Jackson reforms: trials and tribulation

Monday 25 March 2013 by **Eduardo Reyes**

One could be forgiven for thinking the campaign to halt or defer the main planks of the civil justice reforms devised by Sir Rupert Jackson is still in full swing. To be fair to the refusniks, the impression that all was not settled has been given in part by the last-minute approach the Ministry of Justice has taken to issuing details on implementation. If the government and the senior judiciary had yet to say what was to come on, respectively, damages-based agreements and big-ticket costs budgeting, perhaps they were still open to persuasion?

Rules

The uncertainty has piled pressure on lawyers and clients who will need to work with the new rules. As Rachel Rothwell, editor of *Gazette* sister magazine Litigation Funding, puts it: 'I can see no reason why everything had to be so last minute, and frankly it has been grossly unfair on the profession.' Of course we have known broadly what is coming since the government's response to the Jackson report in March 2011. But with many of the changes, the actual regulations, CPR amendments and practice directions giving all-important detail have only been published in the last few months – even weeks.

Francesca Kaye, president of the London Solicitors Litigation Association, says: 'The implementation process is beset by difficulties and delays. Implementation itself is a shambles.' Rothwell concurs: 'In some cases, the regulations that have been published are simply not fit for purpose.' She cites the damages-based agreement regulations – described by experts as 'riddled with errors' – as a key example. 'Even the finest legal minds cannot fathom for certain whether or not the regulations will actually permit lawyers to act under a partial DBA – and that is of fundamental importance,' says Rothwell. What is worse, notes the Law Society's head of law reform, Robert Khan, is that 'this problem is widely known, but there is no sign of government addressing it before DBAs come in. It just isn't high enough on the Ministry of Justice's priority list'.

Costs

Predicting and controlling costs is at the heart of the reforms. Michael Kain, chairman and founder of costs lawyers Kain Knight, says: 'The proportionality test pretty much gives a judge carte blanche to do what he likes, with little chance of appeal.' Kain has concerns about the supporting infrastructure: 'Provisional assessment risks bogging down the courts for years, unless the government is prepared to invest substantially in more court staff.'

He adds: 'Of course, we note that the only claimant that is going to be exempt in the non-PI world is the Inland Revenue, which is the main creditor in every insolvency. It smacks of one rule for government and another for everyone else.' Rothwell also highlights the confusion caused by last-minute attempts to sort out the looming dissonance between different courts – a task that has had to work around the conflict between the urge to control costs, and the need for the commercial court to be a 'destination' forum for large international disputes.

'One of the most important aspects of the reforms is costs budgeting,' she says. 'This was due to apply widely across the civil justice system, although the Commercial Court – which deals with big-ticket litigation – negotiated an exemption from the rules, acknowledged in Lord Justice Jackson's final report back in 2010.'

Then, as Rothwell recalls, the senior judiciary announced that costs budgeting would no longer

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automatically apply to cases worth more than £2m in the Chancery Division, Technology and Construction, and Mercantile courts: 'They introduced this exemption because litigants have a choice of bringing their action in these courts, or opting for the Commercial Court. If the Commercial Court does not require costs budgeting but the others do, this could cause a 'forum shopping' problem.' She adds: 'I can understand the logic of this exemption – but the question is, why leave it so late? It is hardly fair on the law firms that have been developing IT and actively preparing for the new rules, only to find that the goalposts have suddenly moved.'

Those goalposts may continue to move, Dundas & Wilson disputes partner Gemma Lampert cautions: 'Greater costs certainty and greater proportionality of costs seem to be the aims, but it is likely that the extent to which the changes are implemented in court will depend to a degree on the enthusiasm of each particular judge to adopt and promote the new reforms.' She points to the *Henry* case (see this feature) as an example of how costs 'certainty' may not work out as advertised.

Will this increase the pressure on litigating parties to behave in a more collaborative way? Rob Williams, head of costs at Weightmans, believes so: 'Collaboration will become the new watchword, and that can and should start with litigators spending more time with their in-house costs specialists scoping out a reasonable costs budget before disputes reach court.'

The new system could give rise to an increased uptake of alternatives to litigation: 'Even when cases do go to litigation, there is a strong inference from the courts that a collaborative approach with the other parties would be helpful. This could include agreeing a budget with other parties at the pre-lit stage. Agreement may stand both parties in good stead before a judge, particularly as there is uncertainty about what process the courts will operate for any challenges a party wishes to make to its opposing party's costs budget once litigation starts.' There will be a time-lag before budgeting becomes 'second nature', Williams adds, but 'those litigators and clients who embrace the positives of greater clarity and certainty that the new system provides will benefit from it first'.

Rod Evans, president of the Forum of Insurance Lawyers (FOIL), agrees: 'All parties – claimant, defendant and the judiciary – will need to work and learn together to make these changes the success they need to be. Notwithstanding all the hyperbole, I believe that this will happen, just as it did with the Woolf reforms.' Kaye has high expectations of the new rules on disclosure: 'The changes in the rules relating to disclosure offer the greatest opportunity to change the way we manage litigation strategically. With the possibility of persuading the court that the appropriate disclosure order can range from no disclosure at all, through to issue-based disclosure, from past-standard disclosure to Peruvian Guano disclosure, there are real opportunities to use disclosure to change the shape of a dispute.'

She hopes that 'in the right case, used properly, the disclosure rules could result in early, better and more cost-effective outcomes for our clients'. If the parties and the courts look at disclosure 'in a new way', Kaye adds, 'we may find in 12-18 months, once the rules have settled down, that the most significant impact of the Jackson reforms will be how we approach disclosure'.

From 1 April...

- Paying or receiving referral fees in personal injury is banned. Law firms can pay into collective advertising schemes but they cannot pay for individual referrals.
- A new proportionality rule will be used by the courts to ensure that the cost of bringing a case is proportionate to the damages at stake. Lawyers are concerned at the lack of guidance on the new rule and predict that it will lead to satellite litigation over costs.
- Lawyers must comply with requirements to submit and update costs budgets, which will apply automatically to multi-track cases in the county court and Queens Bench Division of the High Court, and cases worth less than £2m in damages in the Chancery Division, Technology and Construction Court (TCC), and Mercantile Courts. Judges may also require costs budgeting in higher value cases in these courts, but the Commercial and Admiralty Courts are exempt.
- In personal injury, a new system of 'qualified one-way costs shifting' is introduced, protecting losing claimants from being liable for a defendant's costs, except in certain circumstances.

- Damages-based agreements are lawful in litigation for the first time. This is an arrangement whereby a client gives up a proportion of their damages to their lawyer, in return for the lawyer taking on the risk of being paid nothing if the case loses.
- Lawyers' success fees and after-the-event insurance premiums cannot be recovered from the losing party. The cost of this must instead be met by clients.
- Courts will apply a 10% increase in general damages for personal injury cases.

In addition:

- From the end of April, fixed legal fees for RTA claims valued under £10,000 reduce from £1,200 to £500.
- From July, for the first time, there will be fixed fees for RTA claims valued up to £25,000 as well as PL and EL claims of the same value.
- The general small claims track limit, where there is no recoverability of legal costs, will increase from £5,000 to £10,000 in April, and may later rise to £15,000. In the summer, the government is also likely to increase the small claims court limit in personal injury cases from £1,000 to £5,000. This is likely to encompass the majority of whiplash cases.

Products

Central to the way that lawyers and clients respond to the reforms will be the funding and insurance products that support litigation. The market is changing.James Delaney, director of independent litigation funding brokers TheJudge, explains: 'The market has been absolutely flooded with last-minute ATE applications over the past few weeks, the quality of which has been higher than expected.' But he attributes this to lawyers who 'haven't had the luxury of trying to settle the case ahead of applying for cover or indeed using ATE quotes as leverage to try and initiate a settlement'. Ultimately this has meant less adverse selection against the market.

He adds: 'This is an important issue. Had this been the norm over previous years, ATE premiums would probably have been lower across the market as insurers can spread their risk over a large pool of good-quality cases.' However, he believes it also sends a warning to the market post-April. 'The temptation will be only to apply for ATE insurance after all efforts to settle the case have failed.' This is likely to increase premium rates, which of course are ultimately no longer recoverable, he predicts.

Rothwell praises insurers' attempts to develop products in an information vacuum: 'They have come out fighting, with a host of new products for the post-Jackson world. It will be difficult for lawyers to navigate their way through the new product range and make sure that they are choosing the right insurance to protect their clients.'

Funder Andrew Langhoff, chief executive of Burford Capital UK, is certainly betting on increased finance needs from the market, believing reforms 'will serve to accelerate the use of litigation finance in the UK'. 'Despite the fact that adverse costs insurance premiums will no longer be recoverable,' he adds, 'we believe that new pricing models will allow this important component of litigation finance to continue and thrive.' Burford's design of new 'products', centred on the financing of lawyers' fees, disbursement and adverse costs insurance, underlines his confidence.

Delaney says Burford is not alone: 'The biggest challenge lawyers face is understanding the diverse range of new products coming to the market from April. If there are, say, 10 main funders and eight insurers who enjoy the largest market share, and each company has its own ideas, pricing methods and product structures to work in a post-Jackson environment, it creates a real headache for lawyers trying to explain the options.' Notwithstanding that headache, he predicts, the post-Jackson world will be a 'buyers' market'.

Concessions and support

The Law Society and its allies have undertaken a substantial volume of work on behalf of members in relation to the government's civil justice reform programme. The main concessions,

amendments and assurances secured throughout that process are described below.

A delay in the implementation of the reforms until April 2013

Civil litigation funding

Pressure from the Society and others has led to three major concessions, an initial delay and guarantees in relation to the operation of the proposed QOCS regime.

An exemption for mesothelioma victims

Victims of mesothelioma, caused by exposure to asbestos, will for now remain exempt from the proposed reforms to the operation of no win, no fee agreements.

An exemption for insolvency cases

The abolition of the recoverability of success fees and insurance premiums under the act in April 2013 will not apply to claims by liquidators, administrators and trustees in bankruptcy until 2015.

Guarantees in relation to the proposed QOCS regime

There will be no means test to decide whether a losing claimant should be protected by qualified one-way costs shifting; and there will be no minimum payment that a claimant will have to pay under the proposed regime.

An exemption from non-recoverability of ATE premiums for experts' reports on liability and causation in clinical negligence cases

Conditional fee agreement regulations withdrawn on the advice of the Law Society

Damages-based agreement regulations amended

On the advice of the Law Society the government amended the proposed damages-based agreement regulations in order to resolve issues of uncertainty and avoid confusion.

Civil Procedure Rules amendments

A number of amendments to Civil Procedure Rules prior to publishing resolved a number of priority concerns with drafting.

- To book your place at one of the Law Society's civil litigation roadshows, or download the accompanying information, go to the 'Costs' webpage.

Conclusion

Whatever the long-term prospects for the success of the Jackson reforms, few predict a smooth transition. Lampert says: 'Litigators had expected that the details of the reforms would be known in 2012, but the relevant legislation was only put to parliament in January 2013 and so there is a steep learning curve for all involved in litigation to be ready.' She adds: 'Until some of the changes have been tried and tested and the new rules bed down, it is going to be very difficult to predict the cost consequences of any steps in proceedings, which will actually result in less certainty and potentially additional cost in preparing for the unexpected.'

Michael Frisby, partner at Stevens & Bolton, says: 'Of most serious concern is the impact on the relationship between clients and solicitors: costs battles are now more likely to be waged by clients on their solicitors than [between] parties.' Personal injury lawyers had a long wait for the final detail on how their new costs regime will operate. Many of them supported the principle behind qualified one-way costs shifting, but they are worried the detail of the rules creates too much uncertainty for claimants, and could put their damages at risk.

Colm Nugent, barrister at Hardwicke Chambers, makes two long-term predictions: 'First, the "dubious claim" industry run for the benefit of claims management companies with tiny general damages claims and large storage or hire charge claims will wither and fade.' Second, he says: 'In the next few years, professional negligence claims will blossom when the claimant who accepted modest settlement figures a few years earlier – on the urging of a harassed and overworked legal executive under time and cost

pressure – turns out not to have recovered as anticipated after all.'

Will the upheaval have been worth it? Kaye, on balance, thinks not. While liking the changes to come on disclosure, she concludes: 'For me the rest is just more cost and process for clients with little benefit. The reforms as a whole will increase litigation costs and, potentially, reduce recoverable costs, thus only increasing the pain successful parties feel at what, in many cases, will continue to be Pyrrhic victories.'

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