



## **Hailsham Chambers Annual Costs Group Seminar**

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### **THE JACKSON REVIEW: THE FUTURE?**

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## THE JACKSON REVIEW: THE FUTURE?

1. This is a review which goes to the heart of essentially all current costs issues. It plainly has the support of the Lord Chancellor and, if Labour were to remain in power, it seems likely that many of his recommendations would make it on the statute book. What the Conservatives think is not publicly known, but it is the case that the primary movers on restricting Claimants' costs are the newspapers and media organisations, and we all know how powerful they are when there's an election in the offing.
2. A full review of the interim report published earlier this month is not possible, particularly given the document is over 600 pages long. However, it is a surprisingly easy read and merits at least dipping into in relation to the parts which interest you the most. In any event, there's still time to get your views in on any particular bugbear.
3. Some of the tentative early conclusions appear to be as follows.

### (1) **Costs Shifting:**

4. The first option is **abolition** of costs shifting altogether. Many countries have no costs shifting including most states in the USA and it is a system which operates in many tribunals including the Employment Tribunal (subject to a limited exception), and of course in the Small Claims Court. However, Sir Rupert has identified no general support for abolishing the principle that the loser pays the winner's costs across the board.
5. The second option is "*one way costs shifting*". Sir Rupert has identified one version of this which does find some favour with him, namely that if the claimant wins they get their costs but if the defendant wins there is no order for costs.
6. While that might sound unattractive at first sight to Defendants, at the moment defendants pay out a vast amount on ATE premiums which are covering the risk that the claimant might have to pay the defendant's costs, when in fact that very rarely

happens. In fact one Defendant personal injury solicitor provided figures to Sir Rupert which indicated that they had actually recovered their costs in 0.1% of their cases. In these circumstances, the economic case for one-way costs shifting in personal injury cases seems overwhelming. It is known, for instance that the Medical Defence Organisations and the NHSLA are thinking seriously about agreeing to it.

7. However, the potential problem with it is that, without any risk of paying the Defendant's costs, there are no disincentives for the Claimant to conduct cases so as to increase the Defendant's costs with no recompense. "Safeguards" may have to be built into this.
8. The third option is "***Partial costs shifting***". This means that if one party wins, all it gets is a relatively modest fixed sum for costs from the other side which does not even purport to be all the reasonable costs, but which provides some incentive to act reasonably. This is what occurs in Germany, a country whose system seemed to be of particular interest to Sir Rupert.
9. Its advantage is the avoidance of satellite litigation about costs, and that the losing party pays proportionate and modest costs. The disadvantage is that the litigants have to bear the shortfall themselves out of their damages and/or a Defendant who was wrongly brought into litigation has to pay out significant amounts in costs in order to establish that.

(2) **Fixed costs:**

10. Is there scope for widening considerably the scope of fixed costs regimes, currently limited to fast track trial costs, RTA claims and employers' liability claims in the personal injury field?
11. There are, for simplicity's sake, two main types of fixed costs:
  - (a) Fixed costs which are fixed on the basis of extensive evidence as to what it actually costs to do that litigation and thus are given on the basis that they are a reasonable estimate of what it reasonably costs on a "swings and roundabouts" basis: this is what the industry-wide brokered agreements now contained in CPR 45 attempt to achieve on the basis of evidence;

- (b) A fixed costs regime which does not attempt to estimate the reasonable costs of doing the work but is just a fixed sum which is probably much less than it actually costs: there are some limited examples of this in the CPR (see Part 1 of CPR 45), and it is (again) the system in many European countries, notably Germany.
12. The perception is that the fixed costs regime has worked for low value RTA cases, but perhaps because they are “factory” cases and it was possible in such cases (in contrast to more complex ones) to work out what they should cost to run.
13. The Fast-track is being extended up to £25,000 (from £15,000) and Lord Woolf always envisaged that all costs on the fast track would be fixed, whereas only trial costs were so. Is it time to fix the entirety of fast track costs? If so, would there be any room for exceptions? Sir Rupert is clearly minded to recommend this. Some of you might remember Scale 1 and the Scale 2 “Preparation item” in the old County Courts Rules.
14. Further, should fixed costs be radically extended to larger claims – e.g. all business/small and medium sized enterprises’ (“SMEs”) claims worth up to £250,000 in damages? This has the obvious advantages from the Jackson LJ’s terms of reference of killing two birds with one stone – making costs proportionate and getting rid of satellite litigation, and it would also further the overriding objective of putting the parties on a more equal footing since a major problem in commercial litigation is bullying by large organisations with armies of lawyers against the small company.
15. But would it be just? It might be reasonably easy to get figures for “factory” claims like low value RTAs, where there are a set number of steps needed to be taken, but can it be done to commercial litigation.

**(3) Personal injury:**

16. This field has been at the heart of the costs war. Is there a way of stopping the satellite litigation which has plagued it over the past 9 years while also reducing the costs?

17. A fundamental question raised by the review is whether it can ever be right for claimants to suffer a reduction in their damages as a result of not recovering all their own solicitors' costs from the other side. While it used not to be unusual for the lawyers to take some of the damages for their costs, the CFA culture over the past 9 years, and particularly since the advent of CFA-lites, is now contrary to that. Many solicitors compete for business by offering deals in which clients never have to pay anything, win or lose.
18. Of course, that in itself has been controversial and was severely criticised by the House of Lords in Callery v Gray (No's 1 and 2) [2002] UKHL 28; [2002] 1 WLR 2000, as the "no risk" culture provides no disincentive to run up unreasonable costs because no-one on the Claimant's side will ever pay them and so there are no constraints. While the "no-risk litigation" culture has undoubtedly benefited access to justice over the past few years, has it been at the expense of proportionate and reasonable costs?
19. Another option for the current problems is pure U.S.-style contingency fees, i.e. where the solicitors take a percentage of the damages. It means costs would be proportionate and, if as in the USA, there was no costs shifting, then that would get rid of (most) satellite litigation. But what about access to justice for lower value cases? These claims simply could not be brought if a proportion of the damages (say one third) were taken as fees because the fees would simply not be enough to make it worth taking the case.
20. And the other issue if costs shifting were abolished along with contingency fees is whether general damages need to be increased significantly to "cover" the irrecoverable elements of costs? Is it right to increase damages to pay for costs: is that just a lack of transparency. At present, Sir Rupert seems attracted by the idea.
21. Another option is Contingency legal aid funds or CLAFs: these are large schemes where the claimants all pay a part of their damages in successful cases into a fund which pays for losing cases without the need for success fees. The CFA regime would need to go, as CFAs would be more attractive to the lawyer and the client than a

CLAF. This is hugely controversial with claimants' representatives: is it right for injured claimants who win their claims to finance solicitors in losing cases?

**(4) Before the Event Insurance vs After the Event Insurance:**

22. BTE or LEI is usually a subsidiary add-on to another type of insurance: e.g. attached to a house contents policy or a car insurance policy. Sometimes, for businesses, it can be a standalone policy in case of litigation. The perceived advantages of BTE, at least in its traditional model, are that, unlike the “no risk” culture with CFAs with ATE, an insurer is liable to pay the claimant's costs and thus there is an incentive to keep costs down, and there are no additional liabilities for the other side to pay.
23. However, Sir Rupert identified two types of BTE:
- (1) BTE cover where insurers pay solicitors to act for the insured when a claim arises – “BTE 1” or “the traditional model” identified above; and
  - (2) BTE cover where insurers will “sell” to solicitors claims which arise in return for referral fees and the solicitors will thereafter work on a CFA or CCFA: “BTE 2”
24. Perhaps unsurprisingly, he likes BTE 1 but does not like BTE 2. He concludes that it is in the public interest to promote a substantial extension of BTE 1, so that the cost of litigation in any year by the few insured who need to bring or defend claims will then be born by the many who do not. However, he asks for help as to how this could be achieved.
25. This in contrast to his attitude to after the event insurance, or ATE. He notes that insurers traditionally have no control over costs. Further, he is concerned at the size of premiums, particularly outside the personal injury and clinical negligence field and is sceptical of the decision in Rogers v Merthyr Tydfil CBC [2006] EWCA Civ 1134; [2007] 1 WLR 808, a decision widely viewed as a sop to the ATE market to keep it afloat at all costs, and where the courts abdicated responsibility for the proper assessment of insurance premiums.

### **(5) Group Actions**

26. Costs in group actions often give rise to difficulty. How do the Claimants fund the case given the amount of expenditure required and the danger of having to pay very substantial Defendants' costs if the case is lost? The threat of paying the Defendants' costs has put off a number of potential group actions, some which had been up and running before receipt of the Defendant's costs estimate. And the Claimants' costs of a large group action when it succeeds can be enormous and wholly disproportionate from the Defendant's perspective.
27. Sir Rupert's "tentative view" is that costs shifting should be abolished in "collective actions" so that the normal rule would be that each side would bear their own costs whatever the outcome.
28. How does that help access to justice? Can smaller value actions – such as the holiday cases etc – be brought when there is no likelihood of recovery of costs so that it has to come straight out of any damages. And what would be the disincentives to bringing weak claims and/or poor conduct. The Employment Tribunal approach may not go far enough as a costs order is very unusual with a high test to satisfy.

### **(6) Main Action Court Procedure**

29. It is obvious that Sir Rupert has taken his brief to be much wider than a review of Parts 43 to 48 of the CPR. When reviewing the costs of litigation, one has to consider how many hours have been spent by the lawyers and how much they charge for it and whether those costs are increased by reason of the obligations on lawyers resulting from the current rules and their operation. And when you do that, you go beyond the costs practice direction and risk making yourself into "Woolf Mark 2". This is simply unavoidable from Sir Rupert's terms of reference.
30. The most striking aspect of this part of the review is in relation to disclosure. In England and Wales, we have what is now called "standard disclosure", which involves an obligation on each party to make a reasonable search for documents (and

then, once found, disclose their existence to the other side) which are relevant to the issues in the litigation, and not just documents that help your side but also documents which are adverse to your interests and/or favour the other side's interest. That might sound to us like the bedrock of fair and open system of justice (and is cited by many international companies as a reason for choosing England and Wales as the seat for arbitrations and litigation), but it is surprisingly rare in other jurisdictions. They only oblige parties to disclose documents which they want to rely on.

31. Commercial litigation in particular is plagued by huge costs being run up by armies of junior staff on disclosure, followed by heated and protracted battles on applications for orders for specific disclosure. Should all this be swept away by adopting the practice of only disclosing favourable documents? Or should disclosure per se be got rid of, as is the case in France, Germany and the Netherlands: only if facts are controverted is it then necessary to lodge (supportive) documents at court.
32. Ultimately, the question may be whether you want a Rolls Royce service with the often disproportionate costs that that entails, or do you instead want instead a system with lower costs but less justice?

**(7) Expert evidence:**

33. Expert evidence was identified by a number of the people and bodies who put in submissions in Phase 1 as a substantial and ever increasing cost of litigation. Sir Rupert is of the view that experts are failing to concentrate on the real issues which matter – thereby running up unnecessary costs – but that expert meetings have worked well in principle.
34. It appears Sir Rupert is attracted by changes in procedure so that there is
  - (a) Sequential exchange of expert evidence, and
  - (b) A presumption that all quantum experts will be jointly instructed;
  - (c) The appallingly named “hot tub” practice (increasingly adopted in Australia) of hearing from experts concurrently at trial, so that the Judge chairs a discussion between them with the agenda having been the experts' meeting agenda. This is said to reduce costs.

**(8) Recovery of additional liabilities:**

35. A significant body of the legal profession, and in particular the Bar, has been opposed to CFAs in principle as inherently giving rise to a conflict between the lawyer's duty to their client and their concern about their own pocket. However, with no obvious alternative to funding most litigation other than on the basis of payment by results, it is clear they have been fighting a losing battle. It appears Jackson LJ currently thinks CFAs are here to stay as they have been "*absorbed into our litigation culture*" over 14 years.
36. However, it is also clear that he believes that recoverability of additional liabilities in 2000 was a disaster. Sir Rupert notes that it has not been adopted in other countries. He notes Professor Fenn's conclusion that if recoverability was abolished, then market forces would reassert themselves as the Claimant would then have an interest in a low success fee and low ATE premium, because he/she would actually have to pay it.
37. But the question arises as to what protection clients would need to have so that the costs taken out of their damages do not obliterate them and that the lawyers are paid sufficiently to make it worth taking on the cases and thus giving "access to justice". Do you introduce compulsory before the event ("BTE") insurance so that everyone can litigate without additional liabilities? Or a CLAF where the winning claimants fund the lawyers on the losing cases?

**(9) Costs Capping and Costs Management:**

38. The current rules on costs capping in CPR 44.18 to 44.20, introduced in 2008, follow the fairly restrictive approach to capping by Gage J in Smart v East Cheshire NHS Trust [2003] EWHC 2806 (QB) and import in the Practice Direction a requirement that a costs capping order should only be made in "*exceptional circumstances*".

39. Costs capping is a subject which divides people. Some consider it to be a comprehensive answer to disproportionate costs, others consider it is a pointless and expensive piece of satellite litigation.

40. It is clear that Sir Rupert does not think costs capping is a panacea and considers the present test of exceptional circumstances to be the correct one because it doesn't get at the heart of why costs of litigation in this country are too high, and addresses the symptoms rather than a cure:

*“Costs capping must not be used as a shortcut or as treated as a sword to cut through the Gordian knot of civil costs.”*

41. However, that is not as good news as most claimants' solicitors would think. Rather than overall costs caps, favours “*Costs Management*”, i.e. a kind of project management where the costs of the next step in the litigation are planned in advance, with the court setting budgets to each party at each stage of the litigation on case management conferences:

*“So when giving directions for disclosure, service of witness statements, service of expert reports etc, the court would attach a price tag to each activity. These price tags could either be agreed by the parties or fixed by the court after argument. The maximum recoverable cost of each stage of the litigation would be that specified by the court in advance.”*

42. Sir Rupert considers that such a system would have to major advantages:

- (1) Each party would have certainty about the extent of its costs liability in the event of losing the action;
- (2) The parties and their lawyers would have an incentive to keep costs down at each stage of the action.

43. But are judges really equipped to carry out this exercise? What do they know about how much the next stage actually costs? And will it not just generate more satellite litigation?

44. Sir Rupert has 5 answers to this:

- (a) More judges are solicitors these days and thus understand costs better: he may be overestimating how much better on costs solicitors on costs issues;
- (b) Judges should receive training;
- (c) All the evidence and skeleton arguments would be lodged in advance;

- (d) Judges determine many matters which are more complex than costs management issues and in respect of which they have no prior expertise;
- (e) Once we're used to it, it will largely be agreed anyway.

45. There is no doubt that he is very keen on this idea in principle. If you disagree, then please tell him!

### **(10) Hourly Rates**

46. A number of people consider that the heart of the problem on excessive costs is not so much the hours spent but the hourly rates allowed for it. A number of problems arise:

(1) What is a solicitor's hourly rate? What is it made up of and how is it to be calculated? In the pre-CPR days, we used to have a rough idea, namely the actual cost to the solicitor's firm of doing that particular work (including salaries, overheads etc) – the "A" figure – plus a percentage of that figure on top for profit or "care and conduct" – the "B" figure - with a starting point of 50%. However, in their wisdom when the CPR came in, this was seen to be confusing for clients and thus amalgamated rates were brought in. This has meant that rates are calculated by how much others are charging (not actually costing), which has a ratchet effect on rates without a ability to check to see if the rates are reasonably calculated;

(2) Why, in the professional indemnity insurance, clinical negligence and personal injury fields, to name but a few, are Defendant lawyers able to get by in business with rates that are often a fraction of the Claimant's rates. While there may be some reasons why Claimant's rates are higher, can it possibly be justified as to how much higher they are when they do not themselves compete on price because their client will in all probability never have to pay them.

47. However, in 2007 the Advisory Committee on Civil Costs was set up under the chairmanship of Professor Stephen Nickell, an economics professor at Oxford University to consider the SCCO guideline hourly rates. They then carried out a survey in 2008 into rates which gave rise to a number of difficulties: including, firstly, the low response rate, and secondly it was measuring simply what they charged not

what it cost to do the work etc. They published guideline rates for 2009 which differed little from the previous versions but promised to look into the other concerns about hourly rates.

48. Does Sir Rupert have any right to trample on the ground of Professor Stephen Nickell. We shall have to wait and see.

**(11) Assessment of Costs**

49. Summary assessment is seen in some quarters as being unsatisfactory in that it is carried out by Judges with little knowledge of costs, with little information in advance and usually in a rush beyond the expiry of the time estimate for the hearing. Sir Rupert appears to favour more sparing use of summary assessment and more substantial payments on account pending detailed assessment (a revision of the *Mars* guidance).
50. As for detailed assessment, Sir Rupert clearly feels that it is too expensive, old fashioned (particularly as to the form of a bill, and the ability to send it electronically to the court), and doesn't really achieve what it is intended to achieve, namely a fair amount of costs. He appears to favour a "provisional assessment" process, where the court carries out an assessment on paper and then if either party is unhappy with the outcome they can list the matter for a hearing.
51. He also favours guideline rates for detailed assessment, rather than using the summary assessment guidelines for this purpose, although how these might be different in principle is not explained.

**CONCLUSIONS**

52. This is a report written on a vast canvas, perhaps too large. But it deals with issues which are fundamental to our practices and to access to justice generally and I would encourage all not to miss the opportunity of having your say about them.