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Lord Justice Jackson's preliminary report on costs

Summary report - what you need to know

June 2009

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Introduction

Lord Justice Jackson, a Court of Appeal judge, has been tasked by the Master of the Rolls with reviewing the entire civil litigation system, and making recommendations for promoting access to justice at proportionate cost. At the heart of the review is the affordability of litigation, and the desire to make it cost effective for litigants.

Lord Justice Jackson is devoting all of this year to the costs review, and will not be sitting as a judge. The review is being conducted in three phases:

- Phase 1 (April – May): preparation of a Preliminary Report, after meeting and consulting with stakeholders and other interested parties, and receiving submissions.
- Phase 2 (May – July): further consultation with interested parties and public seminars around the country on the materials and questions raised in his Report.
- Phase 3 (September – December): preparation of a Final Report, setting out recommendations for law reform.

Phase 1 was completed when Lord Justice Jackson's Preliminary Report was published on 8 May 2009. It is a thorough and hefty document, which can be downloaded at www.judiciary.gov.uk/about_judiciary/cost-review/preliminary-report.htm.

During Phase 2 of his costs review, Lord Justice Jackson is travelling the country, listening to the various views of interested parties in light of his Preliminary Report. He has an open mind on changes to the current system.

The Preliminary Report necessarily covers a lot of ground, given the breadth of Lord Justice Jackson's remit. Few people will read the report from cover to cover. What are the key points? Which areas of the civil litigation system are being targeted? What do you need to know?

In this summary report we set out some of the key points arising from the Preliminary Report for those involved in (generally high value) commercial litigation, and highlight some questions that arise. We have grouped these points under four headings:

- **Costs management** – can costs be controlled if parties are required by the court to provide cost estimates or budgets at regular intervals? Should the court specify the maximum recoverable cost of each stage of the litigation in advance?
- **Case management** – can the courts keep costs down by making orders as to what is to be done and by when? Are there steps in court proceedings that can be streamlined?
- **Settlement** – what can be done to help parties to settle their disputes quickly and cheaply?
- **Funding** – should there be new or different funding arrangements to make litigation affordable (or more affordable)?

There are also important issues raised in other discrete areas, such as for defamation claims, collective actions and patent claims. We touch on these towards the end of this summary report.

Finally, and most importantly, you can provide your own feedback to Lord Justice Jackson based on your own experiences, and what you think should be changed. See the end of this report for details.

Costs management

What is "costs management"?

"Case management" was the central feature of Lord Woolf's "Access to Justice Report" of 1996. "Costs management" (not a phrase used in the CPR) describes the active management by the court of the expenditure of costs by the parties as a case proceeds through litigation.

The current Costs Practice Direction sets out the court's power to require parties to file and to copy to their client an estimate of costs at any stage in the proceedings in order to keep the parties informed about their potential liability in respect of costs and to assist the court to make decisions about case management. Lord Justice Jackson comments that scant attention is given to this Practice Direction in case management hearings. Similarly, the court makes relatively little use of the powers conferred by other Rules, for example the power to limit prospectively the amount of recoverable costs for a given step in the proceedings (costs capping) and retrospectively, to limit a receiving party's recovery to the estimate of costs he has previously provided if actual costs exceed the estimate by 20% or more for no good reason.

Costs budgeting (where costs are planned in advance and the litigation then managed and conducted in such as way as to keep within budget) was not recommended by Lord Woolf's report, although the concept was discussed at the time. Lord Justice Jackson queries whether concerns about costs budgeting in 1996 remain legitimate in 2009.

How can costs management be effected?

The Preliminary Report canvasses a number of options for costs management, including the following:

- **Budgets**. Parties could be required to provide detailed estimates of their costs at regular intervals in court proceedings. Budgets could alert the court to activities where costs are predicted to be high (e.g. in disclosure), and the court could then make orders to try to keep costs down (e.g. by limiting disclosure). The court could also review the steps in the proceedings if actual costs were to exceed the budgets given (and parties would be under a duty to notify the court of any budget overruns). By applying these measures, the court would be acting as a project manager of the litigation.

- **Budgets + cost capping**. This is the same as above, except that the court also has the power to order in advance that the maximum recoverable costs of a successful party will not exceed the amount shown in its budget. This would give the parties certainty as to their likely exposure to costs, or on the flipside the maximum amount they could recover, and it could discipline the parties to stay within their estimates. But it could also leave a successful party substantially out of pocket, if its actual legal costs exceeded its estimate. Lord Justice Jackson describes this as "the more Draconian measure" of costs management.

The use of litigation budgets (without cost capping) is currently being piloted in the Birmingham Technology and Construction Court and Mercantile Court, and we expect that Lord Justice Jackson will refer to this pilot in his final report.

Related points that Lord Justice Jackson's Preliminary Report raise are:

- **Cost shifting.** This refers to the "loser pays" rule, i.e. the unsuccessful party is to pay the successful party's costs. The idea is that a successful party should not be out of pocket by having its rights vindicated by the courts. Lord Justice Jackson notes that the general consensus in England and Wales seems to be that the costs shifting rule should stay, i.e. we should not adopt a system like that in the United States where there is usually no cost shifting, and each party bears its own costs – win or lose. There are arguments for and against the cost shifting rule. An argument in favour is that it discourages unmeritorious claims, because a claimant will know that if its claim fails, it will be required to pay the defendant's costs.

- **Fixed costs.** There are a limited number of circumstances in which recoverable costs are fixed by the rules of court. One is where a claimant is successful in an uncontested claim, and default judgment is entered. The recoverable amount is fixed at a relatively low level, so a claimant is unlikely to recover all of its legal costs. The question raised in the Preliminary Report is whether costs should be fixed in a wider variety of circumstances. In some countries, e.g. Germany, they have fixed scales of costs that prescribe exactly what is recoverable for each step in the proceedings. There is no scope for variance, as there is under our current system. There are strong indications that Lord Justice Jackson favours a fixed cost regime for all fast track cases. As regards cases above the fast track, he is considering some form of fixed costs regime for some categories of cases (small business disputes and disputes between SMEs - small and medium sized businesses) whilst allowing other categories (generally high value business claims) to maintain the current open approach.

- **Summary assessment of costs.** A summary assessment of costs is where the judge not only orders that one party is to pay costs to the other party, the judge also assesses the amount payable (usually shortly after having given judgment). The alternative is for a costs officer (e.g. a costs judge) to determine on a separate occasion what are the recoverable costs, after having gone into the detail of the costs incurred. Summary assessment can be applied in certain circumstances, e.g. at the conclusion of any hearing that has not lasted more than 1 day. Summary assessment has the benefit of being speedy, i.e. it avoids the additional time and cost of a detailed assessment. However, one of the complaints about summary assessment is that it produces "rough and ready" decisions on recoverable amounts. Lord Justice Jackson identifies 3 options for the summary assessment rules:

    - Make no change to the current system.

    - Abolish summary assessment, so that there are only detailed assessments, with the judge being able to make an order that there be an interim payment of costs (e.g. for 70%-75% of the costs claimed at the hearing).

    - Restructure summary assessment, e.g. so that judges only consider summary assessment where they have sufficient expertise and time to conduct a proper summary assessment, and the parties to the litigation have the necessary costs information and time to consider it.

Questions for consideration

- Is costs management by the court a desirable thing? Should the court be the project manager of how the parties allocate their resources in pursuing their respective cases?

- Are litigation budgets desirable (where they are disclosed to a party's opponent and to the court)? Do they jeopardise confidentiality? Are they an interference, unworkable and unfair, or just an expression of good commercial project management?

- If litigation budgets are used, should they be combined with cost capping? Does costs capping give rise to unacceptable risks of injustice?

- Should fixed costs be used in a greater variety of circumstances? E.g. should the amount recoverable for preparing a witness statement be fixed? Or should our current system remain as it is, with the amount recoverable as costs being determined by what is reasonable in the circumstances?

- Is summary assessment working, or does it produce unsatisfactory awards of costs?

References in Preliminary Report .

Fixed costs – chapters 21-23; Cost capping – chapter 45; Cost shifting – see in particular chapter 46; Costs management - chapter 48; Summary assessment – chapter 52.

Case management

What is "Case management"?

Case management refers to the court's use of its powers to control the conduct of proceedings.

The courts already have broad case management powers, but as Lord Justice Jackson observes in his Preliminary Report, the comment is often made that the courts should do more to manage cases actively and exert greater control over proceedings. The starting point for the courts' case management approach is at CPR Rule 1.1 which sets out the "overriding objective" that requires the courts to deal with cases "justly". This includes ensuring that the parties are on an equal footing, expense is saved where possible, and that cases are dealt with in ways which are proportionate, taking into consideration the circumstances of the case and the parties involved. It also requires the courts to deal with cases expeditiously and fairly.

The Preliminary Report suggests a number of options for changes to case management to ensure that the cost of litigation is kept proportionate to the amount or issues in dispute. Below we set out some of the key proposals for case management in civil litigation generally and in relation to large commercial claims in the Commercial Court.

Disclosure

Disclosure of documents in civil litigation in England & Wales requires parties to making available relevant documents to their opponent even if those documents are adverse to their case. However, concern is often expressed in relation to commercial litigation that disclosure, including the disclosure of electronic documents (e-disclosure), can be extremely time consuming and, therefore, expensive, and that there may be little marginal benefit in parties being required to disclose a wide range and large volume of documents.

Options raised in the Preliminary Report for disclosure of documents (in addition to making no changes) include:

- Abolishing standard disclosure and permitting specific disclosure only (along the lines of the International Bar Association's (IBA) Rules on the Taking of Evidence in International Commercial Arbitration (the IBA Rules), which (i) require each party to submit the documents on which it relies; and (ii) allow a party to request specific documents or narrow categories of documents from an opponent, although the opponent may object to the request in certain circumstances).
- "Issue based" disclosure as is being trialled in the Commercial Court.
- No default position, allowing orders to be made in each case to suit the proceedings.
- Use of disclosure assessors in "heavy" cases, which involves a third party experienced lawyer immersing himself or herself in the issues in order to identify the categories of documents that truly merit disclosure.

Witness statements

The concern is sometimes expressed, particularly in relation to larger commercial cases, that witness statements are too lengthy, and often record what is already shown in documents, or deal with points or matters other than those that are central to the dispute. Options that the Preliminary Report canvas for keeping the length and content of witness statements under control are:

- Using witness summaries, where a witness gives a brief outline of the facts in his/her knowledge, and reintroducing oral evidence-in-chief to supplement the summary;
- Confining witness statements to matters that are not within the parties' documents; and
- Limiting the length of witness statements.

Expert evidence

Expert evidence is used in many commercial disputes. The Preliminary Report proposes measures that might be taken to streamline the process of experts giving evidence, so as to reduce cost. Options include:

- Sequential exchange of experts reports on liability to be standard.
- A presumption that all quantum experts will be instructed as single joint experts, unless the court permits individual experts.
- "Hot tubbing" (metaphorically speaking) of experts, the judge and the parties' representatives, where the judge can ask questions of the experts, and an expert can ask questions of his or her counterpart. This procedure has worked successfully in Australia.

Trials

The Preliminary Report looks at how trials can be conducted on a cost and time efficient basis. Lord Justice Jackson says that in his own experience he has found "chess clock" procedures to be effective for long trials, i.e. where each party has a limited amount of time to use for making submissions or examining witnesses: "They force the parties to concentrate on their best points".

The point is open for debate: should "chess clock" procedures be used more widely, to try to control the length of trials? Or is it unfair to guillotine parties if it means that they cannot fully or properly present their cases?

Judicial resourcing

The Preliminary Report considers a number of issues in this area (including under-staffing and use of technology). A key recommendation of the Preliminary Report and a view shared by Lord Justice Jackson (and his Assessors) is that a docketing system should be introduced for civil litigation, so that each case is assigned to a judge from commencement to trial. Unfortunately, Lord Justice Jackson concedes that judicial deployment is beyond his terms of reference and it remains to be seen whether this recommendation can be taken forward.

Large commercial claims

The Commercial Court usually hears large commercial claims, and in doing so it applies its own special case management techniques.

Following the collapse of two long-running high-profile cases in the Commercial Court, with legal fees running into many millions of pounds, the Commercial Court Long Trials Working Party was established to review the conduct of long trials in that court. The Working Party made a number of recommendations in its report of December 2007, many of which were subsequently implemented, including the following:

- There should continue to be no specific Pre-Action Protocol for the Commercial Court, and the exchange of pre-action information between parties should be concise. The concern here is that following pre-action protocol procedures can generate considerable cost, and that overseas litigants (who often use the Commercial Court) do not readily understand the hoops through which they must pass before commencing proceedings.
- Statements of case should be limited to 25 pages unless there are exceptional circumstances justifying a longer statement of case.
- For every case there should be a judicially-settled list of issues, not exceeding 10 pages, which is the keystone for the management of litigation in the Commercial Court, so as to relegate the parties' pleadings to secondary importance.

Lord Justice Jackson acknowledges in his Preliminary Report that there is a clear overlap between his costs review and the ongoing work of the Commercial Court Long Trials Working Party. He has stressed that, although he will liaise with and listen to the Commercial Court and its users, he does not regard the Commercial Court as sacred territory, and that the recommendations made at the end of his costs review may well impact on case management in the Commercial Court.

Questions for consideration

- Do the courts currently have sufficient case management powers to keep costs under control, or do they need additional powers?
- Is there a general problem with the breadth of disclosure in commercial litigation? Should it be more limited or targeted, and if so how should this be done? Do the IBA Rules provide an attractive alternative to the current rules?
- Should e-disclosure be limited to medium to large size cases, or should there be e-disclosure in all cases where relevant documents are in electronic format?
- Are witness statements generally too lengthy and uninformative? Should the CPR be amended to introduce limits on the length of witness statements, or the matters that should be covered in a witness statement?
- Is the single-joint expert procedure under-used at the moment, and should the CPR be amended to make it more widely used (e.g. by creating a presumption that there is to be a single joint expert on matters of quantum)?
- Should "chess clock" procedures be used more widely, particularly for long trials? Or should parties not face arbitrary time limits when presenting their cases?
- Should a docket system be introduced in civil litigation or at least in relation to large commercial claims?
- Should large commercial claims that are brought in the Commercial Court be treated on a different footing to other claims?

References in Preliminary Report

Large commercial claims – chapter 32; E-disclosure is chapter 40; Disclosure generally is chapter 41; Witness statements and expert evidence – chapter 42; Case management is considered generally in chapter 43; Trials – chapter 44.

Settlement

Many court users, including especially commercial litigants, are now well familiar with the various means available to try to settle disputes. The Pre-Action Protocols require parties to exchange information about their respective cases, and explore opportunities for settlement, rather than go straight to court. Alternative dispute resolution ("ADR") techniques, of which mediation is the most notable variety, provide ready opportunities for avoiding litigation. Parties are also encouraged by the rules of court to make offers to each other to settle the proceedings.

Although in the view of many people the current system works well in encouraging parties to settle their disputes, there are some areas where improvements have been suggested. In this regard, the Preliminary Report notes the following.

Pre-Action Protocols

Pre-Action Protocols were introduced with the Woolf reforms and there is a general consensus that the Pre-Action Protocols have brought about a change in attitude as regards the importance of early exchange of information and the opportunity that brings for the quick resolution of disputes. However, concerns have been expressed about the front-loading of costs as a result of the Pre-Action Protocols and some now question the continued need for them given the change in attitude referred to above.

Depending on the complexity of a case, the cost of complying with a Pre-Action Protocol can sometimes come to several hundreds of thousands of pounds. Sometimes significant costs have been incurred before a defendant has even had an opportunity to settle.

Lord Justice Jackson received many submissions in relation to the effectiveness and cost of Pre-Action Protocols prior to the issue of his Preliminary Report and he says he finds the issues surrounding Pre-Action Protocols some of the most intractable questions in the costs review. Nevertheless, reducing the costs of the Pre-Action Protocol is something on which he wishes to concentrate during Phase 2.

In particular Lord Justice Jackson is asking for feedback on whether the Pre-Action Protocol (including any of the specialist protocols) could be simplified. He also asks whether there should be a restriction on recoverable costs in respect of the protocol period and/or sanctions for non-compliance should be made more effective.

A novel proposal that is floated in the Preliminary Report is for the Pre-Action Protocol process to take place after proceedings have been commenced. The court would then stay the proceedings to allow the Protocol process to continue, and the court could be called upon to prevent any abuses of that process. If it became apparent that costs were being duplicated, or that the Protocol process was not worthwhile, the court could lift the stay and allow the action to continue.

Whether this idea would have the effect of removing one of the main benefits of the Pre-Action Protocol – that is, a process or space in and through which parties can explore the strengths and weaknesses of their case without the pressure and cost of court interference – is something that will no doubt be explored in consultation.

ADR

ADR has proven itself to be an effective way of resolving disputes without the parties having to go to court. Alternatively, if proceedings have commenced it is common for the proceedings to settle before trial – often by the assistance of ADR.

The Preliminary Report acknowledges that people in the business world are well familiar with ADR processes such as mediation, and can usually make sensible decisions about whether and if so when to use it, without needing extensive input from the judge. Lord Justice Jackson notes that:

> *"If [parties] want to mediate they will do so. If, on the other hand, they desire the decision of the court, then that is what they are entitled to receive, without being forced to incur fruitless mediation costs".*

The Preliminary Report does not propose any specific changes to the current system and its use of ADR in relation to business disputes, but it does raise a question of emphasis, i.e. when should the courts require the parties to mediate, or push them towards doing so?

Part 36 offers

Encouraging the parties to settle their dispute by making settlement offers (under Part 36 of the CPR) is beneficial. If a party makes a Part 36 offer which is not accepted, and the offeror "beats the offer", by obtaining a decision that is more favourable to itself than if its offer had been accepted, the offeror may obtain an enhanced award of costs and possibly also interest than if the offer had not been made. The Preliminary Report notes that the Part 36 system generally works well, and is effective in encouraging settlement offers (and settlements).

However, in *BAA v Carver* [2008] EWCA Civ 412 the Court of Appeal held that the court may take into account the entire circumstances of the case, so if a Part 36 offer is only beaten by a modest amount, the court may approach the case on the basis that the offer should have been accepted and award costs accordingly. This decision has been criticised, because it introduces uncertainty in costs awards, and places unreasonable pressure on Claimants to accept offers that are not quite high enough. Lord Justice Jackson has suggested an amendment to the CPR to reverse the effect of the Court of Appeal's decision in this case.

Questions for consideration

- Are Pre-Action Protocol procedures cost effective, or do they lead to an increase in or wastage of cost (and time)? Should the Pre-Action Protocol process be modified to permit a party to commence proceedings and then engage in an information exchange with its opponent about their respective cases?

- In business disputes, is mediation something that should be left to the parties, or should the courts actively encourage the parties to mediate (or force them to do so)? Do mediations involving unwilling parties lead to costs being wasted, or can mediations change a party's position and lead to settlement?

- Should there be more defined parameters for Part 36 offers?

References in Preliminary Report

Pre-Action Protocols – chapter 43, section 3; ADR – chapter 43, section 6.

Funding

Providing "access to justice" means not only that the courts are available to resolve legal disputes, but that parties are not denied justice due to lack of funding. In recent years we have seen significant changes to the ways in which litigation – including commercial litigation - is funded.

Lord Justice Jackson's Preliminary Report considers some of the funding options currently available, and their overall effectiveness in promoting access to justice.

Insurance / Conditional Fee Agreements (CFAs)

It is reasonably common for "Before-the-Event" (or BTE) insurance to be taken out by businesses as an incidental part of insurance for their normal operations against claims. If, for example, a company takes out public liability insurance, it may include a component that covers the company for legal fees arising out of public liability claims made against it. It is relatively unusual for BTE insurance to be taken out as a stand alone policy. The insurance is "before-the-event" because it is taken out before the occurrence of an insured event (e.g. a claim against a business) that may give rise to litigation. The Preliminary Report does not contemplate any changes to cost rules affecting BTE insurance, and says that BTE insurance should be promoted.

On the other hand, "After-the-Event" or "ATE" insurance is squarely confronted in the Preliminary Report. ATE insurance is insurance taken out by a party (usually a claimant of little financial means) to cover any future liability for the costs of an opposing party in the event that the first party's case is not successful. ATE insurance can also cover other costs risks, such as liability for own disbursements and counsel's fees. It is taken out "after-the-event" that has given rise to the court proceedings. ATE insurance often goes hand-in-hand with Conditional Fee Agreements ("CFAs"), which are commonly referred to as "no win no fee" agreements but can also work to give a lawyer an uplift from his or her base fee in the event of success.

The key point is that under our current system, if a claimant has engaged lawyers who are acting on a CFA, where ATE insurance is in place, the unsuccessful defendant can be required to pay not only the uplift in the claimant's legal fees under the CFA for "success", but also the cost of the ATE premium. This can leave a defendant with a heavy costs burden.

The Preliminary Report suggests that the cost of litigation would be reduced if the costs rules were changed, so that ATE insurance premiums are not recoverable from an unsuccessful defendant. However, this in itself would simply shift the cost of ATE insurance from the unsuccessful defendant to the successful claimant, without reducing the overall cost of litigation. One option suggested by the Preliminary Report to overcome this is to change the costs rules so that, in certain cases (e.g. personal injury cases) there is "one way cost shifting", i.e. an unsuccessful claimant is not required to pay the successful defendant's costs, so that the need for ATE insurance is reduced substantially.

Contingency fees

Contingency fee agreements are agreements between a client and a lawyer under which the lawyer is not paid unless the client's claim is successful, with the lawyer's fee coming out of any amount awarded, usually as a percentage. Lawyers in England and Wales are currently not permitted to act on a contingency fee basis in court proceedings. However, contingency fee agreements are used widely in the United States, and one of the questions raised by the Preliminary Report is whether contingency fee agreements should also be allowed in England and Wales.

The question of whether contingency fees should be permitted gives rise to strong opinions on both sides of the argument. Nevertheless, unlike the system in the US, there is consensus that if contingency fees are permitted, cost shifting (i.e. "loser pays") should be retained. For example, contingency fees work well in Canada, where there is a costs shifting rule, although costs recovery is effected on the conventional basis rather than by reference to the contingent fee agreed between claimant and lawyer.

Deliberately, the Preliminary Report does not express a strong view on whether lawyers generally should be permitted to act on a contingency fee basis – this is a matter for consultation and discussion in Phase 2 of the costs review. However, Lord Justice Jackson does suggest that contingency fees might be acceptable in collective actions – a point we return to at the end of this summary report.

Third-Party funding

Third-Party Funding (TPF) is where a person who is not a party to court proceedings provides a loan to a claimant to fund the litigation, where the loan is repayable only in the event of success, usually as a percentage of the amount awarded to the claimant. TPF is therefore similar to contingency fee arrangements, except that TPF is permissible whereas lawyers are currently not permitted to act on a contingency fee basis.

TPF represents a growing area of business and source of funding for litigation, and funders are increasingly looking at cases that are viable investments. The Preliminary Report does not express any strong views about TPF. Instead it invites submissions on whether TPF should be regulated – currently it is not.

Questions for consideration

- Should the cost shifting rule ("loser pays") be removed for certain types of cases, so as to do away with the need for ATE insurance, and combined with this should ATE insurance premiums be irrecoverable from an unsuccessful party? Does ATE insurance have a legitimate role in civil litigation, or is it an unnecessary expense?

- Should lawyers be permitted to act on a contingency fee basis, so that they are paid out of damages awarded to their client? Are contingency fees suitable for collective actions? Would they be appropriate for other actions?

- Is there a need, or is it desirable, for Third-Party Funding of litigation to be regulated? Is there any evidence of funders abusing their positions?

References in Preliminary Report

BTE Insurance – chapter 13; ATE Insurance – chapter 14; Third-party funding – chapter 15; CFAs – chapter 16; Contingency fees – chapter 20; One way cost shifting in personal injury claims – chapter 25; Collective actions – chapter 38.

Other issues arising

The Preliminary Report raises a number of discrete points that affect certain types of case, which we touch on briefly below.

Defamation

- The Preliminary Report notes the concerns of defendant representatives, particularly the Media Lawyers Association, about the cost of defending defamation actions. There are a number of factors that can make defamation actions disproportionately expensive, including the fact that a claimant is not necessarily or entirely concerned with obtaining damages. The claimant may feel that an apology is owed, or that its right to privacy needs to be protected. Pleadings are also treated more rigorously e.g. than in general commercial claims, which can lead to costs being incurred through applications to strike out and other applications.

- Another concern of defendant lawyers is that, if unsuccessful, defendants often have a heavy costs burden where claimant lawyers act on the basis of a CFA with ATE insurance, with the claimant's success fee and ATE premium being recoverable from the defendant.

- How can the cost of defamation actions be kept proportionate? One idea is for less substantial cases to be transferred to the County Court. Another is for the cost rules to change so that ATE premiums are no longer recoverable.

Reference in Preliminary Report: chapter 37.

Collective actions

- Collective actions (or "group actions") in England and Wales are currently made on an "opt in" basis (i.e. the claimants must make a positive choice to be part of the action). The alternative model is "opt out", where claimants who have a common claim are included in a group action unless they decide not to participate. The Preliminary Report notes that, from a costs perspective, the issue at stake is not so much whether the system should change to "opt out" or remain the same, but more the cost implications of each. If "opt out" was adopted, there would be implications for security for costs and interim costs awards, for example.

- The Preliminary Report raises the question of whether the cost of collective actions would be brought down if the cost shifting rule (i.e. "loser pays") were to be abolished. Claimants would then not have to provide security for costs, nor be exposed to the risk of adverse cost orders – this could promote access to justice. Lord Justice Jackson says that this measure merits "serious consideration".

- Allied to this is the issue of whether lawyers in collective actions should be entitled to act on a contingency fee basis, so that they are paid out of the damages awarded to the claimants. Lord Justice Jackson expresses the tentative view that "there may be no objection in principle" to claimant lawyers in collective actions being remunerated on a contingency fee basis, provided that the extent of the lawyers' deduction from the amount awarded is both regulated and assessed by the court, at least where there is no cost shifting in such actions.

- Should there be no cost shifting in collective actions? Will this promote access to justice? If there is no cost shifting, claimant lawyers will probably need to be remunerated out of any damages awarded (i.e. by way of a contingency fee). Should contingency fees be allowed in collective actions, and if so what constraints (if any) should there be upon them?

Reference in Preliminary Report: chapter 38.

Patent disputes

- Lord Justice Jackson notes that that concern has been expressed as to the cost of low value patent disputes. This is a real burden for SMEs. It may also have an effect on the British economy, as businesses take their patent disputes to Continental Europe (e.g. Germany), where costs are much lower.

- The Preliminary Report floats the idea of introducing a "small claims track" for patent litigation under which recoverable costs would be fixed.

- Is patent litigation too expensive, especially for low value claims? Will fixing the recoverable costs assist SMEs by bringing down the cost of patent disputes?

Reference in Preliminary Report: chapter 29, section 5.

Judicial review claims

- Lord Justice Jackson notes that judicial review claims (i.e. challenges to administrative decisions made by the various arms of government) are usually relatively low cost disputes. This is because, among other things, pleadings are less elaborate, there is no disclosure, and evidence is given in writing - with there being no cross-examination. There is no real concern about the process of judicial review proceedings.

- The only significant issue raised by the Preliminary Report for consideration is what cost rules should apply in judicial review claims, particularly where a claim deals with matters of public interest. Currently, protective costs orders (PCOs) may be ordered in limited circumstances to cap the costs liability of a claimant should its claim be unsuccessful. The Preliminary Report asks whether access to justice would be improved if the current guidelines on PCOs were to be relaxed, so that e.g. claimants who happen to have a private interest in the outcome of the court proceedings were eligible for a PCO (currently they are not).

Reference in Preliminary Report: chapter 35.

Environmental claims

- Environmental claims may take a number of forms, including (i) proceedings brought for a statutory nuisance; (ii) private actions for a private nuisance; and (iii) judicial review proceedings against government decisions on environmental matters. The Preliminary Report identifies two main points of interest for environmental claims.

- The first is whether there should be "one way cost shifting" in private nuisance cases, so that if a claimant is successful it is paid its costs, whereas if the defendant is successful the claimant is not required to pay the defendant's costs. The concern is that unsuccessful defendants currently bear a high costs burden, as claimants' lawyers are usually engaged on the basis of a CFA with ATE insurance. An

unsuccessful defendant is usually required to pay the claimant's lawyers success fee as well as the ATE premium. The cost of litigation would be reduced if there was "one way cost shifting", so that the need for an ATE premium disappeared.

- The second point is whether, in judicial review proceedings, the cost is "prohibitively expensive". The Aarhus Convention (ratified by the UK in 2005) requires that there be proper consultation on all administrative decisions that affect the environment, and that procedures for access to justice be "fair, equitable, timely and not prohibitively expensive". A 2008 review of the UK system concluded that the current system of judicial review is "prohibitively expensive", and that the UK may therefore be in breach of its Convention obligations. Lord Justice Jackson suggests that options for ensuring that judicial review proceedings are not "prohibitively expensive" include introducing one way cost shifting, and using protective costs orders more widely to ensure that a claimant's cost exposure is appropriate to the circumstances.

Reference in Preliminary Report: chapter 36.

Appeals to the Court of Appeal

- The Preliminary Report notes the importance of costs in appeals to the Court of Appeal, but points out that costs of appeal are inherently less expensive than at trial, given that appeal proceedings are usually much shorter than a trial. Lord Justice Jackson suggests that any changes to the procedures in or cost rules of the Court of Appeal should be addressed once decisions have been made about what steps, if any, should be taken to control the cost of hearings in lower courts. Although Lord Justice Jackson is interested in hearing what people may have to say about the cost of appeals, his suggestion is that this issue be "parked".

Reference in Preliminary Report: chapter 39.

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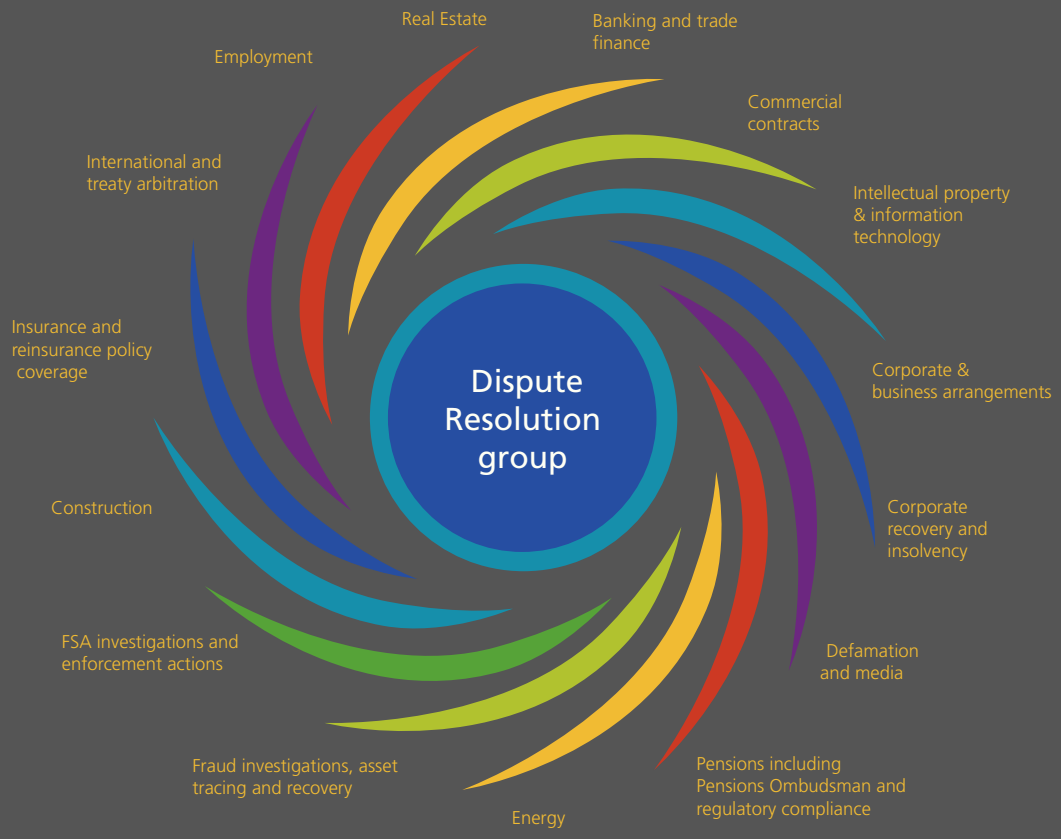
CMS Cameron McKenna

We have one of the largest disputes practices in Europe with teams in London, Bristol, Aberdeen, Edinburgh, Bratislava, Bucharest, Budapest, Kyiv, Moscow, Prague, Sofia and Warsaw.

We always approach disputes as commercial problems. We understand that no business relishes the prospect of a lengthy dispute and work closely with our clients to minimise risk and cost. When proceedings are the only solution, our clients have the support and experience of a team recognised for their "dilgence and willingness to get their hands dirty when the situation dictates" (Chambers Legal, 2008).

We are experts in handling the largest and most complex claims, domestic and international, involving litigation, arbitration and all forms of ADR. We have extensive experience in obtaining judicial assistance in support of foreign proceedings and enforcing foreign judgments and arbitral awards.

Our specialist team advises clients on managing their risk issues, particularly arising from standard terms of business, corporate structures and guarantee/indemnity arrangements and identifying and avoiding potentially contentious issues and risks long before any dispute is contemplated or escalated.



"CMS Cameron McKenna LLP has one of the largest contentious practices in the City...the firm has developed a leading commercial litigation practice in its own right, and has attracted a range of landmark, high-profile cases."

Legal 500 directory, 2008 edition

CMS

Through the CMS network, our practice is supported by close ties with eight further firms giving us a unique pan-European reach.

CMS provides sophisticated understanding of legal, tax and business issues and delivers client-focused services through a joint strategy executed locally across 28 countries with 56 offices in Western and Central Europe and beyond. CMS firms employ more than 2,200 lawyer worldwide.

CMS has a common culture and a shared heritage, which makes us distinctively European.

- Most extensive European footprint of any international law firm
- Integrated, high quality services across all offices and jurisdictions
- "One-stop shop" - pan-European instructions managed by a single contact in the most convenient jurisdiction for you
- Lawyers who regularly work closely together on cross jurisdictional cases
- Locally grown firms with deep local expertise
- Industry specialists in pan-European sector groups

CMS and associated offices

CMS nine member firms are:

- CMS Adonnino Ascoli & Cavasola Scamoni (Italy)
- CMS Albiñana & Suárez de Lezo (Spain)
- CMS Bureau Francis Lefebvre (France)
- CMS Cameron McKenna LLP (UK)
- CMS DeBacker (Belgium)
- CMS Derks Star Busmann (Netherlands)
- CMS von Erlach Henrici (Switzerland)
- CMS Hasche Sigle (Germany)
- CMS Reich-Rohrwig Hainz (Austria)

Feedback

We would be most happy to discuss your thoughts on the Preliminary Report and the costs review. Details of key contacts appear below.

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We can also pass on your feedback to Lord Justice Jackson, or alternatively you can do so directly, by hard copy or email:

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Email: costs.review@judiciary.gsi.gov.uk.

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