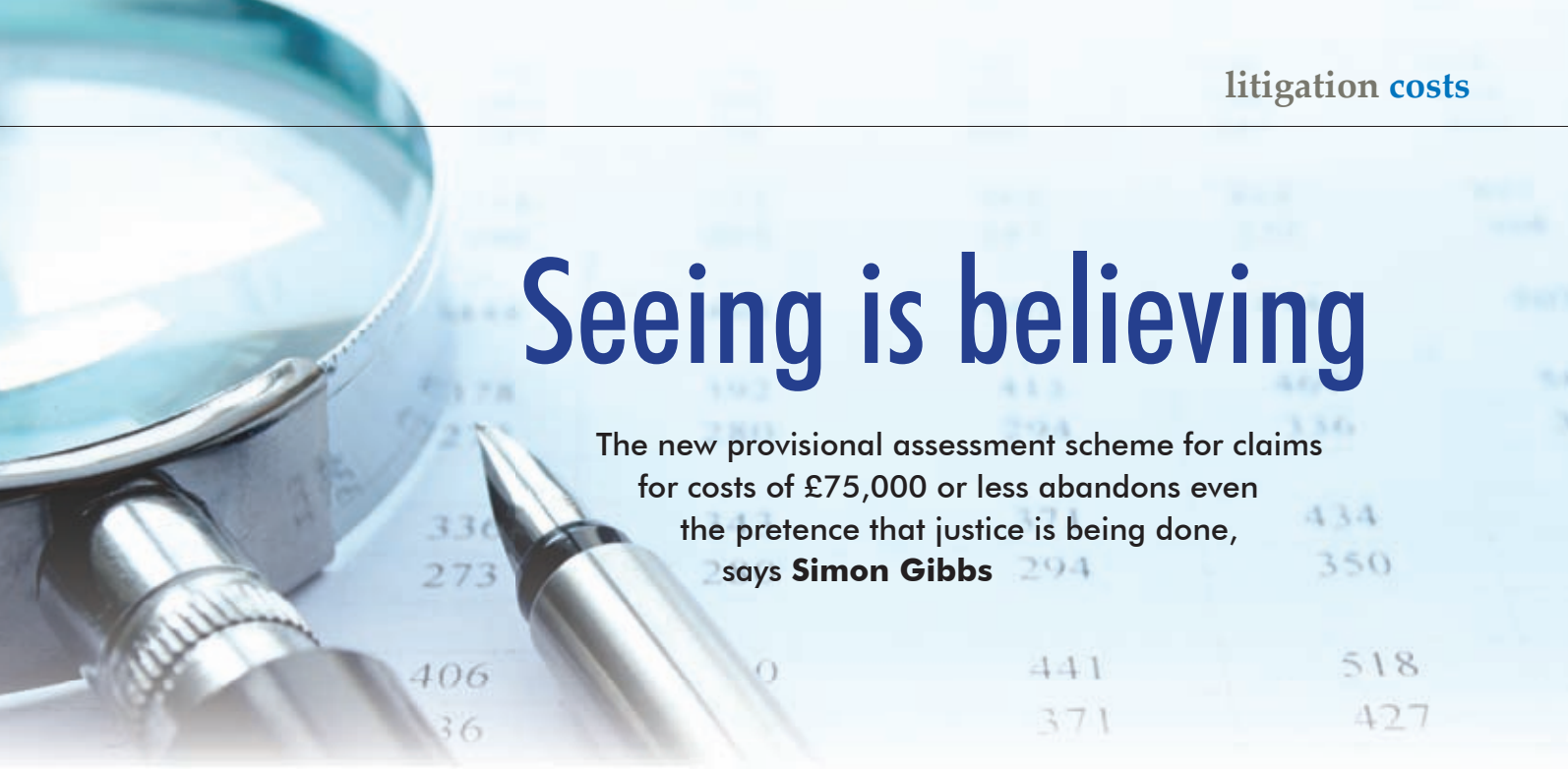

Seeing is believing

The new provisional assessment scheme for claims for costs of £75,000 or less abandons even the pretence that justice is being done, says **Simon Gibbs**

The Ministry of Justice has recently announced that, in an effort to control excessive legal costs, trials will be dispensed with in relation to civil disputes where the amount at stake is £75,000 or less. In addition, witness statements and expert evidence will not be allowed. A Ministry of Justice spokesman explained: "Experienced judges do not need to consider any evidence to decide on the merits of a claim and are more than capable of reaching a decision based on the pleadings alone."

Naturally, I am joking and you can imagine the uproar there would be if any such proposal was put forward.

Nevertheless, this is precisely what is happening in relation to the new provisional assessment scheme for claims for costs of £75,000 or less. The assessment is undertaken without any hearing and the papers to be lodged in support are not much more than the costs pleadings and the fee notes (although sloppy drafting has left some ambiguity as to what needs to be filed with the court).

Although parties unhappy with the outcome of the provisional assessment can request an oral hearing, the rule that the party requesting the hearing will be liable for the associated costs unless they improve their position at the hearing by 20 per cent or more effectively means that parties will be stuck with the outcome of the provisional assessment in all but the rarest of cases.

How is a judge on provisional assessment meant to consider the reasonableness of, for example, a £1,500 fee for a psychiatric report where the judge has seen neither the report nor the instructions to the expert?

There is a perfectly legitimate case to be made out for fixed experts' fees but this is not what is being introduced. The clue should be in the name: "provisional assessment". The judge is meant to undertake an actual assessment of what is reasonable but is expected to do this in a virtual total vacuum without any evidence to undertake that assessment.

"How is a judge on provisional assessment meant to consider the reasonableness of, for example, a £1,500 fee for a psychiatric report where the judge has seen neither the report nor the instructions to the expert?"

How is a judge on provisional assessment meant to consider the reasonableness of, for example, a conference with a medical expert and counsel where the judge has seen neither the instructions nor an attendance note of the conference?

Again, there is a perfectly legitimate case to be made out for introducing fixed recoverable costs across the board. This inevitably creates winners and losers in any given case but should create a broadly reasonable outcome on average if the fixed fees have been set at an appropriate level. Although the category of case subject to fixed fees is being extended, the provisional assessment scheme is designed for precisely those claims that do not attract fixed fees.

However, how can judges undertaking provisional assessment do anything other than impose an arbitrary tariff for certain categories of case in the absence of any evidence in the form of the solicitors' actual file of papers in front of them? Again, there would be nothing wrong with an open tariff system but this will be an unwritten one varying from judge to judge. This is not even comparable to the process of summary assessment. Firstly, summary assessment would rarely be considered appropriate where the claim for costs was as high as £75,000. Secondly, a judge undertaking summary assessment will have seen the witness statements, expert reports, etc and gained a reasonable understanding of the relative complexities of the case by the end of a trial and by the time the summary assessment is being undertaken.

Any legal system designed around justice does not simply seek to ensure that actual justice is done but also seeks to ensure that justice is being seen to be done.

The new provisional assessment scheme appears to have abandoned even the merest pretence that either of these outcomes is important.

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