

costs update

Jackson reforms get the green light

On 29 March 2011, the Lord Chancellor, Ken Clarke, confirmed the Government's intention to implement the majority of Lord Justice Jackson's proposals. In addition to a commitment to push through some changes as soon as parliamentary time allowed, the Ministry of Justice also unveiled a wider consultation process that requires a root and branch reform of the civil justice system.



Paul Edwards, Head of Costs, with Sir Rupert Jackson, keynote speaker at Hill Dickinson's transport seminar on 7 April 2011

The Government confirmed its intention to implement Sir Rupert Jackson's proposals for reform, as endorsed by Lord Young in his report on the compensation culture. Shadow Justice Minister, Sadiq Khan, confirmed that at face value, it would be difficult to argue with the proposals, and it was noted in the House of Commons that this work was simply carrying on the previous Government's commitment to reform; as supported by Jack Straw. The Lord Chancellor highlighted that one of the biggest problems was that the current system was forcing defendants to settle claims that they felt sure they could win, solely because of the commercial risks.

It is interesting to note that in his foreword, Ken Clarke confirms that the steps taken are those demanded by the European Court of Human Rights in the recent case of *MGN -v- UK* (see page 5). It also hints at our analysis from previous editions of *costs update*, where we argued that the main reason Sir Rupert's proposals were likely to be taken and implemented, is largely because of the impact it will have on business and public authorities. Where the taxpayer is the winner, it is difficult to object. That said, it is easy to see why many interested parties are uneasy.

Whilst initially highlighting certain areas of reform that are to happen as soon as parliamentary time can

be found, it is clear that the intention is to implement the vast majority of Jackson's proposals, with it being agreed that *"these proposals should be taken forward as a package, and that the connected constituent parts should be implemented together."* How soon this will happen is open for prediction, with some expecting reform later this year. Bearing in mind the time it can take to draft primary legislation, April 2012 would appear feasible for some change; though some of the Government's own impact assessments on the issues start in autumn 2012. Presuming the rule changes won't be retrospective, it is clear that the current regime will be here for some time to come.

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Welcome

Welcome to the latest edition of *costs update*. The start to 2011 has been dramatic in terms of costs developments with new consultations, government proposals and important case law. In this special edition, we will draw all these strands together, focus on some of the detail in the proposals, take a look at the additional consultation that has started, and provide an update on the latest case law - some of which is potentially significant. We will also report on Sir Rupert Jackson's visit to our Liverpool office earlier this month.

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Jackson's public letter spells dedication to reforms

Highlighting the devotion of Lord Justice Jackson to ensuring his reforms were implemented, it is interesting to note that during the Government consultation, he took the unusual step of responding in a public letter to the Government regarding his own recommendations. He urged Justice Secretary, Ken Clarke, to implement his civil costs reforms in full. Undoubtedly, he was conscious of lobbying from some areas to dilute the impact of his proposals.

In the letter to the Lord Chancellor, Jackson said:

"...if you accept the recommendations (a) to abolish recoverability of ATE and success fees and (b) to raise general damages by 10%, the package should be implemented in full. It would be the worst of all worlds to retain elements of recoverability (subject to qualifications and exceptions) thus adding to the present morass of rules and case law. Likewise, it would be a disaster to raise general damages in CFA cases but not in other cases. Any such approach would create perverse incentives and undermine the structure of the reforms."

He continued:

"...the complexity of civil procedure is now a real problem and generates substantial costs. The new rules must be simple and clear. Any attempt to legislate for every situation is a chimaera, resulting in complexity and escalating costs."

Since his initial enquiry, he was given time off from sitting as a judge to oversee the progress and he advised that recently he has been speaking up to four times a week on the subject.





Hill Dickinson pleased to welcome 'the most unpopular judge in England'

We were delighted to welcome Sir Rupert Jackson to our offices on 7 April, to provide the keynote speech to our guests at our transport seminar. He dubbed himself 'the most unpopular judge in the country', and explained the review process he had led, the ongoing costs work he is involved in, and his hopes for the impact of the reforms.

He acknowledged that his appointment was a poisoned chalice, and that such was the variety of opinions he received, it was inevitable that the majority would be unhappy with his conclusions. He was delighted that the Coalition Government had embraced his proposals and admitted that after the election, he feared that he had wasted a year on his enquiry.

Jackson's views on implementation were that; whilst in the interim there could be some reforms, realistically, it would be October 2012 before all of his reforms were introduced as a package. He responded to concerns expressed about the lack of experience of judges on costs matters and confirmed that district judges were being given a new training module on costs, and that they would be expected in future to be as expert in assessing costs as they are in dealing with damages.

Sir Rupert also confirmed his intention to tighten the rules regarding obtaining relief from sanction. He highlighted that court orders are to be followed and that too often, relief is granted when parties ignore court rules. This is a particular concern in the costs arena, where a failure to provide information regarding additional liabilities has not been provided.

When asked about referral fees, expressing concern that it was too late to put the "genie back in the bottle". Jackson was extremely bullish, first citing that he didn't believe in genies, and that in his view, it was perfectly possible to reverse bad legislation.

The seminar was well received and covered a variety of subjects including combating fraudulent claims.

The recoverability of success fees and ATE premiums to be abolished

In terms of reducing legal costs, this abolition is the bluntest instrument that could be used - it will have an impact overnight. The Justice Minister, Jonathan Djanogly, said that this would save the NHS £50 million a year.

In terms of success fees, this returns us to the situation that existed before April 2000. If success fees are to be recovered, they can be deducted from a claimant's damages. To protect claimants, this deduction will be capped at 25% of the damages.

An exception to this rule is in respect of clinical negligence work, where ATE premiums that cover expensive expert evidence will still be recoverable. It is hoped, however, that schemes can be piloted with the NHSLA to allow for the instruction of joint experts to avoid this expense.

Sir Rupert believes that by deducting success fees from damages, claimants will once again have an interest in their legal costs, and that competition will grow - this time between solicitors - as to who will deduct the least amount, rather than between claims management companies.

One train of thought is that to win work, claimant solicitors may have to continue to guarantee clients 100% of damages. This would not be a surprise, as claimant personal injury solicitors compete for work. The danger that the death of deductible success fees would bring is that the control mechanism to drive down base costs (the claimant's own self-interest) would vanish.

Contingency fee agreements

Contingency fee arrangements (now re-branded as 'damages-based agreements'), will be allowed in court proceedings for the first time, allowing lawyers to take a proportion of damages as fees. These arrangements are already popular in employment tribunal work. The proposal to require independent advice before such an agreement could be signed has been sensibly dropped. It is hoped that these arrangements will expand access to justice.

10% increase in general damages

To compensate for the deduction of success fees from damages, it is proposed that damages be increased by 10% in all cases. It is predicted that, overall, most claimants will be better off. Properly taking into account such a small increase may prove difficult, as defendants are likely to claim that their offers take it into account.

Qualified one-way costs shifting

Qualified one-way costs shifting is to be introduced in personal injury cases, to protect the vast majority of claimants from paying a winning defendant's costs. On the face of it, this reform is controversial, as it stops defendants from (in most cases) recovering their costs. The reason such a regime has merit, is because of the way it fits in with the rest of the proposals. When defendants give up the right to recover costs, they ensure that claimants do not (in the main)

need ATE to insure against third party costs. This works at a commercial level, as Sir Rupert explained during his talk at our seminar. On a sample of 23,000 claims, defendants had to pay £3 million in ATE premiums - but were only able to try and recover £250,000 worth of costs. It is envisaged that the qualification regime will work in a similar way to how costs protection works in publicly funded cases. This is an area where further consultation and investigation is needed.

Moving forwards

The consultation documents alone total almost 170 pages, and will require serious consideration. At this early stage - and from hearing the Lord Chancellor's clear intention to restore "proportion and confidence" to the civil justice system - it is clear that considerable reform will happen. In the personal injury arena, from a paying party's perspective, whether it be a corporate client, an insurer, or a public body, these reforms are well overdue, and the fact that they go beyond the initial remit of the Jackson review, to look at a root and branch review of the civil justice system, is to be welcomed. This area of work amounts to over 90% of all litigation. Concerns do remain as to the impact on commercial cases. Whilst Jackson has been concerned for SMEs, there still remains concern that small business will struggle to afford to run cases where ATE is required.

As ever, the devil will be in the detail, but it is interesting to note that the new consultation paper, *Solving disputes in the county courts: creating a simpler, quicker and more proportionate system*, puts forward a raft of reforms to the county courts including:

- extending the limit of the current RTA process to £25,000 or £50,000;
- the extension of the MOJ RTA scheme into EL/PL and long-term into the clinical negligence arena for smaller claims; and

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- the long-talked-about introduction of a scheme for fixed costs in fast track cases not caught by other processes.

These three areas of reform will dramatically alter the legal landscape, as they will relate to the majority of all cases. In theory, they will improve the speed of processing such claims and end any real dispute over costs. We await further details on this matter, but believe that the approach of parties seeking to increase or decrease costs (depending on perspective) makes it likely a new costs war will ensue, as both sides seek to test the system:

For example, the 'escape clause' in the proposed fixed costs regime in the fast track will need to be strictly managed.

Other proposals include:

- New pre-action protocols for money claims under £100,000, involving a staged process with fixed costs at each stage.
- In Parliament, Ken Clarke announced an intention to increase the small claims limit to £15,000, being tripled from its current level. Claimant personal injury lawyers will have given a sigh of relief when it was confirmed that the £1,000 limit for PI work would remain!
- Compulsory mediation in small claims was acknowledged in Parliament as needing serious consideration if only due to a lack of qualified mediators.

- A restriction will be put on the issuing of cases worth less than £100,000 in the High Court, a four-fold increase from the current £25,000
- Administratively and undoubtedly with a view to saving expense, there is to be the establishment of a single county court to allow for cases to be dealt with more efficiently.

Despite much debate about whether Sir Rupert's proposals would ever get off the ground, it is now clear that the Government intends to embrace them, undoubtedly spurred on by the savings that can be achieved in the costs of administering litigation, and more dramatically, in view of the millions that can be saved by the public purse in paying out legal costs on top of damages.

Case law update

One of the biggest proposals for reform is with regard to the ending of the recovery of success fees on an inter partes basis. This will have a dramatic impact on the liability of paying parties.

It was thought that the highly publicised decision in the case of **MGN Ltd -v- UK** (known better as the Naomi Campbell case against the Daily Mirror) might have led to an earlier end to the recovery of success fees. The European Court of Human Rights held that the recovery of the success fee, in a case where the claimant could afford to pay her solicitors without the incurring of substantial success fees, was disproportionate, interfered with the newspaper's 'human rights', and impinged upon free speech. This interference did have a legitimate aim, but the requirement that the applicant pay success fees to the claimant was disproportionate, having regard to that legitimate aim of achieving access to justice. Three main reasons were given: first that the CPR and CPD were not fit-for-purpose, as they fostered 'costs races; second, because the court's control of success fees was not good enough; and finally,

because the MOJ had accepted (as part of the Jackson enquiry and subsequent consultation) that costs were disproportionate.

Some commentators predicted the immediate end of success fees, and a number of parties rushed to get a case before the Court of Appeal to see if the principle could be extended generally. Sousa -v- London Borough of Waltham Forest was the first of such cases. The court was clear in its findings that, whilst it opposed the current 'bonanza' that success fees afforded claimant solicitors, they were permitted by statute and could not be disallowed. The Campbell decision was distinguished due to its media aspect, but the court confirmed that the Jackson reforms could not come into force quickly enough.

VAT change in personal injury cases

Medical report costs in personal injury cases will not be subject to VAT, following a successful appeal against HM Revenue & Customs (HMRC) in a tax tribunal. The HMRC's interpretation of the way medical reports and records used in litigation

are assessed for VAT was challenged. Fees paid to medical experts for reports and records had previously been regarded as a disbursement, and did not attract VAT until 2008, when the HMRC changed their stance, requiring VAT to be paid in respect of such fees. Law Society president, Linda Lee, said that the decision of the tax tribunal was a good result for the Law Society and the solicitors' profession, stating:

"The decision is a reminder that HMRC guidance is not necessarily an accurate reflection of the law, but simply HMRC's own interpretation."

"While HMRC have well-established guidelines on what may be treated as a disbursement for VAT purposes, its interpretation of those guidelines to require solicitors to account for VAT on items obtained as agent for their client, such as medical reports, previously accepted as disbursements, had caused confusion in the solicitors' profession."

"The approach taken by HMRC would have increased the costs of pursuing personal injury and clinical negligence cases. These increased costs would have been met by insurance companies, the NHS and the Legal Services Commission."

Success stories

[Brierley -v- Hill Dickinson client](#)

A 50% saving of costs, plus recovery of costs of assessment was achieved in a recent hearing in the Senior Courts Costs Office (SCCO). A bill was claimed at £10,693.47. The defendant argued that it was unreasonable to issue proceedings, and the costs associated with issuing should be disallowed. Most notably, we asked for the increased second stage premium, issue fee, and costs of and associated with the particulars of claim to be removed from the bill of costs.

Despite numerous arguments to the contrary from the claimant, the costs officer agreed with our case. The bill was settled for £5,250 and our client recovered their own costs of £1,350.

[Manjra -v- Hill Dickinson client](#)

Attending a detailed assessment hearing at Bolton County Court, such was the amount of costs disallowed, that the court awarded the claimant no costs of assessment. The level of counsel's fees was reduced, and the time spent was dramatically reduced by about 45%. The bill was therefore assessed at £22,880 against the bill which was claimed at £41,519.80, with no costs of assessment awarded.

[Harvey -v- Hill Dickinson client](#)

A finding that costs incurred were disproportionate helped us achieve an order at court that the claimant would recover £20,000 inclusive against a claim of £44,862.22, plus interest and costs of assessment.

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