THE IMPACT OF THE "JACKSON REFORMS" ON COSTS AND CASE MANAGEMENT

WRITTEN SUBMISSIONS ON BEHALF OF THE MEMBERS OF 1 CHANCERY LANE, THE CHAMBERS OF JOHN ROSS Q.C.

1. 1 Chancery Lane is a well-established leading common law set of barristers' chambers. We presently have 44 members.

2. Our members practise in a wide range of areas of law including personal injury, professional negligence, clinical negligence, property and public and administrative law. Our members act for a wide range of clients and in nearly all areas in which we practise we receive instructions to act for both claimants and defendants.

3. We consider that our members are collectively well-placed to give a broad "coalface" account of the impact of the "Jackson Reforms" on common law claims in the county courts and Senior Court.

4. There is no doubt that the "Jackson Reforms" are changing the culture in which litigation is conducted and that this is to be welcomed. There are, however, a number of impacts of the reforms that cause concern.

Unintended consequences of fixed fees in personal injury cases

5. The Post-Jackson costs regime for personal injury is producing a chain of unintended consequences that have already become noticeable to our members.

6. The first consequence is that the quality of the care and conduct in personal injury actions by the claimant's representatives is diminishing. Our members are aware of firms acting for claimants which, in order to ensure that the work can be conducted profitably, limit the number of times that a fee earner should deal with each case before reaching settlement.

7. A consequence of this reduced level of care is that our members are encountering an increasing number of cases where claims have been or are about to be under-settled.

8. The result of the increased level of under-settled personal injury claims is an increase in the number of claims for professional negligence against solicitors for under-settling personal injury claims. Our members have noticed an increase in such instructions in recent months.

9. Our members are aware of at least one firm of personal injury solicitors which is retraining its fee earners and marketing itself to attract the claims of personal injury claimants whose claims have been under-settled.

Access to justice

10. It is becoming difficult for litigants who have meritorious but difficult (i.e. costly to litigate) low to mid-value claims to find representation in some areas of practice.

11. For example, a person who has lost their business due to the negligence of a solicitor may well find it difficult to find representation if the business was worth £50,000. Any success fee would have to be paid out of the damages or settlement recovered by the client. As this would leave the client with little or no sum in his pocket cases which might have been accepted for a CFA before April 2013 are now being declined.

Costs management resulting in increased costs

12. The new Costs Management rules have the potential to increase the amount of costs paid by clients.

13. There are two reasons for this.

14. Firstly, there are the direct costs of costs management. Under the practise direction these costs are capped at 1% of the approved budget for completing the Precedent H and 2% of the approved budget for all other costs relating to costs management. There is therefore a direct cost of up to 3% of the approved budget.

15. The actual proportion of costs that are related to costs management can be much higher. Costs management occurs at an early stage of proceedings. If a claim settles shortly after a costs management hearing the proportion of the costs that relate to the costs management exercise is likely to exceed 3%.

    Example

    A claim is issued, allocated to the multi-track and a costs management hearing is ordered. The parties' costs incurred prior to

preparation for the costs management hearing are approximately £10,000. Each party incurs £750 preparing their Precedent H and a further £1,500 preparing and attending the costs management hearing. The parties' budgets are both approved in the sum of £75,000. The case settles shortly afterwards when each side's costs incurred are approximately £15,000. The proportion of costs referable to costs management will have been 15% of the total costs.

16. Secondly, the restriction in CPR 3.18 on recovering costs not within the approved or agreed budget mean that the dynamics of the exercise can cause costs to increase whilst remaining within the reasonable and proportionate bracket..

17. This is because the effect of CPR 3.18 is that parties preparing a Precedent H must be careful not to underestimate the costs of each stage whilst. The figures put in Precedent H are therefore higher than the figures that would be given to the client if they asked for the solicitor's "best guess" of the costs of each stage.

18. Nevertheless, the figures within the Precedent H (though higher than a "best guess") may still be "a proper estimate" (as required by the statement of truth) and may be properly agreed or approved as being reasonable and proportionate.

19. Once the figure in the Precedent H has been agreed or approved there is a risk that these figures become the benchmark against which the costs must be justified rather than the lower "best guess" figure.

20. The rules should provide greater flexibility about when costs management is required.

Increased costs through lack of judicial pragmatism

21. Our members are encountering cases where costs have been increased because of a lack of pragmatism by judges.

22. We are willing to provide further details in confidence.

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