

As from 1 April 2013, the Jackson reforms created a new funding regime for court proceedings and made several other changes to litigation procedure. The reforms are the result of Lord Justice Jackson's wide-ranging review of the civil litigation costs system in which he was required to make recommendations in order to promote access to justice at proportionate cost. Lord Justice Jackson's terms of reference in carrying out his review extended to establishing the effect that case management procedures have on costs and considering whether changes in process and/or procedure could bring about more proportionate costs.

This crib sheet lists the key changes.

Funding litigation

- Parties are still free to enter conditional fee agreements (CFAs) with their legal representatives, but where entered into on or after 1 April 2013, the success fee payable under the CFA is no longer recoverable from the other side irrespective of whether the case is won or lost, with the exception of (i) claims for damages in respect of diffuse mesothelioma; (ii) publication and privacy proceedings; and (iii) insolvency proceedings (although this exception is set to expire in April 2015)
- Parties continue to be free to take out after-the-event insurance (ATE insurance) but where the ATE policy is entered into on or after 1 April 2013, the ATE insurance premium is not recoverable from the other side irrespective of whether the case is won or lost
- On or after 1 April 2013, parties became entitled to enter a new type of fee arrangement with their legal representative. These are called Damages-Based Agreements (DBAs). However, there has been a low take up of these sorts of agreements since 1 April 2013 and the Ministry of Justice recently ruled out a proposal (which was backed by Lord Justice Jackson) for "hybrid" DBAs in which some fees are paid on a traditional basis with the rest at risk under a DBA. For more information please click [here](#)

Recovering the costs of litigation

- **Proportionality.** From 1 April 2013, parties are no longer able to recover costs simply because they are reasonably and necessarily incurred. Costs incurred on or after 1 April 2013 must be “proportionate” to the matters in issue in the claim (except for cases commenced before 1 April 2013 when the proportionality test does not apply). This means that courts are required to deal with cases justly, at proportionate cost i.e. in ways that are proportionate to the amount of money involved, the importance of the case, the complexity of the issues and the financial position of each party
- **Costs budgeting.** There is a new strict requirement in Part 7 multi-track proceedings for cases commenced on or after 22 April 2014, to submit a costs budget, although certain proceedings are exempt from the automatic application of the new costs management requirements (essentially those worth over GBP 10 million or which contain a statement that the claim is valued at GBP 10 million or more) or which are subject to a fixed costs order. In any cases falling outside the exceptions, the court retains a discretion to: (i) order the parties to file and exchange costs budgets; and (ii) make costs management orders. NB: For cases commenced before 22 April 2014, different exemptions for costs management apply: i.e. cases in the Admiralty and Commercial courts (all exempt) and cases over GBP 2 million in the Chancery Division, Technology & Construction Court and Mercantile Court are also exempt
- **Costs management orders.** Irrespective of whether the case commenced before or after 22 April 2014, where costs budgets are filed and exchanged, the court will generally make a costs management order unless satisfied that the litigation can be conducted justly and at proportionate cost. Once a costs management order has been made, the court will thereafter control the parties’ budgets in respect of recoverable costs. Costs incurred in excess of the budget may not be recoverable

Litigation procedure

- **Case management.** From 1 April 2013, courts became subject to a new requirement to exercise stringent case management (backed up by a new, simplified and stricter CPR 3.9), deal with cases at “proportionate” cost, monitor compliance with directions and (for multi-track cases) have regard to parties’ budgets when making case management decisions. For cases where defences are filed on or after 1 April 2013, after receiving an “allocation notice”, parties are obliged to file a “directions questionnaire” (this has replaced the old allocation questionnaire) and submit proposed directions. For multi-track cases, parties’ directions proposals must be filed 7 days before any case management conference occurring on or after 9 April 2013
- **Relief from Sanctions (CPR 3.9).** In 2013, the landmark decision of *Mitchell v News Group Newspapers* (2013) on CPR 3.9 (relief from sanctions) was handed down. In this case, Master McCloud decided not to grant relief and instead limited the breaching party’s costs recovery to court fees as a penalty for filing its costs budget 6 days late. The decision was draconian but firmly endorsed by the Court of Appeal. Although welcome in driving through a new culture of efficiency and rule compliance, the decision had some unfortunate side effects. It resulted in uncooperative behaviour between litigants who took the view that, strategically, it would be unwise to waive an opponent’s breach, if (following *Mitchell*) the court is likely to penalise the breach (which would invariably assist the non-breaching party). Secondly, it resulted in a raft of applications by breaching parties for relief from sanctions as well as, where necessary, extensions of time, to complete the relevant procedural step. These applications had to be listed and parties’ opposing submissions heard. A raft of satellite litigation with the associated wastage of costs and court time was the result
Many such applications were reported but no consistent approach to how *Mitchell* should be applied in practice was taken. Thankfully, there have been some recent key developments which have gone some way to resolving these issues:
 - These are:
 - (i). **The Court of Appeal decision in three conjoined appeals** (collectively “Denton”): *Denton & Ors v White & Ors*; *Decadent Vapours Ltd v Bevan & Ors*; *Utilise TDS Ltd v Cranstoun Davies & Ors* (2014), which clarified and further explained the guidance given in *Mitchell* regarding the proper approach to be taken to relief from sanctions applications pursuant to CPR 3.9. In summary, it confirmed that, even with serious/significant breaches, which were without good reason, relief is not automatically to be denied. Rather, courts must consider “all the circumstances of the case” when deciding whether or not to grant relief, and in doing so, give factors (a) and (b) in CPR 3.9 particular weight. For more information please click [here](#) to access our briefing note on this case; and
 - (ii) **to reduce satellite litigation, the Civil Procedure Rules Committee drove through a new “Buffer Rule”** in the form of CPR 3.8(4) (in force since 5 June 2014) allowing parties to agree 28-day time extensions without having to seek the court’s permission. This alters the previous CPR 3.8(3) rule which provided that where a rule, practice direction or court order requires a party to do something within a specified time and specifies the consequences of failure to comply, the parties must seek the court’s permission to extend the deadline. From 5 June 2014, in such

circumstances, the parties may, by prior written agreement, agree to extend the deadline in question without having to seek court permission by up to a maximum of 28 days, provided no hearing date is jeopardised as a result. For more information, please click [here](#) for our briefing note on this case; and

(iii) **The Court of Appeal's decision on 19 May 2014 in *Hallam Estates Ltd v Baker (2014)*** clarified that the Mitchell criteria, which applied to applications for relief from sanctions, did not apply to applications for extensions of time made before the relevant deadline expired (even if the hearing of the application occurred after the deadline expired). The decision emphasised that parties have a duty, under CPR 1.3, to further the overriding objective, which included allotting an appropriate share of the court's resources to an individual case. As such, legal representatives must make efforts to agree to reasonable extensions of time which neither imperil future hearing dates nor otherwise disrupt the conduct of the litigation. By avoiding the need for a contested application they are furthering the overriding objective and saving costs. Similarly, the Court of Appeal emphasised that the courts should not refuse to grant reasonable extensions of time. For more information, please click [here](#) for our briefing note.

- NB: In the six to seven months following the *Denton* case (see above), the courts have, in applying the staged test set out in *Denton*, taken a noticeably more balanced and flexible approach to applications for relief from sanctions. For more information, please click [here](#) for our Case Tracker which sets out recent decisions on applications for relief from sanctions and whether or not relief was granted
- **Disclosure.** In multi-track cases, 14 days before the parties' case management conference ("CMC"), parties are required to file and serve a report describing existing relevant documents, how they are stored and their locations (for electronic documents), the cost of giving standard disclosure (including of electronic documents), and which of the directions set out in CPR 31.5(7) and (8) (which relate to the type of disclosure and how it is to be provided) are to be sought. The parties must try to agree a proposal regarding how disclosure is to be conducted not less than seven days before the first CMC. At the first or any subsequent CMC, the court will decide (having in mind the overriding objective and the need to limit disclosure to what is needed to dispose of the case justly) which of the menu of disclosure options to adopt. Orders include: (i) an order dispensing with disclosure; (ii) an order for a party to disclose the documents on which it relies and, at the same time, request any specific disclosure it requires from any other party; (iii) an order for the parties to give disclosure on an issue by issue basis; (iv) an order for each party to disclose documents which, it is reasonable to suppose, may contain information that will enable that party to advance its own case or damage the case of any other party, or leads to an enquiry that has either of those consequences; (v) standard disclosure; (vi) any other order that the court considers appropriate
- **Part 36.** With respect to Part 36 offers made on or after 1 April 2013, a claimant's recovery is enhanced (in addition to existing sanctions) (see CPR 36.14(3)(d)) by a percentage of the damages awarded (or costs in non-damages claims) where the defendant fails to better the claimant's offer at trial. The maximum sanction is capped at GBP 75,000, hence the effect of this rule change on higher value commercial claims is limited. This additional sanction is calculated as follows: In money claims or mixed claims, for amounts awarded of up to GBP 500,000, 10% of the amount awarded. In money claims or mixed claims, for amounts awarded above GBP 500,000 up to GBP 1,000,000, 10% of the first GBP 500,000 and 5% of any amount above that figure. In non-monetary claims, for costs awarded of up to GBP 500,000, 10% of the amount of costs awarded. In non-monetary claims, for costs awarded above GBP 500,000 up to GBP 1,000,000, 10% of the first GBP 500,000 of costs awarded and 5% of any amount of costs awarded above that figure
- **Witness statements.** From 1 April 2013, (see Part 32.2(3) of the CPR) the court may give directions identifying or limiting the issues to which factual evidence may be directed, identifying the witnesses who may be called or whose evidence may be read, or limiting the length or format of witness statements. This new power was given to the courts as a result of recommendations in Lord Justice's Jackson's final report which stated that, for the purpose of avoiding wastage of costs occurring as a result of lengthy and irrelevant witness statements, the court should, in appropriate cases, hear argument at an early case management conference about what matters need to be proved and then should give, in relation to witness statements, specific directions of the type set out in CPR 32.2(3)
- **Expert evidence.** The court's power to control expert evidence has been strengthened by new requirements for parties applying for permission to rely on expert evidence to identify the issue which the expert evidence will address and the estimated cost of the evidence. An order giving permission for expert evidence may specify the issues which the expert evidence should address. This applies to applications made on or after 1 April 2013. Also from that date, paragraph 11 of CPR Practice Direction 35 provides for "hot-tubbing" (the giving of evidence concurrently) of experts and sets out a procedure for enabling this to be done. This procedure for the presentation of evidence is similar to that in common law jurisdictions and may be effective in reducing the areas of conflict in expert evidence

Other changes of note

- **10% increase in (specific types of) damages in all civil claims including contract and tort claims.** Following *Simmons v Castle* (2012), in all cases in which judgment is given on or after 1 April 2013, a 10% increase in damages is awarded in all civil claims (not just tort cases) where damages are awarded for (a) pain and suffering; (b) loss of amenity; (c) physical inconvenience and discomfort; (d) social discredit; (e) mental distress. All successful claimants will benefit from the increase but, where the claimant has entered into a CFA, the 10% increase will only apply where the CFA arrangement is agreed on or after 1 April 2013. Please note that this 10% increase is in addition to the 10% increase in damages in Part 36 where a defendant fails to beat a claimant's offer (see above)
- **Qualified Once Way Costs Shifting (“QOCS”) for personal injury/fatal accidents.** CPR 44.13 - 17 introduced new rules on qualified one-way costs shifting (QOCS) in relation to proceedings (but not including those where the claimant has entered a funding arrangement before 1 April 2013), which include a claim for damages for: (i) personal injuries; (ii) under the Fatal Accidents Act 1976; or (iii) which arises out of death or personal injury and survives for the benefit of an estate¹. As from 1 April 2013, the ability of a defendant to recover its costs in a personal injury claim are restricted as set out in CPR 44.14. In brief, (subject to exceptions in CPR 44.15-16) this means that orders for costs against a claimant may only be enforced without the permission of the court to the extent that the amount does not exceed the amount of damages (including interest) awarded in the claimant's favour. Thus QOCS limits the claimants' exposure to liability for opponents' costs
- **Pre-Action Protocol in force from 31 July 2013 for (i) Low Value Personal Injury Claims in Road Traffic Accidents; and (ii) Employers' Liability/Public Liability.** These protocols increased the previous Road Traffic Accident (RTA) Personal Injury Scheme from claims up to GBP 10,000 to claims up to GBP 25,000. They also extended the RTA scheme to include employers' liability and public liability claims. The accompanying fixed recoverable costs (FRC) regime was extended accordingly

¹By virtue of section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934.