

Note of APIL meeting 24th June 2013

DJ Marshall Phillips –Regional Cost Judge

DJ Marshall Phillips said that we need to appreciate as solicitors the change of culture since the Jackson reforms. The best source of information for this is the series of Jackson implementation lectures and in particular lectures 5, 15 and 16.

The new culture in the courts echoes what happened in Singapore in the early 1990s. There was a huge backlog of cases. A new chief judge brought in a robust new system, parties were expected to follow court orders or be struck out. The backlog soon disappeared.

District Judge Phillips gave some examples to the meeting of how Cardiff CJC had over the past few weeks dealt with failure to comply with earlier directions. Since April 2013 there have been some cases in Cardiff where late submission of case summaries and proposed directions which have not got to the file before a CMC has not been tolerated. The sanction imposed by the court in some such cases was to adjourn those cases with the defaulting party ordered to pay costs. The message is, comply with court orders

Something which is concerning practitioners is the application of the new proportionality tests. The court has to apply now two tests; the old proportionality rule to pre-April 2013 work and the new proportionality rule to post April 2013 work. DJ Marshall Phillips was sympathetic to the issue of the modest value case where large costs have been run up due to the poor conduct of one party. Conduct is an issue the court can consider still. If it can be shown that the party not at fault had flagged the issue with the other side, and given them every opportunity not to incur such costs, only for this to be ignored, the court still had the power to award costs in such circumstances that might not normally be strictly proportionate. The judges are also aware of the potential tension between controlling costs and justice for the parties concerned.

There has not yet been in Cardiff a cost budgeting hearing. Cardiff Court does not expect to receive any such cases from Salford until July or August and is unlikely to have a cost management hearing of that nature until September. The Designated Civil Judge for Wales has expressed his current view that any such hearing would have to be in person, not on the telephone. Time estimate will be a minimum one-hour. The best way to avoid any problems with a cost budgeting hearing is for the parties to agree the budget, as unless the Court changed the directions upon which the budget was based, the Court would be unable to change the budget. District Judge Marshall Phillips thought that a lot of such cases would reach agreement between the parties. Therefore the court might not have to intervene as much as people fear. If the court is involved in cost budgeting District Judge Marshall Phillips thought some judges will apply a light touch, whilst others will go into it in greater detail.

Relief from sanctions is now being treated differently- see the new test under CPR 3.9. The court must have regard to the need to comply with previous court orders. There is now far greater risk that relief will not be granted. If the parties cannot comply strictly with court directions, in his view in a case where the trial date had been fixed and where the parties agreed to extend time, then there was no need to issue an application to extend time if the trial date and the date for filing of the pre trial checklist was unaffected. However, if that was not the case then an application should be issued. Equally, in a

case where no trial date had been fixed but slippage meant that the Court would be unable to progress the case at the next CMC , an application to extend time should be issued.

The parties must try to agree directions and file them (and case summary) seven days before any CMC.

If a party is looking for expert evidence be mindful of CPR 35.42, be prepared to provide the court with evidence of the cost of such expert evidence and as to the issues it will deal with.

For multitrack cases use the standard template for directions. For fast-track cases follow the guidance of CPR 28

District Judge Marshall Phillips is a member of the Costs Committee of the Civil Justice Council and represents the District Bench. Those representing the claimants view on the committee sought an increase to the rates ; those representing the insurers a reduction . District Judge Phillips appealed to members to participate in a survey the Committee is likely to undertake over the next few months so that any recommendation it makes can be evidenced based.