

BRIEF OVERVIEW OF THE MAIN COSTS AND CPR CHANGES FOR APRIL 2013

KEITH LEVENE: 18 FEBRUARY 2013

This summary takes into account the Statutory Instruments in respect of changes from 1 April 2013 relating to Conditional Fee Agreements, Damages Based Agreements, CPR Part 36, the Recovery of Costs Insurance Premiums in Clinical Negligence proceedings, and amendments to the Civil Procedure Rules which have all been published in January/early February 2013, but is subject to the to imminent new CPR Practice Directions in respect of the CPR changes to be implemented in April 2013.

FROM 1 APRIL 2013 IT IS PROPOSED THE FOLLOWING WILL BE IMPLEMENTED.

1. **CONDITIONAL FEE AGREEMENTS ("CFAs")**

CFAs will continue to be permissible, **however**, save for certain exceptions (including publication and privacy proceedings (see below), insolvency proceedings, and diffuse mesothelioma claims), for CFAs entered into after 1 April 2013 the success fee element of a CFA payable by a client to its solicitor will not be recoverable from an opponent. Base costs, disbursements and VAT if applicable will continue to be recoverable between parties.

In December 2012, and following the Leveson report, the Government announced that it would not make CFA success fees and legal expense costs insurance premiums (see 2 below) irrecoverable in claims for defamation and breach of privacy until it has introduced costs protection for unsuccessful claimants in line with recommendations contained in the Leveson report. Sections 44 and 46 of LASPO will not come into force in relation to defamation and privacy claims until a new regime of qualified one-way costs protection has been implemented through changes to the Civil Procedure Rules. (i.e. an extension of the proposed 'QOCS' from just personal injury claims - see 14 below).

2. **AFTER THE EVENT ("ATE") LEGAL EXPENSES INSURANCE**

The changes will not prevent a party purchasing ATE, however in respect of any ATE policy entered into after 1 April 2013, save for an exception relating to experts reports in clinical negligence claims, the premium paid or payable by the insured will not be recoverable from an opponent.

From 1 April 2013, any CFA success fee or ATE premium incurred by a party will be its own liability, will not be recoverable from an opponent, and accordingly, if incurred will reduce a party's net recovery in litigation.

3. DAMAGES BASED AGREEMENTS ("DBAs")

3.1 As from 1 April 2013 it will be permissible for solicitors and clients to enter into a DBA, subject to such agreement being compliant with certain requirements (e.g. as to the percentage of damages which can be taken as costs by the solicitor).

In essence a DBA will be a contingency fee where costs are based on a percentage of that **recovered**. Whilst previously it has been permissible for solicitors to enter into contingency fee agreements in relation to non contentious business, s.45 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), the DBA Statutory Instrument and the amendments to the court Civil Procedure Rules, will extend and make permissible the use of such agreements in contentious business for work from 1 April 2013.

3.2 DBA caps

Subject to the provisions of the DBA Statutory Instrument, the following costs caps (inclusive of vat) will apply as against sums **recovered** by the client

- commercial claims 50% of damages,
- employment claims 35% of damages, and
- first instance personal injury claims 25% of damages.

It should be noted that the 'cap' in commercial cases will apply to the aggregate of solicitors fees, counsel fees and vat.

3.3 DBAs and recovery of costs from an opponent

The amended court rules and practice directions will provide for how a DBA affects a between the parties costs recovery. Costs recoverable from an opponent will be limited by reference to a reasonable hourly rate and reasonable and proportionate time spent (i.e. as at present). The DBA percentage of fees payable by the client will not be the basis of a costs recovery from an opponent.

In addition, any between the parties costs recovery is to be subject to the so called indemnity principle, which could potentially limit recoverable costs to a very low sum. By way of example, if as a consequence of a low recovery of damages the

total costs payable by the client is low, irrespective of the value of time spent, the costs payable by an opponent will be limited to that payable by the client under the terms of the DBA.

4. OVERRIDING OBJECTIVE

CPR 1 is amended to strengthen the overriding objective to enable cases to be dealt with “*at proportionate cost*” as well as justly. The new test is intended to control the costs of activity that is disproportionate to the value, complexity and importance of the claim and to strengthen enforcing “....*compliance with rules, practice directions and orders*”.

5. COURT COSTS MANAGEMENT WITH CASE MANAGEMENT

5.1 The current costs management pilot schemes in the Technology and Construction Court and in relation to defamation proceedings is to be extended to all courts **except** the Commercial and Admiralty courts.

5.2 Parties will be required to exchange and file costs budgets, to be considered and approved by the court. Costs Budgets will be agreed or as directed by the court, and will be subject to an order of the court (possibly following submissions from the parties).

5.3 Costs budgets will be in a "simple" excel spreadsheet format identifying the fee earner time and disbursements incurred and to be incurred under specific phases (pre action, issue/pleadings, case management conference, disclosure, witness statements, expert reports, pre trial review, trial preparation, trial, settlement/ADR and with contingencies).

5.4 Costs budgets will potentially substantially reduce the time spent or the need for detailed assessment proceedings at the conclusion of an action. In any case where a costs management order has been made, when assessing costs on the standard basis, the court will have regard to the receiving party's last approved or agreed budget for each phase of the proceedings; and not depart from such approved or agreed budget unless satisfied that there is good reason to do so. (new CPR 3.18).

5.5 Costs budgets will be utilised on matters such as applications for security for costs.

5.6 A ‘**heavy price**’ for non compliance - if a party fails file a costs budget despite being required to do so, pursuant the new CPR 3.14, it will be deemed that the party only wishes to claim court fees at the conclusion of the proceedings

5.7 Costs budgets are estimates, will not limit the costs a party may incur, and it will always be permissible for a party to seek an increase in any court approved costs budget during the course of proceedings. Ultimately whilst in court proceedings the recovery of costs will be linked to the court approved budgets, a commercial party will be at liberty to incur whatever cost it considers appropriate (e.g. in relation to the instruction of what it deems to be the most desirable solicitors and counsel) in order to achieve its commercial objective and/or to protect its commercial interest etc.

6. PROPORTIONALITY

The court rules are being amended so as to introduce a new test as to what will be deemed "proportionate". An effect of the new rule will be that merely because it was reasonable for a party to incur certain costs in pursuing or defending a claim, will not necessarily make such costs proportionate, and in turn recoverable from an opponent in a between the parties assessment.

Pursuant to amended CPR 44.3(2)

"Where the amount of costs is to be assessed on the standard basis, the court will

(a) only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred; and

(b) resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party."

In considering proportionate costs between the parties, the court will have regard to the sums in issue in the proceedings, the value of any non-monetary relief in issue, the complexity of the litigation, any additional work generated by the conduct of a paying party and any wider factors involved in the proceedings such as reputation or public importance (amended CPR 44.3(5)).

The new test of proportionality will not be retrospective. Pursuant to amended CPR 44.3(7), paragraphs ,44.3(2)(a) and (5) do not apply in relation to cases commenced before 1 April 2013 and in relation to such cases, rule 44.4(2)(a) as it was in force immediately before 1 April 2013 will apply instead.

7. NEW CASE MANAGEMENT RULES

Revision to general case management rules with amendment to CPR 3.9 to ensure that judges are less tolerant of delay and breaches of orders. The Court of Appeal intends to support judges in being more robust in respect of delay and breaches of orders. On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including *"...the need for litigation to be conducted efficiently and at proportionate cost; and to enforce compliance with rules, practice directions and orders"*

8. ALLOCATION DIRECTIONS (CPR 26)

Replaces previous "Allocation Questionnaire"

9. 10% INCREASE IN GENERAL DAMAGES

There is to be a 10% increase in the level of general damages in all civil claims for personal injury, clinical negligence, professional negligence, nuisance, defamation, and housing disrepair claims commenced from 1 April 2013, whether in tort or in contract.

10. AMENDMENT TO CPR 36

Amendment to CPR 36.14(3) to enhance a Claimant's recovery by 10%. when a defendant fails to beat a claimants CPR 36 offer to settle,

The new additional amount, **which shall not exceed £75,000**, will be calculated by applying the prescribed percentage set out below to an amount which is—

- (i) where the claim is or includes a money claim, the sum awarded to the claimant by the court; or
- (ii) where the claim is only a non-monetary claim, the sum awarded to the claimant by the court in respect of costs.

| <i>Amount awarded by the court</i> | <i>Prescribed percentage</i> |
|------------------------------------|---|
| up to £500,000 | 10% of the amount awarded; |
| above £500,000 up to £1,000,000 | 10% of the first £500,000 and 5% of any amount above that figure" |

11. DISCLOSURE

Adoption of a new "menu option" to in effect allow the court to adopt any method of disclosure appropriate to the case and issues and documentation involved, in conjunction with considering the associated costs.

The new rule provides for disclosure of material relevant to the particular case. In heavier and more complex cases the costly disclosure of material by default may not be justified. Rather than default disclosure the rules are modified to allow a tailored list of disclosure requirements thus reducing the overall costs of providing the material.

Pursuant to new CPR 31.5(3) *"Not less than 14 days before the first case management conference each party must file and serve a report verified by a statement of truth, which—*

- (a) describes briefly what documents exist or may exist that are or may be relevant to the matters in issue in the case;*
- (b) describes where and with whom those documents are or may be located;*
- (c) in the case of electronic documents, describes how those documents are stored;*
- (d) estimates the broad range of costs that could be involved in giving standard disclosure in the case, including the costs of searching for and disclosing any electronically stored documents; and*
- (e) states which of the directions under paragraphs (7) or (8) are to be sought."*

Pursuant to the new CPR 31.5(5) *"Not less than seven days before the first case management conference, and on any other occasion as the court may direct, the parties must, at a meeting or by telephone, discuss and seek to agree a proposal in relation to disclosure that meets the overriding objective."*

12. **FACTUAL EVIDENCE**

Pursuant to new CPR 32

The court may give directions—

- (a) identifying or limiting the issues to which factual evidence may be directed;
- (b) identifying the witnesses who may be called or whose evidence may be read; or
- (c) limiting the length or format of witness statements."

13. **EXPERT EVIDENCE**

New CPR 35: In order to restrict recoverable costs in respect of expert evidence. The amendment to CPR 35 requires a party who is seeking permission to adduce expert evidence to furnish the court with **an estimate of the costs of that evidence**.

The court will have power to direct "...*the issues which the expert evidence will address*".

The court will encourage the introduction of 'hot-tubbing'.

14. **QUALIFIED ONE WAY COSTS SHIFTING ("QOCS")**

New CPR 44.13 to 44.17. In respect of **personal injury** claims brought after 1 April 2013, the amendments introduce of claimants having protection from a liability for costs in the event of losing **except** where the claimant is found to have been fraudulent, the claimant has failed to beat a defendant's CPR 36 offer to settle, the claim has been discontinued, the claim has been struck out as an abuse of process, or possibly the defendant has obtained an interlocutory order for costs.

The effect of QOCS is that a losing claimant will not pay any costs to the defendant, and a successful claimant against who a costs order has been made (for example, where the claimant does not accept and then fails to beat the defendant's CPR Part 36 offer" to settle) will not have to pay those costs except to the extent that they can be set off against any damages received.

QOCS protection will be lost altogether if the claim is struck out or is found to be fundamentally dishonest.

QOCS protection will be lost in part, and subject to the court's permission, in two instances. First, if an otherwise successful claim includes an unsuccessful non-personal injury element (e.g. housing disrepair or costs of credit hire in arranging an alternative vehicle), and there is an order for costs against the claimant of that unsuccessful element, the claimant is liable for all the defendant's costs of that unsuccessful element to the extent that it is just and fair; and second, where the claim, or an element of it, is made for the financial benefit of someone other than the claimant (e.g. a credit hire claim in respect of the financing company), an order for the defendant's costs of the claim, or that element, may be made, and enforced, against that person/organisation.

*(Also see note above re defamation and privacy claims and one way costs shifting)

15. **COSTS CAPPING RULES**

New CPR 3.19 and CPR 52.9A in respect of appeals.

16. SMALL CLAIMS LIMIT

Increased from £5,000 to £10,000 (excluding claims for personal injury and housing disrepair)

17. DETAILED ASSESSMENT OF COSTS

The staged introduction of a new format bill of costs for detailed assessment, mirroring the court phases in the court costs budgets to be filed during the course of proceedings.

Provisional assessment procedure extended to apply to claims for costs up to £75,000.

This note is not intended to provide legal advice

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