slaterheelis LLP
SOLICITORS

THE IMPACT OF THE JACKSON REFORMS

ON COSTS AND CASE MANAGEMENT

1. It has now been almost one year since the introduction of the Jackson reforms. The impact of these reforms has been far reaching in certain sections of the legal profession and has changed the method in which files are dealt with. Here at Slater Heelis LLP the main area in which we have noticed the impact of the Jackson reforms is predominantly in relation to the reforms to costs and case management.

2. Prior to the Jackson reforms we undertook a wide variety of work within our Litigation team (outside of Personal Injury) ranging from boundary disputes to defamation through to complex high value chancery matters involving worldwide freezing injunctions (a full list of our firm's worktypes is annexed to this document). However, the majority of our work fell outside the Small Claims Track (SCT). Whilst we did not run SCT claims on behalf of our clients, we did provide assistance in drafting certain key documents, i.e. Claim Forms, Particulars of Claim and Witness Statements. The clients who instructed us to undertake this work tended to be more affluent individuals owing to the funding methods by which our firm takes instructions in litigation matters, as discussed below.

3. We have noticed that the number and types of cases we take on post the Jackson reforms has increased, rather than decreased. We still cover the entire array of worktypes attached but we have noticed an increase in the volume of SCT matters we now take instructions in and actively run on behalf of our client, whereas previously clients would have run these cases in their own personal capacity. These clients are more than willing to engage us on a privately funded retainer, despite the cost implications of SCT cases. We have attributed this increase in SCT cases to the raising of the SCT limit to £10,000.00 from £5,000.00. We believe this has had two consequences; firstly cases that would have been Fast-Track are now SCT, and secondly we are finding that individuals are less willing to conduct cases at the higher end of the SCT limit themselves. They then seek assistance from our firm, despite knowing that even if they are victorious it will be a phyrric victory as they will stand minimal chance of recovering their legal fees.

4. In terms of how the Jackson reforms have impacted upon the funding of the litigation matters we take on as a firm, we have noticed very little change. When stating this it should be noted, however, that we are not including Personal Injury

litigation work within our observation. The majority of the non-Personal Injury work we undertook prior to the Jackson reforms was privately funded rather than funded by way of 'no win no fee' Conditional Fee Agreements. Our work was either funded by way of a fixed fee or on an hourly rate basis. This has not changed with the overhaul of funding arrangements implemented by the Jackson reforms.

5. We have yet to enter into a Damages Based Agreement with any of our clients. This is partly due to the uncertainty that still surrounds DBAs and partly due to our clients who are still wary of the idea of their Solicitor taking a portion of their damages as payment. Our clients have expressed a desire to have certainty when it comes to their legal fees and would rather have a fixed fee for their work than enter into a DBA, where the amount they would pay is an unknown quantity. From our perspective as a firm we also have doubts regarding the use of DBAs, especially in the event the damages are minimal or the client loses and we receive nothing for our work. We would be more interested in entering into DBAs if the rules surrounding hybrid DBAs were clarified, to explicitly state that a DBA where discounted hourly rates are used in the event of a loss are legal and enforceable.

6. As stated above, the main area in which we have experienced the impact of the Jackson reforms is in respect of costs budgeting and case management. Our overall experience of costs budgeting has been largely positive in nature. We have had several clients who have found having an accurate budget of the likely costs on both sides a useful tool for making an informed decision as to settlement offers. We have also been able to use costs budgets to encourage settlement. In one such matter the forecast costs detailed within the costs budget of the opposition represented in the region of fifty percent of our client's claim. This has assisted us when discussing settlement, as the opposition's client is now more willing to discuss settlement having seen the costs that could be incurred on both sides.

7. We seem to have not actually agreed a costs budget prior to a CCMC yet, although not for want of trying. We have noticed that when budgets are not instantly agreed, the parties in a case often attempt to engage more in costs discussions in respect of identifying the issues each party has with the others costs budget. The parties then attempt to resolve these issues prior to the CCMC with a view to agreeing the costs budgets prior to the CCMC. In our experience if the budgets could not be agreed initially then they will not be agreed, irrespective of the parties attempting to compromise. We believe that one reason parties seek to reach an agreement is that the Court will then have to take a backseat role when considering costs at the CCMC. It is interesting to

note that even in circumstances where we are the party with the lower value costs budget there is still resistance to agree our budget.

8. Whilst we predominantly deal with firms based outside of London, we have observed an interesting assumption from some London firms. This is that costs budgets will agreed without further discussion; irrespective of the amount stated on the budget or how disproportionate the amount on the budget is when compared to the value and importance of the claim. By way of example we acted for the Claimant in a complex Chancery matter, the Defendant was represented by a London firm. The Defendant's costs budget totalled one and a half times the Claimant's. The total of the Defendant's budget was tantamount to the total amount of the Claimant's claim. There was an instant assumption that despite the above we would simply agree the Defendant's budget on the proviso that our budget would then be agreed in turn. This suggests the development of a kind of cartel where firms seek to avoid the interference of the Court irrespective of the potential impact on their client in terms of the ability to challenge the opponent's costs.

9. We prepared several budgets shortly after the conclusion of the initial costs budgeting pilot scheme and have prepared several more since then. We have observed that more recently Judges are making more specific Orders. These state that in addition to costs budgets the parties are required to file a full breakdown of the incurred 'Pre-Action' and 'Issues (Statements of Case)' costs detailed within the costs budget. On the occasions when both sides have produced these breakdowns, in our experience the document is never actually referred to by the Judge at the CCMC. Nor does Counsel use them in their skeleton arguments when discussing costs. In reality this is a task that simply incurs additional fee earner time and increases costs. We have also noted that there seems to be some confusion as to what format these breakdowns should actually be in. We have received some very simple ones that do not actually show anything further than the costs detailed in the costs budget. The majority of the breakdowns we receive, including our own, are in a similar format to that of a Schedule of Costs.

10. Of much more use, in our opinion, is the Scott Schedule comparing the costs budgets that Judges now also seem to be routinely including within their Orders. We have found this a very useful tool in persuading Judges in costs arguments, as it contains an easily readable comparison of the costs budgets on one page. On the cases we have prepared these Scott Schedules we have been the party with the lower value costs either overall or in the majority of sections within the costs budgets. We have also seen the party with the higher value costs use these comparisons to attempt to argue that the large difference between the parties is due to the other party underestimating the amount of work involved in

the matter. When we have prepared these Scott Schedules both Judges and Counsel seem to refer to this document almost exclusively in making their decisions regarding the parties' costs budgets.

11. From our experience Counsel must be fully briefed as to how the figures within the costs budget have been calculated. Therefore Counsel can if required justify the figures. Location permitting, another option is to send the fee earner who drafted the budget so they can provide clarification at the CCMC if needed. At the CCMCs we have attended when our costs are attacked, which inevitably happens even when we are the lower party, being able to justify our costs has seen our costs upheld by the Judge.

12. Having the right Judge makes all the difference to costs management. We have experienced Judges who are very au fait with costs budgeting. These Judges become very involved in the discussion of the costs budgets, performing an analysis akin to a Detailed Assessment of the costs budgets. We have been asked by Judges to provide a breakdown on certain elements of the time listed as forecast costs and to explain our reasoning behind why we feel that the level of time within our costs budget is appropriate and proportionate to the task being discussed.

13. On the other hand we have also experienced Judges who preferred a much lighter touch to costs management. In one instance the parties were informed that consideration of costs akin to a Detailed Assessment would not be permitted, despite both parties' Counsel having extensive costs arguments and case law within their skeleton arguments. The costs budgets were briefly covered and left as not agreed at that CCMC, due to other issues arising at the CCMC both budgets needed revising. A further CCMC was ordered to deal with those revised budgets. It was suggested that it would be preferable for the parties to actually agree budgets to obviate the need for this CCMC. The approach favoured by the District Judge at this CCMC was that they would prefer to agree an overall costs figure and how each party then spent that amount was a choice for them to make.

14. We have observed that there is still some confusion as to where certain tasks and disbursements should actually be placed within the costs budget. We have received some budgets that included two categories which when discussed with our opponent revealed that this was time that solely related to client care and file reviews. When questioned as to why this category had been included within the budget, the reply was that it was work that had been and would need to be undertaken and there was no category into which it fitted on the costs budget, so these categories had been added to the budget. A similar issue seems to arise frequently with the use of the 'Contingencies' category on the budget, most firms

leave this blank despite including costs and disbursements for a formal mediation within their budget.

15. From the costs budgets we have seen across the firm a large element that is neglected by and large in most of these costs budgets we receive is the ‘Assumptions’ for each section of the costs budget. Some firms have supplied us with budgets that either have blank assumptions or simply have one line written. From our experience of costs budgeting to date this does seem to be an issue that exists across more than one firm. However, other budgets do have a full set of assumptions and we have noticed in recent months that this is becoming a growing trend with more firms realising how important a well drafted set of assumptions can be in justifying the costs claimed within a costs budget and allowing for later amendment.

16. In relation to disbursements, particularly the fees of experts or accommodation fees (if the trial will not be in Solicitor’s locality), we have noted that Judges are increasingly asking for justification for the fees listed. They ask the relevant party to justify their disbursement with regards to proportionality. Having the ability to produce a collection of past disbursements as exemplars to justify the amount being claimed is highly useful. Whilst we have not seen any Judge actively consider what methods we have used when instructing experts, given Judges are beginning to play a more active role in costs management we can foresee that Judges will ask about how experts have been selected and whether a tendering process has been used. This will entail more work for the fee earner dealing with the matter, although we are not sure if this represents a step forward or just a step sideways.

17. In cases that settle prior to the CCMC or shortly thereafter we have used our costs budget within the subsequent costs settlement process. We have experienced a largely positive effect of this technique. By having a costs budget to refer to we had a tool to argue that our costs being claimed were reasonable and used the costs budget’s forecast and incurred costs to illustrate this fact.

18. Conversely, we have experienced other firms unsuccessfully attempt to limit the costs we claim in the event of settlement. In this instance our cost budget was referred to and arguments were raised that we should have expended no time in respect of certain tasks (i.e. preparing Witness Statements). From this assumption our opponent then presented us with a figure that they stated represented the maximum amount we could claim. This is part of the danger when costs budgets are used or interpreted incorrectly.

19. Costs budgets can also be used when applying for security for costs and it is useful to have a ready prepared figure for costs in that situation to refer to.

20. The main area where we feel further guidance needs to be given is in relation to claims deemed suitable for allocation to the Multi-Track. In certain instances within our firm we have received Notice of Proposed Allocation to the Multi-Track, however, we feel the matter is actually Fast-Track in nature. We state this view when filing our Directions Questionnaire. However, we still have to file a costs budget with the Directions Questionnaire to avoid facing sanctions for failure to file a budget in the event the matter is allocated to the Multi-Track. We are therefore incurring the work and the associated costs in respect of drafting a budget that may not then be used. If the matter is then allocated to the Fast-Track and we are successful and recover our costs, then the drafting of this budget would not be a recoverable item. We then either have to write the time off or invoice the client personally, leaving them out of pocket. We have discussed this with other firms and they have also faced this dilemma and dealt with it by filing a budget, on a similar basis to us and following the same reasoning regarding the possible sanctions of failing to file a budget.

21. Overall, our impression of the Jackson reforms has been largely positive. A well drafted costs budget can provide clients with enough information to make fully informed decision about their cases and the associated costs involved. This in turn seems to encourage clients to be slightly more realistic when considering offers of settlement.

Slater Heelis LLP - Litigation Worktypes (excluding personal Injury)

- Contract disputes
- Shareholder Disputes
- Partnership Disputes
- Professional Negligence Claims
- Contested Probate
- Winding Up or Company Insolvency
- Bankruptcy or Personal Insolvency
- Insurance Litigation
- Property Litigation, including Boundary Disputes
- Construction Litigation
- Intellectual Property Litigation
- Defamation
- Patents Litigation
- IT Litigation