Civil Justice Council- The Impact of the "Jackson reforms" on costs and case management.

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Types of case being taken on and not taken on.

1- Due to success fees and to some extent ATE premiums no longer being recoverable from the paying party, and instead only being allowed to charge clients 25% of damages (generals and past loss only) this has led to a severe drop in recoverable fees, especially in respect of 50/50 cases, where previously a 100% success fee based on incurred and recovered base profit costs was recovered.

2- For example, on public liability cases such as Highway trippers, supermarket slips, repetitive strain injury cases, product defect cases, that generally have a failure rate of around or more than 50%, previously a 100% success fee would be recovered. Based on say pre-issue (on the few of these types of cases that settled pre-issue, the success fee recovered would equate to around £2,500-3000 plus VAT. On issued cases the base profit costs and so success fee would inevitably be higher

3- With average damages being around £2,000-£2,500 and with the 25% SF from the client being inclusive of VAT, as a firm we have gone from recovering success fees on settled pre-issues cases of £2,500-3000 plus VAT to £416.66 -£520.83 plus VAT, which is a massive reduction.

4- In addition, RSI and product liability claims almost always need orthopaedic medical evidence and always need engineering evidence, with due to the new proportionality test we are unlikely to recover, either at all, or not in full, meaning a further drain on profit costs. We do not take on RSI or product defect types of case on at all now.

5- The same can be said for accidents abroad. Obtaining local standards reports from foreign countries is costly, time consuming and expensive for fee earners in terms of incurred profit costs and for this reason these cases are no longer economically viable and we no longer take them on.

6- We have as a firm ran cases for Polish National clients, using in house translators, which historically we have recovered the translator's time as grade D fee earners in addition to our normal profit costs of the conducting solicitor. Again the new proportionality test and not recovering the extra time due to the client being Polish and not speaking or writing English well or at all means these cases are no longer economically viable, especially with the new very low fixed fees.

7- Cases where the client is a minor are problematic as the Courts are not in our experience allowing the 25% agreed deduction to be taken, again meaning the cases are not economic (especially when combined with very low fixed fees), meaning minor's cases are no longer economic to run.

8- The above matters are a serious access to Justice issue, as well as meaning a lot of cases previously economic to run are no longer, impacting on both the cost of marketing and overall fee income.

9- The EL PL portal in our experience is not working very well as the majority of EL and PL cases put through the portal drop out as liability is not admitted. There is not a strong enough incentive for insurers to admit liability, especially on cases where they know solicitors cannot afford to incur the work and disbursements needed to win the case, (particularly on EL cases with the Enterprise Act where even more work than previously is required to establish liability) as the cost will not be recovered even if the case is won.

Funding of civil litigation

10- All work is funded on a CFA with a 25% success fee taken from damages. Clients are also required to take out an ATE premium (we use Temple) as although QOCS means defendant's costs are not payable in the event of a loss, clients are still liable for their disbursements and the Temple ATE covers defendant's costs and claimant's disbursements in the event a Part 36 offer is rejected (on our advice)and damages are assessed at less.

11- The ATE the client pays causes a conflict with our clients on some cases, due to the premium stepping up (increasing in cost) upon proceedings being issued. For example, liability is admitted outside the portal, a medical report is sent but no offers are forthcoming. From the firm's point of view we would want to issue the matter to progress it, and under the fixed costs regime we would recover more profit costs, but as soon as proceedings are issued the ATE premium (on a fast track case) jumps from £35 to £165 on an RTA, and from £65 to £425 on an EL/PL case.

12- This also has a real effect on the Simmons v Castle 10% uplift on damages. We have not noticed an increase on damages offers from insurers. When we ask for a modest increase, as per Simmons, say from £2,200 to £2,420, we are told no, issue if you dare. Problem is the difference in damages is less than the jump in the ATE premium from the client's point of view, so they are no better off, and what solicitor in the right mind these days would advise a client to issue for an extra few hundred pounds (which they are entitled to) when a Court, using the new proportionality test, would heavily critisise the claimant's solicitors, and punish them in costs no doubt, for wasting Court time and resources issuing proceedings at a cost of thousands to recover a few extra hundred pounds?

13- The effect of this is that the extra 10% damages for clients envisaged by LJ Jackson to offset the ATE premium and success fee they now have to pay, is totally negated. Clients in reality pay the extra SF and ATE but get no more damages than previously.

14- DBAs are of no benefit whatsoever on low value (fast track) case. As any costs recovered would wipe out the success fee the practical upshot is if a solicitor is funded on a CFA they recover the now very low fixed costs and a 25% success fee (less VAT) but if they used a DBA they would only get the low fixed costs. Why would they when it is likely that even with the success fee from the client they cannot make a profit?

15- In addition, the DBA regulations are not tested and are clumsily worded, so why would any solicitor take the risk?

16- The way the success fee is capped at 100% of base costs means on high value damages cases that settle early the success fee from the client is nowhere near 25% as the base costs cap applies. It also means that if a solicitor is inefficient and takes say 5 years to settle a case, rather than an efficient solicitor who settles the case properly in 3 years, the solicitor who has taken the extra 2 years is rewarded for his inefficiency by being able to claim a higher amount of success fee from the client because they would have done more (although probably inefficient work) and the claimant's past losses are higher at the time of settlement.

17- One would have thought QOCS would mean more economic pressure on insurers to settle cases due to having to pay their own solicitor's costs in the event of a win for the defendant. However, our experience of the RTA, EL and PL portal cases is that the majority of EL cases and the vast majority of PL cases are not being admitted in the portal. Anecdotally this seems to because a lot of solicitors cannot secure ATE insurance, or their clients refuse to take it out and if proceedings are issued without ATE the client and/or their solicitor will be liable for disbursements if the case is lost,

which neither can afford. Again, another real barrier to access to justice, where the rich (see all insurers' massively increased profits post April 13, Direct Line for example, whose net profits have increased by 70%, although they have only reduced RTA premiums by 4%...) insurers can effectively block access to justice because they have deep pockets and claimants and their solicitors do not.

Cost Budgeting

18- There is a massively inconsistent approach to costs budgeting. The vast majority of cost budgets we have prepared on our multi-track cases to date, at considerable cost (in house cost draftsmen and conducting solicitors time) the Judges at the first CMC have refused to deal with. Various reasons have been given, such as, "I am a deputy and have no jurisdiction, I'll adjourn the CMC and pass it to a full time Judge", stating they have had inadequate training, stating it is pointless at the first CMC and saying let's wait until the second CMC when we have a better idea of where the case is going, to a point blank don't bother me with that, sort out the costs at the back end.

19- The Precedent H itself is incredible difficult to fill in and is badly set out. It is incredibly time consuming to fill in as a cost draftsman needs to bill all costs to date, then the conducting solicitor and the costs draftsman need to try and guess (based on assumptions, always different from the defendant's assumptions) how the high value complicated case will progress, at a time when the first CMC has not happened and directions have not been ordered.

20- Some precedent Hs we have completed are based on certain experts being allowed on both sides and the Court then disagrees and gives different directions to what the parties envisage, rendering the costs as predicted on the precedent h almost meaningless.

21- We had a case potentially worth 6-7 figures, a badly brain injured client who was run down on his bicycle on a roundabout. He had not worked for 3 years and was still under neurological care. We had not been able to obtain anything but very provisional medical evidence. Liability was the main issue and both sides had agreed to obtain computer enhanced video evidence of the accident caught on very poor quality CCTV, with both sides agreeing in a consent order lodged for the CMC that they both obtain accident reconstruction reports and then mediate on the issue of liability. Very sensible.

22- Each side had 4-5 witnesses. The Judge at the CMC demanded that each side pick their best 2 witness now, demanded that we give him the value of the case, (how could we?) refused permission for the reconstruction experts (already obtained at this point as agreed) and ordered a split liability trial. The precedent H was not mentioned. Luckily both sides saw sense and mediated the issue of liability anyway, which was successful and a liability agreement was reached. This type of approach is just unhelpful.

23- Anecdotally some Judges are slashing both sides budgets to very low amounts, meaning that the work needed to progress the case cannot be done for anywhere near the approved budget. This puts solicitors and their clients in an impossible position. Do they do only the amount of work budgeted for and so risk the case failing for lack of preparation and inviting a professional negligence claim? Do they do the extra work properly needed to deal with the matter, effectively doing work that needs to be done for free and rendering the case uneconomic? Or do they apply back to the Court for an increase in the budget, with no guarantee a Judge,

even another Judge would allow more time, and using another court hearing with attendant additional costs? None of these options are very palatable.

24- Some Judges are just approving the budgets as claimed, which you would think would be good for the winning party at the end. But, this raises another issue. Because the final bill cannot be reconciled with the precedent H, and because there is no budgeting of the pre-issue work, defendant's solicitors , as their insurer clients demand, have to attack all aspects of the final bill in any event and achieve certain percentage reductions regardless of the budget.

25- Added to this that now conducting solicitors and their cost draftsmen have to constantly review and bill their costs as they go along, to see whether they are staying in budget at each stage, the costs budgeting process is adding a considerable amount of additional costs that were not being incurred previously. Plus, as the precedent H bears no resemblance to the bill of costs, at the end of the case the cost draftsman time spent to date is duplicated when they have to effectively draft the bill again from scratch.

26- In reality the whole process adds a large amount of costs and Court time to what would have been incurred without the budget, for what seems no benefit whatsoever at the end of the case.

Courts

27- It would be remiss if we did not mention the current Court situation, which is dire. In most Courts now there is no facility to call the court and speak to anyone, (in the bulk issue centre at Salford you can call them, but it is extremely rare that anyone answers the phone, most of the time you are placed on hold for 5-6 minutes and then cut off) you are generally not able to fax the Court as either the 1 machine is constantly busy or more often switched off. Many Courts have distant call centres who call operatives simply say all they can do is suggest you write to the court or send them an e mail, as if we have not tried that already. Documents can only be sent by e mail if there are no more than around 3 pages of attachments, meaning they have to be posted.

28- Urgent applications or cases where proceedings are issued close to limitation there is no way to check whether the Court has received the documents.

29- It is routine now, in fact, almost inevitable, that documents sent into the Court are lost, do not make their way to the Court file, causing delays and extra costs for solicitors to send in the documents again, or leading to hearings being adjourned. This is made even more grave with the Mitchell decision. Papers are properly sent in to the Court, but there is no way to check they have been received, and then the court strikes out the claim without an unless order, meaning a relief from sanctions application has to be made from what is increasingly errors of the Court. This again adds extra (unrecovered usually from a solicitor's point of view) costs to be incurred and uses even more Court time. This is a vicious circle which is seemingly getting worse and to which there does not seem to be a solution.

30- We had a case recently, settled prior to trial where we were entitled to a partial refund of the hearing fee. The request for the hearing fee refund was made within the letter enclosing the final consent order and consent order fee. We knew the request had been received as the consent order fee cheque had been cashed and we had received the sealed consent order back from the Court. 2 chasing letters were sent and 2 chasing e mails. No response to any of these was received after 11 weeks. Eventually someone rang from the Court. We said we were still chasing the refund and were told they wanted to keep it as they needed the money and were desperate. The Court told us that if they ignored solicitors requests for the refund

most solicitors after a few months gave up chasing so they could keep the fee. A week after this remarkable call the refund did actually arrive (£272.50).

31- We have had quite a few occasions recently where we have written formal complaints to the Court due to their administrative errors and rather than dealing with the complaint we receive a court order asking us to make a formal application about our complaint.

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