APRIL 2013 RECENT CHANGES TO THE CPR

AN OVERVIEW

A depressing introduction

1. Thanks to the recent implementation of the Jackson reforms, your newly minted copies of the White Book 2013 arrived with a special supplement immediately amending large chunks of it. Even that is already out of date. The much touted Jackson Report and its recommendations have been re-written repeatedly by the Rules Committee as recently as last week. The first paragraph of the special supplement begins with the depressing warning that "*the following changes were made by a further Statutory Instrument (Civil Procedure (Amendment No.2) Rules (SI 515/2013)* [sic]*) and CPR Direction Update to the Civil Procedure (Amendment) Rules 2013 (SI 2013/262) and to CPR Update 60 contained in this special edition after this edition went to press*".

2. What that does not tell you is that there is a Civil Procedure (Amendment No.3) Rules (SI 2013/789), made on 2 April 2013, laid before Parliament on 4 April 2013, and coming into force on 30 April 2013 making yet further changes to the rules. There is also now a 61st and 62nd CPR update to join the major 60th update. Chaos may be too kind a word. The pressure is showing at Sweet & Maxwell because there are nonsensical errors in the special supplement which mangle the actual changes made by the secondary legislation. Be alert.

3. There are attached copies of :
    a. The Civil Procedure (Amendment) Rules 2013
    b. 60th update – practice direction amendments
    c. The Civil Procedure (Amendment No.2) Rules 2013
    d. The Civil Procedure (Amendment No.3) Rules 2013
    e. 61st update – practice direction amendments

    The first two are the important ones.

Word on the grapevine

4. A much touted aspect of the new costs regime is the court's power to control parties' budgets for recoverable costs of litigation. The recent re-writes have eroded the breadth of the new regime's application, at least for the time being. Under the first set of amendment

rules (SI 2013/262) under a new r.3.12 the new powers of costs management were going to apply to all multi-track cases commenced on or after 1 April 2013 in any county court or in the Chancery and Queen's Bench Division, with the exception of the Admiralty and Commercial Courts.

5. According to a senior source the Commercial Court, having been the significant source of very high cost cases which gave rise to the Jackson recommendations in the first place, oiled out of the new rules on the basis that its pool of court users were not sensitive to cost issues. Apparently the new Chancellor, Lord Justice Etherton, put his foot down at the notion of treating the Chancery Division and QB Division differently.

6. Presumably that stance was behind initial guidance circulated to the judiciary that the exclusion would for the time being include "similar commercial transaction claims" issued in the Chancery, Mercantile and TCC courts, or to Chancery, Mercantile and TCC court claims with a value of more than £2,000,000 at the first costs management conference unless the court ordered otherwise.

7. That informal guidance has been followed by SI 2013/515, under which the new r3.12 in fact provides that these new rules will apply to all multi-track cases commenced on or after 1 April 2013, except for cases (*inter alia* – see more details at para.9 below) in the Admiralty and Commercial Courts, such cases in the Chancery Division as the Chancellor may direct, and such cases in the TCC and the Mercantile Courts as the President of the QBD may direct. A document[1] was issued by the President and Chancellor on 18 February 2013 saying that on 1 April 2013 a direction would be made in these terms:

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

[1] http://www.judiciary.gov.uk/JCO%2FDocuments%2FPractice+Directions%2Fcosts-budgeting-announcement-draft-direction-cpr-rule-3-12.pdf

So far as can be ascertained, despite that forecast no such direction has yet been made.

8. Incidentally, rumour has it that costs judges expect the new system to collapse in the not too distant future.

A neutral introduction

9. In the wake of the Jackson Report there are a number of significant amendments to the CPR which, to a large extent, came into force on 1 April 2013. The court's overriding objective is now to deal with cases "justly and at proportionate cost" [**r.1.1**], the criteria for relief from sanctions have been changed, a new costs management regime has been created and parts 44 to 48 have been replaced in their entirety. The new "proportionate cost" approach filters through and affects a slew of practice direction and procedural requirements.

10. A brief overview of the main changes is presented below.

Costs and case management

11. The cornerstone of the new costs regime is built into the court's case management powers under Part 3 of the CPR, with new rules set out at para. 3.12 *et seq post.* The new rules are now in force and apply to **all multi-track cases commenced on or after 1 April 2013**, except for cases in the Admiralty and Commercial Courts, such cases in the Chancery Division as the Chancellor may direct, such cases in the TCC and the Mercantile Courts as the President of the QBD may direct, cases which are the subject of fixed or scale costs, or the court orders otherwise. The default position in county courts is that the rules will apply to all multi-track cases unless the court orders otherwise.

12. Where the new rules do apply the essential features are as follows:

    a. Parties must file and exchange budgets [**r.3.13**], defined as an estimate of the reasonable and proportionate costs (including disbursements) which a party intends to incur in the proceedings. The budget follows a five page precedent covering costs incurred and estimated, and needs to be verified by a statement of truth signed by a senior legal representative of the party. Litigants in person do not need to file a budget.

b. The primary date for filing and serving budgets is the date which will be specified by the court when it sends out a notice of proposed allocation and a new directions questionnaire in accordance under the new **r.26.3**. That process replaces the allocation questionnaire system. If the notice of proposed allocation does not specify a date for filing and service of a budget it *must* be done seven days before the first CMC.

c. If a party fails to file a budget it will be treated as having served a budget comprising only the applicable court fees [**r.3.14**], unless the court orders otherwise.

d. Thereafter the court has the power at any time to make a costs management order of its own initiative or on application. Such an order will record the extent the budgets are agreed between the parties and make appropriate revisions insofar as they are not agreed [**r.3.15**].

e. If a costs management order is made the court thereafter controls the parties' budgets in respect of recoverable costs [**r.3.15(3)**]. Revisions to the budget in respect of future costs may be ordered or agreed [**3EPD.2.6**].

f. The court can deal with costs management at a dedicated "costs case management conference" or at any other hearing. CCMCs should usually be in writing or on the telephone.

g. Whether or not a costs management order is made the court must have regard to any available budgets and take into account the costs involved in each procedural step when making any case management decision.

13. Where a costs management order is made it becomes the basis for the future assessment of costs on the standard basis [**r.3.18**]. The court will not depart from the last approved or agreed budget for each phase of the proceedings unless there is good reason to do so. The indications are that the Courts are likely to take a tough line on litigants who substantially exceed the budget: *Henry v News Group* [2013] EWCA Civ 19

Relief from sanctions

14. R.3.9 has been re-written, the familiar nine criteria having been scrapped. On an application for relief the court is now directed to 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 cost; and (b) to enforce compliance with rules, practice directions and orders*". Apparently this is supposed to make relief harder to obtain, although how it achieves this is not immediately obvious, at least to this writer. However, everyone should take time to read the speech by Lord Dyson MR on 22 March 2013[2]. If the approach set out in that speech is reflected in judicial decisions under r.3.9, it will mean that judges will henceforward take a completely different and much tougher approach to a failure to comply with rules and directions.

Costs capping orders

15. Costs capping orders have been shunted from the old Part 44 at 44.18 *et seq post* to a new **r.3.19 – r.3.21** and **PD 3F**. Costs capping order applications are not new, but this may give them some more prominence. Just by way of reminder a costs capping order is an order limiting the amount of future costs (including disbursements) a party may recover pursuant to an order for costs subsequently made [**r.3.19**]. The order may be made respect of the whole litigation or any issues tried separately. There is no need to worry too much about these, as PD3F para 1.1 says "The court will make a costs capping order only in exceptional circumstances."

Disclosure in multi-track cases

16. New rules have been built into **r.31.5** to deal with disclosure in all multi-track claims. Not less than 14 days before the first CMC each party must file and serve a report verified by a statement of truth which describes briefly what documents exist or may exist that are or may be relevant to the issues, describes where or with whom they are located or how they are stored, estimate the "*broad range of costs*" that could be involved in standard disclosure and state which of a specified range of orders for disclosure the party seeks [**r.31.5(3)**]. The parties are enjoined to discuss and seek to agree a proposal in relation to disclosure that meets the new overriding objective [**r.31.5(5)**].

[2] http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/mr-speech-judicial-college-lecture-2013.pdf

Expert witnesses

17. **R.35.4(2)** has been amended so that now "*When parties apply for permission to they must **provide an estimate of the costs of the proposed expert evidence and** identify (a) the field in which expert evidence is required **and the issues which the expert evidence will address**; and (b)…*". The court is then given the power to specify the issues which the expert evidence should address. In practice this is not a new power, but it is now express.

18. The power to order the unappetisingly labelled "hot-tubbing" of experts is built into Practice Direction 35 by a new **35PD.11**. At any time the court can order that some or all of the experts from like disciplines shall give their evidence concurrently. The court can direct the parties to agree an agenda. When called to give their evidence the procedure envisaged [at **35PD.11**.**4**] is that:

    a. The judge will ask the experts, in turn, for their views. Once an expert has expressed a view the judge may ask questions about it. The judge may invite another expert to comment or to ask that expert's own questions of the first expert.

    b. Thereafter the parties' representatives may ask questions of the experts. Such questioning *"may be designed to test the correctness of an expert's view, or seek clarification of it,* [but] *it should not cover ground which has been fully explored already. In general a full cross-examination or re-examination is neither necessary nor appropriate."*

    c. The judge may then summarise the experts' different positions and ask them to confirm or correct the summary.

Part 36 offers

Section 55 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, and Offers to Settle in Civil Proceedings Order 2013 (SI 013/93)

19. There is a rather fierce shake up to Part 36 putting defendants under more pressure to accept claimants' offers to settle. If a defendant fails to beat a claimant's Part 36 offer then in addition to interest and indemnity costs the claimant will be entitled to an additional amount.

20. By **r.36.14(3)(d)** the additional amount is calculated by applying a percentage to an amount which is either the amount awarded by the court (in monetary claims) or the costs awarded by the court (in non-monetary claims). The percentage is 10% of the amount awarded where the award is up to £500,000. Where the award is between £500,000 and £1,000,000 the percentage is 10% of the first £500,000, and 5% of any amount above that figure. The amount to be paid is capped at £75,000 in any event.

21. The amended rules do not, at present, deal with percentages in claims where awards exceed £1,000,000 but the prescribed details "*where rules of court make provision*" for £1,000,000 plus awards are specified in the Offers to Settle in Civil Proceedings Order 2013 (SI 013/93).

Parts 44 – 48

22. A full summary of these re-cast parts of the CPR is beyond the scope of this summary. A selected hi-light of the significant changes are as follows.

Basis of assessment

a. The new emphasis on proportionality of costs is woven into the assessment of costs. To a large extent the rules already required the court to consider reasonableness and proportionality when assessing costs, but it is now expressly stated that costs which are disproportionate may be disallowed or reduced even if they were reasonably or necessarily incurred [**r.44.3**]. Costs are defined as proportionate if [**r.44.3(5)**] they bear a reasonable relationship to:

   i. The sums in issue in the proceedings;

   ii. The value of any non-monetary relief in issue in the proceedings;

   iii. The complexity of the litigation;

   iv. Any additional work generated by the conduct of the paying party; and

   v. Any wider factors involved in the proceedings, such as reputation or public importance.

Conditional fee agreements, success fees and after the event insurance premiums

The Conditional Fee Agreements Order 2013 SI 2013/689

b. References to CFAs are now notable by their absence from the costs practice directions. That is because although CFAs *per se* are still allowed, success fees and after the event insurance premiums (or premia, if you prefer) are no longer be recoverable from the unsuccessful party. CFAs are briefly dealt with in the new Part 48 in order to provide for the continuation of the former rules for funding arrangements entered into before 1 April 2013. If anyone has noticed a rush of CFA notices towards the end of March this year that is the reason why.

c. A measure of costs protection for claimants is preserved by a mechanism called "qualified one way costs shifting" but it only applies to personal injury claims, or claims under the Fatal Accidents Act 1976 or section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934, and hence is at present unlikely to be of any interest to members of chambers.

Damages-based agreements

The Damages-Based Agreements Regulations 2013 SI (2013/609)

d. Lawyers and clients may now agree contingency fees under which the lawyer will receive a percentage of damages. The percentage may not exceed 25% in personal injury claims, or 50% in other claims. By virtue of a new **r.44.18** "*the fact that a party has entered into a damages-based agreement will not affect the making of any order for costs which would otherwise have been made in favour of that party*". However, where costs are awarded in favour of a party who has entered into such an arrangement it may not recover more by way of costs than the total amount payable by that party under the damages-based agreement for legal services provided under that agreement.