Kennedys

Legal advice in black and white

The Impact of the 'Jackson reforms' on Costs and Case Management

Kennedys' response to a call for evidence from the Civil Justice Council

19 March 2014

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" The firm is one of the largest and strongest dispute resolution practices in the country' and 'has a deep understanding of the pressures of the client's bottom-line and has developed a reputation for providing straightforward, pragmatic advice cost effectively." Chambers and Partners

Kennedys is a top 20 specialist national and international legal firm with unrivalled expertise in litigation and dispute resolution. We have some of the most respected legal minds in their fields. We have over 1,200 people globally across nine UK and ten international locations. This includes 170 partners, of whom 37 (plus their teams) specialise in personal injury cases.

Our lawyers provide a range of specialist legal services across many areas such as: insurance/reinsurance, general liability, including motor, personal injury, employers' and public liability and product liability, as well as property, construction and engineering, professional indemnity, healthcare, life and health, occupational disease, employment and health and safety, environment, marine and aviation.

We handle a wide range of insurance disputes and litigation with a client base that includes general insurers, global composites, Lloyd's syndicates, underwriters, self-insured PLCs and self-insuring government bodies.

The firm has expanded considerably over the last eight years, largely as a result of organic growth but also by selected lateral hires made to strengthen key areas of expertise. Today, Kennedys is well equipped with a regional network that can provide our specialist services throughout the UK. Kennedys' global and national network enables us to meet the current and future needs of our clients, the insurance market and the aspirations of our people.

Preamble

Kennedys supports the call for evidence on the impact of the 'Jackson reforms'. Given the extent of the reforms, it is vital to assess how these and related developments are taking effect.

Kennedys is a leading dispute resolution firm which offers a breadth of expertise to a range of clients across the litigation and commercial sectors. As practitioners and on behalf of our clients, we support the objectives of the reforms: increased litigation efficiency and reduced litigation costs. Whilst we believe it is too soon to feel the full force of the reforms, we are already beginning to see some effects of Jackson and consider that 2014 is a critical year, not least with regard to regulation and strategic decisions about what the legal industry faces.

Overall, however, most legal commentators predict it will be at least two financial years from April 2013 to appreciate the full impact, in particular to allow pre-Jackson cases to have worked their way through the system. We agree with that proposition, not least as one of the main reform measures occurred only in July 2013 – namely the implementation of the vertical and horizontal extension of the pre-action protocol and accompanying fixed recoverable costs regimes.

We would also advocate that one the key indicators of seeing whether these reforms have worked is to watch whether claim volume reduces as well as claim costs, which will take time.

Kennedys has recently run a series of seminars for our London and regional clients looking specifically at the impact of Jackson. We invited claimant, industry and other legal representatives to join us on the presenting panel to ensure a comprehensive, and honest, cross-section of perspective was heard. Collectively, these events have been attended by over 300 of our clients, which, broadly speaking can be broken down into types of organisation as follows: 47% insurer, 6% reinsurance, 9% insurance brokers, 4% loss adjusters, 7% local authority, 8% government body and 19% other business type.

The objective of these seminars was to present the findings of the Jackson effects seen so far and consider the likely next steps, including with regard to the prospect of a change in government. As importantly, they allowed us the opportunity to hear our clients' observations and concerns and this submission is written with the benefit of having taken such soundings.

The majority of our client audience agreed that, overall, the Jackson reforms are a positive step. With regard to lower value claims, they considered the extended pre-action Portal process has prompted a positive shift in approach to making liability decisions. Indeed, a majority would like to see a further extension of the process (to include fixed costs regimes) to other claim types and to higher value claims – subject, of course, to suitable consideration of the existing process and the mechanics of a further extension.

With regard to case management, however, the majority client response is that the case of Mitchell v News Group Newspapers Ltd (2013) has harmed the main objectives of Jackson. Whilst the importance of judicial application of Jackson is recognised, the effects of Mitchell have gone too far and risk unintended consequences, including satellite litigation. Whilst it is anticipated that there will be a 'softening' of the Mitchell approach, the current uncertainty which practitioners and clients face is not ideal and risks undermining the spirit and letter of the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012 and Jackson, generally.

Kennedys Civil Justice Group

Even before the last general election, Kennedys recognised the importance of active involvement in the political debate on Lord Justice Jackson. We met with the then Shadow Justice Minister, Henry Bellingham, and following the election we created the Civil Justice Group. This group comprises interested individuals, composite insurers, corporations with a large self-insured element, public bodies and those from the voluntary sector. In addition, we met with consumer groups including the Citizens Advice Bureau and Consumer Focus. The intention behind the group, when formed, was to provide a cohesive response to the Jackson consultation from a wide church of interests (and not just those representing defendant insurers).

Taking a collective approach proved particularly attractive to the Ministry of Justice (MoJ) and other officials, as our proposals came across as more objective. Indeed, this was highlighted by the fact that the MoJ approached us to seek guidance on the cost implications of certain reforms. Members of Parliament also sought us out for advice on specific aspects of the proposed reforms. In addition, we have met with Jackson LJ on two occasions – once before he finalised his report when he sought specific examples of how claimant costs can frequently outstrip damages by disproportionate amounts and again afterwards, whilst his recommendations were being considered by Parliament.

The issues on which we have briefed officials and policymakers span the full liability spectrum, reflecting the range of business needs and concerns of our clients. This has included, in particular, the extension of the pre-action Portal scheme for low value motor, employers' liability (EL) and public liability (PL) claims; implementation of the ban on referral fees; exceptions to the abolition of recoverability of additional liabilities; proposals around managing whiplash claims; establishment of the Diffuse Mesothelioma Payment Scheme and streamlining mesothelioma litigation, as well as setting the discount rate.

More recently, Kennedys (with the Civil Justice Group) was invited to give evidence to the All-Party Parliamentary Group (APPG) on Insurance and Financial Services on the cost of personal injury claims to the UK economy. We also provided oral evidence to the Civil Justice Council for its review of guideline hourly rates.

Kennedys continues to engage with and advise its clients on relevant issues and how they may impact upon their business. This includes providing both bespoke and seminar-based training to assist them with the transition required under the civil justice reforms. Doing so allows us to hear their observations and concerns, and ensure that the knowledge base we draw our observations from is as comprehensive as possible.

Executive summary

We welcome the proposal to review the impact of the 'Jackson reforms'. Overall, we will assert that:

- It is probably too early to assess the full impact of the reforms and it is vital for review to take place on an ongoing basis.
- Nevertheless, the Jackson reforms are to be embraced and are already prompting a positive shift in the litigation experience.
- It is imperative that the Jackson reforms are looked at in the round of other developments and the market activities which have occurred (and which will continue to do so) as a result of the combined effects of those changes. This includes, in particular, the impact of alternative business structures following the Legal Services Act 2007.
- Any contraction of the wider market is likely to lead to less efficient businesses falling away and more efficient ones consolidating. The risk here is that those consolidated businesses look to bypass the spirit and letter of the LASPO Act 2012. The Government should remain alive to the need for effective regulation and the prospect of revisiting the LASPO legislation, and in particular s.56 LASPO Act 2012 (referral fee ban).
- The Government should stay alive to developing behaviours by claimant representatives to cost-build and generate pre-Jackson revenue, particularly where there are differences in the applicable costs regimes.
- Costs budgets are a useful tool to allow greater visibility and clarity towards predicting total costs and in turn, assist in achieving settlement. However, it is vital that there is consistent judicial approach to the examination and application of budgets.
- The current approach to case management risks undermining the objective of saving costs and time, and increases the potential of satellite litigation. It also risks a more aggressive litigation culture to the one which was actually occurring – or beginning to occur – prior to Jackson/LASPO 2012.

FURTHER INFORMATION

Any enquiries about the response or requests for further information should be addressed, in the first instance, to:

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Impact of Jackson Reforms:

Impact on the types of cases being taken on (and not being taken on) by law firms.

As stated above, overall, it is too early to be able to offer a comprehensive answer. Rather, we use this opportunity to highlight our observations about the changes in behaviour we are already seeing as a reaction to the reforms. This may indicate changes in claim activity going forward.

Before doing so, one area where our clients are seeing an increase in a particular claim type is for lower value claim types which have escaped a fixed recoverable costs (FRC) regime. Notably, disease claims (other than mesothelioma claims) can technically fall within the pre-action protocol for low value EL and PL claims (the Portal) and the associated FRC regime which applies therein. However, disease claims which fall outside the Portal still enjoy hourly rates as FRC do not apply (CPR 45.29A).

In particular, our clients are seeing a significant increase in noise induced hearing loss (NIHL) claims and, to a lesser extent, an increase in hand, arm vibration syndrome (HAVS) cases. These claim types represent a particularly lucrative source of claims to help generate pre-Jackson revenue.

The trends in behaviours we are seeing to bypass the Portal are becoming consistent. For disease claims, we are seeing allegations being made against two defendants, when it is apparent that there is only one applicable defendant. For all claim types, we are seeing claimants provide inadequate information on the claim notification form (CNF), for instance by missing out mandatory information such as a national insurance number. Typically, when challenged, the claimant will refuse to resubmit the claim into the Portal and will instead proceed to send a letter of claim. Although a defendant could challenge a claimant and assert that the lower rate of FRC should apply on the grounds of conduct, there is no guarantee of a successful outcome and we are seeing opportunistic behaviour in this regard.

Another trend we are seeing emerge is the addition of a claim for 'situational anxiety', or psychological or rehabilitation loss, in lower value claims. If

this prompts a challenge by the defendant – which will be appropriate for most lower value claims – the claim will no longer proceed in the Portal and again, be subject to a higher rate of FRCs, or in the case of a disease claim, hourly rates. In addition, we are seeing further cost-building attempts by the claimant's firm charging high rates for disbursements (including administrative charges such as photocopying); turning what should be a straightforward matter into an unnecessarily costly one.

We recognise, of course, that there are other factors which might help to explain claim trends. For example, the formation of the Employers Liability Tracing Office (ELTO) has made the tracing of insurers on older policy years significantly more straightforward. Nevertheless, it should be appreciated that where an opportunity exists to exit the Portal process and enjoy a higher rate of legal costs, behaviours are likely to develop to exploit such an opportunity. Such behaviours are likely to be all the more pronounced where those rates are not fixed, as with NIHL and HAVS cases.

It is, therefore, vital that close attention is paid to developing trends and behaviours. We would go further and question why there should be any exceptions to the principle of FRC for low value claims which are suitable for the Portal process. Indeed, we anticipate it is only a matter of time until the meaning of 'disease' is challenged with regard to those lower value disease claims, in order to bring them in-line with the FRC regimes which apply elsewhere.

Impact on the funding of civil litigation in the light of the changes to CFAs and the introduction of DBAs and QOCS.

Some of the behaviours we have been tracking suggest an attempt to circumvent the abolition of recovery of a success fee, for example receipt of letters indicating the claimant is under a conditional fee agreement on which he will seek a success fee notwithstanding it was entered into after 31 March 2013.

We expect that such attempts will disappear as practitioners get used to the reforms.

Other behaviours do, however, suggest a more determined effort to maintain a pre-Jackson revenue stream by looking for ways to cost-build. We refer to our observations made above in that regard. Such efforts are typically complimented by a reluctance to negotiate or indeed communicate by way of answering incoming phone calls.

Overall, it is too soon to be able to gauge any savings made as a result of QOCS and/or any real trends emerging in behaviour. It remains an unknown quantity as to whether QOCS will have an impact on claims handling behaviours, including with regard to the decision to go to trial. As and when such effects begin to emerge, we would anticipate that there may be a different reaction by compensators who have a self-insured element and those who do not.

Looking forward, once QOCS begins to take effect in claims, we anticipate an increase in court applications, which may have a bearing on case management resources. In particular, when faced with the prospect of a case being run to trial and almost certainly incurring the costs, defendants will most likely deploy the opportunity to bring a case to a close at an earlier opportunity by way of seeking summary judgment; thereby circumventing the full force of QOCS.

Taking this line of thinking further, defendants will also be alive to the fact that the claimant will remain protected from an adverse costs order following a successful summary judgment application (as it does not trigger any of the exceptions to QOCS in CPR 44.15 and CPR 44.16). It is likely, therefore, that defendants will issue applications for both summary judgment and strike out to be heard simultaneously.

The defendant will also be alive to the prospect that a claimant who is the subject of an application to strike out may then discontinue the proceedings in order to avoid liability for costs - knowing the court has no power to re-open the matter to consider any of the striking out grounds that could have triggered a costs liability. Indeed, we would expect to see an increase in the number of claimant' discontinuances later in the life of a claim to ensure QOCS protection is not lost.

We appreciate that this reasoning is to some extent speculative at this stage, but we raise it in order to highlight a potential reaction to the reforms which risk undermining the concept of 'proportionality' and fairness. It also represents an additional burden on the court system by dealing with multiple applications.

Impact on experience of costs budgeting and the management of cases through the courts.

Costs budgeting

Overall, our clients are informing us that budgets are a useful tool to allow greater visibility and clarity towards predicting total costs, which is welcomed. In turn, this assists compensators build into reserves and be proactive in deploying settlement strategies, for example by raising an argument of costs at an earlier stage in proceedings, rather than having to wait until the conclusion of a claim.

Budgets also provide greater transparency over how different claimant representatives typically deal with claims, which again allows better insight into effective costs management at different litigation stages. Collectively, such steps enhance the efficiency of the settlement process, generally.

With the introduction of fixed costs regimes, we are seeing a significant reduction in the use of cost negotiators on behalf of claimants. We are, therefore, alive to behaviours which may develop in order to replace this lost form of income, and refer to our previous answers in that regard.

Looking to the approach by courts, overall, the message we are receiving is that solicitors should be realistic about what they are seeking to spend compared to the value of the claim. We are seeing certain judges and Masters taking a firm approach towards claimants who seek excessive and disproportionate time and fees. This is to be welcomed, particularly given the historic disparity on costs between claimants and defendants.

Anecdotally, we are seeing some inconsistency in judicial scrutiny towards budgets. Whilst some judges are taking a forensic approach to their examination of each budget, others are not adopting such a careful approach, which raises the risk of inconsistency. Indeed, in the reported case of Bank of Ireland v Philip Pank Partnership (18.02.14), the failure to include a full statement of truth in the costs budget as filed did not render the budget a nullity. However, in one of our own cases where the statement of truth was held to be defective, the costs of the receiving party were limited to court fees only.

Examples of further judicial inconsistencies centre on when the budgeting process is to take place. Some judges are ordering case management directions and then

setting the budget according to those directions, whilst other judges are setting the budget and then giving direction according to the budget allowed.

There is also a fundamental difference amongst the judiciary as to whether hourly rates play a part in the budgeting process. Some judges are setting budgets based upon a traditional time and expense calculation whilst others ignore the guideline hourly rates and apply a global price for the matter, irrespective of the hourly rate claimed by a party.

Case management

We recognise the importance of compliance with rules, practice directions and orders in order to promote an efficient litigation system. However, such compliance needs to have a reasonable element of flexibility and balance built into it to ensure it is workable.

Unfortunately, as identified above, we consider that the current approach towards case management is absurdly harsh.

The effects of Mitchell and the court approach to case management means we are now operating in a market where only trivial breaches of a court timetable will be tolerated. Should a breach not be tolerated – and for now, it is assumed it will not be – it could result in seismic changes to the ability to bring or defend a claim, for example, by the denial of witness evidence.

Consequently, we are now proceeding on the basis that any prudent party must prospectively obtain a court order if they want to extend time. CPR 3.8 provides that the parties are unable to agree between themselves to vary any deadlines where the rules or an order impose sanctions for non-compliance. The CPR is peppered with rules carrying their own sanctions, including in relation to common steps in the litigation such as witness statements and expert reports. The category of rules for which any extension of time must be compulsorily referred to the court for approval is therefore potentially wide.

Seeking court approval assumes that there are adequate court resources available. It also assumes that the courts themselves have fully adapted to the changes.

However, it is apparent that the pressure of dealing with applications seeking extensions of time has already caused considerable court delays, including at the Royal Courts of Justice (RCJ). The RCJ has reacted by approving a change of the

model directions for clincial negligence cases, allowing the parties to agree in writing an extension of time by up to 28 days, without the need to apply to court. We presume other areas of personal injury may follow suit. However, the uncertainty is far from ideal.

In addition, the situation does not accurately reflect the every day pressures which practitioners face: compliance with a deadline is sometimes – and genuinely - out of their control.

Indeed, we are already seeing a shift from a pre-Mitchell collaborative approach between parties to reach settlement to one of self-preservation. Claimants are already beginning to frontload everything they do pre-litigation so as to make themselves 'Mitchell-proof'. In response, some defendants may now withdraw their pre-litigation cooperation, when previously they might have offered rehabilitation or made admissions, in order to pressurise the claimant to issue proceedings and level the playing field. This is particularly relevant in high value catastrophic claims where collaborative relationships are particularly important.

Instead, parties are now likely to want to build in slack to the timetable and seek to take a point against their opponent, when perhaps previously, they would have been prepared to resolve it by consent.

Experts too are building in slack by extending their reporting time, which has serious implications on a party's ability to secure a suitable expert and promote an efficient directions timetable.

Overall, we are concerned that the current approach to case management undermines the objective of saving costs and time. It risks running counter intuitive to the intention of promoting the interests of justice by recognising and promoting the needs of other court users, and indeed, increases the potential of satellite litigation. It also risks an increase in professional negligence claims against other parties to litigation (including experts) and risks a more aggressive litigation culture. This runs counter to the letter of Jackson and to what was actually occurring – or beginning to occur – prior to LASPO. Ironically, the approach to case management is now creating extra work and might translate to cases taking longer to resolve.

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