THOMPSONS SOLICITORS

STANDING UP FOR YOU

SUBMISSION ON IMPACT OF JACKSON REFORMS TO CJC
BY THOMPSONS SOLICITORS

Introduction

1. Thompsons is the most experienced trade union, employment rights and personal injury law firm in the country with 29 offices across the UK. On employment and industrial relations issues, it acts only for trade unions and their members. At any one time we will be running 70,000 claims on behalf of people who have been injured at or away from work, through no fault of their own

The types of cases being taken on

2. Our relationship with our trade union clients and our joint commitment to providing a quality legal service to Union members means that we are still accepting the same case types as before, but the new fixed costs regime is making that increasingly difficult. Unions are being forced to review their ability to provide the range of legal services their members have historically been able to access such as free legal advice, criminal representation and CICA claim funding. Unions have over 6 million members and a withdrawal from those services, at a time when legal aid availability is being heavily cut and we are seeing the closure of Law Centres and Citizens Advice Bureaux would have a fundamental impact on access to justice for yet more of the population.

3. We cannot comment on the types of case being accepted by none TU firms and legal insurer panel firms, but we note that it is increasingly standard to charge the highest level success fees and that clients are, in addition, commonly being advised to take out insurance to cover own side disbursements and the part 36 risk. Lord Justice Jackson's (Jackson's) comment that the 10% increase in general damages will neutralise the impact of success fees, is, as we predicted in our submissions to his reviews, not turning out to be the case

The funding of civil litigation

4. We are not currently using DBAs, as we don't consider them fit for purpose. It is too early to say what the effects of QOCS will be.

5. With regard to CFA's, firms are typically charging success fees capped at between 20%-25% of relevant damages. Very few firms are offering 100% compensation and those that are appear to be focussing on cost rather than quality. We pointed out in our response to the consultation on the Jackson proposals in 2011 that removing recoverable success fees would have an effect on injured people's compensation. They are losing typically 20% to 25% of special damages and general damages but receiving in return only a 10% increase in general damages which is insufficient compensation.

6. At present, Thompsons is wherever possible working with the TU's to protect their members from the consequences of the Jackson reforms, but union funded cases are particularly hit by the wholly unrealistic fixed costs regime plucked out of the air by The Ministry of Justice who took Jackson's

7. As we predicted in our responses to Jackson marketing costs have not come down. Claims Management Companies are still around, website maintenance (including search engine optimisation) and advertising costs remain the same and, in pay per click advertising, the spend for key words remains extraordinarily high.

8. There is increasing turbulence in the market, with a growing number of law firms of all sizes the subject of insolvency, administration, pre-pack disposals and other forced exits from the market. Established firms such as Cobbetts, Barnetts, Challinors and Linder Myers are recent examples. We are also seeing an increasing number of mergers and acquisitions in the PI market and we expect this trend to continue and intensify. The closure of firms means less choice and less competition, firms being taken over rather than going out of business results in a less diverse market and less expertise.

9. We are very concerned about the subversion of a number of Jackson's proposals. The CJC correctly opposed the unjustified reduction in fixed costs referred to above, but the reductions were still unilaterally introduced by the Government *(CJC Response to MoJ 10/1/13*). Jackson did not recommend the extension of the Pre-Action Protocol for RTA claims to EL and PL claims yet it has gone ahead. Similarly, all claimant stakeholders objected to the inclusion of industrial disease claims in the EL portal, but the MOJ have imposed the change. And most recently mesothelioma claims are being lumped with all other protocol claims.

10. The concerns expressed by stakeholders have been vindicated with difficulties being experienced by claimants in tracing compensators and compensators 'playing the game' by refusing to deal with disease claims unless significant additional information and documentation is provided even though the costs payable at Stage 1 of the EL Disease Protocol are only £300.00. .

Cost budgeting

11. Our experience of costs management is still relatively limited. Since April 2013 we have produced over 700 costs budgets, but costs CMC's have been listed in only 78 of those.

Laptops

12. Some courts are ordering attendance with laptops to update the budget as changes are made. However, advocates experience difficulty updating budgets while at the same time making submissions and taking notes.

Preparation of costs budgets

13. In our experience it can take a costs lawyer more time to prepare a costs budget than it would to prepare a formal bill for detailed assessment. The amount of work involved in the exercise by both claimants and defendants does not appear to be appreciated by the judiciary.

Costs CMC Hearings

14. It would assist if Costs CMCs were held by telephone

Detailed Assessment of Costs Budgets

15. 2.3 of Practice Direction (PD) 3E states that "…when reviewing budgets, the court will not undertake a detailed assessment in advance, but rather will consider whether the budgeted costs fall within the range of reasonable and proportionate costs". We have experienced the exact opposite in many cases despite reference to the PD.

16. Some courts order written submissions to be served prior to CMC's. This usually results in pages of lengthy costs submissions not unlike points of dispute for detailed assessment. In other cases points of dispute to costs budgets are submitted in any event. Considerable time is spent dealing with such submissions.

Assessment of hourly rates as part of costs management

17. A number of District Judges are entertaining arguments on the appropriate grade of fee earner, location of the solicitors and the level of hourly rate, occasionally comparing claimants' hourly rates with those of defendants. This is wholly inappropriate, not what HHJ Brown QC advocated under the costs management pilot schemes and completely contrary to 2.4 of PD 3E.

Provisional assessments

18. We are finding courts are taking several months to list matters for provisional assessment.

19. The limit of recoverable detailed assessment costs on provisional assessment is too low for larger bills. Either the amount of recoverable costs (£1500) needs to be increased or the £75,000 threshold for provisional assessment needs to be lowered.

Management of cases through the Courts

20. The overriding objective is for the court to deal with cases justly and at proportionate cost. Dealing with a case justly and proportionately involves the court taking action to ensure that parties are on an equal footing, that unnecessary costs are not incurred, that cases are dealt with expeditiously and fairly and lastly that the parties comply with court rules, practice directions and orders. We are very concerned that there is no prospect of parties being on an 'equal footing', there is nothing to stop insurers spending significant sums defending an action whilst claimants can only recover fixed costs.

21. We are concerned that with the current judge led approach, 'Justice and Fairness' is taking second place to procedural obsessions. Even minor acts of non-compliance can result in a claim being struck out or a party being deprived of their costs. The following examples are evidence of this approach and highlight the fact that judges are putting compliance with procedural issues ahead of justice.

22. At its most extreme, there is the case of Kagalovsky v Balmore 2014 EWHC 108 (QB). In this case, where 18 months imprisonment for Contempt of Court had been imposed, the Judge indicated that he would have refused an application to extend time for an appeal of the contempt order, even if there had been good prospects of such an appeal being successful. We find it highly worrying that the denial of liberty to an individual was seen as less important than ensuring that the rules were complied with. That cannot be just or fair.

23. In the case of Aldington v ELS 2013 EWHC B29 a High Court Judge, when allowing relief from sanction, stated expressly that consideration of the need to do justice between individuals was not taken into consideration when arriving at a decision. The idea that the judiciary would fail to take

24. Another highly significant way in which Jackson's report was not properly implemented was in the failure to make the important changes to the pre action protocols which he recommended[i]; we suspect that this was because insurance companies would have found it inconvenient. However, in the new Draconian system it is even more pressing that the issues between the parties are known before the litigation starts and we think that this ought to be revisited urgently.

25. In line with CPR provisions, parties would previously work together to agree appropriate extensions of time for compliance with directions, but the recent spate of procedural decisions following on from the Mitchell case (Mitchell v NGN [2013]EWCA Civ 1537) has resulted in what we can only describe as a climate of fear, with parties now issuing applications to extend time in cases where previously an agreement would have been reached. This has resulted in the courts being swamped with applications which only causes delay and is completely contrary to the overriding objective of dealing with cases expeditiously.

26. Senior members of the judiciary, with little or no experience of running a business, making statements that simply do not reflect the current business environment makes a mockery of fairness. We welcome Jackson's efforts to ensure consistency and endorse his view that court orders should be complied with but in the current climate with personal injury firms going into administration or having to merge to survive, a statement that " solicitors cannot take on too much work and expect to be able to persuade a court that this is a good reason for a failure to meet deadlines" and that solicitors " should either delegate the work to others in the firm, or if they are unable to do this, they should not take on the work at all" (Mitchell – per Lord Dyson MR) does not reflect reality.

27. This is as impracticable as asking Court diary managers not to over list for trials, in case not enough of them conclude beforehand and cases have to be adjourned or start to be heard late.

28. In the business world employees resign, they are absent on long term sick, they have babies, are asked to go on jury service etc. Managing partners, already struggling with cash flow issues in a fixed costs regime, are having to juggle caseloads and recruit to ensure that client care is not compromised. Recruitment itself does not happen overnight, it can take weeks and even months. In our experience, there are a multitude of factors which can impact on a fee earner's ability to comply with an order and impositions of rules with no reality check serves only to increase pressure and will lead to more negligence actions which will increase public dissatisfaction and firms' professional indemnity insurance premiums. We urge the CJC to take notice and to impress on senior members of the judiciary the importance of flexibility and of dealing with cases justly.

29. We are also concerned that procedural transgressions by claimants are being dealt with more severely than those of a defendant, and that sanctions often have a far greater impact on the claimant than the defendant, again enhancing the inequality between the parties. If a claimant's case is struck out, that is effectively the end of the action. If a defence is struck out, the defendant can still put the claimant to proof and will be permitted to cross examine the claimant. We can provide numerous examples of inconsistent decisions, with some judges not applying sanctions even for major breaches of the rules, whereas in other cases a minor claimant breach attracts draconian sanctions.

30. The judicial exhortation for co-operation between parties is in the new regime falling on deaf ears. Whereas previously apart from in a minority of cases (which were the only ones that came to the notice of the Judiciary) the parties would agree between themselves to vary directions but in a way that avoided any change to the trial window. However, now that obtaining procedural advantage has become such a potentially devastating prize, cases where there was co-operation are being replaced by litigation by ambush.

31. There has been a worrying growth of rules and directions being governed by the needs and convenience of Judges rather than of litigants. This is evidenced by the huge increase and prescriptive nature of directions. Even in a completely straightforward case, directions can be three pages long, and have become increasingly stringent. We suspect the malign effect of the word processor – lengthy text can be inserted easily and therefore it is - and case summaries are routinely required at every stage of a case do judges really need them? In Birmingham County Court they complain that they are too long! We consider that Jackson's suggestion that directions be simplified should be implemented.

32. The new rules are being applied retrospectively and stringent sanctions imposed where parties have already reached and adhered to agreements made between themselves. There appears to be a judicial view that (as per the example of Singapore which Jackson mentioned in passing in his report) there will be some ‘bloodletting’ which will be justified by a change in culture. This ignores the significant effects on individual cases of that ‘bloodletting’, including individuals with good cases which have, because of a minor procedural irregularity, become difficult or impossible to run this will only increase public dissatisfaction with the legal profession with a claimant’s only redress being to commence a new and possibly more complex case, suing for a loss of chance.

33. The overall effect of the above will be, amongst other things, to shift the burden of compensation payments from tortfeasors to law firms and their professional indemnity insurers. We have recently witnessed a number of firms experiencing problems obtaining professional indemnity insurance, and note that those that have been lucky enough to obtain insurance are incurring higher overheads (increased premiums and increased costs due to the imperative of procedural perfection) whilst of course being paid substantially less in costs. The risk is that those firms will join the growing list of practices in insolvency, in administration etc. whilst all of the firms who cannot obtain insurance will do so.

34. We are already seeing difficulties and unforeseen consequences as the Civil Procedure Rule Committee scrambles to consider further directions because of a wave of (wholly predictable) (CPR 3(8)(3)) emergency applications being made. This is what happens when judges attempt to act as legislators (CF the fiasco over the introduction of the 10% increase in damages where the Court of Appeal had to overturn its own ill-advised Judgment having belatedly listened to interested parties). Many will also remember the judiciary pressing for the introduction of the disastrous 15 months automatic strike out (Order 17 Rule11) which eventually had to be removed, not least because of the huge amount of satellite litigation it produced.

35. We consider that the unintended consequences of ‘Mitchell’ will be to increase both costs and delays (both of which will adversely affect individual litigants).

    - Costs will increase because 'procedural perfection' will require cases to be front loaded; parties will not be able to take the risk of delaying taking expensive steps while negotiations are ongoing and an increasing number of applications to extend time will have to be made where, through no fault of their own, a party is unable to comply with a court order.

- Delays will increase as courts, which have already seen massive budget cuts, struggle to deal with the significant increase in applications.

- Justice will take longer because, where litigation is needed, front loading will result in later issuing and the automatic 'unless' sanctions will necessitate an increasing number of applications to extend time for compliance.

36. Taking everything into consideration, it is our view that the overriding objective of the Jackson reforms is being subverted to suit government policy.

37. We fear a corrosive effect on the relationship between litigators and the Judiciary with the Court expecting procedural perfection whilst, largely because of funding cuts, delivering an increasingly erratic and slow service themselves.

38. We do not think that the system was broken before; it is now however very badly broken due to a Government listening only to its funders in the insurance industry and judges attempting to act as legislators.

For further information:

Judith Gledhill
Thompsons Solicitors
17 Wellington Street
Leeds
LS1 4DL

judithgledhill@thompsons.law.co.uk