

WAS IT ALL WORTH IT?

LECTURE BY LORD JUSTICE JACKSON TO THE CAMBRIDGE LAW FACULTY ON 5th MARCH 2018

CONTENTS

Paras

1. Introduction	1.1 – 1.5
2. Work over the last ten years	2.1 – 2.2
3. Have the reforms done any good?	3.1 – 3.23
4. Conclusion	4.1 – 4.4

1. INTRODUCTION

1.1 This lecture. Professor Andrews has asked me to give a lecture on civil justice reform today – just 48 hours before I retire. This is, therefore, an appropriate moment to stand back and review my work in this area over the last decade. The ineluctable question is whether that work has achieved anything of lasting value. I shall try to answer that question objectively.

1.2 Definitions. In this lecture I use the following definitions/abbreviations:

“ADR” means alternative dispute resolution.

“ATE” means after-the-event insurance.

“CCMC” means costs and case management conference.

“CFA” means conditional fee agreement.

“CJC” means Civil Justice Council.

“CPR” means civil Procedure Rules.

“DBA” means damages-based agreement.

“Final Report” means *Review of Civil Litigation Costs Final Report*.

“FRC” means fixed recoverable costs

“IPEC” means Intellectual Property Enterprise Court, formerly Patents County Court.

“LASPO” means Legal Aid, Sentencing and Punishment of Offenders Act 2012.

“MR” means Master of the Rolls.

“ODR” means on-line dispute resolution.

“PI” means personal injury.

“RJ” is a reference to myself.

“Supplemental Report” means *Review of Civil Litigation Costs Supplemental Report*.

“TPF” means third party funding.

1.3 Neither glamorous nor sexy. Every judge undertakes extra-judicial work: chairing or serving on committees, promoting law reform, giving lectures on jurisprudential matters, holding lofty supervisory roles and so forth. To spend ten years reforming the rules of procedure in an effort to reduce litigation costs is about as unglamorous as it gets.

- 1.4 Will reducing litigation costs make lawyers love you? No. Lawyers generally don't like change and they particularly dislike anyone meddling with costs. Therefore, the task allotted to RJ was bound to, and did, generate quite a few irate letters to newspapers and numerous onslaughts in the legal journals. Almost everyone perceives the public interest as residing in a state of affairs which coincides with their own commercial interests. That is not dishonesty or disingenuousness. It is just human nature.
- 1.5 Has anyone been systematically monitoring the effectiveness of the reforms? No. In November 2013, the CJC held a conference at UCL entitled 'Justice after Jackson', at which several speakers called for such an evaluation to take place. What was needed was for a university or similarly neutral body (a) to gather the contemporaneous evidence and (b) to make an objective assessment of the successes and failures of the reforms. Unfortunately, no university or similar body stepped forward to do that.¹ Instead there has been a stream of journal articles, usually written by people who dislike this or that aspect of the reforms. For obvious reasons, no-one who is content would dream of writing an article to say that.

2. WORK OVER THE LAST TEN YEARS

- 2.1 Summary. Leaving aside the day job (hearing appeals), the following is a summary of events over the last ten years:
- Spring 2008: MR tells RJ of impending appointment to the Court of Appeal + brief to tackle the costs of civil litigation
- October-December 2008: Setting up Costs Review, preliminary meetings etc
- January-April 2009: Phase 1 of Costs Review + publication of ***Preliminary Report***
- May-July 2009: Phase 2 of Costs Review – consultation, including twelve public seminars
- August-December 2009: Phase 3 of Costs Review – writing ***Final Report***
- January 2010-April 2012: Judicial Steering Group ("JSG") chaired by MR oversees implementation. RJ acting under JSG supervision sets up pilots and working groups; prepares draft rules and practice directions for consideration by the Rule Committee, to implement the proposed reforms. RJ and others give a series of 'Implementation Lectures'² to explain the proposed reforms. Those reforms which require primary legislation are included in Part 2 of LASPO.
- May 2012-October 2013: Following an operation and medical treatment RJ drops out of the process. Ramsey J takes over RJ's role. In April 2013 the reforms come into force. RJ resumes sitting full time in 2013, but is not involved in civil justice reform.
- 2014-2016: RJ returns to the fray (following Ramsey J's retirement) and delivers lectures, monitoring the progress of 'his' reforms. These lectures call for amendment of the DBA regulations, more resources for the County Court and the civil justice centres, improvements to costs management, getting a move on with the new form electronic bill of costs, ending the (indefensible) exemption for insolvency cases from the CFA/ATE reforms, better use of the new disclosure rules, a more

¹ The MoJ is committed to reviewing all the reforms introduced by LASPO, but that will only catch a small part of the Jackson reforms.

² Available on the Judiciary website

sensible approach to relief from sanctions and extension of FRC.

January-July 2017: RJ conducts Review of FRC (at the request of the Lord Chief Justice and MR) with the help of fourteen assessors. Chairs five public seminars in Leeds, Manchester, London, Birmingham and Cardiff.

31st July 2017: RJ publishes ***Supplemental Report on Fixed Recoverable Costs***, recommending:

- (i) streamlined procedures and FRC for (a) the whole of the fast track, (b) less complex claims above the fast track but below £100,000, (c) clinical negligence claims up to £25,000;
- (ii) a pilot of capped recoverable costs for business and property cases up to £250,000;
- (iii) extension of the Aarhus rules to all judicial review claims.

October 2017-March 2018: Co-writing the second edition of *The Reform of Civil Justice*³ (to be published by Sweet & Maxwell on 21st March) for the purpose of promoting proper understanding of the reforms.

2.2 What are the strategies underlying RJ's reforms? Five strategies underlie RJ's reforms:

- (i) Amend the rules of procedure, to streamline the litigation process and cut out unnecessary work.
- (ii) Amend the funding rules, so that (a) no method of funding generates increased costs and (b) there are as many different funding options as possible.
- (iii) Facilitate and incentivise early settlement of disputes.
- (iv) Simplify and streamline the method of quantifying what the loser pays to the winner.
- (v) Control the amount of recoverable costs in advance and limit them to that which is proportionate.

3. HAVE THE REFORMS DONE ANY GOOD?

3.1 Case management reforms. This package of reforms includes:

- (i) The introduction of standard directions on line. These are working well and I understand that practitioners find them helpful.
- (ii) Increased docketing. This is effective, so far as it goes.
- (iii) Streamlining the rules for case management conferences, with directions questionnaires replacing listing questionnaires. This has worked well.
- (iv) Firmer enforcement of rules and court orders. This now works well after a particularly bumpy start. Initially the courts went 'over the top' with firmer enforcement. Fortunately, that stopped after *Denton v White* [2014] EWCA Civ 906; [2014] 1 WLR 3926 and courts are now striking the right balance.
- (v) A menu of possible disclosure orders, from which the court should choose that which was appropriate and proportionate, instead of ordering 'standard disclosure' in every case. This reform has not worked well, because by and large people have taken little notice of the new rule. A working party chaired by Gloster LJ is tackling this problem. The working party has drawn up a pilot, which hopefully will secure greater party co-operation and engagement in tackling the burden and costs of disclosure (particularly e-disclosure) and, in turn, lead to more focused disclosure

³ The first edition, entitled *The Reform of Civil Litigation*, was published in 2016.

orders.

Most of the case management reforms introduced in April 2013 are working well and people have (quite reasonably) forgotten that they are part of the Jackson reforms.

- 3.2 Recommendations for proper court IT. RJ, like Lord Woolf before him and Lord Briggs subsequently, has stressed the importance of effective court IT. That includes electronic filing of documents, payment of court fees on line and hearings with electronic bundles accessible to all involved. The Rolls Building now has CE File, an electronic filing and case management system,⁴ but that has not been rolled to the rest of the civil courts. There is much work to do on the IT front.
- 3.3 Concurrent expert evidence ('hot tubbing'). This new procedure has caught on gradually. As more practitioners and judges try it out, they find that it works well and shortens trials.⁵ Some have become 'fans' of the process. On 30th October 2017 the Chancery Bar Association and the Judicial College held a seminar on the topic. There was a mock trial to demonstrate the procedure. Several judges and practitioners said that they had tried it out with surprisingly good results. No-one remembered that this was part of the Jackson reforms – and I certainly didn't mention that fact. This neatly illustrates that when a reform works well, no-one remembers where it comes from. But when people dislike a reform, the author comes under heavy gunfire.
- 3.4 Ending recoverable success fees. This reform has been a success. Recoverable success fees distorted incentives and drove up costs massively. The abolition of recoverable success fees was a key recommendation of the **Final Report**. It has substantially reduced litigation costs. When combined with several counterweight measures (including increased damages, enhanced rewards for claimant part 36 offers, restriction of success fees deductible from PI damages), this package of reforms has controlled costs without inhibiting access to justice. There is no evidence that the reforms have led to a drop off in claims, quite the reverse.⁶
- 3.5 Ending recoverable ATE premiums and introducing QOCS. These reforms, again, have been a success. Recoverable ATE premiums were the most expensive and inefficient form of one-way costs shifting that anyone has ever invented. When they were combined with recoverable success fees, one party litigated at the risk of paying up to four times the cost of the action, while the other party paid no costs regardless of whether they won or lost. Furthermore, there was no effective control over the level of the ATE premiums.⁷ Ending recoverable ATE premiums and

⁴ See Practice Direction 51O.

⁵ See the report of the CJC working party report led by Professor Rachael Mulheron: <https://www.judiciary.gov.uk/wp-content/uploads/2011/03/cjc-civil-litigation-review-hot-tubbing-report-20160801.pdf>.

⁶ It is misleading to look at the figures for 2013 and 2014, because of a rush to issue new claims before the implementation date of 1/4/13. It is better to compare figures for 2012 with 2015. In 2012 the number of claims notified through the Portal was 833,170. In 2015 the figure was 876,532.

⁷ *Review of Civil Litigation Costs Final Report: Response by the Law Society*, October 2010: "There can be no doubt that ATE premiums are a major contributor towards legal costs over which solicitors have no control. ...

introducing QOCS for PI cases has substantially reduced the cost of litigation, thereby promoting access to justice. There have been numerous requests, so far resisted, to extend QOCS to other areas of litigation.⁸

- 3.6 Damages based agreements. This reform has not been a success, because very few people enter into DBAs. There are three reasons. First, RJ's recommendation to abolish the common law 'indemnity rule' has not been implemented. Solicitors are fearful of falling foul of that rule (which has long outlived its usefulness). Secondly, the DBA Rules are unsatisfactory and in urgent need of reform.⁹ Thirdly, the DBA Regulations do not permit 'hybrid' DBAs, thereby inhibiting access to justice for no remotely sensible reason.¹⁰ There is a pressing need for work here by the MoJ and the Rule Committee.
- 3.7 Banning PI referral fees. Prior to April 2013, referral fees were adding a thick layer of costs to PI litigation. Referrers did not (and do not) provide any added value to the litigation process. Solicitors were competing for business, by paying ever higher referral fees. The beneficiaries of that competition were claims management companies and other referrers, not the injured claimants. The ban on referral fees since April 2013 has (despite some circumventions) significantly reduced the cost of PI litigation.
- 3.8 Promoting third party funding. RJ's proposals to promote TPF and introduce a code for funders have been successful. These reforms enable parties to pursue claims (and sometimes defences) when they could not otherwise afford to do so. Funders are highly experienced litigators and they exercise effective control over costs. They often insist upon having court-approved budgets. Self-evidently, these reforms promote access to justice and tend to control costs.
- 3.9 Promoting Alternative Dispute Resolution. ADR is an effective method of resolving many civil disputes at modest cost and to the satisfaction of both parties. RJ's proposals to encourage the use of ADR take their place in a long line of similar initiatives. The publication of *The Jackson ADR Handbook* (now in its second edition)¹¹ has helped. In *PGF II SA v OMFS Co 1 Ltd* [2013] EWCA Civ 1288; [2014] 1 WLR 1386 the Court of Appeal "firmly endorsed" some of the advice given in that handbook. More recently, the CJC's ADR Working Group has published an excellent Interim Report,¹² dated October 2017, directed to the same end. The development of ODR, using modern digital technology, makes alternative dispute even more attractive. If done at an early stage (as the CJC urge),¹³ ADR achieves huge costs

There appears to be a substantial lack of transparency in the ATE market" (page 21); "The price of ATE insurance is currently prohibitive" (page 22)

⁸ There is an issue whether QOCS should be introduced in areas outside PI, where it undoubtedly works well. That is a complex topic, which the CJC has looked at. It is beyond the scope of this lecture.

⁹ See the CJC report on DBAs published in August 2015.

¹⁰ See *The Reform of Civil Justice* (to be published by Sweet & Maxwell on 21st March), paras 8-026 to 8-037.

¹¹ Oxford University Press, 2016

¹² <https://www.judiciary.gov.uk/wp-content/uploads/2017/10/interim-report-future-role-of-adr-in-civil-justice-20171017.pdf>

¹³ See paras 9.27-9.34 of the Interim Report of the CJC's ADR Working Group.

savings for all parties.

- 3.10 Other measures to promote consensual settlement. RJ's other proposals to promote early settlement include a raft of amendments to pre-action protocols and amendments to CPR Part 36 (to enhance the rewards for effective claimant offers and to reverse the effect of *Carver v BAA* [2008] EWCA Civ 412). They have all been implemented. It is reasonable to assume that they have had a beneficial effect, but that cannot be measured.
- 3.11 Summary assessment of costs. There are two issues here:
(i) The new form N260 (proposed in chapter 44 of the **Final Report**) requires parties to provide proper details of work done on documents. This is helpful for opposing parties and for any judge summarily assessing costs.
(ii) RJ's proposals for re-setting the Guideline Hourly Rates have – so far – come to nothing. That is unfortunate, but not the end of the world. Courts increasingly look at the substance of the work done and proportionality in determining the level of recoverable costs.
- 3.12 Provisional assessment. This procedure for bills up to £75,000 has now been in place for five years. It is working well. We can safely infer that from the lack of complaint. If any reform causes problems, practitioners are swift to publicise their concerns. Provisional assessment is substantially cheaper than a traditional detailed assessment. The process seldom leads to an oral hearing. This reform automatically leads to a saving of costs.
- 3.13 Detailed assessment procedures. Chapter 45 of the **Final Report**, paras 5.10 to 5.15 proposed a raft of reforms to the procedures for detailed assessment. These were implemented in April 2013. Again, we can infer from the lack of complaint that they are working satisfactorily.
- 3.14 New form bill of costs. The current form bill of costs is based on a Victorian account book and makes no use of modern technology. The proposal for a new form electronic bill of costs (**Final Report** chapter 45, paras 5.4-5.8) have been long – too long – in gestation, but they will be implemented this year. Practitioners will take time to adjust; there may be some teething troubles; there may be irate articles in the legal journals (with the usual friendly comments posted by readers). In the long term, however, however, the new form electronic bill of costs is bound to save time and costs. I predict that in three years from now people will be amazed that we had put up with the old paper-based bill for so long.
- 3.15 Costs management and limiting recoverable costs to that which is proportionate. CPR rule 44.3 implements this recommendation and defines 'proportionate' costs. It is fair to say that opinion has been divided about these reforms. But, over the last two years, there has been a growing acceptance that these linked reforms are both necessary and beneficial. This was starkly apparent in the consultation responses sent to RJ and the assessors during 2017. See pages 90-93 of the **Supplemental**

Report.¹⁴

- 3.16 Incurred costs. One problem is that although costs management controls future costs effectively, it does not constrain costs previously incurred. The **Supplemental Report** proposes an effective solution to this problem. Unfortunately, that will require primary legislation, namely amendment of section 33 of the Senior Courts Act 1981 and section 52 of the County Courts Act 1984 to permit pre-action costs control. Once that legislation is in place, the Rule Committee can draw up a grid of acceptable pre-action/pre-CCMC costs for different categories of case, coupled with a procedure for pre-action applications for permission to exceed the specified limits.
- 3.17 The proportionality rule. CPR rule 44.3 (5) is satisfactory, in the sense that it has been operated in a generally fair way over the last five years and no-one has yet suggested any improvement to the wording.¹⁵ In its submission to the Review of Fixed Recoverable Costs in 2017 the Law Society wrote:
“It is also worth remembering that parties do not have a "blank cheque" when it comes to their costs budgets. Proportionality is already written into the Civil Procedure Rules, reinforced by case law. Even if costs are necessarily and reasonably incurred, they will not be recoverable if they are disproportionate to the issues at stake.”
The South Eastern Circuit in its submission wrote:
“In the multi-track budgeting, done effectively, should prevent disproportionate costs. It means that at an early stage parties have a clear idea as to their likely costs recovery and liability. It is done on a bespoke basis by experienced local judges after the parties have had a fair chance to make relevant points. The redrafted provisions on proportionality apply and can be applied to the specific case.”
- 3.18 Calls for more guidance about the proportionality rule. Despite those encouraging remarks, there is one concern. It was expected that there would be a cluster of test cases in which the Court of Appeal would apply the new rule to different scenarios. That has not happened. The profession is becoming impatient. The remedy lies in their own hands. The Court of Appeal can only decide the cases which come before it. As an interim measure I have discussed with DJ Middleton¹⁶ (who has huge experience of applying the proportionality rule, as well as writing about costs and teaching at the Judicial College) whether he could provide some practical assistance. He tells me that he will write an article for the April issue of Civil Procedure News in which he takes five different scenarios and explains how he would apply the proportionality rule if setting budgets in those cases. The five scenarios will be: low value clinical negligence case; mid-range contractual dispute; a non-monetary property dispute; mid-range PI claim; mid-range professional negligence claim. Obviously that article will not have a higher status than any other article which appears in legal journals. Nevertheless, practitioners may find it helpful to see how

¹⁴ See also chapter 16 of *The Reform of Civil Justice*, to be published by Sweet & Maxwell on 21st March.

¹⁵ The wording of the rule is as proposed in chapter 3 of the **Final Report**, para 5.15.

¹⁶ DJ Middleton is a highly experienced district judge, who served as one of my assessors last year. He is one of the authors of *Costs and Funding: Questions and Answers*. As explained in that book, he doubts that supplemental guidance is required: the rule is clear; its application is case specific and for the managing or assessing judge.

an experienced district judge assesses proportionality in the sort of cases which they handle every day.

- 3.19 Increasing general damages by 10%. This reform was part of a package of counterweight measures, designed to achieve a balance and to assist claimants, whilst controlling litigation costs. The 10% figure was not plucked out of the air. It was based on (a) analysis of extensive data by Professor Paul Fenn and (b) other wider considerations.¹⁷ The courts have faithfully implemented this reform: see *Simmons v Castle* [2012] EWCA Civ 1039 and 1288; [2013] 1 WLR 1239 and *Summers v Bundy* [2016] EWCA Civ 126.
- 3.20 Legal aid and court fees. One element in the package of recommendations in the **Final Report** has, most unfortunately, not been heeded. That was the statement in chapter 7, para 4.2:
“I do, however, stress the vital necessity of making no further cutbacks in legal aid availability or eligibility.”
On the very day when the Jackson reforms were introduced, there were swingeing cutbacks in civil legal aid. I regret and deplore those cutbacks. Likewise, my plea for restraint in setting court fees (**Preliminary Report**, chapter 7) has fallen on deaf ears.
- 3.21 Fixed costs. FR chapters 15 and 24 made proposals for FRC in the fast track and IPEC. Most of these proposals have been implemented and are working well. There was a substantial increase in the number of new claims brought in the IPEC following the introduction of capped scale costs (a variant of FRC). There was a modest increase in the number of fast track PI claims following the introduction of FRC.¹⁸
- 3.22 Proposed extension of fixed costs. The **Supplemental Report** makes proposals for extending FRC as noted in para 2.1 above. This report has received a warmer reception than the earlier reports, except in respect of clinical negligence.¹⁹ Interestingly, those who oppose any extension of fixed costs place heavy reliance upon the success of costs management. At the time of writing, the proposals in the **Supplemental Report** are still under consideration.
- 3.23 OK, but will the **Supplemental Report** ever be implemented? Obviously, this paragraph is speculation. Delays are inevitable following the ministerial re-shuffle in January 2018. Based on past experience, however, it seems likely that the Government will accept most of the proposals. The recommendations are backed up by evidence and supported by reasonably full argument. Also, they follow wide consultation.

¹⁷ See the Tenth Implementation Lecture, “Why ten per cent?” delivered on 29th February 2012.

¹⁸ See chapter 21 of *The Reform of Civil Justice* (to be published by Sweet & Maxwell on 21st March).

¹⁹ The proposals in respect of clinical negligence have come under attack from two directions, with some people saying that the proposals don’t go far enough and others saying that they go too far. I have done my best on the available evidence and within the terms of reference. Given an ageing population and an over-stretched health service, there are wider questions concerning the role of the civil and criminal justice systems in minimising medical mishaps and how best to compensate victims, which lie beyond my terms of reference.

4. CONCLUSION

- 4.1 A sincere thank you. First, a word of thanks. I am immensely grateful to practitioners and judges, who – despite initial misgivings – have put substantial effort into making the reforms work well. This is my last opportunity to express thanks through the Judiciary website and I take that opportunity gladly.
- 4.2 But are litigation costs still too high? Yes, they are.
- 4.3 Then what on earth have you achieved? Many of the causes of excessive costs have been eliminated and significant improvements have been made in the litigation process. As things stood ten years ago, someone had to do something about costs (especially the absurd CFA/ATE regime). Whoever received that poisoned chalice was bound to make themselves extremely unpopular – unless they ducked every controversial issue. Despite all the criticisms which RJ has received over the last ten years, the blunt and inescapable fact is that the Jackson reforms have achieved significant reductions in the costs of litigation. As discussed above, most of the reforms have worked well, but a few have not. Those reforms which work well have also promoted access to justice.
- 4.4 Was it all worth it? That is for listeners and readers to judge. But it is submitted that the answer is yes.

Rupert Jackson

5th March 2018

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