

# “COSTS LAW AND PRACTICE” CONFERENCE ON 30<sup>th</sup> SEPTEMBER 2014

## KEYNOTE SPEECH BY LORD JUSTICE JACKSON (costsconfpaper)

### 1. INTRODUCTION

1.1 Our chairman tells me that this is the Inaugural Conference of the Costs Law Reports, held to mark the fact that those reports have now been in publication for 15 years. I am grateful to the Costs Judges and the editors of those reports for inviting me to deliver the keynote speech on such a joyous occasion.

1.2 Fifteen years ago I was not aware of the existence of the Costs Law Reports. Indeed the same was true six years ago. How things have changed since then!

1.3 Abbreviations used. In this paper:

“CJC” means the Civil Justice Council.

“DBA” means damages-based agreement, sometimes called contingency fees.

“FR” or “Final Report” means the Review of Civil Litigation Costs Final Report.

“HMCTS” means Her Majesty’s Courts and Tribunal Service.

“MoJ” means Ministry of Justice.

“IP” means intellectual property.

“PR” means the Review of Civil Litigation Costs Preliminary Report.

“SME” means small and medium enterprise.

1.4 Disclaimer. Last year Parliament, the Rule Committee and the judiciary introduced a raft of civil justice reforms, which I had recommended in my Final Report. Of course I accept full responsibility for all those recommendations including:

- abolition of recoverable success fees and ATE premiums
- introduction of qualified one-way-costs-shifting (“QOCS”)
- banning of personal injury referral fees
- ten per cent increase in general damages
- authorisation of DBAs<sup>1</sup>
- introduction of costs budgeting/costs management
- case management reforms designed to focus factual and expert evidence upon the real issues, as well as to speed up the litigation process
- increased docketing
- revision of CPR rule 3.9 to secure more effective compliance<sup>2</sup>
- new disclosure rules
- “hot tubbing” of experts
- enhanced rewards for claimant Part 36 offers
- standard directions online

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<sup>1</sup> The regulations authorising DBAs are unsatisfactory in a number of respects. I and others have repeatedly called for their amendment. I will return to this theme in a lecture at the Law Society on 20<sup>th</sup> October.

<sup>2</sup> The Law Society and others had stressed that securing more effective compliance was an important element in any package of reforms.

- promotion of ADR
- new definition of proportionate costs + reversal of *Lownds* by rule change
- restrictions upon recoverable appeal costs (new rule 52.9A)
- provisional assessment of costs
- new template for summary assessment
- revised procedures for detailed assessment
- fast track fixed costs
- numerous reforms to individual areas of litigation (personal injury, clinical negligence, commercial etc).

**BUT** I am not responsible for the one matter for which I am constantly blamed – sometimes vilified – in the press.<sup>3</sup> I was not a member of the court which decided *Mitchell*. If anyone wishes to see how I think rule 3.9 should be applied, they should read my partially dissenting judgment in *Denton v White* [2014] EWCA Civ 906.

## 2. FIXED COSTS

2.1 The concept of 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.

2.2 Need for regular review. It is important that any scheme of fixed costs should be subject to periodic review, in the same way that guideline hourly rates are subject to periodic review. The obvious body to carry out such periodic reviews of fixed costs is the Costs Committee of the Civil Justice Council, which is chaired by Mr Justice Foskett. In order to undertake the task, that committee would need to be properly resourced.

### (i) The present state of play

2.3 Proposals in the Costs Review Final Report. The FR contained a number of proposals for fixing costs. In particular:

- FR chapter 15 recommended that costs in all fast track cases be fixed and it 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.
- There was a separate recommendation for fixing the recoverable costs of medical reports in fast track personal injury cases: see para 5.22 on page 162.
- FR chapter 24 recommended that a scheme of scale costs<sup>4</sup> be introduced for IP cases in the Patents County Court (now the Intellectual Property Enterprise Court).

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<sup>3</sup> See for example Edward Fennell's article "One year on: the verdict on Jackson" in the *Times* on 3<sup>rd</sup> April 2014. This article strongly criticised me for the *Mitchell* decision and included a fine picture of Mr Mitchell pushing his bicycle.

<sup>4</sup> This scheme was proposed by the Intellectual Property Court Users' Committee. That committee's recommendations fitted perfectly with the wider proposals emerging from the Costs Review and I warmly endorsed them.

- FR chapter 16 recommended that after fixed costs had been introduced into the fast track, serious consideration should be given to introducing fixed costs into the lower reaches of the multi-track.

2.4 Implementation in respect of fast track personal injury cases. The Rule Committee has introduced fixed costs for fast track personal injury cases by means of amendments to CPR Part 45 which came into force on 1<sup>st</sup> April 2013. There may be issues about the figures. The Lord Chancellor in the exercise of his statutory powers directed the Rule Committee to impose significantly lower figures than those recommended in my report. I would suggest that the actual matrices of fixed costs should be kept under review by the CJC Costs Committee.

2.5 Fixed costs for medical reports. With effect from tomorrow CPR Part 45 will be amended to prescribe fixed costs for medical reports and for obtaining medical records in soft tissue injury claims under the RTA Protocol. Rules 45.19 and 45.29 set the recoverable costs as follows:

“(a) obtaining the first report from any expert permitted under 1.1(12) of the RTA Protocol: £180;

(b) obtaining a further report where justified from one of the following disciplines —

(i) Consultant Orthopaedic Surgeon (inclusive of a review of medical records where applicable): £420;

(ii) Consultant in Accident and Emergency Medicine: £360;

(iii) General Practitioner registered with the General Medical Council: £180; or

(iv) Physiotherapist registered with the Health and Care Professions Council: £180;

(c) obtaining medical records: no more than £30 plus the direct cost from the holder of the records, and limited to £80 in total for each set of records required. Where relevant records are required from more than one holder of records, the fixed fee applies to each set of records required;

(d) addendum report on medical records (except by Consultant Orthopaedic Surgeon): £50; and

(e) answer to questions under Part 35: £80.”

2.6 Comment. These new rules are a welcome step forward. I express the hope that this regime will be extended with any necessary adjustments to medical reports for other categories of fast track personal injury claims.

2.7 Implementation in respect of IP cases. In October 2010 the Rule Committee amended CPR Parts 45 and 63, so as to introduce a scheme of scale costs and a costs cap for litigation in the Patents County Court (now the Intellectual Property Enterprise Court). The recoverable costs for determining liability are capped at £50,000. The recoverable costs for determining quantum are capped at £25,000.

2.8 Impact of the IP reforms. The introduction of these limits upon recoverable costs in IP cases has not made the Intellectual Property Enterprise Court any less attractive to users. Quite the opposite is the case. The number of new cases in that court

approximately doubled in the two years after the reforms.<sup>5</sup>

2.9 One unfortunate exception. One important recommendation concerning fixed costs has not yet been implemented. That relates to non-personal injury cases in the fast track. The scheme of fixed costs which I proposed for non-personal injury fast track cases is set out in FR pages 163-168. That recommendation is still under consideration. The pre-trial costs of these cases remain at large. This is highly unsatisfactory. Fast track costs fall outside the costs management rules. If those costs are not fixed, they are not subject to any effective control.

2.10 The MoJ's position. I am told by the MoJ that the Government is supportive in principle of the proposal that all costs in the fast track should be fixed. On the other hand, there is a timing issue. Other matters are currently taking priority.

2.11 Comment. Of course, the manner in which hard pressed Government departments prioritise their work is a matter for them. Nevertheless I do stress the importance of completing the task of fixing all costs in fast track cases. So long as some of those costs remain at large, there is a serious lacuna in the rules. Individuals of modest means and small businesses are the principal users of the fast track. Their needs should not be overlooked or relegated to the back of the queue.

#### (ii) The future

2.12 Proposals in the Final Report chapter 16. FR chapter 16 discussed the arguments for and against introducing fixed recoverable costs in the lower reaches of the multi-track. It also summarised the results of a survey undertaken by the Federation of Small Businesses ("FSB"). The FSB broadly favoured the introduction of fixed recoverable costs for lower value multi-track cases.

2.13 CMS scheme. FR chapter 16 also set out a proposal by CMS Cameron McKenna LLP for fixing costs in cases up to a value of £250,000 as follows. If the case settles pre-issue, recoverable costs would be 10% of the settlement sum. If the case settles post-issue but pre-allocation, the percentage goes up to 15%. The percentage then goes up in stages. If the action proceeds to trial, recoverable costs are 40% of the judgment sum (or of the sum claimed, if the defendant is victor). The scheme includes safeguards so that in exceptional cases or where a party behaves unreasonably there can be full costs recovery.

2.14 Conclusions and recommendations. My conclusions and recommendations were set out in paragraphs 2.10 and 2.11 of that chapter as follows:

"2.10 Once the necessary reforms have been implemented in the fast track and in multi-track cases in the Patents County Court (the "PCC"), there must be a period of evaluation. Following that period of evaluation, I recommend that further consideration should be given to the possibility of introducing a scheme of fixed costs or scale costs into the lower reaches of the multi-track. When that consideration takes place, the views of court users should be elicited by surveys of the kind that the FSB kindly undertook

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<sup>5</sup> See para 3.7 of Mr Justice Arnold's lecture "Intellectual Property Litigation: Implementation of the Jackson Report's Recommendations", seventeenth lecture in the implementation programme. 12<sup>th</sup> February 2013.

during Phase 2. Such surveys should be undertaken on a more extensive basis amongst a variety of categories of court users.

2.11 If, following that future consultation process, any scheme of fixed costs or scale costs is to be adopted, there will be a variety of models for consideration. One model would be a system of scale costs subject to an overall cap, such as that which is planned for the PCC. Another model would be the CMS scheme. A third model would be a scheme of fixed costs of the kind operated in Germany. The German costs regime is described in PR chapter 55. Since the German civil justice system is structured differently from our own, the German costs rules could be a general guide but not, of course, a template.”

2.15 Time for action. Five years have now elapsed since the publication of the FR. The recommendations for fixing costs in the Intellectual Property Enterprise Court and the fast track (except for non-personal injury cases) have all been implemented. The time has now come to take stock and to develop a scheme for fixed costs in the lower reaches of the multi-track.

2.16 Such a scheme may be particularly welcome now, because it will dispense with the need for costs management and costs budgeting in cases valued at less than £250,000. At the same time litigants will have certainty as to (a) their costs exposure if they lose and (b) their future costs recovery if they win.

2.17 Who should do the work? The obvious body to carry out the necessary research and to devise such a scheme is the CJC Costs Committee. If that body does not have the time or resources for the task, then I propose that a separate working party chaired by a judge be set up for this specific purpose. Clear terms of reference must be drafted and a deadline set for completion. In the absence of such a deadline, the work may become never ending.

2.18 Comments from the Association of HM District Judges. The President of the Association of HM District Judges states:

“There is overwhelming support for fixed costs both in the fast track, and in the lower value multi-track cases. This would save time and costs. I have not heard a voice which dissents from this view.”

### 3. OTHER MATTERS

#### (i) Costs management

3.1 Other speakers will be addressing costs management, so I only touch upon the topic briefly. On the negative side, there have been teething problems. Also there are criticisms of front loading of costs. On the positive side, most litigants want to know what their litigation will cost. This new procedure gives them that information. Often it encourages earlier settlements. My strong impression is that as practitioners become familiar with the process, opposition is receding and support for this innovation is gathering momentum.

3.2 Recent feedback. The chairman of the Dispute Resolution Committee of the Birmingham Law Society tells me that he has spoken to the heads of litigation in six

or seven major law firms in his area. They all think that costs budgeting and costs management are helpful. The discipline focuses the minds of both lawyers and clients upon costs [which are the number 1 concern] at the outset. Precedent H is an extremely useful tool for the purposes of arriving at a realistic costs estimate. Indeed precedent H can be used to create the estimate of costs which is sent to the client with the original letter of engagement. The Birmingham lawyers consulted also find it useful to see the other side's estimate of costs. The exchange of costs information assists in achieving settlement.

3.3 It is of course still early days. For many lawyers and judges costs management was uncharted territory until last year. I also accept that judges differ in their expertise in relation to this new discipline. No doubt the concerns which have been expressed in some quarters will be addressed by the Judicial College as well as the deliverers of CPD.

#### (ii) Court administration

3.4 Importance of court administration. Effective and efficient administrative back up is essential to the delivery of justice at proportionate cost. Any country which allows its civil justice system to decay pays a high price. By way of example, one major reason for Italy's poor economic performance is its inefficient delivery of civil justice.<sup>6</sup>

3.5 The additional Government investment in the courts is most welcome. I therefore welcome the Government's announcement in March 2014 that it will be investing an additional £75 million per year for five years in improving the courts and developing court IT systems. HMCTS will be taking forward the reform programme with the assurance that those funds will be forthcoming. In particular, I welcome the work being done (at a cost of £5 million) to introduce a single integrated IT system into the Rolls Building courts, so as to allow electronic case management. I express the hope that modern IT and electronic case management will be introduced in all civil courts as soon as possible.

3.6 Future roll out. I understand that once electronic case management has been achieved in the Rolls Building, the intention is to roll IT out to other courts including the regional court centres. This would eliminate the manual paper handling, which at the moment occupies so much staff time. That would lead to a better and slicker service for court users at reduced costs. All these developments would be good news for the public and good news for the legal profession. They are essential for the health of the civil justice system.

3.7 The next few years. I understand that, realistically, the county court and the regional court centres will be continuing to operate on a paper based system for some time. Here there is a problem, because (while we have a paper-based system) cutbacks in permanent staff have reduced the ability of courts to deliver an efficient service to the public. This is unfortunate because the present period coincides with the bedding in of the recent civil justice reforms.

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<sup>6</sup> See 'Italy's Judicial System: Justice Denied', *Economist*. 19<sup>th</sup> July 2014. "The sluggishness of civil justice is a big reason why the Italian economy is still not growing" (para 2).

3.8 Comments on the Civil Justice Council website. Many of you will have read the comments on the civil justice reforms which the CJC put on its website in March of this year. As you may recall, one commentator in the north of England wrote:

“It would be remiss if we did not mention the current Court situation, which is dire ... It is routine now, in fact, almost inevitable, that documents sent into the Court are lost, do not make their way to the Court file, causing delays and extra costs for solicitors to send in the documents again, or leading to hearings being adjourned.”

3.9 Similar comments from others. I have made inquiries of others and received similar comments. The President of the Manchester Law Society states:

“I must say at the outset I can only applaud the staff at the Manchester District Registry/Manchester County Court for their efforts. It is not their fault that the service provided is not fit for purpose. In recent months, family solicitors have informed me that the court staff cannot cope with the number of litigants in person. Due to public funding cutbacks, these individuals, many of whom have not had any contact with the law before and who do not understand the system are forever telephoning the court staff taking up their valuable time, meaning that the ability of the staff members to complete their own work is being significantly affected.

MLS members have told me that the court staff do apologise profusely because they know that the service being provided is not satisfactory or fit for purpose. They say (off the record) that they are desperate for more staff, particularly when it comes to school holidays, but they are told by senior management that the funding is not there. What seems to be happening is that staff who are leaving for legitimate reasons are not being replaced and that individual departments are unwilling to sanction promotions as this would mean a valuable member of their team leaving that will not be replaced putting further pressure on the remaining members of the team. If this is true, and I have no reason to doubt what is being said, then the obvious impact is that the court service ends up with a demoralised and unhappy staff.

The reality is, that it seems to members of MLS that despite the government wishing to impose ever more cuts, there is simply no flesh left on the bone and that what I am hearing from MLS members is that this is affecting civil justice in Manchester.”

3.10 The President of the Association of HM District Judges, whilst paying tribute to the hardworking court staff, states (after consulting his colleagues) that reductions in court staff have led to delays in processing cases. He adds that the loss of skill and ‘corporate’ knowledge within most court offices can be acutely felt in listing, where more and more problems seem to be surfacing. This can lead to parties attending for hearings not listed or wrong hearing times being sent out. The continuing reliance on agency staff puts pressure on regular staff in terms of training and productivity. It also has a negative effect on morale.

3.11 The gravamen of the comments quoted. The comments quoted above and similar comments are not motivated by self interest. The civil justice system exists for the benefit of the public, not for the benefit of judges or practitioners. The above comments reflect a real concern that – so long as we have a paper-based system – the shortage of experienced staff is hampering the delivery of justice to court users.

3.12 As I understand it, this is a problem which affects court centres in the regions more than in London.

3.13 Reducing court resources drives up costs. If regional court centres are not

properly funded and resourced, then this will drive up the costs of civil litigation. That is precisely the opposite of what the Government was trying to achieve when it introduced the 2013 civil justice reforms.

3.14 This is a valid concern even in times of austerity. I accept at once that we are living in times of austerity. The Government has to make difficult choices about the allocation of scarce resources. On the other hand, the health of the civil justice system is vital not only for the vindication of individual rights but also for the economy.

3.15 Small businesses. Small businesses are vital to the country's prosperity. The *Small Business, Enterprise and Employment Bill* is currently before Parliament. It reflects Government policy which is to support and encourage SMEs to thrive. An efficient court system is an essential part of the environment in which small businesses can flourish. Businesses must be able to enforce their contracts effectively. They must also be able to chase up late payments promptly. Those who deal with businesses and are tempted to default must know that there is an efficient court system in the background.

3.16 Reduced usage of the civil justice system and reduced take in court fees. As the civil justice system becomes less efficient, so fewer people will use it. Although I cannot talk about individual matters, I am told that this is already happening in the case of some small businesses with modest claims which they can ill afford to forego. As usage of the civil justice system drops so does the amount of court fees received by HMCTS.

3.17 Can people enforce their rights by other means? Some litigants have alternatives available, such as adjudication or arbitration. Other litigants have no alternative save for denial of justice. Mediation is not effective unless everyone knows that there is an efficient court system in the background. Otherwise why should an intransigent defendant trouble to come to the mediation table?

3.18 My position. I do not speak on behalf of the judiciary as a whole or indeed on behalf of anyone else. I speak simply as a judge who has spent a year designing reforms to the civil justice system and two-and-a-half years working on the implementation of those reforms. Judges should not enter into the political arena and I do not do so. Nevertheless all of the matters touched upon in this lecture were dealt with in the *Review of Civil Litigation Costs Final Report*<sup>7</sup> – a report which I wrote at the request of the then Master of the Rolls and with the support of the then Lord Chancellor.

3.19 Conclusion. There is always a tendency to criticise things that are going wrong and to ignore things that are going well. I do not fall into that trap. I applaud the achievements of the district judges and circuit judges who have worked tirelessly to make the 2013 civil justice reforms work effectively. Also I welcome all of the new investment being made in the court system, especially the Rolls Building jurisdictions. Nevertheless I have a real concern that (despite the best efforts of the MoJ and HMCTS) the county courts and the regional court centres are slipping

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<sup>7</sup> January 2010, HMSO and on the Judiciary website



through the net. I therefore invite consideration as to whether the resources of those courts should now be strengthened rather than further reduced. As part of the overall reform programme it is essential that civil justice receives its fair share of the available funding.

Rupert Jackson

30<sup>th</sup> September 2014