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Briefing note March 2013

The Jackson reforms: what they mean for English commercial litigation

The Jackson reforms come into force on 1 April 2013. Though aimed primarily at personal injury litigation, the reforms will affect commercial litigation. For example, the rules on disclosure will change, cases could be subject court-determined budgets, and claimants will be encouraged to make settlement offers. The funding of litigation will also change. Success fees payable on conditional fee agreements will no longer be recoverable from the losing party, and lawyers will be able to enter into contingency fee agreements. Not a revolution, perhaps, but the reforms will bring significant changes and, with them, significant challenges, not least for the judiciary.

A revolution in English court procedure took place in the 1870s. This was followed by more than a century of reviews, reports and resulting revisions that led, eventually, to another revolution, in April 1999. The Woolf reforms - in the guise of the Civil Procedure Rules - ushered in new rules involving greater judicial case management with a view to ensuring that litigation was handled more justly and efficiently.

Within a decade of this revolution, the evidence demonstrated that, while the CPR might have speeded up litigation, they had also increased the cost of litigation because case management is time-consuming. The judiciary therefore decided that more revision was required in order to address this problem. The Master of the Rolls relieved Lord Justice Jackson of his normal judicial duties in order to allow him to spend 2009 devising solutions.

Lord Justice Jackson's report of January 2010 is now, in the main, being implemented by the Government through legislation and changes to the Civil Procedure Rules. These reforms extend beyond personal injury litigation into the commercial sphere. In doing so, they carry the risk that, far from cutting litigation costs, they will only increase them.

Disclosure

Disclosure often represents a significant part of the cost of commercial litigation, not least because the advent of email and other digital communications has caused an explosion in the volume of documents that are created and therefore that need to be disclosed. What used to be a transient conversation at the coffee machine is now emailed or texted and held forever on a server.

Under the CPR, the customary requirement was for "standard" disclosure. This obliged each party to disclose the documents upon which it relied and also to disclose adverse documents found in the course of a reasonable search. The court had power to limit or expand disclosure obligations, but standard disclosure remained, as its name indicates, the standard approach.

Key issues

- Parties will be required to file disclosure reports listing potentially relevant documents
- Parties may need to file budgets for approval by the court
- Disclosure reports and budgets risk increasing costs, unless the judiciary removes subsequent steps
- Claimants who make and beat a settlement offer will receive a bonus of up to 10%
- Success fees and ATE insurance premiums are no longer recoverable in costs from the losing party

In the Jackson world, courts are not intended to default to standard disclosure without due deliberation. Instead, they must be conscious of the need to limit disclosure to what is necessary to deal with the case justly and at proportionate cost.

The catch for the parties is that in order to decide what is necessary for these purposes, a court needs information. The parties are therefore required to file a new document, a disclosure report. This report (bolstered by a statement of truth) must state what relevant documents exist or may exist, where and with whom they are located, how electronic documents are stored and the likely cost of giving standard disclosure.

The disclosure list defines the lake into which a party can despatch its industrial-scale trawler to fish for documents

The preparation of this report is therefore an extra step in the litigation. But it doesn't stop there. The parties are then required to discuss their respective reports and, if possible, agree on the scope of disclosure. If they can't agree, the court will decide. The rules give the court the express power to dispense with disclosure altogether, to require the parties to disclose those documents they rely on and request specific disclosure of any documents they want from the other side (the usual arbitration model), and so on through standard disclosure up to the disclosure of absolutely everything.

The preparation of these new disclosure reports will be expensive. Unless the court is prepared to take a radically revised a view of the benefits of and need for disclosure, there will be no countervailing savings in the later disclosure process.

It is easy to envisage a party - particularly one with few documents itself - seeing the other's report as to what documents may exist, and simply saying, like Burglar Bill, I'll 'ave that. The disclosure list defines the lake into which a party can despatch its industrial-scale trawler to fish for documents. If the Jackson reforms are to bring any benefit in this area, the courts will need to take a serious look at what disclosure really is needed and to curb their default tendency to go with the standard flow.

Court budgeting

Another potentially expensive add-on to litigation procedure is court-controlled budgeting. The purpose of this is to allow the courts to try to ensure that recoverable costs are proportionate and to specify at the outset what costs a party will be liable for if it loses the case.

But this again requires the court to have information, this time about the cost of the litigation. Each party must therefore submit a litigation budget to the other party and to the court. If the parties don't accept the appropriateness of each other's budgets, the courts will consider, amend and eventually approve the parties' respective budgets.

If the court is to take this task seriously, the court must examine the budgets carefully: for example, is the figure for preparing witness statements reasonable and proportionate? if not, why not? must the lawyers be assumed to talk more quickly or see fewer witnesses or send less highly qualified people to do the job? Indeed, fundamental questions like what level of costs is proportionate remain unanswered. Is it 10% of the sums in issue, 30%, 50% or something else?

Every pound knocked off the budget will be a pound less in costs recovered when successful

The rules expressly shun the idea that court control of the parties' budgets will entail a full, upfront, costs assessment in every case but, if it is to achieve anything, it must be at least a mini-assessment.

Further, conscious of the potential costs of the process, the rules provide that no more than 3% of a budget can represent the cost of preparing the budget, assessing the other side's budget, attending hearings on the budget, and updating the budget. It might cost more than that in fact, but 3% is all that will be recoverable from the other side in the event of success.

Budgets will be important. The court does not control what the parties can agree with their own lawyers or ask their own lawyers to do. That is still a matter for lawyers to discuss with their clients. Instead, the successful party's budget, as approved by the court, will act as a cap on the costs that the successful party can recover from the other side unless there is "good reason" to allow departure from the budget.

Every pound knocked off the budget will therefore be a pound less in costs

recovered when successful (and every pound expunged from the other side's budget will be a pound less to pay in the event of defeat). If the potential reductions in the budget are big, there will be a strong incentive to fight hard against any reduction. That will create satellite litigation on costs, something the judiciary hates.

The good news, however, is that automatic costs budgeting does not apply everywhere. The Commercial Court has always been exempted (though it has the power to impose budgeting in particular cases). On 18 February 2013, the President of the Queen's Bench Division and the Chancellor of the High Court (who is in charge of the Chancery Division) announced that cases in the Chancery Division, the Technology and Construction Court and the Mercantile Courts would also not be subject to automatic costs budgeting provided that the claim is for more than £2 million. This, they said sternly, was to avoid "inappropriate forum shopping" - presumably the two judges do not want all high value commercial cases migrating to the Commercial Court in order to avoid court budgeting.

Settlement offers

If a defendant makes a formal (Part 36) settlement offer, the offer is rejected, and the defendant (though unsuccessful) is ordered to pay less than the amount of its offer, the defendant will be awarded its costs from the time of the offer. This is a real benefit because the defendant moves from a position of having to pay the claimant's costs because it lost the case to being paid at least some of its own costs instead. An offer therefore puts real pressure on the claimant.

If a claimant makes and beats a formal settlement offer, it may receive an enhanced rate of interest, together with costs calculated on a more favourable basis. These are more intangible and, according to Lord Justice Jackson, give claimants insufficient incentive to make settlement offers.

The good news is that automatic budgeting does not apply in all courts

Lord Justice Jackson's solution is to give the claimant a bonus of up to 10% of the principal amount of its claim if it makes and beats a Part 36 offer (unless that would be unjust). Wary, however, of large numbers, this bonus is capped at £75,000 (10% for the first £½ million; 5% for the second £½ million; nothing for higher sums). Nevertheless, even on a claim for well over £1 million, an extra £75,000 might be worth having. Claimants therefore need to consider making a Part 36 offer at an early stage, even if only at an amount slightly below their full claim. The new rules apply to any offer made after 1 April 2013.

The funding of litigation

Conditional fee agreements (CFAs) remain in place, with lawyers still able to charge up to double their normal fees if a case is won. The Jackson change is that, with a few exceptions, the losing party will no longer be obliged to pay the success fee (ie anything above normal fees) as part of the winner's costs. The same is true of insurance premiums to cover costs liabilities. The winner must therefore pay its lawyers' success fee out of any recoveries it makes. This could render some claims uneconomic to pursue.

In addition to conditional fee agreements, lawyers will be able to enter into a contingency fee agreements (called a damages-based agreements or DBAs) with claimants in which the lawyers agree to accept a share of their clients' winnings, capped at 50% in commercial cases. Again, a losing defendant will not pay the contingency fee in costs but only costs calculated on an orthodox hourly-charging model.

However, DBAs may not be attractive in commercial matters for a variety of reasons. First, it appears that a DBA must be no win, no fee, rather than no win, lower fee (though the drafting of the regulations leaves much be desired). Where CFAs are now used in commercial cases, they are invariably no win, lower fee because the costs and risks of commercial litigation can be very high. The inability to share risk in this way may discourage the use of DBAs.

Secondly, the lawyer must take the solvency and enforcement risk on the defendant. The claimant can only be obliged to pay its lawyer up to 50% of the sums "ultimately recovered". If the defendant becomes insolvent or the judgment cannot be enforced, the lawyer will not be paid at all. Financially sound parties may therefore face litigation funded by a DBA; more dubious parties may pose too high a risk.

Thirdly, it is unclear whether a lawyer entering into a DBA will be personally liable in costs if the case is lost. A lawyer entering into a CFA is not liable in costs on defeat, but a commercial funder entering into a contingency fee agreement is liable for at least some of the winner's costs.

A policy decision is required as to whether lawyers entering into DBAs should be equated with lawyers entering into CFAs or with non-lawyers entering into the equivalent of DBAs. The legislators declined to make that decision, leaving it to the judiciary.

DBAs are available but, unless or until the regulations governing them are changed or clarified by the courts, their attractiveness in commercial litigation is open to question.

Other changes

The Jackson reforms have also brought in other changes to the Civil Procedure Rules relevant to commercial litigation. These vary from the trivial (eg allocation questionnaires are now called directions questionnaires) to the potentially more significant (eg costs may no longer be recoverable if they are disproportionate even if they were necessarily incurred and are reasonable in amount).

However, the main thrust of the reforms is directed at personal injury litigation. Most personal injury litigation was conducted under no win, no fee CFAs. This meant that the claimant had no interest in the level of its lawyers' fees because, win or lose, it would never have to pay them. In the post-Jackson world, the claimant must pay any success fee out of its recoveries. The claimant therefore has an interest in both the level of its costs and in the resulting economics of the claim.

To compensate claimants for having to pay a success fee out of its award, general damages (eg for pain and suffering) have been increased by 10%. Further, "qualified one-way costs shifting" (or QOCS) has been introduced. This means that claimants in personal injury cases will no longer be liable for the other side's costs even if they lose the case, absent something approaching fraud in the bringing of the claim.

Conclusion

Lord Justice Jackson's main remit was to deal with the costs of high volume personal injury cases, but his reforms bring with them risks for commercial litigation. Unless the judiciary changes its spots, the reforms will increase rather than reduce the costs of litigation, just as the Woolf reforms did. This begs the question as to whether another revolution in civil procedure is needed. Is it still sustainable to have a single set of civil procedure rules applicable to cases of all sorts or has the time come to develop different rules - perhaps even different court structures - for different types of litigation?

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