

Possible change to costs system

Since Lord Justice Jackson published his final report on the future of civil litigation costs in January 2010 (Civil Litigation Costs Review – Final Report 2010), there has been a seemingly endless debate about if, when or how the various recommendations would be implemented. Jack Straw, the then Justice Minister, initially welcomed the report and said that the government of the day was ‘actively assessing’ the proposals. Following the change in government, Jonathan Djanolgy, the new Parliamentary Under-Secretary for Justice, announced, in July 2010, that October 2010 would see the start of a consultation process on a number of the key proposals and it was widely assumed that this would mark the start of the implementation process. Interspersed with these official announcements, there has been no shortage of comment from interested parties, solicitors, insurers, judges and others, all offering their opinion on the subject, both positive and negative, and the debate has continued to rage. As recently as August 2010, the Adam Smith Institute published a damning critique of the report, concluding that the key proposals were ‘impractical and unfair; they have not been adequately costed.’ (Access to Justice: Balancing the Risks August 2010). Against this backdrop, the 53rd update to the Civil Procedure Rules, implemented with effect from 1st October 2010 by the Civil Procedure (Amendment No 2) Rules 2010, quietly starts the process of implementation by introducing one of the report’s less controversial recommendations, the provisional assessments of costs.

Lord Justice Jackson’s report recommended:

‘The proposals for provisional assessment should be piloted for a year in respect of bills up to £25,000. The pilot rules should provide that where a party elects to proceed to an oral hearing, it will have to pay both sides’ costs, if it does not do better than the provisional assessment by a defined percentage (possibly 10%). It would be sensible to defer this pilot until after the proposed fixed costs regime for the fast track has been introduced (if my recommendations in that regard are accepted). I suggest that this pilot be carried out at one of the larger justice centres outside London, possibly at Manchester or Liverpool.’ (paragraph 5.17)

From 1st October such a pilot will commence in Leeds, York and Scarborough. The details are set out in a new [Practice Direction 51E](#) but, in outline, for any Detailed Assessment commenced after this date, any Bill of Costs where base costs claimed (that is profit costs plus disbursement) are no more than £25,000 will normally be assessed by way of provisional assessment, that is without an oral hearing. Thereafter, following notification of the assessment, either party will have the option, within 21 days, to request an oral hearing, subject to important provisions regarding the costs of the hearing:

- If the receiving party requests the hearing, unless the costs are assessed at more than 120% of the provisional figure, costs will be awarded to the paying party.
- If the paying party requests the hearing, unless the costs are assessed at less than 80% of the provisional figure, costs will be awarded to the receiving party.
- Where both parties request the hearing, there will be no order for costs if the final figure is between 80% and 120% of the provisional figure. If the assessment is less than 80%, costs will go to the paying party and if the assessment is more than 120%, costs will go to the receiving party.

The rationale for provisional assessment is clear and set out in Lord Jackson's report. Detailed Assessments take up judicial time and the costs of Detailed Assessment can be substantial. By removing an oral hearing from the process, it is hoped that both time and money can be saved. The scheme suggests that provisional assessment will take place within 6 weeks of the Bill being lodged at Court, a considerable improvement over the many months which can currently elapse before an assessment hearing can be listed. Furthermore, it has been suggested that the provisional assessment itself will take about 45 minutes, thereby freeing up considerable judicial time. However, what will be the reality?

The first issues to note are how the actual scheme has already deviated from the recommendation. Firstly, Lord Jackson recommended that the pilot should be introduced after the implementation of a fast track fixed costs scheme. As with the whole report, Lord Jackson was at pains to stress that his recommendations should be implemented as a whole, not piecemeal, and it was on this premise that the whole report was built. It is safe to assume that had this recommendation been followed, the number of assessments which would fall for provisional assessment would be considerable reduced. As it is, the number of bills which will now fall into the process will be considerable, particularly when one considers that Lord Jackson suggested a figure of £25,000 as the limit for the Bill to be provisionally assessed and by changing this to £25,000 for base costs only, the implemented scheme will catch many more Bills. For example, if one adds a 100% success fee, a £50,000 ATE premium and VAT, a Bill in excess of £100,000 could easily fall into provisional assessment.

It therefore appears clear that the number of cases eligible for provisional assessment will be substantially higher than that envisaged by Lord Jackson. In addition, under the traditional detailed assessment process, the proportion of cases that actually proceed to a final hearing is very low. Receiving parties want their money sooner rather than later and this means that they will, wherever possible, prefer to reach a negotiated settlement rather than wait many months for the Court to assess their costs. Similarly, paying parties, primarily due to the substantial potential costs of an assessment hearing, will normally prefer to settle matters by way of negotiation. Paradoxically, the very evils of the current system, delay and cost, actually act to encourage parties to avoid assessment hearings wherever possible. With provisional assessment, the situation is very different. For a receiving party, knowing that an assessment will be done within 6 weeks may make it more likely that they will take their chances with an assessment. Similarly, paying parties, saved from the crippling costs of an assessment hearing, may well take the view that they may as well have the costs assessed – nothing ventured, nothing gained. As a result, many cases that previously would have settled by negotiation may end up being provisionally assessed. Whether the overall effect on judicial time of more assessments but each one taking less time will be positive or negative is open to conjecture.

Furthermore, how long will the actual provisional assessment take in any event? The judge will have to consider the file of papers, the Bill of Costs, the Points of Dispute and Replies, before going through every item in the Bill and assessing the same. In addition, issues as to the validity of the retainer, any CFA, proportionality, the reasonableness of any success fee, the level of the ATE premium, costs estimates, conduct; all will have to be considered before a proper assessment of the costs can be undertaken. Bearing in mind that the parties will not be present, it is safe to assume that the Bill of Costs, Points of Dispute and Replies will have to be considerably expanded to make sure that a party gets across all potential arguments in their favour. Case law will be cited at length, verbatim authorities quoted and every conceivable issue taken by the paying party. The narrative to the Bill of Costs will mutate from a brief summary of the case to a detailed description of every step taken by the successful party, so that the judge can fully appreciate the work that was needed and the prolix Points of Dispute will necessitate equally prolix Replies. It is difficult to imagine how a judge, even without having to hear submissions from the parties, will be able to deal with the same in so short a time. Following on from this, will the outcome of the assessment be reported back to the parties as no more than a final figure or will the Bill of Costs be marked up with every item assessed individually, every preliminary point ruled upon and reasons given? It is difficult to imagine how it could in the time available but, if not, how can the parties make an informed decision as to whether the assessment was reasonable or whether the basis on which any technical or legal challenges was decided was correct? Natural justice demands transparency in any legal system and it is difficult to see how this will operate within the scheme.

In summary, one can easily see the basis for the pilot scheme. It is, presumably, perceived as a modest change which is relatively self-contained and the intention to save judicial time and the costs of detailed assessment are admirable. However, as Lord Jackson stressed, the system of costs is a complex web and it is difficult to change one aspect of the system in isolation. Will judicial time be saved? Maybe has to be the best that one can answer but, maybe, the reverse will be the case. Will the costs of assessment be reduced? Well, the costs of attending a hearing may be avoided, assuming an oral hearing does not follow the provisional assessment, but this may very well be outweighed by the increased costs of expanded Bills, Points of Dispute and Replies, not to mention the higher proportion of cases that may go to assessment, thereby increasing the overall amount of money spent on assessment of costs throughout the system. In conclusion, the scheme is a pilot, so one hopes that all such issues can be examined as the pilot develops. However, at this stage, any assessment of the merits must be considered provisional.

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Citations:

CPR Practice Direction 51E – County Court Provisional Assessment Pilot Scheme

http://www.justice.gov.uk/civil/procrules_fin/contents/practice_directions/pd_part51e.htm