**For the Civil Justice Council**
**27.2.2014**

# PIBA'S ANALYSIS OF ISSUES ARISING FROM THE JACKSON REFORMS

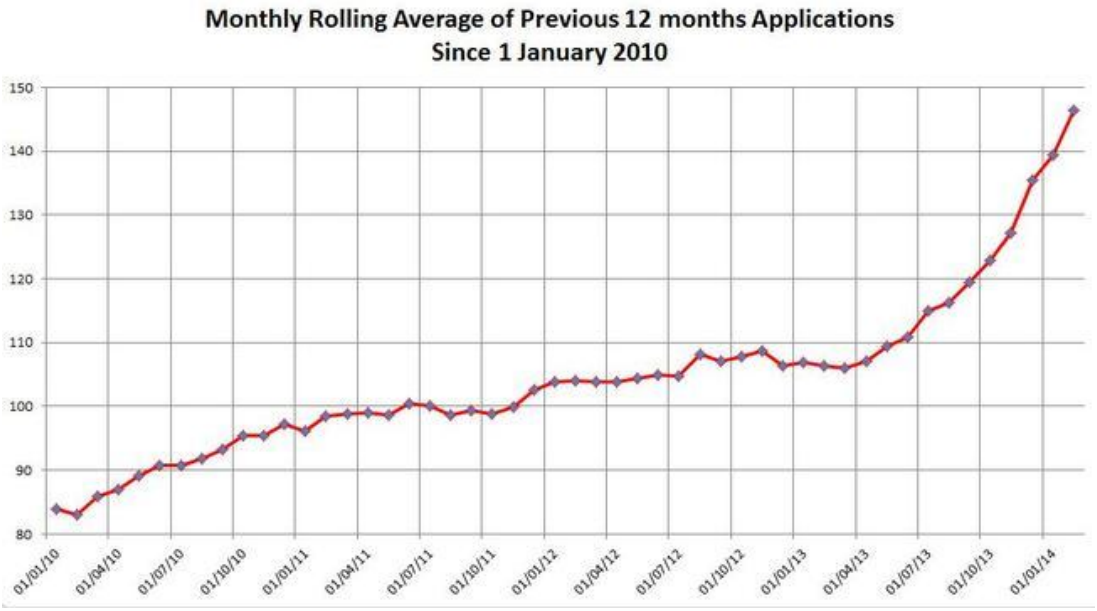
**1. The types of cases being taken on (and not being taken on) by law firms**

Some barristers are already complaining of a marked downturn in work whilst others are not yet able to identify major changes in their own workload at this early stage.

**2. Litigants in person**

When firms and barristers refuse risky PI and clinical negligence cases due to the abolition of inter partes recoverable success fees and the cap on lawyer/client success fees, more litigants in person will appear before civil courts.

Here are the figures from the Bar Pro Bono website:




"2014 is already shaping up to be a challenging year for the Bar Pro Bono Unit with a 78.5% increase from 2013 in the number of applications for assistance received by our casework team of five."

We do not know what percentage of these litigants have PI and clinical negligence cases. It is predictable that these litigants in person will commit procedural breaches and be struck out under the new *"Mitchell – strict procedural adherence"* approach.

**3. CFAs post 1.4.13 and the Bar**

The majority of firms are taking the maximum amount available from Claimants' damages to contribute to the CFA uplift. Almost every barrister that responded complained that this portion of the uplift was not passed on by the solicitor to counsel. The reality is that, in the vast majority of cases, counsel are acting under a post-April CFA with no uplift.

An experienced member of chambers stated in his response, "Once the pre-April 2013 cases have gone through the system, the commercial viability of doing CFA work is highly

questionable. The cases that are lost will simply not be compensated for by those that are won. The shortfall will never be made up. Personal injury lawyers will inevitably become more risk averse. Those claimants with more risky cases, that would have been accepted under the previous system, will find it difficult to get representation." This view was echoed in many other responses.

*Preliminary*

Barristers' CFAs are fundamentally different from solicitor-client CFAs. The latter are entered into by a firm and can be transferred between fee-earners within the firm and potentially assigned between firms[1]. Barristers' CFAs are with an individual and are drafted in such a way as to recognise that certain events may trigger the end of the CFA. Essentially this means that if a barrister is sick, dies, takes silk, retires, or is professionally embarrassed during the course of the case another counsel may have to take over the case.

The problems identified below arise, in our view, largely because of an insufficient recognition by the provisions of LASPO of the distinctions.

*The Problems*

[1] **Solicitor on old CFA, barrister on new CFA** Barristers are being asked to enter into CFAs after 1.4.13 where the solicitor entered into a CFA with the client before 1.4.13 but did not instruct Counsel before 1.4.13, or where they require alternative Counsel.

It is unclear whether counsel can legitimately enter into an old-style CFA with recoverable success fee. It must we believe have been the intention that counsel should be able to do so where the solicitor has done so

If the barrister's CFA must be LASPO compliant then the Defendant is liable to pay the 10% uplift on PSLA affirmed by *Simmons v Castle.* The effect of the solicitor working under an old style CFA is that the Defendant has to pay the success fee, but (given that it is under the pre 1.4 regime) not that 10% uplift. Which is right?

[2] **Assignment of solicitors' retainer:** Many solicitors are re-organising their PI departments, some are closing down, some are being taken over. Fee earners are moving around and some are taking clients with them, some partnerships are turning to LLPs. Some solicitors are assigning the old CFA to the new firm in the hope that this will not be regarded as a novation and hence a new contract and so will avoid the provisions of LASPO.

Where counsel was instructed on a CFA before 1.4.13 but a new CFA is needed after 1.4.13 because of one of the above stated events, what should the barrister do? The options are (a) nothing and assume the assignment of the solicitors CFA was valid and not caught by LASPO; (b) assign the old CFA to the new firm (is this in itself a novation caught by LASPO?); (c) enter a new LASPO compliant CFA thereby giving up the recoverable success fee and charging the lay client the success fee and potentially triggering the 10% *Simmons v Castle* uplift on damages. What did the CJC or the CPRC intend?

[1] many solicitors are extremely concerned as to whether CFAs can be properly assigned to other firms, meaning that some lay clients are finding themselves potentially unable to change solicitors without exposing themselves to a loss of their uplift AND the need to pay an ATE premium the cost of which they cannot recover without the benefit of QOCS.

The penalty for either the solicitor or barrister getting it wrong is of course complete unenforceability and recovery of no fees at all.

Assignment of the solicitor/barrister CFA (whether by barrister or solicitor as the case may be) in PIBA's view is at best dangerous and potentially legally impossible because the CFA is for personal services by the barrister – this is all the more so where the initial CFA was entered into before 31.01.13 and was therefore was non-contractual.

In any event the practical reality, as PIBA Members are increasingly discovering, is that Counsel is being requested to accept the case without an uplift even where the case is very risky and the solicitor's CFA was before 1.4.13 and possibly also where counsel already had a CFA before 1.4.13 because the Claimant was originally promised that no part of his damages would be taken. Therefore the lawyer taking the greatest personal financial risk – the barrister – will receive no risk reward. LASPO and/or the CPR require amendment to address this situation.

**4. Form H**

Respondents were entirely critical of costs budgeting. A disproportionate amount of court time and costs is being taken up with costs budgeting. Cases may often be close to settlement but significant time is taken up detailing and assessing future costs that will never be of relevance. Even where matters have been agreed courts have insisted upon personal attendance to go through the budgets in detail at CCMCs.

[1] There is considerable disparity in the Judiciary's approach to Form H with some judges 'slashing' costs budgets in minutes but with others spending considerable time carrying out something akin to an assessment of costs. Such a disparity in approach is perhaps to be expected in the initial stages of a new regime, but it needs to monitored in case it becomes a chronic problem.

[2] Given the regularly changing nature of the medical evidence in a personal injury claim (whether because of the progression of injuries or otherwise) it is also felt that in appropriate cases budgets should be undertaken not for the whole of the claim, but for parts of a claim. The various contingencies are otherwise simply too many to budget for.

[3] There is already provision in the practice direction for Form H to be restricted in the first instance to liability only as a preliminary issue. This is of course workable and the form H can be filled in accordingly. But if the Defendant makes an offer to settle the claim for a cash sum and the claimant has no provision in form H to recover the costs of proving quantum these will not have been covered in form H and may not be allowed, even though some costs on quantum may properly have been incurred.

This lacuna should be clarified. The rule should include specific provision for a Claimant to revise his costs budget in the event of a cash offer by the Defendant in these circumstances. Alternatively it should be stated as an example of a good reason for departure from the form H budget.

**5. Case Management**

The alterations to the Overriding Objective and the Relief from Sanctions rules have turned the civil courts into a system focussed on strict adherence to rules, procedural default and striking out.

Substantive evidence and issues about justice between the parties are demoted to an irrelevance as cases are struck out for failure to serve evidence on time and parties are left having to sue their solicitors / barrister's insurers.

The list of procedural default cases grows week by week: here are 14 cases which under the old system would probably not have been through a procedural default hearing: *Mitchell v News Group; Aldington v ELS; Bank of Ireland v Pank; Burt v Christie; Chambers v Buckinghamshire; Dinsdale v Evans; Durrant v Chief Constable of Avon; Forstater v Python; Karbhari v Ahmed; Lakatamia v Nobu; Newland v Toba; Lloyd v PCC; SC DG Petrol v Vitol; Thevarajah v Riordan.*

It is PIBA's view that this focus on procedural default is a barrier to justice between parties and damages the reputation of the English Courts as the centre for civil dispute resolution through justice. A return to co-operation between lawyers and parties is recommended.

6. **Fixed Portal Advocacy fees at stage 3**

The advocacy fees in the portal are fixed at £250, whatever the value of the claim. The Portal has now been extended to £25,000. The work involved in an assessment of a claim worth £24,000 is often considerably greater than that for a claim worth £5,000. This should be reflected in an increased advocacy fee. Reference could perhaps be made to the bandings provided for fast track trial costs (i.e. damages up to £3000, £3,000 - £10,000, £10,000 - £15,000, £15,000 - £25,000). We would suggest that a further consultation takes place on the appropriate level of advocacy fees, or we would be delighted to propose reasonable fees.

**7. Payment out of damages for uplift in children/patient cases**

The new regime requires Claimants to pay the CFA uplift from their damages (subject to the cap) and also to pay for any ATE premium themselves. Members have found that some District Judges are unwilling to allow part of a child's damages to be paid out for such purposes. A similar problem may be encountered in respect of a patient's damages. This has led to adjournments of hearings, which causes further difficulties because in some instances the further hearing costs are irrecoverable. It is suggested that District Judges be reminded that the payment out of damages should be sanctioned.

**8. DBAS**

We know of no DBA funded cases in PI and Clin neg. As we advised before the MOJ created the rules for DBAs, they do not work in the current form.

**9. Part 36**

A Claimant faced with a Part 36 Offer under QOCS risks losing some or all of the damages received at trial if QOCS protection is lost because of failing to beat an offer. There is a perceived unfairness to this, particularly as regards to quantum only claims.

The amended part 36 makes no provision for the difference between liability and quantum offers. For example:

[1] Claimant makes offer to settle of 90/10 in April 2013 and in May 2013 offers to accept £250,000 in settlement of his claim

[2] At trial in July 2013 he receives 100% of his damages, assessed at £300,000. He therefore beats both offers

[3] Does he get 10% twice (presumably not)? What if there was a liability trial first – what order would be made when the damages are unknown?

[4] What if there was a pre 1.4.13 offer which he also beats? Does he get the effect of both offers (pre and post 1.4.13)? i.e. indemnity costs/interest from the first and 10% additional damages also from the second?

**10. QOCS**

There are a number of situations in which the effect of QOCS has not been properly thought through:

[1] "**BTE[2]" claimants.** All claimants who are conducting their litigation with the benefit of a BTE policy (and no CFA or supplemental ATE policy) benefit from QOCS. This is even the case where, for example, a Defendant succeeded at trial in January 2013 and their costs are currently subject to detailed assessment. If the Claimant was BTE funded the Defendant finds itself unable to enforce its costs order. It is believed that there should have been a provision in the rules providing an exception for BTE cases whether by reference to date of accident or instruction of solicitors etc.

[2] QOCS does not benefit a Claimant who has at any point prior to 1.4.13 entered into a CFA, even if the CFA has been terminated. Thus where a Claimant is no longer represented by the firm which (s)he had instructed pursuant to a CFA pre April 13 (in other words he has entered into a new, post 1 April 2013 agreement with a new firm of solicitors but had – at some stage – entered into a pre 1 April 2013 CFA as well) he still does not have the benefit of QOCS. He will therefore have to purchase ATE at his own expense to protect him against an adverse costs order, as well as potentially sacrificing part of his damages for the uplift.

[3] There is no guidance given as to when a subrogated claim will cause QOCS protection to be lost. For instance, following an RTA a Claimant seeks his vehicle damage as a subrogated loss (£2,000) and then seeks £498,000 damages for personal injury with associated losses. He loses at trial on liability. It cannot surely be the case that QOCS will not apply simply because of the presence of a small vehicle damage claim.

[4] If a claim is struck out because of a solicitor's failure to comply with directions then the Defendant remains unable to recover its costs (absent proof of abuse of process).

**The Personal Injuries Bar Association**

27.2.2014

[2] Before The Event Insurance