



SEMINAR ON THE POST-IMPLEMENTATION REVIEW FOR PART II OF THE LASPO ACT 2012

Introduction, Overview and Context

Mr Justice Robin Knowles opened the seminar by praising the diverse range of attendees. He encouraged them to consent to having their details shared after the event, to keep the important conversation going. He explained that attendees were joined by members of the press with an interest in this field and the Chatham House rule was not in effect.

The range of attendees in the room was to ensure the seminar would tackle the 5 objectives of today:

- to focus on the key impacts of Part II;
- whether the reforms had reduced litigation costs and made those costs more proportionate;
- what the effect had been on access to justice;
- and any unintended consequences – with what suggestions for addressing any ongoing problems.

He expressed the importance to recognise the conversation was about the entire legal system. Any points discussed at the seminar could have a wider impact across the system, impacting on behaviour and feeding through into confidence (or lack of) in our system and inform how that system is structured into the future. This was a welcome opportunity which came with much responsibility.

Sir Terence Etherton, Master of the Rolls was grateful for the strong attendance for the important opportunity to assess LASPO part 2. He was also grateful to Lucy Frazer MP for her attendance.

LASPO part 2 was intended to give effect to Sir Rupert Jackson's reviews which were commissioned by the then Master of the Rolls, Sir Anthony Clarke to conduct an independent review into the rules, principles and costs of civil litigation and to make recommendations to promote access to justice at proportionate cost. This review had been a Herculean task and those interested in the promotion of access to justice would be forever grateful to him.

He explained that the review covered amendments to conditional fee agreements (CFA), after-the-event-insurance (ATE), damages based agreements (DBA), case management, disclosure, cost management, qualified one-way costs shifting (QOCs), referral fees, fixed recoverable costs and assessment of cost with many of those topics up for discussion at the seminar. The attendees would be able to give their expert views in light of their experience.

He expressed his profound gratitude to the members of the Civil Justice Council (CJC) for their considerable work in relation to the civil justice system who, over time, had considered many of the matters up for discussion at the seminar.

He mentioned the recent CJC work into reviewing Before the Event Insurance which played an important role in other countries.

The day's discussions would give rise to important and interesting ideas and assist the government in making an informed evaluation and further thought for the work of the CJC.

Finally, he thanked Sir Robin Knowles for all of his contributions to civil justice.

Lucy Frazer MP thanked the Master of the Rolls and the Civil Justice Council for hosting such an important conference. She praised Sir Robin Knowles, saying that the seminar was very fortunate to have him as the Chair. The event had a distinguished and experienced guest list and she looked forward to receiving attendee details after the event. The principal architect was Sir Rupert Jackson, and it was a pleasure to also have him present at the event.

She gave a background to LASPO part 2, which was intended to underpin access to justice in civil cases. The Part 2 reforms came into effect in 2013 and made significant changes, particularly through the changes to CFA cases in personal injury. The main purpose of the review was to examine whether the government had met its objectives and assess any unintended consequences.

As explained earlier, Sir Rupert Jackson's first review was published in 2010 and commissioned by the then Master of the Rolls to undertake an independent review of the rules and principles of civil litigation, and make recommendations to improve access to justice. The two principal aspects of the review were that it needed to be independent and to provide access to justice at proportionate cost. After a year of analysis, a package of reforms was proposed, with 109 recommendations. This was a significant achievement leading to major reforms in civil cases. Some changes fell to the government others to the judiciary. This was strongly endorsed by the judiciary and the government. Civil costs had become unsustainably high and disproportionate to Defendants with the blame on CFAs. The process for Defendants had become oppressively expensive. The previous regime had led to more settlements, creating a culture of higher numbers of claims.

The Government consulted on these recommendations and drafted the LASPO Bill in 2011. There were two sides to the Part 2 debate - some supported reforms as necessary with proportionate costs for access to justice. Others opposed it with some vigour saying it reduced access to justice.

The Bill was passed and rules and regulations were approved. The Ministry of Justice (MOJ) was grateful to the CJC for assisting with the details.

Then followed a period of adjustment with claimant firms being largely positive about the changes, having adapted to the reforms, and with the belief that they were generally working well. There were some continuing areas of concern but this

was due to the details in the rules and regulations, rather than arising out of behaviour.

The Post Implementation Review (PIR) note to the Justice Committee reported that there were not significant concerns arising out of Part 2 and that statement had not been challenged. This review would set out the definitive account. The MOJ assessment had been published to help focus discussion at the seminar. There had also been academic research. The PIR would close on 24th August 2018. It would assess the impact of the reforms and the extent to which it had achieved its aims of finding balance, but also allow parties with a genuine claim to bring this and also encourage early settlements and discourage unmeritorious claims.

Part 1 would also be considered carefully. The MOJ had already met with over 50 key stakeholders and was gathering evidence, however legal aid was not on the agenda for this seminar. Fixed recoverable costs were also being considered and the government would set out the way forward in due course.

The government was looking forward to hearing views. MOJ officials would be listening with interest and were available to answer questions and consider the outcome of discussions and responses to the survey. They were seeking further data and evidence and a report would be published later in 2018. The government would then decide what to take forward.

She thanked everyone for their attendance and participation and extended thanks to the Master of the Rolls and the CJC.

Sir Rupert Jackson then presented on his reforms, which he describes as a package of interlocking measures designed to promote access to justice at proportionate cost. He explained that the seminar would not look at the whole package, but 5 elements that required primary legislation and listed by Sir Robin earlier.

He praised the seminar for being a valuable exercise but asked attendees to not forget the context. The reforms currently under review were intimately linked to others which were not subject to review at that time. For example, the 10% increase in damages, introduced by judicial decision, had been arrived at after detailed calculations by Professor Paul Fenn who had served as an assessor in Sir Rupert Jackson's first and second review. He was hugely grateful to Professor Fenn for his assistance.

His reforms were built on 5 strategies:

- Amending rules of procedure, so as to streamline the litigation process and cut out unnecessary work.
- Amending funding rules, so that (a) no method of funding generates increased costs and (b) there are as many different funding options as possible.
- Facilitating and incentivising early settlement of disputes.

- Limiting recoverable costs to proportionate levels and streamlining the process of assessment.
- Controlling the amount of recoverable costs in advance.

He had received criticism from many different groups but overall those reforms had not had cataclysmic consequences. They were successful.

DBAs however, were not being effectively utilised. He proposed the reason for this involved technical deficiencies in the regulations that built upon Part 2. Professor Rachael Mulheron had produced a first-class report urging the MOJ to implement a number of recommendations as part of the present review.

Another issue had been the reluctance of the government to adopt hybrid DBAs, who were stated to be cautious when creating new forms of funding for high value claims. Sir Rupert believed these could be used for low value claims also and were already used widely overseas as the main way of funding litigation in some jurisdictions. They had also been used in the Employment Tribunal for many years and should not be confined to niche areas. Some of the criticisms being levelled at DBAs could equally be made of third party funding. Both third party funding and DBAs provided another means of access to justice. If hybrid CFAs were allowed, then hybrid DBAs should also exist.

He stated that control of costs in advance was essential to keep costs at a reasonable level. This either meant fixed costs or costs management and there was a need to extend fixed costs. Costs management was working well after a challenging start. He had set out the detail of this in his book (published by Sweet & Maxwell) and had undertaken research with Alex Hutton QC and Nick Bacon QC on a review of costs management in group actions. He had set out a number of examples in his paper to the seminar. He had concluded that costs could be so high that the expense of the budgeting process was a drop in the ocean. It provided a good discipline, assisted the parties and livened up case management which had previously been a formality. The ban of referral fees on paper had been a success however there were concerns about policing this as the MOJ had highlighted in their PIR. There was agreement that further work was needed, but he stressed that the government should not abolish the ban.

Chris Coxon, MOJ analyst spoke to his slides which presented on the various data sources used by the MOJ. He explained that PIRs were policy led rather than analytical. They used as much data and evidence as possible to supplement their final review. They had faced limitations on court data which was relatively basic and a blunt tool to measure these reforms in detail.

They had particularly looked at personal injury data since 2012 although this was not the only category affected, and created a graph to show the trends pre and post LASPO, noting that other policies would also have impacted on the data such as Part 1 and increased court fees. High court data had also been useful as it was broken down into case types.

For pre-issue, there were various data sources that could assist, including the Claims Portal, a web based system introduced in 2010. Other data sources included

NHS Resolution, YouGov, the Solicitors Regulation Authority. One data gap was on litigation costs but they had drawn on information provided by Professor Paul Fenn. They also appreciated the value of expert insights and he encouraged attendees to respond to the MOJ web based survey.

Professor Paul Fenn also spoke to his slides. He explained that the changes in LASPO may have had a behavioural impact as indicated by a body of academic literature. One paper, for example, showed an impact of a reduction in base costs when recoverability was introduced in the Access to Justice Act 2000. He was now exploring the impact of the reversal of that recoverability in LASPO.

When testing the impact of measures on outcomes, for statistical confidence it is necessary to have data on relatively large numbers of claims. It was not possible to directly test the impact of LASPO on many personal injury claims due to the introduction of fixed costs in the months following LASPO. You could not disentangle the effect of LASPO from the effect of the fixed cost extensions. Therefore, he used data from personal injury accident claims over £25k and clinical negligence claims, which were not subject to fixed costs. Taylor Rose and Acumension provided this data.

He explained that graphs showing mean settlement outcomes were not helpful in interpreting effect of LASPO as there remained a mix of pre- and post-LASPO rules applying to those settlements, and claims with post-LASPO CFAs would be shorter and less complex on average. The alternative was to compare cohorts of claims with similar claim dates, and similar settlement durations, but run under different rules, for instance comparing monthly cohorts of similar claims either side of the LASPO implementation date (April 2013).

He explained it was very likely that total cost recoveries *from defendants* had reduced since 2013 because the majority of personal injury claims were now subject to fixed recoverable costs, both in and outside the claims portal. This said nothing about total costs, many of which were now recovered from claimants' damages through success fees (with limited data available). Therefore, while they are outside this review, he would argue that the significant changes to fixed recoverable costs within and outside the claims portal in 2013 should be subject to further evaluation of their impact.

Nevertheless, it may be possible to determine the overall effect of LASPO itself on costs and damages, by focussing only on claims not subject to fixed costs – clinical negligence and other personal injury claims over £25k in damages. He and Professor Rickman were working on the data with the aim of producing initial findings later in 2018.

Analysis of LASPO reforms on funding litigation

Recoverability of Success Fees & ATE premiums/Qualified One-way Costs Shifting (QOCS)

Panel: Nicola Critchley, John McQuater, Claire Green and Paul Wainwright and Paul Wainwright.

Nicola Critchley, Head of Costs at Horwich Farrelly, had dealt primarily with Defendant insurers for 17 years.

- She said that the 5 elements to the review, listed above could not be looked at in isolation as there was a complex interplay.
- Fixed cost regimes had driven costs savings and efficiencies but there was still room for improvement. She had not seen a significant reduction in claims frequency with holiday sickness claims flourishing.
- She had seen the start of case law interpreting rules, for example *Qadar v Esure*¹ and a whole raft of other cases beyond a value of £25k.
- She disagreed with Sir Rupert Jackson as she had seen a considerable degree of cases in the non-fixed fee area going to assessment, more than pre LASPO.
- In sub £75k provisional assessment cases, her experience was that the decisions and awards made by judges were more favourable to the receiving party. She had also seen, in higher value personal injury claims, increased hourly rates and time claimed.
- She agreed with Sir Rupert that costs budgeting had a bumpy start, but had since been really well handled although there was room for improvement.
- Five years on, there was still no binding decision on proportionality. Two cases had gone to appeal but there was no real guidance.
- With CFAs and ATE, she felt the landscape had not changed much. With CFAs 25% was taken out of claimant's damages. She had not seen a reduction of 25%.
- She had not seen any take-up of DBAs in personal injury.
- She found QOCs to be working and judges making robust decisions. In 600+ cases, 400 had used fundamental dishonesty.

John McQuater, APIL, provided a claimant perspective.

- He stressed the importance to remember the historical context and never-ending cycle of corrective reform. At the end of WWII, there was a comprehensive legal aid scheme which underwent a number of changes with unintended consequences. These that led to Sir Rupert's first report and key interlocking reforms.
- A key impact of LASPO 2 were the linked recommendations of removing recoverability but giving effective protection via QOCs.
- The success fee needed to remain for access to justice. With ATE insurance, the position was different. The intention of QOCs was to remove that cost from the system. There was the link between the removal of recoverability and introduction of QOCS which must have led to a reduction in costs.
- An unintended consequence was the exception to QOCs for fundamental dishonesty. Claimant practitioners were seeing increasingly inappropriate allegations of dishonesty. This should be dealt with at the case management

¹ *Qader v Esure and conjoined appeal* [2016] EWCA Civ 1109

stage, properly and fairly, with multi-track allocation. He also suggested greater use of standard directions.

Paul Wainwright, Browne Jacobson, looked at the behavioural perspective.

- The changes to CFAs were welcome and had led to a reduction in costs. For his firm's fraud workload, the risk of taking these to a final adjudication was now more predictable.
- He did not think that some law firms were doing the right thing by their clients by deducting success fees in a way that was open and transparent. He had often not seen any calculation for damages. Regulation was needed to ensure confidence and increase transparency.
- He thanked Nicola Critchley for her statistics on QOCs. He felt the judiciary was adopting the intended approach.
- There was one argument that claimant should not come under pressure by the defendant when there was an inference of fraud, however he did not agree that these changes were intended for that purpose.
- The challenge for QOCs was in the mismatch of the true value of a claim and the claimant's expectations. This could be supported by increased judicial involvement.

Claire Green, Association of Costs Lawyers, looked at the situation from both perspectives.

- From the coal face, she experienced a disjoint between the rules and practice directions and what is was happening within the profession. More work was needed on rule and policy.
- There needed to be as many different funding options as possible and the reforms were closing these down rather than opening them up. They needed to look at other means by which people can fund and increase access to justice.
- Success fees could have been fed into an alternative legal aid fund but they were now petering out.
- She believed that the reforms had resulted in a decrease in costs.
- There was still no definition for proportionality resulting in a situation similar to a pendulum swinging between the rights of different sides.
- She had seen improvement on the controlling of recoverable costs in advance through budgeting but there were problems concerning the training of the judiciary and practitioners.

Paul Wainwright, BLM

- felt that QOCs had been a success over the past 5 years.
- There was work to be done going forward such as claims against police which should be entitled to use QOCs. Other exclusions such as mesothelioma should also be reconsidered.

- Structural changes have made defendant work a lot easier. They were now able to build more a more accurate model of costings through broad agreement on issues.
- This was resulting in making litigation costs on the lower end more predictable leading to access to justice.

Damages-Based Agreements

Panel: Professor Rachael Mulheron, Rocco Pirozzolo, Hardeep Nahal & Ali Akram

Rocco Pirozzolo offered a perspective as a director of litigation funding as well as an ATE insurance underwriter.

- Litigation funding enabled the use of DBAs for certain commercial claims. This had worked for those law firms with an appetite to offer DBAs to their clients but who sought to be financed by a funder. The structure of the arrangement involved 2 contracts. A funding agreement between the law firm and the funder (to which the client is not a party) where the funder agreed to pay an agreed percentage of the firm's hourly rate and the disbursements. This funding agreement enabled the law firm to enter into a DBA with their client. Any DBA fee recovered by the law firm was held on trust to repay the funder's investment before any remaining monies were divided between the law firm and the funder in accordance with the terms of the funding agreement. This 'hybrid DBA' arrangement was widely available from the funding market. However, its availability reflected the investment criteria of funders who, in general, were interested in claims where the realistic value of the claim was at least 10 times greater than the amount of the funding required. These claims, typically, exceeded £10 million in value.
- Although the ATE insurance market had received numerous requests to insure a broad range of commercial disputes since 2013, it was evident that very few DBAs have been entered into over the last 5 years for these claims.

Hardeep Nahal – a commercial litigation partner explained that:

- DBAs were not being used in commercial litigation. It was also a key issue that hybrid DBAs were still not permitted. If hybrids were brought in, the cap could be reduced from 50%.
- Synthetic DBAs were effectively a way around, he therefore asked why could hybrid DBAs not be implemented.
- Another issue was the concern as to whether clients might bring challenges based on undue influence. Another issue is if the client walks away.

M Ali Akram – a barrister, solicitor-advocate and partner at LEXLAW, had brought litigation on behalf of clients from all major banks and had much experience with SMEs.

- DBAs were failing to provide access to justice, as very few used as unworkable.

- He gave an example of a litigation case his firm had worked on, where the client had run out of funds but he had seen merits in their claim. They initially declined a percentage based agreement but when LASPO came in they agreed a DBA at 10% plus VAT with the financial benefit to the claimant at around £1m. When the bank revealed they would make a substantial offer the claimant sought to abandon the DBA, despite two years' worth of work. This resulted in satellite litigation.
- DBAs regulations were not clearly written outside of employment cases and the chance of a legal attack was high. Regulations are badly drafted outside of employment cases.
- A proposed solution was to retrospectively correct the DBA regulation to include a mandated ground for termination. There was no judicial guidance or model DBAs to work from.

Professor Rachael Mulheron, Queen Mary University of London

- The MOJ statement that introducing new form of funding needed caution, in her opinion instead required clarity. The 2016 paper prepared by the CJC was a valuable piece of work.
- In addition to drafting corrections there were a number of policy issues that needed further consideration. One was the treatment of counsel's fees and whether they were within the DBA cap. As the 2016 report indicated, this was problematic for commercial litigation. Both solicitors and claimants were claiming on one pot of money and as the case advanced, counsel fees would rise as would conflicts of interest. The recommendation was that Counsels' fees should be treated as a expense and taken outside of the cap resulting in a cap plus expenses.
- She explained the Ontario model vs success fee model. The latter model, which the report recommended, involved recoverable costs coming out of the DBA cap, or the success fee given on top of recoverable costs. The Ontario model involved no further recovery.
- Sir Rupert recommended abolition of the indemnity principle, which had not occurred, however the balance of the working group on DBAs had recommended its abrogation. The argument against concerned windfalls. The working group recommended that if abrogated for DBAs, this should also be the case for CFAs.

Costs budgeting and management

Panel: DJ Simon Middleton, Alexander Hutton QC, Matthew Hoe, Deborah Burke and Cormac Toomey

Simon Middleton, a District Judge, provided judicial costs management training and guidance.

- He believed that costs management had reduced the costs of litigation as largely driven by process. The determination of a directions order resulted in a more streamlined process and reduced trial costs.
- Costs management encouraged earlier settlement due to earlier informed decisions.
- On proportionality, he would redesign Precedent H so it was not based on the rate multiplied by the time spent. He wanted to move away from that calculation, and take a step back to look at the overall spend, based on the issues.
- Following the Court of Appeal decision in *Harrison*², he had seen adequate exploration of the generic challenges of the costs management regime. The rules were clear. Going forward there would be large decisions, but also individual exercises of discretion and the identification of proportionality.

Alex Hutton QC, Hailsham Chambers

- His experience was largely based on high value claims and group actions for which costs management worked very well. It provided certainty, gave a figure for ATE insurers, encouraged settlement and controlled costs. From the defendants' perspective, it controlled claimants' costs in a way that was effective.
- He wanted costs budgeting to be included in group actions and cases above the £10m limit to prevent costs getting out of control.
- His main criticisms were a lack of judicial time to do the process properly (with the process often relegated to the end of case management conferences), a lack of judicial resources causing delay and inconsistency within the judiciary.

Matthew Hoe, spoke as an analyst of the data gathered over the years.

- He had taken a narrow set of data from 2017-2018 and 5000 concluded costs cases. He stripped out fast track and fixed costs cases, leaving him with 750 multi track claims. Costs management had only taken place in about 100 cases. Many had settled and others were too old to be included. Only 8 had a detailed assessment hearing.
- Limited data said that costs budgeting correlated with fewer detailed assessment hearings but had not replaced them.
- *Harrison* had a chilling effect on detailed assessments.
- The need to deal with incurred costs meant detailed assessment was still taking place
- Going forward he believed it may save unnecessary bills of budgeted costs to replace the presumption of such a bill with the paying party asking for it instead, if so advised. More broadly, the lack of controversy may have meant

² *Harrison v University Hospitals Coventry & Warwickshire NHS Trust* [2017] EWCA Civ 792

there was a readiness for fixed costs. Or that lack of controversy may have been imposed by the *Harrison* judgment.

Deborah Burke acted to support and promote civil litigators

- She had seen a very wide range of claims. Her personal interest was in legal technology and the promise that this would improve efficiency and increase profits.
- The Hutton committee had shown us that the profession had to battle significant changes in the approach to costs management and the view of the Law Society was that access to justice at proportionate cost should not just concern what lawyers charge but also procedural reform.
- She stressed the importance of data. Now was a real opportunity to collect, analyse and interpret structured data.

Cormac Toomey, The Law Society

- said that his clients would agree with the statement that litigation costs were unsustainably high and he would be in favour of costs management however there were often better options than costs budgeting such as fixed recoverable costs.
- The question had to be asked on whether costs budgeting was working in cases where it was required the least and also not working where it was really required.
- Incurred costs were a real issue in budgeted cases when trying to settle. The supplemental report by Sir Rupert said that 32% of the claimant's total cost to trial were incurred and 15% of the defendant's. However, where a case settles earlier than trial, incurred costs are often 80% more of the total costs.

Part 36 settlements

Panel: Kerry Underwood, Mark Friston, and Melanie Hart

Melanie Hart, Gordon Dadds and The Law Society Civil Justice Committee, said that part 36 did have real teeth but it was challenging to explain to clients and greater clarity was required. She couldn't say that the additional 10% of damages brought about any additional settlements.

Mark Friston, Hailsham Chambers was optimistic given considerable success stories. Game theory had been turned into law and placed in the Civil Procedure Rules. It had worked because it was simple and straightforward.

He did query the need to state whether the offer extended to a counterclaim in cases where there was no counterclaim. He also commented on a few "wrinkles" to be ironed out: for example, in the context of fixed costs which could overlap with other regimes. In his view, Part 36 did not bring a great deal to the detailed assessment process but concluded by emphasising its success.

Kerry Underwood, Law Abroad

- said that the rule needed redrafting to help LIPs understand and provide greater clarity, certainty and unity. Cases with key issues should be accelerated to the Court of Appeal to assist this.
- Moving forward there should be a fixed uplift for part 36. There was also a need for it to be spread to the small claims court or no sanction imposed on not taking an offer.
- He recommended that 10% should be increased to 20% to fill the gap.
- They should learn from the settlement system in the employment tribunal where no employment matter could be settled without the advice of a lawyer. This could be introduced to personal injury claims. £350-500 would protect claimants who were unrepresented and would give the Defendant a big incentive to settle.

The ban on Referral fees

Panel: Richard Collins, Kevin Rousell and Craig Underwood

Richard Collins, Solicitors Regulation Authority (SRA)

- there were two conditions for the SRA to intervene. A referral had to be made, involving the passing of information regarding an offer to give legal services, and for a payment to be made in return. This was a precise definition.
- Generally, the SRA dealt with solicitors that complied. There were 725 firms who specialised in personal injury (50%+ of their clients). Most firms were trying to comply. Between 2013-2018, 260 cases were referred where there had been a breach. The SRA worked closely with claims management companies and so far they'd encountered 11 cases with internal sanctions.
- They also assisted in ensuring marketing schemes were correctly structured.

Kevin Rousell, CMC Regulator

- He had worked with the Financial Conduct Authority and the SRA. They wanted to make it clear they were serious and visited 1000 firms unannounced. They also introduced a ban on inducements recommended by Lord Young at the same time.
- After the first year, about 1000 claims management companies were no longer authorised to practice. In 2012 there were 2550 firms operating in personal injury. This had reduced to 630. The drop from £455m profit to £157m last year also showed pressure on the market. Claims management companies were however good at diversification and were working with solicitors to develop new marketing models to ensure they were working properly in practice and not in breach.
- He asked whether the rules should be tightened up and whether they were still relevant in light of the Civil Liability Bill?

Craig Underwood, Director Optima Legal

- He emphasised that the seminar was not on the legitimacy of LASPO, but the effectiveness of it.
- S.56 was drafted in isolation from other provisions at that time. The exceptions provided within LASPO offered an infinite number of exceptions that businesses could adopt and change.
- The controversy for s56 was that the exchange of value on the supply chain had got out of hand. This rule had more to do with lowering turnover than the cost of reform.
- He did not think that LASPO alone was responsible for change.
- At the time, he had looked at alternative models to ascertain whether businesses could continue. There had been a low appetite of regulators to come up with a strict enforcement regime.
- He had two recommendations: firstly that the ban was too narrow and should be extended into the rest of the supply chain and secondly, that transparency should be included in the legislation so that the customer/client had full details of the amount of value being created in that chain.
- He felt that S.56 was largely an irrelevant piece of legislation and would have driven some marginal claims.

Overall reflections on the reforms

The claimant view – John McQuater.

- His firm saw a full range of personal injury claims
- He had seen a number of changes in 10-20 years and time was needed for those to settle down. One driver of disproportionate costs was to have satellite litigation.
- On costs budgeting it was important for clinical negligence cases to have bespoke fixed costs and effective case and costs management.
- A Court of Appeal decision on proportionality was needed.
- Part 36 had been a success. NHS Resolution said it was helpful to have offers from claimants. He endorsed what Andrew Parker said – not to tinker as they were big reforms and needed time to settle.

The defendant view – James Heath provided a defendant solicitor view as a representative of FOIL.

- The key was that LASPO was part of an overall interlocking package of reforms which could not be looked at in isolation.
- LASPO aimed to reduce the costs of claims and improve access to justice but this did not mean that all costs were proportionate. He had seen unintended consequences and adverse behaviours but these should not tar everyone. LASPO was only one piece of programme of ongoing reform.
- The ban on referral fees was crucial and the first necessary step in preventing claimants being regarded as commodities. Of a sample review of 40 firms,

78% still had referral arrangements in place. That review ended up in disciplinary action of one firm. 1 in 40 demonstrated it was not an issue that was across the board however referral fees should not return.

- He wanted an extension of the fixed costs regime and agreed with Sir Rupert Jackson's recommendations.
- He agreed with Kerry Underwood and Mark Friston that Part 36 was overly complicated and required simplicity and clarity.
- He did not agree with the idea that settlements should only arise in the small claims track with legal advice. This went against the Civil Liability Bill. It seemed non-sequitur to take costs out of low value claims, only to add in more for solicitors' involvement.
- QOCS had been a success but needed the necessary evolution and clarity on fundamental dishonesty to enforce it. There was now increased clarity via case law through *Gosling v Hailo and Screwfix Direct Ltd (29 April 2014)*, *LOCOG v Sinfield [2018] EWHC 51*, and *Howlett and another v Davies and another [2017] EWCA Civ 1696*, with the judiciary now adopting the correct approach.
- He did not think that costs management was working entirely and could result in front loading costs, adverse behaviours and increased rates of fee earners.
- He also focused on a lack of judicial time and training.

The judicial view – Senior Costs Judge Andrew Gordon Saker provided his own personal view to the seminar.

- He explained that he would have liked to return to 1998 before the costs war, introduction of referral fees, and other developments that saw litigation being treated as a commodity. He felt that LASPO had been a step in the right direction but more work was needed.
- Litigation costs had reduced in cases where additional liabilities would have been recoverable and in cases now subject to fixed recoverable costs.
- Costs budgeting was a good thing and it was better for the parties to consider liability for costs at an earlier stage and for the courts to be involved earlier. He was unable to say whether this had reduced costs. It was too early to say. *Harrison* made clear the importance of the agreed or approved figures.
- He said that Part 36 appeared to work albeit with one small alteration, to disapply 36.17(4) to detailed assessment proceedings as he felt it was unfair to penalise the paying party. Extra interest was sufficient and 10% of damages was too much and would be better used by the NHS. He would extend QOCs as far as they would go now that ATE premiums were not recoverable. QOCs should fill the gap left by the loss of legal aid costs protection. This could be extended to police claims or professional negligence via means based QOCs.
- *Harrison* showed more work was needed to get the figures right on costs budgeting. If a costs judge could decide at the end of a case what was reasonable throughout, he could not see why they could not do this in advance at a case management conference. Costs judges were happy to help.

- Finally, he referred to the growing industry of challenging solicitor/client bills. He also said that some solicitors thought that success fees were fixed at 25% of damages. The Law Society could educate on this and regulators could also be involved. Pt. III of the Solicitors Act 1974 should also be reviewed. There should be a simpler system to challenge a bill and he would remove or clarify the distinction between interim and final bills.

Closing remarks

Robert Wright, head of civil litigation funding and costs at the Ministry of Justice.

The MOJ had a team established to considering the reports and to consult with and advise ministers. They had worked with the CJC on the details of some of the regulations. It was important to reflect on major pieces of legislation.

The general view was that the reforms had been a success and it had been a fascinating seminar with contributions on a wide range of issues. It had covered a huge amount of ground and it was reassuring that the mood had been positive but there were still aspects to consider.

There had been a successful launch to the review, following the survey published online on the 28th June 2018. The team would take time to consider this. Although many comments had been made at the seminar, he asked for formal responses. He also asked for additional data. It was important from the MOJ's perspective to not only to look at the areas for development, but also to reflect on what had gone well. The department would publish a response by the end of the year. There would be a concurrent review into LASPO part 1 which was more contentious and sensitive. The plan was to publish responses to both by the end of 2018 and then for Ministers to consider next steps.

The MOJ would be interested in taking part in additional events considering commercial litigation however they were not planning to host further formal sessions.

He gave thanks to the CJC whose work was appreciated by the MOJ. He endorsed the Master of the Rolls' comments that the members gave their time and expertise for free to further the interests of justice. Even if the MOJ did not respond immediately to all the reports they produced, they did consider them and were grateful for them. He also wanted to thank Sir Robin Knowles for the way he had chaired the event.

Mr Justice Robin Knowles gave thanks to Robert and the appropriate working relationship and crucial role he held with the CJC.

He asked attendees not to forget other points not part of the discussion on the day, such as BTE which had been referenced by the Master of the Rolls, and to fixed recoverable costs. Sir Rupert would have been interested and fascinated by all of the comments. The day should be dedicated to him for all the hard work he put into the subject area.

He also wanted to emphasise the value of following up on opportunities for further input. The further call for evidence, online contributions and HHJ Cotter's generous

contribution re training. Finally, he thanked the CJC staff team, Peter Farr, Alexandra Morton, Graham Hutchens and Andy Caton.