Civil Justice Council – The Impact of the Jackson Reforms on Costs and Case Management

Response from Irwin Mitchell LLP

Introduction

Irwin Mitchell is a full service, national law firm with 7 offices in the UK (Birmingham, Bristol, Leeds, London, Manchester, Newcastle and Sheffield) The firm is also associated with Irwin Mitchell Scotland LLP based in Glasgow.

We are a top 20 law firm in the UK and employ over 2200 staff. We deliver a wide range of personal and business legal services and we are a major litigation practice with a wide range of litigation services as well as delivering private client services such as family, probate, debt recovery and conveyancing.

1. The Types of Cases Being Taken On (and Not Being Taken On) By Law Firms

1.1. This response is particularly focused on personal injury cases .It is barely a year since the reforms were introduced. It is, perhaps, premature to comment on the types of cases that will be taken on and those which are now rejected but previously were pursued. The impact of these radical law reforms should be the subject of regular review by the CJC and the MOJ.

1.2. It is generally accepted that as a result of the reforms the amount of fees that Claimants' lawyers are able to recover has been substantially reduced. On CFA cases whilst it is possible to charge clients the success fee, ATE premium and other unrecovered costs 'price competition' is already emerging .Law firms will continue to look for improvements to their business models to improve efficiency but those opportunities have their limits so it is inevitable that solicitors will seek to improve their prospect of generating revenue by becoming risk averse and will take on clear winners but shun the more complex and difficult cases There are already indications that only those cases with good prospects of success are being pursued and others are experiencing difficulties in locating law firms who will take on their case. It means that those cases where there are challenging issues on liability may well be rejected now with a consequential denial of access to justice.

1.3. A further problem experienced in relation to the type of cases being taken on is the impact of the proportionality test. There are a whole range of multi track cases where proportionality will be an issue as a result of the change of rule. We have in mind, for example, child and elder abuse cases, workplace injury cases, clinical negligence cases, all with a value in the region of £25,000 - £100,000. These are substantial sums of money but may be placed at risk depending on how the rule on proportionality is defined Any costs not recovered from defendants are likely to be charged to clients and in moderate value complex cases these charges may represent a substantial proportion of damages awarded. If price competition erodes these charges again the impact will be that solicitors will become risk averse and access to justice will be denied.

1.4. We are aware that the Master of the Rolls has indicated in a speech that we will have to wait for the Courts to decide how the new proportionality rule is to be interpreted. So far, no decision on this issue has been given which leaves a good deal of uncertainty. We would invite the Master of the Rolls to reconsider and we regard it as desirable that a Practice Direction attached to the Rule is promulgated which may give some assistance to the parties and will help them make appropriate case management decisions and to advise clients at

the outset of the likely level of costs recovery and the extent to which they will have to meet costs out of their damages

1.5. In this regard we would also invite consideration to be given to the current Part 36 Rule. Presently, the Claimant can only take advantage of the favourable consequences of beating their own Part 36 offer in the event of Judgment being given. If the position was that the Rules were amended to enable the Claimant to receive in their favour all the benefits of beating their Part 36, if the offer is accepted out of time, then we consider that this will result in a speedier conclusion of cases. It will encourage Claimants to make earlier Part 36 offers particularly in respect of those cases which may be caught by the impact on the rule on proportionality. There should be a level playing field for parties in relation to Part 36. The anomaly works in favour of the Defendants and additionally the cap of £75,000 (by which the Claimant is rewarded for beating his/her own Part 36) should be removed.

1.6. In summary we consider that less than a year from the introduction of the reforms evidence is already emerging of solicitors becoming risk averse and clients having to contribute substantial proportions of the damages they recover to meet solicitors costs no longer recoverable from the other party.

2. The Funding of Civil Litigation in the Light of Changes to CFAs and the Introduction of DBAs and QOCS

2.1. We remain of the firm view that claimants should be entitled to recover their reasonable costs and additional liabilities from the other party allowing solicitors to guarantee that claimants will recover 100% of their damages

2.2. Individual cases of injustice caused by the new CFA provisions will emerge on a daily basis as cases begin to settle and the true impact of these reforms become clear. For example, in cases involving children or protected parties, there is no guidance on how the courts will approve a success fee and an ATE policy deduction from damages and it is unclear what guidance the Court of Protection has had in relation to approval of CFAs for children and adults under a disability.

2.3. The compensatory provision of a 10% increase of general damages for pain suffering and loss of amenities is inadequate and in most cases involving serious injuries only makes a small contribution to the cost of additional liabilities falling on claimants and should be increased further.

2.4. We are unaware of any DBAs being used in personal injury cases. The DBA Regulations have been heavily criticised and we are concerned that they are unenforceable.

2.5. One particular concern with regard to Conditional Fee Agreements, relates to Claimants who have entered into CFAs prior to 1 April 2013. Through no fault of their own, they may have to enter into a post April 2013 CFA. In the light of the changes made, it is highly likely that they will then have to suffer a deduction from their damages as a result of not being able to recover additional liabilities from the defendants. The cases that come to mind are those where:

2.5.1. The Claimant wishes to change solicitor which is a regular event in personal injury cases in a time of market disruption

2.5.2. The change of solicitor can come about as a result of one firm of solicitors merging with another.

2.5.3. A Claimant reaching the age of majority.

2.5.4. A Claimant dying and his Estate taking up the case on the Estate's behalf.

2.6. We would propose that the necessary amendments to Regulations should be introduced to enable Claimants in these circumstances to continue to be able to recover their success fee and ATE premiums.

2.7. Legal aid has been retained for a minority of clinical negligence cases, abuse cases and public law cases with a personal injury element. However, because a Claimant has to show that no other funding is available and because of changes in eligibility, there is little access to public funding in real terms. This is despite the fact that Lord Justice Jackson proposed no change to public funding

3. Experience of Costs Budgeting and the Management of Cases Throughout the Court

3.1. We have, so far, prepared in excess of 200 Budgets. We have spent, on average, about 25 hours on each budget. This includes liaising with experts, Counsel and other parties. It also involves considering our opponents' budgets and attendance at hearings. Some of the larger budgets have taken considerably more time. One in particular took over 80 hours.

3.2. This is in marked contrast to the position prior to the introduction of costs budgets. In relation to the detailed assessment procedure, we probably had contested costs assessment hearings in around 5% of cases.

3.3. The costs management process itself is proving difficult. The main problem we have encountered so far has been the inconsistency of approach by different Courts. There remain differences of opinion in relation to when the budget has to be filed. As a result of the consequences of not complying with the Rules, we ensure that a budget is filed with the Directions Questionnaire unless there is a specific Order to the contrary.

3.4. There have been cases where the Court has exercised its discretion to dispense with the budgeting process. The best examples relate to children's cases where prognosis is put back for many years. In these cases it is very difficult to assess what will need to be done for some considerable time and, in particular, what expert evidence will be needed. We consider that this type of case should be identified and excluded from the Rules as requiring a costs budget. Another example of this is where the issue of liability still has to be resolved and the parties agree that a split trial is appropriate. In such cases costs budgets should be limited to the liability issues.

3.5. We are now required to lodge a significant number of documents before a costs management hearing at which the costs budget will be considered. This would include a breakdown of pre-budget work and a comparison document between both sides' budgets. The bundle itself takes many hours to prepare, much more than previously needed.

3.6. A longer period is given now for Case Management Conferences to include the costs management hearing. However, it is rarely the case that the amount of time given is long

enough. If there is not sufficient time the matter is relisted and there can be some delay before the case is listed.

3.7. It is also proving difficult to agree the budget, or even parts of it. Opponents feel uncomfortable agreeing figures until it is clear how the budgets will be dealt with at the conclusion of a case. What will, for example, be a "good reason" to escape from the budget? There is too much uncertainty in the Rules and it seems that it will be some time before case law starts emerging regarding the back end assessment of costs in post-LASPO cases. In the interim, it is difficult to narrow issues regarding budgets which leads to many contested hearings.

3.8. There has also been a difference of approach by Judges at CCMC hearings. Some have given global figures per phase following relatively short hearings. This would be our preferred approach. However, at the other extreme, Judges are wanting to consider hourly rates and component elements of the budget in great detail and conduct a mini detailed assessment. We do not consider that the Courts, at this stage, should conduct a detailed assessment.

3.9. We consider that it is desirable for the Courts to give the benefit of the doubt to receiving parties. If an element of work or contingency might be needed, it should be provided in the first budget. Judges who do not allow such items may find many applications for budget revisions which will slow the process yet further. It has yet to be seen what would happen if a case is due to conclude but cannot because a party is concerned at settling their case before a budget is revised

We would propose the following:

(a) There should be more exemptions to the budgeting process specified in the Rules, Practice Directions or guidance notes. When children are involved or if the medical prognosis is unclear so that it is not possible to budget with any certainty in personal injury cases, there should be an exemption provided for these cases in the Rules.
(b) It must be made clear when the budget is to be filed. The existing rule is not uniformly applied.
(c) Consistency is needed in relation to documents which need to be filed prior to the CCM and also in relation to the approach to budgeting hearings which Judges should take. The hearing should not turn into a mini detailed assessment hearing.

3.10 We would also comment that the provisional assessment of costs at £75,000 is too high. This is resulting in many more hearings at this stage of the process.

3.11 We would also comment that cost budgeting is taking up substantial court resource which is creating major delays in the progression of cases. CMC hearings can now take many months to be listed and the effect is to slow down the delivery of civil justice and this can only get worse as more post April case arrive at the costs budgeting stage. The courts need more judicial and administrative resource to cope with this and there needs to be a regular review of the value of costs budgeting (the return on investment) of this substantial investment of resource in achieving the objectives set for it. At the moment it is soaking up valuable resource that could be applied to the core elements of the administration of justice.

3.12 Cost budgeting only makes sense in our view if the detailed assessment process is in practice substantially streamlined otherwise the courts face a massive increase in resource allocation to costs management which at a time of substantial cuts to the MOJ budget has to be considered in the context of other judicial resource priorities.

3.13 Another major issue in relation to the management of cases is the impact of changes to the CPR regarding court management of timetables and relief from sanctions. This has created

considerable uncertainty in the legal profession about when applications to the court should be made to extend timetables or to seek relief from sanctions. The management of the 'Mitchell' approach is soaking up large swathes of judicial time. It is also creating numerous individual injustices because prejudice and the impact on the individual claimant of what are often disproportionate sanctions are not taken into account in reaching those decisions. The ultimate impact is likely to be a substantial rise in claims on PII and considerable inconvenience and ultimate injustice for victims who have to bring actions against their solicitors rather than pursuing their primary action. This places additional burdens on the court system and prevents claimants obtaining swift justice and potentially delivers an inferior remedy.

3.14 The greatly increased number of court applications (for variation, extensions or relief from sanction) has come at exactly the same time as the courts are grappling with the extra time required for cost budgeting. This has had a huge impact on court lists and added further delay to cases, an increase in costs and increased use of judicial resources.

Summary

At the centre of our concern in this submission is ensuring that injured people have access to justice and independent and high quality legal advice. In our view claimants are entitled to recover 100% of their damages. These reforms mean that claimants will have to pay a substantial proportion of their damages to contribute to legal costs. The 10% increase in general damages for pain suffering and loss of amenity is wholly inadequate to compensate for those liabilities. These reforms have put the judicial system under major strain at a time of swingeing cuts in budgets for judicial services. This is seriously impeding the swift administration of civil justice without in our view delivering tangible benefits to those seeking justice. The impact of these reforms needs to be kept under regular review supported by research and consultation with the profession to we maintain a strong system of civil justice for those seeking redress

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