



REVIEW OF
CIVIL LITIGATION COSTS

REPORT ON THE PROVISIONAL ASSESSMENT PILOT

1. INTRODUCTION

1.1 Provisional assessment. Provisional assessment (“PA”) is a procedure whereby the court provisionally assesses costs on paper. If either party is dissatisfied, it can seek an oral hearing. However, that party will pay the costs of that exercise if it does not achieve a substantial improvement upon the provisional assessment. This procedure has been used successfully in Hong Kong since 2nd April 2009.

1.2 Recommendations in Costs Review Final Report. Chapter 45 of the Final Report contained a recommendation that provisional assessment in respect of bills up to £25,000 should be piloted at one of the larger court centres outside London. If the pilot proved successful, the intention was to introduce this procedure nationally.

1.3 The present pilot. The Provisional Assessment Pilot began on 1st October 2010 and completed its first year on 30th September 2011. The pilot is continuing for a second year, but monitoring has been less intense since 1st October 2011 because of other pressures on court staff. The pilot is running at Leeds, Scarborough and York County Courts. The vast majority of cases under the pilot have proceeded at Leeds, which is a much larger court centre than the other two.

1.4 Procedures adopted in the pilot. The procedures for PA adopted in the pilot are set out in Practice Direction 51E. In essence any bill of costs, in which the base costs claimed are £25,000 or less, is assessed on paper by the district judge, who then produces a “provisional assessment” of the amount of costs due to the receiving party. If either party is dissatisfied, it can request an oral hearing. If that party achieves a result at the oral hearing which is better by 20% (or more) than the provisional assessment, it may recover (subject to any offers that have been made) the costs of the oral hearing. If it fails to achieve that degree of success, it pays the costs of the oral hearing. The two regional costs judges conducting the pilot are DJ Bedford and DJ Hill.

1.5 This report. This report is based upon the data collected at Leeds. All data from the first year of the pilot available as at 4th January 2012 are set out on a massive spreadsheet, which was supplied to me on that date. I cannot append a copy of that spreadsheet, because it contains confidential data concerning individual cases. This report will be put onto the Judiciary website on 26th January 2012, in order to coincide with the delivery of the 8th lecture in the implementation programme. That lecture is specifically focused on the assessment of costs.

2. THE RESULTS OF THE PILOT DURING THE FIRST YEAR

2.1 Numbers of cases. There were 119 cases which entered the pilot during the first year. Most, but not all, of these cases were personal injury claims. The claimant was receiving party in 106 cases and the defendant was receiving party in 13 cases. Out of the 119 cases, 16% settled at an early stage with 84% proceeding to PA. Of the 100 proceeding to PA, 52 were conducted by DJ Bedford and 48 were conducted by DJ Hill. There were 17 requests for oral hearings, which comprised 9 requests by paying parties and 8 requests by receiving parties. There were 3 cases in which the district¹ judge ordered an oral hearing because of special features. Most of the cases in which an oral hearing was requested or ordered settled before that oral hearing took place. There were, however, 2 cases in which an oral hearing took place.

2.2 Outcomes of oral hearings. At each of the two oral hearings some adjustments were made to the earlier PA determination. In neither case, however, did the requesting party achieve an improvement of 20% or more upon what it had secured in the PA. Accordingly in each of those cases the requesting party was ordered to pay the costs of the oral hearing. There was an appeal to a circuit judge against one of those two decisions. The circuit judge allowed that appeal on one ground relating to hourly rates.

2.3 Timescale. Practice Direction 51E requires the provisional assessment to be carried out within six weeks of the commencement of detailed assessment proceedings. This requirement was met in all cases.

2.4 Staff time involved. Most of the staff time recorded on the spreadsheet is attributable to collection and analysis of data. The staff time required to administer the PA process is no greater than the staff time required for conventional detailed assessment proceedings. This is reported by the judges involved and has been confirmed by the court manager.

2.5 Judicial time involved. The average time spent on each provisional assessment was 37 minutes and the median time was 40 minutes. It was the experience of both regional costs judges that the most efficient way to handle this work was by listing a day of PAs, allowing 45 minutes for each one. Experience during the second year of the pilot suggests that where PA is carried out by a district judge who is not a regional costs judge (and therefore has less experience of assessing costs) 60 minutes should be allowed for the exercise.

2.6 Popularity of the PA pilot. Unfortunately very few solicitors completed feedback questionnaires. According to these questionnaires, four firms were more likely to commence detailed assessment proceedings under PA and one firm was less likely to do so. Seven firms said “about the same”. On the other hand the number of cases within the pilot suggests that it is attracting in more business. Prior to the pilot approximately 70 receiving parties with bills up to £25,000 commenced detailed assessment proceedings per year.² Under the pilot that figure has substantially increased, namely to 119 cases in the first year of the pilot. Also DJ Hill states that

¹ In one case there was an issue as to whether the assessment had already been settled. In another case it was not possible on the papers to apportion costs between different defendants. In the third case there was a preliminary issue concerning radiological evidence.

² There were 71 such detailed assessments commenced during the calendar year 2009.

some solicitors outside the court areas had asked if their cases could be provisionally assessed under the pilot. This was not allowed, but it was another indicator of demand from the profession.

3. CONCLUSIONS FROM THE PILOT

3.1 Provisional assessment appears to be a success. Provisional assessment appears to be a success for the following six reasons:

(i) The process is quick and simple. It thus enables many parties, who would normally be put off by the expensive and convoluted process of detailed assessment, to obtain a judicial assessment of bills. Thus the process addresses one major complaint about costs which was repeatedly pressed upon me during the costs review.

(ii) Because more parties appear to be seeking provisional assessment, there may be increased fee income for the courts.

(iii) The figures which are assessed or agreed following provisional assessment are likely to be fairer than settlements negotiated in circumstances where neither party can face going through the process of normal detailed assessment.

(iv) The process is far cheaper for the parties than traditional detailed assessment, because (save in rare cases) they avoid the costs of preparing for and attending a hearing. Indeed, unlike traditional detailed assessment, it is cost effective. DJs Hill and Bedford estimate that the savings for the parties are at least £4,000 per case. This is because the case usually ends after the PA and thus the parties avoid a half day or one day hearing.

(v) Informal feedback from parties has been positive.

(vi) Court time is saved, because the judicial assessment is accomplished in about 40 minutes, rather than half a day or a day.

3.2 Teething troubles. There were problems early in the pilot, as result of the format in which PA decisions were sent out. This has been overcome by a revised system under which the district judge annotates his decision on a copy of the bill. The new format of Points of Dispute which has recently been approved by the Rule Committee will make the whole process much simpler. The district judge will simply record his decision in the right hand column of Precedent G.

3.3 The PA procedure is capable of improvement. In the light of experience during the pilot there are a number of improvements which should be made to the procedure set out in Practice Direction 51E. In particular:

(i) There should be a capped sum of costs for the PA process. I propose that the rule or PD should say that the court will award “a reasonable sum not exceeding £1,500”.

(ii) When lodging documents for PA the parties should file (a) any open offer and (b) in a sealed envelope any offer under Part 36.³

³ Under other reforms recently approved by the Rule Committee the Part 36 procedure will be incorporated into detailed assessment proceedings.

(iii) The PD should require any party requesting an oral hearing to specify (a) what aspects of the provisional assessment it disputes and (b) a time estimate for the hearing.

(iv) The PD should require the parties to agree and then file the final costs calculation after the district judge has annotated his decision on Precedent G; with liberty to apply.⁴

3.4 Other conclusions from the pilot. Provisional assessment should be seen as the first stage of a two stage process. In other words the same district judge should do both the PA and the oral hearing (unless prevented by illness or other absence). The oral hearing should not be seen as an appeal against the PA, but rather as a second stage of the process before the assigned district judge. If one party is dissatisfied, it can appeal to a circuit judge at the end of the PA process. In order to ensure that PAs are carried out within the six week period, PAs should be listed at set times, allowing 45 or 60 minutes (as appropriate) for each one. In this way parties will be able to see from the cause lists when their matter will be dealt with.

4. THE WAY FORWARD

4.1 The procedure could now be rolled out nationally. In the light of the experience of the pilot, I recommend that the PA procedure should be incorporated into the Civil Procedure Rules and thus become part of the service provided at all civil court centres for bills up to £25,000. Draft rules for PA (taking into account lessons learned during the pilot) will be presented for consideration by the Rule Committee in due course. The following paragraphs will only apply if the Rule Committee either now or in the future approves the proposal for rolling out provisional assessment.

4.2 Training. Both court staff and district judges must receive proper training before the procedure is introduced. HMCTS have indicated that they can deal with the training of court staff in relation to the administrative procedures of PA. A training session on how to conduct PA can be provided to district judges at the annual conference of the Association of District Judges on 30th March 2012, if the Rule Committee decides to take this recommendation forward at the present time. Subsequent training can be provided by the Judicial College.

4.3 Possible future automation. The Senior Costs Judge will invite the Association of Costs Lawyers (as part of its present project)⁵ to consider developing an electronic form of Precedent G, with a self-calculating facility. This will make the whole process of PA considerably easier for all concerned.

Rupert Jackson

13th January 2012

⁴ This will be necessary in case the parties cannot or will not agree.

⁵ The Association of Costs Lawyers has set up a Jackson Working Group to take forward the proposals in chapter 45 of the Costs Review Final Report for developing a new form bill of costs with associated software.