JUDICIARY OF
ENGLAND AND WALES

LORD JUSTICE STEPHEN RICHARDS
DEPUTY HEAD OF CIVIL JUSTICE

Ms L Scott-Moncrieff
President
The Law Society
113 Chancery Lane
London
WC2A 1PL

13th February 2013

Dear Ms Scott-Moncrieff,

Re: Civil Procedure Rules Amendments

Thank you for your letter of 7 February 2013 concerning the Civil Procedure Rules. I am pleased to say that the letter arrived in time for it to be tabled at the meeting of the Civil Procedure Rule Committee on 8 February, at which the Committee gave careful consideration to the issues raised in the letter.

The first issue concerns the transitional provisions for qualified one way costs shifting (QOCS), in particular the effect of new rule 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)"). Your concern relates to cases where the claimant has entered into a CFA before 1 April 2013 but has not taken out ATE insurance by that date. That issue was considered when the new rule was formulated and agreed. The view taken was that there would be few such cases, since solicitors will have had sufficient notice of the rule to enable those who have entered into CFAs before 1 April to arrange ATE insurance by that date even if they might otherwise have delayed until just prior to the commencement of legal proceedings. The matter was reviewed at the meeting on 8 February in the light of your representations, but the Committee decided in favour of retaining the new rule without amendment.

The second issue concerns the transitional provisions for the new rules on proportionate costs, in particular the effect of new rule 44.3(7) ("Paragraphs (2)(a) and (5) do not apply in relation to cases commenced before 1 April and in relation to such cases, rule 44.4(2)(a) as it was in force immediately before 1 April 2013 will apply instead"). Your letter makes the point that, under the rule as drafted, work done *before* 1 April in relation to a case commenced *after* 1 April would be

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subject to the new regime concerning proportionate costs and that this could be considered to be retrospective in effect. At the meeting on 8 February the Committee acknowledged the force of that point and decided in favour of a further transitional provision within rule 44.3, to the effect that costs incurred in respect of work done before 1 April 2013 will not be disallowed if they would have been allowed under the rules in force immediately before that date. It was too late to introduce that amendment into the main Statutory Instrument containing the "Jackson" rule changes, which was laid before Parliament yesterday; but there is expected to be a further Statutory Instrument in March which will provide the opportunity to make the amendment so as to have effect from 1 April.

The third issue relates to the inability to recover a success fee in respect of counsel instructed after 1 April 2013 in a case where the solicitor has entered into a pre-commencement funding arrangement. As the Committee understands the position, the point that concerns you arises out of section 44 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and the commencement provisions relating to that section. It is therefore one for the Ministry of Justice, not for the Committee, to address.

The final issue relates to the wording of new rule 44.14 in respect of QOCS ("... 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"). Your letter suggests that this is ambiguous and could be read to imply that if the costs exceed the damages, no costs can be recovered. The point had been considered previously but was given further consideration by the Committee at the meeting on 8 February in the light of your concern. The Committee concluded, however, that there is no realistic possibility that the court would construe the rule in the way you suggest might happen. It took the view that the words themselves are clear ("to the extent that", *not* "if" or "where") and that a purposive approach would also tell strongly against your suggested construction.

I am very grateful to you for the clear and constructive way in which you have raised these matters of concern, and for your indication that the Law Society remains committed to working with the Committee to help deal with issues as and when they arise. I am confident that the Committee, for its part, will continue to give careful attention to input of this kind.

Yours sincerely,

From the President

The Rt. Hon. Lord Justice Stephen Richards
(Chair – Civil Procedure Rules Committee)
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By email to: Andrew.caton2@judiciary.gsi.gov.uk

7 February 2013

Dear Lord Justice

Civil Procedure Rules Amendments

I am writing to you about the proposed amendments to the CPR aimed at implementing the forthcoming reforms to civil justice costs and funding. A draft of the proposed rules was sent to the Law Society in confidence and members of its Civil Justice Committee (the Committee) have reviewed them.

It is obvious that a great deal of hard work and commitment by members of the Rules Committee has gone into producing these rules in such a short space of time to meet the implementation date. However, we do have some serious concerns regarding unintended consequences, particularly in relation to transitional provisions. These are particularly serious as the rules will be published to the wider profession only 6 weeks or so before implementation, giving very little time for them to be read, understood and acted upon with regard to current cases.

Firstly, there appears to be a degree of uncertainty and unfairness regarding the transitional provisions for one way costs shifting (QOCS). CPR 44.17 deals with the transitional provisions for QOCS and CPR 48.2 defines a pre commencement funding arrangement. The protection of QOCS will only apply if the funding arrangement was entered into after 1 April. The wording in CPR 4.17 is potentially ambiguous – it is possible that the Committee meant only to exclude QOCS where an ATE policy had been taken out before 1 April 2013 which would be entirely reasonable. But, as drafted, it would appear to also exclude QOCS where a CFA was entered into before 1 April 2013, even if no ATE has been taken out. In many cases after event insurance (ATE) will only be taken out just prior to the issue of legal proceedings (i.e. when the client may be at risk as to costs). Consequently, if a CFA pre dates, but an ATE policy post dates 1 April, then there is an unfair dilemma for the client. Claimants will of course continue to need ATE for some time after implementation in order to cover the risk of a pre QOCS adverse costs order but the client cannot recover the ATE premium.

Secondly, I would refer you to the proposed CPR 44.3(7) which provides that the new test on proportionality will not apply to those cases which are commenced before 1 April 2013. This has been interpreted by the Committee as applying to all cases *"issued in court"* on or after 1 April 2013. However many cases are prepared months, and in some cases years, before they are issued. Preparation on the case begins as soon as the funding arrangements or terms of business are signed. Solicitors will have been preparing current cases on the basis of the *"Lownds"* test on proportionality where *"reasonable and necessary"* work will be recoverable. They will have advised clients to embark

upon litigation with the expectation of the client will be able to recover costs already incurred if they are proportionate in accordance with the old rules.

The rule will therefore have retrospective effect in that the more restrictive rule on proportionality (where even reasonable and necessary work will be disallowed if the costs as a whole are considered disproportionate) will be applied to work done before the rule has come into effect. This could affect millions of pounds of work already done in current non issued cases to the prejudice of solicitors and their clients (who, subject to the specific terms of the retainer, are primarily liable to pay the fees to their own solicitor even if not recoverable between the parties).

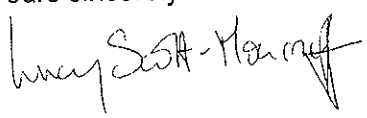
Two possible solutions are proposed. The new proportionality test could be related to the date of the retainer rather than the issue of proceedings. This would be the fairest solution as it would mean that the basis of cost recovery has not changed for solicitor and client during the currency of the case. Alternatively, the new test could apply to work done after 1 April 2013 (as did the introduction of proportionality itself in 1999 – see CPR Practice Direction 51A, paragraph 18). This would at least avoid the retrospective effect of the new test on work that had already been done, although it would require the court to apply two different tests of proportionality.

Thirdly, we are concerned that as drafted the rules will prevent recovery of a success fee in respect of counsel instructed after 1 April 2013 even in a case where the solicitor has entered into a pre-commencement funding arrangement. This will have the effect that in the same case the client will be able to recover the solicitor's success fee, but not counsel's if counsel is instructed. There are obvious prejudices to clients in this. Similar problems will emerge if a client wants to change solicitor after 1 April 2013. Loss of recoverability will mean that clients may feel forced to continue with the original solicitor even where trust and confidence has broken down. This cannot be in the public interest. We would suggest that consideration is given to amending the definition of pre-commencement funding agreements to allow for success fees to be recoverable provided that the first CFA in respect of the matter is made before 1 April 2013.

Finally, on the substantive provisions, it has been suggested that there is some ambiguity in the draft QOCS rule 44.14 (1) in that it could be read to imply that that if the costs exceed the damages, none of it can be recovered. (It is suggested that "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" could be replaced with "but only to the extent of the aggregate amount in money terms of any orders for damages and interest made in favour of the claimant").

I am sure that with changes of this magnitude there will be other issues which we have not yet been able to spot, but we remain committed to working with the Rules Committee to help to deal with these as and when they arise.

Yours sincerely



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