

**Lord Justice Jackson’s paper for the Civil Justice Council conference  
on 21<sup>st</sup> March 2014**

<u>INDEX</u>	<u>Pages</u>
1. Introduction	1
2. Background to the civil justice reforms	1 - 3
3. Case management	3 - 6
4. Restrictions upon recoverable costs	7 - 8
5. Costs management	8 - 9
6. The assessment of costs	9 - 10
7. Funding and Part 36 offers	10 - 11
8. Costs Council/Costs Committee	12 - 13
9. Reforms to specific areas of litigation	13 - 14
10. Impact of the reforms – an early impression	14 - 17

## 1. INTRODUCTION

1.1 This paper. I am asked by the Civil Justice council (“CJC”) to prepare a paper: (i) summarising the background to the recent civil justice reforms, their objectives and what those reforms comprise; (ii) stating my early impressions of the impact of the reforms.

1.2 The public interest. Every stakeholder group seems to perceive the public interest as residing in a state of affairs which coincides with its own commercial interest.<sup>1</sup> I have tried to cut through that and, after listening to a mass of conflicting arguments for a year, to design an evidence-based package of reforms which is in the public interest. Time will tell if that design is successful.

## 2. BACKGROUND TO THE CIVIL JUSTICE REFORMS

2.1 Civil Litigation Costs Review and Reports. The Civil Litigation Costs Review was set up by the Master of the Rolls (and supported by the MoJ) because there was mounting concern in many quarters about the escalating costs of litigation.<sup>2</sup> The principal document which sets out the background to the reforms and the “mischiefs” against which they are directed is the *Final Report*. Much of the evidence relied upon in the *Final Report* is to be found in the *Preliminary Report* and its appendices.

2.2 Implementation process. The implementation process required both primary legislation and the drafting of new or amended rules. The primary legislation was contained in Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (“LASPO”). LASPO came into force on 1<sup>st</sup> April 2013. During the period 2010 to 2013 the Rule Committee approved a large number of new rules to implement the reforms, but held most of these draft rules in escrow until 1<sup>st</sup> April 2013, the general implementation date.

---

<sup>1</sup> See e.g. chapter 10 of the *Preliminary Report*.

<sup>2</sup> Solicitors (a) paying huge sums to claims management companies to buy up low value claims or (b) offering cash rewards or free holidays to people for making PI claims hardly helped to assuage these concerns.

2.3 Judicial Steering Group. A Judicial Steering Group (“JSG”) chaired by the Master of the Rolls was set up to oversee implementation on behalf of the judiciary. The JSG approved any draft rules which Ramsey J<sup>3</sup> or I prepared for consideration by the Rule Committee.

2.4 Pilots. With the approval of the JSG and the Rule Committee, the following pilots were established:

Costs management of defamation cases in London;

Docketing in Leeds;

Concurrent expert evidence in the Manchester specialist courts;

Provisional assessment of costs in Leeds and York;

Costs management in the specialist courts, initially at Birmingham but subsequently at all court centres.

2.5 Monitoring of pilots. Professor Dame Hazel Genn of UCL monitored the concurrent evidence pilot and has published her findings.<sup>4</sup> Nicholas Gould of King’s College and Fenwick Elliott monitored the principal costs management pilot and has put his report on the Internet.<sup>5</sup> I monitored the provisional assessment pilot (with much help from the judges involved) and summarised the results in the eighth implementation lecture. Nick Taylor of Leeds University monitored the docketing pilot and has published his findings.<sup>6</sup> One great benefit of the pilots was that they exposed teething troubles and glitches. The final rules were modified to deal with these difficulties.

2.6 Working groups. A number of working groups took forward the implementation of specific recommendations. Michael Napier QC chaired a group which developed a code for third party funders. An editorial advisory board (chaired by Lord Neuberger and Lord Clarke) oversaw the publication of an ADR handbook. HH Simon Grenfell chaired a working group, which developed a series of standard directions and model directions for cases of common occurrence. A CJC working group embarked upon revising the pre-action protocols. Michael Napier chaired a working group which advised the MoJ on rules for contingency fees. The Senior Costs Judge chaired a group which undertook the necessary re-writing of the costs rules (CPR Parts 43 – 48).

2.7 Implementation lectures. Between September 2011 and March 2013 judges delivered a series of eighteen implementation lectures to alert practitioners to the forthcoming reforms. Some of these lectures set out and commented upon the text of the draft rules which were being held in escrow. These lectures were all placed on the Judiciary website.<sup>7</sup> They are:

1. *Legal aid and the Costs Review reforms* (5/9/2011) Jackson LJ

2. *Contingency legal aid fund and supplementary legal aid fund* (11/10/2011) Jackson LJ

3. *Technical aspects of implementation* (31/10/2011) Jackson LJ

---

<sup>3</sup> In April 2012 I underwent a cancer operation and Ramsey J took over my role in relation to implementation work.

<sup>4</sup> *Getting to the Truth: experts and judges in the “hot tub”* (2013) 32 CJQ 275 – 299

<sup>5</sup> <http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/costs-management-pilot.pdf>

<sup>6</sup> *Docketing lite: an analysis of a process of assigning multi-track cases to individual judges* (2012) 31 CJQ 430 – 450

<sup>7</sup> <http://www.judiciary.gov.uk/>

4. *Focusing expert evidence and controlling costs* (11/11/2011) Jackson LJ
5. *Achieving a culture change in case management* (22/11/2011) Jackson LJ
6. *Third party funding or litigation funding* (23/11/2011) Jackson LJ
7. *Controlling the costs of disclosure* (28/11/2011) Jackson LJ
8. *Assessment of costs in the brave new world* (26/1/2012) Jackson LJ
9. *Docketing: completing case management's unfinished revolution* (9/2/2012) Lord Neuberger MR
10. *Why ten per cent?* (29/2/2012) Jackson LJ
11. *The role of ADR in furthering the aims of the Costs Review* (8/3/2012) Jackson LJ
12. *The reform of clinical negligence litigation* (23/3/2012) Jackson LJ
13. *Reforming the civil justice system – the role of IT* (27/3/2012) Jackson LJ
14. *Keynote address to Association of Costs Lawyers conference* (11/5/2012) Lord Neuberger MR
15. *Proportionate costs* (30/5/2012) Lord Neuberger MR
16. *Costs management: a necessary part of the management of litigation* (30/5/2012) Ramsey J
17. *IP litigation: implementation of the Jackson Report's recommendations* (14/2/2013) Arnold J
18. *The application of amendments to the Civil Procedure Rules* (22/3/2013) Lord Dyson MR.

### 3. CASE MANAGEMENT

3.1 Terms of reference. The terms of reference for the Civil Litigation Costs Review required me *inter alia* to “establish the effect case management procedures have on costs and consider whether changes in process and/or procedure could bring about more proportionate costs”. This provision was sensible, indeed inevitable. One cannot bring down the cost of litigation simply by rewriting the costs/funding rules.

3.2 Recommendations. Chapter 39 of the *Final Report* dealt with case management. The principal recommendations made in this chapter were:

- (i) Measures should be taken to promote the assignment of cases to designated judges with relevant expertise.
- (ii) A menu of standard paragraphs for case management directions for each type of case of common occurrence should be prepared and made available to all district judges both in hard copy and online in amendable form.
- (iii) CMCs and PTRs should either (a) be used as occasions for effective case management or (b) be dispensed with and replaced by directions on paper. Where such interim hearings are held, the judge should have proper time for pre-reading.
- (iv) In multi-track cases the entire timetable for the action, including trial date or trial window, should be drawn up at as early a stage as is practicable.
- (v) The courts should be less tolerant than hitherto of unjustified delays and breaches of orders. This change of emphasis should be signalled by amendment of CPR rule 3.9. If and in so far as it is possible, courts should monitor the progress of the parties in order to secure compliance with orders and pre-empt the need for sanctions.
- (vi) The Master of the Rolls should designate two lords justices, at least one of whom will so far as possible be a member of any constitution of the civil division of the Court of Appeal, which is called upon to consider issues concerning the interpretation or application of the CPR.

3.3 Docketing. In relation to recommendation (i) above, judicial continuity is

important for a number of reasons. First, every time a new judge takes over a case there is a need for re-education. Secondly, case management is more effective and “joined up” if the same judge conducts successive case management hearings. Thirdly, the advent of costs management makes judicial continuity even more important, so that the judge who sets a budget can deal with any subsequent variations. Fourthly, the need for greater judicial continuity was one of the few matters upon which the various warring parties agreed during the Review. Finally, the experience of both Australia and the US confirms the benefits of judicial continuity.

3.4 HMCTS and the judiciary are now making serious efforts to increase judicial continuity in all cases of substantial size or complexity. During 2011 the Admiralty and Commercial Court Guide was amended to permit more frequent assignment of cases to designated judges, as recommended in chapter 27 of the *Final Report*. There is a parallel drive to achieve greater continuity of case management in family cases following the Norgrove review.

3.5 Despite those efforts, I have heard criticism that more needs to be done to promote judicial continuity in case management, at least at some court centres.

3.6 Standard directions. Standard directions and model directions have been prepared in accordance with the recommendation (ii) above. They are available online.<sup>8</sup> The new rule 29.1 (2) requires both the parties and the court, in appropriate cases, to use these drafts as their starting point when preparing case management directions. Rule 29.4 has been amended to give effect to recommendation (iii) above. The objectives are (a) to capture best practices which have been developed at different court centres and (b) to promote uniformity of approach between different courts.

3.7 Case management to trial. Rule 29.8 has been amended to give effect to recommendation (iv) above.

3.8 Tougher enforcement of rules, practice directions and orders. Rule 3.9 has been amended to give effect to recommendation (v) above. At the same time the overriding objective in Part 1 of the CPR has been amended by the addition to rule 1.1 (2) of a new sub-paragraph (f): “enforcing compliance with rules, practice directions and orders”. Lord Dyson MR provided a valuable commentary on these rules in the eighteenth implementation lecture.

3.9 In *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537<sup>9</sup> the Court of Appeal emphasised that these rule changes herald a genuine change of culture. Nevertheless parties should not be allowed to exploit trivial or insignificant breaches by their opponents, as Leggatt J stated in *Summit Navigation Ltd v Generali Romania Asigurare* [2014] EWHC 398 (Comm).

3.10 Agreeing extensions of time. Parties should be able to agree sensible variations of time limits which do not disrupt the litigation timetable. It is no part of my recommendations that parties should be prevented from doing this. Parties should be

---

<sup>8</sup> [www.justice.gov.uk/courts/procedure-rules/civil](http://www.justice.gov.uk/courts/procedure-rules/civil)

<sup>9</sup> Followed and applied in *Durrant v Chief Constable of Avon & Somerset Constabulary* [2013] EWCA Civ 1624

enabled, indeed encouraged, to co-operate in progressing litigation smoothly and at proportionate cost. I understand that the Rule Committee is actively looking at this.

3.11 Designated lords justices. In relation to recommendation (vi), the Master of the Rolls has designated five members of the Court of Appeal. It is intended that at least one of them will be a member of any court hearing appeals concerning the recent civil justice reforms. They are the Master of the Rolls, Richards, Jackson, Davis and Lewison LJ. So far I have only dealt with one appeal arising under the new rules.<sup>10</sup>

3.12 Disclosure. Chapter 37 of the *Final Report* deals with disclosure, which in larger cases can generate huge costs. This chapter recommends that instead of standard disclosure being the normal order, there should be a menu of orders from which the court may choose. CPR Part 35 has been amended to implement this recommendation. A new rule 31.5 sets out a procedure which has to be followed before the first case management conference. That consists of a report by each party followed by a meeting or telephone discussion to seek to agree on the appropriate disclosure for a given case. The report has to be served not less than 14 days before the first case management conference and has to describe, briefly, what documents exist that are relevant to the matters in issue in the case. It has to state the location of those documents including information about electronic documents. It has to provide an estimate of the costs which would be involved in giving standard disclosure in the case and set out what directions for disclosure are being sought. In the subsequent meeting or discussion, the parties attempt to reach an agreement about disclosure.

3.13 The possible range of disclosure orders, which the parties may agree or the court may order, include an order dispensing with disclosure; an order that a party should disclose documents on which it relies and request specific documents from the other party; an order for disclosure on an issue by issue basis; an order similar to that which applied previously under the *Peruvian Guano* test, documents leading to an enquiry; an order for standard disclosure or any other order that the court considers appropriate. One possible order which might be agreed under the rubric of “any other order” is a “key to the warehouse” order. That means each party gives to the other free access to all its documents. Parties can then devote their energies to identifying documents which they want, rather than to spotting documents which they think the other side would want.

3.14 Factual evidence. Section 2 of chapter 38 of the *Final Report* recommends that in appropriate cases the court should give directions to limit and focus factual witness statements. The new rule 32.3 (3) is intended to implement this recommendation. This rule provides that the court may give directions:

“(a) identifying or limiting the issues to which factual evidence may be directed;  
(b) identifying the witnesses who may be called or whose evidence may be read; or  
(c) limiting the length or format of witness statements.”

3.15 Expert evidence. Section 3 of chapter 38 of the *Final Report* recommends that expert evidence should be more focused and that the costs of such evidence should be controlled in advance. This has been implemented by making changes to rule 35.4.

---

<sup>10</sup> *JE (Jamaica) v SSHD* [2014] EWCA Civ 192

Where parties apply for permission to rely on expert evidence, they must provide an estimate of the costs of the proposed expert evidence. They must also identify the issues which the expert evidence will address. This will allow the court and the parties to assess whether the costs of the expert evidence are justified and whether issues do in fact need expert evidence. These reforms are closely linked with (a) the new rule on proportionate costs and (b) the introduction of costs management.

3.16 Concurrent expert evidence. Concurrent expert evidence, colloquially known as “hot tubbing”, has been used in Australia and in arbitrations for many years. Chapter 38 of the *Final Report* recommended that this procedure should be piloted in England and, if successful, introduced into the CPR. Such a pilot was set up in Manchester and was the subject of a report by Professor Hazel Genn, as discussed above. Practice Direction 35 has now been amended to make this procedure generally available. In appropriate cases the court may order that an agenda be agreed for the purpose of taking concurrent evidence. At trial the experts are sworn and then matters proceed in a manner directed by the judge. Such procedure might include the judge asking questions of each expert and inviting them to comment on the evidence of other experts or to ask questions of those experts. At that stage the court might invite the parties’ representatives to ask questions and the judge might then summarise the position and ask the experts to confirm or correct that summary. The precise procedure will depend on the circumstances of each case. Experience has shown that judges have gained more assistance from experts by hearing evidence concurrently. The extent of disagreement has been reduced and the real issues have been identified.

3.17 Alternative dispute resolution. Alternative Dispute Resolution (“ADR”) forms a necessary part of the dispute resolution process. The *Final Report* emphasised the need for the court to encourage the use of ADR. The aim is that, in general, no case should come to trial without the parties at least having seriously considered some form of ADR to seek to settle their dispute. To assist in this process an ADR handbook was published in April 2013. A copy has been supplied to every judge who deals with civil litigation. The purpose of the book is to provide the judiciary, the professions and lay-clients with a practical handbook, so that they are aware of the availability and potential application of ADR methods. In *PGF II SA v OMFS Company I Ltd* [2013] EWCA Civ 1288 the Court of Appeal upheld a costs sanction against a party which had failed to respond to a mediation proposal. The court endorsed the advice given in paragraph 11.56 of the ADR Handbook: see in particular [34] – [40] of the judgment of Briggs LJ, with which McFarlane and Maurice Kay LJJ agreed.

3.18 Pre-action protocols. The principal purpose of pre-action protocols is to promote the settlement of disputes on an informed basis before the issue of proceedings, where this is practicable. The secondary purpose is to ensure that, where proceedings are issued, each side has a proper understanding of the other side’s case at the outset. It is important that protocols serve a useful purpose, rather than merely drive up costs by adding an additional layer of work: see the *Preliminary Report* at pages 422 to 427. The *Final Report* made a number of recommendations for revision of the protocols. A working party chaired by DJ Suzanne Burn has been revising some of the protocols, taking into account those recommendations. I understand that this working party will report to the Rule Committee in April.

## 4. RESTRICTIONS UPON RECOVERABLE COSTS

4.1 Terms of reference. The terms of reference for the Review required me to “make recommendations in order to promote access to justice at proportionate cost”. This may look like a simple examination question, but it bristles with complications. In the first instance, it is necessary to define what the phrase “proportionate costs” actually means. I have attempted this task in chapter 3 of the *Final Report*, a chapter which was much debated with the assessors and which I re-wrote more than once.

4.2 The new definition of proportionate costs. The new definition of proportionate costs, as formulated in chapter 3 of the *Final Report*, now appears in rule 44.3 (5). Under this rule costs are proportionate if they bear a reasonable relationship to the value of the subject matter of the litigation, the complexity of the litigation, any additional work generated by the conduct of the paying party and any wider factors involved in the proceedings, such as reputation or public importance. Lord Neuberger MR provided valuable commentary on this rule in the fifteenth implementation lecture.

4.3 Proportionality trumps necessity. The *Final Report* recommended that the effect of the Court of Appeal’s decision in *Lownds v Home Office* [2002] EWCA Civ 365; [2002] 1 WLR 2450 should be reversed. Rule 44.3 (2) achieves this by providing that in an assessment on the standard basis: “the court will ... only allow costs which are proportionate to the matter in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred.”

4.4 Fixed costs. One simple way of ensuring that costs are proportionate is to introduce fixed costs or scale costs. Such costs are by definition proportionate and they obviate the need for detailed assessment. Chapter 15 recommended that costs in all fast track cases be fixed and proposed matrices of fixed costs. These matrices were based upon extensive research by Professor Fenn and also upon discussions at a series of facilitative meetings organised by the Civil Justice Council. Chapter 24 recommended that a scheme of scale costs be introduced for IP cases in the Patents County Court (now the Intellectual Property Enterprise Court). These recommendations have been implemented through amendments to CPR Part 45, which deals with fixed costs. There is, however, one unfortunate exception.

4.5 The one unfortunate exception – fast track non-personal injury cases. I express the hope that steps will be taken to fix the costs of fast track non-personal injury cases as soon as practicable. This will be far more satisfactory than being thrown back upon the “proportionality” rule in a large number of low value cases.

4.6 The portal. Concern has been expressed about the high costs involved in respect of cases which start in the portal and then drop out because they are defended or for other reasons. I understand this concern. Indeed I warned of the risk on pages 225-226 of the *Final Report*. What is crucial is that the costs of fast track cases should be fixed, not that all such cases should pass through the portal. The portal is a concept which, essentially, is suited to undefended cases.

4.7 Appeals. A particular problem arises when cases move from a no-costs regime or a low costs regime to a full costs shifting regime, for example when there is an appeal from the Employment Appeal Tribunal to the Court of Appeal. Chapter 34 of the *Final Report* recommended that in such cases the appeal court should have power at an early stage to limit or exclude the recovery of costs. The new rule 52.9A implements this recommendation.

## 5. COSTS MANAGEMENT

5.1 An innovation. Costs management is a novel discipline, which was proposed in chapter 40 of the *Final Report*. Most civil litigation is a form of business project in which the parties invest substantial sums in order to achieve a just outcome. Even justice must have a price. It is not rational to spend £1,000 to recover a £100 debt, however strong and virtuous your claim. Outside litigation, no normal business project is conducted on open-ended basis, with costs simply being added up at the end. The time has now come to apply sensible budgetary control to the recoverable costs of litigation. During the Review it was striking that clients were supportive of this proposal, even though some lawyers were more cautious. The Law Society strongly supported the concept as did litigation funders.

5.2 Parties need to know what the costs will be if they win and if they lose. Clients are increasingly demanding budgets from their own lawyers. But that budget only presents part of the picture. It does not reveal (a) how much they will recover from the other side if they win or (b) how much they will pay out by way of costs if they lose. The advent of costs management means that clients have a much clearer picture of the overall costs position at an early stage of litigation.

5.3 The new rules. The new costs management rules are contained in CPR Part 3 rules 3.12 to 3.18 and Practice Direction 3E. They were explained by Ramsey J in the sixteenth implementation lecture. These rules follow a number of successful pilot schemes. The purpose of costs management is that the court should manage both the procedural steps to be taken and the costs to be incurred by the parties, in any proceedings. This is to further the overriding objective that all cases should be dealt with justly and at proportionate cost.

5.4 Costs budgets. The costs management process is started by each party filing and exchanging a costs budget in a standard form, precedent H. The costs budgets are to be filed as directed or within 7 days before the first case management conference. The parties should discuss and attempt to agree the costs budgets. The court will then generally make a costs management order, either recording the extent to which the parties have agreed the budgets or recording the court's approval of revised budgets where the parties are not agreed. Once a costs management order has been made the court, when assessing costs on the standard basis, will have regard to the receiving party's last approved or agreed budget for each phase of the proceedings and will not depart from such approved or agreed budget unless satisfied that there is good reason to do so.



5.5 Case management is linked with costs management. In addition, when making case management decisions the court will have regard to any available budgets and will take into account the costs involved in each procedural step. When a judge directs parties to undertake tasks, it is obvious good practice that the judge should appreciate the costs consequences of what he/she is ordering. The court should not generally compel parties to incur disproportionate costs in the furtherance of their litigation.

5.6 Revision of budgets. There is provision for parties to revise budgets upwards or downwards if significant developments in the litigation warrant such revisions. Otherwise it is necessary for the initial budget to reflect accurately the costs of the litigation.

5.7 Costs management is not price fixing. Costs management bites upon recoverable costs, not own costs. The objective is to prevent unconstrained expenditure of other people's money.

5.8 New role for the courts. The court therefore has to undertake a new role in approving budgets. The court has to consider whether the budgeted costs fall within the range of reasonable and proportionate costs. When the court is approving costs budgets, such approval will relate only to the total figure for each phase of the proceedings, although the court will have regard to the constituent elements in each total figure. The court will not, however, undertake a detailed assessment in advance when approving a costs budget.

5.9 Higher value commercial, chancery and TCC claims. The extent to which higher value commercial, chancery and TCC claims should be exempted from costs management has been the subject of separate consultation. The scope of such exemption is being narrowed. I understand that this has been the subject of recent agreement within the Rule Committee.

5.10 Does all this lead to front loading and additional costs? The introduction of costs management has come as a shock to some, but not all, practitioners. There has been a learning curve and this costs money. Nevertheless litigation is a process, not an Eleusinian mystery. It is amenable to sensible budgeting and such budgeting is very much in the public interest. It takes time for costs management to bed in. Both practitioners and judges need to become comfortable with the process. Once this has happened, the overall effect will be to bring down the costs of litigation, as the Law Society originally predicted in its submissions to the Costs Review.<sup>11</sup> In other words the costs savings achieved by costs management should exceed the costs of the exercise. The restriction upon the recoverable costs of the costs management exercise (para 2.2 of Practice Direction 3E) plays an important role in this regard.

## 6. THE ASSESSMENT OF COSTS

6.1 Summary assessment. One feature of summary assessment is that work on documents is often a very large item. Yet the old form N260 completed by the parties

---

<sup>11</sup> See *Final Report*, chapter 40, para 6.7 (page 413).

gave no indication as to what that work comprised. In April 2013 a new version of form N260 was introduced, providing detailed information concerning work on documents, as recommended in chapter 44 of the *Final Report*. One problem, which I and some other judges have encountered, is that many practitioners continue to use the old form.

**6.2 Detailed assessment.** In relation to detailed assessment at the end of a case, a number of procedural reforms are recommended in chapter 45 of the *Final Report*, in order to make the process more efficient and less expensive. These reforms were effected on 1<sup>st</sup> April 2013 by means of amendments to the Costs Rules and the Costs Practice Direction. In particular, points of dispute and points of reply must now be more focused. They should be in ‘Scott Schedule’ form, as set out in the new Precedent G. The Part 36 procedure has been imported into detailed assessment, in order to promote early settlement.

**6.3 Provisional assessment.** Following a successful pilot at Leeds and York, provisional assessment was introduced nationally on 1<sup>st</sup> April 2013. This procedure applies where there has to be detailed assessment and the amount of the costs claimed is £75,000 or less. In such cases a new rule permits there to be a provisional assessment made by the court on the documents. This provisional assessment may be challenged within a limited period, but otherwise it becomes binding. The experience of the pilot was that this method of provisional assessment (a) led to few challenges<sup>12</sup> and (b) enabled costs assessments to be dealt with more quickly and at lower cost than a full detailed assessment. A similar procedure has been used in Hong Kong since April 2009. The procedure in Hong Kong is regarded as satisfactory and is not subject to any monetary limits.

## 7. FUNDING AND PART 36 OFFERS

**7.1 Statistical evidence.** The statistics gathered during the Costs Review demonstrated that recoverable success fees under conditional fee agreements (“CFAs”) and recoverable after-the-event (“ATE”) insurance premiums are two of the principal drivers of high costs. The figures are set out in the *Preliminary Report*, the *Final Report* and their respective appendices. See in particular chapter 2 of the *Final Report*, entitled “The Costs of Civil Litigation”. The recoverability regime distorted incentives and tended to drive up costs by significantly more than the amount of the success fee and the ATE premium: see e.g. tables 1 to 11 on pages 489 to 495 of the *Final Report*.

**7.2 The reform – abolition of recoverability.** The *Final Report* recommended that CFA success fees and ATE premiums should cease to be recoverable. Parliament implemented this reform, subject to certain limited exceptions, in Part 2 of LASPO.

**7.3 Impact on claimants.** Although either party to litigation can enter into a CFA or take out ATE insurance, in practice it is usually the claimant who does so. Thus in the main it is claimants, rather than defendants, who would lose out if the above reforms stood in isolation.

---

<sup>12</sup> Out of 119 cases in the first year of the pilot only 2 proceeded to an oral hearing.

7.4 Measures to protect claimants. A number of separate reforms have been introduced in order to assist claimants under the new arrangements. In particular:

- (i) Damages-based agreements (otherwise known as contingency fees) are now permitted.
- (ii) General damages for pain, suffering, loss of amenity and similar matters have been increased by 10%: see *Simmons v Castle* [2012] EWCA Civ 1039, [2012] EWCA Civ 1288, [2013] 1 WLR 1239.
- (iii) The rewards for effective claimant offers under CPR Part 36 have been increased.
- (iv) Claimants in personal injury claims are protected by qualified one way costs shifting (“QOCS”). This is not an elegant term, but it was the best phrase that I could devise. It means costs protection subject to exceptions which are intended to weed out those who do not deserve such protection.

In relation to (i) above, there is concern that the current regulations do not permit the full range of hybrid damages-based agreements. In particular lawyers and clients should be able to enter into “no win – low fee” damages-based agreements. I hope that the MoJ will give early attention to amending the regulations.

7.5 Part 36 offers. In this and the following paragraphs a “successful” party means a party who has made a Part 36 offer which the other side has failed to beat at trial. The pre-existing regime tended to operate harshly against successful claimants in two respects. First, a claimant who only beat a Part 36 offer by small amount was still liable to be punished in costs following the Court of Appeal’s decision in *Carver v BAA plc* [2008] EWCA Civ 412; [2009] 1 WLR 113. Secondly, the reward for a successful defendant was often more generous than the reward for a successful claimant. This created an uneven playing field. Chapter 41 of the *Final Report* therefore proposed two reforms to the Part 36 regime:

- (i) The effect of *Carver v BAA plc* should be reversed.
- (ii) There should be an enhanced reward for successful claimants.

The second reform has the additional benefit of assisting CFA claimants at a time when they can no longer recover success fees from their opponents.

7.6 Reversal of the effect of *Carver v BAA plc*. The Rule Committee achieved this in 2011 by inserting a new paragraph (1A) into rule 36.14. This provides that “more advantageous” means better in money terms by any amount, however small.

7.7 Enhanced reward for successful claimants. Section 55 of LASPO enables an additional amount to be paid to successful claimants. The enhanced reward which the court may award comprises (a) 10% of any damages awarded up to £500,000 and (b) 5% of any damages awarded above that figure but under £1 million.

## 8. COSTS COUNCIL/ COSTS COMMITTEE

8.1 Recommendation. Chapter 6 of the *Final Report* recommended that the Advisory Committee on Civil Costs (“ACCC”) should be disbanded and that a Costs Council chaired by a judge should be established in its place. The Costs Council could be either a free standing body or an adjunct to the Civil Justice Council. The remit of the Costs Council should be to:

- (i) set guideline hourly rates (“GHRs”) for summary assessment and detailed assessment;
- (ii) review the matrices of fixed costs for the fast track;
- (iii) review the overall upper limit for fast track costs.

8.2 Implementation. A variant of this recommendation was implemented in early 2013. The ACCC was disbanded and a Costs Committee was established as a committee of the Civil Justice Council. A High Court judge, Foskett J, is the chairman and Senior Costs Judge Peter Hurst is the vice chairman. The committee members are drawn from many different stakeholder groups. They are all people of long experience and high standing. Their role is to evaluate the evidence objectively, not simply to “represent” their own constituencies.

8.3 Remit. The first task of the Costs Committee is to undertake a comprehensive, evidence-based review of the GHRs and to make recommendations accordingly to the Master of the Rolls by April 2014. Thereafter the Costs Committee will review the GHRs on an annual basis and make recommendations to the Master of the Rolls about how they need to be updated.

8.4 GHRs Survey 2013. During November/December 2013 the Costs Committee conducted a nationwide survey to gather evidence as part of their review. It was designed to supplement and provide a cross-check on the validity of material from other surveys carried out on the costs of running a solicitor’s litigation practice and to assess recovery rates for costs claimed in litigation. The survey included (a) a call for written evidence and (b) sending out questionnaires to solicitors about the costs of running a litigation practice. A total of 42 written submissions were received following the call for evidence. The Committee held two oral evidence sessions in which a number of organisations and firms made submissions. The data which results from this review, together with data from the other surveys, will form an important part of the evidence underlying the Committee’s recommendations to the Master of the Rolls in April 2014.

8.5 Final term of reference. The Costs Committee’s final term of reference is: “to monitor the operation of the costs rules, in consultation with the Ministry of Justice, and where appropriate, to make recommendations”. This provision is pregnant with possibilities.

8.6 Fast track fixed costs. For the reasons set out above, it is very much to be hoped that all costs (not just personal injury costs) in the fast track will soon be fixed. The existing matrices of fixed costs and any future matrices of fixed costs are part of the costs rules which the Costs Committee is enjoined to monitor. I would respectfully suggest that it should be the function of the Costs Committee to keep the figures for fast track fixed costs under regular review and to include recommendations on this

issue to the Master of the Rolls. If the Costs Committee don't do this, who else (a) has the expertise to do so or (b) will actually get round to doing it?

## 9. REFORMS TO SPECIFIC AREAS OF LITIGATION

9.1 Personal Injuries. There has been a tendency in the past for the demands of personal injury lawyers to drive civil procedure reform. This is not appropriate. On the other hand personal injury claims constitute a vital area of civil litigation, which merits special consideration. My recommendations in this area are set out in chapters 18 to 22 of the *Final Report* and most have now been implemented. These reforms include increasing general damages by 10% and introducing QOCS, as discussed above; developing the portal; including defended personal injury claims within the fixed costs regime; restricting the costs which lawyers can recover from personal injury clients to 25% of damages (excluding damages referable to future losses); banning referral fees.

9.2 Referral fees. Referral fees turned out to be a particularly contentious area during the Review. The battle lines did not follow the usual claimant/defendant divide. On any objective analysis, however, it was clear that referral fees were driving up costs to the benefit of referrers (claims management companies, BTE insurers etc) and to the detriment of personal claimants: see chapter 20 of the *Final Report*. I recommended that these referral fees be banned. Both the Bar and the Law Society supported the recommendation. Sections 56 to 60 of LASPO introduced the ban of referral fees with effect from April 2013.

9.3 Clinical negligence. Chapter 23 of the *Final Report* proposed a package of reforms concerning the nuts and bolts of clinical negligence litigation. Most of these reforms were introduced before the general implementation date of 1<sup>st</sup> April 2013. For example, the NHSLA changed its policy and agreed to obtain independent expert reports before denying liability. In order to facilitate this, the time allowed for defendants to respond to letters of claim was increased from three to four months. For further details see the twelfth implementation lecture, *The reform of clinical negligence litigation*.

9.4 Intellectual property claims. Chapter 24 of the *Final Report* proposed a number of reforms to IP litigation. Most of these were introduced before the general implementation date of 1<sup>st</sup> April 2013. For a lucid summary of these reforms, see the Seventeenth implementation lecture delivered by Arnold J, *Intellectual property litigation: implementation of the Jackson Report's recommendations*. In particular, amendments have been made to the Patents Court Guide to promote active case management. Scale costs or fixed costs have been introduced in the Patents County Court, now re-named the Intellectual Property Enterprise Court. A small claims track has been introduced for low value cases proceeding in that court.

9.5 Small business disputes. Chapter 25 of the *Final Report* addressed small business disputes. This is a topic of particular importance, given the contribution made by SMEs to the UK economy. One particular problem noted was that Mercantile Courts around the country (unlike the other specialist courts) lacked any effective co-ordination. It was therefore recommended that there should be a single High Court

judge in charge of all Mercantile Courts. This reform was implemented in 2010, with Gloster J becoming the first judge in charge. Another major recommendation was that there should be a single court guide for all Mercantile Courts. Hamblen J oversaw the preparation of this guide, which came into force in 2012.

9.6 Technology and Construction Court. Chapter 29 of the *Final Report* deals with litigation in the Technology and Construction Court (“TCC”). Most of the recommendations are focused upon case management and have been implemented. Changes are still needed, however, to enable designated district judges to sit in the TCC. Some district judges have practical experience in the construction field (e.g. as surveyors) and would be an ideal tribunal for small construction disputes.

9.7 Chancery litigation. Chapter 28 of the *Final Report* proposed a number of case management reforms in this area. Many of these were implemented between 2010 and 2012. Quite apart from those recommendations, logistics have impacted upon procedure. In 2011 the Chancery Division, the Commercial Court and the TCC all moved into the Rolls Building. This coming together under one roof has led to some convergence of the procedures of all three courts.

9.8 Chancery Modernisation Review. During 2013 Briggs LJ carried out a massive review of the practices and procedures of the Chancery Division. He published his final report on 17<sup>th</sup> December 2013. It is anticipated that implementation will follow during 2014.

## 10. IMPACT OF THE REFORMS – AN EARLY IMPRESSION

10.1 Feedback and submissions by respondents to the CJC. I have read many of the submissions made by respondents to the CJC and received much informal feedback from practitioners and judges. It is fair to say that opinion is divided now on the main issues, as it was during the Review. It is also notable that the criticisms are focused upon part only of the package of reforms summarised in the first part of this paper.

10.2 Some unpopularity is inevitable. Reforms which are designed (a) to bring down the costs of litigation and (b) to change the way in which lawyers work are bound to be unpopular with practitioners.

10.3 Reduction in delays and ‘tactical games’. An interesting observation made by one firm of solicitors is that, following the reforms, there appears to be far less inclination on the part of parties to delay or play ‘tactical games’.

10.4 Recent judicial decisions. Many of the comments made by respondents are directed to recent judicial decisions, on which it is not appropriate for me to comment. Case law is developed through argument in court, not by debate at conferences.

10.5 Are the respondents to the CJC a fair cross-section of opinion? This is no criticism of the CJC, but my impression is that the responses may not be a fair cross-section of opinion within the profession. Those who are opposed to or angry about the reforms may be more inclined than others to send in responses.

10.6 Is access to justice reduced? Critics of the reforms say that access to justice is reduced. Supporters say that it is not. It is therefore helpful look at the evidence. There appears to have been no reduction in the numbers of (a) new claims issued or (b) new claims notified following the introduction of the reforms. It will be recalled that following the introduction of the Woolf reforms there was a sharp drop in new claims issued. Many people predicted a similar drop off after April 2013. In fact the MoJ statistics for England show that there was a slight increase in new claims during the first six months.<sup>13</sup>

10.7 Other factors in play. When considering claim numbers and access to justice, it should be noted that other factors are also in play. Contrary to my recommendations, civil legal aid has been substantially cut back.

10.8 Too early to reach conclusions. Many people have commented that it is still too early to reach balanced conclusions about the reforms. I agree. In my view the reforms will need time to bed in, so that both judges and practitioners can become comfortable with them.

10.9 Ending recoverability of success fees. This comes as a disappointment for those who operated under CFAs under the old regime. Whilst I understand that disappointment, which is reflected in many claimant submissions, all I can say is that the old regime was indefensible. It distorted incentives and was a massive driver of costs, as demonstrated by the statistical analyses. No other country in the world has such as a bizarre system. We have, in essence, returned to the pre-2000 rules, which proved perfectly satisfactory.

10.10 Suggested modification in PI cases. One modification suggested by the Bar Council is that the success fees which lawyers can deduct from damages should be 25% of **all** damages, i.e. not limited to general damages and past losses. I was originally minded to recommend precisely that, but was persuaded to ring fence damages in respect of future losses by the powerful submissions which claimant PI lawyers advanced.<sup>14</sup>

10.11 Agreeing reasonable extensions of time. Many practitioners have said to me and many respondents have stated in their submissions that it should be possible for parties to agree reasonable extensions of time which do not disrupt the litigation timetable. I agree, as stated in para 3.10 above.

10.12 Costs management. Some of the feedback is positive. Some is wholly negative. Some of the feedback makes sensible proposals for improving the process. Inevitably the proposals are inconsistent. For example, one respondent urges that there should be more exemptions from the process, whilst another urges that a wider range of cases should be included.

10.13 Judicial training. The Judicial College undertook a huge training exercise in the period January to March 2013, which may not be fully appreciated by commentators.

---

<sup>13</sup> The figures for Cardiff appear to show the opposite. Unfortunately these figures contain glitches which have not yet been corrected. If and when the Cardiff figures are corrected, they will show a similar picture to that elsewhere.

<sup>14</sup> See the tenth implementation lecture, para 2.7.

Nevertheless it does appear from the feedback that further training may be needed in respect of both costs management and provisional assessment of costs, in order to achieve greater uniformity of practice.

10.14 Law Society proposal for “good practice” guidance. The Law Society proposes that guidance on “good practice” in relation costs management should be published for the assistance of the judiciary. This is a sensible proposal which the Judicial College may care to consider. No doubt the CJC or its Costs Committee or the Law Society would be willing to assist, if requested.

10.15 Further training for practitioners. Since there is comment in the submissions about judicial skills, perhaps practitioners should also be mentioned. There is a divide between those solicitors’ firms who can produce reasonable budgets without undue fuss and expense and those who cannot. One city solicitor is quoted in *The Times* today<sup>15</sup> as saying that there is no logical reason for keeping budgeting out of the Commercial Court regime. He adds that lawyers should and must be able to budget.

10.16 Prediction. Nobody would embark upon building works or any other business project without a budget, albeit subject to appropriate future revision. No-one suggests that quantity surveyors or bills of quantities are unnecessary merely because they lead to “front loading” of costs. Whether you are an individual caught up in a boundary dispute or a global corporation defending its patents, litigation is usually a major business project. I predict that in future years people will look back on the “old” regime of uncontrolled litigation costs as absurd.

10.17 DBAs. Many of those who have approached me and many respondents to the CJC are critical of the regulations governing DBAs. Indeed so far as I can see everyone on both the claimant and defendant side says that DBAs are not being used at all. This underlines the urgent necessity of amending the regulations as indicated above. This point has been made repeatedly over the last year. I am unable to understand why it has not been acted upon.

10.18 Unimplemented proposals. One or two respondents have drawn attention to unimplemented proposals and have suggested that these should be taken forward. That must be a matter for the Rule Committee and the MoJ. I should, however, draw attention to one proposal which is bound to take time to implement, namely that relating to bills of costs.

10.19 New forms of bills of costs. Recommendation 107 in the *Final Report* is:

“Software should be developed which will (a) be used for time recording and capturing relevant information and (b) automatically generate schedules for summary assessment or bills for detailed assessment as and when required. The long term aim must be to harmonise the procedures and systems which will be used for costs budgeting, costs management, summary assessment and detailed assessment.”

---

<sup>15</sup> 13<sup>th</sup> March 2014. The article also refers to research indicating that London will lose business to overseas jurisdictions if the costs of commercial cases are not reined in.



This will require the development of new form bills of costs and much work by IT experts. It is a long term project. I understand that the Association of Costs Lawyers (“ACL”), of which Ramsey J is Honorary President, is involved in taking this forward. It would be helpful to hear what progress the ACL has made.

10.20 Proposed reforms of the reforms. Practitioners have raised a host of proposals for amending/improving the new rules. These matters must be for the Rule Committee, not for me. I am not a member of the Rule Committee. I ceased to have any involvement with the implementation of the reforms in April 2012. Indeed this is only the second conference on the reforms to which I have contributed since then. Accordingly none of the opinions expressed above reflect the views of the Rule Committee or the MoJ.

Rupert Jackson

13<sup>th</sup> March 2014