LORD JUSTICE JACKSON'S RESPONSE TO MINISTRY OF JUSTICE CONSULTATION PAPER CP6/2011

General

1. In this response I only address chapters 2 and 3[1] of the Consultation Paper. A number of the proposals in chapters 2 and 3 follow closely the recommendations in my Final Report on Civil Litigation Costs ("FR"). I therefore welcome those proposals.

RTA PI scheme: Questions 1 to 5

2. For the time being it would be premature to increase the upper limit of the RTA PI scheme. The scheme has not yet bedded in properly and it needs time to do so.

3. In the future, however, I hope that the scheme will apply across the whole fast track. The tariff of costs should be that proposed in FR chapter 15 and appendix 5.

4. One specific modification to the scheme should be considered, namely fixing the fees for expert reports.[2] I am told by district judges that sometimes detailed assessment proceedings are being issued (unnecessarily) simply to deal with disbursements.

Extension of RTA PI scheme: Questions 6 to 8

5. The scheme should be extended to employers liability (both ELA and ELD) and public liability accident[3] cases. It must be accepted, however, that more of these cases are defended on liability and thus would "drop out" during the process. The upper limit should be the same as for RTA cases.

6. The tariff of costs[4] should be that proposed in FR chapter 15 and appendix 5.

7. One general modification which should be considered is reducing the length and complexity of the scheme documents (protocol, practice direction etc). Every procedural step or requirement adds to the costs of the process. The RTA scheme, though designed to deal with the simplest category of litigation which exists,[5] has added a mass of new material to the rule book. See FR chapter 22.

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[1] These are the chapters which directly relate to or impact upon the implementation of the Costs Review Final Report.
[2] See FR chapter 15, para 5.22
[3] But not other more complex cases which are sometimes classified as "public liability", e.g. child abuse.
[4] For ELA and PLA cases
[5] RTA claims under £10,000 where liability is admitted

Clinical negligence: Questions 9 to 11

8. I welcome the fact that certain FR recommendations in respect of clinical negligence litigation have already been implemented.

9. A variant of the RTA PI scheme could be introduced for lower value clinical negligence cases where liability is admitted. However, given the complexities and causation issues which commonly arise in such cases, such a scheme is unlikely to be used often. It is not wise to create complex procedures which will seldom be used.

General comment re questions 1 to 11

10. Once it is decided how far to extend the RTA PI scheme (in terms of scope and upper limit), I recommend that a single procedure be prepared to embrace all PI cases falling within the scheme. This would be an adaptation or extension of the existing Practice Direction 8B and the existing Pre-Action Protocol for Low Value Personal Injury Claims in Road Traffic Accidents. The opportunity might also be taken to simplify and shorten the rules, without of course defeating their objective.

11. Any timetable for extending the RTA PI scheme should, of course, allow a sufficient period of time for law firms and insurers to develop the IT which must follow the new rules.

Fixed recoverable costs: Questions 12 to 15

12. A matrix of fixed recoverable costs in the fast track should be introduced similar to that proposed in FR chapter 15 and Appendix 5. My reasons are those set out in FR chapter 15 (which was drafted after extensive consultation with interested parties at meetings facilitated by the Civil Justice Council). There should also be a limit on recoverable costs in those fast track cases which fall outside the matrix: see chapter 15 section 6. The proposed limit of £12,000[6] in respect of pre-trial costs was based upon data gathered in the judicial survey of January/February 2009 and was agreed to be appropriate by the Senior Costs Judge.

13. Fixed costs should be set for disbursements, in particular medical reports: see FR chapter 15, paras 5.22-5.23.

14. I agree that some adjustment may be needed to the FR figures, which are now one-and-a-half years out of date.

15. At the same time a mechanism should be established for annual review of the figures for fixed costs. Ideally, this should be done by a Costs Council, as proposed in FR chapter 6.

16. Timing and linkage with other reforms. Referring to para 83 of the Consultation Paper, I do not think that the introduction of fast track fixed costs should await the

[6] FR chapter 15, paras 6.2 and 6.3

extension of the RTA PI scheme. There is now some urgency about introducing fixed costs. The MoJ has said that it will introduce the new definition of "proportionality" proposed in FR chapter 3 next year, but will add a gloss that this definition will only cut down "reasonable" costs in a small number of cases.[7] I foresee difficulty, if fast track fixed costs are not introduced at the same time as the new definition of "proportionality" (as was envisaged in the FR). Furthermore, the introduction of fast track fixed costs can be done by rule change.[8] So there is no need to wait for further primary legislation.

Mandatory pre-action directions: Questions 16 to 21

17. I do not support the proposal for pre-action directions. We already have a vast and tangled web of interlocking protocols, practice directions and rules, which require simplification not further complication.[9] This MoJ proposal would super-impose yet another category of rules.

18. In so far as the existing protocols are deficient, these should be revised – preferably in the direction of greater simplicity and cutting out unnecessary verbiage (e.g. delete the first five pages of the Clinical Disputes Protocol,[10] which are of no practical assistance to anyone who is handling a clinical negligence claim).

19. Fixed recoverable costs already exist for certain fast track cases which settle pre-issue. This regime can and should be extended. However, such an extension does not require the creation of "pre-action directions".

Undefended debt claims (paras 90-92 of consultation paper – no question asked)

20. Debt claims form the largest category of business passing through the county courts. I agree that they require their own (simple) protocol. However, they do not require mandatory pre-action directions.

Housing repossession: Questions 22 to 23

21. I agree that non-compliance with the Rent Arrears Protocol and the Mortgage Protocol appears to be a problem: see FR chapter 26. However, I do not think that inventing new procedures or introducing a mandatory settlement stage is the answer. Courts already have sufficient powers to deal with non-compliance, but they do not always exercise those powers.[11] The remedy for this acknowledged problem is for courts to use their existing powers more effectively.

22. This problem is best tackled through liaison with the Judicial College and the Association of District Judges.

[7] See the reasoning in para 219 of MoJ Consultation Paper CP 13/10.
[8] All provisions for fixed costs are simply added in to CPR Part 45, as has been done previously.
[9] See FR chapter 4 paras 3.2 to 3.6 and recommendation 2
[10] i.e. down to the end of para 2.3 (c)
[11] See FR chapter 26, paras 3.5 and 3.9.

23. If a landlord or mortgagee diligently complies with the relevant protocol, but the tenant/borrower declines to engage with the process, little can be done to help him/her. A mandatory settlement stage (in which the tenant or borrower probably takes no active part) merely adds delay to the process and generates further costs for which the tenant/borrower will ultimately be liable.

24. As to making the behaviours required by the two protocols mandatory, I accept that in certain instances the word "should" could be amended to "must", but in my view this would make little practical difference. The real task here is one of judicial training, not rule-making or tinkering.

Electronic channels: Question 24

25. As pointed out in the main Judiciary response, it is important to make the electronic channels which are provided more efficient, easier to use and thus more attractive to court users. As to the need for investment in better court IT, electronic files etc, please see FR chapter 43. It is unfortunately the case that court IT in England and Wales lags behind that offered in a number of other jurisdictions, e.g. Singapore, Australia, USA and Austria.

26. I also agree with the MoJ that parties should be encouraged to use electronic channels, as they become available: MCOL, PCOL and more recently e-working as introduced in the TCC and Commercial Court. One way to encourage the use of new electronic channels is to reduce costs recovery where a party declines to use them. I therefore agree with the proposal in para 103 of the Consultation Paper. If a claimant declines to use MCOL or PCOL when it is available and thus incurs additional court fees, I do not see why that extra cost should be passed on to the debtor or tenant who is being sued.

Increasing the small claims track limit: Questions 25-26

27. The small claims track has been an undoubted success. For example, a "Which?" survey in 2006 found a satisfaction rate of 85%, which must presumably include a fair number of litigants in the small claims track who lost their cases.[12] It by no means follows, however, that the upper limit of this track should be raised.

28. I agree that in disputes between businesses an appropriate upper limit for the small claims track might be £15,000, essentially for the reasons set out in paras 112 to 114 of the Consultation Paper.

29. Nevertheless, in relation to disputes involving individuals I have serious concerns about raising the upper limit to £10,000 or more. For the ordinary citizen £10,000 is a large (and possibly devastating) sum to lose through the operation of a rough and ready/ informal procedure. Also it would impose a heavy additional burden on district judges if they have to deal with such high value disputes between

[12] See Costs Review, Preliminary Report, chapter 48, para 4.4 (page 502).

unrepresented individuals.[13]

30. I have considered the possibility of having two separate small claims limits – one for disputes between businesses and another for all other disputes. But I would reject that on the grounds that it would add complexity to the rules.

31. In my view, the upper limit should remain at £5,000, with the court having discretion to allow higher value claims up to £15,000 to proceed in the small claims track when appropriate.[14] This could be achieved by a modest amendment to rule 26.7.

32. If that proposal is rejected, then my fallback proposal is that the small claims limit be increased to £7,500.

Personal injury and housing disrepair: Questions 27 and 28

33. The small claims upper limit for housing disrepair and personal injuries should remain at £1,000 for the time being, essentially for the reasons set out in paras 116 to 120 of the Consultation Paper.

34. I do, however, believe that there may be a better way of dealing with low value housing disrepair claims,[15] namely through an ombudsman scheme as suggested in FR chapter 15, para 6.17. The ombudsman would have to be financed by social landlords, for whom the pay off would be reduced litigation costs. I recommend that this proposal should be included in the MoJ's next consultation exercise. If such a scheme is introduced and is successful, it may (a) be cheaper for all involved and (b) enable the small claims limit of £1,000 to be raised.

35. If these reforms are implemented, there would also be a saving to the legal aid fund, since legal aid is to be retained for housing disrepair.[16]

Fast track claims limit: Questions 29 to 30

36. In view of the radical reforms being made to the fast track (in particular the introduction of fast track fixed costs), I do not think that the upper limit should be raised at the present time. In my view, the better course is to allow the other reforms to bed in and to be evaluated before the fast track upper limit is reviewed.

37. Once the other reforms have bedded in, I agree that the fast track ceiling should be raised. In my view, it will probably be appropriate to raise the ceiling at least to £30,000 and possibly to £50,000. Before this happens, however, further work will have to be done to devise a matrix of fixed costs for the new swathe of cases which

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[13] The Liverpool district judges expressed serious concern at this prospect during a recent meeting with me.

[14] This would normally be appropriate in disputes between businesses.

[15] In so far as they are not resolved under the Pre-Action Protocol for Housing Disrepair Cases

[16] See the MoJ's recent consultation paper on legal aid.

will fall within the fast track.

Alternative Dispute Resolution Questions 31 and 37

38. I agree that ADR in general and mediation in particular should be encouraged as a means of resolving disputes between willing parties at much reduced cost to themselves and to society. I repeat the recommendations in FR chapter 36 for promoting and extending the use of ADR.

39. On the other hand, Professor Genn's research has shown that ADR is much less effective when forced upon unwilling parties. I do not support compulsory ADR, which sometimes has the effect of simply increasing cost and delay.

40. Certain categories of case cry out for mediation, for example small building disputes between householders and builders as discussed in para 131 of the Consultation Paper. See the discussion of these cases in FR chapter 26, paras 4.1 to 4.6. The costs consequences for both parties, if they decline to mediate, should be spelt out with crystal clarity at the first case management conference. This can readily be achieved if both parties have completed proper budget forms, as will be required by the new costs management pilot for TCC and mercantile cases.[17]

41. Boundary disputes between neighbours are another category of case which cries out for mediation, because of the disastrous consequences which sometimes follow from contested litigation. I repeat the proposals set out in FR chapter 28, paras 4.10 to 4.12 for promoting mediation in these cases. This task will be easier if and when a general costs management rule is introduced. (Boundary disputes will not generally fall within the forthcoming costs management pilot.)

42. I support the accreditation scheme for mediators discussed in paras 137 to 139 of the consultation paper. One of the problems which is endemic in mediation is fragmentation: lots of different mediators in different organisations providing services – not always of uniform quality. See FR chapter 36, paras 3.7 and 3.8. An officially recognised accreditation scheme in conjunction with a single authoritative handbook on mediation[18] will be an effective way of tackling this problem.

43. I agree with the comments in the Consultation Paper about the value of mediation in small claims cases. I agree that it should be strongly encouraged. However, mediation should not be made mandatory. Some parties are determined to go to court – that is their right as citizens and the small claims regime makes this affordable. Those parties should not be put to additional expense and delay by being forced to sit through a mediation.

[17] The Practice Direction for this pilot has been approved by the Rule Committee and it will come into effect in October 2011.
[18] As per FR recommendation 76

Small claims hearings: Question 38

Telephone hearings

44. Tempting though the telephone is, it simply will not work for small claims hearings. In practice, parties bring relevant documents to court and pass them to one another and to the judge as appropriate.

45. There is also the problem of controlling unrepresented parties. One district judge succinctly summarised this in a recent email to me:

> "Whilst it is possible to control a Small Claim between litigants in person who are present, telephone hearings are more difficult to control; there is no eye contact between participants and experience from telephone case management conferences demonstrates that it is more difficult to control advocates who raise arguments over the phone than if they are present."

Paper determinations

46. Paper determinations in small claims cases would only be practicable in those rare situations where all parties (a) consent and (b) are capable of presenting their cases effectively in writing.

47. The use of paper determinations in low value RTA PI claims (referred to in para 160 of the Consultation Paper) is not a useful yardstick in this regard. Under the RTA scheme the parties are legally represented and only quantum of damages is in issue. The judge makes his/her assessment on the basis of written medical evidence. Even then there is only a paper determination if both parties consent.

Mediation in higher value claims: Questions 39 – 42

48. I agree that information about mediation should be provided to all litigants. An information pack about mediation should be delivered to the parties in every case, as proposed in FR chapter 36, para 3.10. On most occasions this can be done electronically and thus at very little cost to the court, the parties or their lawyers. If this is what is meant by compulsory provision of information about mediation, then I support it. In many cases, of course, the litigants and lawyers know all about ADR and may have in mind an appropriate time for mediating (e.g. after disclosure).

49. The extent to which the judge at a CMC should encourage mediation will depend very much upon the circumstances of the case. Many cases will settle perfectly satisfactorily through bilateral negotiation, without any need to involve and pay a mediator.[19] On the other hand there are some cases where the judge should strongly encourage mediation at a CMC or other short hearing with the parties compelled to attend – e.g. in small building disputes or boundary disputes (see above).

50. The proposals for (a) improved training of judges and lawyers re mediation and (b) increasing public awareness of the benefits of mediation should also be taken forward.[20]

[19] See, for example, the research on the respective roles of mediation and bilateral negotiation set out in chapter 34 of the Costs Review Preliminary Report.
[20] See FR chapter 36, in particular paras 3.9 and 3.10

The EU mediation Directive: Questions 43 – 44

51. I do not agree that the EU Mediation Directive should apply to domestic cases. This will add a raft of unwelcome rules to no useful purpose.

52. If a mediation results in a settlement agreement, that can be enforced just like any other settlement agreement, namely by an application for summary judgment under Part 24. In practice, settlement agreements only rarely give rise to enforcement proceedings, because parties generally do not settle if they do not like the terms. There is simply no need for a special procedure to enforce settlements reached by means of mediation.

53. There is no need for special rules to protect mediators from being called as witnesses. This is very seldom an issue. Furthermore, evidence about "without prejudice" settlement negotiations is inadmissible – whether a mediator is involved or not.

54. Limitation and prescription periods are not a barrier to mediation. In those (relatively rare) cases where a mediation is desired just when time is about to run out, the remedy is simple: issue a claim and then have a stay for mediation.

55. We should not be creating complicated procedures to address problems which do not exist.

Additional matters

56. At a meeting with representatives of the MoJ and HMCTS on 5th May 2011, I was told that the FR recommendations 61, 85 and 92 would not be included in the current Bill (re CFAs etc). However, these proposals would be considered for inclusion in whatever Bill follows this present consultation exercise. These three recommendations all require primary legislation and are as follows:

Recommendation 61: amend s. 68 (1) (a) of the Senior Courts Act 1981 so that district judges can sit in the Technology and Construction Court.[21]

Recommendation 85: permit pre-action applications in respect of breaches of pre-action protocols.

Recommendation 92: permit pre-action costs management by the court.[22]

57. May I suggest that consideration now be given to these three recommendations? The supporting reasoning is set out in FR chapters 23, 29, 39 and 40.

Rupert Jackson 24th June 2011

[21] Important, so that small building disputes can be dealt with in the fast track by district judges with appropriate expertise.
[22] In certain categories of litigation, e.g. clinical negligence, pre-issue costs can be substantial.