



Impact of the Jackson reforms: Some Emerging Themes

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1. What problems did Woolf diagnose and what was the remedy

Woolf diagnosed a number of problems in the civil procedural system of which delay and expense, were the major difficulties. The Woolf reform effort and the civil procedural rules that followed, pretty much on all fours with his proposals, were directed to the management of cases. During the course of the enquiry research and discussion was directed to the question of costs and, in particular, substantial effort was put into the possibility of introducing fixed or predictable costs as a means of constraining activity, particularly in the fast-track, to enhance proportionality. These cost proposals were not carried through to any great extent into policy by the Civil Procedural Rules (CPR). Lord Woolf's belief was that effective case management and rationing of procedure in the fast-track would create downward pressure on costs.

In fact a combination of forward loading implicit in the Woolf objective of avoiding litigation by early settlement and the impact of recoverable conditional fees, and the satellite litigation surrounding their introduction, created opposing pressures which tended to increase costs.¹ Effort by the Civil Justice Council (CJC) through industry mediation, ameliorated many of these problems. However, a decision was made to ask Lord Justice Jackson to revisit the unfinished work of Woolf in his review of civil litigation costs.

2. What problems did Jackson diagnose and what was the remedy

The paper that Lord Justice Jackson presented to the CJC Cost Forum on the 21st of March 2014 sets out in detail his brief; objectives and diagnosis and they are not repeated here. However, the following points may be helpful to understand the reasoning behind the themes that emerged during this research and/or the information offered by interviewees and analysed from documents.

a) The Cost Review was promoted at a time when many observers felt that the heat have gone out of the cost war and that the reforms introduced by the CJC, whilst far from comprehensive, did seem to have reduced the pressure for further changes. However, the Master of the Rolls and the government felt that the costs of litigation were escalating and that effort was required the changes to be made in order to promote access to justice at proportionate cost.² Whilst, the Woolf reforms had not curbed excessive costs, at the time of setting up the Jackson review there was not, apart from some egregious examples, any generally accepted research evidence that costs were escalating out of control. To that extent, and to this observer, the setting up of the review was somewhat of a surprise. However, it was certainly true that in some areas, particularly personal injury practice, the payment of referral fees as a mode of acquisition of cases was viewed by many as unsatisfactory. Without making any particular point at this stage the evidence disclosed by this research does not address the question as to whether referral fees are a "good" or "bad" thing (as it was not part of the brief) but does canvas the question as to whether the banning of referral fees has been effective in reducing the cost of doing work, particularly personal injury work, or has been replaced by other acquisition costs.

¹ 'The Management of Civil Cases: a Snapshot' (with Professor Mary Seneviratne) *Civil Justice Quarterly*, vol 25, July, Sweet & Maxwell, 2006, pp 312-326.

² 'In some areas of civil litigation costs are disproportionate and impede access to justice. I therefore propose a coherent package of interlocking reforms, designed to control costs and promote access to justice'. From the introduction to the Final Report.

b) Certain "headline features" of the Jackson reforms have been particularly examined in this research either as part of the standard initial questioning of interviewees or issues raised by interviewees. While only certain parts of the raft of reforms have been canvassed this reflects the current attitudes and interests of practitioners one year on from introduction. No doubt other issues, which have not been a central interest to these interviewees, nor which have emerged from an analysis of other evidence, may well come to the fore in the future.

c) These 'headline features' include the tougher enforcement of rules and orders; the issue of proportionality and the trumping of necessity by proportionality (i.e. reversing *Lownds*); fixed costs; cost management (budgeting); the abolition of recoverability; referral fees; the introduction of QOCS; and the introduction of DBAs.

3. Changes in the legal environment

Changes in procedural rules do not occur in isolation. They reflect and in turn are influenced by changes in the economic cycle and wider society. This includes lobbying and media interventions by institutional and commercial organisations and businesses operating within the litigation space. What is of particular interest in relation to the background to the Jackson changes is the actual and potential competitive influence of the development of ABSs and what might be called quasi-ABSs. By this is meant that not only are legal service providers becoming full corporate bodies providing direct services to the public but also that traditional law firms, particularly in the commodity market in personal injury work, are increasingly presenting a branded face to the market. This process appears to be increasing at a pace. The relationship between an individual client or prospective client and an ABS or quasi-ABS goes beyond the scope of this research but it is bound to increasingly impact and is likely to change the professional service relationship which has been a feature of this area.

The immediate impact on this research is that in attempting to make contact with lawyers active in the relevant fields (other than those already known to the researcher) difficulties emerged in attempting to get beyond the outward branded face of the legal service provider (with one particular exception where an ABS was extremely helpful). The traditional way of researching this area is to identify a firm with a list of partners and target a particular partner in the relevant practice area. In ABSs and quasi-ABSs individuals are rarely externally projected with a focus on the brand image. It has been surprisingly difficult to get beyond the call centres, which 'protect' and form the interface with these organisations and the outside world, to try to make contact with individuals. Whilst, the travails of a researcher are not of serious concern this does raise the issue as to the whether the relationship between citizens and lawyers, which has been largely on a personal basis, may be increasingly less so. This, of course, raises issues beyond the range of this report, but is perhaps something to be considered in future tests of opinion amongst the profession/legal service providers.

4. The nature of this research: what this research can and cannot do

The results of the research are triangulated from:

- a) Relevant extracts from the professional press during a period 2011 to date
- b) Internal documentation and submissions to the CJC.

Lengthy semi-structured interviews (face to face and by telephone) with 15 subjects. (The number of people actually interviewed, was part of a larger number of people who were approached) during a period from 15th February 2014 to 7th March 2014.

- c) The areas of practice were commercial (with an emphasis of work for SMEs); personal injury and general practice for individuals. It was hoped that there could be input from interviewees in the housing area (particularly disrepair) but the response to requests in this area was very limited. Given the time available this aspect could not be pursued further. These interviews have been recorded, transcribed and checked for accuracy. All information is held confidentially and any quotes used are anonymised.

The resources and time scale for this research was short. Additional information was acquired when further submissions (particularly organisational submissions) became available in the lead up to the Cost Forum on the 21st of March.

This research is qualitative in nature. Its results are not capable of being generalised, as a large scale randomised survey, can be. However, it is capable of demonstrating the key *attitudes* of a range of litigators. (Shortage of time meant that wider interest groups including the judiciary; insurers and clients were not interviewed). This attitudinal snapshot demonstrates:

- a) What areas of change are practitioners are currently concerned about?
- b) Their attitudes to these specific areas

The original semi-structured interviews followed a format of initial questions largely derived from the concerns raised and reported in the Jackson reports and in the professional press. Each interview was supplemented by additional questions which were practice area specific. As successive interviews took place the questioning became more focused as similar responses were offered. It was noticeable that within practice areas subjects views were quite similar and whilst this is not offered as evidence of generalizability it was quite noted.

5. The research questions

The interviews were carried out with a focus on cases for individuals including personal injury cases; clinical negligence; contractual; consumer; housing and welfare **and** lower value commercial cases for SMEs.

The questions were focused around two specific areas as set out by the CJC:

1. The impact of the reforms on cases being taken on by lawyers before and after April 2013 and the implications of this for access to justice.
2. Some initial insights into how the CJC could build a picture of the type and number of cases dropping out of the system, and the implications of this for access to justice.

6. The results: some initial comments

This researcher has carried out qualitative research, largely into attitude to proposed and actual changes in the litigation process, amongst lawyers for nearly 30 years on a reasonably frequent basis.

This experience leads to certain general conclusions:

- a) Whilst the image of litigators might be that of aggressive risk takers in fact in relation to changes in the procedural and financing environment, they tend to be quite conservative. It is unsurprising that when faced with an alternative between, say, a true and tried method of financing and a new method, many will add here to the old method when given the choice.
- b) Many litigators tend to be unprepared for changes for two reasons. Firstly, until the new rules are promulgated and appear to be settled then they take the view that investment in understanding and preparing for the operation of the new rules may be wasted.
- c) Some litigators (none interviewed in this research) tend to be a little like rabbits in the headlights and find it difficult to respond to change and gear up to a new environment. Some firms do not have the capital base or business acumen to respond effectively.
- d) Taken together, there is a tendency among some litigators (again none interviewed in this exercise) to believe that the changes mean that the sky is going to fall in, and it takes some time for them to become reconciled to major changes.

This picture was certainly more common at the start of the Woolf reforms. The characterisation above is less common now. Many litigation firms and practices are much more business-like and savvy than they once were, and therefore more capable of dealing with change effectively and this is demonstrated in the fieldwork and many of the submissions. This was also demonstrated at the Cost Forum which was marked by a highly constructive attitude by the participants. However, there is some evidence in the professional media and submissions to the CJC of concern about the fact of change itself rather than the detailed change and its overall implication. Equally, and importantly there is a widespread, legitimate and honest focus on clients' needs and access to justice throughout all the research results.

7. It's too early to say

A common feature of changes within litigation practice, is that there are more lags than leads in the response to change. This is particularly noticeable in the Jackson reforms as expressed through the Legal Aid Punishment and Sentencing of Offenders Act 2012 (LASPO). The elimination of recoverability, particularly of the ATE premium, produced a well documented spike in cases taken on in the months leading up to April 2013. These cases are still working through the system and will represent a substantial part of the case loads of many litigators. The change to new methods of financing and court control, such as cost management, have in turn, grown in practical importance during the last year. The effect is that in a survey of attitudes, it is important to recognise that some attitudes to the changes may be quite newly minted and not yet settled down.

8. Comments on the Number of Cases in the System: the Funnel Narrows

The number of cases which come through the door of solicitors' offices may well be the same as they were prior to April 2013. This does not mean the same number of cases will get as far as actual instruction and then proceed to initial letters of claim or initiation of protocol activity. In a risk managed system a certain percentage will be sifted out because of difficulties over proof, quantum or financing. Some interviewees suggested there may be attempt to test the waters in some weaker cases by putting them into the portal and if a defence is raised not proceed further. These cases are likely to be relatively rare and becoming rarer: the funnel is narrowing.

Any changes in gross numbers of *instructions* after April 2013 should be judged against what some stakeholders and the government have suggested is supplier led demand in this area. This was certainly the rationale behind banning referral fees and, it is suggested, explains the reduction in predictable costs in RTA which bears a striking similarity to the anecdotal figure of the costs of buying cases through paying referral fees to introducers such as claims management companies; breakdown services; body shops and defendant insurers. Is there any evidence of supplier led demand?

- a) There are certainly cases which have been generated by the recoverable fee regime. This was of course unsurprising as the rationale behind the Access to Justice Act was to extend access to those unable to use legal aid and to replace legal aid in key areas by recoverable CFAs ; intended to hold a claimant harmless in the same way as legal aid.
- b) There certainly have been fraudulent cases generated by the recoverability regime, generally described as 'cash for crash'. The number of those cases is highly contested, but it is possible that there are more of these cases than they were before the recoverability regime was introduced.

c) There is no reason to think that the number of actual incidents which could lead to recovery, i.e. the number of trips and slips, are influenced to any great extent by the marketing or acquisition activity of solicitors. What may be happening is, just as in the National Health Service, an attempt to look for work reveals previously undiagnosed cases which are then being dealt with. Contrariwise, in the commercial area there has been little attempt to generate cases by aggressive acquisition — referral fees seem to be effectively non-existent. The normal measures of market penetration by free educational activity and a high profile still prevail. Commercial litigation volumes continues to be subject to the vagaries of the economic cycle.

d) The banning of referral fees may have been intended to reduce the numbers of cases 'attracted' into the system. However, the interviews and submissions did not suggest that there has been a return to the pre-Access to Justice Act business model of modest advertising and referrals by recommendation rather than payment. Acquisition and acquisition costs are still the watchword with effort directed into targeted advertising and franchises of various kinds. As such the elimination of the 'referral fee' target figure from costs does not eliminate the need to spend something of the same order in acquiring cases. No doubt economic efficiencies will be driven in. No doubt new business models will emerge and call centre technology and cost saving will be increasingly utilised. No doubt firms attempting to preserve market share by over-promising ('We will never take your damages') will find this increasingly difficult. It is enormously difficult to speculate whether the effect of these changes will be to reduce the number of cases in the system or to generate acquisition costs from clients' damages or from firms' bottom line without substantially reducing the gross number of cases in the system

The key factors in determining how many cases get through the funnel will be what happens to acquired cases once they are subject to the effect of the abolishing of recoverability and the reduction of recovered costs inter-acting with the caps. There is bound to be more risk aversion by firms as the reward for taking on cases effectively reduces.

... expressions of interest from the public coming in probably stayed the same but firms are far more risk averse... in the old days you took it on. In the old days (would have taken on) probably about forty per cent of enquiries....If it looked OK you took it on. If it was fifty one percent you'd give it a run. These days it's a completely different scenario...Sixty per cent minimum. (And how many of those would you expect to turn into a settled case for the client?) High percentage of that. Of that probably eighty five per cent. (Now) We'll now take on less because there's no ATE in reality.. and there's no success fee to help pay for the losers. No war chest. So instead of fifty-one per cent risk I wouldn't look at it unless it was sixty per cent and that's pushing it ... that's me being brave. (personal injury litigator)

This approach comes from personal injury practice; it is matched by comments in every practice area where individuals bring claims and in some areas, such as clinical negligence, the situation is likely to be even more tight. Cases which would have been taken on the balance of probability test will not now be pursued. On this analysis QOCS is important but not fundamental: the terms of trade have altered against risking *the firm's capital* on cases with a higher risk profile. Although, non-commercial clients will be expected to share damages it is not likely they will offer to pay their lawyers if the case is lost. This would take the situation back to pre-recoverability with contributions to legal aid and would require a real culture shift after many years of recoverability and clients being held harmless. In terms of the first research question: 'The impact of the reforms on cases being

taken on by lawyers before and after April 2013 and the implications of this for access to justice' there will be fewer cases taken on; many of which would have formerly led to a settlement. The extent to which this represents a loss of access to justice is a policy question, beyond the brief for this research but let there be no doubt that fewer cases will be taken on.

9. Damage Based Agreements (DBAs). A Damp Squib

As a long time promoter of the advantages of contingency fees³ it gives me no pleasure to report that DBAs appear to be like the Yeti: they are believed to exist in practice but hardly any sightings have been made.

*I don't know any solicitor in my profession that does DBAs.
(personal injury lawyer with extensive contacts)⁴*

The reason why DBAs have failed to take off so far to take off are complex.

a) There is some ethical resistance to the idea of the charging model being based on a claim to a percentage of the client's damages from both personal injury and commercial litigators. This is quite separate to other issues such as concerns about the regulatory regime and a risk management model that finds low value claims unattractive: the game is simply not worth the candle.(Of course, the caps exacerbate this).

We haven't offered DBAs in our cases.... I think we have slight concerns over the sort of nature of the ... arrangement in that there is a ... certainly I perceive there to be conflict in advising your client what their damages are and what is the percentage that you're taking ... and .. you know.. generally we think they aren't necessarily economic in terms...of what the client ends up with at the end.(personal injury litigator)

I've never actually...had one ... I think the uncertainty as regarding how it works.I think to give up their damages when they're uncertain in any event is quite a big ask of most clients .. to just give up a percentage of their damages as a way of paying for a case. I don't offer DBAs and ... I like to be able to say to my client the bill is likely to be X because we're spending this amount of hours and this is the work that's required. I like that. I'm not comfortable with the principles of DBAs and I don't particularly like the idea of them. So I tend to offer discounted CFAs...I'm not a big fan of DBAs or contingency fees. (commercial litigator)

b) The latter quote was typical in suggesting that a DBA offer was unattractive and a now familiar CFA model was preferred. It looks like DBAs cannot live alongside CFAs at present. Although, both are useful: one squeezes out the other. The relationship seems similar to that between pre Access to Justice Act 1988, legal aid and non- recoverable CFAs. Prior to recoverability, a client with a high contribution (vulnerable even if the case was won because of the operation of the law society charge in respect of unrecovered costs) might be better off accepting deduction from recoverable damages on a no win no fee basis. The argument was that the lawyer could well be more motivated and the legal aid bureaucracy could be avoided. This argument advanced by this researcher during the period achieved very little success and appeared to have no practical impact.

³ 'What's Wrong with Contingency Fees?', *Nottingham Law Journal*, 10(1) (2001), p 22.-46

⁴ All quotes throughout this report are edited as indicated for comprehension and to protect anonymity

c) There appears to be concern amongst some litigators that there are problems of enforceability against clients. This does not appear to be correct in respect of a straight forward DBA i.e. a contract to charge the client costs up to the cap and within the indemnity if the case succeeds, relieving the client of this charge pound for pound as costs are recovered from the loser (the Ontario model). Whilst, not an exact analogy (as there are rarely adverse costs) the long history of DBAs in the employment tribunals suggest they are enforceable if compensation is recovered without significant difficulty.⁵ Perhaps, commercial and personal injury departments need to talk to their colleagues in their contentious employment departments.

However, there is clearly a problem around issues of termination and transfer of DBAs which appears to be a matter of widespread concern: no one wants to end up in dispute with their own client.

There is a significant anxiety still .. amongst the commercial litigators that I understand and .. and counsel I've spoken to about the unenforceability and issues around the sort of standard DBA agreement The big risk at the moment is ... I think there's a problem over the termination provision. (commercial litigator)

d) Irrespective of whether DBAs are objectively simple from a regulatory point of view they are certainly not viewed as such. The consensus is that the new diet of financing options is difficult to explain to clients:

This was across the board in our sector of the profession, nobody you know... (who had)...been on courses on with it and discussed with other professionals in other firms, no one had a clear idea in relation to it .. the DBA. We took the view that it was just better for the client if it's dealt with on a CFA basis if possible. .. the rules were not clear... is the general consensus. And to answer your earlier question I'm not aware of other people offering DBAs in PI or clinical negligence... going to great lengths with formula to advise what might be the case if it's CFA, what might the case if it's DBA but all that is dependent on what you might recover. You try (to) predict what a client might recover in a complex PI or a complex clinical negligence matter on day one and you're into dangerous territory. (So you're saying it's hard for the professionals who do this for a living to understand it and incomprehensible and impossible to explain to clients?) Yeah. (personal injury litigator)

This concern might be allayed if there was a generally recognised and 'signed off' standardised set of DBA contracts to act as a reassurance to the profession. However, this appears to be unlikely at present as the Bar in their submission stated that, in their view, the regulations were flawed and they could not recommend barristers to sign up to DBAs.

e) There is concern about a yet untried model being introduced into area such as personal injury where the history of the 'Cost War' is well remembered. As will be remembered this conflict between payers and receivers of costs following the event was distinguished by payees being threatened with loss of *all* their costs rather than trimming the quantum. As well as being conservative litigators have long memories and no one wants to be the first to have their DBA challenged. Whilst, the potential to challenge DBAs by payers is intended to be very limited and, in the light of the recoverable CFA case law, unlikely to succeed no one wants to be first into the arena.

⁵ On the rare occasion that a claimant in the employment tribunal recovers costs *and* has instructed a lawyer on a DBA an argument has been raised in the past by potential payers that there is no indemnity to be satisfied and payment has been refused.

. But actually what came past with the DBA regs was so utterly disappointing and frustrating ... it turned out worse than ...even....before they were...permitted. The (DBA) regulations have all the old hallmarks of the CFA regs 2001. So if you don't(have) an 'l' right or a 't' crossed it will fall over. And don't forget in this case...you've got real client detriment where...on the 2000 CFA regs.. you just had a wheeze by defendants to avoid being paid. (general litigator and cost lawyer)

...if you think back to what happened in the first four or five years of CFAs and a lot of firms were scarred by that and I don't mean that disparagingly. There was some very difficult litigation around CFAs such that you know left a lot of firms feeling, I don't want to go through that again. And here you are with a new ... tool where there's been a fair bit of commentary in the legal press it not operating in a desirable way or having some doubts about it.. why would you use it unless there is a good business reason? if you're reasonably sophisticated about how you create a CFA.... we may have talked about this before... you can do pretty much anything a DBA would do more easily and in a space you're familiar with. (defendant personal injury lawyer)

- f) A feeling that the reward bearing in mind the pound for pound reduction is simply unattractive.

Two reasons really (for not doing DBAs). One the costs offset in that you're no better off, there is no additional fee in reality. Low value costs you know when.. our average damages we work on about two, two and a half for the fast tracks. Obviously you do get high ones but that's the average. And whatever we get off the client would effectively on that amount would be wiped. So we get no additional benefit whatsoever on the vast majority of the files that we'd have. Where on CFA because you get that in addition you actually get to keep the... just over twenty per cent of the success fee once you've took the VAT off in addition to whatever costs you get. So on the CFA model you get whatever costs you get back, fixed fees or portal costs or whatever it is.. plus effectively twenty per cent of the damages. So you get both. On the DBA model you would only get your recoverable costs. You effectively get no benefit whatsoever from the success fee element. (personal injury litigator largely practicing in the fast track)

Where the claim is promptly settled with limited work done recovery of a success fee might be regarded as a windfall to the claimant litigator. However, this will be a rare situation and helped to form the war chest for the unsuccessful cases. The reward in these cases is now much less attractive.

- g) The converse of the lag before litigators get used to a new procedure is that once they and their clients become familiar with it they are reluctant to displace it with something new to get used to. In commercial work it seems that after a decade there seems to have been a developing interest amongst clients in CFAs based around a recognised model of hourly charging. As yet there has been no real demand for DBAs from SMEs pursuing commercial claims. Allied to some suspicion by clients and litigators of a model that takes their damages it seems that the attractiveness of CFAs albeit without recoverability will be difficult to shift.

well I don't offer DBAs...I like to be able to say to my client the bill is likely to be X because we're spending this amount of hours and this is the work that's required. I like that. I'm not comfortable

with the principles of DBAs and I don't particularly like the idea of them. So I tend to offer discounted CFAs or on occasion no win no fee agreement...(commercial litigator)

I think there's three things (against DBAs). There's the fact that the .. that the ... success fee isn't recoverable because in practice I know that it would be very difficult to get a success fee out of a client... even you know even if we win because they will forget ... or won't care... about the risks that ...the risks that we took. Secondly the fact that there is.. that the insurers' premiums aren't recoverable means that the whole deal is less attractive to a client. And ... the third reason... that the CFA the success fee(in commercial litigation) is capped at fifty per cent. Well that that that makes it far less attractive to us because if we were running cases you know.. borderline cases and and claiming and able to justify one hundred per cent success fee ... obviously that's very different from a fifty per cent success fee. You know ... it means it means that under the old regime we could ... we could lose ... one in two cases ... if we're doing them on a one hundred per cent success fee whereas ... we can't now. Well I mean it's not simply not right to suggest that the risks in commercial litigation are only twice as much as .. the rear end shunt.

(commercial litigator)

I think we find it very difficult now to sell our services to clients who rightly or wrongly are very ...have a very little understanding of LASPO. Everyone still thinks we could do CFAs, no win no fee, no cost to client. As soon as you mention that you know success fees might be coming out of damages for example or if it's not a damages based claim they would have fund it .. it .. it sounds like a foreign language to them. There still a lot of turn off in the market place around that. (commercial litigator)

The research identified one solitary enthusiast or, perhaps, realist:

.. we're in a world of competition much more than we've ever been in the past and and.... I think the interest will come quite possibly from clients saying.... “.. I have this litigation case but I'm going next door with the DBA. Are you going to do one here?” (Have you seen that yet?) No. (commercial litigator)

h) 'Not our costs.'

One extremely experienced personal injury litigator stated that the difference between costs recovered under a CFA and a DBA was that in the latter case, the recovered costs were 'not our costs'. Of course, from a technical point of view recovered costs have never been the solicitor's, but have always been the client's. What is being stated in this quote is that in a profound way the lawyer operating under a system that the defendant will pay in most cases, despite all the problems, now look to the client to pay. Thus the pattern in personal injury, the pattern for many years, will stop. Liability insurers are used to pay lawyers. Clients are not.

- i) One interviewee raised a potential difficulty arising between client and lawyer in the DBA space.

And also running the risk of...unless you know and trust your client very well they could do a deal behind the scenes...you may never find out. (commercial litigator)

The scenario here is that during a mediation the client on a DBA reaches out to the opposing party and 'swaps' damages for a commercial advantage such as a long term supply contract. The cap would now bite on a smaller sum. This type of risk might be possible in, say, personal injury when an insurer directly contacts a claimant with an offer but would be much more likely in the deal making arena of commerce. How far this is a 'real' issue and not avoidable by solicitor and client terms would need to be explored. The issue is one of perception and concern in a new arena.

- j) Finally, in the light of the comments above about conservative litigators we must not forget conservative clients. At the start of any new initiative there will be a tendency to cleave, if at all possible, to more familiar territory:

I think some of my commercial clients would entertain DBAs if I'm honest but most of the them.. most of them most of the time want to know precisely what the hourly rate is, how much time you're going to spend on it. And it's just easier with a commercial client to have that kind of conversation with them. I'm sure there are certain matters which would lend themselves to that kind of hybrid or even to just a general DBA. But most of my commercial clients .. businessmen, they just want to know how long you're going to spend on the matter. And it's much more transparent that way... that's why as a matter of principle I'm comfortable with it .. I'm sure there are circumstances where my client base would say, we'll go for a DBA instead but most of them, the vast majority just want an hourly rate (commercial litigator)

.. we're very flexible on fees. We do lots of fixed fees now. We do lots of discounted rates and...for blocks of work we'll look at the discounted arrangements the Discounted CFAs whatever.. but one matter where I looked at them fairly recently, put a proposal to the client and they weren't interested. They just wanted... they said it was too complicated.. They just wanted a fixed fee for their work. (property litigator)

Of course, there is an element of chicken and egg here. If lawyers aggressively market new financing models to their clients they will generate interest. However, for all the reasons outlined above such a marketing charge seems unlikely.

10. The relationship between DBAs and CFAs & fixed costs: a hybrid solution?

... what folks anticipated with the DBA regs.... would be you would have a pot which could comprise some element that you get paid in any event... nobody thinks you can do that under the currently worded regs. You would also win the case and the worst you were required to do would be paid by the other side... obviously basic costs only but that would also go into the pot ... And then the DBA percentage was really a success fee for taking the risk. So you got your basic costs from the other side and you got your DBA percentage on top of that. ..it was a sort of hybrid that they talked about in some of the city firms.. some element of payment by the client...at a discounted rate or a fixed fee or whatever. None of that is permissible unless you take a very very bold view of the regulations. ..(general litigator and cost lawyer)

If DBAs simpliciter are unattractive the same cannot be said for a hybrid model incorporating, as appropriate, different charging approaches, such as fixed fees followed by a DBA or CFA related to different stages of the dispute resolution process and different risk profiles:

I think they...would be better if you could at least split the risk with the client and have a hybrid so again with the CFA so you can recover part of your fee it would limit the risk on a solicitor's firm. I mean some firms can't take that risk. So.. you know a lot of firms aren't big enough to take the risk of losing too much money.. so the fact that you can have a hybrid allows you to .. to spread the risk doesn't it? I think the same with the CFA whereby you can simply say to somebody, I'll put part of this on...to the DBA but for half of our time we would bill you at a normal rate. So in other words fifty per cent of our charges will be billed whether we're successful or not.. the other fifty per cent we would recover if successful as a percentage of your damages. (clients would find that attractive) because I think they would be giving up a smaller part of their damages.(So the risk would be spread out more between you and the client?) Exactly. (commercial litigator)

I think I could certainly see the merit of that going back to the CFA world because that's almost invariably on a commercial case ...that's how we did it. Someone walks in the door and says, "Can you do this no win no fee?" in a .. in a commercial matter we'll more often than not say, "Well actually we don't know yet. We need to dig into it much deeper. We need to do that initial work." So very often we'd have somebody where someone would be charged on an hourly rate probably up to a certain budget and then say, "Look we've done that. Now we'll analyse whether we can do it on a CFA"... that's what you'd need on a similar type of commercial case. (commercial litigator)

I .. know there (is) some uncertainty about hybrid DBAs. I think there's probably a potential in the market place for ...for some sort of hybrid scheme which would be.. which I'm guessing would be a bit like the sort of discounted CFAs where lawyers get something but share a bit of the risk ... and that's where .. that's where firms ... not us... but firms generally seem to be at in terms of offering discounted CFAs before the change ..to the rules... if there was some sort of equivalent to that which encompassed a DBA then I could see that possibly having some attraction in the market place... and when that happens we'll think about it again. All I know is that there's a doubt as to their enforceability .. and as soon as I hear and read that I think, right. Well we're not going there (commercial litigator)

.. the discounted conditional fee was a real a real win for clients. And where we would have taken it I think is really looking at packaging a product where it would have been a fixed fee DCFA. So we would (have) given the clients certainty that the most we're going to take on this is (a) thousand for fees or hundred for fees or whatever and that would align with us our clients because we want a success as much as they did. From a client care point of view you never had any issues over delay, costs on a CFA or DCFA basis because everyone's interests were firmly aligned. (commercial litigator)

The quotes above demonstrate the absolute consensus amongst commercial litigators interviewed and in the professional press and journals. Of course, not all SMEs are run by captains of industry but business people are more likely to be familiar with the management of risk and able to negotiate robustly. The growth of mediation in commercial disputes reflects the same balance of knowledge and interest. Can mediation risk manage the down side costs? Can mediation make the cake bigger and help all parties come away from the dispute with at least a half smile on their face? If we believe that SMEs can and do understand the mechanics of mediation and increasingly see the advantage of it why cannot they be allowed to engage in a similar process with their own lawyer?

There is no similar groundswell of opinion amongst personal injury lawyers. There would be a difficulty that some 'one off' clients, unfamiliar with litigation and finance, would struggle to understand a hybrid arrangement. The Jackson proposal that third party advice should be compulsory in setting up a DBA would assist but of course it has not been carried forward.

If hybrid arrangements were limited to commercial cases, broadly described, they would be popular and would drag up on their coat tails the use of DBAs. There seems to be no cogent reason why they should not be introduced. There is no similar groundswell of opinion amongst personal injury lawyers.

11. Future for ATE

Why...not many of these sorts of cases (commercial disputes for SMEs)(were not) taken on conditional fee agreements is an interesting question. One of those problems was actually difficulties in obtaining those insurance policies.. in our experience that there was a clearly established and mature market for PI and we did very little PI work.. There are other areas where there was also quite an established market such as professional negligence claims.. Never quite saw that mature market in general business disputes. the thing I perceived was that CFAs and ATE policies worked well where your proposed defendants was an insurance company because...the costs are going to get paid by the third party. In my experience it's always much more difficult where to get an ATE policy and...perhaps from the other side of equation I was less keen to think about CFA perhaps when I was suing somebody I didn't know would be around. You know .. if we won the case would they be able to pay the fees? Would they be able to pay the damages? I have not taken out any ATE policies since April 2013...I'm not sure if a market has really been established for the new world after April 2013. We've had lots of people come and talk to us about new products and damages based products and these sorts of things but.. I don't think anyone in the firm has taken out an ATE policy with a premium which is not recoverable ...(commercial litigator)

.. the reasons for those ATE insurance premiums being reduced, but not reduced entirely to a level that's acceptable to clients is the risk is lower so you're not going to have the full cost liability that you would have had if QOCS weren't in place. And secondly you've got to get people to pay these things. When they were selling ATE before 2013 the claimants didn't pay, the defendants couldn't protest at the end of the case. Once Rogers had been decided there wasn't too much they could do. So premiums of four, five, ten, sixty thousand or whatever were charged and it... and the ultimate policy holder never paid the premium. So there was a degree of artificiality in premium setting. Now you've got to be able to say to the client this premium is reasonable. You've got to be prepared to pay it and you've got match up against the risk you'd otherwise pay by proceeding without it. (Premium rates) might go up as there's more experience because I actually think if you look at closed off cases...a lot of failure to beat part 36, and ...I'm going to be slightly controversial here, if you've got dumbed down staff because on limited costs that's all you can afford they'll make mistakes or they'll run things that they shouldn't otherwise run or whatever. So I actually that ATE experience on paying out on claims won't be that great but it'll take them a few years to find out. (general litigator and cost lawyer)

I think as well the lack of recoverability of ATE is wrong in the market.... It allowsbig multinational organisations to effectivelynot bully but preventsmaller entities taking them on because of the cost risk.... whereas ATE I think was cost effectiveIt required the case to have success to (have) ... whereas now if you're know you're going into a big piece of litigation with a big multinational with deep pockets, and we've seen a few cases of this... soon as...cost estimates come out now the smaller man is quite simply petrified and they .. you know.. some of the ATE premiums are still fairly lumpy for want of a better phrase, and they can't afford to litigate... I think we're going to need to see the insurers being more innovative about about how they package these products..... I don't think it's going to fade away because where we're seeing is people still do like as I call it.. want to put their risk in a known box. They want to know what that looks like..... Litigation is still horrendously costly and if people can limit that.. that risk I think they will.. they will do so. Again I think it comes to this education curve ...CFAs only something being understood by commercial clients just as they were falling off the stocks. I think that.. that may happen again. And I think you'll.. you'll see there was an article in the Times last week all around fixed fees in commercial work .. that.. I think the hourly rate is already dead. And I think where commercial clients want to be is in a known a known .. exposure on costs and that includes adverse costs. So I think the right product will still sell. (commercial litigator)

When first preparing this section it seemed that this section might have to be left blank: there was no discernable future post recoverability and the likely withdrawal of deferred premiums. The central rationale for ATE had gone in QOCS cases. However, we are at an early stage of any developments. The residual risk of failing to beat a Part 36 offer and cover for disbursements remains despite QOCS so there a need for insurance. Certainly, this researcher's belief that ATE would shift from insuring individual personal injury cases for a premium, to insuring a firm's caseload for, in effect, a fee has not emerged centre stage.

The question is whether the price will remain low as it has been or after the usual struggle for market share by keeping premiums low they will rise as the insurance pool declines and demand will fall away. A word of caution. In very few cases will it be inappropriate for solicitors to advice against insurance and if this were to happen regularly we may be looking at a future 'miss-not-selling' scandal. However, to advice purchase of a product that, subject to price, may not be cost effective may seem like going through the motions so there will be a future tension here.

In commercial cases the pattern has been during recoverability that most clients paid up front anyway so, subject to price, they will continue.

12. QOCS

Once the bizarre and unique experiment of recoverability ended and legal aid was effectively abolished for most civil claims then access to justice dictates that there must be some protection against adverse costs after the event (a full or partial loss).

The measures of protection vary across civil litigation jurisdictions. In USA state courts the normal model will be that there are no adverse costs. In Germany there may well be adverse costs after the event but these are predictable, can be low, and for citizens and small businesses are likely to be covered by legal expense insurance.

The Jackson model had two important elements. Firstly, the suffix of 'Q' before 'OCS', largely to deal with fraud. Secondly, the limitation of QOCS protection to 'David' and 'Goliath' situations. This model can also be seen in tort law since the development of vicarious liability of employers. An employer who profits from an employee and, latterly, has to have liability insurance, cannot avoid liability by arcane rules such as 'common employment': injured employees need protection. This doctrine spread to cost protection through legal aid; firstly to protect employees in relation to personal injury and increasingly to innocent citizens. The Government has accepted that the Jackson recommendation for QOCS in relation to personal injury.

The question now is does access to justice require QOCS to extend further? It is unlikely in the near future that cost protection, US style, will be introduced nor will predictable costs be introduced across the board. Surprisingly, QOCS was not raised by those interviewed but it is a subject of government review and was flagged up in the submissions.

Extension of QOCS to areas such as defamation raise difficult issues. However, there are two areas which, the evidence suggests, QOCS needs to be swiftly extended to.

Firstly, on the grounds of justice in a classic 'David and Goliath' situation, an unstoppable argument for QOCS relief in claims against the police. The Police Actions Lawyers Group in a cogent submission pointed out that an individual wrongly arrested and, possibly, imprisoned is only protected by QOCS if insult is added to injury and they are assaulted as well. The Independent Police Complaints has acknowledges its resourcing difficulties in investigating police wrongdoing. Citizens need lawyers to represent them and ATE is hard to obtain: QOCS must be extended.

Secondly, if a lawyer is pursuing a personal injury case and through negligence loses the cases or under-settles QOCS does not cover any resulting professional negligence case. The claimant is potentially injured three times: one in the accident; twice in losing compensation and thrice in being deprived of an effective remedy against incompetence. This situation is completely illogical and needs to be addressed. Such an extension would not open the floodgates as damages are often low in such cases. As such they may well be unattractive to lawyers acting on risk based arrangements.

13. Proportionality

All civil litigation systems where 'costs follow the event' have to grapple with the issue of proportionality. This has two aspects. Firstly, does the combination of the risk of paying your own lawyers costs *and* the other sides costs constitute a bar to access to justice in civil adjudication? Secondly, how far should individual, corporate and state resources be allocated to adjudication?

Some jurisdictions address this issue by limiting recoverable costs to a modest amount. Indeed, in France, court fees for most cases have been abolished. In other jurisdictions, such as Germany, proportionality is addressed within the confines of a predictable cost regime by increasing costs, according to the stage of the cases reach or the value of the damages claimed/awarded. In turn, a party's costs should be reduced (offset to an extent by increased court fees) because the judge in an inquisitorial regime does more of the heavy lifting. In England parties 'get up' their own cases and as court fees rise the problem of costs increases.

In England the issue of proportionality is central to the CPR. The overriding objective addresses head-on the question of equality of arms; the use of individual resources and the necessity of allowing a fair share, but no more, of the courts resources to individual cases. Proportionality has been further addressed by the creation of the portal and predictable cost regime in specific areas of litigation. Beyond this, in the multitrack, it is addressed by cost management (see below) and was originally subject to the guidance of the court in the somewhat friendless case of *Lownds*. The reversal of *Lownds* in the Jackson reforms address his head on the tension between the necessary means to win the case (necessity) and the use of resources in the case. Striking the right balance may be helped when cost management gets into its stride; at least to the extent that difficult issues should be flagged up earlier in the process between client and lawyer and with the opposition. Of course it will not remove the need to face difficult decisions.

The issue of proportionality is inevitable going to raise strong feelings depending on whether litigators are receiving costs or their clients' are paying them or a combination. This was reflected in interviews:

... smaller cases .. can often cost sometimes as much as larger cases to run when you .. you're facing a.. particularly difficult case and it's very difficult to see proportionality in the same way. You still may havean awful lot to do. For example take a building dispute. We've got experience ...at the moment of a building dispute. It's particularly complicated. The value is twenty to thirty thousand. We're going to give the client a cost estimate which may be double the value of the claim. And we're having to say to the client, You are not going to recover a substantial part of these costs because the new rules on proportionality etc.... and the client's saying, Well why should somebody be able to do you know get away with doing a defective building works and leave me with the problem? (Do you see that operating against access to justice?) I do. ..someone's being denied the right (commercial litigator)

I think outside of personal injury it's very hard to get a case off the ground unless it is very high value, and very good prospects. Neighbour disputes, professional negligence, all the small level.. actually

very important cases.. SME type cases that just can't be run or people are taking a bad settlement or they're just not bothering and it's massive access to justice issue. ..Proportionality is a risk across the piece both in terms of PI and non-PI because what we're seeing at the moment is the law's the same, it's just as complex, the client behaviour, facts and evidence is just the same, just as complex and time consuming. When it comes to proceedings new proportionality applies .. rightly so.. that's the law.. but the work that is required to win the case is actually increased (because) there's an increased layer of stuff to do with all the new Jackson type directions... cost budgeting...and there is no sense at all that the judges are taking robust steps to match what you've got to do to the proportion of budget. You're getting Rolls Royce directions to move Mickey Mouse ... budgets or fees. And if you're in the fast track the costs have gone down but the work's exactly the same as it was before. (general litigator and cost lawyer)

How do you deal with a case whereby work needs to be done but the cost of doing that work makes a case disproportionate. And I had a case like this that came in .. settled just before .. the Jackson reforms came in where .. my client was being sued by its accountants for (tens of thousands of) pounds... the client believed with some justification for it that the accountant had over .. had over-inflated their final fees in a fit of pique because .. my client had decided to switch accountants. So there was a dispute and ... and ... the accountant sued and we defended ... on the grounds that that the work hadn't been done. ... there was a lot work needed because we had to actually go through the time sheets provided by the accountants. I think our costs were (equal to the claim)and I suspect the other side's were something fairly similar. Now the .. under the new regime...had we gone to trial and we'd won I don't think we would have got (that amount)back for a claim of that .. of that magnitude. I think it would have been said, well those costs were disproportionate... So assuming that we couldn't have found some way to get indemnity costs and it's worth perhaps saying as a footnote there that I think there'll be a lot more applications for indemnity costs in the future.. but assuming that we couldn't get indemnity costs.... you know.. what should we have done? What should the client have done? Should...the client have fought that case knowing that even through being successful it would only recover say fifteen thousand pounds and still be fifteen grand out of pocket or should the client have rolled over and... assuming the client was right ... just paid the accountant what they were asking for because they were bigger than us and .. and because we couldn't recover.. recover it? And at what point do you make the decision? So I think there's a lot of issues in there that.. don't...come into play in the bigger cases those are generally the type of ... businesses that have these sort of .. these disputes.. the forty, fifty, sixty, seventy grand dispute .. and they're the ones who ... are not in my opinion going to get access to justice because although the rules on cost recovery have been tightened up nobody's changed the rule... nobody's realised what you have to do to win a case.(commercial litigator. NB exact figure removed to protect anonymity)

14. Cost Management (Budgeting)

The experience and attitude of litigators to budgeting (and capping recoverable costs) is varied depending on their practice area and the court they practice in:

Cost budgeting is not something that comes easily to us...it is a new skill that we are having to learn.. So we have a very good relationship with a firm in X who are cost lawyers that... they're not pure cost lawyers. They do all our assessments now and we're looking to use them for our cost budgeting on a multi-track case on the basis that we will provide them the information but they will then do the cost budgeting because they have the particular skills that we don't have now. It is difficult and it is difficult to get right .. in the commercial litigation world we all think we're bespoke lawyers. Every case is different... how do I know what's going to happen in the future. And there's there's a bit of an arrogance there I think to all us that we think we're doing something different to the hacks who do PI and everything else. So it is difficult and and there is there is certainly evidence of people underestimating their cost budgeting.... every case is different. How can we ever assess what our costs were in the past? And the other one is we've not traditionally captured that information. So what we're having to look a ...three things. One is trying to capture the past information. And of course we're too late doing it in many ways but .. so we're now trying to implement rules that say when we finish a case we will then sit back and review and actually go back and say.. well how long did this going to take us, how long did witness statements take us etc. So trying to capture and capture the empirical evidence is one. Secondly it's then armed with that information, general experience, trying to come up with a decent cost budget that is realistic. And then the third one which is again a really tricky issue for us is how to monitor that cost budget going forward...and have an IT system that actually can enable us to say easily of that five hours with other case budget for disclosure how much have I spent .. and we're not there yet I have to say. And I don't think anyone's there yet... so part of our challenge is getting an IT system to capture that we can actually .. having given a...cost budget how do we actually monitor it that we're actually performing it... And you're saying it's a bit early. We're still in the prep stage if you like. I mean it may be that we're talking about a number of years before this gets into the DNA of firms so they understand how to do this. (commercial litigator)

Well my view on budgeting is it's a good idea up to the point where you have to agree it and that's where the problem lies I think. It's helpful to do things in advance. It's helpful to set out a scheme and a regime of cost budgeting. What's not helpful and taking a lot of time and cost is to try and get that agreed because when you come to costs lawyers and courts argue just as vociferously as they do the claim itself and that ... is unhelpful for the process of the claim because it's getting in the way of the process of the claim but it's also incurring a huge amount of time that you wouldn't normally do until the end of the matter... on the commercial side... it's not just the value of the claim that dictates how much work is involved. Some of the more complicated matters have very low value claims. For instance if you take a boundary dispute ... very little value in the land but the principles involved means that the parties are entrenched in litigation. (commercial litigator)

People have got to have sufficient time to get used to this new regime .. and . I've heard some really quite alarmist hysterical reactions to budgeting .. and then other people say: "OK this is it...I think we're going to have problems because I don't think we can do it.. but we've got to do it so we'll have

our best shot" I am positive about this. I've been positive about Jackson. I remain positive about it. I think there are a lot of good things. I think there's a lot of good in the budgeting and sanctions process as applied. It will take some getting used to. I think the natural reaction of the profession is to kick against it. (defendant insurance litigator)

I would say our exposure to it has been incredible small you know... we have only had just a couple of cost budgeting hearings...we've taken it incredibly seriously since you know we knew it was coming in and we've...had to spend money on having our systems ... amended to deal with the ... precedent stage H and...the cases that are going to be budgeted and how they're tackled. My you know general view...a serious concern (is) that you sit down, you budget what a case is going to cost and then you go into court and that's reduced and then it's sort of ties your hand before the case (Referring to a meeting with firms with more cost management experience) I think the overall view was that they weren't...as bad as they had expected. But...there is a lot of concern amongst the profession that cost budgeting is a .. a limiting factorwhich I guess in its nature it is intended to be ... could be adverse to the case and how you progress it...a couple of points .. Firstly, the people who are signing it off are the .. in the High Court.. it's the 'masters' who ... I think themselves acknowledge they don't have any experience in this area. It would be quite different if it was the Supreme Court Cost Office...And like you say yes if it's signed off and you know it's reasonable then there's a lot less trouble at the end in recovering your costs. But...if you get a tradesman in to do some work you expect a quote at the start and that he will stick to it and that should be reflected in the same way in legal services..... I don't think it's applicable in the work that we're doing because the .. the cases can take incredibly unexpected .. turns and more to the point the ... a lot of the power over how a case develops is not in our hands but in the hands of the defendants ...whether or not they're going to fight on liability or contributory negligence or you know or on issues of care or periodical payments has a massive influence on the costs of the case. So we can budget for that we don't know exactly how it's going to be born out. (personal injury litigator)

We've only had a few cases on budgeting where we put the budgets in with the court but again we found slightly arbitrary the decisions that have been taken. Some judges will look at disclosure and just simply say, "You can't have that. You can just have this": (it) just bears no sense to the amount of work involved in cases. One of my colleagues in PI was telling me they have a huge amount of disclosure and the judge who .. a few weeks ago commented," You're not having all of that. I know solicitors make all their money through counting the number of pages and just charging their time" and arbitrarily in that particular case he was allowed two hours for disclosure... on a massive personal injury case ...I don't think that kind of attitude is .. right. I think it's a wrong way to approach a case myself... referring to cost management in different courts)...They're all different...I think one of the things that worries me on it is ... it.. it's very very difficult with litigation to always ... estimate exactly ... what you will do. Very very difficult. And the fact that you .. for example, if on witness statement you happen to go three hours over, on disclosure two hours' difference, you can't swap that time across really. I think that's a little unfair because there should be more flexibility in the budget. I think because it is such a difficult thing to estimate one hundred per cent...(commercial litigator)

We've got to do a full cost budget for these cases but. .. less one per cent go to trial... so everyone's saying, Why... that's quite a lot of extra early expense to do an account budget for something ...incredibly unlikely to go to trial. So the Property Litigation Association came up with a wording to put in directions that the court will dispense with the cost budgeting requirements. We do a lot of these.. we're more often with the tenant hat on... my colleague tells me that most landlords agree to that clause going in and most judges agree to it as well. However post (the) Mitchell decision my colleague quite rightly still puts ... our budget in seven days before ...before the hearing because he doesn't want the judge to say no and say, Where is your budget? I'm striking you out. And he tells me that some of the landlords' solicitors say, Oh. Are you? But we've agreed it? And he says, well I'm not taking the risk. And they say, Good point, and they put one in as well... so they put them in but then they ask the court not to go through the budgeting process ... don't how bizarre that sounds to you.(property litigator)

Well my view on budgeting is it's a good idea up to the point where you have to agree it and that's where the problem lies I think. It's helpful to do things in advance. It's helpful to set out a scheme and a regime of cost budgeting. What's not helpful and taking a lot of time and cost is to try and get that agreed (with opponent and court) because when you come to costs lawyers and courts argue just as vociferously as they do the claim itself and that ... is unhelpful for the process of the claim because it's getting in the way of the process of the claim but it's also incurring a huge amount of time that you wouldn't normally do until the end of the matter.(commercial litigator)

Our attitude is that it's something that has to be done, has to be done properly. It's time consuming. It's expensive and thewe're getting a total lack of inconsistency from the courts as to how they're dealing with it. But our attitude is that it has to be done and we're doing it. Under the current rules...is that it's not really helping anyone other than the recoverability cost for the lawyers. When it comes to the end of these matters ... required to be budgeting it will be helpful to the lawyer because we will have incurred time and cost doing the budgeting that we might not have necessarily have recovered before in the post conclusion negotiation of costs.(personal injury litigator)

I never really understood the point of (cost budgeting) to be honest....I think it's people who don't really run litigation ... deciding that ... the costs are out of control and you must know what you're in for at the beginning. Well it's all very well.. I mean great problem with litigation is that it adversarial... you can have an idea of what's going to need to be done in a particular case. But I mean the analogy I've always put forward is that.. if I'm building a house it's pretty easy for my builders to prepare a full ... case plan of costs for the building, they can work out the stages and cost everything and say that's what it's likely to cost. Now if you think of litigation as a building where every day your builders come onto site and build part of your house and then while they're off site overnight other builders come in and try and knock some of it down. Which is what litigation is like you know. ...the approach that the courts have always had of controlling unreasonable costs by ... the entitlement to have a detailed assessment at the end has always been sensible... because at the end you look at what was done and you can look at whether it needed to be done and you can penalise people in costs ... for things that that shouldn't have been done. It just doesn't make sense to try and decide in an adversarial context at the outset what people are going to have to do because you just don't know. I mean you can speculate and you can have a pretty good idea but then every case done on the multi-track is different.. you know... And different things happen, witnesses do different things. You might end up with ... in one case it might seem pretty similar to another, you might end up with two liability experts and an admission... in another you might end up with eight liability experts and no admission...Then on the top of that they don't add to the resources of the courts to deal with cost budgeting so they're adding this extra layer of cost and delay and.. I mean cost budgeting CMCs is taking a couple of hours basically. And partly as a result of that you know you

can't get an appointment for anything now whereas you might be able to get an appointment on in perhaps four to six weeks for the clin(ical) neg(ligence) masters in London... I mean they're routinely listing things for maybe four six months away now. (clinical negligence litigator)

Mitchell...was a terrible decision. It was an absolutely it was it was a .. ridiculous decision .. and whilst objectively I can understand why the Court of Appeal felt the need to uphold Master McCloud ... I think the original decision from Master McCloud was was ridiculous. I'm not surprised by it and there were particular circumstances in that case .. not least the fact that it was high profilebut the Court of Appeal and Master McCloud have .. done litigantsand for that matter and less relevantly lawyers no favours at all by that decision. (commercial litigator)

I declare an interest. When in 2003 I proposed, as chair of the cost committee of the CJC, that budgeting should be introduced into litigation the profession (and many judges) were underwhelmed. Many practitioners were downright hostile. Facing court rules prescribing budgeting most of these interviewees exhibit some grudging acceptance of the new regime. This is entirely consistent with a conservative approach to a new and quite major change in practice. Further, practitioners are largely at the beginning of this process and while they are seeing the downside (increased forward loaded work) they have yet to see any up-side (greater certainty of recovery of budgeted costs without detailed assessment).

The risk to the success of this reform is inconsistency and lack of expertise amongst cost managing judges. At this stage interviewees reported that in cost management hearings there was no great canvassing of proportionality in the hearings. No amount of Judicial Studies Board training will allow judges in higher courts who have not run a business to acquire the experience of litigators in the vagaries of organising the preparation of a case. (After all this is one of the rationales for the division between solicitors and barristers). Perhaps, there is still an element of 'slash and burn' amongst the case managing judges which has allegedly been a function of some assessment hearings in the past⁶, reducing bills by a rough and ready amount. As one who wishes these reforms well there needs to be a reasonably consistent approach across the country. The SCCO with its praetorian guard of cost judges is clearly a resource for advice but careful attention needs to be paid to ensure that the reform is not knocked off course until it bears fruit.

6

15. Sanctions

The question of sanctions was the major controversy amongst interviewees and in the submissions. Post *Mitchell* sanctions and relief from sanctions have become identified with cost management but, of course, they are much wider than that. Like proportionality they are an example of the tension in civil procedure (and in many bureaucratic systems) between certainty and flexibility. The current situation represents a signal from the Jackson Review and the Court of Appeal that the pendulum has swung towards compliance. Potentially, a small firm, in an extreme case, which has lost the right to recover costs as a sanction could be left facing a negligence action or an existential cash flow problem. Many large firms in, for example, the defendant insurance market, may not be quick enough on their feet to respond to tight time tables and may be caught out. It seems that *pour encourager les autres* the judicial steer, following the Jackson recommendations, encourages serious sanctions and offers very limited relief. Whether the approach is right or not in policy terms it is not without consequences.

The existential example, above, are likely to be unusual. More importantly at this stage with the dust from case law still settling is how the sanctions are dealt with in different courts – particularly out of London. In the earliest days of the CPR Lord Scott as first Head of Civil Justice became aware that local courts were introducing their own practice directions and clamped down on it to ensure, at least at an early stage of development, that consistency was preserved. It may be that in the area of sanctions a close eye needs to be kept on developments and information channels opened between litigators and the judiciary to try to keep everyone on board. In the meantime it is likely that practitioners will be extremely risk averse if asked to take on cases that might trip them up on sanctions; for example, cases which may be difficult to investigate or bundles of cases which have been handled by a firm which wants or must pass them on following an intervention. This has access to justice implications.

Based on these interviews many practitioners are as yet unconvinced that the balance between certainty and flexibility is correct:

The two issues are, and they tend to rate together it's the whole area of cost budgeting and then the whole area of relief from sanctions and everything else so .. and the two are forming a real quite tight knot which I suppose has meant for us ...that wehave to get our act in order much more than we've ever done in the past. So and in terms of of ... Mitchell it is that you know there are no dates that can possibly behonoured in the breach and...no court requirements can be honoured in the breach. ... we've got a case ... where we have served a.. we served witness statements three minutes late. Three minutes past four on the deadline. And we're having to make a full application for relief from sanctions. You can see what the result is.... Costs gone. I think the overall view is that you can't take any risk at all (that any) court is lax in any shape or form. So the witness statement one is because CPR whatever says that unless you have exchanged witnesses in compliance with a court order you cannot rely upon the evidence in court unless unless you get the court's permission. ... so technically three minutes late is three minutes late and therefore you have to apply. What's really interesting there is how you react to one of those. You know if I'm.. if I'm the defaulting party I just know what I've got to which is I've got to make my application. It's how.. if

you're on the other side of these do you actually fight the case or do you actually .. and risk having a cost order against you for your unreasonable behaviour. It's very interesting to see how that goes. I think it was all coming ... we've got away with too much for too long. So I think it was coming and .. the firms that will work are the ones who wake up and smell the coffee quickest..... I I sense still ... particularly with cost budgeting and the sanctions things we know it .. if we're going to make a success of this we've got to get those things right. And if we don't we're going to capture very large costs... particularly the big cases you know wheredon't know. You .. easily I ... come.. you know two hundred, three hundred thousand pounds worth of legal fees you know .. if you've not put some of these things right. That's huge, huge hit to our bottom line if we get it wrong. (commercial litigator)

(Referring to a sanction decision following the Mitchell case).. that was the sign of a slight softening I thought but an inconsistent reason as to why that was so different from Mitchell...there's a sign that the courts want to soften things but they're not quite sure how to justify it because the example they use doesn't seem any more or less evil than the crime in Mitchell.(property litigator)

(Referring to the position in the past where the parties could agree an extension and that this is unlikely to be acceptable to the court now) Well in fact the clinical negligence masters have just issued a draft direction .. allowing parties to agree up to twenty eight days extensions of time because it has really become unworkable..... the reality is .. the senior judges don't know what they're doing in this. I mean quite honestly they should stick to adjudicating on cases you know which is what they're good at and not trying to run practice or procedure. .. it's complete chaos out there at the moment. It's also.. it doesn't make sense to encourage parties to mediate, to try and discourage litigation and then prevent the parties from co-operating in the way they run the litigation. I mean you know in the past it's worked very well that.. the only.. the trial date gets fixed and .. the parties then effectively manage the case.. leading up to the trial date. The one thing that the courts would get involved in that if there were alterations that might put the trial date at risk. And that was quite right. It doesn't make any sense for masters or DJs to have to micro manage cases where you have experienced solicitors on both sides working out how best to timetable a case. And rather than promoting early resolution we are delaying the resolution of cases enormously... in a combination of cost budgeting and this rigorous approach to ... compliance with the rules means that cases .. are .. have already been set back at least six months. I mean I think we're going to see horrendous delays in dealing with cases. It just .. it's it doesn't make any sense at all.(clinical negligence litigator)

(What is your feeling about the way the court or courts are approaching sanctions at the moment? And how is that affecting your practice?) Inconsistency and fear! Fear of ...getting it wrong and then spending more time and effort and money to get it right (Personal injury litigator)

I mean it depends which end of the decision you're on. I had a case recently where we got an award from the court. No one had made an application..... And a judge had stepped in, reviewed an original direction which was agreed by the parties and signed off by one judge, and another judge has stepped in, and said, "No no no we're not doing that". There's no witness statements going be admissible beyond ...(it was a contested probate matter).. beyond the two testamentary documents. There's no open and closing statements, and the judge and the court on its own motion cut down a two day trial to two and a half hours. Quite welcomed that actually. So the court was practically managing the case. In terms of the sanctions generally, I tend to agree...there's a lack of consistency. (commercial litigator)

(referring to the sanction issue in Michell) It's too inflexible. I mean it's caused chaos. It's caused huge amounts of uncertainty. It's ... flooded the courts with applications even though the whole point behind it was to try and ... improve ... the administration of justice... we've got a position whereby the sanction is entirely disproportionate to the default. ... the Court of Appeal have said.... solicitors being too busy or making a mistake or overlooking a date ... those don't amount to good reason.. and I think the examples they gave as good reasons sort of.. you know.. as somebody dying.. a close family member dying or something like that ...those are very much the extremes That's not going to happen in most cases. The reality is that even in the best run firms, the best run departments sometimes.. a mistake is made.. or there is an oversight or sometimes the (solicitor) is let down by the barrister or he's let down by the client or it's.. or .. usually it's a combination of things...the solicitor asks the client for information a little bit too late, the client gets back a little bit too late... and something goes wrong. it's absolutely right that in those circumstances there should be a penalty and the penalty for that traditionally has been that the defaulting party has borne the costs of getting.. of putting it right and one can have no complaint about the justice or the equity of that. But to get to a situation whereby a litigant's case is struck out ...because of what may be a minor default albeit that it doesn't fall within the Court of Appeal's definition of good reason ... I don't think is.. is leading towards .. a just decision. I think one of the problems is that as the system becomes more efficient it becomes less fair and as it becomes more fair it becomes less efficient. (commercial litigator)

(referring to case law on sanctions) my point though is that it's very far from unthinking. There was a deliberate intent to improve the workings of justice system inherent in this which frankly was predicated in Woolf and then not followed through. The difference this time is they mean it and the profession us included need to wake up to it. There is always in the early days of a change a bit of a difference of opinion. I know that there are some local DJs who are not following it. I know that there are some courts who are really concerned.. I've heard anecdotally that (X Court) is completely clogged by Mitchell applications. I do think the proposed mechanism has come out... I think out of the clinical negligence 'masters' but is certainly now adopted by the asbestos masters. ..The twenty-one day leeway or twenty-eight day leeway? I think there's a lot of good in the budgeting and sanctions process as applied. It will take some getting used to. (Defendant insurance litigator)

You know I've not really been subjected to any situation where there's been a serious threat of sanctions through...failure to comply. But I think my.. in terms of our practice the one significant change I've noticed is the .. whereas previously if there was to be some movement in the timetable that could be quite well accommodated between the parties in correspondence. I could pick up the phone or email the defendants and say, I need an extra week to serve these statements. The environment now is such is that we're too concerned about the long term implications to deal with it on that basis...the defendants say, well we don't accept it. It wasn't sealed in an order then I'm at risk. ... the one thing I have noticed is a significant rise in the number of application to vary orders because of the concern over the timetable.... And so inevitably the master's and it must also be at the county court level are approving orders for changes in timetables whereas previously that work you know wouldn't have even got to the court door.(personal injury litigator)

.. most of us are trying to do a very good job, a professional job. We're aware of our responsibilities. We trying trying our best ... and sometimes litigation is such that the pressures on you from... having to deal with sixty, seventy, eighty cases are huge. And sometimes you might miss a deadline. But if it's not deliberate or it's not prejudicial to the case .. what's the problem on it. If you're given a warning that's fine...I can accept given a warning ... but not to be given a warning and then you're out. I think that's too far.(Commercial litigator)

I have significant concerns about the area of sanctions. And only this morning I've had half an hour with one of my team over just this. You can be frankly an idiotic tactical litigator if you want and that is not in the interests of justice and more importantly keeping costs down which is what all this is about. You know we are seeing the classic quarter to five letters on a Friday .. trying to point score. What is the point? We all want these cases resolved...say there points of sanction along the case one of which is the trial date.. and there might be a middle one which is a case management review and one around the close of pleadings. Everything else should be allowed, specially in the commercial area, to be negotiated and extended ... as long we don't extend point A and B which are the the .. beginning and end of a case.. that's fine. But you know just because my client's mother has passed away and he's not in a position to sign a witness statement. I've had points scoring from opponents on the other side, well you're going to be in breach of the witness statement disclosure. So you've got to go to court whereas that used to be a gentlemanly conversation, nine times out of ten there'd always be a bit of give and take and you know what we're seeing as well people do take holidays... so you've virtually got to have two people briefed on a case to overlap. It's... I just... I think there should be tight deadlines.. I think the great failing of Woolf was the lack of firm case management from judges. You know... proper pragmatic.. especially district judge level where these ladies and gentleman have all been practising solicitors and hopefully in the commercial area, commercial lawyers, they know what it looks like when someone's delaying on a case and they know when things happen on a case that require a little bit of flexibility. And for that not to take place is.. is... there's just going to be so much peripheral skirmishing and when we were in an issue of ... in a time scale where we're all trying to be more cost effective and proportionate it goes completely completely against.. We've had daft issues taken like ... serving a document at five minutes past four, the other side not accepting it because it was a four o'clock. Now I'm sorry. You know that that.. and they're absolutely right to. The only people who are going to benefit from this are the professional negligence lawyers, the professional indemnity insurance lawyers. (commercial litigator)

Searching for a consensus amongst these attitudes it seems that there is a recognition that judicial opinion has altered and that litigators will have to live with a stricter regime. Budgeting may well be a factor in requiring a stricter compliance to the case plan. The question is how strict?

Litigators with long memories will remember the debacle of Order 17 Rule 11 (Automatic Strike Out) introduced in 1991 as a response to the Civil Justice Review 1988 with the well-meaning objective of ensuring that cases were brought to trial while there was a chance that witnesses could vaguely remember what the case was about. The aim was correct: timely justice. The practice was disastrous: struck out cases and professional negligence actions. The CPR abolished it with the emphasis now on judge not rule led case management.

In the days after the introduction of the CPR there was a reluctance amongst some litigators to accept case management taking the view that 'they knew best', the 'they' being the parties solicitors. In fact this researcher's work in the early days of the CPR⁷ showed that lawyers were beginning to help themselves *and* the court by agreeing directions that they believed, from

⁷ The Management of Civil Cases: a Snapshot' (with Professor Mary Seneviratne) *Civil Justice Quarterly*, vol 25, July, Sweet & Maxwell, 2006, pp 312-326.

experience, the case managing judge would accept. In this way a *modus vivendi* was achieved which was much better than the scorched earth of pre CPR Automatic Directions. The question now is whether the right balance is being struck in a judge managed system between rules laid down, albeit by case managers, but with less or more room for manoeuvre when things go wrong as, inevitably, they will.

A requirement for strict compliance will work — in the sense that litigators will accept directions. However, litigators will be concerned over whether their client's case will suffer if, for example, evidence or costs are lost by failure to comply. They will be concerned about their indemnity insurance. They will react. Just like pushing a balloon full of water in one place produces a bulge in another the reaction will be an increase in risk aversion and applications to the court. As the court is starved of resources then these applications will form a steadily growing queue and a delay in substantive matters with clear implications for access to justice. Rarely a strict system will throw up bizarre consequences. One matter raised in the submissions was a refusal to allow relief for failure to comply with an order delivered to the representative by the court *after* the date of compliance had passed. Such a mixture of Kafka, Catch 22 and Bleak House will, hopefully, be rare and cannot ever be just or proportionate.

It seems to this researcher that the answer lies not in subtle changes in case law apparently giving more room for manoeuvre. Litigators will still be risk averse. A model which recognises that a trial date or window cannot be shifted (as was the case in the past) but within that model there is some for flexibility (as the clinical negligence masters have informally demonstrated in their 'buffer' order) seems to strike an appropriate balance.

16. Conclusions and some personal comments

The research questions in this review of the research themes arising from considering the Jackson reforms one year in were as stated as:

1. The impact of the reforms on cases being taken on by lawyers before and after April 2013 and the implications of this for access to justice.
2. Some initial insights into how the CJC could build a picture of the type and number of cases dropping out of the system, and the implications of this for access to justice.

As indicated above it is clear that Jackson, in the context of a number of changes in the legal and financing environment, has had a major impact on the operation of litigation and the propensity for lawyers to take on cases. Cases that prior to the LASPO/CPR/Portal changes would have been attractive to entrepreneurial lawyers may now be less attractive. The risk profile has altered against initiating such cases and, possibly (although not covered in this research) there will be a greater incentive to settle and eliminate risk with an attendant fear of under settlement. The hope that the greater potential reward in certain higher value DBAs might encourage the take up of more risky but viable cases has not yet been achieved. As non-entrepreneurial lawyers will have a limited life in this litigation space then, as night follows day, fewer cases will be taken on. This is the answer to the first part of question: 'The impact of the reforms on cases being taken on by lawyers...' The second part: 'the implications of this for access to justice' is as indicated above essentially a policy question. Clearly, the present government has a policy objective in an era of austerity to save court resources; to drive down insurance premiums and cut legal aid and believes that these objectives will be met by the changes. It is inevitable that access to justice will be affected by this approach.

Of course, the Jackson reforms are not just about access. They follow the Woolf reforms in engaging with the culture of litigation focusing on making the process more efficient by ensuring that orders are obeyed and more predictable by measures around cost management. The shoe is pinching most at the present time on sanctions and if controversies in this area can be resolved then the prospects for the whole reform effort will improve. The creation of a specific panel of judges in the Court of Appeal dealing with the Jackson changes and close ties to the Civil Justice Council; the implementation lecture programme; the Judicial College and the Rules Committee are all very helpful in sending signals to judges and practitioners. However, the difficulty of steering procedural reform in a common law system, for all its admirable flexibility, is that the appeal courts are limited by the material (the appeals) they have to work on. They cannot initiate their own cases: there has to be a genuine and appropriate controversy and patience must be exercised.

This essentially hit and miss approach has been ameliorated following the Civil Justice Review 1988 by judge led enquiries assisted by assessors and some research. In this researcher's view the missing piece in the puzzle is the testing of measures which emerge from this process before implementation. The objective is to test, as far as possible, how they will work in practice and the

reduction of unintended consequences. Probably, the best approach would be take a proposed new procedure or a set of rules and test them in simulations. What is the attitude of practitioners and judges to the new situation and how are they likely to respond? One can imagine that the introduction of DBAs without a hybrid option would have been very clear offering when tested in such a setting.⁸

The second question addressing the numbers and types of cases within what is likely to be a reduced gross figure is easier to answer. Since research was attempted by this researcher in the early days of Woolf implementation it has been very clear that it is enormously difficult, expensive and often barred by commercial confidentiality to retrieve numbers (and information about drop outs) from law firms. Their data systems are not normally set up to easily retrieve this information and there is great variation between the firms in what data is captured. It is likely that case information from the court remains expensive and difficult to capture. The most efficient data capture system is that addressed to the payers i.e. the large institutional players such as insurers and self-insured organisations. While, this may be confined to the personal injury market and, possibly, some housing issues the answer remains: over to Professors Fenn and Rickman!

⁸ Models for testing proposals are discussed in a new book J.Peysner , *Access to Justice: A Critical Analysis of Recoverable Conditional Fees and No Win No Fee Funding*, Palgrave Macmillan, 2014 (forthcoming)