Butterworths Costs Services Bulletin

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INTRODUCTION

We have reported on the most important updates from 20 February 2014 to 10 June 2014. We first include a specific section on the new Consumer Regulations which have received less attention than they deserve, and then address the more commonly reported updates on the Jackson Reforms. Finally, we summarise some interesting recent case law specifically in respect of costs budgets.

New Consumer Regulations

With over a decade of fairly fundamental regulatory challenges brought about by the **Access to Justice Act 1999**, **s 58 of the Courts and Legal Services Act 1990** (Conditional Fee legislation) and more recently **Legal Aid, Sentencing and Punishment of Offenders Act** (Jackson and DBAs), not to mention the overhaul of the Solicitors Code of Conduct to its present guise of the Handbook in October 2011, one would be forgiven for thinking that the solicitors profession is already sufficiently regulated without yet more intricate legislation. However, it seems not. It is now necessary for the profession to get to grips with this latest round of regulation bestowed upon the profession by Brussels.

On 13 June 2014 the **Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013** ("the CCR 2013") come into force. They apply to contracts entered into on or after that date. These regulations impose a new statutory regime governing the pre-contractual requirements of certain consumer contracts, including important provisions relating to cancellation. They complete the implementation of the **Consumer Rights Directive** (**2011/83/EU**), and thus represent a further step towards the harmonisation of consumer contract law across the EU. The Directive records that, "The harmonisation of certain aspects of consumer distance and off-premises contracts is necessary for the promotion of a real consumer

internal market striking the right balance between a high level of consumer protection and the competitiveness of enterprises, while ensuring respect for the principle of subsidiarity".

Evidently this includes contracts which govern the relationship between solicitors and their consumer clients. For many solicitors conducting business via off premises or distance selling communication, they will be familiar with the **Consumer Protection (Distance Selling) Regulations 2000** and the **Cancellation of Contracts made in a Consumer's Home or Place of Work etc Regulations 2008**. However, from 13 June 2014 those regulations will no longer apply. Parliament has not chosen to revoke these regulations, but rather to expressly disapply their application to contracts entered into on or after 13 June 2014.

Application to Solicitors

The new CCR 2013 is likely to apply to all Solicitors' retainers where the client is a consumer and where the contract of retainer is entered into:

- on their business premises;
- away from the solicitor's own place of business or following discussions that take place away from their own place of business;
- at a distance as part of an organised distance sales or service-provision scheme.

"Consumer" is defined as an individual acting for purposes which are wholly or mainly outside that individual's trade, business, craft or profession. Whether the regulations apply will therefore depend on the factual circumstances of each case. But there seems little doubt for the vast majority of solicitors where clients instruct the firm in respect of their own personal/private affairs outside that individual's trade, business or profession, then the regulations will apply.

There are essentially three different scenarios to which the regulations apply:

- on premises contracts;
- off premises contracts;
- distance contracts.

Contracts concluded in the Solicitors' office

This will be an "on-premises contract". The solicitor must now ensure that the requirements of regulation 9 are met. This requires the solicitor to give or make available to the consumer information required by Schedule 2 to the CCR 2013. In essence most solicitors current retainers issued to clients are likely to meet these requirements but checks should be made. Under Chapter 1 of the Handbook "Client Care" the requirements for the provision of information to clients is *outcome* based and less prescriptive than Schedule 1. It is therefore necessary to cross check retainers against the specific requirements of Schedule 1. Information will include a description of the services to

be provided, the identity of those providing the service, the total estimated cost or if fixed, the total price for the work to be completed, the manner in which the charges are to be calculated, arrangements for payment and performance of the services, the solicitors' complaints handling policy, the likely duration of the contract. This information has to be provided or made available before making the contract. The information provided is to be treated as a term of the contract of retainer. Any change to the information provided is not effective unless expressly agreed between the consumer and the trader. This would apply, presumably, to increase in hourly rates and/or changes to budgets.

What if the solicitor fails to comply? There is no express provision rendering the retainer unenforceable. However, regulation 18 of the CCR 2013 provides that the contract of retainer will be treated as including a term that the solicitor has complied with the provisions of regulation 9. Accordingly, where it is shown that the solicitor has not so complied, the client is likely to be able to invoke common law remedies arising from alleged breach of contract and/or misrepresentation where the circumstances permit. Query to what extent a third party (for example a paying party in an *inter partes* assessment) could invoke those rights when challenging an *inter partes* costs bill. We have no doubt that the point will have to be considered by the courts in due course.

Contracts concluded off premises

"Off-premises contracts" are contracts between the solicitor and client where one of the following applies:

- the contract is concluded in the simultaneous physical presence of the solicitor and the client in place which is not the solicitor's business premises.
- an offer was made by the client in the simultaneous physical presence of the solicitor and the client, in a place which is not the solicitor's business premises but where the contract of retainer is concluded on the business premises. For example, if a solicitor visits a client at home and the client offers to engage the solicitor to carry out legal work, and the solicitors then accepts the offer by telephoning the client from the office the following day, this would be considered to be an off-premises contract.
- a contract concluded on the business premises or through any means of distance communication immediately after the client was personally and individually addressed in a place which was not the solicitor's business premises.
- the contract is concluded during an excursion organised by the solicitor with the aim or effect of promoting and selling services to the client.

This part of the regulations is the more demanding of the other parts. Before the client is bound by the contract of retainer, the solicitor must first give to the client the information listed in Schedule 2 in a clear and comprehensive

manner. Additionally, the client must be provided with a right to cancel in the form prescribed by Part B of Schedule 3.

The Schedule 2 requirements are varied. All solicitors should read Schedule 2 and satisfy themselves that they have complied with the requirements prescribed. Many of the requirements are not difficult to meet and are likely to be covered by existing retainer letters. Thus, the main characteristics of the services to be provided, the identity of the solicitor, the address of the firm, the costs of the work to be undertaken and/or the manner in which the costs will be calculated, arrangements for payment, the complaint handling policy, cancellation rights, termination rights and out of court complaint and redress mechanisms. Paragraph (h) of Schedule 2 requires in a case of contract of "indeterminate duration" that the consumer is provided with the "total costs per billing period" or (where there is a fixed rate charge), the total monthly costs. Again, these are matters which most solicitors will be providing in any event, it is just that a failure to do so under the regulations has implications beyond breaches of the Handbook/Code of Conduct.

Regulation 10(4) provides that if a trader has not complied with, inter alia, paragraph (h) of Schedule 2, then "the consumer is not to bear the charges or costs referred to in those paragraphs". It is immediately obvious that this provision is likely to be invoked by clients on solicitor and client assessments where there are allegations of overcharging and a failure to keep the client updated on the question of costs. "Indeterminate duration" is not defined in the regulations but presumably will cover many contentious and non-contentious retainers where it is just not possible to determine with any precision the likely duration of the retainer. Long running administration of estate cases may be a good example. Once again, the contract is to be treated as including a term that the solicitor has complied with the provision of information requirements (regulation 18), leading to breach of contract/misrepresentation claims in cases of default. Any changes to the information provided must be agreed with the client (regulation 10(6)).

The regulations require the Schedules 1 and 2 information to be provided before the contract is entered into. This means that the solicitors must incept a mechanism which allows the client to read and understand the information before the contract of retainer is executed.

Once the off-premises contact is executed, the solicitor must provide the client with a copy of the signed agreement or written confirmation of the agreement. This should be effected before work starts on the case (r 12(4)(b)).

Distance Contracts

"Distance contracts" are contracts concluded under an organised distance sales or service provision scheme (eg mail order, online sales and telesales) without the simultaneous physical presence of the solicitor and the client, with the exclusive use of distance communication up to the point the contract is agreed.

Contracts of this nature require the solicitor to provide the Schedule 2 information much in the same way as with "off-premises" contracts but there

are special provisions where the means of distance communication (telephone/internet) allows for limited time or space to display the required information under Schedule 2. Solicitors conducting business of this type must familiarise themselves with r 13 and the Schedule 2 requirements.

Where the distance contract is concluded by electronic means, then the solicitor is obliged to ensure that the client is aware from prominent postings of the client's obligation to pay before the request for services is made. Specific requirements relate to the labelling of buttons on web sites and legibility of obligations to pay when confirming instructions (placing an order). If these requirements are not met then it can be fatal for the solicitor. Regulation 14(5) provides that if these requirements are not met then the client is not bound by the contract. Specific requirements are set out for the content of telephone conversations where contracts are concluded and obligations to provide confirmation of the terms of the contract following its execution.

Where there is a dispute as to whether the solicitor complied with the requirements pertaining to off-premises and/or distance contracts, then the burden is placed on the solicitor to prove compliance: r 17.

Cancellation Notices

The CCR 2013 introduces changes into the format of the Cancellation Notices which solicitors have been historically providing under the **Consumer Protection (Distance Selling) Regulations 2000** and the **Cancellation of Contracts made in a Consumer's Home or Place of Work etc Regulations 2008**. There is a new prescribed cancellation Notice which must be used. There is also a "model instruction" which it is advisable to use. This is set out in Part A of Schedule 3. The Cancellation Notice/Form is set out in Part B of Schedule 3.

The right to cancel arises in off-premises and distance contracts. The CCR 2013 provides that the client may cancel a distance or off-premises contract at any time in the cancellation period without giving a reason and without incurring a liability. Furthermore, the regulations provide that the solicitor (trader) must not begin the supply of any services before the end of the cancellation period unless the client has requested early supply of the services in advance of the cancellation period expiring: r 36(1). The normal cancellation period is 14 days after the day on which the contract is entered into. Furthermore, the solicitor must also make it clear to the client that if such request is made, that the client will be required to pay the solicitor reasonable costs for the work done up to the point of cancellation if cancellation occurs after the work is started. No charges can be raised for work in the cancellation period unless these requirements are met: r 36(6).

If the solicitor fails to provide the client with a right to cancel then if the information is provided late, but within 12 months of the contract being entered into, then the cancellation period is extended to end 14 days after the client receives the cancellation notice. Otherwise, the cancellation period will be assumed to end at the end of 12 months from the contract being entered

into. Of more concern to the solicitor however, will be the criminal sanction for failing to provide the cancellation information required by Schedule 2 in an off-premises contract. The regulations create a summary offence with a fine not exceeding level 5 (£5,000): r 19.

A specific form is prescribed for the client to use if exercising a right to cancel (Part B of Schedule 3) which should be provided by the solicitor before the contract is executed. However, the client is in fact free to cancel by "any clear statement setting out the decision to cancel the contract".

Ancillary Contracts

Solicitors must also be aware that where a client cancels an off-premises or distance contract, any ancillary contract is also automatically terminated without cost to the client, unless the client has requested early supply of the service within the cancellation period under r 36. "Ancillary contracts" is defined as a contract by which the consumer acquires goods or services related to the main contract, where those goods or services are provided by the solicitor or by a third party on the basis of an arrangement between the third party and the solicitor. It will be a matter for future argument but it will doubtless be argued that ancillary contracts include retainers with barristers entered into by the solicitor on the particular client's case and possibly after-the-event contracts too.

Jackson Reforms

Costs budgeting

Scope of the rules

After much debate between the various divisions of the High Court and Civil Procedure Rules Committee, the Civil Procedure (Amendment No 4) Rules 2014 (the 72nd Update) provide that the costs management rules will now apply to all Part 7 multi-track cases, except:

1. Where the claim is commenced on or after 22 April 2014 and the amount of money as stated on the claim form is £10 million or more; or
2. Where the claim is commenced on or after 22 April 2014 and is for a monetary claim which is not quantified or not fully quantified or is for a non-monetary claim and in any such case the claim form contains a statement that the claim is valued at £10 million or more; or
3. Where the proceedings are the subject of fixed costs or scale costs or where the court otherwise orders.

The Civil Procedure Rules Committee has clarified that the amended version only applies to cases issued on or after 22 April 2014 and will not be applied retrospectively (see their note of clarification released on 4 April 2014).

The significant changes are therefore:

- The £2 million cap introduced by various divisions of the High Court is replaced by a global £10 million cap across all divisions;

- The confusion over the applicability of the costs management rules to Part 8 claim deemed to be allocated to the multi-track has been resolved; and
- Clarification is provided as to non-monetary claims and/or unquantified claims and further guidance is given in Practice Direction 3E.

Costs management orders

The 72nd Update also amends CPR, r 3.15(2), by inserting "*Where costs budgets have been filed and exchanged the court will make a costs management order unless it is satisfied that the litigation can be conducted justly and at proportionate cost in accordance with the overriding objective without such an order being made*".

There is a clear presumption that a costs managements order will be made.

Statement of Truth and Precedent H

The 69th update to the Civil Procedure Rules took effect on 22 April 2014 and amends Precedent H to replace the previous statement of truth as currently specified. The new rule, which is more apt for costs budgets, provides:

"*This budget is a fair and accurate statement of incurred and estimated costs which it would be reasonable and proportionate for my client to incur in this litigation*".

Extensions of time

In light of the inundation of courts by applications to extend time (and as recognised by the QB Masters) the 73rd Update to the Civil Procedure Rules, which came into force on 5 June 2014, provides that parties may agree, in writing, to an extension of time, up to a maximum of 28 days without an application to the court. The parties may not make such an agreement, if the court has ordered that such an agreement cannot be made, or if any extension of time agreed puts the hearing date at risk. Consequential amendments are also made to PDs 28 and 29.

Allocation of cases

The 69th update also reflects changes to the High Court and County Court Jurisdiction Order 1991 which will provide that financial claims below £100,000 must be made in the County Court (and consequential amendments to PD 7A).

Other developments

Other points of interest in the relevant period are:

- The costs committee of the Civil Justice Council has now provided its report on guideline hourly rates, which will not be published until the Master of the Rolls has had a chance to review it;

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- Lord Justice Jackson has produced a paper for the Civil Justice Council Conference on 21 March 2014 in which he:
  - Summarises the background to the recent civil justice reforms, their objectives and what those reforms comprise; and
  - States his early impressions of the impact of the reforms;
- Notwithstanding the negative responses to the proposal from the Civil Justice Council and the Senior Judiciary, the government is proceeding with its plans to increase court fees, as stated in its response to its consultation on court fees;
- The Chancery Division is piloting fixed-ended trials;
- On 2 May 2014 the government published its consultation entitled "*Whiplash Reform: Proposals on Fixed Costs for Medical Examinations/ Reports and Related Issues*" which addresses:
  - The need to fix fees for medical examinations and reports in whiplash claims;
  - Discouraging offers to settle being made before appropriate medical reports have been obtained; and
  - The imperative for independence in the commissioning and provision of reports; and
- The Court of Appeal is due to hear three conjoined appeals over 16 and 17 June 2014 in respect of the Mitchell decision and relief from sanction.

CASE LAW

DIVISION A – CIVIL LITIGATION COSTS

COSTS BUDGETS

THE GOVERNOR & COMPANY OF THE BANK OF IRELAND v PHILIP PANK PARTNERSHIP [2014] EWHC 284 (*TCC*) (*Mr Justice Stuart-Smith*) *12/02/14*

Facts: on 24 January 2014, seven days before the original date for the CMC, the parties exchanged costs budgets. The Claimant adopted Precedent H, but on the first page failed to include the full Statement of Truth. Instead, the document had the words "[Statement of Truth]" immediately above the place for signature and dating by the Claimant's legal representative. The document was signed and dated by a partner in the Claimant's firm of solicitors. The Defendant argued that the Claimant failed to file and exchange a costs budget as the costs budget did not contain the full Statement of Truth. The Claimant applied for relief from sanction if the court held that the budget was deficient.

Held: finding that the sanction in CPR, r 3.14 did not apply: (1) CPR, r 3.14 provides for a sanction in the event that a party "fails to provide a budget"

but does not include the additional words "complying in all respects with the formal requirements laid down by PD 3E" or any other words to similar effect. There is nothing in the rules of practice directions which requires any and every failure to comply with the formal requirements for budgets as rendering the budget a nullity, as opposed to being one which is subject to an irregularity; (2) while the importance of Statement of Truth should not be underestimated, in the circumstances the budget only suffered from an irregularity and was not a nullity; and (3) although it was unnecessary to determine whether relief from sanction should be granted, relief would have been granted in any event. The absence of the Statement of Truth was not trivial, but was a failure of form over substance.

Comment: an eminently sensible decision which has now been mitigated by the amendments to Precedent H in respect of Statement of Truth referred to above. The decision can still be relied upon for other minor defects in budgets.

UTILISE TDS LTD v NEIL CRANSTOUN DAVIES [2014] EWHC 834 (Ch) (His Honour Judge Hodge QC sitting as a Judge of the High Court) 24/02/14

Facts: the notice of proposed allocation to the multi-track in form 149C was sent out to the parties on or about 9 August 2013, but made no reference to costs budgets or filing Precedent H. None of the parties filed a Precedent H with the respective directions questionnaires. By order staying the claim on 2 October 2013 the District Judge recorded that the parties had failed to file Precedent H in accordance with CPR, r 3.13 and ordered the parties to file the same by 4 pm on 11 October 2013. The Defendant complied. The Claimant sent its Precedent H to the court by fax, apparently at 4.41 pm on Friday 11 October 2013. A hard copy letter is stamped as received by the court on Monday 14 October 2013, with no faxed copy on file. The District Judge ordered that the Claimant was in breach of the order and CPR, r 3.14 applied thus the Claimant's costs budget was treated as extending only to court fees. The Claimant applied for relief from sanctions, which the District Judge dismissed. The Claimant appealed.

Held: dismissing the appeal: (1) the District Judge had erred in considering that the Precedent H should have been filed with the directions questionnaire, given that the form 149C had not specified a date; (2) viewed in isolation the breach in filing Precedent H no more than 45 minutes late was a trivial breach; (3) however, the court could take into account the fact that the Claimant had also failed to notify the court in writing of the outcome of negotiations within the period so ordered, and therefore had been in further breach of the court order; (4) viewed together, the breaches merited some explanation or good reason. Given the two breaches, and the lack of explanation, the District Judge could treat the otherwise trivial breach a non-trivial one; and (5) the Claimant had not shown any good reason for the breach, and there was no good reason to interfere with the District Judge's decision.

Comment: the form 149C has since been corrected, but this case demonstrates the strict approach which the courts may take to any delay, particularly if combined with other breaches. This case is due to be heard on appeal by the Court of Appeal on 16 and 17 June 2014 as referred to above.

WAIN v GLOUCESTERSHIRE COUNTY COUNCIL [2014] EWHC 1274 (TCC) (His Honour Judge David Grant sitting as a High Court Judge) 02/04/14

Facts: the Fourth Defendant ("D4") was one day late in filing her costs budget, so that instead of the budget being served seven clear days before the first CMC and costs management hearing, it was in fact served six clear days before the hearing. The Claimant asserted that the sanction in CPR, r 3.14 applied, and D4 made an oral application for relief from sanction.

Held: allowing the application for relief from sanction, the brief being trivial as: (1) the delay was of one day in the context of a time period of seven days; (2) that seven-day period is usefully compared with the three-day period for service of an application notice before its hearing: see CPR, r 23.7(1); (3) the Claimant had not suffered any prejudice; (4) the parties were able to deal with costs at the hearing notwithstanding the breach; (5) unlike Mitchell, there was no disruption to the court's timetable; (6) the Claimant narrowly missed the requirement (as per the guidance in Mitchell); and (7) the use of the word "insignificant" in Mitchell resonates with the above, namely the relevance of the interrelationship between the breach and its consequences.

Comment: given the differing decisions on relief from sanctions, and the further clarification about to be given by the Court of Appeal in the three conjoined cases referred to above, it is unclear whether such reasoning would be upheld in subsequent cases.

IAN KERSHAW v (1) MARION ROBERTS; (2) JAMES GERARD JONES (as personal representatives) [2014] EWHC 1037 (Ch) (Mr Justice Hickinbottom) 10/04/14

Facts: in a Part 8 claim, the county court listed a hearing for "Directions". The Claimant served a costs budget on 14 November 2013 by fax. The Defendants sent their budget by post on 19 November 2013. The telephone hearing took place on 21 November 2013, when the Claimant argued that the Defendant had failed to serve their costs budget in time and CPR, r 3.14 applied. The judge held at a subsequent hearing that the hearing on 21 November 2013 was not a CMC, and there was therefore no obligation to file a costs budget, and ordered that the costs of the issue be costs in the case. The Claimant appealed against the decision that there was no requirement to file a budget, the Defendants cross-appealed against the costs order.

Held: dismissing the appeal and allowing the cross-appeal: (1) Part 8 claims are not automatically allocated to the multi-track, merely treated as allocated to the multi-track. Unless and until a claim is allocated to the multi-track, the CMC provisions of Part 29 do not apply; (2) there are no CMCs in Part 8 claims unless the court decides to allocate the case to the multi-track and

order a CMC. The first hearing in Part 8 claims is not a CMC, and therefore the requirement in CPR, r 3.13 to file and budget is not triggered unless the court so orders; and (3) the Defendants should be entitled to half the costs of and occasioned by the hearing, as the Defendants had won on the costs budgeting issue.

Comment: although superseded by the new CPR, r 3.12 (see above), this is an interesting analysis of Part 8 which may be applicable in other cases (and those which precede the new rules).

VIVEK RATTAN v UBS AG [2014] EWHC 665 (*Comm*) (*Mr Justice Males*) *12/03/14*

Facts: the Claimant's solicitors wrote to the Defendant's solicitors and stated that it understood that the parties were obliged to file costs budgets by 28 February 2014. The Defendant provided its costs budget on Friday 28 February 2014, which was only six clear days before the CMC, not seven. The Claimant argued that the sanction in CPR, r 3.14 should apply, notwithstanding its letter to the Defendant.

Held: (1) there was an agreement that the costs budgets would only be filed and served on 28 February 2014; (2) if relief for sanctions had been necessary, the case for such relief would have been overwhelming; and (3) the Claimant should pay the Defendant's costs of the hearing on the indemnity basis.

Comment: the case demonstrates that different courts will take different approaches to arguments as to non-compliance and Mitchell. This case is a reminder to non-defaulting parties that they cannot always be overly opportunistic in cases of breach.

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