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The future, just how will the Judges Manage?

From attending numerous seminars on costs over the past few months and having attended the recent Association of Costs Lawyers Annual Costs Conference it is clear that there is a collective will on the part of the judiciary to get to grips with managing cases post 1 April 2013.

There is, in my view, a clear message that the previous "applicant friendly" approach to Relief from Sanction applications is to be a thing of the past.

There will be much greater emphasis placed on **case management** to ensure costs are ***proportionate*** and indeed early emphasis is found in the overriding objective which states:

1.1.(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases **justly and at proportionate** cost.

The Costs Rules as amended provide further evidence of things to come:

"Conduct" of litigation by the parties will assume greater importance as "the court must have regard to it in deciding what order (if any) to make about costs": CPR 44.3 (4).

CPR 44.3 says: "(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. (Factors which the court may take into account are set out in rule 44.4.)"

CPR 44.3 then defines "proportionate": "(5) Costs incurred are proportionate if they bear a reasonable relationship to—(a) the sums in issue in the proceedings; (b) the value of any non-monetary relief in issue in the proceedings; (c) the complexity of the litigation; (d) any additional work generated by the conduct of the paying party; and (e) any wider factors involved in the proceedings, such as reputation or public importance."

As HHJ Simon Brown QC recently commentated in his excellent series of online articles for New Law Journal "*This means that the hitherto binding Court of Appeal authority of Lownds v Home Office [2002] EWCA Civ 365, [2002] 4 All ER 775 which laid down the criteria of necessity and reasonableness is to be sacrificed on the new altar of proportionality*".

The Practice Directions that accompany the amended rules advise: *the court will 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*** *– (my emphasis added).*

It is this provision for costs to be ***disallowed even if reasonably and necessarily incurred*** that has many predicting early case law being required.

Costs Judges will be required to undertake an assessment and then "stand back" to consider if the total allowance following assessment still appears disproportionate and if yes then make a further reduction!

As HHJ Brown commented:

The approach will be as Sir Rupert described it: "In an assessment of costs on the standard basis, proportionality should prevail over reasonableness and the proportionality test should be applied on a global basis. The court should first make an assessment of reasonable costs, having regard to the individual items in the bill, the time reasonably spent on those items and the other factors listed in CPR rule 44.5(3).

The court should then stand back and consider whether the total figure is proportionate. If the total figure is not proportionate, the court should make an appropriate reduction.

The Ancient Regime of Lownds of "reasonableness and necessity" are on the tumbrel to the guillotine in the world of standard recoverable costs. Proportionality is the new king of "trumps" and any doubts about it are to be resolved in favour of the "paying party".

The Civil Procedure (Amendment No. 2) Rules 2013 provides that 44.3(2) (a) does not apply to cases "commenced" before April 1 2013 and (b) does not apply to costs incurred in respect of work done before 1 April 2013.

Simply put, if the claim was issued before 1 April 2013 the only test to be applied when dealing with the issue of proportionality is the one established by ***Lownds*** (subject to further case law) and where claims are issued after 1 April 2013 bills will be split to show work undertaken pre/post 1 April 2013 to reflect the two different approaches to the proportionality issue.

When considering applications for relief from sanction, the former requirement to consider all of the circumstances of the case, including nine specific matters set out in the former rule, no longer applies and now simply reads:

CPR 3.9 is a simplified version of the previous rules setting out when relief from sanctions will be ordered. As well as considering 'all the circumstances of the case so as to enable it to deal justly' with such an application, the court must also now take into account the need:

(a) for litigation to be conducted efficiently and at proportionate cost; and

(b) to enforce compliance with rules, practice directions and orders.

District Judge Gold commentated on future applications for Relief when writing in the *New Law Journal*:

"obtaining relief from sanctions will be tougher when you apply on or after 1 April 2013 (r 5). The raft of the nine specific CPR 3.9 factors to be taken into account as part of all the circumstances (interests of the administration of justice, whether application made promptly, whether failure to comply was intentional and the rest) has been dumped. … The change is intended to reflect the Jackson recommendation that the courts should be less tolerant of unjustified delays and breaches of orders. Unless the weakness or strength of the applicant's substantive case is clear as a pikestaff, we suggest that the courts will not normally take substantive merits into account in determining a relief application."

Judges have used recent cases to fire shots across the bows of profession providing warning of a much less tolerant approach from judges in the future.

Fred Perry (Holdings) Ltd v Brands Trading Plaza Ltd [2012] EWCA Civ 224

The Court of Appeal refused to overturn a judge's decision not to grant relief from sanctions under CPR r.3.9**, indicating that it was vital that the Court of Appeal should support first instance judges who made robust but fair case management decisions.**

In the matter of ***Murray & Anor v Neil Dowlman Architecture*** EWHC 872, Mr Justice Coulson (TCC) commented during his summing up:

In addition, I consider that this rigorous approach is mirrored by many of the other changes to the CPR coming into force on 1 April 2013, including (for example) the amendments to r.3.9(1). These amendments now place much more emphasis on the importance of complying with the orders of the court, rather than the previous lengthy 'shopping list' of matters which the court was obliged to work through. Fred Perry (Holdings) Ltd v Brands Trading Plaza Ltd is clear authority for the proposition that these changes mean that the courts will generally be less ready than before to grant relief from sanctions for procedural defaults.

At the recent ACL Costs Seminar DJ Besford told the gathered Costs Lawyers that District Judges had been told to "*hold the line*" in CPR 3.9 applications adding "*We will have considerable sympathy with the little old lady. But we will strike her out*".

Since originally preparing this article a post April 2013 decision has be provided where in a claim was struck out for failure to provide the Claimant's Particulars of Claim with the Claim form which was served on the very last permitted date; the Claimant's solicitors thought, erroneously, that they had a further 14 days from service of the Claim Form to provide the Particulars of Claim. Matter of ***Venulum Property Investments v Space Architecture and ors [2013] EWHC 1242***.

The Hon Mr Justice Edwards-Stuart referred to the "***Fred Perry***" case mentioned above and to the comments of Jackson LJ in his report when striking out the claim. However there were other factors considered including the Claimant taking over 5 years to consult solicitors, the case against the Defendants who had taken issue with the delay (others had agreed an extension for service) and the fact that the Claimant was seeking to advance a claim for bad faith that was pleaded in particularly vague terms. That said, it may well be the first of many cases struck out in this new era.

Be warned, the Judges mean business.

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