

Jackson Reforms – Provisional Assessment

1. The Jackson reforms were made with the mandate of providing access to justice at proportionate cost. Provisional assessment is resulting in greater costs being allowed on assessments than were being allowed before the reforms. Partly that is the result of decisions in individual cases. Such outcomes are unavoidable in a judge led system and are not the focus of this paper. Instead, this paper is concerned with the effects of a lack of adherence to process.
2. I represent receiving and paying parties, but predominantly the latter. Taylor Rose Law has a specialist practice representing insurers and hence paying parties in costs assessment proceedings.

Correct process

3. Provisional assessment is not working as intended. The bill of costs should be the primary statement of case setting out the claim in all detailed assessment proceedings. The paying party raises objections via points of dispute. The receiving party may reply, limited to concessions and points of principle. There should be no need to set out the case in replies, as it is done already in the bill. Points and replies should both be shorter and more focussed.

Replies to Points of Dispute

4. Receiving parties are often ignoring the restrictions on replies in PD47 12.1. The subsequent comments assume familiarity with the strictures of that provision.
5. Frequently, there is a reply to every point. Many should be characterised as denials. There is often a factual preamble to each reply, setting out the case.
6. PD47 8.2 requires points of dispute to be 'short and to the point'. Although the word 'limited' in PD47 12.1 might imply that replies should be similarly short, it is not stated expressly. Replies are commonly considerably longer than the point to which they respond. PD47 12.1 would be improved by requiring replies to be concise.

Prejudice

7. The rule changes apply to all detailed assessments. These issues are not so significant where the bill exceeds £75,000, as there will still be a detailed assessment hearing. Both parties will have the opportunity, through advocates, to elaborate on their arguments.
8. However, in the context of provisional assessment there is prejudice to paying parties. Receiving parties are gaining an unfair advantage. A paying party has one opportunity to object to the claim for costs. The receiving party is making two opportunities to present the claim: in the bill and, non-compliantly, in the replies.

9. Such replies are leading to decisions on provisional assessment unfairly in the receiving party's favour.

Oral review

10. It is accepted that both parties have the option to request an oral review. However, the 20% rule concerning the costs of that review in CPR 47.15(10) means that many provisional assessments will be accepted, perhaps reluctantly. It is important that the provisional assessment is conducted fairly, and by that it is meant that each step is conducted in accordance with the rules.

Tolerance

11. Such concerns may be addressed by asking the court to enforce compliance. This firm has made applications concerning replies. Results have been mixed. Some judges have struck out the replies. Others have ordered that replies are amended to comply with PD47 12.1. Most judges have allowed the replies to stand. Some judges have said they find the replies 'helpful', so that they know the receiving party's case. Some have interpreted 'point of principle' generously, so as to permit all the replies.
12. Most replies with which we are served appear non-compliant and we cannot make an application in every case.
13. We are not aware of any decisions on appeal. The fact that permission to appeal case management decisions is granted more sparingly may mean appellate decisions are unlikely. Parties will also bear in mind the cost of an appeal.
14. It may well be that longer replies are 'helpful'. They also breach PD47 12.1. The court may equally find it helpful if paying parties set out points of dispute more fully; but we anticipate that is not a compelling reason to depart from PD47 8.2. It is an inevitable but under-appreciated fact that the court must be prepared to make assessment decisions based on more concise written submissions. Nevertheless, this firm has come to feel compelled to raise longer points of dispute to protect our clients' positions.
15. What constitutes a 'point of principle' seems clear. It will be a matter of law or a fundamental issue in the assessment.

The way forward

16. We would recommend that further guidance to judges on enforcing compliance in provisional assessments would be beneficial, and a specific sanction for non-compliance with PD47 12.1 would assist. That might be automatic strike out and disallowance of costs.

17. Having discussed with other paying party representatives, it appears this firm's experiences are common.
18. In order for provisional assessment to work properly and fairly, its procedure must be enforced by the court more strictly, with less indulgence to the parties that there has been so far.

Matthew Hoe
Taylor Rose Law LLP

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