

C/M/S/ Cameron McKenna

Lord Justice Jackson's Costs Review

Key points from the Final Report

February 2010

CMS established 1 July 1999

Offices 53

Member firms 9

Partners c600

Lawyers >2,400

Cities 47

Countries 27

- 4_ Introduction
- 5_ Major recommendations
- 6_ Contingency fees
- 7_ Third party funding
- 8_ Pre-Action Protocols
- 9_ Claimants' settlement offers
- 10_ Case management and costs management
- 11_ Disclosure
- 12_ Witness evidence
- 13_ Expert evidence
- 14_ Large commercial cases
- 15_ Fixed costs
- 16_ Alternative Dispute Resolution
- 17_ Summary
- 18_ The future



Introduction

Lord Justice Jackson, a Court of Appeal judge, published his Final Report on civil litigation costs in England and Wales on 14 January 2010. The Final Report is the culmination of a year-long review of the cost of civil litigation in England and Wales. His terms of reference required him:

“To carry out an independent review of the rules and principles governing the costs of civil litigation and to make recommendations in order to promote access to justice at proportionate cost”.

If implemented, Lord Justice Jackson’s recommendations will have a major impact on civil litigation. We summarise below some of the key points emerging from the Final Report, including recommendations that will impact on commercial litigation.

Major recommendations

The major recommendations made by Lord Justice Jackson involve a root-and-branch reform of the current system of “no win / no fee” agreements. “No win / no fee” agreements (also known as “conditional fee agreements” or CFAs) are seen as the major cause of the cost of litigation becoming disproportionate.

The reforms that Lord Justice Jackson proposes to the current “no win / no fee” regime will have their greatest impact on personal injuries litigation, where the costs that unsuccessful defendants are required to pay are often completely out of proportion to the amounts in dispute. He has recommended a whole package of interlocking measures to tackle high costs in those cases.

The wider consequences of Lord Justice Jackson’s recommendations which will apply to all types of litigation are:

- Claimant lawyers’ “success fees” under CFAs, which are presently recoverable from unsuccessful defendants, will cease to be recoverable. CFAs will still be allowed, but any “success fee” is to be paid by the claimant to his or her lawyer, i.e. the defendant will not be required to bear it.
- “After-the-event” (or ATE) insurance premiums, which are also currently recoverable from unsuccessful defendants, will cease to be recoverable. ATE insurance is taken out by a claimant to cover it against the risk that its claim fails, and its subsequent liability for the successful defendant’s legal costs. ATE premiums can be very high, and by making them irrecoverable from unsuccessful defendants Lord Justice Jackson is attempting to bring the costs liabilities of defendants down to proportionate levels.

If success fees and ATE premiums cease to be recoverable, the rationale for clients instructing lawyers to act on a “no win / no fee” basis changes enormously. Currently some claimants can instruct their lawyer on a “no win / no fee” basis in the knowledge that they will not have to dip into their own pockets at all should the claim succeed – the unsuccessful opponent pays the success fee and ATE premium. If all that changes and the claimant has to pay the success fee itself, possibly out of the damages it recovers, claimants will be more hesitant before engaging “no win / no fee” lawyers, and will have a greater interest in and control over the level of its lawyers’ fees on which the success fee itself is based.

In summary, “no win / no fee” agreements (or CFAs) will not be banned, but they will lose some of their attraction to claimants. This, however, is seen as a necessary change in order to ensure that unsuccessful defendants are not routinely required to pay legal costs that are out of proportion with the sums or issues at stake. CFAs are used widely in personal injuries litigation and also libel cases, and those types of litigation will certainly be affected by Lord Justice Jackson’s proposed reforms.

CFAs are used from time-to-time in general commercial litigation, but they are by no means commonplace. Although we are likely to see a rapid decline in the use of CFAs, Lord Justice Jackson has made other proposals that will permit or encourage alternative methods of funding litigation. The most important of these recommendations relates to contingency fee agreements, which are discussed overleaf.

Contingency fees

A “contingency fee agreement” is one under which a lawyer is only paid if a case succeeds, and then the lawyer is usually paid out of the damages (or other monetary recovery) of his or her client. Contingency fee agreements are used widely in the United States and Canada. Under such agreements a lawyer’s contingency fee will usually be 20%-30% of the damages recovered (or settlement sum).

Lawyers in England and Wales are currently not permitted to act on a contingency fee basis in litigation and arbitration. Lord Justice Jackson has recommended that this is changed, so that lawyers (solicitors and barristers alike) are permitted to work on a contingency fee basis. The rationale is that permitting lawyers to act on such a basis improves access to justice, because it means that people who might not otherwise bring a claim (because of their financial circumstances) are able to do so. The catch is that the lawyer will take a percentage of the damages, meaning usually that the claimant will not receive all of the money paid to them to compensate them for their loss or injury. But this may be a price worth paying if the alternative would be that no claim would be brought at all.

Unlike the position in the United States, where unsuccessful defendants **do not** pay the winning claimant’s costs, Lord Justice Jackson is proposing that unsuccessful defendants pay only normal or usual costs to a claimant who has engaged a lawyer on a contingency fee basis. That is, an unsuccessful defendant will not necessarily be required to pay the claimant the amount of his or her lawyer’s contingency fee if it exceeds what would be a reasonable and proportionate amount for the defendant to pay. This is essentially what happens in Ontario, when contingency fees are used in litigation. Lord Justice Jackson proposes that England and Wales adopts the Ontario model.

What is this likely to mean in practice?

If the claimant wins its case and recovers e.g. £2m, his or her lawyer – if acting on a contingency fee basis – will take a percentage of the damages, e.g. 25%, as his or her fee, i.e. £500,000.

- The claimant, having been successful, will usually be entitled to recover its legal costs from the unsuccessful defendant. But the claimant will only be entitled to “normal” legal costs for such a case, which is not necessarily the amount its lawyer will take as its contingent fee.
- If the “normal” legal costs of a claimant for the particular type of claim are, say, £400,000, the claimant will be able to recover that amount from the defendant. However the claimant will have to bear the difference (£100,000) between its lawyer’s fee and the amount it recovers from the defendant.

Will contingency fees catch on? There is every possibility that they will, especially if (as seems likely) the “no win / no fee” agreements that are currently used will be substantially emasculated by Lord Justice Jackson’s proposed reforms.

Third party funding

England and Wales has, in recent years, seen an increase in the levels of litigation being funded by professional investors, referred to as “third party funders”. Third party funders usually operate in a similar manner to lawyers who act on a contingency fee basis, i.e.:

- A funder will lend money to a claimant on a non-recourse basis.
- If the claim succeeds, the funder will take a percentage of the damages (or settlement sum), e.g. 30%.
- If the claim fails, the funder receives nothing.

Third party funders usually take a conservative approach to the cases that they will fund. Generally speaking, they look for higher value claims which have a strong chance of success. Lord Justice Jackson encourages third party funding, as it provides yet another avenue to helping claimants bring meritorious actions before the courts, where in the absence of funding they would be able to do so.

One issue that was raised during the Costs Review was whether third party funders should be regulated and subject e.g. to capital adequacy requirements. Lord Justice Jackson has not recommend that funders be subject to regulation just yet. Funders have prepared their own voluntary code of conduct, and Lord Justice Jackson suggests that if funders sign-up to the voluntary code and it proves satisfactory in its operation, there may be no need for regulation.

Third party funding is on the rise. Currently it is only used for substantial cases that are perceived to be low-risk. It is difficult to predict whether it will be more widely used, for “everyday” cases. Nevertheless we can expect to see more of it if Lord Justice Jackson’s reforms are implemented.

Pre-Action Protocols

The Pre-Action Protocols were introduced in the late 1990s, following Lord Woolf's landmark reforms of the civil litigation system. The idea behind them is simple. Parties to potential litigation are required to engage in an exchange of information about their respective cases before court proceedings are commenced, and they are to explore seriously whether it is possible to settle a case rather than have it go to court. By going through this process, parties may avoid going to court, and thereby avoid the trouble and expense of litigation.

Overall the Pre-Action Protocols are regarded by most people as a good thing, especially because they encourage the early settlement of disputes. The main criticism of them is that they are open to abuse, particularly by those (both potential claimants and defendants) who use the Protocol process to ask numerous, detailed questions, which go beyond what is necessary to assess the overall strength or weakness of the case. A lengthy Protocol process can lead to costs being racked up and time wasted – if the parties finish up in court anyway.

Lord Justice Jackson has taken these criticisms on board, and recommended that the Protocols be kept, but that they be tightened up to ensure that there is less scope for abusive behaviour. For example, in relation to the Construction and Engineering Protocol it is recommended that it be made clear that a letter of claim need not annex or reproduce a draft pleading. In relation to claims in the Commercial Court – where there is no specifically applicable Protocol – Lord Justice Jackson has accepted the views of Commercial Court users expressed during the Costs Review that there should not be a Protocol for actions in that court. (More on the Commercial Court below).

A further recommended measure is that there is a rule change to enable parties to make pre-action applications to the court where their opponent is engaging in conduct which constitutes a failure to comply with a Protocol. For example, if a defendant has not engaged constructively in a Protocol dialogue, the claimant could apply to the court for orders that it is relieved from any further compliance with the Protocol, and that the defendant should pay the claimant's costs incurred by reason of the defendant's non-compliance. In practice, this is likely to be a measure that is only invoked in extreme cases.

Claimants' settlement offers

The courts encourage parties to settle their claims, and provide disincentives for parties to refuse to accept reasonable settlement offers. However, the disincentives vary, depending on whether the claimant or defendant makes an offer, which is not accepted, which the offeree fails to “beat” at trial.

Where a claimant makes an offer to settle (e.g. for £500,000 plus costs), the defendant rejects that offer, and the matter goes to trial and judgment, if the claimant's judgment exceeds the amount of the offer (e.g. the claimant is awarded £700,000 by the court), the defendant will usually be penalised for failing to have accepted the claimant's offer. The defendant will usually be ordered to pay:

- A higher rate of interest on the judgment sum;
- The claimant's costs on an indemnity basis; and
- Interest on the claimant's costs.

The view was expressed to Lord Justice Jackson during the costs review that these disincentives were not great enough. Many defendants will not accept a reasonable claimant's offer, because the downside of refusing to accept the offer is not so great compared to the normal costs of losing if no offer had been made.

To give claimants' settlement offers more “teeth”, Lord Justice Jackson has recommended that an additional penalty apply to a defendant who fails to beat a claimant's offer. The penalty is that the defendant would be required to pay to the claimant a further 10% of the claimant's financial recovery. So in the example above, where the claimant made an offer to settle for £500,000, but obtained a judgment for £700,000, the unsuccessful defendant – who unreasonably rejected the claimant's settlement offer – would be ordered to pay a further £70,000 to the claimant. With this additional disincentive, Lord Justice Jackson believes defendants will think hard before rejecting a claimant's reasonable settlement offer.

Case management and costs management

The Woolf reforms of the 1990s gave judges broad powers to give directions during the course of court proceedings to ensure that the litigation was conducted in a time and cost efficient manner. Despite this, the complaint has been made that judges do not do enough to use their powers, to ensure that litigation does not get out of hand.

It was suggested to Lord Justice Jackson that judges should exercise their “case management” powers to ensure that parties were given realistic deadlines for taking steps in the proceedings, and more importantly that the courts should get tough on parties who fail to comply with procedural orders, rather than let deadlines slip and the litigation drift. Lord Justice Jackson recognises the force of this suggestion, but does not make any general recommendations regarding the use of case management powers. This is perfectly understandable, as the case management needs of any particular proceedings will very much depend on the nature of the case and the amount in issue. It would be dangerous to take a “one size fits all” approach to case management.

Nevertheless, Lord Justice Jackson recommends that the process of case management itself should be streamlined so that case management conferences are only held where they are actually needed. Standard directions could be issued by courts, particularly in lower-value claims, and thereby do away with the need for (and cost of) case management hearings.

“Costs management” refers to judges and parties taking active steps to ensure that litigation costs are kept proportionate. The primary vehicle by which it has been suggested that costs management could be used effectively is by requiring parties to provide “litigation budgets” to the court and to each other. By doing this, the court and the parties can obtain an early warning of areas of the litigation that are likely to involve considerable cost, so that measures can be taken to keep costs down, e.g. by limiting disclosure.

Is costs management (and the use of litigation budgets) an effective way of controlling costs, or (paradoxically) can it lead to costs being increased, if parties and the court have to spend time preparing and considering budgets? Lord Justice Jackson has concluded that costs management could be of assistance, but it should be used where there is a reasonable prospect of it leading to costs being saved. This is more likely to be the case in proceedings of a larger value. But Lord Justice Jackson does not recommend that the use of costs management (involving budgeting) be compulsory. He recommends that the court should have a discretion as to whether it orders that litigation budgets be used, and that this discretion be exercised where the court is of the view that active costs management by the court and the parties could lead to a costs saving.

Disclosure

The disclosure of documents is regarded as an important part of the civil litigation process in England and Wales. The rationale for it is that it enables all relevant documentary evidence to be brought before the courts. However, disclosure can often be a very time consuming and expensive exercise to perform, especially if there are many thousands (or hundreds of thousands) of documents to be reviewed.

Many submissions were made to Lord Justice Jackson as to how disclosure could be rationalised to keep the cost of it proportionate with the needs of the case. Again, rather than adopting a “one size fits all” approach, Lord Justice Jackson has recommended that judges for larger cases (e.g. where the amount claimed is £1m+) should be able to choose from a range from disclosure orders from a “menu”. The disclosure order that the judge makes will reflect the needs of the case. For example, in a case that is likely to turn on a few choice documents, only limited disclosure may be needed, whereas in a fraud case there may be need for wide-ranging disclosure. The ideal is for the court to limit disclosure to what is necessary, having one eye on the needs of the case and another on the likely cost of disclosure.

Witness evidence

Witness evidence is usually given by way of a written witness statement, followed up with oral evidence including cross-examination at trial. Witness statements are generally regarded as useful because not only do they save court time, they can assist in exposing at an early stage the facts and matters at issue, which can help in settling a case, or at least narrowing the points that are in dispute.

Several submissions made to Lord Justice Jackson during the Costs Review were to the effect that costs were often increased by parties preparing unduly long witness statements, that would cover matters that were not controversial, or were already recorded in documents the content of which was not disputed. In his Final Report, Lord Justice Jackson has acknowledged that this can and does occur, but recommends two measures to try to discourage parties being overenthusiastic in their witness statements. These measures are:

- Making an adverse costs order against a party that submits an unduly long witness statement, e.g. if the party is a successful claimant, by not allowing it to recover from the defendant some or all of the costs of preparing the witness statement.
- Through costs management (discussed above). For example, a judge could in an appropriate case direct that witness statements are not to exceed the length of X pages.

Taking this approach should lead to witness statements being of a reasonable content and length, thereby ensuring that the costs associated with witness statements are reasonable.

Expert evidence

As with witness statements, one of the complaints made to Lord Justice Jackson about expert reports is that they can be too lengthy, and contain an unnecessary recitation of undisputed facts, leading overall to an increase in cost (both to the party on whose behalf the report was prepared, and the other party who has to wade through the report). Lord Justice Jackson makes similar recommendations as to how to control the content and length and content of expert reports, i.e. through costs sanctions and case management.

One interesting idea that Lord Justice Jackson has adopted from Australia – and recommends that it be trialled in England and Wales – is experts giving evidence concurrently at trial. In Australia (and some other places), this is referred to evocatively as “hot tubbing”. How does it work?

- Traditionally experts give evidence at trial separately – usually one after the other. Most of their evidence is consumed by cross-examination.
- With concurrent evidence, all of the experts of a particular discipline give evidence together. They are not cross-examined in the conventional way. What usually happens is that the judge will ask experts about the key issues between them, and get their response. The experts may even ask questions of each other. Parties’ legal representatives are permitted to ask questions, but their questions and the length of their questioning will usually not be as great as occurs during a conventional trial.
- Ideally, the overall effects are (i) the judge is able to get to the bottom of the key issues the subject of expert evidence; and (ii) the period taken for the experts to give oral evidence is considerably reduced, as is the cost associated with them giving evidence.

If a concurrent evidence pilot is undertaken and found to be successful, we should expect to see a significant uptake in experts being required to give evidence concurrently – at least where this is likely to save time and cost, and assist the court.

Large commercial cases

Many large commercial cases, particularly international ones, are heard by the Commercial Court – a part of the High Court. The Commercial Court has developed special procedures for resolving cases in a cost and time efficient manner. Many of its current procedures came out of recommendations of the Court's Long Trials Working Party.

Lord Justice Jackson's Final Report recognises that the Commercial Court is an effective court where costs are generally not out of proportion to the amounts and issues involved. He has taken on board the fact that the Court, particularly through the efforts of the Long Trials Working Party, has developed special procedures that work effectively. Lord Justice Jackson therefore does not make any major recommendations for the Commercial Court.

He has, however, recommended that there be a greater use of "docketing" in the Commercial Court. Docketing means that a case is allocated to a specific judge, who will give directions for the conduct of the case throughout its life. The potential advantage of docketing is that it enables a judge to become familiar with a case, and make appropriate directions for its efficient conduct. A judge who comes to a case "cold" may not be able to do so as readily, especially if there are many files of documents to read.

Fixed costs

One of the issues that Lord Justice Jackson focussed on in great detail during the Costs Review was whether the costs that are payable by an unsuccessful party in litigation to a successful party should be fixed by statute or regulation. The current position is that for many if not most civil claims, a successful party is usually entitled to recover his or her reasonable legal costs, without there being a cap or limit on what those costs may be. If recoverable costs are fixed, there is no risk of an unsuccessful party being lumbered with a wholly disproportionate bill for the successful party's costs.

What Lord Justice Jackson has done is to recommend that recoverable costs be fixed at certain levels for certain types of litigation, starting with fast track personal injuries claims (worth up to £25,000). The majority of personal injuries claims are brought in the fast track, and fixing recoverable costs will ensure they never become disproportionate.

Lord Justice Jackson has floated the idea, however, of whether fixed costs should be introduced for other types of case. For example, should recoverable costs be fixed for business cases, where the amount in dispute is up to £100,000, or £250,000, or some other figure? Fixing costs for business cases would give business litigants certainty over their potential costs exposure, and they would never be exposed to a costs liability that dwarfed the sum in dispute.

Lord Justice Jackson asked two CMS Cameron McKenna partners (Guy Pendell and Simon Chandler) to devise a scheme which explored how one might go about determining an appropriate level of fixed costs for business cases worth between £25,000 and £250,000. The scheme is referred to in the Final Report as the "CMS Scheme". Although Lord Justice Jackson does not advocate the immediate implementation of the "CMS Scheme" (or any other scheme) for business cases worth between £25,000 and £250,000, he does recommend that a "wait and see" approach be adopted, i.e. once costs have been fixed for fast track cases, the success and any limitations in a fixed costs regime should be considered before it is rolled out more widely to small to medium size business cases and similar disputes. The Final Report emphatically puts fixed costs on the agenda, and we should expect to be hearing more about them in the future for a broad range of cases.

Alternative Dispute Resolution

Alternative Dispute Resolution (ADR) is an umbrella term that refers to ways of resolving disputes informally, i.e. otherwise than by a binding decision of a court (or arbitrator). ADR is encouraged by the courts, primarily because it can assist the parties in reaching an early settlement of their disputes, and in avoiding the expense of a case going to trial and judgment.

Lord Justice Jackson recognises, in his Final Report, the important role that ADR plays in modern dispute resolution. He does not make any “hard” recommendations in respect of ADR, e.g. he does not recommend that parties be forced to mediate, even if they are unwilling to do so. Instead he recommends that there be a campaign to ensure that lawyers, judges and the general public are better informed about ADR, and the benefits it can bring. He also recommends, as a complementary measure, that an authoritative handbook be prepared to educate people about ADR and how it works.

Summary

It is difficult to provide a summary of the Final Report, because the scope of the costs review was so broad – covering the entire civil litigation system, from the smallest and simplest of cases to the largest and most complicated. The primary concerns of the cost review are that litigation costs should be reasonable for all parties, and that parties with legitimate claims and defences are able to run their cases in court without being unduly deterred from doing so by cost.

Personal injuries cases and similar types of litigation (such as clinical negligence cases) are seen as the main culprits when it comes to disproportionate costs. But there are other areas where costs can and do get out of hand. Lord Justice Jackson has conducted a most thorough review of all areas of civil litigation, and come up with a tight and comprehensive package of reforms which, if implemented, will bring about major changes in areas that are consistently problematic, whilst introducing smaller yet important changes in other types of civil litigation that need fine tuning to make them more cost effective.

The future

Some of the reforms recommended by Lord Justice Jackson can be implemented relatively easily either by way of judicial decision, or by amending regulations. However, the major proposals that are made – particularly those affecting the current “no win / no fee” regime, will require an Act (or Acts) of Parliament to implement them.

The government has yet not provided any indication of its attitude to Lord Justice Jackson’s recommendations. To add to the uncertainty, there is a general election in the offing, and a possibility that a new government will need to consider what to do with his recommendations. So currently there is no clear picture of which (if any) of Lord Justice Jackson’s recommendations will be adopted, when they will be adopted, and by whom.

However, the senior judiciary of England and Wales – including the Lord Chief Justice and the Master of the Rolls – have thrown their full weight behind Lord Justice Jackson’s recommendations. This was a serious and comprehensive review of the civil litigation system that will be accorded the serious consideration it deserves. There is a strong likelihood that it will lead to a shake-up of civil litigation, and most importantly to changes that will ensure that litigants receive the promised salvation of access to justice at proportionate cost.

Obtaining the Final Report

The Final Report may be downloaded from this link: www.judiciary.gov.uk/about_judiciary/cost-review/jan2010/final-report-140110.pdf.

Not just another glossy



solve

legal solutions to business issues

If you would like to receive Solve please email us at communications@cms-cmck.com or call us direct on +44 (0)20 7367 2191

CMS Legal Services EEIG is a European Economic Interest Grouping that coordinates an organisation of independent member firms. CMS Legal Services EEIG provides no client services. Such services are solely provided by the member firms in their respective jurisdictions. In certain circumstances, CMS is used as a brand or business name of some or all of the member firms. CMS Legal Services EEIG and its member firms are legally distinct and separate entities. They do not have, and nothing contained herein shall be construed to place these entities in, the relationship of parents, subsidiaries, agents, partners or joint ventures. No member firm has any authority (actual, apparent, implied or otherwise) to bind CMS Legal Services EEIG or any other member firm in any manner whatsoever.

CMS member firms are: CMS Adonnino Ascoli & Cavasola Scamoni (Italy); CMS Albiñana & Suárez de Lezo, S.L.P. (Spain); CMS Bureau Francis Lefebvre (France); CMS Cameron McKenna LLP (UK); CMS DeBacker (Belgium); CMS Derks Star Busmann (The Netherlands); CMS von Erlach Henrici Ltd. (Switzerland); CMS Hasche Sigle (Germany) and CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH (Austria).

CMS offices and associated offices: Amsterdam, Berlin, Brussels, London, Madrid, Paris, Rome, Vienna, Zurich, Aberdeen, Algiers, Antwerp, Arnhem, Beijing, Belgrade, Bratislava, Bristol, Bucharest, Budapest, Buenos Aires, Casablanca, Cologne, Dresden, Duesseldorf, Edinburgh, Frankfurt, Hamburg, Kyiv, Leipzig, Ljubljana, Lyon, Marbella, Milan, Montevideo, Moscow, Munich, Prague, São Paulo, Sarajevo, Seville, Shanghai, Sofia, Strasbourg, Stuttgart, Utrecht, Warsaw and Zagreb.

The members of CMS are in association with The Levant Lawyers (TLL) with offices in Abu Dhabi, Beirut, Dubai and Kuwait City.

www.cmslegal.com