REVIEW OF CIVIL LITIGATION COSTS: SUPPLEMENTARY REPORT FIXED RECOVERABLE COSTS

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Following on from his overhaul of Civil Litigation in April 2013, Jackson LJ has returned, to in his own word "*finish the job*" when dealing with the costing of Civil Litigation in England and Wales. The report which seeks to do this entitled the "*Review of Civil Litigation Costs: Supplemental Report Fixed Recoverable Costs*" (herein referred to as the Report) and was published on the 21st July 2017 and whilst not containing whole sale changes to the law, does propose to make several significant changes, evolutions and in some cases perhaps unwelcome developments into the field of the provision of legal services in England and Wales.

The report is substantial and the product of in-depth research and considered opinion. Whist there are hard choices to be made, and not all parties will be satisfied, the report cannot be faulted on not having considered the evidence before it nor the time and energy given to it by Jackson LJ.

The corner stones of the report

Whilst these recommendations are not certain to come into force there a sense of inevitability about the report, and with this point in mind there are several new developments flowing from it that need to be borne in mind, namely;

a. A grid of Fixed Recoverable Costs (herein refeed to as FRC) for all fast track cases;
b. The creation of a new "*intermediate track*" for certain claims up to £100,000 which can be tried in three days or less, with no more than two expert witnesses giving oral evidence on each side and attracting FRC;
c. To develop a grid of FRC in clinical negligence claims up to £25,000.00;
d. A Voluntary pilot of a capped costs regime for business and property cases up to £250,000, with streamlined procedures and capped recoverable costs up to £80,000. If the pilot is successful, the regime could be rolled out more widely for use in appropriate case;
e. Expanding on the Aarhus Rules in Judicial review cases which should be adapted and extended to such claims;
f. To review the use and success of FRC, with the intention to seek to further extend the notion in the future.

This seminar is intended to give an overview of the report and focus in on the main points and proposals that appear imminent. The seminar will largely be practical in identifying areas of change, but also potential conflict. Whilst the report is at present just that, a report, there may well be changes, variations or even whole scale departures from the proposals. All practitioners should be encouraged to review the report themselves with the 135 pages containing impressive and illuminating research into the issue of costs in Civil proceedings.

Costs and the principals of the report

The principal underlying costs in civil litigation in England in Wales is that the losing party should pay the winning parties costs. Whilst QOCS has somewhat altered this in Personal Injury and Clinical Negligence cases practically, a costs order can still be made, against a failed Claimant, but only enforceable with further order of the Court.

Payment of such costs in their entirety is rare. A costs order in practise will be reflective of an order that the losing party should contribute towards those costs, such contribution being assessed as what an assessing officer views as the "*reasonable costs*" of a litigation or application.

This point can be side stepped in certain circumstances, such as if indemnity costs are awarded (by order of the Court or the bettering of a part 36 CPR offer for example) but as a general principal, the uncertainty and potential for disproprtiante costs is this is genesis of the reforms rather than any direct evidence of such wide spread injustice.

Jackson LJ asks, almost rhetorically, what should be the goals of a costs management scheme? The answer in his view is that the framework that should be striven for, is a "*system in which the actual costs of each party are a modest fraction of the sum in issue, and the winner recovers those modest costs from the loser*". With all respect to Jackson LJ, there is a natural conflict between the application of excellent legal services in a fair and accessible manner and focusing wholly onto the value of a claim as the barometer or costs required. This will lead to unsatisfactory results and (while he accepts the same) somewhat ignores that a litigant's conduct and decisions will impact on costs, and drive them.

For the greater good?

Jackson LJ does identify that this objective is almost impossible to achieve. He highlights that as adversarial litigation is an inherently expensive process the real role of the report is to see what is achievable in the real world. In his view, the best that can be achieved is;

a. To modify the procedural rules with the aim of reducing the actual costs so far as possible;
b. To restrict recoverable costs to that which is "*proportionate*" as defined in the new proportionality rule;
c. To control recoverable costs in advance.

In all fairness, Jackson LJ does acknowledge that "*it is not feasible to preordain how much clients must pay to their lawyers in every individual case. Also, that would be an unacceptable interference with freedom of contract. The best that we can do is to restrict the recoverable costs*". However, the report then summarises (in apparent contradiction to the previous statement) that this will incentivise lawyers (who are in competition with one another) to keep the actual costs down, so that the client's shortfall in costs recovery (if it wins) is as low as possible. However, this appears to ignore, or attach less weight to his previous acceptance that;

a. All litigations are different;
b. All litigations will require different tactics, input, and work levels;
c. That all litigations, by their nature involve at least two parties, and the reasonable conduct of both cannot be assumed;
d. That access to justice should not be restricted.

In short, Jackson LJ is dealing with a complex and hydra like problem, where one issue is defeated, it spawns more. There is a sense from the report that this is not a "*one size fits all*" but rather a considered approach seeking to provide justice to the many, whilst understanding and regretting the detriment that may be caused to the few.

The control of costs

Placing oneself into the feet of the consumer, ask yourselves why is it important to control the recoverable costs in advance? The report identifies two main reasons;

a. It is necessary to impose discipline. The traditional approach of parties doing what they see fit, then adding up the costs at the end and recovering as much as they can from the opposing party is a recipe for runaway costs;
b. Parties need certainty. They need to know at the outset what costs they will recover if they win and what costs they will pay out if they lose

However, does imposing arbitrary restrictions and glass ceilings on costs not cause the conduct and work required in the actual litigation itself to be ignored or glossed over through focusing on the concept of value as the defining character of the litigations "*merit*"?

Furthermore, doesn't this also fail to identify that "*value*" by its nature, is a subjective and variable concept? For example, £10,000 to a large company may be an acceptable loss, but to a small business owner, it could be the difference between solvency and insolvency.

Practically, placing oneself in the Courts position, there are really only three ways to be certain of restricting and controlling the costs of a litigation, either by setting them at an early stage (fixed recoverable costs), through bespoke costs budgeting or not allowing costs to recoverable at all. Both of the first methods, have been implemented and whilst there may be some satisfaction, they have largely worked, so why change what is apparently working? As to the third, whilst Employment Tribunals have used this format, it is unlikely to ever work in more generalised Civil Litigation.

The report will stress that the heart of its decision-making rationale is to ensure that access to justice lies always at the core of any reform (despite the foregoing). Jackson LJ stresses that controlling the costs of litigation and providing clarity as to each party's financial commitment are vital elements in achieving access to justice, which is an agreeable sentiment and statement.

However, it can be argued that legal services shouldn't be forced to operate in a two-tier system of restricted and fixed costs as opposed privately paid costs where the richer party with deeper resources can afford to invest more to achieve their desired outcome, for example a injured Claimant driver and a large insurance Company. Commercially a party who is working solely on

restricted costs will reach a point where further work can become uneconomical and in this situation, resources to fund further work does become a factor.

Whilst there are some provisions to increase FRC, this scenario will be a likely reality in cases where issues as to causation of injury are raised in road traffic cases (LVI defences). In accepting that there is unlikely to ever be a happy medium between the two, the decision whilst a harsh one, had to be made and it seems that the sanctity of the right of access to justice and parity or arms perhaps needs to be revisited in light of the current economic climate.

Why the change now?

During Jackson LJ's previous report, it was clear that the use and application of FRC in the fast track were just the start of the reforming process with costs budgeting dealing with claims that were allocated to the multitrack. Previously, the Jackson reform had set out 5 main objectives;

a. Amending rules of procedure, to streamline the litigation process and cut out unnecessary work.
b. Amending funding rules, so that;
    i. No method of funding generates increased costs and
    ii. There are as many different funding options as possible.
c. Facilitating and incentivizing early settlement of disputes.
d. Limiting recoverable costs to proportionate levels and streamlining the process of assessment.
e. Controlling the amount of recoverable costs in advance.

However, these are not the only reforms currently coming to fruition in the legal system and the report shouldn't be looked at in pure isolation. There are several wide spread and ambitious reforming programmes currently in the process of moving forward reflecting a change in not only how litigation is funded, but how the actual Court system in which litigation is accommodated operates. Briefly, these include;

The Briggs Review

The final report of the Civil Courts Structure Review carried out by Briggs LJ made 62 recommendations, and identifies 5 main weaknesses in the service provided by the civil courts and proposes many sweeping reforms to complement this;

a. The lack of adequate access to justice in lower value cases, for which Briggs LJ proposed a new Online Solutions Court and an extension in the regime for FRC. The Online Solutions Court would be a new Court, separate from the County Court, dealing with money claims up to an initial level of £25,000.
b. Inefficiencies arising from "*the continuing tyranny of paper*" combined with "*obsolete and inadequate IT facilities in most of the civil Courts*". Digitalization of the Courts has been suggested
c. Delays in the Court of Appeal, caused by its excessive workload. Briggs LJ also recommended increasing the value threshold for issuing a claim in the High Court from its current level of £100,000 (£50,000 for personal injury claims) to £250,000 (and no lower limit for personal injury claims) with a view to a subsequent increase to £500,000.
d. Under-investment in provision for civil justice outside London;
e. The widespread weaknesses in the processes for the enforcement of judgments and orders.

Court Reform Programme.

On the 15th September 2016, the Ministry of Justice (herein referred to as the MoJ) published the document "*Transforming our justice system: summary of reforms and consultation*". It outlined the Government's plan to invest over £700m in the Courts and Tribunals services to improve them, and make them more efficient.

Ministry of Justice Review of LASPO

On the 17th January 2017 Sir Oliver Heald QC, the then Justice Minister, announced that the MoJ will be undertaking a review of the effects of the LASPO. Principally the review will be considering the effect of withdrawing much of the legal aid that was previously available. At present, QOCS doesn't appear to be in the firing line.

Department of Health Consultation on FRC for clinical negligence

The Department of Health (herein referred to as the DoH) published a consultation document on 30th January 2017 inviting responses to its suggestion to introduce a mandatory scheme of FRC for clinical negligence claims. This scheme would apply to claims between £1,000 and £25,000 in the fast track or multi-track, but not those in the

small claims track.

The consultation closed on the 2nd May 2017, and the response is awaited. The report itself touches on the issue, but seems to be willing to wait for the response and to deal with this matter in an informed manner.

National Audit Office investigation

In December 2016, the National Audit Office (herein referred to as the NAO) announced that it would be undertaking a study, named "*Managing the costs of clinical negligence in trusts*". The result of this study is expected to be published in September 2017 and will complement any review into Clinical Negligence Costs.

Whiplash reforms

On the 23rd February 2017, the Government published part one of its responses to the consultation, "*Reforming the soft tissue injury ('whiplash') claims process*", which closed on 6th January 2017. This includes a number of reforms, including;

a. The introduction of a tariff of fixed compensation for pain, suffering and loss of amenity for injuries with a duration of less than two years;
b. A ban on settlement of claims without medical evidence;
c. Increasing the small claims limit for RTA related personal injury claims to £5,000;
d. Increasing the small claims limit for all other types of personal injury claims to £2,000.

In the Queen's Speech on the 21st June, the new Government stated its intention to proceed with whiplash reform by a new Civil Liability Bill. This reform itself merits significant consideration and it is suggested, is completely contrary to the principals of the report.

Whilst Jackson LJ's views of these reforms are not publicly known, it is hoped that he sees and acknowledges it is in direct contraction to the core principals of his intended reforms since they seek to not restrict the costs of a litigation, but rather strangle damages, and a litigant's ability to seek access to justice.

IMMEDIATE ISSUES

So, in the report, what are the immediate issues and trends?

Banding

Across and throughout the report with the development of a proposed intermediate track, and extension of FRC into areas of litigation where previously they did not apply there is obviously, going to be difficulty since one set of fees cannot fit all cases. For example a straightforward contract claim of £50,000 will be less intense than a fully contested personal injury claim where liability and causation are disputed, but the claim is valued at the same sum.

Considering this in some detail, the report adopts realistically the only possible way to streamline such litigations using FRC, namely to create a scaling which will identify the unique difficulties in a claim and allocate an appropriate level, or band of FRC. Jackson LJ intends to do this through the concept of banding. The higher the band (1 - 4) the more costs are recoverable.

Banding is dealt with in more detail below, but in general parties are going to be encouraged to either agree a band early on, or have a Judge at the case management conference stage (herein referred to as CMC) decide it for them. Bearing in the mind the potential for greater costs to flow form a higher banding there is a natural incentive for disproprtiante disputes to emerge and develop in this area.

The issue with indemnity costs

Interestingly the report directly refers to the decision of **Broadhurst v Tan** [2016] EWCA Civ 94 and the effect of an order for indemnity costs within the fast track Jackson LJ comments that the decision, "*unless its effect is modified by rule change, will impact upon fixed costs generally*".

For those whom are unaware of the principal, where a Court orders that costs be paid (either in the entirety or from a certain point in time) on the indemnity basis, fixed costs will not apply. This is necessary when one considers it to give effect to part 36 CPR in fast track cases implementing fixed recoverable costs.

The report itself seems uncertain as to how this point should be addressed but Jackson LJ appears to indicate that the correct way to deal with the issue of indemnity costs in a fixed recoverable costs system, would be to replace indemnity costs with a percentage uplift of 30% or perhaps 40%. This will require an almost complete recasting of the rules and appears to be a attempt to generalise the solution, rather than tailor it. After all indemnity costs apply to individual conduct in a claim, so why enforce and impose a catch all solution?

The report stresses that this is a this is a clear issue of policy, which will need to be addressed in the consultation exercise following this report.

Unreasonable litigation conduct

In cases of unreasonable litigation conduct, the Court should have the power either to award a percentage uplift on costs or to make an order for indemnity costs. The Court will exercise that power, having regard to the seriousness of the conduct in question.

Inflation

Mercifully Jackson LJ has acknowledged that the rates set will need to be assessed to deal with inflation through uprating. However, the guideline rates for solicitors have been static now for over a decade, and it may be too optimistic to see a regular upscaling of rates. It is suggested that the sums are reassessed every 3 years, and that the "*uprating will only apply to the 'lump sum' elements of fixed costs, not to any percentages of damages which may be added*". However, he has not said they will not go down.

Counsel's fees

As we move into consideration of the reforms, there is one point which inevitably would lead to conflict, that of Counsels fees. Many of the written submissions Jackson LJ recived were forceful on the need to specifically ring fence fees for Counsel for two main reasons;

a. Ring fencing is necessary for the protection of the junior Bar, which is very much in the public interest.
b. Counsel's specialist input at an early stage is beneficial for the client and for the efficient conduct of the litigation.

However, despite the arguments on these points being well rehearsed, Jackson LJ decide that "*it is for solicitors to decide whether to do items of pre-trial work themselves or to instruct counsel*". In short, the fees provided, is a fee which is a recoverable cost in a litigation, and it is for a party to decide how to allocate such funds.

Disbursements

Disbursements across the proposed fast track and intermediate track are intended to be fixed. The principal disbursements will be Court fees, expert fees and (where ADR takes the form of mediation) the mediator's fee. In some cases, translators and/or interpreters are needed. Once the new fixed costs regime is in place, Jackson LJ intends work to commence on developing fixed costs for experts, which on the current fast track, has been quite successful.

COSTS BUDGETING, WHERE ARE WE?

Broadly, practices will say that they are in the main, content with costs budgeting. Whist there is a certain sense of inevitability as to the extension of fixed recoverable costs in the fast track, the sense that there needs to be further reform over the fast track level, can be viewed as unnecessary. With this in mind, and if the reforms are going opposed or contributions made, then the data on which they are predicated needs to be understood.

The current state of costs

The report reflects that between 5th December 2016 and 20th January 2017 Jackson LJ collated data from some 223 Cost budgets with a view to preparing some idea how the Courts were approaching costs budgeting focusing on the following 7 areas of practise;

a. Clinical negligence
b. Personal injury
c. Business disputes
d. Chancery and property
e. Technology and Construction Court ("TCC
f. Defamation
g. Other

This data identified;

a. Whether the budget was Claimant or Defendant-side;
b. Whether the sums were those originally claimed by the party, were as agreed between the parties, or were as approved by the Court;
c. The value of the claim and any counterclaim;
d. The cause of action and the nature of the dispute;
e. Key features of the case which might help to explain the level of costs, such as the number of parties, the number of issues in dispute, the number of witnesses and expert witnesses, the anticipated length of trial, whether provision was made for a Pre-Trial Review ("PTR") or alternative dispute resolution ("ADR"), and the nature of any contingency costs; and
f. The numerical data from the budgets: costs incurred to date for each Precedent H phase (recording time costs and disbursements separately), future costs for each Precedent H phase (again recording time costs and disbursements separately), as well as counsel's fees and experts' fees (where the back pages of the Precedent H form were available).

The report itself sets out the following summaries which are illuminative as to how costs budgeting, and the Courts approach to what costs should be allowed, is arrived at.

Clinical negligence: agreed/approved budgets for claimants and defendants, split by incurred and future costs

Clinical Negligence – Claimant – Average				
Value (£)	**Number of Budgets**	**Incurred (£)**	**Agreed or Approved Future (£)**	**Total (£)**
0-25k	6	35,988	59,568	95,555
25-50k	12	47,965	107,665	155,630
50-100k	15	59,987	137,214	197,200
100-250k	13	74,920	152,695	227,615

250k+	2	64,062	85,526	149,588
Value unknown	3	93,640	227,221	320,861

Clinical Negligence – Defendant – Average				
Value (£)	**Number of Budgets**	**Incurred (£)**	**Agreed or Approved Future (£)**	**Total (£)**
0-25k	4	3,771	30,728	34,499
25-50k	9	10,589	74,225	84,814
50-100k	15	15,192	67,705	82,898
100-250k	13	10,885	82,119	93,004
250k+	2	11,053	70,051	81,104
Value unknown	3	15,629	105,383	121,013

Personal injury: agreed/approved budgets for Claimants and Defendants, split by incurred and future costs

Personal Injury – Claimant – Average				
Value (£)	**Number of Budgets**	**Incurred (£)**	**Agreed or Approved Future (£)**	**Total (£)**
0-25k	13	16,723	34,589	51,312
25-50k	17	21,151	47,912	69,062
50-100k	10	30,074	52,592	82,667
100-250k	9	51,443	97,593	149,035
250k+	1	40,703	92,908	133,611
Value unknown	6	26,962	45,718	72,680

Personal Injury – Defendant – Average				
Value (£)	**Number of Budgets**	**Incurred (£)**	**Agreed or Approved Future (£)**	**Total (£)**
0-25k	14	3,954	26,542	30,496
25-50k	17	3,652	29,847	33,499
50-100k	11	4,062	36,726	40,787
100-250k	9	14,621	72,230	86,851
250k+	1	15,422	114,880	130,302
Value unknown	5	2,712	41,458	44,170

Business disputes and TCC: agreed/approved budgets for Claimants and Defendants, split by incurred and future costs

Business Disputes and TCC – Claimant – Average				
Value (£)	**Number of Budgets**	**Incurred (£)**	**Agreed or Approved Future (£)**	**Total (£)**
0-25k	0	0	0	0
25-50k	1	18,701	57,895	76,596
50-100k	1	20,711	89,350	110,061
100-250k	3	27,804	59,712	87,517
250k+	1	18,407	52,768	71,175
Value unknown	0	0	0	0

Business Disputes and TCC – Defendant – Average				
Value (£)	**Number of Budgets**	**Incurred (£)**	**Agreed or Approved Future (£)**	**Total (£)**

0-25k	0	0	0	0
25-50k	3	7,914	45,964	53,878
50-100k	1	20,600	108,892	129,492
100-250k	3	6,848	46,647	53,494
250k+	1	9,013	35,690	44,703
Value unknown	0	0	0	0

Chancery and property: agreed/approved budgets for claimants and defendants, split by incurred and future costs

Chancery and Property – Claimant – Average				
Value (£)	**Number of Budgets**	**Incurred (£)**	**Agreed or Approved Future (£)**	**Total (£)**
0-25k	1	12,710	41,139	53,849
25-50k	0	0	0	0
50-100k	1	21,976	57,960	79,936
100-250k	1	19,583	35,221	54,804
250k+	2	19,696	40,845	60,541
Value unknown	3	9,718	21,130	30,847

Chancery and Property – Defendant – Average				
Value (£)	**Number of Budgets**	**Incurred (£)**	**Agreed or Approved Future (£)**	**Total (£)**
0-25k	1	6,420	40,846	47,266
25-50k	1	1,492	6,971	8,463
50-100k	0	0	0	0
100-250k	1	8,373	30,475	38,848
250k+	1	11,760	45,200	56,960
Value	2	6,994	28,002	34,995

unknown				

Clinical negligence: total costs in cases where agreed/approved budgets were available for both the claimant and the defendant

Clinical Negligence				
Value (£)	Total Cost (£) - Average			Difference in Claimant and Defendant Agreed or Approved (£)
	Number of Cases	Claimant	Defendant	
		Agreed or Approved	Agreed or Approved	
0-25k	4	88,504	34,499	54,005
25-50k	9	166,730	84,814	81,916
50-100k	12	195,088	85,187	109,902
100-250k	11	218,590	98,218	120,372
250k+	2	149,588	81,104	68,485
Claim value unknown	3	320,861	121,013	199,848

Clinical negligence: total costs in cases where both claimed and agreed/approved budgets were available

Clinical Negligence - Claimant				
Value (£)	Number of Cases	Total Cost (£) - Average		
		Claimed	Agreed or Approved	Reduction
0-25k	1	78,764	74,204	4,560
25-50k	6	168,746	156,519	12,227
50-100k	10	244,059	206,843	37,216
100-250k	13	259,791		32,176

			2 227,615	
250k+ Claim value unknown	2 2	197,722 611,450	149,588 396,228	48,133 215,222

Clinical Negligence - Defendant				
Value (£)	**Number of Cases**	**Total Cost (£) - Average**		
		Claimed	**Agreed or Approved**	**Reduction**
0-25k 25-50k 50-100k 100-250k	2 6 13 12	39,306 64,265 88,491 91,807	36,285 69,854 86,557 89,348	3,022 (5,588) 1,935 2,459
250k+ Claim value unknown	2 3	80,079 147,072	81,104 121,013	(1,025) 26,059

Personal injury: total costs in cases where agreed/approved budgets were available for both the claimant and the defendant

All Personal Injury Cases				
Value (£)		**Total Cost (£) - Average**		**Difference in Claimant and Defendant Agreed or Approved (£)**
	Number of Cases	**Claimant**	**Defendant**	
		Agreed or Approved	**Agreed or Approved**	
0-25k 25-50k 50-100k	9 13 9 7	36,932 64,977 83,870 131,31	28,660 35,440 43,292 83,780	8,272 29,537 40,579 47,533

100-250k		3		
250k+ Claim value unknown	0 5	0 63,492	0 44,170	0 19,322

Personal injury: total costs in cases where both claimed and agreed/approved budgets were available

All Personal Injury Cases - Claimant				
Value (£)	**Number of Cases**	**Total Cost (£) - Average**		
		Claimed	**Agreed or Approved**	**Reduction**
0-25k	4	48,409	39,137	9,272
25-50k	12	79,441	60,663	18,779
50-100k	4	85,864	64,799	21,064
100-250k	6	144,979	123,069	21,910
250k+ Claim value unknown	0 3	0 97,683	0 83,992	0 13,691

All Personal Injury Cases - Defendant				
Value (£)	**Number of Cases**	**Total Cost (£) - Average**		
		Claimed	**Agreed or Approved**	**Reduction**
0-25k	6	31,488	30,667	821
25-50k	13	41,532	34,069	7,464
50-100k	6	50,507	40,086	10,421
100-250k	5	98,067	93,690	4,377
250k+ Claim value unknown	1 3	130,302 48,473	130,302 49,946	0 (1,473)

In short, the use of costs budgeting has been working well, and there is a serious question as to why now this should be changed?

THE FAST TRACK

A substantial body of cases across the entire spectrum of litigation will potentially fall into the fast track. part 26.6 (5) CPR the fast track is the normal track for cases where;

a. The value of the claim is less than £25,000.00;
b. The trial is likely to last for no longer than one day and
c. Oral expert evidence will be limited to one expert per party in any field and not more than two expert fields.

Briggs LJ whilst recommending the establishment of an Online Solutions Court, which will deal with cases up to a value of £25,000 claims arising from;

a. Personal injury;
b. Clinical negligence;
c. Possession;
d. Intellectual property; and
e. Housing disrepair claims

are going to be excluded from the proposed and envisaged Online Solutions Court. It is safe therefore to say, that in the forecasted regime, the actual workload of the fast track as we know it, is going to dramatically reduce in scope and scale.

The real change is going to be that in cases where costs are recoverable for other parties, fixed recoverable costs should be extended to cover the whole track and these actions.

Whilst in principal this makes sense, it does seem to strike at the heart of the idea of the fast track since restriction of costs in complex fast track cases will likewise inevitably restrict access to justice, especially in claims between small businesses.

Extending fixed recoverable costs across the whole fast track

Fixed recoverable costs are envisaged as being extended across the entirety of the fast

track unless there is a massive and at present, unexpected change of heart from Jackson LJ.

It should be remembered that the current fixed recoverable costs regime in the fast track provide for a 12.5% uplift on fixed costs payable to a party who lives in the London area and instructs a legal representative who practices in the London area (part 45.29C (2) (b) CPR, and part 45.29F (5)(b) CPR Practice Direction 45 paragraph 2.6. These rules should remain in place and should apply to the extended FRC regime proposed and is a small point, likely to assist a number of persons attending this seminar.

Banding

The Report draws on a huge body of research to arrive four different bands of work which will be used and applied in assessing how cases in the fast track should be filtered, and into which potential range of costs they should warrant.

This is a positive example of how Jackson LJ is seeking to be flexible, but perhaps cynically, the figures seem low and the concept of banding is going to create contentious allocation hearings. Nonetheless, it is a positive step forward in princapal.

Band 1:

RTA non-personal injury claims (popularly known as 'bent metal' claims) and defended debt cases.

Band 2:

RTA personal injury (within Protocol), holiday sickness claims.

Band 3:

RTA personal injury (outside Protocol), ELA, PL, tracked possession claims, housing disrepair, other money claims.

Band 4:

ELD claims (other than NIHL), any particularly complex tracked possession claims or housing disrepair claims, property disputes, professional negligence claims and other

claims at the top end of the fast track. With this in mind, the following has been proposed.

Matrix of FRC for fast track claims (applies to both claimant and defendant recoverable costs)

	Complexity Band			
Stage:	**1**	**2**	**3**	**4**
Pre-issue £1,001-£5,000		£104 + 20% of damages	£988 + 17.5% of damages	£2,250 + 15% of damages + £440 per extra defendant
Pre-issue £5,001-£10,000		£1,144 + 15% of damages over £5,000	£1,929 + 12.5% of damages, over £5,000	
Pre-issue £10,001-£25,000	£500	£2,007 + 10% of damages over £10,000	£2,600 + 10% of damages over £10,000	
Post-issue, pre-allocation	£1,850	£1,206 + 20% of damages	£2,735 + 20% of damages	£2,575 + 40% of damages + £660 per extra defendant
Post-allocation, pre-listing	£2,200	£1,955 + 20% of damages	£3,484 + 25% of damages	£5,525 + 40% of damages + £660 per extra defendant
Post-listing, pre-trial	£3,250	£2,761 + 20% of damages	£4,451 + 30% of damages	£6,800 + 40% of damages + £660 per extra defendant
Trial advocacy fee	a. £500 b. £710 c. £1,070 d. £1,705	a. £500 b. £710 c. £1,070 d. £1,705	a. £500 b. £710 c. £1,070 d. £1,705	a. £1,380 b. £1,380 c. £1,800 d. £2,500

The figures in all of the above boxes in grey are intended to be cumulative, except for the trial advocacy fees The report identifies that there "*is obviously some difficulty in applying the above table to claims for, or including, non-monetary relief*" and Jackson LJ with some reluctance concedes that the Court must, "*assign a value to such relief*" and doing the best he can, indicates a declaration or injunction should be seen as a claim for

£10,000, with the Court having power to vary that figure upwards or downwards.

As to the percentage of upscaling, if the Claimant succeeds, the specified percentage applies to the level of relief recovered, not that claimed. If the defendant succeeds, the specified percentage applies to the claim defeated, as valued in the particulars of claim.

Noise induced hearing loss (NIHL) claims on the fast track

One of the unique features in dealing with how to approach the issue of costing in NIHL cases is that Claimant and Defendant representatives agreed a prescriptive process for dealing with NIHL claims and an accompanying grid of FRC. Jackson LJ has approved this and a cynical mind may well ask, "is *this an example of the carrot and the stick*" to Clinical Negligence practices?

Proposed matrix of FRC for NIHL claims (applies to both Claimant and Defendant recoverable costs)

Stage:	**NIHL claims with value less than £25,000**
Pre-issue	£4,000 + £500 per extra defendant (reduced by £1,000 if there is an early admission of liability or by £500 if settled before proceedings drafted)
Post-issue, pre-allocation	£5,650 + £830 uplift per extra defendant
Post-allocation, pre-listing	£7,306 + £1,161 uplift per extra defendant
Post-listing, pre-trial	£9,187 + £1,537 uplift per extra defendant
Trial advocacy fee	Not agreed

In addition to the above, a fee of £1,280 is recoverable for restoring a company to the register.

Trial advocacy fees have been prosed by Jackson LJ to fall into band 4. In relation to the new Band 4 and NIHL claims the report does offer a different stance and provides that Counsels fees for the following item of work, can be ring fenced although from the reading of the report, there is likely to be some movement on these sums;

a. Post-issue advice or conference, £1,000
b. Settling defence or defence and counterclaim, £500

Interim applications and preliminary issues

The costs of any applications properly made (e.g. because the other party is in default) should be recovered separately. There are fixed costs for such applications under part 45.29 H (1) CPR.

It is conceded in the report that requiring the provision in part 45.29H (1) CPR "*one half of the applicable Type A and Type B costs*" should be amended to "*two thirds of the applicable Type A and Type B costs*" in cases dealing with band 4 claims.

The fixed recoverable fee for an interim injunction application should be £750.

The costs of any preliminary issue trials should be recovered separately but are discouraged actively in the report as;

a. There is much overlap of evidence between limitation and liability;
b. The litigation will get hopelessly bogged down if the limitation decision goes on appeal;
c. To have two trials of a fast track case drives up costs and is disproportionate.
d. If the Claimant wins on limitation and then loses on liability, the first trial has been a waste of time.

Clinical negligence

Clinical negligence claims will not generally fall within the parameters of the fast track. They are more demanding than other forms of personal injury litigation and require more complex pre-issue investigation but that is not to say, arguments are not going to happen on these points.

Escaping the fast track

Part 45.29 J CPR enables a party to escape from the fast track FRC regime in exceptional circumstances. That provision is going to continue to apply, but its reach will be extended

following the extension of FRC across the whole of the fast track. Use of this provision will continue to be rare, because any case of exceptional complexity is unlikely to be in the fast track.

INTERMEDIATE TRACK

Whilst acknowledging arguments that both multitrack cases are varied in character that rigid costs budgeting would not be preferable, and that costs budgeting is working well, Jackson LJ seems intent on the development of a new intermediate track.

It is proposed that there should be an upper limit of £100,000 and that only cases of modest complexity should fall within the new intermediate track regime and its FRC regime. The proposal has attracted a great deal of skepticism from practitioners and bearing in mind the success of costs budgeting, the establishment of this track appears to be unnecessary, and will have in some cases, a negative effect on access to justice since certain types of litigation will become uneconomical, and therefore only the wealthy may be able to peruse certain causes of action as Claimants may struggle to find law firms willing to take their cases.

Whilst a "*race to the bottom*" doesn't seem inevitable, the issue of success fees in Personal Injury proceedings often being assessed at 0%, is a clear indication that market forces will have an impact and that seeking additional monies from clients in reality, is not going to occur in every case.

It is also clear that there are going to be arguments in the future at the CMC stage where parties will seek to remove a claim from the intermediate track.

So, what goes in?

The intermediate track is envisaged to apply to claims which are principally for monetary relief, such as damages or debt. It will include cases where declarations are sought largely to support claims for monetary relief.

The following criteria has been proposed to deal with the issue of allocation to the intermediate track;

a. The case is not suitable for the small claims track or the fast track;
b. The claim is for debt, damages, or other monetary relief, not higher than

£100,000;

c. If the case is managed proportionately, the trial will not last longer than three days;
d. There will be no more than two expert witnesses giving oral evidence for each party;
e. The case can be justly and proportionately managed under a new expedited procedure;
f. There are no wider factors, such as reputation or public importance, which make the case inappropriate for the intermediate track.
g. The claim is not for mesothelioma or other asbestos related lung diseases;
h. Alternatively, there are good and particular reasons to assign the case to the intermediate track,

Mesothelioma and other asbestos related lung diseases

Such claims at present, are in large going to be excluded from the proposed intermediate track on the rationale that these claims are managed in accordance with the procedure contained on the Mesothelioma Practice Direction (Practice Direction 3D). They are case managed in specific courts in specialist Asbestos Lists by judges experienced in this work. Further, the law is understandably more complex, and often covers uncommonly encountered statutes further adding to the complexity and specialisations required.

Complex personal injury claims and professional negligence claims

Such cases on a fact by fact basis, can be excluded. It remains to be seen if this will include personal injury claims where a Defendant alleges fraud.

As aspects of the LASPO reforms and the proposed whiplash reforms is (at least we are told) were and are designed to counteract fraudulent claims, it is also true that it is the Defendant who raises the issue of fraud which in turn, can turn a modest claim for personal injury into a claim involving;

a. Significant disclosure;

b. A trial lasting more than a day;

c. Significant potential detriments to an unsuccessful Claimant.

Therefore, considering the restrictive nature of the proposed track, there is a danger that whilst encouraging access to justice, an allegation of fraud could render a litigation un economical, and render a Claimant without representation. Alternatively, there is a danger that a Judge could place it as a Band 2 case, causing when looking at the figures required serious concerns for Claimants.

Unsuitable cases?

Some cases are going to be unsuitable for the intermediate track. The report identifies these as;

a. Some multi-party cases;

b. Actions against the police;

c. Child sexual abuse claims; and

d. Intellectual property cases.

The Court will also retrain a residual discretion to allocate any case not satisfying the criteria set out above (including any claim for non- monetary relief) to the intermediate track, where such allocation is necessary to promote access to justice.

Streamlined procedure

There will need to be a practice direction for the intermediate track. This practice direction will include specific guidance on assignment to bands but as of yet, there is nothing proposed other than that the relevant issues will be;

a. Complexity of the factual and legal issues;

b. Volume of evidence;

c. Remedy sought and value of claim.

A new directions questionnaire must be designed to elicit the information which the Court will need for this task.

Exiting the intermediate track

The Court as in the fast track must in the view of Jackson LJ have a residual power to take cases out of the intermediate track. It may be necessary to do so if the nature of the case changes fundamentally. The discretion is intended in the report to be "*strictly limited*" and in "*exceptional circumstances*", since otherwise litigants will not enjoy certainty as to costs, which is one of the principal benefits of the fixed costs regime.

A more streamlined approach?

The report envisages a highly streamlined approach on the intermediate track although at present, there is little set in stone.

Banding

The following bands are envisaged to be applied on the intermediate track. Sadly, the report is a little vague on the point. What can be extrapolated is;

Band 1

The least complex cases in the intermediate track. A simple claim over the fast track limit, where there is only one issue and the trial will take a day or less, would generally be suitable for that band: for example, many debt claims or quantum only personal injury claims

Bands 2 and 3

The '*normal'* bands for intermediate track cases, with the more straightforward cases going into Band 2 and the more complex cases going into Band 3

Band 4

The most complex cases in the intermediate track: for example, a business dispute or an employers' liability disease claim where there are serious issues of fact/law and the trial is likely to last three days.

Allocating the band

On allocating a case to the intermediate track, the Judge will (either by agreement between the parties or by reference to the directions questionnaires) assign it to a Band.

On issue of a claim, a Claimant will have ascribed a value to their claim for Court fee purposes whilst this may assist a Judge in the task of allocating cases to tracks and bands at the subsequent CMC either party may challenge the assigned band.

If the only reason for holding a CMC is the dispute about assignment, the unsuccessful party on that issue should incur a costs liability of £300 to the successful party which seems to be far too low to discourage satellite litigation.

The Proposed Grid

Stage (S)	**Band 1**	**Band 2**	**Band 3**	**Band 4**
S1 Pre-issue or pre-defence investigations	£1,400 + 3% of damages	£4,350 + 6% of damages	£5,550 + 6% of damages	£8,000 + 8% of damages
S2 Counsel/ specialist lawyer drafting statements of case and/or advising (if instructed)	£1,750	£1,750	£2,000[12]	£2,000[13]
S3 Up to and including CMC	£3,500 + 10% of damages	£6,650 + 12% of damages	£7,850 + 12% of damages	£11,000 + 14% of damages
S4 Up to the end of disclosure and inspection	£4,000 + 12% of damages	£8,100 + 14% of damages	£9,300 + 14% of damages	£14,200 + 16% of damages
S5 Up to service of witness statements and expert reports	£4,500 + 12% of damages	£9,500 + 16% of damages	£10,700 + 16% of damages	£17,400 + 18% of damages
S6 Up to PTR,	£5,100 + 15%	£12,750 +	£13,950 +	£21,050 +

alternatively 14 days before trial	of damages	16% of damages	16% of damages	18% of damages
S7 Counsel/ specialist lawyer advising in writing or in conference (if instructed)	£1,250	£1,500	£2,000	£2,500
S8 Up to trial[14]	£5,700 + 15% of damages	£15,000 + 20% of damages	£16,200 + 20% of damages	£24,700 + 22% of damages
S9 Attendance of solicitor[15] at trial per day[16]	£500	£750	£1,000	£1,250

Advocacy on the intermediate track

Stage (S)	**Band 1**	**Band 2**	**Band 3**	**Band 4**
S10 Advocacy fee: day 1	£2,750	£3,000	£3,500	£5,000
s11 Advocacy fee: subsequent days	£1,250	£1,500	£1,750	£2,500
S12 Hand down of judgment and consequential matters	£500	£500	£500	£500
S13 ADR: counsel/specialist lawyer at mediation or JSM (if instructed)	£1,200	£1,500	£1,750	£2,000
S14 ADR: solicitor at JSM or mediation	£1,000	£1,000	£1,000	£1,000
S15 Approval of	£1,000	£1,250	£1,500	£1,750

settlement for child or protected party				

Sadly, the costs denoted in grey are again intended to be cumulative.

An additional £3,000 can be allowed in Band 3 cases if there is a counterclaim and defence to counterclaim. The rules may need to specify how costs are split between claim and counterclaim.

Part 8 proceedings

At present Part 8 proceedings are not intended to fall into the new intermediate track.

Practical ways to avoid the track

Practically how can the intermediate track be avoided? At first blush, it seems;

a. By issuing a claim over £100,000;

b. By having enough experts to make it unsuitable;

c. By having such a volume of witness evidence as to make the trial lost longer than 3 days;

d. Convincing a Court it is not suitable for the intermediate track (likely to be onerous)

Considering these points, there is actually an incentive on parties to make litigation more complex, to avoid the propose intermediate track.

CLINICAL NEGLIGENCE

At present, the report seems keen to look to extend fixed recoverable costs in to the field of certain clinical negligence claims, although nothing definitive has been proposed yet. That said, it does seem a matter of when, as opposed to if, such reforms come into force.

At present, it seems intended that fixed recoverable costs will be brought into claims up to £25,000 and would be a stand-alone scheme catering for cases up to £25,000, regardless of whether they are suitable for the fast track, the intermediate track, or the multi-track.

Jackson LJ does state that "*once delivered and implemented, in time it might be possible to extend the success of such an initiative to claims of somewhat higher value*" which is quite concerning.

A minority of clinical negligence cases with a value between £25,000 and £100,000 might be suitable for the intermediate track. Jackson LJ gives the example of such a case may be one where the Defendant admits breach and causation in the protocol period and all that remains are relatively straightforward quantum issues. Jackson LJ does concede that the majority of cases above £25,000, however, are likely to proceed in the multi-track and be subject to costs management.

Jackson LJ recommends that the Civil Justice Council should in conjunction with the Department of Health set up a working party, including both Claimant and Defendant representatives to develop a bespoke process for clinical negligence claims initially up to £25,000 together with a grid of FRC for such cases.

JUDICIAL REVIEW

In cases of Judicial review and extension of the Aarhus Rules is proposed, with costs budgeting to be applied in "*heavy judicial review*" cases. Jackson LJ has identified that;

a. Even though many Judicial Review cases fall into a standard pattern, costs are too variable to permit the introduction of a grid of FRC.

b. Costs capping orders are of little practical value, because the procedure for obtaining such orders is too cumbersome and too expensive. The criteria for granting Costs capping orders are unacceptably wide and the outcome of any application must be uncertain;

c. There would be merit in extending the Aarhus Rules, suitably amended, to all

Judicial Review claims. The fact that most Judicial Review cases fall into a standard pattern makes it possible to set default figures as caps, even though it is not practicable to draw up a grid of FRC.

d. The discipline of costs management should be available in larger Judicial Review claims, at the discretion of the Court.

A CHANGING BATTLEFIELD

Three main recent decisions in the field of costs have recently emerged which need to be considered and also reflected on in dealing with the field of costs and provide useful weapons for the proverbial arsenal;

a. **Harrison v University Hospitals Coventry & Warwickshire NHS Trust** EWCA Civ 792;

b. **Findcharm Limited v Churchill Group Limited** [2017] EWHC 1108 (TCC);

c. **Catalano v Espley-Tyas Development Group Ltd** [2017] EWCA Civ 1132.

Harrison v University Hospitals Coventry & Warwickshire NHS Trust EWCA Civ 792

In this case the appellant NHS trust, which had settled a clinical negligence claim brought by the respondent, appealed against a decision relating to the costs recoverable by her.

Factually, the claim form had been sent to the court under cover of a letter dated the 27th March 2013. The documents were stamped as received by the court on the 2nd April 2013 and the claim form itself was formally issued on the 9th April. In August 2014, a costs-management conference took place at which the parties were given permission to rely on their updated costs budgets. The costs shown as already having been incurred by the respondent exceeded her estimated future costs. Shortly before the trial date in July 2015, the claim was settled. Because of this, the Respondent's costs were subject to a detailed assessment.

At the detailed assessment hearing, three main questions were asked and argued;

a. First, where a costs-management order approving a costs budget had been made, should a costs Judge on a subsequent detailed assessment be precluded from going below the budgeted amount unless satisfied that there was good reason for doing so?

b. Secondly, regarding costs incurred before the budget, was there or was there not a like requirement of good reason if a costs judge on a subsequent detailed assessment was to depart from the amount put forward at the relevant costs-management hearing?

c. Finally, what was the date when a case was to be treated as "commenced" for the purposes of part 44.3(7) (a) CPR?

Budgeted costs

The Court of Appeal held that where there was a proposed departure from a costs budget, be it upwards or downwards, the Court on a detailed assessment could sanction such a departure only if satisfied that there was good reason for doing so being the "*natural and ordinary meaning of the words*" employed in part 3.18 (b) CPR.

This is an important point in practice since it means that budgeted costs, in practical terms can been seen as already having been assessed. Furthermore, it is incumbent on parties to seek to update and amend costs budgets so that increases, or decreases in the budget can be accommodated.

Davis LJ held at paragraph 44 of the judgment that;

"*Where there is a proposed departure from budget – be it upwards or downwards – the court on a detailed assessment is empowered to sanction such a departure if it is satisfied that there is good reason for doing so. That of course is a significant fetter on the court having an unrestricted discretion: it is deliberately designed to be so. Costs judges should therefore be expected not to adopt a lax or over-indulgent approach to the need to find "good reason": if only because to do so would tend to subvert one of the principal purposes of costs budgeting*

and thence the overriding objective…. Nevertheless, all that said, the existence of the "good reason" provision gives a valuable and important safeguard in order to prevent a real risk of injustice; … As to what will constitute "good reason" in any given case I think it much better not to seek to proffer any further, necessarily generalised, guidance or examples. The matter can safely be left to the individual appraisal and evaluation of costs judges by reference to the circumstances of each individual case".

The upshot of this appears to be that once costs are budgeted, a paying party will need to identify a "*good reason*" to depart from the approved budget. This point was tempered at paragraph 52 of the Judgment with;

" *I add that where, as here, a costs judge on detailed assessment will be assessing incurred costs in the usual way and also will be considering budgeted costs (and not departing from such budgeted costs in the absence of "good reason") the costs judge ordinarily will still, as I see it, ultimately have to look at matters in the round and consider whether the resulting aggregate figure is proportionate, having regard to CPR 44.3(2)(a) and (5) : a further potential safeguard, therefore, for the paying party*".

Incurred costs

Incurred costs would be the subject of detailed assessment in the usual way, without any added requirement of "*good reason*" for departure from the approved budget since part 3.18 (b) CPR, related to a departure from "*the approved or agreed budget*". But the costs incurred before the date of the budget were never agreed in the instant case, nor were they ever "*approved*" by the costs-management order.

When did the case commence?

A case was "*commenced*" for the purposes of part 44.3(7)(a) CPR when the relevant proceedings were issued by the Court (in this case the 9th April 2013).

Findcharm Limited v Churchill Group Limited [2017] EWHC 1108 (TCC)

This underreported case is a welcome decision of the Technology and Construction Court in dealing with the practise of parties who seek to use the costs budgeting process to create a false impression of the costs of the litigation to reduce a party's budget in order to create a greater contrast between the competing budgets.

The claim concerned a gas explosion at a hotel owned by the Defendant, in which the Claimant operated a restaurant. The claim was for £820,0000 (plus interest), the bulk of which related to business interruption and loss of profit caused by the restaurant's closure for four months. The Claimant's costs budget amounted to approximately £244,000 and was based on a single joint accountancy expert report and no expert evidence about the cause of the explosion, because no positive defence on that issue had been pleaded by the Defendant. The Defendant's costs budget was £79,371. It had suggested a budget of £46,900 for the Claimant's costs.

Interestingly the Claimants costs budget was approved in the sum claimed. Putting aside the immediate forensic reasons as to the viability of the pleadings (such being fact dependent), Coulson J made a number of bold but accurate comments in his Judgment as to how parties in such proceedings should, and should approach the budgeting exercise from paragraph 3 onwards.

"*However, even now, some parties seem to treat cost budgeting as a form of game, in which they can seek to exploit the cost budgeting rules in the hope of obtaining a tactical advantage over the other side. In extreme cases, this can lead one side to offer very low figures in their Precedent R, in the hope that the court may be tempted to calculate its own amount, somewhere between the wildly different sets of figures put forward by the parties. Unhappily, this case is, in my view, an example of that approach.*

… Churchill's cost budget is in the sum of £79,371.23. Even on Churchill's own case, it seems erroneous on its face. For example, it allows nothing at all for fire experts, even though at the CMC Churchill were arguing that causation was in issue and an expert was necessary. It also purports to estimate a sum of less than £7,000 for the preparation of a High Court trial. It is therefore, on any view, an unrealistically low budget. However, since Churchill have put it

forward, Findcharm have (not unreasonably) agreed it. The sum of £79,371.23 is therefore the approved cost budget figure for Churchill.

In that same vein, through their Precedent R, Churchill have offered just £46,900 in respect of the estimated costs to be incurred by Findcharm. When that is added to the costs that Findcharm have already incurred, that comes to less than £90,000 altogether.

In my view, Churchill's Precedent R is of no utility. It is completely unrealistic. It is designed to put as low a figure as possible on every stage of the process, without justification, in the hope that the court's subsequent assessment will also be low. In my view, therefore, it is an abuse of the cost budgeting process.

... For all these reasons, I am obliged to disregard Churchill's Precedent R"

Catalano v Espley-Tyas Development Group Ltd [2017] EWCA Civ 1132

Whilst the passage of time will inevitably lessen the impact of the consequences of this decision, the potential impact cannot be understated for personal injury and Clinical negligence practitioners.

In this case the appellant employee appealed against a decision that the qualified one-way costs shifting (QOCS) regime was not applicable to her claim for loss and damage suffered as a result of noise-induced hearing loss sustained during her employment with the respondent employer.

Factually she had begun proceedings under a conditional fee agreement (CFA) entered into on the 13th June 2012 and on the same date after the event (ATE) insurance was declined. On the 1st April 2013, the QOCS regime came into force and on the 15th July 2013 the employee entered into a new CFA with the same solicitors, which was said to have replaced the prior arrangement. One day prior to trial, the employee served a notice of discontinuance.

The issue before the Court of Appeal was whether the district judge had been correct to find that the QOCS regime was not applicable so that, after her discontinuance, the employee was liable for the employer's costs of £21,675.52 excluding interest. Factually, there was in practical terms

one funding arrangement in place for the provision of legal services, which was then changed to take advantage of the effects of QOCS. Whilst the pre-existing funding arrangement would have conferred benefits on the employee in that additional recoverable benefits could have been recovered from the Defendant (i.e. a success fee) this would not be provided for under the QOCS regime.

The issue before the Court of Appeal was effectively how to deal with transitional provisions of part 44.17 CPR;

"*This Section does not apply to proceedings where the claimant has entered into a pre-commencement funding arrangement (as defined in rule 48.2)*".

Part 48.2 CPR defined the arrangement in these circumstances as

1) A pre-commencement funding arrangement is—

> *(a) in relation to proceedings other than insolvency-related proceedings, publication and privacy proceedings or a mesothelioma claim –*
>
> > *(i) a funding arrangement as defined by rule 43.2(1)(k)(i) where –*
>
> *(aa) the agreement was entered into before 1 April 2013 specifically for the purposes of the provision to the person by whom the success fee is payable of advocacy or litigation services in relation to the matter that is the subject of the proceedings in which the costs order is to be made; or*
>
> *(bb) the agreement was entered into before 1 April 2013 and advocacy or litigation services were provided to that person under the agreement in connection with that matter before 1 April 2013;*
>
> *(ii) a funding arrangement as defined by rule 43.2(1)(k)(ii) where the party seeking to recover the insurance premium took out the insurance policy in relation to the proceedings before 1 April 2013;*

The Claimant sought to argue that the termination of the previous CFA meant that the rule could not apply, however as identified by the Court of Appeal this would require a reading into the rules of the word "*un-terminated*". Therefore, QOCS protection could not in her case apply. At paragraph 26 of the Judgment Longmore LJ provided that;

"*If [the appeal ants] argument were correct it would either be necessary to read the words "a conditional fee agreement" in section 44(6) as "an un-terminated conditional fee agreement" which would be impermissibly to read the word "un-terminated" into the statute or there would be a complete mismatch between the statute and the rule when the statute and the rule were self-evidently intended to cover the same ground albeit from the two different perspectives of continuing entitlement to recover the success fee as part of the costs and the non-application of QOCS to agreements already made*".

There may well be a huge body of cases where Claimants potentially have done exactly the same, and have been advised that there is no need for them to obtain ATE insurance. In these cases, there is a sump of potential professional negligence claims, which whilst finite in number, have the potential to cause significant damage to Claimant law firms.

CONCLUSION

The next few months are going to be a turbulent time for litigators, there can be no escaping that. However, the idea of change shouldn't be opposed for simply being a "*change*" but only opposed when the change will cause a detriment to the justice system.

The report itself may stay close to the mark in places and when considered in isolation pass muster, but when the online Courts and Whiplash reforms are considered in conjunction with the report, there is quite a lot to be concerned about. Whilst the later two are largely creatures of policy, the overall system which we are moving into has to be considered, adapted to and where appropriate opposed.

It seems that early reconciliation will become more essential but also, so will the making of early part 36 CPR offers. Furthermore, there are certainly ways that the intermediate track can be made to work efficiently and the certainly it will develop as to costs is attractive.

For example, if claims from the fast track can be moved into this section (LVI defences etc.) then litigants would benefit and issues with the funding of complicated but low value personal injury claims addressed. Further setting experts fees in personal injury claims on the intermediate track will encourage an equality of arms, and unintentionally regulate a buyers' market.

The proposals, if they come to pass will encourage innovation and could actually positively effect smaller practices whose overheads are less than large practices, but also depending on how lower value personal injury work involving LVI and fraud defence's is "*banded*", benefit them. Whilst not being a ring-fenced fee, the use of Counsel clearly has a role to play in dealing with such cases in a cost efficient and proportionate manner.

Further as damages on the intermediate track are now likely to be a significant component in the assessment of what costs are recoverable, it seems likely to expect more cases to seek to settle at lesser sums, and to do so more regularly since there is a stronger incentive placed on a Defendant to make reasonable and early part 36 CPR

offers. Vice versa, stronger cases are likely to fight to trial in order to ensure as strong a result is obtained on damages. Whilst these points are not mentioned in the report, and are only observations, they are positive.

The report itself whilst being open to criticism has tackled a hydra like problem and done so fairly and bravely. I do feel the proposed FRC are to low by as much as 20% - 25%, but hopefully the profession can assist in the crafting and development of a system which is usable, sustainable and functions as intended.

LIAM RYAN