

## **Preliminary observations about the proposed reforms and possible impact of Lord Justice Jackson's recommendations on mediation.**

### **1. Implementation issues**

- It will be seen from the recommendations (which have been taken directly from Lord Justice Jackson's final report) that some of his proposals will require primary legislation. This will inevitably mean delay in implementation, even if the report is accepted and adopted by the Government.
- It remains to be seen whether changes are made in the meantime, which require only regulatory amendment. The regulations will have to be carefully drafted to avoid unintended consequences so far as possible and it is anticipated that there will be delay before implementation, which will enable interested parties to review their business models.
- However, if the recommendations by Lord Justice Jackson are implemented piecemeal, this will put a considerable strain on all interested parties, including lawyers, funding organisations and the judiciary.
- It further remains to be seen whether some of Lord Justice Jackson's "fall-back options" will be implemented as a temporary measure. This might, for example, mean the capping of ATE premiums pending the repeal of Section 29 of the Access to Justice Act 1999.
- The possible permutations are too numerous for comment at this stage.

### **2. Strategic issues**

#### **General Observations**

The final report is likely to have a serious impact on business strategy and it will be necessary for all interested parties to consider the report in detail, draw up a strategic plan of action and review it on a frequent and flexible basis, as and when developments occur.

#### **The abolition of the indemnity principle and introduction of contingency fees**

Lord Justice Jackson has recommended the indemnity principle is abolished and that contingency fees are permitted.

It is not clear precisely how these provisions are to be regulated and how the market responds to them.

#### **BTE insurance**

Lord Justice Jackson encourages the use of BTE for claims by small and medium sized companies and householders. In addition he recommends regulation 6 of the Insurance Companies (Legal Expenses Insurance) Regulations 1990 is amended to provide that the insured's right to choose his/her own solicitor arises when a letter of claim is sent.

### **The Abolition of CFA's**

The report advocates that Section 58A (6) of the Courts Legal Services Act 1990 and all rules pursuant to it are repealed. That is the section, which provides for conditional fee agreements and it must be remembered that a collective conditional fee agreement is a form of conditional fee agreement. Collection conditional free agreements and recoverable success fees will therefore be abolished.

### **The abolition of recoverable ATE premiums**

It is also proposed that Section 29 of the Access to Justice Act 1990 and all rules made pursuant to it are repealed. Section 29 is the section, which deals with the recovery of after the event insurance premiums and so recovery of those premiums from the defendant will also be abolished.

Interestingly, I can find no reference in this report to Section 30 of the Access to Justice Act, which is the section that gives statutory authority to an approved organisation, such as a Trade Union, to recover an additional amount (the premium equivalent) in relation to the provision made by that union against the risk of losing and having to pay the other sides' costs.

### **Small Claims Track Limit**

Lord Justice Jackson recommends no change (currently) to the present limit of £1000 in personal injury cases. He qualifies this by saying that if a satisfactory scheme of fixed costs is not established or if the reforms prove unsatisfactory the issue will have to be revisited at the end of 2010.

### **One Way Cost Shifting**

Lord Justice Jackson recommends the introduction of qualified one way cost shifting (OWCS).

It is proposed that a claimant in a personal injury claim will be able to recover his/her costs from the defendant in the event of success, but that the defendant will not be entitled to claim costs against the claimant in the event of failure.

However, this recommendation is for a qualified one way cost shifting rule, the qualifications are as set out in Section 11(i) of the Access to Justice Act 1999 in relation to legal aid, which provides :

“except in prescribed circumstances, costs ordered against an individual in relation to any proceedings or part of proceedings funded for him shall not exceed the amount (if any), which is a reasonable one for him to pay having regard to all the circumstances including :

- Financial resources of all the parties to the proceedings.
- Their conduct in connection with the dispute to which the proceedings relate”

Lord Justice Jackson's proposed rule is set out below:

"4.7 – proposed rules.

I therefore propose that all claimants in personal injury cases, whether or not legally aided, be given a broadly similar degree of protection against adverse costs. In order to achieve this result, I propose that a provision along the following lines be added to the CPR:

Costs ordered against the claimant in any claim for personal injuries or clinical negligence shall not exceed the amount (if any), which is reasonable of him to pay having regard to all the circumstances including:

- a the financial resources of all the parties to the proceedings,
- b their conduct in connection with the dispute to which the proceedings relate."

He maintains that in accordance with the overriding objective, this will provide protection to someone who is at a financial disadvantage.

It provides a mechanism whereby the court need can make an award for costs:-

"Where the claimant has behaved unreasonably;

Where the defendant is neither insured, nor a large organisation, which is self insured; or

Where the claimant is conspicuously wealthy."

The Judiciary can expect satellite litigation in relation to conduct in particular and possibly the issue of wealth.

In his report Lord Justice Jackson discusses the issue of disbursements but concludes that these should be born either by the solicitor or claimant, or by taking out a limited ATE policy. It is too early to say whether insurers will be prepared to offer this sort of limited cover, but solicitors will need to prepare their strategy for dealing with disbursements. One possibility discussed in the report is to take into account the cost of covering disbursements when calculating a contingency fee.

Lord Justice Jackson proposes that referral fees be abolished either by primary legislation or by an amendment to the code.

### **Fixed Fees**

Lord Justice Jackson recommends the introduction of fixed fees for fast track cases for RTA and Employers Liability. Following the failed facilitation at which he was hoping to obtain an agreed industry standard under the guidance of the CJC, Lord Justice Jackson has published his recommended fees for such cases.

Lord Justice Jackson did not accept the Claimants arguments that fixed fees and process should be discussed together, or for add ons, on the basis that the regime should be issue based i.e. the scale should have levels of fixed costs, depending upon the issues involved.

For reasons of practicality, as much as anything else, a figure has been recommended on a “rough with the smooth” basis, which is intended to provide a fair reward, irrespective of the issues involved.

Various arguments were put forward by the claimant and defendant camps respectively as to the levels of costs and those are referred to in detail in the report, but Lord Justice Jackson placed considerable reliance on figures produced by Professor Paul Fenn, which both camps accepted as statistically reliable in respect of RTA, EL and PL claims.

Lord Justice Jackson has not accepted the argument by the claimant camp for a realistic escape. Their fear in relation to fixed fees is that an unco-operative defendant could simply string the process out until such time as the claimant runs out of money.

Under the present RTA Scheme, which applies to cases worth less than £10,000, which have not been issued, the practical escape is simply to commence proceedings. However, the introduction of fixed fees pre and post issue would mean this is no longer viable.

The present escape clause, apart from the issue of proceedings, provides that the costs must be assessed at a figure 20% in excess of fixed fees and the court must be satisfied there are exceptional circumstances making it appropriate for the court to depart from the usual fixed fees. As far as I am aware there has been no successful application under this rule.

By adopting the same rule for fixed costs pre and post issue, Lord Justice Jackson seems effectively to be trying to ensure that people stay within the fixed fee regime and he has attempted to deal with the issue of conduct in other ways (particularly in relation to part 36).

Fixed costs have strategic/management/training significance in relation to the development of the business for both claimant and defendant lawyers and for the Judiciary.

The fixed fee regime applies to fast track cases only and it follows that the only realistic escape from the regime is for the case to be allocated to multi track. The likelihood in the short term therefore is that there will be a series of allocation wars and it is suggested that the judiciary will need to be aware of this and will undoubtedly gear itself up to ensure a robust and consistent approach to the issue of allocation. Solicitors must be prepared for this.

Lord Justice Jackson recommends three measures to assist claimants in paying non recoverable success fees:

- A cap on success fees of 25% of damages(excluding future loss)
- 10% on general damages, (although I am not aware of any mechanism whereby this is to be introduced. Once again therefore the judiciary will be aware that this is an issue in relation to allocation and also that steps will be needed to ensure a consistent approach to valuation. The likelihood is that the JSB Guidelines will be revised upwards by 10 %.)
- A10%enhancement of damages if the claimant beats his/her part 36 offer

## **Clinical Negligence**

The recommendations here include docketing of judges (one of the recommendations in this report is that judges should set out their specialist knowledge and interests in various fields, including clinical negligence).

In addition the report recommends that litigation be conducted much along the lines as suggested above, namely that there should be a focus on case and costs management. This is both training issue and a management issue for both lawyers and the judiciary.

Lord Justice Jackson stresses that case and cost management should be both pre and post issue and he recommends that the rules should be changed so as to allow pre-action applications in relation to conduct and management issues, including and in particular breach of protocol. This is once again a management issue and a training issue for the lawyers so as to ensure compliance by both parties and it is a further management and training issue for the judiciary to try and ensure a consistent approach in terms of sanctions.

Solicitors must therefore both ensure compliance so as avoid applications by the other side and be prepared to make pre action applications themselves.

In addition, Lord Justice Jackson recommends case management directions for clinical negligence should be harmonised across England and Wales and this is a training issue for both lawyers and the judiciary.

## **Dispute Resolution**

IP Litigation, note the suggested small claims track in the PCC for IP claims worth less than £5,000 and fast track for claims worth between £5,000 and £25,000. One or more District Judge, Deputy District Judge or Recorders with specialist patent experience should be available to sit in PCC.

## **Small Business Disputes**

It is proposed amongst other things that HMCS should provide a guide in respect of small business disputes, for the assistance of business people acting in person either in relation to mediation or proceedings in the small claims track.

## **Housing Claims**

A simplified system is recommended together with changes to costs and the pre action protocol.

## **Large Commercial Claims**

Issues include fixed costs, as well as the issues of case and cost management, e disclosure and the special-ism of or docketing of the judiciary.

### **Chancery Litigation**

Amongst other things, a scheme of bench mark costs is recommended for bankruptcy petitions and winding up petitions and costs management procedures control the cost of complex insolvency proceedings. It is proposed that the amount of costs deductible from a costs fund or estate should be set at a proportionate level at an early stage in litigation and whether costs should be paid by the party who incurred them or by some other party should be determined by the Judge.

### **Technology and Construction Court litigation**

Amongst other things, it is proposed that the CPR should be amended so that appropriate TCC cases can be allocated to fast track, so that District Judges with appropriate experience can be authorised to manage fast track cases. Mediation should be vigorously promoted.

### **Judicial Review Claims**

Please note the proposed introduction of qualified one way cost shifting.

### **Defamation and Related Claims**

Note the increase in damages by 10% and proposal for qualified one way cost shifting and amendments to the protocol. This proposed increase in general damages is again likely to affect the judiciary as a training issue, to provide consistency.

### **Collective Actions and Appeals**

For strategic purposes, it is worth noting that for personal injury actions, qualified one way cost shifting is proposed for collective actions and in all other cases two way cost shifting.

### **Third Party Funding of Collective Personal Injury Claims**

As to appeals you will note the recommendations, but the procedures and costs rules should be reviewed and progress should be monitored.

### **Pre-action Protocols**

It is worth noting that in various chapters of his final report, Lord Justice Jackson deals with pre-action protocols and stresses the importance of compliance. Developments to or amendments to the protocols and the issue of compliance both need to be monitored. The Judiciary will need particular expertise in dealing with allegations of breach of protocol and making robust, but fair, proportionate and consistent sanctions.

Once again solicitors must therefore both ensure compliance so as avoid applications by the other side and be prepared to make pre action applications themselves.

## **Alternative Dispute Resolution**

Lord Justice Jackson falls short of recommending any rule changes or concluding that ADR should be compulsory in any circumstances. However, he does stress that there should be a serious campaign to ensure that all litigation lawyers and judges are properly informed and that the public and small businesses should be alerted to the benefits of ADR.

It remains to be seen what impact this would have. My experience as a mediator is that, perhaps rather surprisingly, I have found that for the most part people will engage in the process once they are there, even if they were initially an unwilling participant and the onus should very much be on the party who refuses mediation to justify that decision. If I may be permitted a personal comment therefore, it would be that I would have preferred to see a change in the rules to the effect that mediation would be the norm, once (compulsory) negotiation had failed, unless the party refusing was able to justify that refusal by reference to some criteria (perhaps as set out in Halsey).

I was however encouraged to see that Lord Justice Jackson strongly supports mediation and refer specifically to CEDR (with whom I qualified) and Association of Northern Mediators and Trust Mediation Ltd (with whom I am associated).

On page 361 of his report, Lord Justice Jackson refers specifically under paragraph 3.4 to the judiciary encouraging mediation. We have been extremely lucky in Chester in that the judiciary have been proactive for many years now in encouraging mediation and this has undoubtedly saved time and costs to the parties involved and has resulted in a settlement of cases, which would otherwise have taken up court time unnecessarily and resulted in a very expensive bill to one party or the other. However this will require training to ensure that the Judiciary are proactive and adopt a consistent approach.

Lord Justice Jackson refers in terms under that paragraph to what he thinks the courts could and should do and I am pleased to see he recommends that there is a mechanism whereby the court, whilst not making it compulsory to mediate, can penalise parties, who have unreasonably refused mediation by imposing costs penalties.

The form of the cost penalty should be at the discretion of the court and this is another area, which is likely to impact quite heavily upon judges and doubtless training guidelines will be provided so as to ensure a proactive and consistent approach.

In future solicitors must consider mediation and retain evidence that they have done so (and where appropriate evidence the other side has not done so).

If these recommendations are followed there is likely to be an increase in the number of mediations and providers (in particular CEDR, ANM and Trust Mediation) must develop a strategy to ensure they are best placed to service that increase in demand and take an active part in the proposed “serious campaign” and any training which is required for lawyers and the judiciary.

## **Disclosure**

E disclosure should form a substantial part of

- CPD for solicitors and barristers
- Training for Judges who have to deal with it on the bench.

## **Witness Statements and Expert Evidence - Case Management and Cost Management**

It is suggested that these items be considered together. If Lord Justice Jackson's proposals are accepted, they will represent a major shift in behaviour. Many of the submissions made during the course of this process, (including mine), focussed on the failure of the parties to comply with the spirit of the Woolf Reforms and comply with the overriding objective by helping the court narrow down the issues, adduce only such evidence as was reasonably necessary to deal with the issues in the case and limit the costs accordingly.

Full details are provided in the report and it is recommended (if only because it is a hobby-horse of mine) that the provisions of the report are read in full in relation to the issue of case and costs management and expert evidence.

It is suggested that all solicitors should try to lead by example as a management and training issue and should provide protocols for reasonable conduct and compliance (bearing in mind that reasonable compliance does not mean carrying out unnecessary work in fast track cases where fixed costs will prevail).

It is proposed that cases be assigned to designated judges with relevant expertise and this will further impact on the judiciary. It is also proposed that the court shall be less tolerant of unjustified delays and that Rule 4.9 should be amended to allow the court to monitor progress of the parties in order to secure compliance and pre-empt the need for sanctions. The impact of this on the judiciary is dealt with above, in that it is similar to the issue of sanctions for non compliance with pre action protocols. Once again a fair, proportionate and consistent, but robust approach will be required.

By way of comment, it will be recalled that one of the main thrusts of the Woolf Reforms was that case management should not just be left to the parties, but that there should be a robust and interventionist control of case management by the court. It is generally perceived that the courts control over the proceedings must be strengthened and this will impose a further burden on the judiciary in terms of management and training to combine a robust and fair approach with consistency. It is suggested in the report that it will require the Court of Appeal to provide their support to the lower courts and it is proposed that an experienced district judge might sit at the Court of Appeal on case management issues.

## **Part 36**

CPR Part 36 deals with offers to settle and Lord Justice Jackson proposes to beef this up because he says there is insufficient penalty to a defendant who fails to beat a claimant's offer and insufficient reward for a claimant who

makes a realistic offer, which is then beaten. He proposes that in those cases damages are increased by 10%.

This is on top of the 10% increase in damages across the board. From the solicitors' point of view this is more a management issue and a training issue, than a strategic one, but the effect is likely to be that claimants will take more care to make an early and properly considered part 36 offer.

The impact on the judiciary will be that this will be a matter of discretion and must be valued. In particular, the judiciary may wish to ensure that a systematic and consistent approach is taken to valuation of cases where money is not the issue and the recommendation provides that the court must place a value on the claim and increase the value by 10%.

Lord Justice Jackson recommends the effect of *Carver v BAA* be reversed

Note – this was the case where an Air stewardess beat the Defendant's part 36 offer by just £51 and the Court of Appeal issues guidelines for matters to be taken into account when deciding whether the Claimant had obtained a Judgment, which was "more advantageous" than the Defendant's offer. Lord Justice Jackson recommends that for the sake of certainty costs follow if the Claimant beats the Defendant's offer even if it is by just a small amount.

The likely impact on solicitors is that there will be an incentive for an early part 36 offer by claimants in virtually every case and these should be taken seriously by defendants.

### **Courts Administration**

The proposals with regard to issue and transfer of routine proceedings and/or defended cases should be noted.

In particular, Lord Justice Jackson recommends the Association of District Judge and HMCS should draw up a scheme for increased delegation of routine box work from District Judges to proper officers.

### **Information Technology**

A suitable body should be appointed to exercise strategic exercise over all IT system.

It would appear that IT will be an ongoing issue both for development of IT and training for District Judges and staff.

### **Summary and Detailed Assessment**

It will be noted that Lord Justice Jackson recommends that proportionality be redefined and *Lownds* be overturned.

Under the present rules, proportionality is to be applied according to section 11 of the CPD. Having regard to rule CPR1.1 (2) (c).

Lord Justice Jackson recommends that the CPR be amended to include a definition of proportionate costs as follows:

“Costs are proportionate if and only if, the costs incurred bear a reasonable relationship to:

- a. sums in issue in the proceedings;
- b. value of any non monetary relief in issue in the proceedings;
- c. complexity of litigation;
- d. any additional work generated by the conduct of the paying party; and
- e. Any wider factors involved in the proceedings, such as reputation or public importance.”

You will note that this over turns Lownds and in addition it modifies CPR Rule 1.1(2) (c).

Once again it is suggested that this is more a management and training issue for all interested parties.

The impact of this in the long term may not be as significant as it sounds, because solicitors will have to adjust their business model to accommodate fixed fees anyway in the fast track.

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## **Summary Assessment**

It will be noted that Lord Justice Jackson has recommended the ACCS should be replaced by a Costs Council to consider, amongst other things, guideline hourly rates and fundamentally the basis on which such rates are to be set. From a strategic point of view, it is of crucial importance to ensure that the guidelines are fair to all the parties involved and provide a reasonable reward for work carried out.

It has long been my view that firms of lawyers should not sit back and leave things to others, but should engage in such processes.

Lord Justice Jackson outlines various alternatives but concludes that summary assessment is a valuable tool, which has made a substantial contribution to civil procedure, but that the court requires more detail than presently available and it is a process, which should be carried out by those with appropriate expertise and time.

Firms of solicitors will need to monitor any change in the rules and comply, so as to assist the court in maximising the effectiveness of summary assessment.

The impact on the judiciary is to try and build in further time into an already busy schedule for proper consideration of any additional information provided and of course to ensure that the judiciary have the appropriate expertise.

## **Detailed Assessment**

Note – in the chapter on costs management Lord Justice Jackson makes various observations, which I recommend should be read in full and he refers for example to the Birmingham Cost Management Pilot.

It is suggested that if the parties identify the issues and set out the evidence required and the cost of that evidence in advance, then it is much easier for the Judge at the end of the day to award reasonable costs, whilst at the same time refusing to allow costs, which have not been flagged up in advance and are not justified.

If Judges have the information and projections properly set out in the first place, it is easier for them to restrict the costs to those necessary to deal with the issues and effectively cap costs in advance, without taking the draconian step of imposing a cap retrospectively and arbitrarily.

Equally, by proper case and costs management and by providing appropriate information to the court the solicitors can ensure they receive appropriate costs.

While Lord Justice Jackson recommends more appropriate use of IT and says various pilots should be introduced, he criticises the absence of detail in relation to what precisely the lawyers were doing during time spent on various types of work.

Lord Justice Jackson recommends a new format of bills, which would be more informative and supported by appropriate software and he refers back to section 5 and recommends a package of measures to improve detailed assessment proceedings.

Finally, Lord Justice Jackson proposes provisional assessment should be piloted for one year at a Civil Justice Centre outside London in respect of bills up to £25,000.

It is suggested that it is essential for lawyers to ensure that they monitor any rule changes and to comply not only with the word but also the spirit of those changes. It is further suggested that this is again likely to impact on the judiciary in terms of management and training.

If these recommendations are implemented it will be crucial for solicitors to case and cost manage the file properly at an early stage, identify the issues and prepare a fully costed plan setting out the evidence required to deal with those issues. In addition they must update their software to provide more detail in the bill to ensure full recovery of costs.

### **Further Comments on Fixed Costs**

Lord Justice Jackson recommends that fixed costs should be an on going project and of course this is likely to involve ongoing mediation between the interested parties, under the CJC umbrella.

Lord Justice Jackson recommends that Professor Fenn be asked to produce statistics in relation to EL Disease cases and that there be further facilitations prior to 31<sup>st</sup> March 2010.

Lord Justice Jackson recommends that there is an overall limit on recoverable costs in a fast track for non-personal injury cases of £12,000 including counsel's fees, experts' fees and other disbursements and all other pre-trial outlays. The only exception is the success fee and ATE insurance premium currently recoverable until and unless his recommendations are implemented.

This raises an interesting issue for practitioners and the judiciary in relation to expert's fees. Lord Justice Jackson refers us to CPR Rule 35.4(4). This provision provides that the court may limit the amount of a party's expert fees and expenses it may recover from any party. He says it is a matter for the individual judge, but consideration should always been given to making use of this provision when the court gives permission for expert evidence in fast track cases.

It has the following ramifications:

- a. For the practitioners, care in providing full information and costings to the court in advance and agreeing a fee with the expert. The danger for the solicitor is that whilst the court will restrict the fee recoverable from the other side, the expert may well insist upon being paid his full fee and the question is whether the balance should be paid by the solicitor or the client and market forces may dictate the former.

- b. From a judicial point of view, training and management may be required to ensure consistency of approach.

### **Fall Back Options**

In addition to his primary recommendations, Lord Justice Jackson has a number of fall back options, which may be implemented and should be considered for the short term.

For example he says if ATE premiums are to remain recoverable, there should be a limited period in which the Defendant has an opportunity to admit liability and avoid the cost of an ATE insurance policy.

He suggests there should be a cap on recoverable premiums at 50% of damages. In cases where the ATE insurers are entitled to avoid the policy as against the insured, he suggests something akin to compulsory insurance.

If his recommendation to abolish recoverability of success fees is not accepted, then such success fees should be rigorously controlled and fixed success fees should be introduced to all areas of litigation along the lines of the model two stage fee used in Part 45. Furthermore, there is a strong argument for a period during which the Defendant has an opportunity to admit liability before a success fee is chargeable.

He sees no justification for success fees being allowed in detailed assessment proceedings (*Crane v Cannons Leisure*) and he believes the cases of *Lamont v Burton* and *Kilby v Gawith* are reversed.

Note – *Lamont v Burton* the Claimant failed to beat the Defendant's part 36 offer at trial, but was nevertheless entitled to 100% success fee up to the date of expiry of the part 36 offer.

*Kilby v Gawith* the Court awarded a success fee despite the availability of before the event insurance on the basis that the court had no discretion under CPR r 45.11(1) to disallow a successful claimant a success fee provided for in the conditional fee agreement with her solicitors.

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