Recent changes in civil litigation procedure: an overview for In-House Lawyers

Spring 2015 saw the introduction of a number of changes to the Civil Procedure Rules (CPR) ranging from a hike in court fees to amendments to the CPR Part 36 regime. We set out some highlights below for those who do not have day to day involvement in litigation but like to keep up to date with procedural changes.

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KEY COMMERCIAL POINTS FOR IN-HOUSE LAWYERS ARISING OUT OF RECENT CPR CHANGES

If there's a dispute brewing or you are currently handling a dispute, it's worth keeping the following points in mind:

- Court fees have increased: it's now more expensive to issue court proceedings.
- New pre-action protocols have been introduced. They increase the focus on alternative dispute resolution (ADR) and firmly encourage parties to try to settle their claims pre-action. Before you resort to court, keep ADR at the top of your list of priorities. (For more guidance on settlement, read our checklist: How to approach settlement in a dispute (start early).)
• On 9 July 2015, new regulations will come into effect, obliging traders to notify consumers about what options are open to them if they cannot resolve their dispute. A "consumer" for these purposes is an individual acting for purposes which are wholly or mainly outside that individual's trade, business, craft or profession.

• The courts are becoming stricter about the length of court documents – brevity is actively encouraged and in some areas is being enforced by the CPR.

• The provisions of Part 36 have changed. If you are contemplating making a Part 36 offer, there are new rules to consider.

• Costs budgets are now required in many court proceedings as part of the drive for proactive management of litigation costs. Failure to prepare and serve budgets properly can mean that recovery of legal costs is restricted - even if a party is successful in the claim. It is important therefore to engage in the process as soon as possible and assist your external lawyers to ensure the budget is as accurate as possible. In return, the budget will help you to prepare and monitor annual budgets for your in-house legal spend.

• A breach of the CPR can lead to an onerous sanction. If you are involved in litigation proceedings, comply with the Civil Procedure Rules and ensure you respond promptly to requests for information or action from your external lawyers. Following the decision in Denton, the courts are more willing to take into account all the circumstances of the breach, but relief from sanctions remains difficult to obtain.

• The Brussels Regulations on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (known as 'Brussels Recast') came into force on 10 January 2015 and introduced changes to the 2001 Brussels Regulations. Brussels Recast applies where a defendant is domiciled in a member state and regulates the determination of jurisdiction between the courts in member states. The changes have emphasised the importance of including a well-drafted exclusive jurisdiction clause in commercial contracts.

For more information on the above topics, read our updates below.

NEW PRE-ACTION PROTOCOLS ARE IN FORCE AND FOCUS ON SETTLEMENT AND ADR

Pre-action Protocols form part of the Civil Procedure Rules (CPR): they set out required action for those parties who intend to litigate. Parties who issue proceedings without complying with these pre-action requirements risk being sanctioned in costs.

From 6 April 2015, new and amended pre-action protocols were brought into force including protocols for the following types of action: professional negligence; judicial review; housing disrepair cases; possession claims by social landlords; possession claims based on mortgage or home purchase plan arrears in respect of residential property; personal injury; the resolution of clinical disputes; and, low value personal injury (employers’ liability and public liability) claims.

The protocols put more emphasis on alternative dispute resolution (ADR) and encourage pre-action settlement. For more information, read our briefing here.

A new Practice Direction on Pre-Action Conduct and Protocols (the 'PDPACP') also came into force on 6 April 2015 and applies to all cases not covered by specific protocols. Like the specific
protocols some of which are mentioned above, the PDPACP sets out the procedure that parties are expected to follow before they commence legal proceedings and aims to promote early settlement.

A full list of the protocols can be viewed [here](#).

**Changes to CPR Part 36 - What You Need to Know**

Part 36 of the CPR deals with offers to settle in litigation proceedings and acts as both a carrot and a stick in persuading parties to consider compromise seriously. It sets out a highly technical procedure for making a settlement offer which litigating parties must follow in order to gain costs protection and benefits.

In April 2015, Part 36 was given a make over and important changes were made. To find out more, read the article by Gwendoline Davies and Sue Harris on [Part 36 changes: What you need to know](#).

**The Courts Continue to Crack Down on Wordy Documents**

Litigators should aspire to brevity in both argument and court documents, and the courts are increasingly intolerant of those who do not. In keeping with this crack down, the provisions relating to skeleton arguments in the Admiralty and Commercial Courts Guide have been amended:

- skeleton arguments for heavy applications whose hearings are likely to last over half a day, should not now exceed 25 pages;
- skeleton arguments for ordinary applications, should be limited to 15 pages.

There is scope to apply for a longer skeleton in long hearings but such an application is unlikely to succeed unless there is good reason. Skeleton arguments for use at trial remain limited to 50 pages.

**Fixed-End Trials in London’s Chancery Court**

Following a successful pilot, the Chancery Court has introduced fixed-end trials in London. This means that each trial will have to be completed within the period allocated to it (save in exceptional circumstances).

Parties in Chancery Court proceedings must now ensure their time estimates are accurate, monitored and revised if necessary. See [the judiciary’s practice note](#).
INCREASED COURT FEES AND EASIER WAYS TO PAY

- Court fees were increased radically on 9 March 2015. The amended fees, (for example for issuing a claim), can be viewed on the www.justice.gov.uk site.

- Users of the civil courts can now use a HM Courts & Tribunals Fee Account to facilitate payments.

THE DRIVE TOWARDS ELECTRONIC WORKING IN THE COURTS

In his 2010 review of civil litigation, Lord Justice Jackson recommended the adoption of an effective IT system for the courts. His wish list included: electronic filing, storage of documents in electronic files and the facility to make online payments of fees.

More recently, in his speech to the Law Society at an event to celebrate the Magna Carta on 21 April 2015, Lord Dyson, Master of the Rolls, concentrated his attention on the right to timely justice as enunciated in the Magna Carta. He talked about how such a right could be maintained and focused in particular on the need to invest in and properly use technology (including Online Dispute Resolution (ODR)), to introduce effective reforms to the CPR and to ensure effective case management. (To read Lord Dyson's speech in full, click here.)

It comes as no surprise then that despite the problems experienced with electronic working (e-working) in the Rolls Building in 2012, HM Courts and Tribunals Service (HMCTS) remain committed to introducing e-working into the Rolls Building and to that end, a contract was awarded in 2014 for a new IT system.

It has now been announced that the Technology and Construction Court (TCC) will start a pilot of a new e-working system towards the end of May 2015.

Practice Direction 51J (PD51J) prescribes the pilot's procedure for using the new e-working software called CE-File which will operate 24/7 all year round (including weekends and bank holidays except for planned and some unplanned 'down-time' for maintenance). Key points include:

- the pilot will apply to TCC claims and arbitration claims made in the TCC issued after the pilot's launch;
- those wanting to use e-working must register for an account and comply with security requirements;
- forms and documents should be filed in pdf format except draft orders which should be in word format;
- fees will be payable by HMCTS approved online methods;
- proceedings issued after the pilot's start date will be converted to PDF format.

PD51J also deals with the procedure for applications, case management, filing and trial bundles.

The procedure for the pilot is not entirely clear but feedback will be sought and any necessary amendments to PD51J will be made as appropriate. If the pilot is successful, it is intended to roll out e-working to the other courts in the Rolls Building including the Admiralty, Commercial and Mercantile Courts, the Chancery Division and the Bankruptcy and Companies Court.
THE CLAMP DOWN ON LITIGATION COSTS: COSTS MANAGEMENT IS STILL A HOT TOPIC

Litigation costs and their management continues to be a hot topic for litigators. Here’s an overview of some of the current issues.

Cost budgeting in brief – a reminder

Effective management of litigation costs was a key focus of Lord Justice Jackson’s reforms to the Civil Procedure Rules (CPR) back in 2013. One major change was the requirement to prepare and submit costs budgets early in court proceedings for agreement or approval by the court.

Costs budgets must detail all the costs that are expected to be incurred in taking / defending the claim up to trial. The costs must be proportionate to the matter in dispute. At the end of the trial, the costs judge will use the budget to help determine what costs are recoverable.

Failure to prepare budgets properly can mean that recovery of legal costs is restricted - even if a party is successful in the claim. It is important therefore to engage in the process as soon as possible and assist your external lawyers to ensure the budget is as accurate as possible. In return, the budget will assist you in preparing and monitoring your annual budgets for in-house legal spend.

Note – you can instruct your lawyer to undertake legal work in relation to the claim that is not covered by the budget. However, the cost of such work will not be recoverable from the losing party.

Guideline Hourly Rates

Guideline Hourly Rates (GHR) provide a widely-accepted guideline for the recoverable hourly rate for different grades of fee earner in the different regions of England.

Following a consultation on GHR in 2014, Lord Dyson, Master of the Rolls has confirmed that the rates will be left at their current level. Lord Dyson acknowledged that GHRs are becoming less relevant for assessing costs in the context of other factors such as the judiciary’s use of proportionality to assess costs, the use of costs budgets and the trend towards fixed costs. GHRs will, however, continue to have relevance in as much as they provide a starting point in preparing for detailed costs assessments and act as a costs benchmark both for clients and for effective comparisons between parties' costs budgets.

For more information, see the information note posted on www.Judiciary.gov.uk.

Costs budgeting is a permanent, procedural fixture

Lord Justice Jackson toured the country recently to discuss how the new costs management rules are working with litigators. Several of our lawyers took part in those discussions.

In a recent speech(1), Lord Justice Jackson explained his conclusions from those discussions and particularly that costs budgeting has worked well and has brought about substantial benefits to court users since its introduction in 2013.

So it seems costs budgeting is here to stay. That said, Jackson LJ suggested one or two tweaks to the procedure including for example extending the 7 day pre Case Management Conference (CMC) requirement for serving the costs budget to 14 days. He also suggested that criteria be set out in the CPR to help courts decide whether or not to make a case management order in a particular case. This new discretion, which would be available only where a lack of court resources would lead to significant delays, is not without judicial opposition and we will have to wait to see what, if any amendments are made are to the process.
(1) See Lord Justice Jackson's Harbour lecture 'Confronting Costs Management', 13 May 2015

**J-Codes and a new form bill of costs for detailed assessments**

'J-Codes' are the new litigation time recording codes being created by a Jackson steering committee. They will help the parties to record litigation costs more efficiently, transparently and accurately and the courts to better assess what time was properly (and proportionately) spent in carrying out work - and how much should therefore be recovered.

A committee of specialists has been drafting the J-Codes and it is looking more likely that they will be adopted as the most common standard for the categorisation of litigation costs following their approval by both the senior judiciary and LEDES, an international standard setter in the electronic exchange of billing.

At the same time, a new form bill of costs for detailed assessments is being prepared which will make use of available technology and make the creation, use and assessment of bills of costs far easier and cost efficient. The net effect of all this activity is that:

- litigators should now be ensuring their firms' time recording system will align with J-Codes;
- a practice direction is expected to be introduced which should allow parties to use the new bill of costs voluntarily from October 2015;
- a mandatory pilot for the use of the new bill of costs is likely next year.

**ENSURING LITIGATION COSTS ARE PROPORTIONATE (BUT THERE’S STILL LITTLE GUIDANCE ON ‘PROPORTIONALITY’)**

Costs incurred in litigation must now be proportionate to the matters in issue to stand a chance of being recoverable. Yet, despite the list of relevant factors provided in CPR 44.3 (5), litigators – and judges – have struggled with how to apply the concept of proportionality. Before Jackson LJ's civil procedure reforms were introduced in 2013, Lord Neuberger specifically refused to give guidance as to 'what constitutes proportionality and how it is to be assessed' but unfortunately there remains no judicial guidance at appeal court level. Clues are, however, starting to emerge from some recent decisions. Here are some examples.

In Savoye v Spicers [2015] 1 Costs LR 99 in which there was a summary assessment of costs, the judge referred to CPR 44.3(2) and (5) and CPR 44.4 and set out (in paragraph 17 of the judgment) the factors to consider when assessing the proportionality and reasonableness of costs as follows:

- the relationship between the amount of costs claimed for and incurred and the amount in issue;
- the amount of time spent by the solicitors and barristers in relation to the total length of the hearing;
- the extent to which the parties have spent time and money in resolving their dispute in other proceedings (for example, adjudication proceedings);
- the extent to which the case is a test case or in the nature of a test case; and
- the importance of the case to either party.
While these are useful guides, it is still not clear how a judge will be apply them to other matters: every case needs to be reviewed on its own facts.

The case of **CIP Properties v Galliford Try [2015] EWHC 481 (TCC)** involved a costs management conference in which the judge set out his reasons for taking ‘a dim view of the claimant's costs budget'. In reaching his decision to reduce the claimant’s costs budget for being disproportionate, the judge cited with approval the decision in **Savoye v Spicers** (above) but added that in the CIP case, the value of the claim was not as important a factor as the complexity of the claim. In CIP, the value was high but the issues were fairly straightforward and the judge did not believe a high value claim would in itself justify higher recoverable costs. It did not help that the claimant could not explain the increase in costs claimed and that its budget included so many assumptions that judge concluded it was unreliable.

For now, the safest approach is to ensure that any step taken in the litigation process can be justified as proportionate to a costs judge on an assessment, stick to your costs budget once agreed/approved and if your budget becomes inadequate – seek an amendment without delay.

(2) **CPR 44.3(2) (a)**


**WHEN WILL RELIEF FROM SANCTIONS BE GRANTED FOR A BREACH OF THE CIVIL PROCEDURE RULES?**

Following the implementation of the Jackson Reforms in 2013, litigators are only too aware that breaches of the Civil Procedure Rules (**CPR**) will be sanctioned - potentially severely – unless they can successfully argue their way through the three stage test set out in the **Denton** decision. Compliance with the CPR therefore remains an imperative.

For more about the Denton principles to be applied when an application is made for relief from sanctions, click here: **Mitchell Take 2 - revised guidance for those seeking relief from court sanctions**.

Since 2013, there has been a steady flow of decisions on the issue of relief from sanctions and when such relief will be given. There has been no fundamental change from the position set out in the decision in **Denton**: the courts have to go through a three stage process in which they 1) identify and assess the seriousness and significance of the specific breach, 2) consider why it happened and whether there was good reason for it and then, 3) consider all the circumstances (including 1) and 2)) to ensure the application for relief can be dealt with justly, having regard to the need to ensure the litigation is conducted efficiently and at proportionate cost and to ensure compliance with court rules, orders and practice directions.

Recent cases, however, appear to show a judiciary more willing to allow relief after a review of the third stage (all the circumstances) even where on the facts, there appear to have been serious breaches. For example:

- in **Priestley v Dunbar and Co (a firm) [2015] EWHC 987 (Ch)** (Bailii), the High Court allowed an application to set aside a judgment in default despite the defendant not having made the application promptly. There was a realistic defence and the court, after applying Denton and considering all the circumstances of the case thought it was just to do so;
• in Hogg v Eddery [2015] EWHC 942 (Ch) (24 February 2015) (Casetrack), the appellant was granted relief from sanctions in circumstances where the appellant had lodged the appeal bundle with court in time but had inadvertently not served a copy on the respondent.

However, we should not regard these examples as evidence of a softening in the judicial approach: each case will be judged on its own facts and the examples above should be contrasted with cases such as Cockell (t/a Cockell Building Services) v Holton (No 2) [2015] EWHC 1117 (TCC) (Bailii) in which no relief from sanctions was given after the defendant failed to comply with an unless order.

There is therefore no escaping the onerous obligation to comply strictly with the CPR but parties (and their solicitors) can take a small degree of comfort from cases such as Hogg v Eddery that the court are prepared to exercise their judgment and take particular circumstances into account where it is just to do so.

(4) Although note that leave has been granted to appeal the decision in Thevarajah v Riordan and others [2014] EWCA Civ 14 in the Supreme Court.

CONTINUED JUDICIAL SUPPORT FOR ADR AND SOME NEW ADR LAW

• The courts encourage parties to consider alternative forms of dispute resolution and with the backing of the CPR, the judiciary continue to show themselves willing to penalise parties who forge ahead with litigation without giving due consideration to the benefits of Alternative Dispute Resolution (ADR) processes such as mediation.

Click here for our checklist on how to approach settlement in a dispute.

• Lord Neuberger gave a speech on mediation at the Civil Mediation Conference on 12 May 2015. He discusses both the advantages and disadvantages of mediation and its growing popularity given the growing costs of litigation. While he was cautious about going so far as to advocate compulsory mediation, he indicated that he was inclined that way for certain types of smaller cases. He is of the firm view that mediation works as a vital adjunct to litigation.

For those who would like to read Lord Neuberger’s views, click here.

• The Alternative Dispute Resolution for Consumer Disputes (Competent Authorities and Information) Regulations 2015 (the Regulations) were published in March 2015 and are the means by which the UK will implement the ADR Directive (Directive 2013/11/EU). The provisions of the regulations have come /are to come into force in stages but must be transposed into UK law by 9 July 2015.

Parts 1 to 3 of the Regulations came into force in April 2015. They provided for the designation of ‘competent authorities’ and set out the standards a certified ADR entity will have to meet.

On 9 July 2015, further provisions of the Regulations will come into effect, obliging traders to notify consumers about what options are open to them if they cannot resolve their dispute. A “consumer” for these purposes is an individual acting for purposes which are wholly or mainly outside that individual’s trade, business, craft or profession.

For more information on retailers’ duties to notify customers, click here for Gwendoline Davies’ explanation.
To read the Department for Business, Innovation and Skills' explanatory memorandum 2015 No 542, click here.

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BRUSSELS (RECAST) – A RECAP ON THE NEW REGULATIONS

The Brussels Regulations on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (known as 'Brussels Recast') came into force on 10 January 2015 and introduced changes to the 2001 Brussels Regulation. Brussels Recast applies where a defendant is domiciled in a member state and regulates the determination of jurisdiction between the courts in member states.

The changes have emphasised the importance of including a well-drafted exclusive jurisdiction clause in commercial contracts.

For more on this topic, read Malcolm Simpson's and Stephanie Clarke's article: Brussels Recast: the importance of the exclusive jurisdiction clause.

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THE CIVIL PROCEDURE RULES: WHAT CHANGES LIE AHEAD?

- A working group of the Civil Justice Council continues to review the Damages-Based Agreements Regulations 2013 including the issue of whether hybrid DBAs should be allowed. The group are expected to submit a report to the MoJ soon. In the meantime, the Law Society has stopped its work on the model DBA.

- Following Lord Justice Jackson's speech on 13 May 2015, we can probably expect some proposals for minor amendments to the costs management rules.

- Work also continues on a number of Pre-action protocols (PAPs) including the debt, dilapidations and defamation PAPs.

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Direct contacts

Gwendoline Davies, Partner
+44 (0)113 283 2517
gwendoline.davies@walkermorris.co.uk

Sue Harris, Director
+44 (0)113 283 2522
sue.harris@walkermorris.co.uk

Walker Morris LLP
Kings Court
12 King Street
Leeds LS1 2HL
T+44 (0)113 283 2500
F+44 (0)113 245 9412
www.walkermorris.co.uk