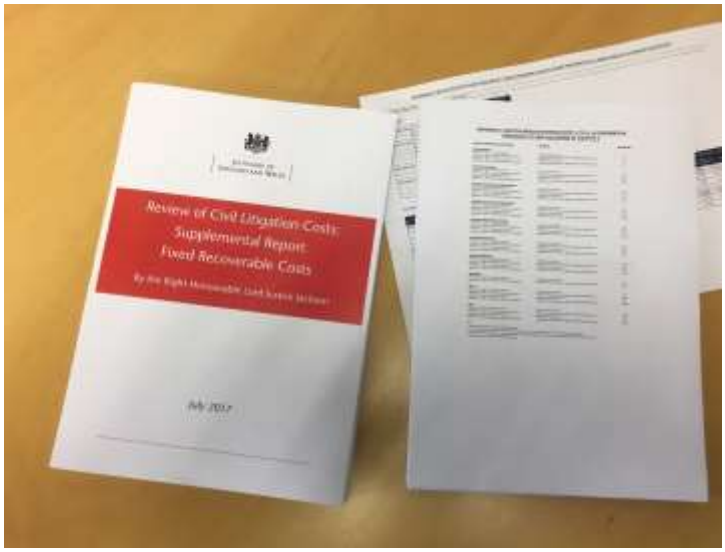
Lord Justice Jackson's Supplemental Report into Civil Litigation Costs

After many months of work, Lord Justice Jackson's report on fixed costs is now available.

This briefing considers his proposals and the potential consequences.



Described as being a 'supplemental report' to his original Final Report of 2010, it seeks to advance fixed costs further than the scheme previously introduced but not as far as anticipated, since Lord Justice Jackson has accepted that, at least to some extent, budgeting has meant that there is no need to develop FRC to that extent (i.e., for all cases up to £250,000). He has, however, still made a significant number of other proposals for change.

The Current Regime

Whilst Lord Justice Jackson considered that the current FRC regime 'overall works well', there was one area where he considered there should be change, namely in relation to the *Broadhurst v Tan* [2016] EWCA Civ 94 issue. Perhaps part of the reason is that, absent of a rule change, it will also affect Lord Justice Jackson's other fixed costs proposals.

Broadhurst determined that where a Claimant beat their own Part 36 offer they should be entitled to the benefits of that and therefore fixed costs did not apply, but indemnity costs do.

Whilst accepting that the assessors assisting with the report were 'sharply divided' on the issue, Lord Justice Jackson himself came down in favour of replacing indemnity costs with a percentage uplift of 30 or 40%. His reasoning behind this is that a Claimant should still be rewarded for making an effective Part 36 offer, but such an arrangement will avoid the need for detailed assessment and will provide a greater level of certainty.

Unreasonable Behaviour

Where a party has behaved unreasonably in litigation, Lord Justice Jackson proposes that the court should either award a percentage uplift (he recommends 30 or 40%) or to make an award for indemnity costs, depending on the seriousness of the misconduct in question.

In considering what amounts to unreasonable behaviour, Lord Justice Jackson refers to *Dammerman v Lanyon Bowdler LLP* [2017] EWCA Civ 269 and the comments made therein.

Longmore, LJ and McFarlane, LJ, although considering unreasonable behaviour within the context of CPR r 27.14(2)(g), the small claims track, said:

> '*We doubt if we can usefully give general guidance in relation to the circumstances in which it will be appropriate for a court to decide whether a party "has behaved unreasonably" since all such cases must be highly fact-sensitive'* [30]

They went on to consider the comments of Sir Thomas Bingham, MR in *Ridehalgh v Horsefield* [1994] Ch 205 when looking at wasted costs and although they did not want to incorporate wasted costs into unreasonable behaviour in small claims cases, they considered those comments should *'give sufficient guidance'* to judges:

> *"… conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting in a practitioner's judgment, but it is not unreasonable"*

Thus, it would appear that Lord Justice Jackson is suggesting the same; that whilst all of wasted costs case law should not be incorporated into his future fixed costs regime, the comments here are intended to provide guidance as to what might amount to unreasonable conduct. An example he gives of such conduct would be substantial non-compliance with the pre-action protocol.

Although the issue may not arise often in small claims cases, it is likely to arise much more often in fixed costs claims in the future and it would seem likely, therefore, that this aspect of the reforms will give rise to the next battleground of case law.

'Uprating'

Something that Lord Justice Jackson proposed in his original report was for the fixed costs to be reviewed periodically. He has returned to that theme in every talk he has given since then in relation to fixed costs and again in this supplemental report on fixed costs.

The supplemental report proposes triennial reviews (considering that annual increases would *'generate too much complexity and confusion'*) with the FRC regimes being increased with reference to the Service Producer Price Index.

Of course, the Service Producer Index relates to business to business services and rose by an average of 1.4% in 2016. In contrast, the Consumer Price Index, which generally relates to business to consumer services rose by around 2.6%.

In any event, given that all of his calls for such a review since his initial report have been ignored, it seems likely that this call will also be ignored.

Noise-Induced Hearing Loss (NIHL) Claims

The CJC set up a working group of claimant and defendant representatives to consider a process for dealing with these claims together with an accompanying FRC grid that awards fixed costs as the following:

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

In addition to the above sums, there is agreement that a further £1,280 will be recoverable for a company to be restored to the register.

Lord Justice Jackson considered that the agreement was a reasonable one. He did, however, go on to make proposals in respect of those areas where agreement could not be reached, namely counsel's fees and trial advocacy fees. In respect of these, Lord Justice Jackson proposed £500 for the Particulars of Claim or Defence and Counterclaim and £1,000 for a post-issue advice or conference. The trial fee is split into bands: for cases up to £10,000 = £1,380; £10001 to £15,000 = £1,800 and £15,001 to £25,000 = £2,500.

<u>Other Fast Track cases</u>

This includes non-PI cases with Lord Justice Jackson proposing that a 'reasonable figure' should be put forward for each category of cases having regard to certain factors:

(i) the proportionality factors set out in CPR rule 44.3(5);
(ii) such data as is available;
(iii) the experience of the assessors;
(iv) the costs of conducting personal injury cases of comparable complexity.

For cases where there is no monetary relief, Lord Justice Jackson states that *'the court must, I am afraid, assign a value to such relief'*; a task that is easier said than done. An example given is a claim for an injunction or declaration, which Lord Justice Jackson says should be treated as equivalent to a claim of £10,000 with the court to have power to vary that figure up or down.

Thus, for all cases that will fall into the fast track, whether PI or not, Lord Justice Jackson proposes four bands of complexity. Examples are provided of the types of case that may fall into each Band:

- Band 1 is therefore proposed for non-PI RTA and defended debt claims;
- Band 2 for RTA PI (within the protocol) and holiday sickness claims;
- Band 3 for RTA PI (outside the protocol), ELA, PL, tracked possession claims, housing disrepair and other money claims; and
- Band 4 for ELD claims (other than NIHL), any particularly complex tracked possession or housing disrepair claims, property disputes, professional negligence claims and other claims that are at the top end of the fast track.

The figures proposed by Lord Justice Jackson for these cases are as follows:

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

	Complexity Band			
Stage:	**1**	**2**	**3**	**4**
a. = up to £3,000;	a. £500	a. £500	a. £500	a. £1,380
b. = £3,001 - £10,000;	b. £710	b. £710	b. £710	b. £1,380
c. = £10,001 - £15,000				
d. = £15,001 - £25,000	c. £1,070	c. £1,070	c. £1,070	c. £1,800
	d. £1,705	d. £1,705	d. £1,705	d. £2,500

The figures are cumulative, so for example, a Band 1 case of £17,000 that proceeds to Trial will attract a fixed fee of £9,550. In addition, London weighting will still apply (as it will to NIHL).

The figures in relation to the Trial advocacy fees compare favourably to the current fixed costs trial fees, which are much lower than those now proposed (a. £485; b. £690; c. £1,035 and d. £1,650). In addition, the discretion provided by CPR r45.39 will remain.

However, the lack of any pre-issue fee and low fee in Stage 1 claims may result in solicitors being reluctant to take such cases on. Confident consumers may be happy dealing with these cases up to the point of issue and then locating a solicitor to take them on, but vulnerable consumers may suffer.

If the Claimant is successful, then the % to be calculated applies to the amount received or relief recovered. If a Defendant is successful, then the % will apply to the value of the claim as presented in the particulars of claim.

How the Bands are decided

It is proposed that the pre-action protocols be amended to require the parties to attempt agreement on the appropriate track and also, in fast track cases, which Band their case should fall in. Claimants will have to set this out in their letter of claim and Defendants will set out their own position in their letter of response. If agreement is not reached, then the judge at allocation should allocate in the usual way and state which Band the case will belong in.

That decision could be challenged by either party, however, an unsuccessful party on such an application will incur a costs liability of £150. This will raise an interesting question as to whether that sum should be paid by the solicitor or their client depending on the nature of the agreement between them on costs.

If the case settles prior to allocation and no agreement has been reached, then it will be for the judge assessing costs to determine the appropriate Band. This means that in such cases, it is likely that there will almost always be a need for assessment.

However, it is also proposed that Judges at the allocation stage should have discretion to move individual claims between the Bands having regard to the nature of the case, but should exercise such discretion sparingly. The implication is therefore that even if the parties' come to an agreement in relation to the Band, the court may have the power to move the case to another, lower Band at allocation, although whether this happens in practice is yet to be seen.

An 'Escape Clause' that provides no escape

There will be an escape clause in the same way as is allowed for under the current regime in 'exceptional circumstances'. Lord Justice Jackson maintains that use of this provision 'will continue to be rare because any case of exceptional complexity is unlikely to be in the fast track'. In practical terms, the underlying message is that it will be extremely unlikely that you can escape FRC if your case is allocated to the fast track.

Counsel's Fees

Whilst in Bands 1-3, there will be no ring-fencing for counsel (save in respect of the trial fee), in relation to Band 4, Lord Justice Jackson recommends that, as with the NIHL claims, £500 be allowed for the Particulars of Claim or Defence and Counterclaim and £1,000 for a post-issue advice or conference.

It is still possible, of course, for a solicitor to choose to instruct counsel or a specialist lawyer to undertake work outside of these restrictions, however, no additional fee will be allowed for such work and so must be taken out of the overall fixed fee allowed for any particular stage.

Interim applications

The recommendation is that fees for any application *'properly made'* should be recovered in addition to the fixed fee at a fixed amount of £750.

Preliminary Issues

If there is a trial on a preliminary issue, then the costs of this will be recovered separately, although Lord Justice Jackson says that he *'strongly discourage*[s]*'* the use of preliminary issue trials in the fast track.

The Intermediate Track – Dealing with Lower-Level Multi-Track claims

Having considered all the evidence, and although fixed costs are not being extended to the extent that was threatened previously, Lord Justice Jackson remains of the view that lower-level multi-track cases should be subject to a fixed costs regime, citing the following reasons for his decision:

(i) Many cases which are currently in the lower reaches of the multi-track are sufficiently straightforward to be accommodated within a fixed costs regime;
(ii) A fixed costs regime will eliminate the process of costs budgeting and assessment;
(iii) The extension of FRC to such cases will bring a greater level of certainty than costs management can achieve;
(iv) Such a regime will promote access to justice for some individuals and SMEs, who may otherwise be unable to litigate;

(v) We now have four years' experience of FRC in the fast track and of costs management in the multi-track. It is now possible to draw up a realistic grid of FRC for straightforward lower value cases outside the fast track.

In order to deal with these cases in a practical way, a new 'track' is proposed; the suggested name for this new track being the intermediate track.

This new track will encompass cases above £25,000 and below £100,000 but only where those cases have 'modest complexity'. More complex cases of that value will still be appropriate for the multi-track. Examples of cases that will fall within this track are *'principally… monetary relief, such as damages or debt'*. Mesothelioma and other asbestos-related lung diseases are excluded from the intermediate track, since they already have a bespoke procedure. Complex PI and professional negligence claims will also be excluded, and other cases would only rarely be suitable for it, such as some multi-party cases, actions against the police, child sex abuse claims and intellectual property claims.

However, Lord Justice Jackson also envisages use of the track in claims where it is necessary to promote access to justice or where there are 'other reasons'. An example of the former is given as where individuals of modest means bring defamation claims because of material on the Internet (a growing category of claimants). In these cases, Lord Justice Jackson argues they may only feel comfortable proceeding if their adverse costs risk is limited by an FRC regime. An example of the latter is given as where proceedings where emotions run high and parties *'need to be protected from their own enthusiasm for the fray'*.

The track will also have a more streamlined procedure so that lawyers for both parties do less work in the intermediate track and therefore any other types of case that may not be suitable for such a streamlined process are suitable for the intermediate track. For example, statements of case will be limited to 10 pages.

As with the fast track, the intermediate track will have 4 Bands of cases depending on the complexity of the case in question and, once again, the pre-action protocols will encourage the parties to agree the track and the Band. If not agreed, these will be determined on allocation. Once again, a party can challenge the decision at the CMC, but if the only reason for the hearing is to dispute the assignment, the unsuccessful party will incur a costs liability of £300.

The court may remove the case from the intermediate track after the first CMC if the case changes fundamentally, although Lord Justice Jackson envisages that such a step would only be undertaken in 'exceptional circumstances'.

Applications will also have a streamlined process, with tight timescales to respond and the court will determine the costs of the application at the application hearing to be paid in addition to the fixed costs. However, if the court considers that a party is making 'vexatious applications', the court may consider that amounts to unreasonable conduct.

There will be a new PD in relation to cases in the intermediate track. The proposed amounts to be allowed under the intermediate track are as follows:

Stage	Band 1	Band 2	Band 3	Band 4
S1 Pre-issue or pre-defence investigations	£1,400 + 3% of damages	£4,350 + 6% of damages	£5,550 + 6% of damages	£8,000 + 8% of damages
S2 Counsel/ specialist lawyer drafting statements of case and/or advising (if instructed)	£1,750	£1,750	£2,000 (or £3,000 if there is a counterclaim and defence to counterclaim)	£2,000 (or £3,000 if there is a counterclaim and defence to counterclaim)
S3 Up to and including CMC	£3,500 + 10% of damages	£6,650 + 12% of damages	£7,850 + 12% of damages	£11,000 + 14% of damages S4
S4 Up to the end of disclosure and inspection	£4,000 + 12% of damages	£8,100 + 14% of damages	£9,300 + 14% of damages	£14,200 + 16% of damages
S5 Up to service of witness statements and expert reports	£4,500 + 12% of damages	£9,500 + 16% of damages	£10,700 + 16% of damages	£17,400 + 18% of damages
S6 Up to PTR, alternatively 14 days before trial	£5,100 + 15% of damages	£12,750 + 16% of damages	£13,950 + 16% of damages	£21,050 + 18% of damages
S7 Counsel/ specialist lawyer advising in writing or in conference (if instructed)	£1,250	£1,500	£2,000	£2,500
S8 Up to trial 14	£5,700 + 15% of damages (reduced by £500 if the receiving party did not prepare the bundle)	£15,000 + 20% of damages (reduced by £750 if the receiving party did not prepare the bundle)	£16,200 + 20% of damages (reduced by £1,000 if the receiving party did not prepare the bundle)	£24,700 + 22% of damages (reduced by £1,250 if the receiving party did not prepare the bundle)

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Stage	Band 1	Band 2	Band 3	Band 4
S9 Attendance of solicitor at trial per day	£500 (halved if attendance is for half a day or less)	£750 (halved if attendance is for half a day or less)	£1,000 (halved if attendance is for half a day or less)	£1,250 (halved if attendance is for half a day or less)
S10 Advocacy fee: day 1	£2,750	£3,000	£3,500	£5,000
s11 Advocacy fee: subsequent day	£1,250 (halved if attendance is for half a day or less)	£1,500 (halved if attendance is for half a day or less)	£1,750 (halved if attendance is for half a day or less)	£2,500 (halved if attendance is for half a day or less)
S12 Hand down of judgment and consequential matters	£500	£500	£500	£500
S13 ADR: counsel/specialist lawyer at mediation or JSM (if instructed)	£1,200	£1,500	£1,750	£2,000
S14 ADR: solicitor at JSM or mediation	£1,000	£1,000	£1,000	£1,000
S15 Approval of settlement for child or protected party	£1,000	£1,250	£1,500	£1,750

The complexity of the table demonstrates the difficulties in attempting to fix costs in anything other than the most simple of claims. The matter is further complicated by the fact that for non-PI claims that settle pre-issue, the figure in S1 becomes a cap, as opposed to being a fixed amount, which is bound to give rise to contention between the parties as to the amount that should be paid.

Although in the short-term, disbursements are in addition, Lord Justice Jackson recommends that once the regime is in place, work should begin on fixing experts' fees in respect of the intermediate track.

As with the fast track, Lord Justice Jackson has proposed percentage uplifts to these figures for a failure to beat a Part 36 offer and unreasonable conduct and that the figures should be revised triennially.

Clinical Negligence Litigation

Although the Department of Health launched a consultation in relation to fixing costs in clinical negligence claims, the recommendation from the report is that a working group be established similar to that in relation to NIHL claims.

Whilst Lord Justice Jackson considered that the consultation was a 'step in the right direction', it was not in his view a bespoke process and therefore he recommends that the Civil Justice Council and the Department of Health should set up a working party to include both Claimant and Defendant representatives to develop a bespoke process for claims initially up to £25,000 and an FRC grid for such cases.

Part 8 Claims

For the time being, at least, it is not envisaged that these would be suitable for an FRC regime, with the exception of infant approvals and costs-only proceedings.

In the former, where settlement is reached pre-issue and Part 8 proceedings are issued for approval, the amount allowed in the table (S15) will be awarded as Lord Justice Jackson considered that this was comparable to a Part 23 application in existing proceedings.

In relation to costs-only proceedings, the fee is proposed as £300 for a claimant and, if the proceedings fail for some reason, £150 for the defendant.

Again, however, Lord Justice Jackson has recommended that this position be reviewed in the future.

Assessment of Costs

If there is any dispute, there will be an assessment of costs. However, Lord Justice Jackson's proposal is that if a case proceeds to trial, then the trial judge will summarily assess costs at the end of the hearing and if not, there will be a shortened form of detailed assessment.

Reference is made to CPR r47, PD5.7 in relation to this shortened assessment. However, that reference refers to cases where the only dispute relates to disbursements, in which case a bill only needs to show a title page, some background information and a list of the disbursements with both parties putting brief written submissions as to why they are not agreed. That is appropriate where the dispute is so limited, but experience has shown that assessments in relation to the current fixed costs regime are not always limited to just disbursements. Such a shortened assessment may prevent both parties from raising valid arguments in relation to the costs, thus denying them their right to a hearing. This should be further expanded/considered by the Association of Costs Lawyers (ACL) or in the consultation in order to ensure that no such risk arises.

This does not make it clear what will happen if the matter proceeds to trial and the parties raise issues that are not suitable for the matter to proceed by way of summary assessment. Will those cases fall into the shortened form of detailed assessment or will the court now be expected to conduct more of an assessment hearing at the end of the trial?

The shortened assessment process should have a cap of £500. Note that this is a cap, not a fixed fee, meaning that there will be considerable uncertainty and debate about what should be allowed in each case, further increasing costs unless all parties agree the fee.

What about budgets?

At this time, there will be no change as the other reforms set out above are 'significant' and should be allowed to bed in before taking another major step. However, the recommendation is that in the future, consideration should be given to fixing incurred costs on budgets. He accepts that this will not be easy, since budgeted cases will be those that fall in the multi-track and it would be necessary to consider all aspects of litigation and prepare 'an elaborate grid' of pre-issue and pre-budget costs. There would also have to be changes to pre-action procedures for allowing a party to seek leave to exceed those sums.

It may be that such a process will be too complex and difficult to ever achieve, bearing in mind the multitude of cases of varying complexity and value that end up in that track. In any event, this is not something that parties need to be concerned with at the current time.

Next Steps

It is safe to expect that none of these reforms will be immediately implemented. The former Lord Chancellor in September 2016 stated that any proposals from Lord Justice Jackson's review would be the subject of consultation. Any such consultation is unlikely to be rushed onto the political palette in the current climate, and as yet there is no word on a timescale as to when or if this process may start.

However, in the meantime, if Lord Justice Jackson's proposal to establish a working party in relation to clinical negligence costs is taken up by the parties, this can start more immediately.

If there is anything you would like to discuss regarding this briefing or Lord Justice Jackson's report, please do not hesitate to contact one of the partners, Malcolm Goodwin or Dom Malatesta.

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