The Impact of the 'Jackson Reforms' on costs and case management

Response of DWF LLP
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DWF LLP is a leading business law firm, with over 2,500 people working nationally across a wide range of sectors. We have one of the largest dedicated Insurance teams in the UK with more than 1,000 people, including 96 partners and over 720 legal advisers.

Introduction

1. Whilst it is understandable to seek to review the impact of the reforms almost 12 months from the date of implementation of the main parts of the reforms, it should be recognised that it is still too early to be able to reach a considered view as to the impact of the reforms. Whilst some parts of the reforms, such as in relation to claimants' Part 36 offers, impacted straight away last April, others have not yet significantly been felt.

2. The changes in relation to the loss of recoverability of additional liabilities in the form of success fees and ATE premiums, with those claimants to be recompensed by an increase in the level of awards for pain, suffering and loss of amenity (PSLA) as well as QOCS protection, came into play only for new retainers entered into after 1 April 2013. Of this new generation of claim, only a minority will have reached a conclusion as yet, the majority are still on-going. The effect of those changes will therefore not be clear for another year or two.

3. Those reforms also need to be considered alongside the extensions to the portal scheme for low value personal injury claims which for the most part only started at the end of July 2013. These changes which not only affect the claims processes, but also introduce fixed costs into the majority of those claims are even more recent than the Jackson reforms and again, their impact will not be felt across the board for another year or two.

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

4. As a law firm generally instructed by insurers who are responding to claims being taken on by claimant law firms, our perspective is based on indirect rather than direct evidence.

5. The monthly management information available from the portal company as to volumes of new claims submitted to the extended portals do not allow any definite conclusions to be reached yet as to the volumes of new claims which are being taken on. The latest data shows that in January 2014, 74,700 claims were submitted to the RTA portal, the sixth highest number of monthly new claims since that portal first came into operation. It will probably take until mid-2014 for stability to be achieved as to the number of new RTA portal notifications. Use of the new EL, PL and EL disease portals is increasing by reference to the number of new claims submitted to it. The data does not appear to show by reference to numbers of new claims that there are any significant access to justice issues causing significantly reduced claims numbers in relation to any type of claim.

6. Notwithstanding the introduction of the referral fee ban as part of the Jackson reforms, we are aware that there seems to be an active market competing for new instructions amongst claimant firms, and again, there is no evidence from that source of access to justice issues. It is likely that the wider use of fixed recoverable costs (FRC) within low value RTA, EL and PL claims is likely to have at least some impact on the selection of claims by claimant law firms. In simple terms, if their potential costs recovery is less, claimant law firms will be less keen to take on significant numbers of claims where they are unlikely to recover costs at all.

7. We still see a significant number of late notified personal injury claims arising out of motor accidents suggesting that the practice of claims farming continues. The ban on referral fees and decreased fees for solicitors has not deterred some accident management companies and law firms from continuing to take on those cases.

8. There does appear to be a greater awareness on the part of claimant law firms, of the risk of fraudulent claims. This will affect a firm's decision whether to accept instructions on a new claim where there is a perceived risk of failure due to the possible presence of fraud. Additionally, we anticipate that claimant law firms will be less inclined to take on claims which are weaker as to liability. If this analysis is correct, then the initial signs are that the reforms have been successful in ensuring that unmeritorious claims are no longer in fact taken forward. Whilst welcoming this fact, it should be set alongside the continuing high level of claims volumes shown by the portal MI.

9. The lack of any issue around access to justice is supported by the Government's decision not to increase the small claims track limit at the present time.

10. Claimant law firms might claim that, taken together, the Jackson and portal changes mean that valid claims which are small as to quantum but complex on the issues are now too expensive for them to run. If indeed that is so, it is only a reflection of the fact recognised by Lord Justice Jackson that in the real world, few well advised litigants would be willing to spend £10,000 seeking to recover outlays of £5,000.

The impact of the Jackson reforms on the funding of civil litigation in the light of changes to CFAs and the introduction of DBAs and QOCS

11. Again, we see no significant access to justice issues arising.

12. In injury cases, our understanding of the market currently is that claimant lawyers are entering into CFAs with 100% success fees. Whereas many people, including Lord Justice Jackson, had thought that market forces might result in claimant law firms taking on new claims without recoverable success fees, this seems to be the exception rather than the norm at present.

13. It is also our understanding that claimant solicitors do not generally take on new claims under DBAs, as they consider the regulations to be too restrictive, and less advantageous to their clients and themselves when compared with CFAs.

14. Claimants entering new retainers after 1 April 2013 do of course have QOCS protection, though we are aware that the market in After the Event insurance products providing cover for both claimants' disbursements and residual costs risks has developed since last April. Law firms will consider the nature of their advice to their clients on whether this type of cover is needed on a case by case basis. Our understanding of the new ATE market is that policies are available at much lower premium cost than the policies issued before April 2013 even allowing for the reduced scope of the cover.

15. Notwithstanding the limited period in which to measure experiences in this area, there is no aspect of the changes to funding of civil litigation since 1 April 2013 that gives rise to a high level of concern requiring process change. The claimant market is still developing, and the hope of many is that we will begin to see efficient claimant operations which are able to be profitable without taking a reduction from claimants' damages as success fees.

16. We would raise one matter on behalf of insurers in relation to the review of the DBA regulations. It would be of assistance to require a claimant proceeding under a DBA to give notice of that fact at the outset of a claim and also to require disclosure of a copy of the DBA at the conclusion of a claim. This relates to the indemnity principle which we presume will continue to apply to any revised DBA regulations, as Lord

Post Jackson experiences of costs budgeting and case management through the courts

Compliance with rules, Practice Directions and court orders

17. Lawyers were made aware of the court's approach to compliance issues after the Eighteenth Lecture in the Implementation Programme delivered by the Master of the Rolls, Lord Dyson, in March 2013, warning of an end to "the culture of toleration of delay and non-compliance with court orders". Against that background, the Court of Appeal delivered its seminal judgment in Mitchell v News Group Newspapers in November 2013.

18. This judgment significantly raised the profile of compliance issues, which lawyers are coming to terms with and are strengthening their claims management processes. Claimant law firms have begun to realise the significant threat created by the court's response to non-compliance. The moves towards larger, more efficient claimant law firms brought about by the financial impact of the Jackson reforms have been given fresh impetus by the decision in Mitchell and its stressing of the importance of compliance which in turn can only be achieved through efficient, well-managed operations.

19. A certain amount of protest has been heard in response to the Court of Appeal's view as to compliance as stressed in Mitchell, and we expect that responses to this consultation from certain quarters will highlight the perceived unfairness of the decision and the extent of the expectation on lawyers to comply with rules, Practice Directions and court orders. It seems to us that those complaints are now beside the point, the court has given its judgment which is designed to be of wide impact and that judgment is unsurprising when set against the Eighteenth Implementation Lecture.

20. We see every reason for lawyers to embrace the new approach, upon which we expect to see progress during 2014. We anticipate refinement of the law as more guidance is given as to what constitutes "triviality" and "good reason" as defined in the Mitchell judgment. It is right to recognise that where default is trivial, or there is good reason for it, then the parties and their lawyers should expect the court not to be slow to provide them with relief. Currently, there is some inconsistency between the lower courts as to application of the Mitchell tests, but we expect those judgments to become more consistent as we move through 2014.

21. One unresolved issue currently is the use by the courts of "buffer orders" allowing parties to agree limited extensions of case management directions. We understand that the CPRC is considering the issue. Where there is a need to avoid draining limited court resources in dealing with applications which seek to obtain approval of consensual extensions of time which are limited in extent, and where that judicial time is better spent managing cases, we can see reason for a greater use of this type of buffer order.

Case management

22. Following Mitchell, we see more potential for the court to use its powers to proactively manage cases. Those powers include the court's duty to manage cases (CPR 1.4), the power to make an order of the court's own initiative (CPR 3.3) and the power to strike out a statement of case (CPR 3.4). An example is the approach taken in M A Lloyd v PPC International (2014) EWHC 41 (QB) where Turner J said "This court is under a duty under CPR 1.4 not simply to adjudicate passively … but to actively manage cases".

23. We see a need to encourage the judiciary to be willing to use its existing powers of case management in order to ensure the efficient conduct of litigation. The introduction of "buffer orders" and a greater

24. We also see a need to move towards a greater use of docketing of cases, whereby a case is managed by the same judge throughout its process.

Costs budgeting and management

25. We recognise the importance of these new processes and the emphasis given to them by the Mitchell judgment. Successful operation of costs management by the court remains a key part of the Jackson reforms and will achieve greater control of litigation costs. At present there is only a limited amount of experience of operation of the processes to report on. This is another part of the Jackson reforms where more time will have to be allowed before this new part of the system can be properly evaluated. Indeed, issues surrounding the timing of filling and service of costs budgets, as seen in Mitchell, have proved a diversion in being able to properly judge the new processes.

26. We are aware of some hopefully limited instances of judicial reluctance to embrace costs management. The on-going efforts to secure judicial buy in, and the expected changes to the exemption from costs management (only excluding cases worth in excess of £10 million) should assist in widening the impact of costs management.

27. It is important that sufficient judicial time is allowed for the main case and costs management conference (CCMC). A CCMC should have an estimated length of hearing of not less than 1½ hours, to allow for judicial reading time, and then discussion of both the case and costs management with the parties. We would not be in favour of case management and costs management taking place at separate hearings, because of the obvious overlap between the two, and the fact that the court will need to know the costs involved when making its case management directions. A sufficiently long ELH would allow the two matters to be dealt with at the same hearing. As a last resort, if there proves to be insufficient time at a hearing to conclude both aspects, we would suggest that case management directions be given having specific regard to projected costs as set out in the costs budgets, with a second hearing taking place in the light of the directions given to "fine tune" the budgets.

Behavioural issues arising out of the extended portals

28. It should not be seen as surprising that not only do behavioural issues continue, but they have increased following the extensions to the portals.

29. In our view, while portal issues can be seen as less important because of the lower value claims being dealt with within them, when points of principle occur they affect a significant number of claims. We would see the need to recognise more importance from judicially determining portal issues than has previously been the case.

30. Whilst there are costs consequences for failure to comply with the relevant portal protocol, or electing not to continue with it, there are financial incentives for lawyers to seek to exit claims from the portal process, namely to move to the higher level of FRC outside the portal (or in the case of EL disease claims to move to hourly rate costs as they are not subject to FRC outside the portal).

31. At present, there are few judicial decisions in this area, and those are from the lower courts. It seems to us that there is reason to be gained to publicise the existence of these issues, and that guidance from the Court of Appeal would be appropriate in this area in relation to certain types of behaviour, which should then assist in steering future desired behaviours in an area in which difficulties currently arise.

Future areas of interest

32. It is worth identifying other aspects of the Jackson recommendations which remain to be taken forward, but which are worthy of further attention at this stage. We have identified these as follows:

33. **The extension of costs budgeting and management to the handling of claims pre litigation** is an increasingly important area as we are already noticing the "front loading of costs" pre-litigation to avoid judicial scrutiny.

34. **The extension of the current FRC processes so as to provide, as anticipated by Lord Justice Jackson, the fixing of costs in fast track cases for all types of claim, thereby including non-injury claims and any other claims not starting in the portal.** Not having all fast track cases under the same regime can promote the targeting by law firms of cases where costs recovery is more lucrative. Indeed, anecdotal evidence suggests that the number of clinical negligence claims is increasing, no doubt as a result of them falling outside FRC as well as the extended portal. This unfortunate effect will increase demands on the public purse.

35. **The result of the guideline hourly rate consultation is awaited** and provides an opportunity to ensure that civil costs remain proportionate.

36. **The "neutral" calibration of PSLA tools** is an area worthy of further consideration to narrow the areas of dispute in claims.

37. **Future portal developments** which could include for example the refinement of the EL disease protocol to increase the retention of claims within the portal. The submission of the claimant's medical evidence could take place at an earlier stage in the process, before a Stage 1 decision is made on liability, because of the clear overlap between causation and the issues dealt with within an admission of liability at Stage 1.

38. Additionally, all of the protocols could be developed to allow for a claim to be retained within the portal in order to proceed to Stage 2, if a liability agreement (either apportioning liability or agreeing a reduction for contributory negligence) is achieved at Stage 1.

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