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Jackson Reforms

Inside

Introduction

Lord Justice Jackson undertook a review of litigation procedure in 2009 with particular emphasis on the concerns expressed by the judiciary and others in relation to the high cost of litigation. This resulted in the publication of two reports (interim and final) in 2009/10, which made numerous recommendations proposing radical changes to litigation procedure. This was set against a background view that the costs of litigation were often the driving factor in many claims and that the courts had not managed claims efficiently or effectively.

Many of the recommendations contained in the report have now been implemented.

Implementation - How and when?

The Jackson reforms were implemented on 1 April 2013 through a series of statutory and rule changes and through the introduction of various regulations. The statutory changes are found in the Legal Aid, Sentencing and Punishment of Offenders Act Part 2 (2012) ("LASPO"). This received Royal Assent on 1 May 2012. Most of the Act (Part 2) was implemented on 1 April 2013.

In addition, the Civil Procedure Rule Committee and Civil Justice Council have prepared many rule changes to the Civil Procedure Rules (the "CPR"

New Rule on Proportionality

Why?

Proportionality underpins costs management. Arguably one of the problems with the Woolf reforms, which came into force in 1999, was the failure of the judiciary to implement proportionality effectively as a test in respect of costs. The fault also lay with the case of Lownds v Home Office [2002] 1 W.L.R. 2450. The difficulty with that case was that it allowed costs to be recoverable where they were considered to be reasonably necessary to the litigation, with reasonableness and necessity considered on a narrow basis, largely without regard to the size of what was at stake in the proceedings. This meant that even where claims were fairly modest providing the individual costs had been necessary they were recoverable. The new rule has effectively reversed the approach of Lownds so that necessity does not render costs proportionate.

The difficulty is that "necessity" suggests it is necessary to achieve justice on the merits – that is, substantive justice and necessity can trump the overall proportionality. The change in the rules is designed to be tempered by the need for economy and efficiency, so the test will remove necessity and follow a more reasonable approach. Jackson LJ clearly considers it a fallacy to think that time and money are no object where the operation of the civil justice system is concerned, and believes proportionate costs between the parties are necessary from the outset.

Proportionality and the Overriding Objective

Proportionality is now contained within the "Overriding Objective", which is the court's mission statement. This means that in every decision the court reaches it must have regard to the principle of proportionality. All cases commenced and work done after 1 April 2013 (where no case has been commenced) will be subject to the new rule.

The overriding objective is also extended to include "enforcing compliance with Rules, PDs and Orders". This reinforces the amendments to CPR 3.9 in respect of relief from sanctions in terms of case management detailed below.

The new rule on proportionality provides in CPR 44.3(5) that:

…costs incurred are proportionate if they bear a reasonable relationship to:

a) the sum in issue in the proceedings;

b) the value of any non-monetary relief in issue in the proceedings;

c) the complexity of the litigation;

d) any additional work generated by the conduct of the paying party; and

e) any wider factors involved in the proceedings, such as reputation or public importance.

There are no guidelines to these rules. Neuberger LJ anticipated some satellite litigation as to how the rule would be interpreted. However, it is clear that, if the action involves a claim for monies, the "sum in issue" is likely to be the most important factor. Therefore, where a claim is worth, say, £500,000, it is unlikely that the courts will consider costs spent of, say, £750,000 to be proportionate. It is hoped and clearly desirable that the Court of Appeal provide useful guidelines through case law in the near future.

Case and Costs Management

Case Management - Relief from Sanctions

The new rules require the judiciary to manage cases more effectively and their ability to extend time for non-compliance or to give the parties relief from sanctions is greatly restricted under CPR 3.9. As a result of the rule changes, parties will

find it far harder to vary time limits imposed or ignore court orders, as the sanctions will be that much greater.

Costs Management
Why?

Costs management (also known as "costs budgeting" or "costs estimates") was first mooted by Jackson LJ in 2009. Concerns were expressed that, when costs were running up, no one knew who would be paying the bill or how much the bill would be. This was no longer acceptable. As a result, there are substantive changes to costs management, which has seen the introduction of costs budgets. The new rules will mean that costs will be managed on a project management-basis, so each phase of the litigation will be planned in advance and will include all lawyers' fees, including those of solicitors, barristers and experts. The preparation of the budget will require a detailed analysis of the claim at an early stage in order to complete the detailed budget. The new costs rules can be found at CPR 3.12-3.18 and are also contained in the new Practice Direction 3E.

Application of Costs Budget Rules

These new rules are applicable to all multi-track cases except those claims with a value of over £10 million (excluding interests and costs) or where the claim is a non-monetary claim which is not quantified or not fully quantified but the claim is valued at £10 million or more. The £10 million level was introduced in April 2014 as a result of a judicial consultation. There are also a few other exemptions such as Directors' Disqualification claims. However, it should be noted even if the claim falls within an exemption the rules from April 2014 provide that the court may manage the costs to be incurred in any proceeding.

New Budget Rules – Highlights

There will be a requirement to discuss and exchange budgets with your opponent on a date specified by the court, except where you are dealing with a litigant in person. The parties will agree the budget after discussions or, alternatively, at the first Case Management Conference ("CMC"), the court will make a Costs Management Order ("CMO").

Failure to follow these rules where applicable will mean that you have filed an equivalent budget comprising only applicable court fees.

Assumptions and Contingencies

Parties will be required to attach to the budget a series of assumptions/contingencies. It is most important these are carefully drafted, as the budget has to be completed on the basis that it contains all steps that a party may wish to take. Any failure to include a specific step may result in those costs being unrecoverable if that step should have been included in the original budget. Where new steps are required that the parties could not have foreseen, a budget increase will be allowed. There is no doubt that the new rule on proportionality and the ability to order CMOs will require a detailed understanding of the costs to be incurred at an early stage and that clear case planning will be required.

Funding

One of the key changes being implemented by the Jackson reforms is the change to funding.

Conditional Fee Agreements ("CFAs") and After-The-Event insurance ("ATE") will see both major changes and the introduction of contingency fees, known as Damage-Based Agreements ("DBAs"), for virtually all claims.

CFA Changes

The claimant will no longer be able to recover the success fee (called an "additional liability" under the CPR) from a defendant. This applies to all CFAs entered into after 1 April 2013, except for insolvency claims which will be delayed until at least 2015. The insolvency exemption applies to proceedings brought by liquidators, administrators and trustees in bankruptcy to recover the assets of an insolvent estate. In addition, following Lord Justice Leveson's report, the government issued a ministerial statement stating that these changes will not be applicable to defamation and privacy claims until a new regime of Qualified One-Way Costs protection has been implemented through changes to the CPR. This will mean that success fee under CFAs and premiums under ATE will remain recoverable from opponents (usually the defendant) until such rules are introduced.

CFAs may still be used by parties to fund cases but the success fee will no longer be recoverable in most cases from the opposing party (usually the defendant).

ATE Insurance Changes

Similar changes are made to ATE insurance. The ATE premium will no longer be recoverable from your opponent. This applies to all ATE entered into after 1 April 2013. Again, there is an exception for insolvency, defamation and privacy claims, as detailed above. ATE may still be entered into but the premium will be paid by the party receiving the insurance rather than by the opponent.

Contingency Fees/DBAs

These were already allowed in employment matters under section 58 of the Courts and Legal Services Act prior to 1 April 2013. From 1 April 2013 they are allowed in all matters (except for criminal and family matters), but they will have to comply with the DBA Regulations. It should be noted that non-contentious business agreements may still be used for non-contentious matters and are specifically exempt under section 45(10) of the LASPO. The DBA Regulations have been implemented but unfortunately there are concerns as to their drafting and they are therefore now being revised for re-issue later this year.

Ontario Model

The DBAs are based on the "Ontario" model. How this will work in practice is that, where a contingency fee has been agreed of, say, 50% of the damages, and where damages recovered total £500,000, then the lawyer would be entitled to £250,000. However, under the "Ontario" model, the starting point is to look at recovery of the inter partes costs, so assuming you have recovered, say, £125,000 in costs, you will then take the remainder from the damages, leaving in this example £375,000 damages for the claimant.

DBA Caps

There are caps as to the maximum percentage of damages a lawyer may receive under a DBA for different types of litigation.

These are:

- 25% for personal injury matters;
- 35% for employment matters;
- 50% for all other matters.

CPR Changes

Disclosure - CPR 31

A new procedure is introduced in all multi-track claims, which are usually all commercial case, (save for those including a claim for personal injuries) and will apply unless the court orders otherwise. The revised procedure is contained in CPR 31.5. The new CPR 31.5 means that standard disclosure is no longer the starting point or the fallback position in multi-track cases. The new provisions provide for a menu of options for disclosure. 14 days before the CMC a disclosure report will have to be exchanged with your opponent and filed at court 7 days before the CMC.

Disclosure Report

The report must contain a statement of truth and deal with the following:

- a description of the documents which are relevant;
- where and with whom the documents are or may be located;
- a description of how any electronic documents are stored;
- an estimate of the broad range of costs that would be involved in giving disclosure on the standard basis, including the costs of disclosing electronically stored documents; and
- which direction under CPR 31.5(7)-(8) will be sought (if it is alternative to standard disclosure, costs must be stated in the report).

The practical implications of this new regime will mean that constructive discussions will need to take place with opponents and a review of disclosure will need to take place at a much earlier stage.

Witness Statements – CPR 32

There is now a new sub-section CPR 32.2(3), which allows the court to order directions in order to enable the court to identify or limit issues of fact, identify who will give evidence and limit the length or format of the evidence.

Experts – CPR 35

If parties wish to adduce expert evidence, they will be required to provide an estimate of costs and identify both the fields in which the expert evidence is required and the issues which the expert will address.

The courts have additionally introduced the use of concurrent expert evidence at trial under CPR 35. This is known as "hot-tubbing", and was successfully piloted in Manchester Mercantile Court and the TCC. This will allow the judge to carry out a more inquisitional approach to the experts' evidence and is likely to result in the judge asking more questions than the parties' barristers.

Part 36

The changes to Part 36 further encourage early settlement, as there will be an increased incentive to consider carefully Part 36 offers made by claimants. Where the defendant fails to win and beat the claimant's Part 36 offer, there will be a 10% increase in damages awarded to the claimant, tapered to a maximum of £75,000. In non-monetary claims, for costs awarded of up to £500,000, an additional 10% of the amount of costs awarded will be payable by the defendant to the claimant. This applies to all Part 36 claimant offers made after 1 April 2013.

It is therefore important to consider this where any claimant offers have been made prior to this day and whether tactically it would be appropriate to make a further offer after 1 April 2013.

Other changes

Small claims will increase to £10,000 from £5,000, except for personal injury and housing claims, which will remain at £1,000.

General damages increase by 10% from 1 April 2013 for claims in contract or tort for non-pecuniary loss (e.g. pain and suffering and loss of amenity). This was designed primarily for personal injury claims who will be the "losers" in terms of the success fee no longer being recoverable under a CFA.

There is also the introduction of Qualified One-Way Costs Shifting (QOCS) in personal injury cases.

All costs rules have been moved and amended under the CPR, which includes those relating to fast-track cases as well as to summary and detailed assessments.

For further information on this subject please contact:

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Please note this is a general summary of the Jackson Reforms and further guidance on specific issues should be obtained as appropriate.

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