Linklaters

March 2013

Implementation of the Jackson Reforms.
The key changes.

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Introduction

On 1 April 2013, a large tranche of the reforms proposed by the 2010 review of civil litigation costs by Lord Justice Jackson will come into effect. Most reforms will be introduced by changes to the court procedure rules while others have required new legislation and regulations. The changes broadly fall into three categories; litigation funding, the costs regime in civil proceedings and general procedural streamlining. Whilst a number are, on their face, quite radical, the impact of the reforms on the day to day management of large scale commercial litigation is likely to be somewhat more limited. That said, they introduce significant changes of which all litigators should be aware.

Litigation Funding

In his review, Lord Justice Jackson found that the funding of litigation by way of conditional fee agreements (CFAs) had, unintentionally, led to excessive costs, with risk-free litigation for claimants and additional costs being paid by defendants. He therefore recommended changes to what is recoverable from the losing party where a case is funded by a CFA and the introduction of damages–based agreements (DBAs, or "contingency fees"). These changes are now implemented by provisions in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPOA) and new regulations, which come into force on 1 April 2013 despite repeated calls for postponement.

Changes to costs recovery under CFAs

Lord Justice Jackson found in his review that the recoverability of CFA success fees and after-the-event (ATE) insurance premiums from the losing party had resulted in an excessive costs burden being placed on defendants who choose to contest a claim to trial and lose. He recommended that the success fee and ATE premium in cases funded by a CFA should no longer be recoverable from the losing side. This has been reflected in sections 44 and 46 LASPOA and the Conditional Fee Agreements Regulations 2013 for all CFAs entered into after 1 April 2013, except claims for personal injury in respect of diffuse mesothelioma (pending a consultation to be launched in Spring 2013), privacy and defamation proceedings (until October 2013) and

proceedings in respect of and relating to insolvency (until April 2015). While claimants are still able to enter into CFAs and take out ATE insurance, the associated additional costs of doing so will no longer be recoverable from the losing party.

In addition, the success fee in personal injury cases is to be limited to 25% of damages excluding damages awarded for future care and loss, to protect claimants from having too much deducted by their lawyer as a success fee. Subject to the cap in personal injury cases, the maximum success fee that can be charged remains 100% of the solicitor's base costs.

Increase in general damages for non-pecuniary loss

To compensate successful claimants for the non-recoverability of the success fee and ATE premium, the Court of Appeal announced in the case of *Simmons v Castle* [2012] EWCA Civ 1288 that general damages awarded for non-pecuniary loss in civil cases would be increased by 10% from 1 April 2013. The uplift extends to both contract and tort claims. Several types of damage will benefit from the uplift, including pain and suffering, loss of amenity, physical discomfort, social discredit, mental distress and loss of society of relatives. The increase is most relevant to claims for personal injury but also extends to nuisance and defamation claims.

The introduction of DBAs

Under a DBA a lawyer can agree with a client to conduct litigation in return for a share of the damages awarded to the client – that is, on a contingency fee basis which was, until now, illegal as contrary to the rule against champerty. DBAs have been legalised by section 45 LASPOA, which extends the use of DPAs, previously restricted to non-contentious business including employment matters, to all areas of civil litigation. The Damages-Based Agreements Regulations 2013 sets out the conditions with which a DBA will need to comply in order to be enforceable. DBAs are only available to claimants.

Under a DBA, a lawyer's agreed fee is contingent on the success of the case and is determined as a percentage of the damages "ultimately recovered" by the claimant. The amount of damages that may be taken as the lawyer's fee is capped in personal injury cases at 25%, in employment matters at 35% (as currently) and in all other cases, including general commercial litigation, at 50%. However, questions as to how the DBAs are to work in practice remain, including exactly what sums will be included within the capped amount and what will be considered "expenses" and therefore outside the cap and payable in addition to the contingency fee agreed.

Under the indemnity principle, a claimant may not recover more by way of costs from the other party than it is liable to pay for the legal services provided. This means that where the costs awarded to the claimant are higher than the contingency fee agreed, the defendant will only be liable to pay the lower contingency fee amount. Where the contingency fee to be paid by the claimant to the lawyer is higher than the costs as assessed (and therefore payable by the defendant), the claimant will have to pay the shortfall

out of its damages. In this way, a DBA will not increase a defendant's potential costs liability.

There is some uncertainty as to the impact DBAs will have on the funding of commercial litigation. While they provide an alternative funding option for claimants and may prove attractive to lawyers and third party funders willing to take on more risk for a potentially greater share of damages awarded, the operation of the cap may mean that DBAs are not commercially viable in lower value commercial claims.

Changes to the civil litigation costs regime

An enhanced ability for the courts actively to manage parties' costs is a key part of the reforms. New rules will apply to all cases on the multi-track commenced on or after 1 April 2013, excluding all cases in the Commercial & Admiralty Court and any cases in the Technology and Construction Court, the Mercantile Courts of the Queen Bench Division or in the Chancery Division where sums in dispute exceed £2m, unless the court orders otherwise.

Costs budgets and costs management

New rules will require all parties (except litigants in person) to file and exchange costs budgets setting out their projected costs for each stage in the proceedings before the first case management conference (CMC). Parties who fail to file a costs budget will be treated as having filed a budget comprising only the applicable court fees. Given the extent to which parties may be limited by their costs budgets when it comes to recovery (see further below), this will operate as a potentially significant penalty for those who fail to comply with the new rules.

A new power to make a costs management order will enable a court to control the steps to be taken and the costs to be incurred by the parties. The court will need to approve each party's budget and budgets may not be departed from when making costs orders without good reason. If there is a difference of 20% or more between the amount claimed and the budgeted costs, a statement of the reasons for the difference must be provided. Unsatisfactory reasons may be taken as evidence that the costs claimed are unreasonable or disproportionate. Reliance by the paying party on the budget may also prompt the court to limit recoverable costs.

The potential impact of a costs budget on recovery at the conclusion of proceedings underlines the importance of budgeting as accurately as possible. This is particularly the case where a costs management order has been made. It is also vitally important that a budget is filed on time, if parties are to avoid being limited to recovering only the applicable court fees should their claim succeed.

Changes to the proportionality test

A new test of proportionality is introduced for cases commenced after 1 April 2013, by which the costs incurred by a party will only be considered proportionate if they bear a reasonable relationship to:

- the sums at issue in the proceedings;
- the value of any non-monetary relief at issue in the proceedings;
- the complexity of the litigation;
- any additional work generated by the conduct of the paying party; and
- any wider factors involved in the proceedings, such as reputation or public importance.

In a change to existing rules, where costs are assessed on the standard basis, costs that are disproportionate under the new test may be disallowed or reduced even if they were reasonably or necessarily incurred.

Part 36 – Enhancement of claimants' offers

Lord Justice Jackson viewed the consequences for a defendant of failing to accept a claimant's Part 36 offer as far less severe than those for a claimant who rejects a defendant's offer and then fails to equal or beat it at trial. Part 36 has therefore been amended to "level the playing field" in this respect. A defendant who fails to equal or beat a claimant's Part 36 offer made on or after 1 April 2013 may now be ordered to pay an additional penalty calculated as 10% of damages in a money claim or 10% of costs in a non-money claim, reduced on a sliding scale for larger claims, up to a maximum of £75,000. While the impact of this new rule on large scale commercial litigation is likely to be limited, the extension of the regime to detailed assessment proceedings may prove useful to those hoping to avoid lengthy detail assessment provisions.

General procedural streamlining

Disclosure

The workings of the disclosure rules in larger civil cases was, unsurprisingly, one of the main areas of concern for Lord Justice Jackson. For all cases on the multi-track (save where the court orders otherwise) where the first CMC takes place on or after 16 April 2013, standard disclosure will now be replaced with a 'menu' of disclosure possibilities which include: no disclosure; specific disclosure; issue by issue disclosure; Peruvian Guano disclosure; standard disclosure or any other order it considers appropriate. The court may also give directions as to how this is to be carried out. The aim is to limit disclosure and therefore costs, wherever possible and appropriate. In many cases, however, particularly in the Commercial Court, it may well be that this does not mark a great change in approach.

Ever more robust case management

Consistent with the overall tenor of the Jackson reforms, amendments are made to various overarching provisions of the CPR with the intent that the court should be tougher in its outlook to case management and less tolerant of delays. For example, the overriding objective is amended to become:

"to deal with cases justly *and at proportionate cost"* (emphasis added), and enforcing compliance with rules, practice directions and orders is expressly included as an example of that.

Parties will be under a stricter obligation to try to agree directions for the management of the proceedings and the court will be given the power to make enquiries of the parties to monitor compliance with directions.

Witness Evidence

The court will have new powers to control the witness evidence adduced in proceedings and may give directions identifying or limiting the issues on which evidence may be given. When applying for permission to bring expert evidence, parties will have to identify both the issues that the evidence will address and provide an estimate of costs of that evidence. The court may also order that expert evidence is given concurrently (known as "hot tubbing").

Comment

The Jackson reforms have been heralded as the greatest shake up in civil procedure since the introduction of the Civil Procedure Rules in 2001. How far they impact on large-scale commercial cases may, in practice, be limited. Certainly, some of the case management provisions are reminiscent of those introduced into the Commercial Court following the Working Party's review of procedure in that court in 2007. Likewise, the effectiveness of DBAs at plugging the financing hole remains to be seen, with much depending on the attitude to risk of potential litigants, lawyers and financiers alike.

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A16379893/0.1/27 Mar 2013