appeal, High Court and county courts) of 2008 Order, incorporating amendments made by SI 2013/534 and SI 2013/734. Amends fee 2 to remove references to allocation questionnaires and to clarify that a fee remains payable on receipt of a directions questionnaire, even where the case is not subsequently allocated to a case management track. Extends fee 10.3 (search of bankruptcy and companies records) to search of High Court court records generally. Subject to transitional provisions, merges fees 5.1 and 5.5 (request for detailed assessment by party publicly funded, and application for court's approval of costs certificate where costs payable from public funds) and sets fee 5.1 at £195. Re-describes fee 5.5 as a request or application to set aside a default costs certificate and sets that fee at £105. In force July 1, 2013. (See ***Civil Procedure 2013*** Vol.2 para.10-7.)

■ NON-CONTENTIOUS PROBATE FEES (AMENDMENT) ORDER 2013 (SI 2013/1408)

Non-Contentious Probate Fees Order 2004. Amends Sch.1 (Fees to be taken), fee 8(c) (copies of documents in electronic form), by increasing fee from £4 to £6. In force July 1, 2013. (See ***Civil Procedure 2013*** Vol.2 para.6C-217+.)

Practice Direction

■ PRACTICE DIRECTION – CIVIL RECOVERY PROCEEDINGS

Substantial changes to this free-standing Practice Direction are made by CPR Update 65 (forthcoming). In particular, para.7.3(2) is amended, and paras 7A.1A to 7B.7 are added after para.7A.1 and came into effect on July 31, 2013. Paragraphs 7A.1 to 7B.7 re-instate in revised form provisions which were, before April 1, 2013, contained in the Costs Practice Direction. (See ***Civil Procedure 2013*** Vol.2 para.3K–16.)

Practice Guidance

■ PRACTICE GUIDANCE (COMMITTAL PROCEEDINGS: OPEN COURT) (NO 2) [2013] 1 W.L.R. 1753, Fam D

Family Procedure Rules 2010, Court of Protection Rules 2007, RSC Ord.62. Contains further guidance for committal applications. Prescribes forms in which applications to be heard in open court and in private should be shown in public court lists. Provides for making application notices available to non-parties. Supplements *Practice Guidance (Committal Proceedings: Open Court)* [2013] 1 W.L.R. 1316 (issued on May 3, 2013), and states that that Guidance and this apply to applications in the Court of Protection, the Family Division of the High Court, in family proceedings in county courts and in family proceedings. Issued by the President.

Pre-Action Protocols

■ PRE-ACTION PROTOCOL FOR LOW VALUE (EMPLOYERS' LIABILITY AND PUBLIC LIABILITY) CLAIMS (CPR Update 64, July 2013)

Protocol applies to an "employers' liability claim" (as defined) for damages arising from an accident or a disease and to a "public liability claim" (as defined) arising from an accident. It is limited to claims valued at not more than £25,000. In the case of accidents it applies to those occurring on or after July 31, 2013, and, in the case of disease claims, to cases where no letter of claim has been sent prior to July 31, 2013. Provides for a three-Stage process, and for a Pt 45 fixed costs regime, similar to that provided for by the RTA Protocol. (See further "CPR Update" section of this issue of *CP News*.)

■ PRE-ACTION PROTOCOL FOR LOW VALUE PERSONAL INJURY CLAIMS IN ROAD TRAFFIC ACCIDENTS (CPR Update 64, July 2013)

Protocol applies where: (1) a claim for damages arises from a road traffic accident where the claim is submitted on or after July 31, 2013; (2) the claim includes damages in respect of personal injury; (3) the claimant values the claim at: (a) no more that £25,000 where the accident occurred on or after July 31, 2013; or (b) no more than £10,000 where the accident occurred on or after April 30, 2010, and before July 31, 2013; and (4) if proceedings were started the small claims track would not be the normal track for that claim. The RTA Protocol which commenced on April 30, 2010, will continue to apply as it stood immediately before July 31, 2013, to all claims where the Claim Notification Form was submitted before that date. (See further "CPR Update" section of this issue of *CP News*.) (See ***Civil Procedure 2013*** Vol.1 para.C13A–001 et seq.)

In Detail

WITNESS STATEMENTS

When introduced in 1998 the provisions in the CPR as to witness statements were more flexible than what had gone before. However, it was intended that previous practice should be tightened up in certain respects. In the Final Access to Justice Report, Lord Woolf complained (p.129) that in too many instances witness statements had ceased to be an authentic account of the evidence which the witness could give and had become "an elaborate, costly branch of legal drafting". His lordship said that witness statements should, so far as possible, be in the witness's own words, should not discuss legal propositions, and should not comment on documents (p.130).

In CPR r.32.4, a "witness statement" is described as "a written statement signed by a person which contains the evidence which that person would be allowed to give orally". Paragraph 18.1 or Practice Direction 32 (Evidence) states that a witness statement must, if practicable, be in the intended witness's own words and should be expressed in the first person. The statement must indicate: (1) which of the statements in it are made from the witness' own knowledge and which are matters of information or belief; and (2) the source of any matters of information or belief (see para.32PD.18 below). A witness statement must comply with the requirements set out in that Practice Direction (r.32.8). In several of the Court Guides, these propositions are reinforced.

In the years since, Lord Woolf's intentions have not been realised. As the commentary in the *White Book* on r.32.4 and r.32.8 shows, frequently appeal judges and judges at first instance have complained about complete failures by parties to comply with the letter and spirit of the rules.

A recent example is the case of *J D Wetherspoon Plc v Harris* [2013] EWHC 1088 (Ch), *The Times* June 13, 2013, where the claimants applied to strike out all but seven paragraphs of a 230-paragraph witness statement made by individual witness on behalf of one of the defendants. In relation to a number of the paragraphs, the claimant's principal complaint was that the evidence consisted of opinion evidence. (For summary of this case, see "In Brief" section of this issue of *CP News*.)

In dealing with application the Chancellor referred to the relevant rules and took the opportunity to draw attention to what is now said in the Chancery Guide (7th edn) in para.7 of Appendix 9. That paragraph states as follows:

"A witness statement should simply cover those issues, but only those issues, on which the party serving the statement wishes that witness to give evidence in chief. Thus it is not, for example, the function of a witness statement to provide a commentary on the documents in the trial bundle, nor to set out quotations from such documents, nor to engage in matters of argument. Witness statements should not deal with other matters merely because they may arise in the course of the trial."

Sir Terence explained that rules as to witness statements and their contents are not "rigid statutes". His lordship said it is conceivable that in particular circumstances they may properly be relaxed in order to achieve the overriding objective of dealing with cases justly; even opinion evidence may sometimes be included in the witness statement of a witness as to fact as part of the witness's account of admissible factual evidence "in order to provide a full and coherent explanation and account" (para.40).

His lordship granted the claimant's application on terms that the defendants should have a short period in which to consider whether, in addition to the paragraphs in the witness statement which the claimants conceded to be admissible, there were some other paragraphs which, consistently with the principles he had outlined, should be retained.

REFERRAL TO ATTORNEY GENERAL OF FALSE STATEMENT COMMITTAL APPLICATION

Part 81 (Contempt of Court) was inserted in the CPR by the Civil Procedure (Amendment No.2) Rules 2012 and came into force on October 1, 2012. As is explained in the *White Book* commentary, the rules in this Part largely re-enact legislation formerly found in RSC and CCR Orders contained in the CPR Schedules. There are some innovations, most notably the rule that an application for an order committing a person for contempt in the form of interference with the administration of justice may not proceed without the court's permission.

Liability for contempt may be incurred in a wide variety of circumstances. Part 81 is divided into Sections reflecting the principal circumstances. Thus, the rules in Section 6 (rr.81.17 and 81.18) govern applications to permit a person for making a false statement of truth (r.32.14) or false disclosure statement (r.31.23). The power to make committal orders for this form of contempt, whether the contempt is alleged to have been committed in relation to High Court proceedings or county court proceedings, lies with the High Court.

The Attorney General has certain duties in relation to the enforcement of the law of contempt, some derived from statute (see Contempt of Court Act 1981 s.7). These duties are reflected in the rules. Thus, in Section 6, r.81.18(1)(b)

states that an application for an order committing a person for making a false statement of truth or false disclosure statement in connection with proceedings in the High Court may be made by the Attorney General. The Attorney's power to make an application is not exclusive. An application may be made by someone else in such circumstances, but only with the permission of the High Court (r.81.18(1)(a)). Rule 81.18(5) states that "the court", in dealing with an application for permission, may, instead of granting or refusing permission, direct that "the matter" be referred to the Attorney General with a request that the Attorney consider whether to bring proceedings for contempt of court. It would follow from this that a High Court judge considering an application for permission made under r.81.18(1)(a) in the circumstances posited above may give a direction under r.81.18(5).

So far so good. But what is the position where the contempt allegation made is that a person made a false statement of truth or false disclosure statement in connection with proceedings in a county court? Rule 81.18(3)(b), reflecting the Attorney Generals' duty in relation to contempt, states that an application to the High Court to commit for such contempt may be made by the Attorney. Again, the Attorney's power is not exclusive. And, again, an application may be made by someone else in such circumstances, but only with the permission "of a single judge of the Queen's Bench Division" (r.81.18(3)(a)). And, yet again, that single judge may, instead of granting or refusing permission, direct that the matter be referred to the Attorney General. In all of this the county court plays no role. However, in *Utopia Tableware Ltd v BBP Marketing Ltd* [2013] EWPCC 28, May 30, 2013, unrep., it was submitted that, although a county court has no jurisdiction to deal with an application to commit for contempt falling within Section 6 of Pt 81, and although a county court judge may not grant a party permission under r.81.18(3)(a) to make a committal application in the High Court, a county court judge may, in accordance with r.81.18(5), direct that "the matter" be referred to the Attorney General with a request that the Attorney consider whether to bring proceedings for contempt of court. (For summary of this case, see "In Brief" section of this issue of *CP News*.)

That submission turned on the proper construction of "the court" within r.81.18(5). Birss J. accepted the submission. His lordship said he could see no reason why r.81.18(5) should be read in a restrictive way which prevented referral to the Attorney General from a county court. His lordship said such referral does not undermine "the gateway element" of the provisions in r.81.18, and does not involve the exercise by the county court judge of a jurisdiction which the county court does not have "since the whole point of the referral is that a decision whether to bring a committal application is one for the Attorney General and not for the court referring the matter" (para.14). His lordship noted that his conclusion seemed to differ from the opinion of the Attorney General's Office.

AMENDMENT AFTER LIMITATION PERIOD

Where a claimant bringing a claim against a defendant where, because of the nature of the cause of action and the circumstances in which it is alleged to have arisen, the latter may be able to plead statutory limitation as a procedural bar to the continuation of the proceedings, the provisions in the Limitation Act 1980 which give the court power to permit the proceedings to continue notwithstanding the expiry of the relevant period (notably s.35), and the rules of court authorised to support applications for the exercise of that power and to permit, if necessary, the amendment of statements of claim and the addition or substitution of parties accordingly (notably CPR r.17.4 and r.19.5), come into play. The statutory provisions and the rules are complicated, and the case law is extensive.

In the recent case of *D&G Cars Ltd v Essex Police Authority* [2013] EWCA Civ 514, May 16, 2013, CA, unrep., the claimants applied under r.17.4 to amend their particulars of claim for the purpose of making certain serious allegations against the defendants. On grounds that the application to amend came after the expiry of a period of limitation within r.17.4 (i.e. a three month period fixed by Regulations) and amounted to a new claim not arising out of facts already in issue, a Master and, on appeal, a judge refused the application. A single lord justice granted the claimants permission for a second appeal. On the appeal, the Court of Appeal (Leveson, Patten & Briggs L.JJ.) held, by majority (Patten L.J. dissenting), that the appeal should be dismissed. The several judgments delivered contain an extensive review of the authorities. (For summary of this case, see "In Brief" section of this issue of *CP News*.)

This was not a case where the question was whether a new cause of action could be pleaded because it arose out of the same or substantially the same facts as the claim already pleaded. The question was whether the allegations which the claimants sought to add by way of amendment constituted a new cause of action. The claimants had a fall-back position. The submission was that, if the court found that the allegations in their proposed amendment constituted a new cause of action, and therefore could not be made, those allegations might nevertheless be pleaded by way of reply to the defendant's defence. In specifically rejecting that submission, Briggs J. referred to the commentary in the *White Book 2013* on r.16.7 (Reply to defence) (Vol.1 para.16.7.3) where it is stated:

"A reply must not contradict or be inconsistent with the claim; for example it must not bring in a new claim. If the claimant wishes to depart from the case set out in their claim they should seek to amend that claim rather than serve a reply."

His lordship said this was an important principle of pleading. His lordship did not note, though he may have done so, that it is a principle which, before the CPR came into effect, was enshrined in rule form (in RSC Ord.18, r.10), but in the CPR is relegated to para.9.2 of Practice Direction 16 (Vol.1 para.16PD.9).

DATE OF ACCRUAL OF CAUSE OF ACTION

In the case of *Berney v Saul* [2013] EWCA Civ 640, June 5, 2013, CA, unrep., the facts were that, on April 12, 2002, solicitors (D) acting for a lady issued a claim form for a personal injury claim in which she (C) claimed damages of £50,000 arising from a road traffic accident on April 20, 1999. Unfortunately, the claim was not properly constituted because that claim form incorrectly named as defendant, not the alleged tortfeasor (Y), but her husband. On August 20, 2002, after the expiry of the relevant limitation period, D re-served the claim form with Y named as defendant, but failed to serve particulars of claim then or thereafter. Y acknowledged service and admitted liability.

In March 2004, C instructed new solicitors who, on June 2, 2004, advised her that, as D had not served particulars of claim, her claim was vulnerable to a strike out application. On January 25, 2005, Y's solicitors withdrew assurances given to C's new solicitors (on November 19, 2004) that they would take no point based on C's procedural delay and urged C to make appropriate applications promptly. On November 1, 2005, the claim was compromised. On January 10, 2011, C commenced a professional negligence claim against D, alleging that because of their failure, within the currency of their retainer, to serve the particulars of claim (as required by CPR r.7.4) she had had to settle her claim against Y at a figure far below the true value of her claim.

D pleaded limitation. The relevant limitation period was that fixed by s.2 of the Limitation Act 1980. That section states that an action founded on tort shall not be brought "after the expiration of six years from the date on which the cause of action accrued". D argued that C's cause of action accrued well before January 10, 2005, and in particular submitted that C's claim became statute-barred by, at the latest, June 2, 2010, being six years after D had been advised that her claim was vulnerable to a strike out application.

On D's application under r.3.4, a district judge dismissed C's claim on the grounds: (1) that it was time-barred; and (2) in the light of amount recovered from X, had no prospect of success. A circuit judge dismissed C's appeal on the former ground. A single lord justice granted C permission for a second appeal.

The Court of Appeal (Moses, Rimer & Gloster L.JJ.) allowed the appeal. An interesting feature of this case is that the reasoning that led Moses L.J. (with whom Rimer L.J. agreed) to the conclusion that C's claim was not statute-barred was significantly different to that which led Gloster L.J. (who gave the lead judgment) to the same conclusion.

Put briefly, the reasoning of Moses L.J. was as follows: (1) in cases of tort the cause of action accrues (within the meaning of s.2), not when the culpable conduct occurs, but when the claimant first sustains damage; (2) the settlement of November 1, 2005, reflected the strike out and costs risks to which C was then potentially exposed; (3) between January 25, 2005, when X's solicitors withdrew their assurances, and the settlement date, there was actual damage in the form of a real risk to C that, had C's new solicitors made an application for the extension of time for serving the particulars of claim, C's claim would have been restricted to the amount of the original claim, or to such lesser sum as the evidence based on the expert reports disclosed at that time; (4) in this case, the question was: when was C financially worse off as a result of D's breach of duty than she would have been otherwise?; (5) it could not be said that C had suffered actual financial loss, in the form of diminution of her claim, prior to January 25, 2005; (6) it followed that C's claim, having been brought on January 10, 2011, had not been brought after six years from the date on which the cause of action accrued and; therefore (7) it was not statute barred.

The reasoning of Gloster L.J. was, again put briefly, as follows: (1) in cases of tort the cause of action accrues (within the meaning of s.2), not when the culpable conduct occurs, but when the claimant first sustains damage; (2) in a professional negligence action, determining the date at which the claimant first suffered actual damage raises an essentially factual question dependent on the circumstances; (3) in this case, the question was: when was C financially worse off as a result of C's breach of duty than she would have been otherwise?; (4) the settlement of November 1, 2005, reflected the strike out and costs risks to which C was then potentially exposed; (5) it could not be said that C had suffered actual financial loss prior to that date; (6) it followed that C's claim, having been brought on January 10, 2011, had not been brought after six years from the date on which the cause of action accrued and, therefore, was not statute barred.

Moses L.J. and Gloster L.J. agreed that it is necessary to ask when it was that C was financially worse off than she would otherwise have been as a result of D's breach of duty of care. Gloster L.J. alighted on the date of the settlement on November 1, 2005, and took the view that there was no real risk that C would have failed, at any time before then, to obtain an extension of time for serving her particulars of claim, applying the relief from sanctions considerations identified in r.3.9. One of the differences between their lordships was that Moses L.J. did not share this view. His lordship's opinion there was a real risk that prior to the date of the settlement had C's solicitor made an application to the court to extend time for service, she would have been confined either to the sum of £50,000 which she had originally claimed, or to such lesser sum as the evidence based on the medical reports disclosed at that time was based on the decision of the Court of Appeal in *Price v Price* [2003] EWCA Civ 888, [2003] 3 All E.R. 911, CA, where the Court met the justice of the case by extending time for service of the particulars of claim but restricted the claimant to reliance only on that which could have been substantiated prior to the time when the particulars of claim should have been served.

CPR Update

PRE-ACTION PROTOCOLS FOR LOW VALUE PERSONAL INJURY CLAIMS

1. INTRODUCTION

In June and July 2013, the CPR were amended by three statutory instruments; they are the Civil Procedure (Amendment No. 4) Rules 2013 (SI 2013/1412), the Civil Procedure (Amendment No. 5) Rules 2013 (SI 2013/1571), and the Civil Procedure (Amendment No. 6) Rules 2013 (SI 2013/1695). The first two of these statutory instruments came into effect, respectively, on July 1 and June 27. Their effects are limited and are shortly explained in the "In Brief" Section of this issue of *CP News*.

The third statutory instrument follows upon the revision and extension of the RTA Protocol and the making of a new Pre-Action Protocol and has a broad and significant impact on the CPR. The explanation is as follows.

When first introduced, the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents ("the RTA Protocol") applied to claims arising out of accidents occurring on or after April 30, 2010. That Protocol has now been revised and re-issued. As modified, the Protocol applies where a claim for damages arises from a road traffic accident where the Claim Notification Form (CNF) is submitted on or after July 31, 2013, and the claimant values the claim at no more than "the Protocol upper limit". That limit is £25,000 where the accident occurred on or after July 31, 2013, or £10,000 where the accident occurred on or after April 30, 2010, and before July 31, 2013. The RTA Protocol will continue to apply in the form as it stood immediately before July 31, 2013, to all claims where the CNF was submitted before that date. In the revised Protocol, the circumstances in which the Protocol does not apply remain the same as in the original Protocol (see para.4.5).

Another Pre-Action Protocol, based on the same approach to pre-action processes as that found in the RTA Protocol, is now introduced; that is the Pre-Action Protocol for Low Value Personal Injury (Employers' and Public Liability) Claims ("the EL/PL Protocol"). The upper limit is £25,000. The Protocol applies where either the claim arises from an accident occurring on or after July 31, 2013, or in a disease claim, no letter of claim has been sent before that date. In this Protocol, the circumstances in which the Protocol does not apply are listed in sub-paras (1) to (11) of para.4.3.

The revised RTA Protocol and the EL/PL Protocol are published in CPR Update 65. As a consequence of their coming into effect on July 31, 2013, various amendments have to be made to certain CPR Practice Directions and to other Pre-Action Protocols. Those changes are also published in Update 65. Unfortunately, Update 65 was not available in its final form until the second week in July. The most significant Practice Direction amendments made by Update 65 in this respect are those made to Practice Direction 8B. Since 2010, "the Stage 3 procedure" in the RTA Protocol has been set out in that Practice Direction (supplementing r.8.1(6)). It is now re-titled so as to take account of the fact that it provides the Stage 3 procedure under both Protocols and amended to reflect changes that have been made to rules in other CPR Parts which support the processes in these Protocols and their respective Stage 3 procedures.

2. IMPACT OF PROTOCOLS ON RULES IN CPR

When the RTA Protocol was first introduced, for the purpose of making the scheme contained in it properly effective, by the Civil Procedure (Amendment) Rules 2010 various new rules were added to the CPR and some existing rules were amended. Such rules are, principally, in Pt 14, r.14.1B (Admissions made under the RTA Protocol), in Pt 27, r.27.14 (Costs on the small claims track), in Pt 36, Section II (RTA Protocol Offers to Settle) (rr.36.16 to 36.22), and in Pt 45, Section III (formerly Section IV) (Fixed Costs for RTA Protocol Claims) (rr.45.16 to 45.29) (before April 1, 2013, what is now r.45.29 (Costs only application after a claim started under Pt 8 in accordance with Practice Direction 8B) was r.44.12C).

For the purpose of taking account of the new EL/PL Protocol, and the changes now made to the RTA Protocol, the rules mentioned above had to be amended with effect from July 31, 2013. And so we come, eventually, to the third of the recent statutory instruments mentioned above, that is the Civil Procedure (Amendment No. 6) Rules 2013. That statutory instrument was not made until July 5, and was not in the public domain until the third week in the month. In some important respects, its terms were not settled until very shortly before the statutory instrument was made.

Despite the very late production of this statutory instrument and of CPR Update 65, the First Cumulative Supplement to the 2013 edition of the *White Book* will be published on July 31, 2013, and will include the amendments made to the rules and practice directions by these means.

So now, to the effects of the Civil Procedure (Amendment No. 6) Rules 2013. The amendments to r.14.1B and r.27.14 are merely consequential. The amendments to Section II of Pt 36 are also consequential. However, two important new rules are added to Section I (Pt 36 Offers to Settle) of that Part. Those rules are r.36.10A and r.36.14A. Both of

those rules refer to a new Section now added to Pt 45, Section IIIA (see further below). Rule 36.10A deals with the costs consequences of acceptance of a Pt 36 offer where Section IIIA of Pt 45 applies, and r.36.14A with the costs consequences following judgment where Section IIIA of Pt 45 applies.

The amendments to Pt 45 are substantial. The amendments to Section III of that Part include changes to the table (Table 6) in r.45.18 (Amount of fixed costs) stating the Stage 1, Stage 2 and Stage 3 (Types A, B & C) fixed costs for RTA Protocol claims, and the addition of a table (Table 6A) stating such costs for EL/PL Protocol claims. Further, two new rules are added to Section III; they are r.45.23A (Settlement before proceedings are issued under Stage 3) and r.45.23B (Additional advice on value of the claim).

In addition, as already indicated above when referring to new r.36.10A and new r.36.14A, the Civil Procedure (Amendment No. 6) Rules 2013 insert in Pt 45 a new Section, Section IIIA (rr.45.29A to 45.29L), entitled "Claims Which No Longer Continue Under the RTA and EL/PL Pre-Action Protocols – Fixed Recoverable Costs". That rather long heading encapsulates the scope of this new Section of Pt 45. As r.45.29A (Scope and interpretation) states, the Section applies where a claim is started under the RTA Protocol or the EL/PL Protocol, but no longer continues under the relevant Protocol or the Stage 3 procedure in Practice Direction 8B. The Section contains a further three tables of fixed costs, Tables 6B, 6C and 6D. The provisions in the Section do not apply to a disease claim started under the EL/PL Protocol, and none has the effect of preventing a court from making an order under r.45.24 (Failure to comply or electing not to continue with the relevant Protocol—costs consequences).

The rules in new Section IIIA of Pt 45 are complicated. The fact that claims falling within the RTA Protocol and the EL/PL Protocol, though described as "low value", now have an upper limit of £25,000, has meant that the fixed costs Tables have had to be drafted in terms more elaborate than those that would be required had the upper limit been restricted to £10,000. Further, to an extent the rules in the Section have to accommodate recent revisions to the law relating to costs implemented under the Jackson reforms. The Rule Committee had difficulty in settling the terms of a number of the provisions in the Section, in particular the terms of r.45.29F (Defendants' costs) which apply where the court makes an order for costs in favour of the defendant and limits the costs recoverable. In that rule, any potential conflict between, on the one hand, r.36.10A and r.36.14A (mentioned above) and, on the other, r.45.29F, is resolved in favour of the former rules. And para.(10) of r.45.29F states that where, in a case to which Section IIIA applies, any of the exceptions to qualified one way costs shifting in r.44.15 and r.44.16 is established, the court "will assess the defendant's costs without reference to this rule". Thus, where a claimant against whom an order for costs is made has the QOCS protection afforded by r.44.14 (Effect of one-way qualified costs shifting), then his costs liability is limited to the defendant's costs as determined in accordance with r.45.29F. But where the claimant loses QOCS protection for the reasons stated in r.44.15 or r.44.16, then a claimant against whom an order for costs is made may be ordered to pay the defendant's reasonable and proportionate costs. (The court retains power to award such costs on an indemnity basis, where the court finds that the claimant behaved disgracefully.)

As explained above, the revised and extended RTA Protocol and the new EL/PL Protocol, and also the consequential amendments to Practice Direction 8B are contained in CPR Update 65 and will appear in Supplement 1 to the 2013 *White Book*. Also, the changes to CPR provisions related to these developments, and made by the Civil Procedure (Amendment No.6) Rules 2013, will also appear in that Supplement.

Of the rule changes, perhaps the most important is the insertion in Section II of Pt 36 of r.36.10A and r.36.14A, and the insertion in Pt 45 of the new Section, Section IIIA (rr.45.29A to 45.29L). For the assistance of *White Book* subscribers, the texts of those provisions are set out below.

3. PART 36 – RULES 36.10A & 36.14A (COSTS CONSEQUENCES OF OFFERS)

Rules 36.10A and 36.14A state as follows. (It should be noted that r.36.10 (Costs consequences of acceptance of a Pt 36 offer) is now to be read subject to r.36.10A.)

"Costs consequences of acceptance of a Part 36 offer where Section IIIA of Part 45 applies

36.10A—(1) This rule applies where a claim no longer continues under the RTA or EL/PL Protocol pursuant to rule 45.29A(1).

(2) Where a Part 36 offer is accepted within the relevant period, the claimant will be entitled to the fixed costs in Table 6B, Table 6C or Table 6D in Section IIIA of Part 45 for the stage applicable at the date on which notice of acceptance was served on the offeror.

(3) Where—

(a) a defendant's Part 36 offer relates to part only of the claim; and

(b) at the time of serving notice of acceptance within the relevant period the claimant abandons the balance of the claim,

the claimant will be entitled to the fixed costs in paragraph (2).

(4) Subject to paragraph (5), where a defendant's Part 36 offer is accepted after the relevant period—

(a) the claimant will be entitled to the fixed costs in Table 6B, Table 6C or Table 6D in Section IIIA of Part 45 for the stage applicable at the date on which the relevant period expired; and

(b) the claimant will be liable for the defendant's costs for the period from the date of expiry of the relevant period to the date of acceptance.

(5) Where the claimant accepts the defendant's Protocol offer after the date on which the claim leaves the Protocol—

(a) the claimant will be entitled to the applicable Stage 1 and Stage 2 fixed costs in Table 6 or Table 6A in Section III of Part 45; and

(b) the claimant will be liable for the defendant's costs from the date on which the Protocol offer is deemed to be made to the date of acceptance.

(6) For the purposes of this rule a defendant's Protocol offer is either—

(a) defined in accordance with rules 36.17 and 36.18; or

(b) if the claim leaves the Protocol before the Court Proceedings Pack Form is sent to the defendant—

(i) the last offer made by the defendant before the claim leaves the Protocol; and

(ii) deemed to be made on the first business day after the claim leaves the Protocol.

(7) A reference to the "Court Proceedings Pack Form" is a reference to the form used in the Protocol.

(8) Fixed costs shall be calculated by reference to the amount of the offer which is accepted.

(9) Where the parties do not agree the liability for costs, the court will make an order as to costs.

(10) Where the court makes an order for costs in favour of the defendant—

(a) the court will have regard to; and

(b) the amount of costs ordered shall not exceed,

the fixed costs in Table 6B, Table 6C or Table 6D in Section IIIA of Part 45 applicable at the date of acceptance, less the fixed costs to which the claimant is entitled under paragraph (4) or (5).

(11) The parties are entitled to disbursements allowed in accordance with rule 45.29I incurred in any period for which costs are payable to them.

Costs consequences following judgment where Section IIIA of Part 45 applies

36.14A—(1) Where a claim no longer continues under the RTA or EL/PL Protocol pursuant to rule 45.29A(1), rule 36.14 applies with the following modifications.

(2) Subject to paragraph (3), where an order for costs is made pursuant to rule 36.14(2)—

(a) the claimant will be entitled to the fixed costs in Table 6B, 6C or 6D in Section IIIA of Part 45 for the stage applicable at the date on which the relevant period expired; and

(b) the claimant will be liable for the defendant's costs from the date on which the relevant period expired to the date of judgment.

(3) Where the claimant fails to obtain a judgment more advantageous than the defendant's Protocol offer—

(a) the claimant will be entitled to the applicable Stage 1 and Stage 2 fixed costs in Table 6 or Table 6A in Section III of Part 45; and

(b) the claimant will be liable for the defendant's costs from the date on which the Protocol offer is deemed to be made to the date of judgment; and

(c) in this rule, the amount of the judgment is less than the Protocol offer where the judgment is less than the offer once deductible amounts identified in the judgment are deducted.

("Deductible amount" is defined in rule 36.15(1)(d).)

(4) For the purposes of this rule a defendant's Protocol offer is either—

(a) defined in accordance with rules 36.17 and 36.18; or

(b) if the claim leaves the Protocol before the Court Proceedings Pack Form is sent to the defendant—

(i) the last offer made by the defendant before the claim leaves the Protocol; and

(ii) deemed to be made on the first business day after the claim leaves the Protocol.

(5) A reference to the "Court Proceedings Pack Form" is a reference to the form used in the Protocol.

(6) Fixed costs shall be calculated by reference to the amount which is awarded.

(7) Where the court makes an order for costs in favour of the defendant—

(a) the court will have regard to; and

(b) the amount of costs ordered shall not exceed,

the fixed costs in Table 6B, 6C or 6D in Section IIIA of Part 45 applicable at the date of judgment, less the fixed costs to which the claimant is entitled under paragraph (2) or (3).

(8) The parties are entitled to disbursements allowed in accordance with rule 45.29I incurred in any period for which costs are payable to them."

4. PART 45 – SECTION IIIA (FIXED RECOVERABLE COSTS)

CPR Pt 45 (Fixed Costs) was re-enacted by the Civil Procedure (Amendment) Rules 2013 (SI 2013/262) and came into force on April 1, 2013. It is contained in the Cumulative Special Supplement for the 2013 edition of the *White Book* at para.45n.0.1 et seq. New Section IIIA consists of twelve rules, rr.45.29A to 45.29L. Their texts are set out

below. (It is convenient to note here that, by the addition after para.2.10 to Practice Direction 45 of a new paragraph, para.2A, brought about by CPR Update 65, amounts for loss of leave under para.(2)(g) of r.45.29I (Disbursements) are set at £90 per day where the value of the claim is not more than £10,000, and £135 where the value is more than £10,000.)

"IIIA Claims Which No Longer Continue Under the RTA of EL/PL Protocols – Fixed Recoverable Costs

Scope and interpretation

45.29A.—(1) Subject to paragraph (3), this section applies where a claim is started under—

(a) the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents ("the RTA Protocol"); or

(b) the Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims ("the EL/PL Protocol"),

but no longer continues under the relevant Protocol or the Stage 3 Procedure in Practice Direction 8B.

(2) This section does not apply to a disease claim which is started under the EL/PL Protocol.

(3) Nothing in this section shall prevent the court making an order under rule 45.24.

Application of fixed costs and disbursements – RTA Protocol

45.29B. Subject to rules 45.29F, 45.29G, 45.29H and 45.29J, if, in a claim started under the RTA Protocol, the Claim Notification Form is submitted on or after 31st July 2013, the only costs allowed are—

(a) the fixed costs in rule 45.29C;

(b) disbursements in accordance with rule 45.29I.

Amount of fixed costs – RTA Protocol

45.29C.—(1) Subject to paragraph (2), the amount of fixed costs is set out in Table 6B.

(2) Where the claimant—

(a) lives or works in an area set out in Practice Direction 45; and

(b) instructs a legal representative who practises in that area,

the fixed costs will include, in addition to the costs set out in Table 6B, an amount equal to 12.5% of the costs allowable under paragraph (1) and set out in Table 6B.

(3) Where appropriate, VAT may be recovered in addition to the amount of fixed recoverable costs and any reference in this Section to fixed costs is a reference to those costs net of VAT.

(4) In Table 6B—

(a) in Part B, "on or after" means the period beginning on the date on which the court respectively—

(i) issues the claim;

(ii) allocates the claim under Part 26; or

(iii) lists the claim for trial; and

(b) unless stated otherwise, a reference to "damages" means agreed damages; and

(c) a reference to "trial" is a reference to the final contested hearing.

Table 6B

Fixed costs where a claim no longer continues under the RTA Protocol

A. If Parties reach a settlement prior to the claimant issuing proceedings under Part 7			
Agreed damages	At least £1,000, but not more than £5,000	More than £5,000, but not more than £10,000	More than £10,000, but not more than £25,000
Fixed costs	The greater of— (a) £550; or (b) the total of— (i) £100; and (ii) 20% of the damages	The total of— (a) £1,100; and (b) 15% of damages over £5,000	The total of— (a) £1,930; and (b) 10% of damages over £10,000
B. If proceedings are issued under Part 7, but the case settles before trial			
Stage at which case is settled	On or after the date of issue, but prior to the date of allocation under Part 26	On or after the date of allocation under Part 26, but prior to the date of listing	On or after the date of listing but prior the date of trial
Fixed costs	The total of— (a) £1,160; and (b) 20% of the damages	The total of— (a) £1,880; and (b) 20% of the damages	The total of— (a) £2,655; and (b) 20% of the damages
C. If the claim is disposed of at trial			
Fixed costs	The total of— (a) £2,655; and (b) 20% of the damages agreed or awarded; and (c) the relevant trial advocacy fee		

D. Trial advocacy fees				
Damages agreed or awarded	Not more than £3,000	More than £3,000, but not more than £10,000	More than £10,000, but not more than £15,000	More than £15,000
Trial advocacy fee	£500	£710	£1,070	£1,705

Application of fixed costs and disbursements – EL/PL Protocol

45.29D. Subject to rules 45.29F, 45.29H and 45.29J, in a claim started under the EL/PL Protocol the only costs allowed are—

(a) fixed costs in rule 45.29E; and
(b) disbursements in accordance with rule 45.29I.

Amount of fixed costs – EL/PL Protocol

45.29E.—(1) Subject to paragraph (2), the amount of fixed costs is set out—

(a) in respect of employers' liability claims, in Table 6C; and
(b) in respect of public liability claims, in Table 6D.

(2) Where the claimant—

(a) lives or works in an area set out in Practice Direction 45; and
(b) instructs a legal representative who practises in that area,

the fixed costs will include, in addition to the costs set out in Tables 6C and 6D, an amount equal to 12.5% of the costs allowable under paragraph (1) and set out in table 6C and 6D.

(3) Where appropriate, VAT may be recovered in addition to the amount of fixed recoverable costs and any reference

in this Section to fixed costs is a reference to those costs net of VAT.

(4) In Tables 6C and 6D—

(a) in Part B, "on or after" means the period beginning on the date on which the court respectively—

(i) issues the claim;

(ii) allocates the claim under Part 26; or

(iii) lists the claim for trial; and

(b) unless stated otherwise, a reference to "damages" means agreed damages; and

(c) a reference to "trial" is a reference to the final contested hearing.

Table 6C

Fixed costs where a claim no longer continues under the EL/PL Protocol – employers' liability claims

A. If Parties reach a settlement prior to the claimant issuing proceedings under Part 7			
Agreed damages	At least £1,000, but not more than £5,000	More than £5,000, but not more than £10,000	More than £10,000, but not more than £25,000
Fixed costs	The total of— (a) £950; and (b) 17.5% of the damages	The total of— (a) £1,855; and (b) 12.5% of damages over £5,000	The total of— (a) £2,500; and (b) 10% of damages over £10,000
B. If proceedings are issued under Part 7, but the case settles before trial			
Stage at which case is settled	On or after the date of issue, but prior to the date of allocation under Part 26	On or after the date of allocation under Part 26, but prior to the date of listing	On or after the date of listing but prior the date of trial
Fixed costs	The total of— (a) £2,630; and (b) 20% of the damages	The total of— (a) £3,350; and (b) 25% of the damages	The total of— (a) £4,280; and (b) 30% of the damages
C. If the claim is disposed of at trial			
Fixed costs	The total of— (a) £4,280; (b) 30% of the damages agreed or awarded; and (c) the relevant trial advocacy fee		

D. Trial advocacy fees				
Damages agreed or awarded	Not more than £3,000	More than £3,000, but not more than £10,000	More than £10,000, but not more than £15,000	More than £15,000
Trial advocacy fee	£500	£710	£1,070	£1,705

Table 6D

Fixed costs where a claim no longer continues under the EL/PL Protocol – public liability claims

A. If Parties reach a settlement prior to the claimant issuing proceedings under Part 7			
Agreed damages	At least £1,000, but not more than £5,000	More than £5,000, but not more than £10,000	More than £10,000, but not more than £25,000
Fixed costs	The total of— (a) £950; and (b) 17.5% of the damages	The total of— (a) £1,855; and (b) 10% of damages over £5,000	The total of— (a) £2,370; and (b) 10% of damages over £10,000
B. If proceedings are issued under Part 7, but the case settles before trial			
Stage at which case is settled	On or after the date of issue, but prior to the date of allocation under Part 26	On or after the date of allocation under Part 26, but prior to the date of listing	On or after the date of listing but prior the date of trial
Fixed costs	The total of— (a) £2,450; and (b) 17.5% of the damages	The total of— (a) £3,065; and (b) 22.5% of the damages	The total of— (a) £3,790; and (b) 27.5% of the damages
C. If the claim is disposed of at trial			
Fixed costs	The total of— (a) £3,790; (b) 27.5% of the damages agreed or awarded; and (c) the relevant trial advocacy fee		

D. Trial advocacy fees				
Damages agreed or awarded	Not more than £3,000	More than £3,000, but not more than £10,000	More than £10,000, but not more than £15,000	More than £15,000
Trial advocacy fee	£500	£710	£1,070	£1,705

Defendants' costs

45.29F.—(1) In this rule—

(a) paragraphs (8) and (9) apply to assessments of defendants' costs under Part 36;

(b) paragraph (10) applies to assessments to which the exclusions from qualified one way costs shifting in rules 44.15 and 44.16 apply; and

(c) paragraphs (2) to (7) apply to all other cases under this Section in which a defendant's costs are assessed.

(2) If, in any case to which this Section applies, the court makes an order for costs in favour of the defendant—

(a) the court will have regard to; and

(b) the amount of costs order to be paid shall not exceed,

the amount which would have been payable by the defendant if an order for costs had been made in favour of the claimant at the same stage of the proceedings.

(3) For the purpose of assessing the costs payable to the defendant by reference to the fixed costs in Table 6, Table 6A, Table 6B, Table 6C and Table 6D, "value of the claim for damages" and "damages" shall be treated as references to the value of the claim.

(4) For the purposes of paragraph (3), "the value of the claim" is—

(a) the amount specified in the claim form, excluding—

(i) any amount not in dispute;

(ii) in a claim started under the RTA Protocol, any claim for vehicle related damages;

(iii) interest;

(iv) costs; and

(v) any contributory negligence;

(b) if no amount is specified in the claim form, the maximum amount which the claimant reasonably expected to recover according to the statement of value included in the claim form under rule 16.3; or

(c) £25,000, if the claim form states that the claimant cannot reasonably say how much is likely to be recovered.

(5) Where the defendant—
(a) lives, works or carries on business in an area set out in Practice Direction 45; and
(b) instructs a legal representative who practises in that area,

the costs will include, in addition to the costs allowable under paragraph (2), an amount equal to 12.5% of those costs.

(6) Where an order for costs is made pursuant to this rule, the defendant is entitled to disbursements in accordance with rule 45.29I

(7) Where appropriate, VAT may be recovered in addition to the amount of any costs allowable under this rule.

(8) Where, in a case to which this Section applies, a Part 36 offer is accepted, rule 36.10A will apply instead of this rule.

(9) Where, in a case to which this Section applies, upon judgment being entered, the claimant fails to obtain a judgment more advantageous than the claimant's Part 36 offer, rule 36.14A will apply instead of this rule.

(10) Where, in a case to which this Section applies, any of the exceptions to qualified one way costs shifting in rules 44.15 and 44.16 is established, the court will assess the defendant's costs without reference to this rule.

Counterclaims under the RTA Protocol

45.29G.—(1) If in any case to which this Section applies—
(a) the defendant brings a counterclaim which includes a claim for personal injuries to which the RTA Protocol applies;
(b) the counterclaim succeeds; and
(c) the court makes an order for the costs of the counterclaim,
rules 45.29B, 45.29C, 45.29I, 45.29J, 45.29K and 45.29L shall apply.

(2) Where a successful counterclaim does not include a claim for personal injuries—
(a) the order for costs of the counterclaim shall be for a sum equivalent to one half of the applicable Type A and Type B costs in Table 6;
(b) where the defendant—
(i) lives, works, or carries on business in an area set out in Practice Direction 45; and
(ii) instructs a legal representative who practises in that area,

the costs will include, in addition to the costs allowable under paragraph (a), an amount equal to 12.5% of those costs;
(c) if an order for costs is made pursuant to this rule, the defendant is entitled to disbursements in accordance with rule 45.29I; and
(d) where appropriate, VAT may be recovered in addition to the amount of any costs allowable under this rule.

Interim applications

45.29H.—(1) Where the court makes an order for costs of an interim application to be paid by one party in a case to which this Section applies, the order shall be for a sum equivalent to one half of the applicable Type A and Type B costs in Table 6 or 6A.

(2) Where the party in whose favour the order for costs is made—
(a) lives, works or carries on business in an area set out in Practice Direction 45; and
(b) instructs a legal representative who practises in that area,

the costs will include, in addition to the costs allowable under paragraph (1), an amount equal to 12.5% of those costs.

(3) if an order for costs is made pursuant to this rule, the party in whose favour the order is made is entitled to disbursements in accordance with rule 45.29I; and

(4) Where appropriate, VAT may be recovered in addition to the amount of any costs allowable under this rule.

Disbursements

45.29I.—(1) The court—
(a) may allow a claim for a disbursement of a type mentioned in paragraphs (2) or (3); but
(b) will not allow a claim for any other type of disbursement.

(2) In a claim started under either the RTA Protocol or the EL/PL Protocol, the disbursements referred to in paragraph (1) are—

(a) the cost of obtaining medical records and expert medical reports as provided for in the relevant Protocol;
(b) the cost of any non-medical expert reports as provided for in the relevant Protocol;
(c) the cost of any advice from a specialist solicitor or counsel as provided for in the relevant Protocol;
(d) court fees;
(e) any expert's fee for attending the trial where the court has given permission for the expert to attend;
(f) expenses which a party or witness has reasonably incurred in travelling to and from a hearing or in staying away from home for the purposes of attending a hearing;
(g) a sum not exceeding the amount specified in Practice Direction 45 for any loss of earnings or loss of leave by a party or witness due to attending a hearing or to staying away from home for the purpose of attending a hearing; and
(h) any other disbursement reasonably incurred due to a particular feature of the dispute.

(3) In a claim started under the RTA Protocol only, the disbursements referred to in paragraph (1) are also the cost of—

(a) an engineer's report; and
(b) a search of the records of the—

(i) Driver Vehicle Licensing Authority; and

(ii) Motor Insurance Database.

Claims for an amount of costs exceeding fixed recoverable costs

45.29J.—(1) If it considers that there are exceptional circumstances making it appropriate to do so, the court will consider a claim for an amount of costs (excluding disbursements) which is greater than the fixed recoverable costs referred to in rules 45.29B to 45.29H.

(2) If the court considers such a claim to be appropriate, it may—

(a) summarily assess the costs; or
(b) make an order for the costs to be subject to detailed assessment.

(3) If the court does not consider the claim to be appropriate, it will make an order—

(a) if the claim is made by the claimant, for the fixed recoverable costs; or
(b) if the claim is made by the defendant, for a sum which has regard to, but which does not exceed the fixed recoverable costs,

and any permitted disbursements only.

Failure to achieve costs greater than fixed recoverable costs

45.29K.—(1) This rule applies where—

(a) costs are assessed in accordance with rule 45.29J(2); and
(b) the court assesses the costs (excluding any VAT) as being an amount which is in a sum less than 20% greater than the amount of the fixed recoverable costs.

(2) The court will make an order for the party who made the claim to be paid the lesser of—

(a) the fixed recoverable costs; and
(b) the assessed costs.

Costs of the costs-only proceedings or the detailed assessment

45.29L.—(1) Where—

(a) the court makes an order for costs in accordance with rule 45.29J(3); or
(b) rule 45.29K applies,

the court may—

(i) decide not to award the party making the claim the costs of the costs only proceedings or detailed assessment; and

(ii) make orders in relation to costs that may include an order that the party making the claim pay the costs of the party defending those proceedings or that assessment."

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