Response of the Association of Costs Lawyers to the consultation on "the impact of the Jackson reforms on costs and case management"

1. Introduction

The Association of Costs Lawyers (ACL) broadly welcomes the changes brought about by the Jackson reforms, but with reservations concerning the interpretation and application of The Civil Procedure Rules as to sanctions. The ACL is also concerned regarding the apparent reduction of funding and resources to the Court Service and the judiciary, which is perceived to be inhibiting the application of the reforms. The changes to the Civil Procedure Rules were introduced on 1 April 2013 and mostly s it is still too early to assess the full consequences of the reforms and consequently it is not possible to put forward proposals of substance as to revisions to ensure the objectives are achieved. In relation to costs few bills of costs have been assessed applying the new "proportionality" test. In this response the ACL concentrates on the areas where it considers it is best placed to provide comment, but with the caveats stated earlier and later herein. As a starting point the ACL refers to section 1 (1) of The Civil Procedure Act 1997:

"The power to make Civil Procedure Rules is to be exercised with a view to securing that the civil justice system is accessible, fair and efficient."
No one of these three objectives overrides the importance of the others. In interpreting and applying the rules, each objective must be met.
This response follows the six main strands of the reforms with particular regard to case management and costs.

2. Funding

It is, perhaps, too early to assess the implications of the reforms as to funding. However, the indications are:

a. Solicitors moving away from conducting civil litigation.
b. Solicitors requiring payment of success fees and non-recovered costs from their clients, whereas previously under the regime before April 2013 they did not do so.
c. Reductions in income for solicitors, causing significant financial difficulties including bankruptcy and firm closures
d. Damages-based agreements have proved unattractive, although if a hybrid was permitted allowing recovery of basic charges such agreements would be adopted and be a valuable method of funding, resulting in improved access to justice.

3. Changes to the litigation process

The experience of the ACL is that parties are still coming to terms with the new processes as to disclosure and statements. There are encouraging signs of a better understanding and acceptance of the new provisions and an acknowledgement that the processes are justified.

There appears to be some resistance by experts to limitation of their fees. Judicial guidance is likely to resolve these current difficulties, but there are concerns that eminent experts will be discouraged from civil litigation in the future.

Docketing appears to have been highly successful and has achieved real consistency in case management. Some problems have been reported where the allocated judge has not been available at all hearings and has not been the trial judge. In the main this appears to have arisen from the lack of resources. The changes to the procedures in care proceedings have meant that care cases are given priority over other cases, and quite rightly so, but this has resulted in allocated judges being moved to care cases in county courts, resulting in a judge being introduced to a case with little or no background knowledge of the case. This difficulty can be resolved by better resourcing.

The aspect of case management concerning ensuring compliance with rules, practice directions and orders has been much more controversial. Whilst acknowledging the importance of ensuring that litigation is conducted efficiently and at proportionate cost, the sanctions imposed where there have been breaches are considered to have been disproportionate, draconian and unjust. Whilst not seeking to trivialise, in many cases where sanctions have been imposed the breaches have not been such as to merit the sanctions imposed. Whilst acknowledging the third objective under The Civil Procedure Act the other two objectives are equally important and the third should not be allowed to override the other objectives. Where sanctions have been imposed, it is considered that in many cases the sanctions have been unreasonable and unjust. Lesser sanctions would have been sufficient to ensure that the litigation concerned was thereafter conducted efficiently, without other parties compensated and without the administration of justice being prejudiced. In addition lesser, but effective sanctions would be sufficient to signal to litigators the importance of compliance. The sanctions have had serious implications when applied causing financial difficulties to those against whom they have been imposed. There have been indications that experienced legal representatives are considering withdrawing from civil litigation, with the potential of reducing the pool of legal representatives available in certain areas. A further consequence is the increasing professional indemnity insurance premiums arising. These are adding to the financial difficulties of a number of legal representatives. It is inevitable that the increased premiums will increase the cost of access to justice-the hourly rates charged by legal representatives will have to increase to reflect the extra costs of practising. Good lawyers may be forced out. A final consequence of the sanctions being imposed is the objectionable change in the way that certain litigators are conducting litigation. There are those that are now playing the rules to their own advantage, for example by seeking to enter default judgements at the first opportunity. This is quite contrary to the overriding objectives and inevitably will cause a lack of public confidence in the system. It is important that parties do cooperate in the conduct of

litigation to ensure that the overriding objectives are achieved. A review in relation to sanctions is urgently called for and in the view of the ACL justified.

4. The Management of Costs

As to the management of costs there appear to be two key strands:

a. case management by budgeting; and
b. the application of "proportionality" test.

It is only in relation to case management by case budgeting where experience enables initial reasoned conclusions to be formed. There was much initial opposition to budgeting, however, with the exception of concerns arising from the Mitchell judgment practitioners appear to be coping with budgeting procedures and there have been few examples brought to the attention of the ACL that suggest that the judiciary have approached budgeting inappropriately or unfairly. One area that needs addressing is that concerning the discretion afforded to judges to decide that budgeting is not applicable in individual cases. There have been instances where that discretion has conflicted with the objectives of the reforms. There have been reports of judges' lists being overly full, causing delays and adjournments and problems caused by papers filed at court offices not being included in files for hearings. These have arisen due to inadequate court staffing and courts being inadequately resourced generally. It is the experience of the ACL that to date budgeting is further the overriding objective by ensuring cases are dealt with justly and at proportionate cost. In many cases legal representatives are discussing budgets and co-operating in case management more effectively than might have been expected. Budgets are being agreed and then approved reducing costs and court time. One court is dealing with case management on one day and then costs budgeting on a second day. This seems to be appreciated as it enables budgets to be adjusted to meet the case management decisions and this is worthy of further consideration. There has been no indication of litigant dissatisfaction. Indeed. Litigants welcome the certainty that budgeting achieves, enabling informed litigation decisions to be made. An area that does require addressing concerns pre-

action costs where there remains no meaningful costs controls. The extension of budgeting to cases hitherto excluded from budgeting is something that many will welcome. A further area that does require guidance and very probably rule change or new practice directions concerns the detailed assessment process following a budgeted case ending with an order for detailed assessment. In general it is the experience of the ACL that case management by budgeting is working efficiently, but inevitably with any new substantial procedure future rule change/judicial guidance may be required. In relation to the application of "proportionality" test it is simply too early to form an opinion of the implications. Until post 1 April 2013 cases reach the stage of either summary or detailed assessment in sufficient numbers the success or otherwise of the test cannot be known. , Lord Neuberger said in advance of 1 April 2013 there would be no further guidance and costs were very case sensitive and that the law on proportionate costs would have to be developed with a degree of satellite litigation. It seems inevitable that Court of Appeal guidance will at some stage be necessary. It is the view of the ACL that guidance should be given at the earliest opportunity.

5. Fixed Costs

A definitive view as to the impact of the extension to fixed costs cannot be given. It is only cases started after 1 August 2013 that are affected- few cases have settled since. Most solicitors are still conducting pre-August cases towards conclusion. When the latter cases are substantially gone it will, be possible to assess the impact of fixed costs on access to justice and legal practices. Fixed costs are a concern for many. The ACL has seen solicitors close down their practices, practices being sold and redundancies of senior lawyers. Solicitors are clearly seeking to accommodate the reduced fees by economies. There are concerns that this will affect the quality of services delivered and potentially result in under-settlement of claims. Few clients under this regime will see a qualified lawyer and most cases will be mainly conducted by unqualified employees. The amounts of fixed fees and the implications of these should be the subject of regular review.

6. The process of assessing

There were two changes introduced by the reforms:

a. A change to the form N260 statement of costs (summary assessment); and
b. The introduction of provisional assessments to almost all between bills of costs between the parties where the costs do not exceed £75,000.

The first change was caused by the absence of detail provided as to "documents" time in the existing statement of costs. The new version of the form requires more detailed information concerning work on documents and this is welcomed by the ACL, who long advocated to costs lawyers the need to provide this detail in conjunction with the costs statement.

The introduction of provisional assessments for the majority of costs disputes has been more contentious. The ACL advocated a similar procedure some 12 or more years before and delivered a paper on this to the Lord Chancellor's Department – this was well received, but not introduced because a pilot could not be funded. The concerns that have arisen in relation to provisional assessments relate in the main to:

i. delays;
ii. the lack of materials required by the courts when undertaking the provisional assessment; and
iii. incorrect assessment procedures being followed

As to the former the guidance indicates that provisional assessments will be undertaken within 6 weeks. In most courts that is achieved, but not in others. If a party does not accept a provisional assessment he then has to seek a hearing with consequential additional delay. The delays are caused by lack of resources and underfunding.

In the Senior Courts Costs Office and in a limited number of county courts the receiving party is required to lodge supporting papers with the bill and request for detailed assessment. Where that happens it is the ACL experience that assessments are undertaken in such a way as to rarely leave either party dissatisfied with the end result. The Senior Courts Costs Office practice should be followed in all courts.

The service of replies to points of dispute is optional and in most cases discouraged. It is therefore disappointing to see district judges upholding all key points made by a paying party because replies have not been filed, ignoring the principle that unless concessions have been made that all items remain in issue. The ACL believes that errors of procedure as here could be avoided by better judicial training.

7. Miscellaneous reforms

There do remain areas of reform recommended by Lord Justice Jackson that have not yet been introduced. These do should be considered in conjunction with further consultation. The ACL does welcome the introduction of the Civil Justice Council Costs Committee and expresses the hope that it is permitted to review guideline hourly rates and fixed fees sufficiently frequently.

8. Conclusions

While there is much to be commended by the reforms there are areas where the ACL have real concerns, particularly concerning sanctions. There remains much still to be done and reviewed. The reforms are “work in progress”.

Murray Heining
Chairman of the Association of Costs Lawyers
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