CIVIL PROCEDURE NEWS

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CPR rr.27.14 & 52.9A. District judge refusing application by claimant (C) to reallocate claim from small claims track to fast track. Circuit judge dismissing C's appeal against the district judge's order. Court of Appeal dismissing C's second appeal, for which permission granted on basis that it raised an important point of practice ([2014] EWCA Civ 872). On matter of the costs of the second appeal, **held**, making no order for costs, (1) rule 27.14(2) states that, in claims allocated to the small claims track, the court may not (subject to exceptions not applicable) order a party to pay a sum to another party in respect of that other party's costs, including costs "relating to an appeal", (2) that provision is not restricted to "first" appeals to a circuit judge and precluded the Court from making an order for costs against C (or in favour of the respondent defendant) in the instant case, (3) r.52.9A confers power on an appeal court to limit costs of an appeal, but it does not confer power to award costs where there is a provision in the CPR (such as r.27.14(2)) precluding a costs order. (See ***Civil Procedure 2014*** Vol. 1 paras 27.14.1.1 & 52.9A.1.)

■ **CARY v COMMISSIONER OF POLICE OF THE METROPOLIS** [2014] EWCA Civ 987, July 17, 2014, CA, unrep. (Arden, Christopher Clarke L.J. & Barling J.)

Discrimination proceeding –selection and appointment of assessor

CPR rr.2.5(1) & 35.15, Practice Direction 35 para.10, County Courts Act 1984 s.63, Equality Act 2010 s.114(7), Equality Act (Sexual Orientation) Regulations 2007 (SI 2007 No. 1263) reg.3(1), Practice Direction (Proceedings Under Enactments Relating to Equality) para.3. Individual (C) bringing proceedings against police (D) for same sex sexual orientation discrimination (alleged to have been perpetrated when he made to D a complaint of homophobic abuse by his female neighbour). County court judge directing that claim should be heard by a circuit judge and an assessor. Court appointing a person (X) to act as assessor in the proceedings. On first day of trial, C objecting to appointment of X on grounds (1) that there had been no compliance with para.10.1 of PD 35, and (2) that X did not have (within the meaning of s.63(1)) skill and experience in the matter to which the proceedings related, in particular, that X did not have specific experience and expertise in relation to issues of discrimination on the grounds of same sex sexual orientation. Judge dismissing application. **Held**, dismissing C's appeal, (1) the critical question in this case was whether the required assessor had to be someone with specific experience and expertise in relation to same sex sexual orientation discrimination as opposed to any other form of discrimination, (2) the test applicable to all forms of discrimination is that the assessor should be a person of skill and experience "in the matter to which the proceedings relate" (s.63(1)), (3) it would be wrong to lay down a rule to the effect that assessors must have specific expertise in relation to the type of discrimination at issue, without which they are necessarily unqualified to act, (4) in some cases it may well be necessary for an assessor to have a particular expertise, but in the instant case the value of the assessor having specific experience in same sex orientation discrimination would be limited, (5) on the material available to the judge it was open to her to come to the conclusion that X was an appropriate assessor. Court explaining that, although notification of the parties by the court (in accordance with para.10(1)) may be a formal or administrative act within the meaning of r.2.5(1) which can be carried out by court staff, the appointment of an assessor is not and requires a decision by a judge. Court noting that, in the instant case, the process by which X came to be selected and appointed was unclear and giving guidance for practice and procedure to be followed by court and parties for the selection and appointment of assessors in discrimination cases under the 2010 Act. ***Ahmed v University of Oxford*** [2002] EWCA Civ 1907, [2003] 1 W.L.R. 995, CA, ref'd to. (See further "In Detail" section of this issue of CP News.) (See ***Civil Procedure 2014*** Vol. 1 paras 2.5.3, 35.15.2 & 35PD.10, and Vol. 2 paras 3I-6.3, 3I-78 & 9A-539.)

■ **DENTON v T H WHITE LTD** [2014] EWCA Civ 906, July 4, 2014, CA, unrep. (Lord Dyson M.R., Jackson & Vos L.JJ.)

Procedural sanctions taking effect–applications for relief from–correct approach

CPR rr.1.1, 1.3, 3.8 & 3.9. Judges refusing claimants relief from procedural sanctions, in one case, for failures to file costs budget in time and to give court timely notice of outcome of negotiations, and in a second case, for failure to pay court fee by particular date. In a third case, judge granting a claimant relief from sanction imposed for failure to serve witness statements in time. Appeals to the Court of Appeal, by the claimants in the first and second

cases, and by the defendants in the third, conjoined. **Held**, allowing all three appeals, (1) a judge should deal with an application for relief from procedural sanction in three stages by (a) identifying the non-compliance for which the sanction was imposed and assessing the seriousness and significance of it, (b) considering the reasons for the occurrence of the non-compliance (was there good reason for the breach?), and (c) evaluating all the circumstances of the case, including the two matters (factors (a) and (b)) referred to in r.3.9(1), (2) factors (a) and (b) are of particular importance and should be given particular weight at the third stage (cf Jackson L.J. at para.85), (3) an application for relief will not automatically fail where the breach was serious and significant and there was no good reason for it, (4) in a case where (a) the failure can be seen to be neither serious nor significant, (b) where a good reason is demonstrated, or (c) where it is otherwise obvious that relief from sanctions is appropriate, parties should agree that relief from sanctions be granted without the need for further costs to be expended on applications to the court, (4) heavy costs sanctions should be imposed on parties who behave unreasonably in refusing to agree extensions of time or unreasonably oppose applications for relief from sanctions. Authorities on r.3.9 and criticisms thereof examined and explained. ***Mitchell v News Group Newspapers Ltd (Practice Note)*** [2013] EWCA Civ 1537, [2014] 1 W.L.R. 795, CA, ***Durrant v Chief Constable of Avon and Somerset Constabulary*** [2013] EWCA Civ 1624, [2014] 2 All E.R. 757, CA, ref'd to. (See further "In Detail" section of this issue of CP News.) (See ***Civil Procedure 2014*** Vol. 1 paras 1.3.2, 1.3.3, 3.9.4, 3.9.5 & 3.9.6.)

■ **FUTURE NEW DEVELOPMENTS LTD v B&S PATENTE UND MARKEN GMBH** [2014] EWHC 1874 (IPEC), June 9, 2014, unrep. (Judge Hacon)

IPEC claim–challenging jurisdiction–entering an appearance

CPR rr.11 & 63.11, Council Regulation (EC) 44/2001 ("the Brussels I Regulation") art.24, Patents Act 1977 s.37, Patents Rules 2007 rr.78 & 83. C filing reference in UK IPO under s.37 claiming entitlement to European patent of which a company (D) domiciled in Germany registered as proprietor. D engaging in the proceedings and in counterstatement fully responding to C's statement of grounds, in particular contending that the patent had been lawfully assigned to them by C. After a hearing in which both parties participated, Hearing Officer declining to deal with the reference, concluding (as D had urged) that the case was of a nature that it would be better heard by the Patents Court or the IPEC. Thereupon, C issuing claim form in the IPEC claiming entitlement to the patent and D filing acknowledgment of service and indicating its intention to challenge the jurisdiction of the court. By application notice D applying under r.11 for declaration that the court had no jurisdiction to hear the dispute and an order setting aside the claim form. **Held**, dismissing the application, (1) the jurisdiction of the IPEC is governed by the Judgments Regulation, (2) under art.24, "a court of a Member State" (subject to exceptions not applicable in this case) before which a defendant "enters an appearance" shall have jurisdiction, (3) under art.24 the rules according to which a party "enters an appearance" are those governing proceedings in the court of the Member State concerned, (4) "the courts of the Member State" in arts 2, 5, 6 and "a court of a Member State" in art.24 encompass any tribunal of the relevant Member State, or tribunal of a place within the Member State as the case may be, which may lawfully hear the proceedings, (5) accordingly, the IPO is a "court of a Member State" within art.24 and, further, in proceedings before the IPO a party can "enter an appearance" within the meaning of that article, (6) although r.11 does not apply to proceedings before the IPO, under procedural rules governing such proceedings there are provisions by which a party may challenge the IPO's jurisdiction, (7) D entered an appearance before the IPO, and their conduct before the IPO, objectively assessed, could only be interpreted as indicating a willingness to have the dispute heard in England, initially by the IPO and subsequently by the Patents Court or the IPEC, (8) in making that assessment, reservations with respect to jurisdiction made by D in the IPO proceedings (which were equivocal and conditional) had to be taken into account but were not determinative. ***Global Multimedia International Limited v ARA Media Services [2006] EWHC 3612 (Ch),*** [2007] 1 All E.R. (Comm) 1160, ***Maple Leaf Macro Volatility Master Fund v Rouvroy*** [2009] EWHC 257 (Comm), [2009] 1 Lloyd's Rep. 475, ***Antonio Gramsci Shipping Corp v Recoletos Ltd [2012] EWHC 1887 (Comm), [2012] 2 Lloyd's Rep. 365, ref'd to.*** Discussion of extent to which a party is entitled to dispute the jurisdiction of the court and simultaneously take one or more steps in the proceedings inconsistent with its challenge to the jurisdiction, in particular, a step relating to the decision on the merits. (See ***Civil Procedure 2014*** Vol. 1 para.11.1.1, and Vol. 2 paras 2F-12, 2F-17.10.0 & 5-272.)

■ **HOLLOWAY v TRANSFORM MEDICAL GROUP (CS) LTD** [2014] EWHC 1641 (QB), May 20, 2014, unrep. (Thirlwall J.)

GLO group register–expiry of specified date–application for permission to add claim

CPR rr.1.2, 3.9, 19.11 & 19.13. Court making Group Litigation Order for handling of claims brought by women against medical clinics for loss and damage arising out of breast augmentation surgery. Defendants resisting claims and bringing claim for indemnity against suppliers of implants. On October 24, 2012, judge managing the claims making

orders, including direction under r.19.13(e) specifying April 8, 2013, as the date ("cut-off date") after which no claim may be added to the group register (established by the GLO) unless the court gave permission. By application dated January 10, 2014 (and lodged with the court on February 4) 13 women applying to be added to the group register, and by application dated February 11 (and lodged on that date) a further four women making similar application. All 17 women represented by a firm of solicitors (who represented numerous claimants already on the register) which went into administration in May 2013 and which was acquired by an LLP in June 2013 who represented them thereafter. One defendant, against whom 14 of the 17 women proposed to bring claims, and the suppliers resisting the applications. **Held**, dismissing the applications, (1) the applicants' solicitors (a) knew of the cut-off date when it was made in October 2012, (b) decided to proceed with the applicants' claims in December 2013, but (c) made no attempt to get those claims on to the register before February 2014 and made no attempt on the applicants' behalf to extend the date before it expired, (2) the purpose of a cut-off date is to secure the good management of the claims subject to the GLO, (3) although none of the applicants was, within r.3.8, a "party" who "had failed to comply with a court order", the direction that they could not join the GLO without permission was a "sanction" and relief from it had to be determined in accordance with r.3.9, (4) the solicitors had failed without good reason to comply with the cut-off date, (5) whether the applications were considered under r.3.9, or simply as applications for the permission referred to in r.19.13(e), which necessarily would have to be determined by the court in a manner which gave effect to the overriding objective (r.1.2), they were hopeless. ***Taylor v Nugent Care Society*** [2004] EWCA Civ 51, [2004] 1 W.L.R. 1129, CA, ***Mitchell v News Group Newspapers Ltd (Practice Note)*** [2013] EWCA Civ 1537, [2014] 1 W.L.R. 795, CA, ***Chartwell Estate Agents Ltd v Fergies Properties*** [2014] EWCA Civ 506, April 16, 2013, CA, unrep., ref'd to. (See ***Civil Procedure 2014*** Vol. 1 paras 3.9.1 & 19.13.1.)

■ **MCWILLIAM v NORTON FINANCE (UK) LTD** [2014] EWCA Civ 818, May 15, 2014, CA, unrep. (Maurice Kay & Floyd L.JJ.)

Order dismissing appeal by consent–appeal court's power to revoke–re-opening final determination of appeal

CPR rr.3.1(7) & 52.17, Practice Direction 52A para.6. Individuals (C) bringing claim in a county court against finance company (D) for mis-selling of payment protection insurance. Trial judge dismissing claim. On October 11, 2011, single lord justice granting C permission to appeal. Hearing of appeal fixed for March 15, 2012, but on February 7, 2012, D going into administration. On April 12, 2012, upon receipt of request signed by solicitors for both parties, Court of Appeal ordering that C's appeal be dismissed by consent. In January 2013, D entering creditors' voluntary liquidation. In 2014, C applying to Court of Appeal under r.52.17 for permission to re-open the appeal (a course which the joint liquidators would not oppose), alternatively, under r.3.1(7) for an order revoking the order of April 12, 2012 (to which the joint liquidators would consent). **Held**, held granting alternative application, (1) the case for inviting the Court under r.3.1(7) to revoke its previous order by consent was reasonably compelling and in the circumstances it was appropriate to set the order aside and to allow the appeal to proceed, (2) under r.52.17 the Court may re-open a "final determination" of any appeal (including an application for permission to appeal), (3) a final determination is an adjudication of an appeal "finally on its merits", (4) in the instant case, r.52.17 did not apply because (a) the dismissal of C's appeal by consent was not such an adjudication and (b) there was available (in the form of an order under r.3.1(7)) an "alternative effective remedy" (within the meaning of r.52.17(1)(c)). Court explaining that, upon D's going into administration, C ought to have sought an order staying their appeal pending the end of the administration. ***Taylor v Lawrence*** [2002] EWCA Civ 90, [2003] Q.B. 538, C.A., ref'd to. (See ***Civil Procedure 2014*** Vol. 1 paras 3.1.7 & 52.17.2, 52APD.12.)

■ **PAGE v CHAMPION FINANCIAL MANAGEMENT LTD** [2014] EWHC 1778 (QB), June 6, 2014, unrep. (Simon Picken QC)

Default judgment against defendant–co-defendant's application to set aside

CPR rr.3.3, 12.8 & 13.3, Financial Services and Markets Act 2000 s.39. Company (D1) (an appointed representative) entering into an agreement meeting the requirements of s.39(1) with another company (D2) (an authorised person) with result that D1 enabled to provide financial services though not authorised under the 2000 Act regulatory regime. By virtue of s.39(3), D2 (as D1's principal) responsible for D1's acts and omissions. Individual (C) engaging services of D1 for purpose of making investments in film and recording ventures. On January 11, 2013, C issuing claim form bringing action "for professional negligence" against D1 and D2 and other defendants (against whom C subsequently decided not to proceed). C claiming damages for losses as a result of inappropriate advice given to him in relation to the investments. D1 not acknowledging service or serving defence. D2 serving defence denying liability, in particular contending that the services provided to C were executionary only and not advisory. On August 2, 2013, C obtaining default judgment against D1 under r.12.3. At CMC, where D2 submitted that, in bringing his s.39(3) claim against D2, C had to prove D2's negligence and it was not sufficient for C to rely on the default judgment against D1, Master

directing trial of preliminary issue as to the operation and effect of s.39. Parties filing amended pleadings and agreeing on a re-formulation of the issue. D2 applying under r.13.3 to set aside the default judgment against D1. **Held**, (1) on the preliminary issue, accepting D2's submissions, (a) it was common ground that, as D2 were not in a relationship of privity with D1, the doctrine of res judicata did not apply, (b) the court will strive to avoid inconsistent judgments, but none of the relevant authorities supports the existence of an over-arching principle that, in a case such as the present, a defendant "should be stuck" with a default judgment obtained against a co-defendant, (c) in principle, a default judgment obtained against one defendant (here D1), does not preclude another defendant in the same proceedings (here D2), from advancing by way of defence to a claim against it (i.e. against D2), a case which is inconsistent with the default judgment obtained against (i.e. against D1), (d) accordingly, D2 had the right to defend the claim against it on the grounds that D1 was neither negligent nor guilty of any breach of contract, and (2) on D2's application to set aside the default judgment, (a) in the light of the holdings as to the principles, because the claim against D1 (the claim in relation to which default judgment was obtained) was one which could be dealt with separately from the claim against D2, the former claim fell within para.(a) of r.12.8(2) and not within para.(b) thereof, (b) accordingly, D2's submission that the default judgment ought not to have been granted had to be rejected, however (c) had it been necessary to decide the matter, despite some lack of promptness on D2's part, it would have been a proper exercise of discretion under r.13.3 for the court to set aside the default judgment. ***In re Kitchen, Ex p Young*** (1881) 17 Ch D 668, ***Kok Hoong v Leong Cheong Kweng Mines Ltd*** [1964] A.C. 993, PC, ***Yates v Elaby*** November 17, 2003, unrep., ***Otkritie International Investment Management Ltd v Urumov*** [2012] EWHC 890 (Comm), March 1, 2012, unrep., ***Mid-East Sales Ltd v United Engineering and Trading Co (PVT) Ltd*** [2014] EWHC 1457 (Comm), May 9, 2014, unrep., ref'd to. ***(See Civil Procedure 2014*** Vol. 1 paras 12.3.2, 12.8.1, 13.3.1 & 13.3.3.)

■ **R. (GRACE) v SECRETARY OF STATE FOR THE HOME DEPARTMENT** [2014] EWCA Civ 1091, The Times July 14, 2014, CA (Lord Dyson M.R., Maurice Kay & Sullivan L.JJ.)

Judicial review–refusal of permission to proceed–application "totally without merit"

CPR rr.1.1, 3.11, 23.12, 52.3(4A), 54.4 & 54.12(7), Human Rights Act 1998 Sch. 1 Pt I art.8. Ten years after entering UK illegally, individual (C) applying to Secretary of State (D) for leave to remain. D refusing the application. C commencing judicial review claim challenging D's decision. D acknowledging service and giving grounds for resisting the application. On paper, High Court judge, (1) dismissing C's application for permission to proceed, and (2) in order (a) stating that D's decision was "not an arguable interference" with C's art.8 rights, and (b) having concluded that C's application was "totally without merit", recording that fact (r.23.12). On C's application to Court of Appeal for permission to appeal, single lord justice refusing permission on grounds raising issues under the Immigration Rules and art.8, but granting permission on ground raising issue on meaning of "totally without merit" (TWM). On appeal, C submitting that, on an application for permission to proceed under r.54.12, a finding of TWM should not be made unless the claim is so hopeless or misconceived that a civil restraint order would be justified if such application were persistently made. **Held**, dismissing appeal, (1) the effect of a court's recording, when dismissing an application to proceed under r.54.4, of the fact that the application was TWM is that the applicant may not then request a re-consideration of the application at a hearing (r.54.12(7)), (2) the purpose of that procedural bar is to root out claims which are "bound to fail" and that is the test which a judge should apply when considering whether to record a finding of TWM when dismissing an application under r.54.4, (3) in those circumstances it is not necessary for it to be shown that the application is abusive or vexatious, (4) the procedure it is consistent with the overriding objective and does not detract from the vital constitutional importance of the judicial review jurisdiction. ***Perotti v CollyerBristow*** [2004] EWCA Civ 639, [2004] 4 All E.R. 53, CA, ***Sengupta v Holmes*** [2002] EWCA Civ 1104, The Times August 19, 2002, CA, ref'd to. (See ***Civil Procedure 2014*** Vol. 1 paras 23.12.2, 52.3.8.1 & 54.12.1.)

■ **VAPENIK v THURNER (CASE C-508/12)** [2014] 1 W.L.R. 2486, E.C.J. (9th Ch)

European Enforcement Order–requirements for certification

CPR r.74.28, Regulation (EC) No. 805/2004 (European Enforcement Order for uncontested claims) art.6. Creditor domiciled in Austria, bringing action in Austrian court seeking an order that the debtor, who was domiciled in Belgium, pay a debt resulting from a loan agreement between the parties. Creditor obtaining judgment by default and then applying for certification of that judgment as an EEO. Court refusing that application but referring to ECJ for preliminary ruling question whether art.6(1)(d) is to be interpreted as applying only to contracts between business persons as creditors and consumers as debtors, or whether it is sufficient for at least the debtor to be the consumer for the provision also to apply to claims of a consumer against another consumer. Court **ruling** (1) in art.6 (Requirements for certification as a EEO) para.(1)(d) states that a judgment on an uncontested claim delivered in a Member State shall, upon application at any time to the court of origin, be certified as a EEO if the judgment was given in the Member State of the debtor's domicile in cases where (i) a claim is uncontested within the meaning of article 3(1)(b) or (c), and (ii) it relates to a contract concluded by a person, the consumer, for a purpose which can be regarded

as being outside his trade or profession, and (iii) the debtor is the consumer, (2) art.6(1)(d) must be interpreted as meaning that it does not apply to contracts concluded between two persons who are not engaged in commercial or professional activities. Court explaining that, as the aim of the relevant provisions of EU law is to compensate for the imbalance between parties in contracts concluded between a consumer and a professional, their application cannot be extended to persons with respect to whom that protection is not justified. ***Shearson Lehmann Hutton Inc. v TVB Treuhandgesellschaft fur Vermogensverwaltung und Beteiligungen mbH (Case C-89/91)***, [1993] E.C.R. I-139, ref'd to. (See ***Civil Procedure 2014*** Vol. 1 para.74.28.1, and Vol. 2 para.5-357+.)

■ **WAGENAAR v WEEKEND TRAVEL LTD** [2014] EWCA Civ 1105, July 31, 2014, CA, unrep. (Laws, Floyd & Vos L.JJ.)

Qualified one-way costs shifting rule –effect on court's statutory discretion as to cost –application to additional claim for contribution

CPR rr.20.2, 44.2, 44.13 & 44.14; Senior Courts Act 1981 s.51. Individual (C) entering into package holiday contract with travel company (D). Whilst on the holiday in France, on March 8, 2007, C injured in skiing accident. On basis that, under the contract D were liable to her, C bringing claim for personal injuries against D. C's claim funded by a legal expenses insurance policy. D joining C's ski instructor (X) as an additional party and bringing claim for indemnity and contribution against her. On September 19, 2013, in written judgment, trial judge, on trial of issue of liability as preliminary issue, dismissing C's claim against D and D's claim against X. On costs, judge (1) ordering (a) that C should pay D's costs, and (b) that D should pay X's costs, but (2) further ordering, applying the qualified one-way costs shifting (QOCS) provisions of Section II of Part 44 (coming into effect on April 1, 2013), that neither order was to be enforced. On appeals by D and by X, **held** (1) dismissing D's appeal, (a) the court's "full power to determine by whom and to what extent the costs are to be paid" (s.51(3)) is to be read subject to the power of the rule committee to make rules of court applicable to particular circumstances concerning the availability of an award of costs, the amount of such costs, and the exercise of the court's discretion in relation to costs, and (b) the QOCS provisions are rules that the rule committee were fully empowered to make and were not ultra vires, but (2) allowing X's appeal (a) the QOCS provisions apply "to proceedings which include" a claim for damages for personal injuries (r.44.13(1)(a)), (b) those provisions (i) concern claimants who are themselves making a claim for personal injuries in proceedings (whether in the claim itself, a counterclaim or an additional claim and whether exclusively or together with other claims), but (ii) do not apply to the entire action in which such a claim for personal injuries is made, accordingly (iii) the judge was wrong to hold that they applied to the indemnity and contribution proceedings between D and X, (iv) the fact that the additional claim (in which the parties were disputing responsibility for the payment of damages) was made within proceedings which included a claim for damages for personal injuries did not relieve D of the obligation to pay X's costs, (b) in the circumstances there was no reason why the normal "costs follow the event" provisions of r.44.2(2)(a) should not apply and that the order that D should pay X's costs be enforceable (See further "In Detail" section of this issue of CP News.) (See ***Civil Procedure 2014*** Vol. 1 para.44.13.1, and Vol. 2 paras 9A-201, 9A-202 & 12-4.)

Statutory Instruments

■ **CIVIL PROCEDURE (AMENDMENT NO.6) RULES 2014** (SI 2014/2044)

CPR Parts 35, 36, 45, 52, 57, 65 & 83. Make amendments (1) to Part 35, Part 36 and Part 45 (subject to a transitional provision) to provide for fixed costs in relation to medical reports in relation to certain claims started under the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents, (2) to Part 52 to make separate provision for judicial review appeals from the Upper Tribunal (r.52.15A) and for the providing of transcripts at public expense (r.52.5A), (3) to Part 57 to make provision (a) for proceedings commenced under the Inheritance (Provision for Family Dependants) Act 1975 before grant of representation has been obtained (r.57.16(3A)), and (b) for application for presumed death etc under the Presumption of Death Act 2013 (rr.57.17 to 57.23), (4) to Part 65 to make provision for injunctions under the Anti-social Behaviour, Crime and Policing Act 2013 Pt 1, and (5) to Part 83 for purpose of rectifying a practical problem that had arisen in the application of r.83.6. In addition make some other minor amendments. Coming into force on October 1, 2014. Transitional provision (in r.14) relating to the amendments made to Parts 35, 36 and 45 states that they apply only to soft tissue injury claims under the RTA Protocol where the claim notification form was sent on or after that date. (See further "CPR Update" section of this issue of CP News.) (See ***Civil Procedure 2014*** Vol. 1 paras 35.4, 36.10A, 36.14, 36.14A, 45.19, 45.29F, 45.29I & 52.15.***)***

■ **CIVIL PROCEEDINGS FEES (AMENDMENT NO.2) ORDER 2014** (SI 2014 No. 1834)

Civil Proceedings Fees Order 2008. Amends Sch.1 to increase fee 3.5 (Companies Acts application other than one brought on petition and where no other fee is specified) from £160 to £280, and (as corrected by SI 2014/2059) to correct error in SI 2014/874 in relation to fee 8.1 (Count Court enforcement by warrant of control) thereby fixing fee 8.1(a) at £70 and fee 8.1(b) at £100. Also amends Sch. 2 to correct definition of benefits that are excluded when determining whether to grant fee remission. (See ***Civil Procedure 2014 Third Supplement*** paras 10-7 & 10-8.)

Practice Directions

■ **PRACTICE DIRECTION 2D–REFERENCES IN THE RULES TO ACTIONS DONE BY THE COURT** (CPR Update 75 (July 2014))

CPR Part 2. Announces that where, in amendments to Rules providing "for an action to be done by the court" coming into force on or after October 1, 2014, whether inserting a new provision or altering an existing one, such amendments will generally provide (for the purpose of making it clearer that an obligation lies with the court) that the court "must" do the action rather than "will" do the action. The meaning of "will" and "must" in the Rules before October 1, 2014, is unaffected by this announcement.

■ **PRACTICE DIRECTION 2C–STARTING PROCEEDINGS IN THE COUNTY COURT** (CPR Update 74 (July 2014)).

CPR rr.7.1, 8.1, 23.2 & 30.2. Applies to proceedings in the County Court. Provides an overview (together with references to relevant rules, practice directions and enactments) of those claims or applications which must be started, or, in some cases, heard, in particular County Court hearing centres, or which may be sent or transferred to another hearing centre if started elsewhere. Distinguishes claims or applications that may be started in any County Court hearing centre from those that must be started in a particular hearing centre (paras 2 & 3). Refers to rules and practice directions under which claims or applications not started in an appropriate hearing centre will be sent or transferred to the appropriate hearing centre (para.4). Provides that where a Part 8 claim is given a hearing date, the court may direct that proceedings should be transferred to another hearing centre if appropriate to do so (para.6). States general rule that an application must be made to County Court hearing centre where the claim was started and provides details of exceptions to that rule (para.7). Also includes a directory (para.8 and Schedule) which identifies each County Court hearing centre and, where appropriate, provides additional information about them. In force July 31, 2014. (See ***Civil Procedure 2014*** Vol. 1 paras 7.1.1, 8.1.1, 23.2.1, 30.0.2 & 30.2.1, and Vol. 2 para.AP-9.)

■ **PRACTICE DIRECTION 51I–THE COUNTY COURT AT LONDON MULTI-TRACK PILOT SCHEME** (CPR Update 75 (July 2014))

CPR rr.26.2A, 26.3 & 51.2. Provides for a pilot scheme in respect of money claims issued at the County Court Business Centre and the County Court Money Claims Centre for period October 1, 2014, to September 30, 2015. Modifies r.26.2A (Transfer of money claims within the County Court) to enable certain claims to be sent to the County Court at Central London. (See ***Civil Procedure 2014*** Vol. 1 para.26.2A.1.)

■ **PRACTICE DIRECTION 57B–PROCEEDINGS UNDER THE PRESUMPTION OF DEATH ACT 2013** (CPR Update 75 (July 2014))

CPR rr.57.19, 57.21 & 57.22. Supplements Section V of CPR 57 as enacted by the Civil Procedure (Amendment No.6) Rules 2014 (SI 2014/2044), in particular supplementing r.57.19 (Procedure for claims for a declaration of presumed death or a variation order), r.57.21 (Advertisement of claim) and r.57.22 (Interveners). In force October 1, 2014. (See ***Civil Procedure 2014*** Vol. 1 para.57PD.19.)

In Detail

RELIEF FROM PROCEDURAL SANCTIONS

In *Denton v T H White Ltd,* [2014] EWCA Civ 906, July 4, 2014, CA, unrep., the Court of Appeal dealt with three conjoined appeals in which it was argued that judges had erred in the manner in which they dealt with applications for relief from procedural sanctions under CPR r.3.9. That rule states that on an application for relief from any sanction 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 (these latter hereinafter "factors (a) and (b)").

The Court (Lord Dyson M.R., Jackson & Vos L.J.) noted that the guidance given by the Court, in its decision in *Mitchell v News Group Newspapers Ltd (Practice Note)* [2013] EWCA Civ 1537, [2014] 1 W.L.R. 795, CA, as to the correct approach to the application of the rule had been the subject to criticism. (In the light of that, the Court invited the Bar Council and the Law Society to intervene in the appeals.) In giving the lead judgment in the appeal Vos L.J. explained (at para.21) that the principal criticisms may be summarised as follows:

"First, the 'triviality' test amounts to an 'exceptionality' test which was rejected by Sir Rupert Jackson in his report and is not reflected in the rule. It is unjustifiably narrow. Secondly, the description of factors (a) and (b) in rule 3.9(1) as 'paramount considerations' gives too much weight to these factors and is inconsistent with rule 3.9 when read in accordance with rule 1.1. They should be given no more weight than all other relevant factors. It is said that the *Mitchell* approach downplays the obligation to consider 'all the circumstances of the case, so as to enable [the court] to deal justly with the application'. Thirdly, it has led to the imposition of disproportionate penalties on parties for breaches which have little practical effect on the course of litigation. The result is that one party gets a windfall, while the other party is left to sue its own solicitors. This is unsatisfactory and adds to the cost of litigation through increases in insurance premiums. Fourthly, the consequences of this unduly strict approach have been to encourage (i) uncooperative behaviour by litigants; (ii) excessive and unreasonable satellite litigation; and (iii) inconsistent approaches by the courts."

The Court came to the conclusion that the judgment in *Mitchell* had been misunderstood and was being misapplied by some courts. The Court said that the guidance given at paras 40 and 41 of the judgment in that case "remains substantially sound", but conceded that, in view of the way in which it has been interpreted, it was clear that it needed to be clarified and amplified in certain respects (paras 3 & 24). To meet this need, the Court restated, in a little more detail, the approach that should be applied.

As is noted in the summary of this case given in the "In Brief" section of this issue of CP News, the Court said that a judge should adopt a three stage approach. In his judgment, Vos L.J. explained (para.24) that, at the third stage the judge, "is to evaluate 'all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b) in r. 3.9(1)]'". His lordship added that, although describing the two factors (a) and (b) in r.3.9(1) as being of "paramount importance" (as in *Mitchell* at para.36) may lead to confusion, those factors "are of particular importance and should be given particular weight at the third stage when all the circumstances of the case are considered" (para.32). In this last respect, Jackson L.J. took a different view. His lordship said (para.85):

"Rule 3.9 requires the court to consider all the circumstances of the case as well as factor (a) and factor (b). The rule does not require that factor (a) or factor (b) be given greater weight than other considerations. What the rule requires is that the two factors be specifically considered in every case. The weight to be attached to those two factors is a matter for the court having regard to all the circumstances. The word 'including' in rule 3.9 means that factors (a) and (b) are included amongst the matters to be considered. No more and no less."

In addition to restating the approach that judges should apply to applications under r.3.9, the Court gave more general guidance directed at judges and lawyers and designed to reduce the incidence of r.3.9 applications. Thus, the Court stated (at paras 42 to 44):

"42. It should be very much the exceptional case where a contested application for relief from sanctions is necessary. This is for two reasons: first because compliance should become the norm, rather than the exception as it was in the past, and secondly, because the parties should work together to make sure that, in all but the most serious cases, satellite litigation is avoided even where a breach has occurred.

43. The court will be more ready in the future to penalise opportunism. The duty of care owed by a legal representative to his client takes account of the fact that litigants are required to help the court to further the overriding objective.

Representatives should bear this important obligation to the court in mind when considering whether to advise their clients to adopt an uncooperative attitude in unreasonably refusing to agree extensions of time and in unreasonably opposing applications for relief from sanctions. It is as unacceptable for a party to try to take advantage of a minor inadvertent error, as it is for rules, orders and practice directions to be breached in the first place. Heavy costs sanctions should, therefore, be imposed on parties who behave unreasonably in refusing to agree extensions of time or unreasonably oppose applications for relief from sanctions. An order to pay the costs of the application under rule 3.9 may not always be sufficient. The court can, in an appropriate case, also record in its order that the opposition to the relief application was unreasonable conduct to be taken into account under CPR rule 44.11 when costs are dealt with at the end of the case. If the offending party ultimately wins, the court may make a substantial reduction in its costs recovery on grounds of conduct under rule 44.11. If the offending party ultimately loses, then its conduct may be a good reason to order it to pay indemnity costs. Such an order would free the winning party from the operation of CPR rule 3.18 in relation to its costs budget.

44. We should also make clear that the culture of compliance that the new rules are intended to promote requires that judges ensure that the directions that they give are realistic and achievable. It is no use imposing a tight timetable that can be seen at the outset to be unattainable. The court must have regard to the realities of litigation in making orders in the first place. Judges should also have in mind, when making directions, where the Rules provide for automatic sanctions in the case of default. Likewise, the parties should be aware of these consequences when they are agreeing directions. 'Unless' orders should be reserved for situations in which they are truly required: these are usually so as to enable the litigation to proceed efficiently and at proportionate cost."

APPOINTMENT OF ASSESSORS

Section 63(1) of the County Courts Act 1984 states that the judge may, in any proceedings, summon to his assistance in such manner as may be prescribed, one or more persons "of skill and experience in the matter to which the proceedings relate" who may be willing to sit with the judge and act as assessors (see White Book 2014 Vol. 2 para.9A-537). In proceedings to which s.114 of the Equality Act 2010 applies the power under s.63 must be exercised unless the judge is satisfied that there are good reasons for not doing so (ibid. para.3I-78).

Rule 35.15 (Assessors) applies where the court appoints one or more persons under s.63(1) (or under the Senior Courts Act 1981 s.70) (ibid Vol. 1 para.35.15), including where the appointment is made under s.114 of the 2010 Act (see Practice Direction (Proceedings Under Enactments Relating to Equality) para.5 (ibid Vol. 2 para.3I-6.3)). That rule says nothing about the actual process by which a judge may appoint an assessor. That is taken care of by para.10 of Practice Direction 35 (ibid Vol. 1 para.35PD.10). Paragraph 10.1 states that, not less than 21 days before making any such appointment, the court will notify each party in writing of the name of the proposed assessor, of the matter in respect of which the assistance of the assessor will be sought and of the qualifications of the assessor to give that assistance. Paragraph 10.2 states that where any person has been proposed for appointment as an assessor, any party may object to that person either personally or in respect of that person's qualification. Paragraph 10.3 states that any such objection must be made in writing and filed with the court within 7 days of receipt of the notification referred to in para.10.1 and will be taken into account by the court in deciding whether or not to make the appointment.

In *Cary v Commissioner of Police of the Metropolis* [2014] EWCA Civ 987, July 17, 2014, CA, unrep., an individual brought a claim in the County Court against the Metropolitan Police under the Equality Act (Sexual Orientation) Regulations 2007 alleging discrimination on the grounds of his same sex orientation. (For summary of that case, see "In Brief" section of CP News.) In giving the lead judgment in the appeal, Christopher Clarke (with whom Arden L.J. and Barling J. agreed) stated that, in the County Court in this case, the procedure for the appointment of an assessor "went badly awry" and for the purpose of ensuring that this should not happen again explained how the provisions referred to above should be applied (paras 61 to 69).

His lordship began by stating that it is desirable that in discrimination cases the court should, at an early stage, address the questions (a) whether there is any reason not to have one or more assessors, (b) in respect of what matter (or matters) the assistance of an assessor (or assessors) should be sought; (c) what sort of assessor that should be; and (d) his or her identity (para.62). In their preparation for trial the parties should consider these four questions and, if possible, reach agreement on all or some of them. In any event they should be in a position to make representations or suggestions to the court on each of these issues with appropriate reasoning related to the matters in issue in the particular case (para.63). When the court is considering directions for trial, if not before, the parties should apprise the court of the need to address the four questions. To the extent that there is agreement on any or all of those questions the matter can be put before the court for its approval (which must not be treated a foregone conclusion) (para.64).

His lordship then noted the terms of para.10.1 of Practice Direction 35 and stressed that it is important that the notification to the parties by the court of identity of the proposed assessor and of the other matters referred to in that provision should not be left to take place in, say, the two months before the trial, since if an objection under para.10.2 to the person proposed is upheld it will be necessary to select another assessor and give a new notification (para.65).

His lordship explained that, although notification (under para.10.1) of a proposed assessor may be a formal or administrative act within CPR r.2.5(1) which can be carried out by court staff, the appointment (under s.63(1)) of an assessor is not and requires a judicial decision. In his lordship's opinion the selection of a proposed assessor is also something that is required to be done by the judge, since it involves "a process of decision as to the matter in respect of which the assistance of the assessor will be sought and a tentative decision as to suitability" (para.69). (In the instant case, not only was no proper notice given of the appointment of an assessor, it was unclear whether the selection of the proposed assessor had been a judicial decision.)

Christopher Clarke L.J. recognised that, in a given discrimination case, it is in the selection of an appropriate assessor to propose and the notification of his or her qualifications that difficulty is likely to arise. His lordship stressed that selection of an assessor requires a case by case analysis of the matters in issue, what assistance is needed to address them, and who should provide it, and (without intending to be prescriptive) gave guidance as follows:

"66. … In selecting an assessor the court is entitled to seek assistance from any source that it may think valuable, including the parties, regional employment judges, the EHRC and others. I see no reason in principle why the County Court should not in many cases follow the procedure, said to be current, of contacting the relevant Regional Employment Judges to discuss a prospective appointment. The relevant Employment Judges are likely to be those for the regions in or relatively close to which the county court is located but there is no reason why inquiries cannot go further afield. For that purpose the Regional Employment Judge is likely to be assisted by receiving a summary of the particular issue in the case and a description of the matter(s) in respect of which the assistance of an assessor is needed. That may sufficiently appear from the case summary provided at the first CMC. In others something more specific may be called for. In many cases the 'matter' may be no more than assistance in understanding and evaluating evidence in relation to whether the discrimination complained of has taken place. In others something more specific may required. In any event the proposed appointee will need to provide a statement, whether in the form of a CV or otherwise, which shows his or her qualifications to act an assessor."

His lordship added that it was desirable that the parties should be told how the proposed assessor came to be put forward, even if that is only by recording to whom a request for a suitable person was made and with what response (para.68).

QUALIFIED ONE-WAY COSTS SHIFTING

As is well-known, innovative rules as to qualified one-way costs shifting ("QOCS") were introduced into the CPR by the Civil Procedure (Amendment) Rules 2013 (SI 2103/262) with effect from April 1, 2013; see Part 44, Section II (rr.44.13 to 44.17). Those rules were enacted as part of several measures made necessary by the abolition of recoverable success fees and ATE premiums (see White Book 2014 Vol. 1 para.44.0.5). They were considered by the Court of Appeal in *Wagenaar v Weekend Travel Ltd*, [2014] EWCA Civ 1105, July 31, 2014, CA, unrep., a case in which counsel for the defendant submitted, amongst other things, that the QOCS provisions were *ultra vires*, alternatively, that they did not have retrospective effect. The Court of Appeal rejected both submissions. (For summary of this case see the "In Brief" section of this issue of CP News.)

Sub-section (1) of section 51(1) of the Senior Courts Act 1981 states that "the costs of and incidental to all proceedings … shall be in the discretion of the court", subject to the provisions of that Act or any other enactment and to rules of court. Sub-section (3) states that the court "shall have full power to determine by whom and to what extent costs are to be paid". As is explained in the White Book commentary, section 51 came into its present form as a result of amendments made by the Courts and Legal Services Act 1990 s.4(1), implementing recommendations made in the Report of the Review Body on Civil Justice (Cm. 394, 1988), in particular the recommendation that (subject to exceptions) there should be a single costs regime for the High Court and the county courts. Beforehand the effect of the section was examined and explained by Lord Goff in *Aiden Shipping Co Ltd v Interbulk Ltd*, [1986] 1 A.C. 965, HL (the decision that set the costs against non-parties hare running). In that case the House of Lords held that the discretionary power to award costs contained in section 51(1) was expressed in wide terms, leaving the rule-making authority to control its exercise by rules of court, if it saw it to do so, and the appellate courts to establish principles for its exercise.

In the instant case, counsel for the defendant submitted that, since its amendment in 1990, section 51 of the 1981Act did not allow the introduction by secondary legislation of a restriction on (as s.51(3) states) the court's "full power to determine by whom or to what extent the costs are to be paid". The Court held that the argument that section 51(3) must now be construed without the qualification that it is "subject to … rules of court", though ingenious, was wrong.

The distinction between legislation that is concerned with matters of substance and legislation that is concerned with matters of procedure is important in the law for a number of reasons. It is presumed that statutes creating, varying or modifying substantive rights have prospective effect only and cannot operate retroactively unless the legislating body enacts to the contrary. No such inhibition applies to enactments on matters of procedure unless substantive rights are adversely are affected. Indeed, as the Court stated in the instant case, legislation concerned with matters of procedure is to be construed as retrospective unless there is a clear indication that that was not the legislature's intention.

In dealing with the retrospectivity submission the Court of Appeal conceded that the effect of the QOCS provisions on the defendant company (who were the successful party in this case) had been unfortunate, since if the matter had been tried two months earlier, the costs consequences of the outcome of the litigation would have been quite different. Determining whether a particular enactment is or is not merely procedural (and therefore not subject to the inhibition) can be a difficult matter. In the instant case the Court had no doubt that the QOCS provisions were procedural and that there was nothing in them to indicate that they were not intended to be retrospective.

INSOLVENCY PROCEEDINGS PRACTICE DIRECTION

Insolvency proceedings fall outside the scope of the CPR. Such proceedings are subject to Practice Direction (Insolvency Proceedings), [2012] Bus. L.R. 643. That Practice Direction is found in para. 3E-01 et seq of Vol. 2 of White Book 2014. As the editorial note therein explains that Direction was published on February 23, 2013, and came into force on that date. It replaced all previous Practice Directions, Practice Statement and Practice Notes relating to insolvency proceedings.

That version of the Practice Direction has now, in turn, been replaced by a new Practice Direction made by the Chancellor, coming into effect on July 29, 2014. In para.2.1 it is stated, for the avoidance of doubt, that it does not affect Practice Direction 49B (Order under section 127 Insolvency Act 1986) (see White Book 2014 Vol. 2 para.2G-47). Whereas the 2013 version was divided into five Parts, the new edition is divided into six (a consequence of the insertion of an additional Part as Part 4 (see below)).

The Chief Bankruptcy Registrar of the High Court has explained that the principal changes are as follows.

The revised Practice Direction includes a table of contents (which follows the lead given by Professor Scott who first prepared one to give an overview of the 2012 Practice Direction when it was published in the White Book that year) which makes it easier to use.

Account has been taken of the move of the registrars' courts in London to the Rolls Building in Fetter Lane and of the creation of the single County Court.

The provisions relating to winding up petitions and their content (see in particular para.11.2) have been revised to take account of (a) petitions presented in respect of foreign companies and (b) changes made by the Companies Act 2006.

Further clarification has been given in relation to the complex provisions governing service.

A new Part Four contains a reminder about the need to comply with certain requirements of the Financial Markets and Insolvency (Final Settlement) Regulations 1999.

In response to user pressure, the requirements relating to the searches to be carried out before presenting a bankruptcy petition have been changed so as to allow a search to be conducted through the Land Registry rather than requiring searches to be made at a number of courts which could have jurisdiction in respect of a debtor. Increased court fees had made the old search requirements disproportionately expensive.

CPR Update

A. INTRODUCTION

The Civil Procedure (Amendment No.6) Rules 2014 (SI 2014/2044) were laid before Parliament on August 1, 2014, and come into effect on October 1, 2014. As the summary of this statutory instrument given in the "In Brief" section of this issue of CP News indicates, for a variety of purposes a number of rules in the CPR are amended and some new rules are added.

By CPR Update 75 (July 2014), changes are made to a number of CPR Practice Directions and to the Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents (the RTA Protocol), and two new Practice Directions are made. Some of those changes complement amendments made to rules by SI 2014/2044, but others (and the two new Practice Directions) arise for separate reasons.

By CPR Update 74 (July 2014), Practice Direction 2C (Starting Proceedings in the County Court) is added to CPR Part 2 (see summary in the "In Brief" section of this issue of CP News).

The effects of SI 2014/2044 on CPR rules, and of CPR Update 74 and CPR Update 75 on CPR Practice Directions, will be set out in Supplement 4 of White Book 2014 (due to be published on October 1) together with commentary putting them in context.

In what follows, the principal amendments made by SI 2014/2044 to CPR rules and the principal changes made by CPR Update 75 to CPR practice directions are outlined under headings B to F.

B. TRANSFER OF PROCEEDINGS

By SI 2014/2044, a new paragraph, para.(4), is added at the end of r.30.5 (Transfer between Divisions and to and from a specialist list). This new provision is confined in its effects to the transfer of proceedings between (1) the Chancery Division and (2) a Queen's Bench specialist list. It states that, although an application for an order transferring proceedings from or to the Chancery Division may be made to a judge, no order may be made without the consent of the Chancellor (the head of that Division). For practical reasons it was seen fit to make the Chancellor the arbiter. In a given case, various reasons may motivate a party's desire to have proceedings transferred from or to the Chancery Division. One may well be the effect that transfer would have on the application to the proceedings of the costs management provisions in Section II of Part 3.

C. RTA PROTOCOL "SOFT TISSUE INJURY CLAIMS"– RECOVERY OF "FIXED COSTS MEDICAL REPORT"

By CPR Update 75, changes are made to the RTA Protocol, principally for the purpose of introducing a new regime for the recovery of costs allowed for medical reports in claims to which the Protocol applies and which fall within the definition of "soft tissue injury claim" given in para.1.1(16A). (The definition includes claims where there is minor psychological injury secondary in significance to the physical injury.) The aim is to ensure that in such claims (1) the use and cost of medical reports is controlled, (2) in most cases only one medical report is obtained, (3) the medical expert is normally independent of any medical treatment, and (4) offers are made only after a fixed cost medical report has been obtained and disclosed. Under this new regime, "fixed cost medical report" is defined as a report in a soft tissue injury claim which is from a medical expert who, save in exceptional circumstances "(a) has not provided treatment to the claimant, (b) is not associated with any person who has provided treatment, and (c) does not propose or recommend that they [sic] or an associate provide treatment" (para.1.1(10A)).

The introduction of this special regime involved the amendment (by SI 2014/2044) of several CPR rules and (by CPR Update 75) of two practice directions whose provisions interact with the RTA Protocol (and which have done so since the Protocol was first brought into effect).

Rules affected are:

Rule 35.4 (Court's power to restrict expert evidence) (White Book 2014 Vol. 1 para.35.4, p 1145)

Rule 36.10A (Costs consequences of acceptance of Part 36 offer where Section IIIA of Part 45 applies) (White Book 2014 Vol. 1 para.36.10A, p 1203)

Rule 36.14 (Costs consequences following judgment) (White Book 2014 Vol. 1 para.36.14, p 1207)

Rule 36.14A (Costs consequences following judgment where Section IIIA of Part 45 applies) (White Book 2014 Vol. 1 para.36.14A, p 1211)

Rule 45.19 (Disbursements) (White Book 2014 Vol. 1 para.45.19, p 1452)

Rule 45.29I (Disbursements) (White Book 2014 Vol. 1 para.45.29I, p 1469)

Rule 14 of SI 2014/2044 states that these amendments apply only to soft tissue injury claims started under the RTA Protocol where the claim notification form is sent in accordance with that Protocol on or after October 1, 2014.

The principal amendments made by SI 2014/2044 are those made to r.45.19, where new paras (2A) to (2E) are added, and to r.45.29I, where new paras (2A) to (2E) are added. In both rules these new provisions are in identical terms. The amendments made to r.35.4, r.36.10A, r.36.14 and r.36.14A are largely consequential upon the enactment of those new paragraphs in r.45.19 and r.45.29I. In terms those paragraphs state as follows:

"(2A) In a soft tissue injury claim to which the RTA Protocol applies, the only sums (exclusive of VAT) that are recoverable in respect of the cost of obtaining a fixed cost medical report or medical records are as follows—

(a) obtaining the first report from any expert permitted under 1.1(12) of the RTA Protocol: £180;

(b) obtaining a further report where justified from one of the following disciplines—

(i) Consultant Orthopaedic Surgeon (inclusive of a review of medical records where applicable): £420;

(ii) Consultant in Accident and Emergency Medicine: £360;

(iii) General Practitioner registered with the General Medical Council: £180; or

(iv) Physiotherapist registered with the Health and Care Professions Council: £180;

(c) obtaining medical records: no more than £30 plus the direct cost from the holder of the records, and limited to £80 in total for each set of records required. Where relevant records are required from more than one holder of records, the fixed fee applies to each set of records required;

(d) addendum report on medical records (except by Consultant Orthopaedic Surgeon): £50; and

(e) answer to questions under Part 35: £80.

(2B) Save in exceptional circumstances, no fee may be allowed for the cost of obtaining a report from a medical expert who—

(a) has provided treatment to the claimant;

(b) is associated with any person who has provided treatment; or

(c) proposes or recommends that they or an associate provide treatment.

(2C) The cost of obtaining a further report from an expert not listed in paragraph (2A)(b) is not fixed, but the use of that expert and the cost must be justified.

(2D) Where appropriate, VAT may be recovered in addition to the cost of obtaining a fixed cost medical report or medical records.

(2E) In this rule, 'associate', 'associated with', 'fixed cost medical report' and 'soft tissue injury claim' have the same meaning as in paragraph 1.1(1A), (10A) and (16A), respectively, of the RTA Protocol."

Practice Directions affected by the development of the new provisions for RTA Protocol "soft tissue injury" claims are Practice Direction 8B (The RTA Protocol Stage 3 Procedure) and Practice Direction 16 (Statements of Case).

In Practice Direction 8B, after para.6.1 (Filing and serving of written evidence) (see White Book 2014 Vol. 1 para.8BPD.6, p 443) para.6.1A is inserted (and a consequential amendment is made to para.3.5). Paragraph 6.1A provides that, in a soft tissue injury claim, (1) the claimant may not proceed unless the medical report is a fixed cost medical report, and (2) where the claimant includes more than one medical report, the first report obtained must be a fixed cost medical report and any further report from an expert in any of disciplines referred to in para.2A(b) of r.45.19 and r.45.29I (se above) must also be a fixed cost medical report.

In Practice Direction 16 in para.4 (Personal injury claims) (see White Book 2014 Vol. 1 para.16PD.4, p 543) para.4.3A is inserted, in effect replicating para.6.1A of Practice Direction 8B.

The relevant transitional provision in CPR Update 75 states that the amendments made to these Practice Directions apply only to soft tissue injury claims started under the RTA Protocol where the claim notification form is sent in accordance with that Protocol on or after October 1, 2014.

D. PROBATE AND INHERITANCE

Section IV of CPR Part 57 contains rules relating to claim under the Inheritance (Provision for Family and Dependants) Act 1975, among them, r.57.16 (Procedure for claims under section 1 of the Act) (see White Book 2014 Vol. 1 para.57.1, p 2102). By SI 2014/2044, paras (3A) and (3B) were inserted in that rule. Amendments made to s.4 of the 1975 Act (by provisions in the Inheritance and Trustees' Powers Act 2014, implementing a Law Commission recommendation) enable proceedings to be commenced before a grant of representation has been obtained. Paragraphs (3A) and (3B) provide rules for the handling of claims made in those circumstances. The insertion of these paragraphs has not been attended by any amendments to Practice Direction 57.

As is explained in the commentary on r.57.16 (White Book 2014 Vol. 1 para.57.16.0.1), s.4 of the 1975 Act states that an application for an order under s.2 of that Act shall not, except with the permission of the court, be made after the end of the period of six months from the date on which representation with respect to the estate of the deceased is first taken out, and s.23 provides that, for the purposes of determining when representation with respect to the estate of a deceased person was first taken out, certain other grants (e.g. a grant limited to settled land or to trust property) are to be left out of account. By the 2014 Act (para.2 of Sch.3) s.23 has been amended for the purpose of removing uncertainty under the current law over whether the making of certain other types of grant to personal representatives counts as the first taking out of representation for these purposes.

In addition to making the amendments to s.57.16 referred to above, SI 2014/2044 adds to Part 57 a new Section, Section V (Proceedings under the Presumption of Death Act 2013) (rr.57.17 to 57.23). These rules provide for the procedure for applications for declarations of presumed death and related matters under the 2013 Act. The rules in Section V specifically engage rules in other CPR Parts, in particular Part 6, Part 8 and Part 40, and to an extent modify the effects of some of those rules. The rules in Section V are supplemented by directions in Practice Direction 57B (Proceedings Under the Presumption of Death Act 2013), made by CPR Update 75.

E. ANTI-SOCIAL BEHAVIOUR INJUNCTIONS

Section VIII of CPR Part 65 (Anti-social Behaviour and Harassment) contains rules relating to applications for injunctions under the Policing and Crime Act 2009 (see White Book 2014 Vol. 1 para.65.42 et seq, p 2167). The Section was amended by SI 2014/2044), so as to make provision for, in addition to applications for injunctions and other related proceedings under Pt 4 of the 2009 Act, similar proceedings under Pt 1 of the Anti–social Behaviour, Crime and Policing Act 2014.

In some respects the rules in Section VIII of Pt 65 and the statutory provisions in Pt 4 of the 2009 Act (see Vol. 2 para.3A–1719) and in Pt 1 of the 2014 Act (see Vol. 2 para.3A-1776) are closely connected and should be read together. In the 2009 Act Sch.5 (Injunctions: powers to remand) and Sch.5A (Breach of injunction: powers of court in respect of under-18s) are incorporated in Pt 4 (see Vol. 2 para.3A–1737). In the 2014 Act Sch.1 (Remands under ss.9 and 10) and Sch.2 (Breach of injunction: powers of court in respect of under-18s) are incorporated in Pt 1 (see Vol. 2 para.3A-1836).

Provisions supplementing Section VIII are found in Section I of Practice Direction 65, as amended by CPR Update 75 (July 2014) to take account of the application of rules in Section VIII of Part 65 to proceedings under Pt I of the 2014 Act. The most substantial of the 2014 amendments is para.1A which comes into force together with s.18 of the 2014 Act (see below) and which states the practice to be followed where proceedings under Pt 4 of the 2009 Act or Pt 1 of the 2014 Act which were commenced in a youth court are transferred to the High Court or the County Court after the respondent attained the age of 18.

Section 18(1) of the 2014 Act states that rules of court may provide that an appeal from a decision of the High Court, the County Court or a youth court (a) to dismiss an application for a injunction under section 1 of the Act made without notice being given to the respondent, or (b) to refuse to grant an interim injunction when adjourning proceedings following such an application, may be made without notice being given to the respondent. Section 18(3) states that rules of court may provide for the transfer of proceedings from the youth court to the High Court or the County Court (see further para.1A of Practice Direction 65 referred to above).

F. APPEALS

Various amendments are made to Part 52 (Appeals) by SI 2014/2044 and to Practice Directions supplementing that Part by CPR Update 75.

1. Transcripts at public expense

By SI 2014/2044) r.52.5A (Transcripts at public expense) is inserted in Part 52. The rule is designed to ensure a uniform practice for the providing of transcripts at public expense in appeals to the Civil Division of the Court of Appeal, the High Court and the County Court. By CPR Update 75 (July 2014) amendments are made to para.4.3 in Practice Direction 52B and to para.6.2 in Practice Direction 52C stating that any application for a transcript at public expense should be made in the appellant's notice.

2. Judicial review appeals

By SI 2014/2044, r.52.15 (Judicial review appeals) (see White Book 2014 Vol. 1 para.52.15, p 1894) is amended and, after that provision, r.52.15A (Judicial review appeals from the Upper Tribunal) is inserted in Part 52. In combination these amendments are made for the purpose of dealing with certain practical problems that have emerged in recent years.

The amendments made to r.52.15 are by way of a textual addition to para.(2) of the rule and an adjustment to para.(3). In addition the title is amended to read "Judicial review appeals from the High Court", thereby distinguishing the rule from new r.52.15A. Paragraph (1) of the rule states that, where permission to apply for judicial review has been refused at a hearing in the High Court, the person seeking that permission may apply to the Court of Appeal for permission to appeal. Paragraph (1A) states that where permission to apply for judicial review of a decision of the Upper Tribunal has been refused by the High Court, or where permission to apply for judicial review has been refused and recorded as totally without merit in accordance with r.23.12, (a) the applicant may apply to the Court of Appeal for permission to appeal and (b) the application will be determined on paper without an oral hearing.

As amended, para.(2) now reads (the new text is indicated in italics):

"(2) An application in accordance with paragraphs (1) or (1A) must be made within 7 days of the decision of the High Court to refuse to give permission to apply for judicial review *or, in the case of an application under paragraph (1A), within 7 days of service of the order of the High Court refusing permission to apply for judicial review."*

As amended, para.(3) reads that, on an application under paragraph (1) "or (1A)", the Court of Appeal may, instead of giving permission to appeal, give permission to apply for judicial review. Where the Court of Appeal gives permission to apply for judicial review in accordance with paragraph (3), the case will proceed in the High Court unless the Court of Appeal orders otherwise (para.(4)).

Paragraph (1) of new r.52.15A (Judicial review appeals from the Upper Tribunal) states that, where permission to bring judicial review proceedings has been refused by the Upper Tribunal and permission to appeal has been refused by the Upper Tribunal, an application for permission to appeal may be made to the Court of Appeal. Paragraph 3.3 of Practice Direction 52D, which has been substituted by CPR Update 75 (July 2014), states that, where the appellant wishes to appeal against a decision of the Upper Tribunal, the appellant's notice must be filed within 28 days of the date on which notice of the Upper Tribunal's decision on permission to appeal to the Court of Appeal is sent to the appellant. Paragraph (2) states that where an application for permission to bring judicial review proceedings has been recorded by the Upper Tribunal as being completely without merit and an application for permission to appeal is made to the Court of Appeal in accordance with para.(1) of the rule, "the application will be determined on paper without an oral hearing". In this respect, r.52.15A accords with r.52.15.

Paragraph (4) of r.52.3 (Permission) (see White Book 2014 Vol. 1 para.52.3, p 1847) states that, where the appeal court, without a hearing, refuses permission to appeal, the person seeking permission may request the decision to be reconsidered at a hearing. This is subject to para.(4A) of the rule which states that where a judge who refuses permission to appeal without a hearing considers that the application is "totally without merit", the judge may make an order that the person seeking permission may not request the decision to be reconsidered at a hearing. By the Civil Procedure (Amendment No.6) Rules 2014 (SI 2014/2044), para.(4) of r.52.3 is amended so that the rule stated in it is not only subject to para.(4A) but also applies "except where a rule or practice direction applies otherwise", and, as a consequence, by CPR Update 75, para.15(2) of Practice Direction 52C is also amended. This more general wording reflects the fact that there are existing provisions other than para.(4A) that qualify the rule (and perhaps anticipates that there may be others introduced in the future). As was indicated above, both para.(1A) of r.52.15 and para.(2) of r.52.15A have the effect of denying to an applicant for permission to appeal any right to an oral hearing. (Note also para.(7) of r.54.12 (Judicial review permission decision without a hearing), considered by the Court of Appeal in *R. (Grace) v Secretary of State for the Home Department* [2014] EWCA Civ 1091, and referred to elsewhere in this issue of CP News.)

3. Extradition appeals

Until October 1, 2014, the rules for appeals to the High Court against orders approving or refusing extradition made in the magistrates' courts or by the Secretary of State under the Extradition Act 2003 were the normal rules for appeals to the High Court as stated in Part 52 and supplemented by para.21.1 of Practice Direction 52D. As a result of amendments made by s.174 of the Anti-social Behaviour, Crime and Policing Act 2014 s.174 to the Civil Procedure Act 1997 s.1 and to the Courts Act 2003 s.68, with effect from that date appeals to the High Court in extradition cases were made subject to the Criminal Procedure Rules 2014 (SI 2014/1610) (in particular Part 17 thereof) with the result that appeal provisions in the CPR no longer apply in relation to the High Court's exercise of such jurisdiction. (Accordingly, para.21.1 was removed from Practice Direction 52D by CPR Update 75 (July 2014); the change entailed no amendment to rules in Part 52.) Extradition hearings in magistrates' courts are conducted before District Judges in accordance with rules in the Criminal Procedure Rules 2014. The advantage of the changes triggered by s.174 of the 2014 Act is that the whole extradition process including appeals to the High Court (albeit a civil and not a criminal process) is governed by the same set of procedural rules.

In CPR r.2.1 (Application of the Rules), para.(1) states that the CPR apply "to all proceedings in the High Court". Presumably, in due course extradition proceedings will be added to the exceptions to para.(1) set out in para.(2) of the rule.

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