County Court Provisional Assessment Pilot

The last of Jackson LJ's Civil Costs Review Seminars was concerned with the detailed assessment procedure. There was overwhelming, if not unanimous, support for the introduction of provisional assessments on paper.

In the recent Written Ministerial Statement by Parliamentary Under-Secretary of State for Justice (Jonathan Djanogly MP), confirming that the Government planned to press ahead with the Jackson proposals, it was announced that there were a range of continuing judiciary-led costs and case management work including a "pilot of assessing disputed costs under £25,000 on the papers rather than at a hearing, in Leeds, Scarborough and York County Courts from October 2010".

The new rules relating to the pilot scheme are incorporated in the 53rd CPR Update and will run from 1 October 2010 to 30 September 2011.

If this pilot is deemed a success it is inevitable it will be rolled out nationally. It is rumoured that the scheme might also be extended to any case where costs are £50,000 or less, or even to all cases without limit. The pilot therefore merits careful observation. This is what the future might look like.

The first thing to note is that the pilot applies to cases where the *base costs* are £25,000 or less. With success fees and ATE premiums this will catch a large number of claims. It is not immediately obvious from the new rules whether the onus will be on the receiving party to specifically request the provisional assessment or whether someone at the court will be sitting there with a calculator to check whether the level of base costs is above or below £25,000. If the onus is on the receiving party, it is not clear what the sanction, if any, would be for getting this wrong.

District Judge Robert Hill, writing in the *Law Society Gazette*, observed:

> "The scheme should result not only in quicker assessments, but also in a saving of time and expense for litigants, practitioners and the courts."

DJ Hill sits at Leeds, York and Scarborough county courts, where the pilot will run, is the local regional costs judge and a member of the Civil Procedure Rules Committee, who presumably drafted the rules for the pilot.

It is worth exploring the likely success of the pilot scheme in achieving these aims. Apparently, the current thinking is that it is estimated that under the pilot scheme it should take the judge about only 45 minutes to review the documents provided and come to a decision. This is clearly significantly faster than the time taken currently in relation to detailed assessment hearings, where much longer is needed for even the lowest value and most straightforward claim. There are, however, a number of potential problems.

At the last of the Jackson Review Costs Seminars, hosted by the Supreme Court Costs Office Practitioners' Group and Reed Smith LLP, there were only two dissenting voices to the idea of provisional paper assessments. One was a regional costs judge and the other was a principal costs officer. Their concern was that such a process

would lead to an unmanageable surge in detailed assessments that would overwhelm the courts. Far from reducing the amount of time the courts spent dealing with costs matters, it would have the opposite effect.

Currently, the detailed assessment route is an expensive one. With lower value claims the costs of detailed assessment can outweigh the costs of the substantive claim. Even on no more than medium sized bills, the detailed assessment costs can easily run into five figures. Therefore, parties, or at least those properly advised, are reluctant to proceed down this route if it can be avoided. With the provisional assessment, the only cost that will be incurred, beyond the costs of points of dispute and any replies already incurred, will be the court fee. The court fee for bills that do not exceed £15,000 is £300. For bills which exceed £15,000 but do not exceed £50,000 the fee is £600. Either party can therefore obtain a provisional assessment for a bill of up to £50,000 (once success fees and ATE premiums are included) for no more than £600. This is certainly set at a level where the costs of assessment are unlikely to act as a disincentive, unlike the current costs that are incurred.

A large number of cases currently settle after the matter has been listed for an assessment hearing but before the actual hearing. This often happens only a day or two before the hearing. No doubt this is usually caused by the approaching hearing suddenly focusing the minds of those involved. Even a very late settlement will avoid the majority of the assessment costs. The judiciary routinely complain about late settlements of costs disputes. (This is a routine occurrence in substantive litigation as well, of course.) In reality, it is probably only because of late settlements that judges are able to keep on top of some of their paperwork. If late settlements did not occur, the courts would probably grind to a halt.

With the provisional assessment process will there be any incentive on parties to review and try to settle costs in advance of hearings? The court fee will already have been incurred and no further saving will be available. There is certainly every possibility that parties will be more likely to request assessments in the first place and then less likely to look to compromise matters before the assessment has actually occurred.

The second problem is that there is an automatic right to seek a full oral detailed assessment if either party is unhappy with the provisional assessment. Given it appears that there will be no reasons given for reductions made, or not made, to bills, there has to be a real possibility that there will be just as many full detailed assessments as there are presently. The worst case scenario is that the courts are faced with a large number of provisional assessments that they did not previously have to deal with and no reduction in the number of full assessment hearings.

Whether the provisional assessment pilot increases or decreases the workload of the courts remains to be seen.

The next issue is whether provisional assessment will reduce the costs to the parties. Those costs practitioners worried that provisional assessment will reduce their fee income may not need to be too concerned just yet, even if there is a reduction in the number of actual oral detailed assessments hearings.

It will be recalled that Jackson LJ was very clear that his proposed costs reforms were meant to be viewed as a complete package and should not be introduced on a piecemeal basis. The provisional assessment pilot is just such a piecemeal step. Jackson LJ envisaged a much simplified bill of costs format. He envisaged different points of dispute and replies:

> "Both points of dispute and points of reply need to be shorter and more focused. The practice of quoting passages from well known judgments should be abandoned. The practice of repeatedly using familiar formulae, in Homeric style, should also be abandoned. The pleaders on both sides should set out their contentions relevant to the instant cases clearly and concisely. There should be no need to plead to every individual item in a bill of costs, nor to reply to every paragraph in the points of dispute".

The pilot scheme proceeds with these elements unaltered.

Such a scheme might have some chance of success in the Senior Courts Costs Office where, at least the full time, costs judges and costs officers are generally familiar with all the standard costs argument. It is less obvious that those judges sitting in Leeds, Scarborough and York County Courts will be as familiar with the intricacies of costs law. There is no suggestion that the provisional assessments will be conducted by any particular designated judge or the regional costs judge. How knowledgeable are the district judges and deputy district judges who sit in these courts? This is not to suggest any shortcomings in the ability of these judges, but are they really all 100% up to speed on the minutiae of costs law?

Readers will be familiar with some of the surprising gaps in basic knowledge of costs law shown by some sections of the judiciary.

When much of the judiciary is not 100% familiar with every element of costs law - and why should they be expected to be? - the problems with provisional assessment become clear.

Faced with a claim for communications with an ATE provider, a paying party currently may deal with this in the points of dispute as briefly as:

> "Not inter partes. Disallow."

For the small number of cases that reach as far as detailed assessment, a decision can be taken nearer the time which authorities to wheel out in support of this argument.

If a matter might now be heard in one of the pilot courts by way of provisional assessment, is a costs draftsman going to be content to draft such a concise dispute and hope the judge is already familiar with all the relevant case law (in the way one might expect in the SCCO)? Doubtful.

Will it be sufficient to draft a dispute along the following lines referring to the relevant authorities:

> "The Defendant submits that time spent discussing/arranging funding is not chargeable inter partes and refers to the cases of *Re Claims Direct Test Cases* [2002] EWHC 9002 (Costs), *Masters –v- Hewden Stuart Heavy Lifting Limited*, Leeds County Court, 18/3/05 and *Woolley v Haden Building Services Ltd* (No 2) [2008] EWHC 90111 (Costs). Disallow."

With the provisional assessment process being envisaged to take approximately 45 minutes (apparently), can one expect a judge to take the time to track down various unreported decisions, quoted in points of dispute, and work his or her way through them to find the relevant paragraphs and extract the principle? Very unlikely.

Do those drafting points of dispute have any real alternative other than including lengthy quotes from the relevant authority on every point in case the judge is not familiar with the issue? What might have previously been a four word dispute may turn into a four page dispute.

When faced with points of dispute resembling skeleton arguments, is the receiving party going to decide they do not need to serve optional replies? Not a chance.

Are receiving parties going to be content to deal with the dispute above by simply saying:

> "Not agreed."

Will they be content to respond simply by referring to the names of the authorities which go the other way?

When faced with comprehensive points of dispute the receiving party will respond in kind.

Even if the paying party initially keeps their points of dispute relatively brief, when faced with the inevitable weighty tome served by the receiving party they will feel obliged to served amended lengthy points of dispute in response. The automatic right to amend points of dispute and replies (CPD 40.10) remains in the provisional assessment process.

CPD 4.5 states:

> "The background information included in the bill of costs should set out:
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> > (1) a brief description of the proceedings up to the date of the notice of commencement"

As things stand, there are those who struggle to keep the description "brief". With a provisional assessment there will be no chance to orally explain any particular problems with the way the claim proceeded. There will be no way of knowing to what extent the judge will read the papers in detail, if at all. One of Lord Justice Jackson's proposals, in his final report, was for bills of costs to "provide more transparent explanation than is currently provided about what work was done in the various time periods and *why* [emphasis added]". It is easy to see this provisional assessment pilot

encouraging much more of the "why" without any of the corresponding costs saving that Jackson LJ envisaged.

There is about to be an arms race in relation to the length of preambles to bills of costs and the complexity of points of dispute and replies, and all in the name of reducing the costs of assessment.

Would a costs draftsman who fails to comprehensively plead every single point available open themselves up to a negligence claim? Would they be negligent if they failed to serve amended/supplemental pleadings in light of lengthy points pleaded by the other side?

This is going to be a costs building bonanza for those involved in costs until the pilot scheme is hastily amended.

The pilot rules have all the appearance of being hastily drafted and half thought through. The Civil Procedure Rules Committee has no shortage of costs specialists but one does wonder whether input from the ALCD might have been a good idea (and I assume no such input was given).

The problems range from the relatively trivial to the more serious.

At the trivial end (arguably) is that CPD 40.12, which details the papers to be filed with the court in advance of the assessment, remains in place. CPD 40.11, which governs when the papers to be lodged, is disapplied. When do the documents referred to in CPD 40.12 get filed, if at all?

The rules are simply silent as to other aspects. At the conclusion of the provisional assessment the court will "send a copy of the bill as provisionally assessed to each party". The rules do not elaborate on whether the court will simply annotate the bill with the reductions to be applied or actually perform the arithmetic to give a final figure. If the latter, expect some interesting calculations.

The rules allow for either party to request an oral hearing if they are unhappy with the provisional assessment. The pilot courts are obviously not going to encourage such requests but, at least initially, such requests must be expected when bills are either reduced by large amounts, or not reduced despite significant disputes, with no reasons being given. The rules allow for a request for the matter to be listed for full argument on "any aspect of the provisional assessment". This suggests that the oral hearing will relate only to the specific issues raised in the request rather than be a detailed assessment of the whole bill.

The request must be made within 21 days of receipt of notice of the provisionally assessed bill. This seems to create its own problems. At the end of a detailed assessment both parties may not be 100% happy with the outcome but may be content to leave things as they stand. Currently, if one party appeals any aspect of a detailed assessment, the other party can cross-appeal another aspect upon receipt of the notice of appeal. The decision to cross-appeal does not need to be made until the other side have first launched their appeal. A party who may therefore have been content to

leave matters as they were, may decide to cross-appeal only because of the appeal itself.

In relation to the pilot scheme, it seems that both sides must make their decision as to whether to ask for full argument on any specific issue within 21 days. (There is no provision allowing for requests out of time.) The other side does not need to be notified of the intention to ask for an oral hearing. If this interpretation of the rules is correct, a party may not discover until after the 21 days have passed, when it is too late to do anything, that the other side has asked for an oral hearing. This is particularly important because of the rules concerning who pays for the costs of the oral hearing. In simple terms, a party applying for an oral hearing needs to improve their position by 20% or more to get the oral hearing costs.

For example, party A seeks an oral hearing in relation to an issue where there is a chance that it will improve its position by 20%. If it was known that such a request was going to be made then party B might have requested a hearing in relation to those areas which it thinks it has scope for improvement on. However, if party B waits until it hears that such a request has been made by party A, it will usually be too late for party B to make a request on its own. Should it therefore make a request regardless just in case party A has made its own request? Presumably part B could withdraw its request if party A has not sought an oral hearing (although the rules do not deal with whether the request can actually be withdrawn).

Given the importance of securing a 20% improvement, the temptation will be to request a hearing in respect of as many areas as possible, where there is scope for improvement, if one is going to the cost (and risk) of an oral hearing. There would be nothing worse than obtaining an improvement of 19% and then regretting not also raising the issue of the number of letters to an expert witness allowed at the provisional assessment, which might have taken the figure to 20%.

The general rule as to the incidence of costs for the oral hearing is qualified by the time honoured “unless the court otherwise orders”. Yet more scope for argument. Receiving party A requests an oral hearing but makes an offer to the other side offering to accept a further 18% on top of the amount provisionally assessed. Matter proceeds to the oral hearing and the court increases the amount allowed by 19%. Is the court going to order otherwise?

The most worrying provisions, at least from a paying party’s perspective, are those that seem to govern the costs of the provisional detailed assessment.

CPR 47.18 and 47.19 remain in force suggesting that the costs of the detailed assessment proceedings are meant to remain within the discretion of the judge applying all the relevant factors. The most obvious factor is what offers have been made by the parties and whether those offers have been beaten.

However, given neither party will be present at the provisional assessment, how is the court meant to know what offers have been made and when? There is no provision in the rules for sealed offers to be filed with the court.

Section 3 of the new Practice Direction requires the receiving party to file with the court, when requesting the hearing, "a statement of the costs claimed in respect of the detailed assessment drawn on the assumption that (unless any of the following paragraphs apply) no party will subsequently request an oral hearing following a provisional assessment". The statement is referred to in the singular suggesting that it is only the receiving party's statement that is to be filed.

The concern is that the new rules have been drafted in such a manner that the receiving party will be granted their detailed assessment costs regardless of any offers made. Not only might this include significant costs drafting replies and the assessment fee, but this might also give a receiving party the costs of drafting the bill of costs notwithstanding the fact that the paying party had made a "winning" offer before the bill was even drawn.

Let's consider an example. The receiving party submits an informal schedule of costs totalling £20,000. The paying party makes a Part 47.19 offer of £18,000. The offer is rejected and a formal bill of costs is prepared that totals £20,000 in respect of the original claim plus £1,000 for drafting the bill and checking it. A 100% success fee is claimed on the drafting fee plus VAT (ie a total of £2,350 for the bill). The paying party prepares points of dispute (at a cost of £700). The receiving party prepares replies. The matter proceeds to provisional assessment. The receiving party files a statement of costs claiming a further £1,000 in respect of the detailed assessment proceedings and drafting the replies. A 100% success fee and VAT is charged in addition (ie a total of £2,350). The court fee of £600 is claimed in addition. The bill, so far as the original costs are concerned, is assessed at £17,000. Therefore, despite the paying party succeeding on the offer it made (before the bill was drafted), the receiving party appears to be automatically entitled to recover its costs of drafting the bill and the assessment costs – a total of £5,300 subject to reasonableness – and the paying party recovers nothing.

This interpretation of the rules is reinforced by section 9 which states:

> "If a party wishes to be heard only as to the amount provisionally assessed in respect of the receiving party's costs of the provisional assessment, the court will invite each side to make written submissions and the amount of the costs of the provisional assessment will be finally determined without a hearing."

This refers only to the "receiving party's costs" and suggests that the only arguments will be as to quantum and not as to the incidence of costs. It might be possible to use this route to reduce or even disallow the receiving party's costs in the above example but still leaves the paying party out of pocket.

The provision allowing either party to apply for an oral hearing "for full argument on any aspect of the provisional assessment" is of no assistance as it is appears to be concerned with the substance of the provisional assessment, not the costs of it. In any event, surely the courts are not going to welcome endless applications for oral hearings to argue about who should be liable for the costs of assessment.

This may be a misreading of the new rules but, if not, why would any receiving party not press a case to detailed assessment? If the judiciary expect this new scheme, in its current form, to save the courts time and expense they are likely to be in for a nasty shock.

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