CJC/MoJ Technical Aspects of Jackson Implementation Experts Workshop on

31 October 2011

Report on QOCS Breakout Session

A. Report back to plenary by JU

The following items were checked as appropriate for report back with all experts present (about 30?) representing a wide cross section of stakeholders. Certain items, in particular in relation to the MOJ paper on financial aspects were specifically checked (insurers and local authority representatives).

The first five items were more general in nature and there appreared to be agreement.

1. The need to keep it simple was endorsed

2. There was an understanding of the importance of the "interlocking whole" and the problem of considering parts in isolation was emphasised. That includes looking at QOCS when other aspects of the interlocking whole impact on consideration of QOCS. A specific comment (from a compensator) that the implementation and impact of the 10% increase in general damages was not understood and amounted to an "elephant in the room" was given as a significant example.

3. Following on from that perhaps it was thought that the time for consideration of complex matters was too short. Although it was noted that there may be further time for comments in the next two weeks.

4. In spite of that, the breakout session did bring out a few new points (that could have been pursued towards a consensus if more time was available). These included that:

a) Local Authorities would prefer recoverable ATE rather than QOCS

b) A wide definition of personal injury might include professional negligence arising from a personal injury case covering the negligence of the parties' lawyers or experts used in the case

c) There were further issues that need consideration in relation to acceptance of a Part 36 offer out of time

And last but not least

5. In relation to the MoJ paper on financial considerations, we said "Thanks, Robert, but no thanks". There was no requirement for restrictions based on ability to pay, nor for a minimum amount to be paid by a losing claimant. I had mentioned to Robert during the break after the session that I would be making this point and he did not accept what I said without questioning, as he shouldn't. He asked those present in the plenary about this, but there appeared to be no dissent to the position I had outlined.

I then moved on to report on a few more specific issues, where there seemed to be agreement (although with hindsight point 5 above might well fall into that category).

i) on the question of a cap costs recovered by a defendant in relation to the issue of Part 36, I said that we agreed that the desired outcome was not that the claimant's damages should be exhausted. AK helpfully expanded on this further by introducing reference to the option espoused by ARQC to the effect that the cap should be at 25% of the claimants damages, which would better reflect a fair balance with sanctions for the compensator.

ii) on the question of ATE, assumptions about product availability are wrong. It may be that there is a possibility of a market, but, for example, there would no longer be a basket of cases, but a rump (of more difficult cases).

iii) in relation to mixed claims in PI cases the only real exception identified would be credit hire

iv) and there was consensus around the notion that it should be "QOCS for all, or no QOCS at all" (excluding insurers view in relation to issues around Part 36 and QOCS). Certainty is needed, but some discretion is required as one size does not fit all

and finally this is a recipe for satellite litigation.