**PROCEDURE - AVOIDING STRIKE OUT**

**Introduction**

1 April 2013 saw the introduction of wide-ranging reforms affecting all aspects of civil litigation.

The key changes to procedure concern:

* Sanctions
* Strike Out
* Relief
* QOCS

**Sanctions**

The CPR, when introduced in 1999, provided that sanctions would take effect without further order but relief from sanctions might be given. The relevant rules are Part 3.8 and 3.9.

Changes made to the CPR by The Civil Procedure (Amendment) Rules 2013 are likely to make it more difficult for a party in default to obtain relief from sanctions.

*Changes to Part 1*

The change to Part 1, and the overriding objective emphasises the importance of proportionality in the new regime.

The Civil Procedure (Amendment) Rules 2013 provide:

4. In rule 1.1—

(a) In paragraph (1), after “justly” insert “and at proportionate cost”; and

(b) In paragraph (2)—

(i) after “justly” insert “and at proportionate cost”;

(ii) at the end of sub-paragraph (d), omit “and”;

(iii) at the end of sub-paragraph (e), for “.” substitute “; and”; and

(iv) after sub-paragraph (e) insert the following sub-paragraph—

“(f) enforcing compliance with rules, practice directions and orders.”.

*Changes to Part 3*

The 2013 Rules also provide that:

For rule 3.9(1), substitute—

“(1) 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—

1. for litigation to be conducted efficiently and at proportionate cost; and
2. to enforce compliance with rules, practice directions and orders.”

If “robust” case management orders are made the indications, from the Court of Appeal, are that such decision should be upheld: Fred Perry (Holdings) Ltd -v- Brands Plaza [2012] EWCA Civ 224.

However, there remains a need to deal with cases justly and judges may be robust but not unjust: Ryder plc -v- Beever [2012] EWCA Civ 1737. Although that case concerned the old Part 3.9 it seem likely the could would have reached the same conclusion under the new Part 3.9 that relief from sanctions was appropriate.

*Tactics*

* Being aware of those parts of the CPR which provide for automatic sanctions for example:
* Part 31 (disclosure);
* Part 32 (witness statements); and
* Part 35 (expert evidence).
* Diarising to ensure compliance with the court timetable.
* Where the timetable needs to be varied seeking agreement (and if necessary approval of the court) sooner rather than later.
* If application for relief from sanctions is necessary ensuring the court has information on all relevant “circumstances of the case” and why relief should be given to ensure the case is dealt with “justly”.
* If opposing an application for relief from sanctions reminding the court of the terms of Part 1, Part 3.9 and the need for courts to be “robust”.

**QOCS (Qualified One-Way Costs Shifting)**

Lord Justice Jackson recommended the introduction of Qualified One-Way Costs Shifting.

*The CPR*

The Civil Procedure (Amendment) Rules 2013 introduce, from 1 April 2013, a number of amendments to the CPR including a new Section II Part 44 dealing with QOCS.

These rules provide:

**Qualified one-way costs shifting: scope and interpretation**

**44.13.**—

(1) This Section applies to proceedings which include a claim for damages—

(a) for personal injuries;

(b) under the Fatal Accidents Act 1976(**a**); or

(c) which arises out of death or personal injury and survives for the benefit of an estate by virtue of section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934(**b**),

but does not apply to applications pursuant to section 33 of the Senior Courts Act 1981**(c)** or section 52 of the County Courts Act 1984**(d)** (applications for pre-action disclosure), or where rule 44.17 applies.

(2) In this Section, “claimant” means a person bringing a claim to which this Section applies or an estate on behalf of which such a claim is brought, and includes a person making a counterclaim or an additional claim.

**Effect of qualified one-way costs shifting**

**44.14.**—

(1) Subject to rules 44.15 and 44.16, orders for costs made against a claimant may be enforced without the permission of the court but only to the extent that the aggregate amount in money terms of such orders does not exceed the aggregate amount in

money terms of any orders for damages and interest made in favour of the claimant.

(2) Orders for costs made against a claimant may only be enforced after the proceedings have been concluded and the costs have been assessed or agreed.

(3) An order for costs which is enforced only to the extent permitted by paragraph (1) shall not be treated as an unsatisfied or outstanding judgment for the purposes of any court record.

**Exceptions to qualified one-way costs shifting where permission not required**

**44.15.**

Orders for costs made against the claimant may be enforced to the full extent of such orders without the permission of the court where the proceedings have been struck out on the grounds that—

(a) the claimant has disclosed no reasonable grounds for bringing the proceedings;

(b) the proceedings are an abuse of the court’s process; or

(c) the conduct of—

(i) the claimant; or

(ii) a person acting on the claimant’s behalf and with the claimant’s knowledge of such conduct,

is likely to obstruct the just disposal of the proceedings.

**Exceptions to qualified one-way costs shifting where permission required**

**44.16.**—

(1) Orders for costs made against the claimant may be enforced to the full extent of such orders with the permission of the court where the claim is found on the balance of probabilities to be fundamentally dishonest.

(2) Orders for costs made against the claimant may be enforced up to the full extent of such orders with the permission of the court, and to the extent that it considers just, where—

(a) the proceedings include a claim which is made for the financial benefit of a person other than the claimant or a dependant within the meaning of section 1(3) of the Fatal Accidents Act 1976 (other than a claim in respect of the gratuitous provision of care, earnings paid by an employer or medical expenses); or

(b) a claim is made for the benefit of the claimant other than a claim to which this Section applies.

(3) Where paragraph (2)(a) applies, the court may, subject to rule 46.2, make an order for costs against a person, other than the claimant, for whose financial benefit the whole or part of the claim was made.

**Transitional provision**

**44.17.**

This Section does not apply to proceedings where the claimant has entered into a pre-commencement funding arrangement (as defined in rule 48.2).

*Claims within the Scope of QOCS*

Part 44.12 confirms that QOCS applies to certain types of claim. These are:

* Any proceedings which include a claim for damages for personal injuries. (Part 2.3 (1) confirms that in the CPR “claim for personal injuries” means proceedings in which there is a claim for damages in respect of personal injuries to the claimant or any other person or in respect of a person’s death, and “personal injuries” includes any disease and any impairment of a person’s physical or mental condition.)
* Proceedings which include a claim for damages under the Fatal Accidents Act 1976.
* Proceedings which include a claim for damages arising out of death or personal injury and survives for the benefit of an estate by virtue of S.I (1) Law Reform (Miscellaneous Provisions) Act 1934.

Whilst the rules provide for the “claimant” to have protection, Part 44.13 (2) confirms that for these purposes “claimant” means not only any person bringing a claim of the kind described in S.II but also an estate on behalf of which such a claim is brought as well as any person making a counterclaim or additional claim.

QOCS will not apply, under Part 44.17, where the claimant has what is defined as a “pre-commencement funding arrangement” which includes conditional fee agreements entered prior to 1 April 2013 and also conditional fee agreements in those areas where recoverability of additional liabilities will remain. If, however, the claimant has a pre-April 2013 funding arrangement which does not amount to a “pre-commencement funding arrangement” then QOCS will apply, for example private funding/BTE.

*Effect of QOCS*

Where QOCS applies any adverse costs orders can only be enforced up to the extent that “the aggregate amount in money terms of such orders does not exceed the aggregate amount in money terms of any orders for damages and interest made in favour of the claimant”.

Consequently, a claimant who does not recover any damages, whilst an adverse costs order will still be made, will not, subject to the exceptions found in Parts 44.15 and 44.16, have to pay any costs.

Where a claimant does recover any damages then those damages are at risk to the extent that, although successful, there are adverse costs orders. There may be adverse costs orders which have been made at interim hearings, by the court exercising the general discretion as to costs under Part 44 or under Part 36, in particular Part 36.10 (5) and part 36.14 (2).

A claimant who does not recover damages will not have the protection of QOCS if any of the exceptions in the rules apply.

*First Exception*

Under Part 44.15, orders for costs made against the claimant may be enforced to the full extent of such orders, without the permission of the court.

Part 44.15 will apply where the proceedings have been struck out on the grounds stated in the rule.

The grounds in Part 44.15, leading to the strike out, largely reflect those found in Part 3.4 (2), namely lack of reasonable grounds for bringing the proceedings, abuse of the court’s process or conduct, by on behalf of the claimant, likely to obstruct the just disposal of the proceedings.

When dealing with an application to strike out the court is only deciding whether there are reasonable grounds for pursuing or defending a claim, for example Page -v- Hewett Solicitors [2012] EWCA Civ 879.

*Second Exception*

Under Part 44.16 (1) orders for costs made against the claimant may be enforced to the full extent of such orders, with the permission of the court, where the claim is found, on a balance of probabilities, to be fundamentally dishonest.

Allegations of this kind should be pleaded not insinuated: Hussain -v- Amin [2012] EWCA Civ 1456.

Would the claimant’s case in Summers -v- Fairclough Homes Ltd [2012] UKSC 26 be regarded as “fundamentally dishonest”, given that the claimant had genuine claims for injuries suffered as a result of the defendant’s breach of duty?