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Submission to the Civil Justice Council on the Impact of the 'Jackson Reforms' on Costs and Case Management

FOIL (The Forum of Insurance Lawyers) exists to provide a forum for communication and the exchange of information between lawyers acting predominantly or exclusively for insurance clients (except legal expenses insurers) within firms of solicitors, as barristers, or as in-house lawyers for insurers or self-insurers. FOIL is an active lobbying organisation on matters concerning insurance litigation.

FOIL represents over 8000 members. It is the only organisation which represents solicitors who act for defendants in civil proceedings.

This response has been drafted following consultation with the membership.

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March 2014

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The impact of the Jackson Reforms on the types of cases being taken on (and not being taken on) by law firms

1. FOIL members are predominantly, although not exclusively, involved in the handling of claims that have become litigated and the observations that follow are set against that background.

2. One year on from the introduction of the major reforms affecting referral fees, recoverable success fees and ATE premiums, and the introduction of the portal process for EL and PL claims, it is still early days, but the view from FOIL members is that there is no evidence to indicate that the new regime has impacted upon access to justice or has acted to reduce claims volumes.

3. Some of the reforms have not yet taken full effect – the full impact of Qualified One Way Costs Shifting, for example, having to some extent been deferred by the rush of CFA agreements entered into in the run up to 1 April 2013 – and this question would benefit from being revisited in the future.

The funding of civil litigation in the light of changes to CFAs and the introduction of DBAs and QOCS

4. FOIL members have seen no evidence that changes to the funding regime have affected access to justice. FOIL members have seen little evidence of the use of DBAs and little application of QOCS to date.

5. There is some indication, however, that the introduction of QOCS may be encouraging a greater level of speculative claims. The fact that the defendant has little prospect of recovering costs if the claim is defeated lends itself to claimants pressing for an early settlement on economic grounds. Weak cases are also being advanced to trial in the hope of agreeing a settlement as unrecoverable defendant costs rise. This is a particular concern in claims areas with significant repudiation rates, such as disease. It will also be a factor for local authorities facing PL claims, for example, where repudiation rates are also high.

6. The exceptions to QOCS do not prejudice defendants in relation to fundamentally dishonest claims. The exceptions also afford a defendant the opportunity to mitigate the effect of QOCS in claims that are perceived to be weak but not

entirely unmeritorious, by making a low level Part 36 Offer. However, in the face of a claim that appears so unmeritorious as not to warrant even a nuisance offer, a defendant has no mechanism for avoiding the costs of defending a claim.

7. The funding of a case by a CFA no longer affects the costs that losing defendants pay but the position is different under a DBA with the indemnity principle limiting costs to those payable under the agreement. As part of any amendment to the DBA regulations FOIL members would like to see the inclusion of a provision requiring the defendant to be notified when a case is funded by a DBA, and for the DBA to be disclosed prior to the assessment of costs, to enable likely costs to be factored into the claims management process from the outset.

Costs budgeting and the management of cases through the courts

8. Costs budgeting

FOIL members welcome the concept of costs budgeting, enabling better costs control and greater predictability of costs, which encourages a focus on the issues and earlier settlement. Without costs budgeting, there would be no check on disproportionate costs associated with the class of claims falling into the multi-track. FOIL would welcome the removal of the blanket exemption from costs budgeting in CPR 3.12.

9. FOIL does have concerns, however, on the practical implementation of the new regime. It is still early days and inconsistency is a significant problem. The judicial appetite for costs budgeting varies considerably and a great deal of time, effort, and personal attendance can be wasted whilst the budgeting procedure to be adopted in the case, if any, is clarified. Understandably, many judges have little personal experience of the cost of running cases: a continued programme of training would be beneficial to assist the judiciary in developing their knowledge and experience in this area more quickly. This would hopefully enable judges to identify 'tactical' budgets and respond accordingly. At present there is too much judicial reliance upon the assertions of the parties.

10. FOIL believes that some changes could enable greater advantages to be derived from the budgeting process:

- A requirement that budgets be filed at least 14 days/10 working days before the CMC. The current time limit of seven days allows inadequate time for consideration and negotiation.

- Clarification and consistency in relation to the time for filing the budget: some courts require it to be filed with the Directions Questionnaire rather than seven days before the CMC.

- More time for the main costs and case management hearing. Although FOIL understands that this raises issues of court resource and timetabling, too short a period is a false economy if, as often occurs, the costs

budgeting aspects have to be adjourned. This problem is exacerbated by issues arising from *Mitchell* case management (see further below).

It is important that case management and costs budgeting are handled together and they should be dealt with at the same hearing. FOIL understands, however, that a process is being tried in some courts which splits the CMC into two sections on the same day. The directions and overall spend are dealt with in the first part of the hearing, the parties then retire to work up the details of the budget which is considered at the second part of the hearing. FOIL would support this approach.

- Judges should be compelled to list costs budgeting hearings in relation to all cases where costs budgeting is intended to apply, there having emerged some instances of courts making directions orders of their own volition that ignore costs budgeting and thereby leave some hourly rate cases unbudgeted.

- FOIL would further encourage the courts to take a stance against 'strategic' costs budgets, deliberately presenting very high figures in anticipation of those budgets being reduced but with the outcome still being at an inflated level.

11. Case management

The case of *Mitchell* has completely redefined the management of civil claims, introducing a regime of almost zero tolerance, resulting in a raft of decisions to strike out or severely limit claims and defences on the basis of a failure to adhere to applicable rules and orders.

12. At a recent practitioner meeting in Manchester, Lord Dyson defending this tough approach, reporting that "*large efficient firms do not know what the fuss is about"*. FOIL members are all efficient firms: if they were not they would be unable to meet the stringent standards required to stay on the panels of their insurer clients. FOIL understands the thrust behind Lord Dyson's words: under any efficient regime it should be expected that orders will be obeyed and time limits will be met. It is unacceptable for cases to be delayed by inefficient or incompetent lawyers who cannot meet the requirements of the court process. In short, FOIL supports that general principle and the aims of the new regime. However, whilst its members are gearing up to deliver, it believes that the very strict nature of the new rules will have far-reaching consequences which have the potential to undermine the benefits of the Jackson reforms.

13. At this early stage, in the same way as for costs budgeting, inconsistency in judicial decisions is a problem. In personal injury cases some experience of a more lenient approach towards claimants than defendants has been reported. It is important that the regime is a level playing field and that the application of CPR 3.9 is consistent and thus predictable.

14. The consequences of the new regime

A transition such as that imposed by the new CPR and the *Mitchell* decision has consequences beyond the immediate cases which are affected. FOIL is concerned that the cost of the new regime is too high and that important aspects of the civil justice system are being adversely affected.

15. The introduction of the new regime has heightened the contentious nature of litigation in a way not seen since the "Costs Wars". Previously parties were usually willing to provide some assistance to their opponents by agreeing to allow a little more time where needed, or overlooking minor breaches of the rules, to make progress towards settlement, in the knowledge that they were also likely to need some flexibility over the course of the case. In his pre-implementation lecture on case management the Master of the Rolls stated that the intention of the CPR change was not to "*transform rules and rule compliance into trip wires*". In practice, that is what has occurred as on occasion parties whose opponents have defaulted, even in only minor ways, feel obliged to take issue with the default to demonstrate promotion of their client's best interest or risk a claim of negligence themselves. In personal injury claims, the philosophy of working together for the benefit of the injured claimant, embodied in the Multi-Track Code, has been severely undermined.

16. Under the new regime, if a party believes it may breach the rules it will be obliged to make a pre-emptive application to the court to protect its position. If a breach has occurred or is suspected, an application will be made to the court for sanctions. If sanctions are imposed an application will inevitably be made for relief. As a result the courts have become clogged with case management hearings and waiting times for hearings have increased. It has been a feature of many of the reported cases, including *Mitchell*, that the CMC hearing has focused entirely on the issue of default and sanctions, leaving no time to deal with the substantive issues and the budget.

17. A line of judicial authority is developing under which the need to expend court time on dealing with a default is used as a factor in defining the default as non-trivial and therefore not eligible for relief under the *Mitchell* guidelines. Therefore the very fact that a non-defaulting party brings a default before the court is evidence of the seriousness of the failure. This circular approach inevitably encourages applications.

18. Satellite litigation is the unacceptable face of dispute management. It achieves nothing in real terms but absorbs resource, generates costs and creates delay. It has been reported that in Greater Manchester a rise in applications for permission to appeal of more than 20% is expected in 2014, whilst county court sitting days have reduced by 10% since 2012. At a time when the Government is aiming to reduce the cost of the Court Service by a number of measures including greater use of ADR, the courts are under more pressure than ever from satellite litigation arising from case management.

19. The budgetary constraints imposed by the Government on the Court Service not only affect hearings but also court administration, making it more difficult for the courts to react to the new strict regime. It is not uncommon for documents filed at court to fail to reach the court file or for documents to go

missing, which can result in a party being penalised for a failure to file. Mistakes can also be made: confusion has arisen recently through the use by the Courts Service of two different versions of Form N149C, resulting in applications and hearings on affected cases. It is imperative that if zero tolerance is expected from those who use the courts, that the courts themselves should step up, to be able to deliver service to the same level.

20. The vast majority of solicitors will work hard to avoid being in default and potentially facing a negligence action. The strictness of the new regime when applied in its most extreme fashion means there is no room to take risks. If there is any uncertainty in an order or a rule the most cautious approach must be taken. This results in over-preparation and work which will prove not to have been needed. To reduce risk, at the outset solicitors will seek to put in place an initial timetable which allows as much time as possible for meeting directions, which is likely to create delay. Law firms required to meet very tight timetables will need to build more flexibility into their structures, under which fee-earners handle smaller case-loads to allow for quicker response times and build in contingencies.

21. All of these consequences create costs and, potentially, delay. They absorb the resources of law firms and the courts and increase overheads. It might be argued, with justification, that over time the regime will bed-down and applications will reduce. However, the impact on the culture of litigation set out in paragraph 15 above, and the impact of risk management described in paragraph 20 above, will continue as long term features of the civil justice system. These trends, coupled with continuing applications, are to the detriment of litigants. They cultivate an atmosphere of conflict, reduce efficiency and increase costs; all contrary to Lord Justice Jackson's intentions.

22. The application of CPR 3.9 without a degree of flexibility also creates injustice in individual cases. No solicitor or law firm, however conscientious, can hope to work entirely without error. Nor can they be exempt from the occasional unavoidable delay, for example, caused by third parties such as medical providers, employers, experts etc, not promptly providing evidence requested from them. Unless there is a degree of flexibility in the approach to case management, some lawyers will find themselves subject to penalties that are disproportionate to their default, or that arise from defaults that they could not have avoided. imposed for the greater good. Individual claimants and defendants will be denied the opportunity to present their case in full, or at all, and have to rely upon secondary litigation against their legal advisors to achieve some justice. In the event that the default was of their own making they may find that a relatively minor infringement has denied them access to justice completely.

23. The *Mitchell* judgment does provide for flexibility in the approach adopted by the courts, having arisen from a set of factual circumstances where the default in question was stark. Whilst the principle behind the new CPR 3.9 is sound, the courts need to recognise that element of the *Mitchell* judgment and ensure they are consistent in their approach.

24. Proposed amendments

The Court of Appeal having given its definitive decision in *Mitchell* it is likely that the current regime will remain as defined for the foreseeable future. To maintain the benefits it introduces whilst reducing the undesirable consequences, FOIL would like to see some amendment to the regime:

- Confirmation that CPR 2.11 allows the parties to adjust the timetable between themselves, in writing, provided the amendments do not prejudice the underlying progression of the claim, particularly where there is an existing trial or trial timetable.

- In the light of recent case law, a review of CPR 32.10 and confirmation that the parties can agree extensions of time for exchanging witness statements.

- A more certain procedure around consent orders and the production of sealed orders by the court. At present even if parties have agreed an extension of time under CPR2.11, and have filed a consent order to confirm the extension, they are unlikely to know if they are safe from court admonishment through receipt of a sealed order until well after the deadline has passed.

- The general adoption of "buffer orders", allowing the parties to agree one extension of time without the need for a court application where this does not affect the court timetable, even where a sanction is attached to the action in question.

- Parties making an application for an extension of time before the deadline expires to be able to agree an extension until the hearing date for that application.

- Consideration to be given to an amendment which save in the most extreme cases would make the imposition of an unless order the first step in enforcing rules and orders and timetable compliance, rather than the immediate imposition of sanctions.

The Portals

25. Although outside the Jackson reforms, the Portals are a central feature of personal injury claims. FOIL supports the extension of the portal regime but would like to comment on a couple of issues. Most of the problems arise from a lack of information in the CNF; locating the policyholder's portal details when they are not the employer; and behavioural issues. The latter is obviously within the remit of the Claims Portal Company's Behaviour Committee, although more guidance from the courts would be of assistance in improving standards and encouraging adherence.

26. FOIL believes that the protocols could be amended to improve the process:

- To introduce a time limit for presentation of the Stage 2 pack
- To align the time periods for payment of Stage 1 costs and withdrawal of admission on causation, both to be 15 days.
- To clarify and limit the application of Clause 4.3(8) to exclude only abuse claims brought by children and vulnerable adults from the process, not all claims brought by minors.

27. FOIL is concerned that the Disease Portal is not functioning as expected. Although by the end of January 2014 3,800 disease clams had been commenced in the portal, only eight had been settled. Problems arise from a lack of information in the CNF; the lack of medical evidence before a decision is made on liability; and the failure of the current system to deal with the more complex issues of liability, limitation and causation which arise in disease claims.

28. It is particularly important that the Disease Portal process works for Noise Induced Hearing Loss claims (NIHL). The number of potential claims for NIHL far exceeds EL claims and a properly functioning portal for such claims has potential for significant efficiency and costs savings. FOIL would like to see the protocol/portal process for NIHL re-examined, with appropriate resource, with a view to making it fit for purpose.

29. FOIL accepts that the data around portal use has not matured sufficiently for an in depth interrogation and advocates a further review of portal use at a later stage.