For in-house counsel: practical implications of managing litigation

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The Jackson reforms were aimed at increasing the efficiency and reducing the costs of litigation. Since the implementation of the reforms on 1 April 2013, the litigation landscape has changed and in-house counsel who manage litigation at accounting and audit firms should be aware of the practical effects.

The key impacts of the Jackson reforms on litigation are as follows:

1. Costs management:

Rule: Costs management procedures have been introduced via the new CPR rules 3.12 to 3.18 and new Practice Direction 3E on Costs Management. Parties must now file and exchange budgets setting out their estimated costs for each stage in the proceedings. The budgets have to be filed by the date stated in the notice of proposed allocation (which will be sent to the parties after the defence is filed) or, if no date is specified, 7 (clear) days before the first CMC.

Effect: Parties must consider costs at a much earlier stage. This has the effect of front-loading costs. Clients who are able to will still incur the costs they want to incur in order to pursue or defend a claim. The recoverable costs will, however, generally be capped at the budgeted level. For parties who cannot afford the difference between actual costs and recoverable costs, access to justice will be impacted. In practice therefore, parties are proving keener to reach settlement or to attend mediation earlier on in the course of the dispute. The approach of the Courts to costs budgets has been inconsistent but a degree of greater certainty as to a firm's costs exposure has been introduced.

2. Costs budgets:

Rule: It is crucial that parties prepare accurate budgets and keep them updated. If a party does not file a cost budget by the deadline, the party will only be able to recover the applicable court fees, unless the Court orders otherwise.

Effect: There is a higher risk in failing to meet Court deadlines. As we saw in the Court of Appeal ruling in Mitchell v News Group Newspapers, where the claimant solicitors missed a deadline to submit their costs budget, relief from sanctions will rarely be granted when a party fails to comply with court directions, rules and orders. Before this judgment, parties were able to agree an extension of time among themselves. Now, if they miss a deadline, the judge will require an application for relief from sanctions, which in the Mitchell case, was refused. This is more likely to catch out defendants as claimants are more likely to have all their evidence ready before they issue their case. This may afford claimants a strategic advantage in terms of timing over their opponents. The draconian effect of this ruling has been tempered since Chartwell Estate Agents Limited v Fergies Properties SA, in which the Court of Appeal granted relief from sanctions for the late service of witness statements. However, uncertainty remains leaving a higher risk atmosphere in meeting Court deadlines.

3. ATE premiums:

Rule: After the Event ("ATE") insurance premiums and solicitors' uplifts on costs in no win, no fee agreements ("CFAs") are no longer recoverable from the losing party.

Effect: The practical effect of this is that claimants' damages payments are reduced by any no win, no fee uplift payable to their lawyers. This can render lower value cases commercially unviable to run via CFA funding, particularly where there are complex and/or risky liability issues to be addressed before success can be achieved. An increasing number of claimants have therefore chosen not to enter into CFA's or, where they have found lawyers willing to run cases on this basis, have decided not to take out ATE insurance policies. The risk for accountancy firms is therefore that the successful defence of a claim may transpire to be a pyrrhic victory if the claimant cannot pay the resultant costs order.

4. Recovery of costs:

Rule: Parties are no longer able to recover costs solely because they are reasonably incurred. Those costs must also be "proportionate" to the matter in issue in the claim. Costs which are disproportionate can now be reduced or disallowed even if they were reasonably or necessarily incurred.

Effect: This rule mainly affects small to medium size cases where there is greater risk of costs being considered

disproportionate. Predicting which costs a judge will consider to be proportionate is, however, an unenviable task in any size of case. The purpose of the rule is to reduce the costs of litigation and to force lawyers and their clients to be more costs conscious. Ironically, the rule itself is causing lawyers to spend much more time and cost on the cost-budgeting process

with a concomitant increase in litigation and arguments over which party is responsible for generating costs.

5.10% uplift on damages:

Rule: A 10% uplift on damages now applies where a claimant is awarded damages which match or exceed their own CPR Part 36 offer. A maximum uplift of £75,000 is applied.

Effect: The imposition of this additional penalty is designed to promote earlier settlement of cases. We are, however, yet to see any meaningful impact of this rule and envisage that the percentage increase would need to increase well beyond 10% for this sanction alone to drive parties to the negotiating table earlier than would otherwise be the case.

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