TECHNICAL ASPECTS OF JACKSON IMPLEMENTATION – EXPERTS WORKSHOP ON 31 OCTOBER 2011

Summary of report and feedback from Part 36 group

The Group considered six issues:

1. Costs or damages based sanction;

2. If a damages based sanction should the sanction be uncapped, tapered or capped (possibly at 100, 000);

3. If a damages based model is adopted how this would apply to nonfinancial and mixed claims;

4. If a damages based model is applied should this apply only to pi

5. How can/should this new power deal with early offers/late acceptance

6. How would this new provision del with split trials.

There were four preliminary points that emerged from our discussion:

1. The single biggest issue was whether or not it should be a costs or damages based sanction. This essential difference flavoured the approaches taken to all the other issues.

2. The group considered that the rules/legislation had to have in mind the essential purpose of this rule change that effectively has three different objectives: (i) incentivise Claimants to make (preferably) early offers; (ii) incentivise Defendants to accept offers; and (iii) provide some means by which Claimants can recover by other means the success fees claimed by their lawyers that have hitherto been recoverable inter partes

3. It was important that the rules should make clear that whatever the basis of the sanction this was the client's money.

4. One of the important themes that arose in discussion was that this was an additional power. In some situations the view was that the existing rules were enough/sufficient.; however, judges had to be given a clear steer when it was appropriate to use these new powers rather than apply the existing rules.

1. Costs v damages

Strong views were expressed on both sides.

Arguments in favour of a costs based sanction included:

1. continuity with the existing rules under part 36 i.e. based on costs;

2. a costs based sanction more closely relates to the way in which the claim is conducted (i.e costs are incurred as a result of behaviour in the litigation which is not referable to the size/amount of damages);

3. a damages based sanction would to be proportionate to the issues in the case;

4. the full extent of any damages will not be known until the end of the case which will encourage late not early offers;

5. a damages-based sanction will provide little incentive for defendants to settle.

Arguments in favour of damages based assessment included:

1. damage based assessment fits with the broad thrust of the Jackson reforms that the early settlement of litigation should be incentivised for clients not their lawyers;

2. the fact that historically Part 36 is based on costs is not an end in itself - this is a new regime;

3. it is easier to explain to clients with certainty the impact of a damages-based sanction rather than a costs based sanction;

4. damages-based sanctions will encourage the proportionate conduct of litigation as costs and the potential recoverability of costs penalties will be considered in relation to the value of the claim rather than the costs of making the claim.

It was recognised within the group that different considerations applied to small and large claims.

The problem with a costs based assessment related to damages in lower value cases was that it was hard to see how this would be sufficient to cover a reasonable success fee which was no longer recoverable inter partes (objective iii above).

In large claims an assessment based on damages could have a chilling effect - one issue that made it necessary to have a cap on what could be recoverable.

One argument put forward in favour of a costs-based sanction was that it is easier to assess the amount of the sanction in non financial and mixed cases. On the contrary, the view was expressed that the judiciary has and is developing the skills necessary to assess the "value" of non monetary cases.

2. **Cap**

There was general consensus that there should be a cap, but some reservations were expressed abut how a cap might apply in personal injury cases.

In particular pointed out that in commercial litigation there should be a cap because otherwise it would be a too powerful weapon that would have a chilling effect on the conduct of litigation.

There was some discussion about how the cap could be applied in personal injury cases involving periodical payments. It was pointed out that even in these cases an assessment of the value of the claim can still be made by reference to Ogden 6. Moreover, in many PP cases the lump sum received is in excess of 1 million in any event.

The view was expressed that 100, 000 cap would not provide an incentive to settle in large scale litigation so it may be advisable to have a taper which would allow for a % of the value of the claim (maybe at a low level of 1 or 2% increasing over the period of time since the offer was made).

3. Nonfinancial/mixed claims

The view was expressed that judges will have to develop the means and methods by which they will assess the costs value of such litigation.

The problem with this is that it would create a degree of uncertainty, and it would be difficult to advise clients what the likely costs sanction/benefit would be.

The other fear was that such an approach was likely to increases satellite litigation.

Such assessment would be more straightforward if a costs based assessment were preferred

4. Should damages based assessment apply only to PI

The view was expressed that there should only be one method of assessment for all cases and that we should keep it simple.

The contrary view was expressed that we already had different system of assessment for example fixed and predictable costs as well as summary and detailed assessment.

The reforms already distinguish between pi and other types of litigation in relation to QOCS.

5. Early offers/late acceptance

Those in favour of the working party's current proposals pointed out the certainty it provides and the incentives given for early offers.

It was argued that a 10% offer on damages awarded at trial did not provide a sufficient incentive to make an early offer. To the extent that this would encourage the making of offers it would encourage claimants to make them late in the day.

It was suggested that there could be some type of tapering system.

One suggestion was that the current proposals for fixed costs could allow for a sanction assessed partly according to costs and partly according to damages at different stages of the proceedings.

It was pointed out that a trial only sanction provided little incentive in defamation cases where very often a late apology would be made after years of litigation.

It was pointed out that in those cases where the costs sanction would not apply clients would still have the remedies included in the current part 36.

6. Split trials

Similar points were made in relation to split trials as were made in respect of early offers/late acceptance.

If the sanction were to be based on costs it was easier to have a system by which costs sanctions could apply both to the trial on quantum and liability. Essentially the claimant would have two bites at the cherry but as this was referable to costs rather than damages there was no double recovery.

The contrary position was that the client can't have two bites at the cherry. It made sense to have one sanction applied at judgment. The court had to look at the offer that settled the case in money terms.

The point was made that this (again) would discourage early settlement and makes it more likely that offers would only be made towards the end of the litigation.

In relation to split liability offers there are also the current provisions under Part 36.