



REVIEW OF  
CIVIL LITIGATION COSTS

**Review of Civil  
Litigation Costs:  
Preliminary  
Report**

**Volume One**

**May 2009**





REVIEW OF  
CIVIL LITIGATION COSTS

**PRELIMINARY REPORT**

**By the Right Honourable Lord Justice Jackson**

**May 2009**

**VOLUME 1**

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<sup>1</sup> These appendices are available on the disc attached to the inside back cover of Volume 2. Where possible they have been formatted to be printable in A4 format.



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I am asked to review the rules and principles governing the costs of civil litigation and to make recommendations in order to promote access to justice at proportionate cost. The terms of reference are set out in chapter 1 and they include a requirement to “*consider whether changes in process and/or procedure could bring about more proportionate costs*”. This requirement has necessitated a review of civil procedure stretching far beyond the costs rules.

In undertaking this task, I have set on one side opinions previously formed and am approaching the issues with an open mind.

The first step is to marshal the available evidence, to identify the issues for consideration and to set out the relevant factors and competing arguments. Four months have been allotted to this task, namely January to April 2009. This preliminary report is the product of investigations which I have carried out during those four months, with considerable assistance from the assessors and the other persons who are thanked in chapter 1.

Today marks the beginning of the second phase of the Costs Review, namely the consultation period. I hope that this report will be of assistance to all who wish to participate in the consultation exercise. The facts set out in this report and the appendices have been gathered from many sources. They are not intended to support any particular conclusion. On the contrary I hope to ascertain, with the assistance of consultees, where those facts lead us. The data in the appendices, including the results of the four week judicial survey, will have to be analysed in greater detail than has been possible so far. The focus of attention over the last four months has been upon collecting the data rather than reaching conclusions.

Where I have formed tentative opinions, these are indicated in the report, so that those who disagree can explain why such opinions are wrong.

The issues upon which I am asked to report are both complex and intractable. They do not admit of simplistic answers. Nor are the facts straightforward. For this reason the Preliminary Report is bound to be a lengthy document. Anyone looking for a summary of the report should go to chapter 2.

I look forward to engaging in a lively and constructive debate with court users, practitioners and judges over the next three months concerning the matters set out in this report.

After July I shall set about writing a final report, as required by the terms of reference.

Rupert Jackson  
Royal Courts of Justice  
London WC2A 2LL

8<sup>th</sup> May 2009

## **GLOSSARY**

The following is intended as a glossary or working description of some of the key terms and expressions that appear throughout this Preliminary Report. It does not, however, provide an exhaustive list of every expression, term or acronym used in the report, although definitions and descriptions are found in each chapter.

<b>Word or expression</b>	<b>Meaning or description</b>
access to justice	The ability of a person to obtain legal advice and representation, and to secure the adjudication through the courts of their legal rights and obligations.
after-the-event (“ATE”) insurance	Insurance by one party against the risk of it having to pay its opponent’s legal costs, where the insurance policy is taken out after the event giving rise to court proceedings (e.g. an accident involving personal injury).
assessment	The process by which the amount of costs payable by one person to another is determined by a judicial officer (usually a judge or a costs judge). Assessment was formerly known as “taxation”. An assessment may be a detailed assessment or a summary assessment. See chapter 2, paragraph 3.29 and chapter 3, paragraph 4.17.
before-the-event (“BTE”) insurance	Insurance, protecting a claimant or defendant, that was in place before the occurrence of an event giving rise to a legal claim (e.g. a motor vehicle accident) that covers the claimant’s or defendant’s legal fees, and possibly also those of its opponent (in the event of the insured being ordered to pay their opponent’s costs). See generally chapter 13.
Civil Procedure Rules 1998 (“CPR”)	The primary rules of court for civil litigation in England and Wales, introduced as a consequence of the Woolf reforms.
conditional fee agreement (“CFA”)	An agreement pursuant to which a lawyer agrees with his or her client to be paid a success fee in the event of the client’s claim succeeding, where the success fee is not calculated as a proportion of the amount recovered by the client. A typical example of a CFA is where a lawyer is retained on a “no win, no fee” basis. See generally chapter 16.
contingency fee	A lawyer’s fee calculated as a percentage of monies recovered, with no fee payable if the client loses. See chapter 20, paragraph 1.1.
contingency legal aid fund (“CLAF”)	A fund which grants legal funding to chosen applicants, where the receipt of funding is conditional on the applicant agreeing to pay a percentage of any amount awarded (e.g. as damages) back into the fund. CLAFs attempt to be self-financing and operate on a not-for-profit basis. See generally chapter 18



	paragraph 1.3.
cost capping	A mechanism whereby judges impose limits on the amount of future costs that the successful party can recover from the losing party: see chapter 45, paragraphs 1.1 and 4.2.
cost shifting	The ordering that one person is to pay another's costs. Cost shifting usually operates on a "loser pays" basis, so that the unsuccessful party is required to pay the successful party's recoverable costs.
costs	The costs incurred by a party through engaging lawyers to act for it. These costs may include the cost of expert witnesses, barristers, photocopying and other disbursements. Costs may be distinguished from fees which are payable to the court in civil litigation. See chapter 3, paragraph 1.3.
costs judge	A judicial officer, usually a master of the court, who decides the amount of costs payable by one party to another should the amount be disputed.
detailed assessment	An assessment of costs which is carried out by a costs officer or judge (as appropriate). A detailed assessment is more involved than a summary assessment.
disclosure	The process in litigation by which relevant documents are made available to an opponent. Prior to the Woolf reforms disclosure was referred to as "discovery" (and it is still known by that name in many common law jurisdictions). See generally chapter 41.
e-disclosure	The disclosure of electronic material (see generally chapter 40).
fixed costs	Costs which are fixed in amount by rules of court, especially CPR Part 45. See generally Part 5 of this Preliminary Report.
indemnity basis	The assessment of a party's legal costs, made on the basis that the party may recover its reasonable costs that were reasonably incurred and which are reasonable in their amount. However, there is no specific requirement that costs recovered on such a basis be proportionate to the amount or issues in dispute: see chapter 3, paragraph 4.21.
indemnity principle	The indemnity principle holds that a successful party cannot recover from an unsuccessful party more by way of costs than the successful party is liable to pay his or her legal representatives: see chapter 3, paragraph 4.13 and chapter 53, paragraph 1.8.
legal costs	See costs.
legal expenses insurance ("LEI")	Insurance that covers a person against his own legal costs and/or the legal costs of an opponent in litigation. LEI includes both BTE insurance and ATE insurance.

“no win no fee”	An agreement between a client and a lawyer that the lawyer will only be entitled to payment should the client be successful in its claim. In England and Wales such agreements are usually in the form of conditional fee agreements.
standard basis	The assessment of a party’s legal costs, made on the basis that the party may recover its reasonable and proportionate costs: see chapter 3, paragraph 4.19.
summary assessment	The assessment of costs by a judge, usually made quickly and on limited material. See chapter 2, paragraph 3.30, and more generally chapter 52.
supplementary legal aid scheme (“SLAS”)	A SLAS is similar to a CLAF, in that it is a legal fund which aims to be self-funding, and the granting of funding is conditional upon the applicant agreeing to pay a percentage of any amounts recovered back into the fund. A SLAS is different from a CLAF in that it is usually operated by a legal aid body, and is intended to provide funding to persons who do not satisfy the relevant criteria for obtaining legal aid, yet are not of sufficient means to afford legal representation for their case. See generally chapter 18 paragraph 1.3.
third-party funding (“TPF”)	The funding of litigation by a party who has no pre-existing interest in the litigation, usually on the basis that (i) the funder will be paid out of the proceeds of any amounts recovered as a consequence of the litigation, often as a percentage of the recovery sum; and (ii) the funder is not entitled to payment should the claim fail. See generally chapter 15.
Woolf reforms	Reforms arising out of the review of the civil justice system conducted by Lord Woolf, concluding with his final report “ <i>Access to Justice</i> ” in July 1996. The Civil Procedure Rules 1998 (“CPR”) were brought in as a result of Lord Woolf’s recommendations. See chapter 1, paragraph 1.1.



REVIEW OF  
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## **PART 1: INTRODUCTION**

### **CHAPTER 1. THE CIVIL JUSTICE COSTS REVIEW**

#### **1. INTRODUCTION**

1.1 Lord Woolf's reforms. It is now ten years since Lord Woolf's reforms to civil procedure ("the Woolf reforms") were implemented. The Civil Procedure Rules 1998 ("the CPR"), which implemented the Woolf reforms, came into force on 26<sup>th</sup> April 1999. Those reforms have brought huge benefits to civil litigants. Far more cases are settled before issue. Those cases which are contested proceed far more swiftly from issue to trial. We no longer have the repeated tragedy (for such it was) of meritorious claims being "struck out for want of prosecution". The case management function, which the court has assumed following the Woolf reforms, prevents cases from being parked indefinitely, whilst the parties or their lawyers attend to other matters. The creation of "tracks" for cases ensures that each type of case receives an appropriate allocation of resources and degree of attention from the court. The "fast track" ensures that lower value cases are brought to trial with expedition and that the trial costs (although not the pre-trial costs)<sup>1</sup> of such cases are fixed. The procedure for offers contained in CPR Part 36, including claimants' offers (one of Lord Woolf's many innovations) has by common consent been a considerable success.

1.2 The costs of civil justice continued to rise. Despite the general success of the Woolf reforms, the costs of civil litigation continued to rise. This was due in no small part to (a) the introduction of conditional fee agreements ("CFAs") and (b) the reforms to CFAs effected by the Access to Justice Act 1999. These two developments were not based on recommendations contained in Lord Woolf's report. Instead they were consequential upon the retraction of legal aid and the Government's search (in some haste) for alternative means of funding litigation. Leaving aside those parallel developments, however, it must be accepted that some of the cost increases since 1999 do appear to be consequential upon the Woolf reforms. Pre-action protocols and the requirements of the CPR have led to "front loading" of costs. Also the detailed requirements of the CPR and the case management orders of courts cause parties to incur costs which would not have been incurred pre-April 1999. Where cases settle between issue and trial (and the vast majority of cases do so settle) the costs of achieving settlement are sometimes higher than before. I say "sometimes" because the Woolf reforms promote earlier settlements and thus in some cases they

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<sup>1</sup> The pre-trial costs of such cases are not yet fixed, despite Lord Woolf's recommendation that they should be fixed. In this regard, I shall take up the baton from Lord Woolf in chapter 22 below.

achieve an overall cost saving.<sup>2</sup> Furthermore, settlements based upon a fuller understanding by parties of their opponents' cases are more likely to be fair.

1.3 Mounting concerns about the costs of civil justice. Over the last decade there have been mounting concerns about the costs of civil justice. Liability insurers have maintained that the costs payable to claimant lawyers are becoming ever more disproportionate to the damages paid to claimants. The media have forcefully expressed their anxiety about the escalating costs of defamation and related litigation.<sup>3</sup> Claimant lawyers have protested<sup>4</sup> about massive costs being run up as a result of procrastination by liability insurers. There has been an explosion of litigation about costs issues,<sup>5</sup> which has added a further layer to the costs of litigation (sometimes referred to as "costs of costs"). On 21<sup>st</sup> September 2008 the Lord Chancellor delivered a speech which included the following passage:

"I am concerned about another element of legal services – "No win – no fee" arrangements.

It's claimed they have provided greater access to justice, but the behaviour of some lawyers in ramping up their fees in these cases is nothing short of scandalous.

So I am going to address this and consider whether to cap more tightly the level of success fees that lawyers can charge."

1.4 The Master of the Rolls' Costs Review. During 2008 the Master of the Rolls, Sir Anthony Clarke, acknowledged that there was concern about the costs of civil litigation. He indicated on a number of occasions during the summer his intention to appoint a lord justice of appeal to carry out a fundamental review of the costs of civil justice. On the 3<sup>rd</sup> November 2008 the Master of the Rolls made the following announcement:

"The Master of the Rolls has appointed Lord Justice Jackson to lead a fundamental review into the costs of civil litigation.

The review will commence in January 2009, and the findings are due to be presented to the Master of the Rolls in December 2009. Lord Justice Jackson will be the sole author of the final report, but he will be assisted in the review by a small group of 'assessors', drawn from the judiciary, legal profession and an economist. The review group are due to meet monthly to discuss issues and findings.

The review is being undertaken as the Master of the Rolls, Sir Anthony Clarke, is concerned at the costs of civil litigation and believes that the time is right for a fundamental and independent review of the whole system."

1.5 The terms of reference for the fundamental review were set out in an appendix to that announcement.

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<sup>2</sup> For empirical research on these issues, see chapter 9, paragraph 5.3.

<sup>3</sup> The concerns of the media were supported by Brooke LJ in *King v Daily Telegraph* [2004] EWCA Civ 613; [2005] 1 WLR 2282.

<sup>4</sup> Some supporting evidence re specific instances was submitted during Phase 1 of the Costs Review.

<sup>5</sup> The so-called "Costs War", which is described in chapter 3.

## 2. MY TERMS OF REFERENCE

2.1 The terms of reference for my review, as appended to the Master of the Rolls' press release, read as follows:

“With the support of the Ministry of Justice, the Master of the Rolls has asked Lord Justice Jackson to conduct a wide ranging review into civil costs.

### **Objective**

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

### **Terms of reference:**

In conducting the review Lord Justice Jackson will:

- Establish how present costs rules operate and how they impact on the behaviour of both parties and lawyers.
- Establish the effect case management procedures have on costs and consider whether changes in process and/or procedure could bring about more proportionate costs.
- Have regard to previous and current research into costs and funding issues; for example any further Government research into Conditional Fee Agreements - 'No win, No fee', following the scoping study.
- Seek the views of judges, practitioners, Government, court users and other interested parties through both informal consultation and a series of public seminars.
- Compare the costs regime for England and Wales with those operating in other jurisdictions.
- Prepare a report setting out recommendations with supporting evidence by 31 December 2009.”

## 3. THE ASSESSORS

3.1 The original assessors. The original assessors appointed were:

- Senior Costs Judge Master Peter Hurst
- The Right Honourable the Lord David Hunt of the Wirral, Partner at Beachcroft LLP
- Mr Justice Ross Cranston
- Jeremy Morgan QC, 39 Essex Street
- Michael Napier CBE QC, Senior Partner at Irwin Mitchell
- Colin Stutt, Head of Funding at the Legal Services Commission
- Professor Paul Fenn, Head of Industrial Economics at Nottingham University Business School

3.2 Substitution. Unfortunately, Lord Hunt was obliged to resign on health grounds at an early stage of the review. In the circumstances, Andrew Parker, a partner of Lord Hunt at Beachcrofts and a member of the Civil Procedure Rule Committee, kindly agreed to become an assessor in his place.

3.3 Monthly assessors' meetings. The seven assessors have attended monthly meetings with me at the Royal Courts of Justice. On these occasions, numerous issues have been debated. The deliberations and the advice of the assessors have been of enormous assistance. In relation to issues where the assessors disagree, I have gained much insight from listening to the argument and hearing the alternative viewpoints exposed.

3.4 Further contributions made by the assessors. In addition to attending the monthly meetings, the assessors have been generous with their time. They have given advice on individual points. They have assisted with drafting and research for certain chapters of this report. They have commented candidly on various draft chapters which I have prepared and circulated. This report, however, remains my sole responsibility.

#### 4. OTHERS WHO HAVE ASSISTED

4.1 Judicial assistants. I have so far had the assistance of two judicial assistants, based at the Royal Courts of Justice. They are:

- Pete Given, a trainee solicitor at Allen & Overy, who was with me from 5<sup>th</sup> January until 6<sup>th</sup> March 2009.
- Ilona Groark, an associate solicitor at Herbert Smith LLP, who is with me from 9<sup>th</sup> March to 31<sup>st</sup> July 2009.

Both Mr Given and Miss Groark have worked long hours and provided invaluable assistance with research and drafting. They have attended a number of meetings concerning the Costs Review, either with me or on my behalf. They have also discussed the issues with me, as the review has proceeded.

4.2 Part time secondment of experienced solicitor. Between January and April 2009 Julian Bailey, a solicitor at CMS Cameron McKenna LLP, has been seconded to the Costs Review on a part time basis, working from his own office. Mr Bailey is qualified as a solicitor in both England and Australia, with 13 years experience of practice in the two jurisdictions. Mr Bailey, supported by CMS overseas offices, has provided extensive and invaluable assistance with research and drafting in relation to six of the "foreign jurisdiction" chapters.

4.3 Clerk. Abigail Pilkington, a newly qualified barrister, is serving as clerk to the Costs Review from 5<sup>th</sup> January to 14<sup>th</sup> September 2009 (when she will start her pupillage). Ms Pilkington is working long hours at the nerve centre of the Costs Review, liaising with all who are involved in the review and maintaining a well organised filing system of written submissions, correspondence etc. She also attends numerous meetings and assists with research and drafting. Without her meticulous organisation, skill and good humour, this review would be in serious difficulties.

4.4 Lawyers who have helped with individual chapters. One circuit judge and a number of counsel and solicitors have given very substantial assistance with research and drafting for individual chapters. They have applied themselves with considerable

industry to their assigned topics and have attended meetings with me to debate the issues. I have learnt much from all of them. They are (in alphabetical order):

- Gilbert Anderson (Andersons Solicitors LLP)
- Nick Bacon (4 New Square) (assisted by Daniel Saoul)
- Tara Conklin (White and Case LLP)
- Joanna Folan (Beachcroft LLP)
- Andrew Francis (Serle Court) (assisted by Paul Adams, Michael Edenborough, Keith Gordon, and Mark West)
- HH Judge Madge
- Alison Potter (4 Pump Court)
- Kate Wilson (1 Brick Court)

4.5 Others who have given assistance. Many others have given assistance in connection with this report and I thank them all. Although I do not name everyone who has given assistance, I must mention (in alphabetical order): Michael Black QC, Mike Clements, Master Gordon-Saker, Master O'Hare, Denis O'Riordan, Lindy Patterson, Clare Radcliffe and Lisa Sanchez.

4.6 Academic Lawyers. I have had meetings plus follow-up correspondence with the following academic lawyers:

- Mr Neil Andrews (Director of Studies in Law and Fellow of Clare college, Cambridge)
- Professor Dame Hazel Genn (Dean of Laws, Professor of Socio-Legal Studies and co-director of the Centre for Empirical Legal Studies in the Faculty of Laws at University College London)
- Herr Doktor Matthias Kilian (Director Of The Soldan Institute For Law Practice Management, Essen, Germany)
- Professor Herbert Kritzer (Professor of Political Science and Law Emeritus at the University of Wisconsin-Madison)
- Professor Richard Moorhead (Deputy Head of School at Cardiff University Law School)
- Professor Rachael Mulheron (Professor of Law at Queen Mary University of London)
- Professor Ian Scott (Emeritus Professor of Birmingham Law School at the University of Birmingham, General Editor of the White Book)
- Professor Garry Watson (Professor at Osgoode Hall Law School, York University, Canada)
- Professor Michael Zander QC (Professor Emeritus of Law at the London School of Economics and Political Science)
- Professor Adrian Zuckerman (Professor of Civil Procedure at Oxford University)

I have also spoken by telephone with Professor Stephen Nickell, who is Professor of Economics at Oxford University, Warden of Nuffield College and Chairman of the Advisory Committee on Civil Costs.<sup>6</sup> I hope to meet Professor Nickell in the summer.

4.7 Judges. As can be seen from chapter 11 below, numerous High Court judges, circuit judges, recorders, masters, costs judges, district judges and deputy district judges filled in questionnaires for the purpose of the judicial surveys, the results of which appear at Appendices 1 to 9 of this report. Judge Stephen Oliver-Jones QC and District Judge Robert Hill kindly organised the surveys of circuit judges and district judges. They also undertook the exercise of analysing the returns and preparing the spreadsheets which appear at Appendices 1, 1a, 2 and 8. This was a mammoth task, which occupied many hours at evenings and weekends. Judge Stephen Stewart QC kindly organised a series of meetings with judges and practitioners in Liverpool (a city where costs issues are not unknown) and accompanied me to those meetings. Also, whilst travelling overseas in recent weeks, I have met a large number of judges, who have provided much helpful information and advice, based upon their own experience. Finally, I have had numerous discussions about costs issues with my judicial colleagues. I am most grateful for their help, but I will not name all those judges.

4.8 Costs officers and court staff. John Lambert and his colleagues at the Supreme Court Costs Office kindly organised the survey of costs judges and produced the spreadsheet at Appendix 7. Mr Lambert also (with his colleagues) undertook the exercises which I requested in respect of court fees. The results of those exercises appear in chapter 7 and Appendix 16. James Parker and Marie Bancroft-Rimmer kindly organised the survey of Queen's Bench judges, Chancery judges and Chancery masters. They also produced analyses of the results. Stella Christoforou has produced further spreadsheets in respect of the judicial surveys and has assisted in reorganising and formatting the appendices to this report.

4.9 Fast Track Fixed Costs Sub-committee. Two of the assessors, Andrew Parker and Professor Paul Fenn, formed part of the Fast Track Fixed Costs Sub-committee, which was set up following the first assessors' meeting (14 January 2009). The further members of the sub-committee are District Judge Michael Walker, District Judge David Oldham, District Judge Richard Chapman and Colin Ettinger. The results of the sub-committee's deliberations appear in chapter 22.

4.10 Contributors to Phase 1 of the Costs Review. A large number of organisations have contributed information, data and comment to the Costs Review over the last four months. They are identified below. Some organisations were pressed by me for further information or to carry out surveys for specified purposes. They all responded generously to such requests and the results of their endeavours appear as appendices to this report.

4.11 Oxford University. Dr Christopher Hodges (Head of the CMS Research Programme on Civil Justice Systems Centre for Socio-Legal Studies, University of Oxford) and Professor Stefan Vogenauer (Professor of Comparative Law and Director of the Institute of European and Comparative Law, University of Oxford) of the Law Faculty of Oxford University are running a project on overseas costs rules in parallel with this Costs Review. Both Julian Bailey and I have had meetings and correspondence with Dr Hodges and Professor Vogenauer, in order to co-ordinate our respective projects. Dr Hodges will participate in one of the Phase 2 seminars of the Costs Review, namely the Manchester seminar on 3<sup>rd</sup> July 2009. I will participate

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<sup>6</sup> See chapter 52, section 2.



in the Oxford seminar organised by Dr Hodges and Professor Vogenauer on 6<sup>th</sup> and 7<sup>th</sup> July. Although our respective projects have different parameters (Oxford are looking at a wider spread of overseas jurisdictions and have more of an academic focus to their research), it is hoped that each project will benefit from the other. Certainly, I shall be paying close attention during Phase 2 to the Oxford papers which are now being prepared.

4.12 Ministry of Justice (“MoJ”). The Rt Hon Jack Straw MP, the Lord Chancellor, and Mrs Bridget Prentice MP, Minister for Justice, have expressed their support for the Costs Review. I have had most helpful meetings with them. I have also had most helpful meetings with MoJ officials, in particular Mr Andrew Frazer. I have received much assistance from the MoJ officials and statisticians.

4.13 Thanks. I am extremely grateful to all those mentioned above for the enormous assistance which they have provided over the last four months. Many have worked extremely long hours on the tasks assigned to them. None of them has received any payment for that work.<sup>7</sup>

4.14 I am also extremely grateful to the following firms of solicitors for allowing trainees or solicitors on their staff to take time out of fee-earning in order to assist in this review:

- Allen & Overy LLP
- Andersons Solicitors LLP
- Beachcroft LLP
- CMS Cameron McKenna LLP
- Herbert Smith LLP
- White & Case LLP

In the case of CMS Cameron McKenna, I am also grateful for the assistance provided by the European network of “CMS” offices in supplying information, materials and translations, as well as arranging or hosting meetings. In the case of Herbert Smith, I am also grateful for the logistical support which they have provided to Miss Groark while she is working as my judicial assistant.

## 5. THE CONDUCT OF THE COSTS REVIEW SO FAR

### (i) Division into three phases

5.1 Plan for the year. Twelve months have been allotted for the Costs Review, namely January to December 2009. I have decided to divide the year into three separate periods:

- January to April: Phase 1 – fact finding and preparation of this preliminary report.
- May to July: Phase 2 – consultation.
- September to December: Phase 3 – preparation of final report.

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<sup>7</sup> A modest weekly sum is paid to firms of solicitors who provide judicial assistants.

5.2 Commencement date for Phase 2. In order to allow time for copying and distribution of this preliminary report, publication has been fixed for Friday 8<sup>th</sup> May 2009. The consultation period will effectively start with the press conference on that date.

(ii) Work undertaken in Phase 1

5.3 Written submissions during Phase 1. During January I received and considered a large number of written submissions. These were circulated to the assessors, in order to inform discussion at the monthly meetings. A list of the organisations and persons who sent in written submissions is set out in Annex 1. A number of individuals and organisations have sent in letters and written submissions some time after the deadline of 31<sup>st</sup> January 2009. It has not been feasible to take these into account during Phase 1. These “late” documents and submissions have been filed and will be treated as submissions during Phase 2, the consultation period.

5.4 Meetings attended with representative bodies during January and February 2009. During January and February I (together with judicial assistant or clerk) attended meetings with the organisations listed in Annex 2.

5.5 Conferences and seminars. During Phase 1 I have attended the conferences and seminars listed in Annex 2.

5.6 Overseas visits. During January I visited Germany for two days, accompanied by Julian Bailey. During March and April I spent three weeks visiting Hong Kong, Australia, New Zealand, the USA and Canada, accompanied by two of the assessors (Senior Costs Judge Peter Hurst and Michael Napier QC), the clerk to the Costs Review (Abigail Pilkington) and members of the Civil Justice Council. In Hong Kong I was also accompanied by Senior Master Steven Whitaker, who made a presentation at a Hong Kong seminar on e-disclosure. I made a separate one-day visit to Paris in April, accompanied by Julian Bailey. Professor Paul Fenn (assessor) attended a conference on civil litigation costs in Rotterdam on 24<sup>th</sup> April 2009.

5.7 Meetings attended with overseas organisations and persons. During the overseas visits, the assessors and I attended meetings with the organisations and persons listed in Annex 3.

5.8 Report writing. The drafting of this preliminary report has been a major ongoing task throughout Phase 1. Although I have received much research assistance, suggested drafts, suggested revisions to my drafts and many comments from all sides (for all of which I am genuinely grateful), this document remains my own report and I am responsible for all errors and omissions. Much of this report has been prepared in great haste and without the polish which I would normally wish to give to such a document.

5.9 Comment. All contributors to this review have been candid, indeed forthright, in their opinions. That is extremely helpful, because it exposes the issues and lays bare the magnitude of the task which lies ahead. The issue of costs is one which generates deeply held and fundamentally opposed opinions. It is an issue of obvious public importance and one which touches upon a number of vested interests. In the last four months I have been caught up in a maelstrom of conflicting arguments. Indeed, in comparison with the present Costs Review, the design and construction of the Tower of Babel seems to have been quite a harmonious and straightforward project. Whatever I may recommend at the end of this year (and at

this stage I still have an open mind),<sup>8</sup> one thing is inevitable. My final report will generate protest from at least some directions and quite possibly from all directions.

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<sup>8</sup> The reported assertion by some protagonists, that Jackson has already made up his mind and is simply going through the motions, is not correct.

## **CHAPTER 2. THE SCHEME OF THIS PRELIMINARY REPORT**

### **1. PURPOSE AND STRUCTURE OF REPORT**

1.1 **Purpose of report.** The purpose of this report is to review the operation of the costs rules and to examine possible means of reducing the costs of civil litigation, whilst promoting access to justice. This report does not reach any firm conclusions. It sets out the facts (as ascertained during Phase 1 of the Costs Review) and identifies possible options. This report is intended to set the scene for the consultation exercise during Phase 2, not to prejudge the outcome of that consultation.

1.2 **Parts 1 and 2.** Part 1 of this report explains the present cost rules and the struggles to which they have given rise. It sets out the role of the civil courts and the function of the present Costs Review. Part 2 sets out the basic facts. It examines how much civil litigation is taking place; how many claims are being made which settle before court proceedings are issued. Part 2 sets out what court fees are levied on litigants. Court fees are a significant factor in the costs of litigation, over which the parties and their lawyers have no control. Part 2 also addresses the question of what lawyers earn. That chapter reviews average earnings of lawyers in particular categories, in so far as data are available from published sources.

1.3 **Part 3.** Part 3 contains a review of academic research and literature, which bears upon the question of costs. It also summarises the information which I have obtained and the research which I have undertaken during Phase 1 of the Costs Review.

1.4 **Part 4.** Part 4 reviews the different ways in which litigation may be funded. These chapters explain how it comes about that litigation costs at their present level are in fact met.

1.5 **Part 5.** Part 5 reviews the fixed costs regime which currently exists in CPR Part 45 and considers the extent to which such regime might be extended. Strictly speaking some of the costs in Part 45 are “predictable” rather than fixed, but it is convenient to use the word “fixed” in a broad sense, to embrace both fixed costs in the strict sense and also predictable costs.

1.6 **Part 6.** Part 6 reviews the costs of personal injuries litigation. It examines options for reforming both the process and the costs rules.

1.7 **Part 7.** Part 7 focuses on the costs of certain specific types of litigation, devoting one chapter to each. No specific theme emerges from this part, save that it is dangerous to generalise about “costs”. The considerations which govern costs in each individual area of civil litigation are very different.

1.8 **Part 8.** Part 8 focuses on methods of controlling costs. This part is principally concerned with the larger and more complex cases in which disclosure and preparation of witness statements can be a major generator of costs.

1.9 **Part 9.** Part 9 reviews regimes in which currently there is no cost shifting. Neither employment tribunals nor ancillary relief proceedings fall within my terms of reference. Nevertheless, it is extremely helpful to see how a regime in which each side bears its own costs works out in practice. In the context of employment tribunals, we can also see the effect of contingency fees.

1.10 Part 10. Part 10 deals with the two methods of assessing costs and examines options for reform.

1.11 Part 11. The fifth bullet point of my terms of reference requires me to “*compare the costs regime of England and Wales with those operating in other jurisdictions*”. Accordingly, Part 11 of this report describes the costs regimes operating in nine other jurisdictions. Readers of this report can compare those regimes with our own (as described in chapter 3). It is hoped that the uniform structure adopted for chapters 54 to 62 will assist in that exercise.

1.12 Part 12. Part 12 of the report draws the threads together and sets out what is planned for Phase 2 of the Costs Review.

## 2. AVAILABILITY OF THIS REPORT

2.1 A limited number of hard copies of this report have been printed and are being made available to interested parties. Alternatively, the report and its appendices are available to be downloaded via a link from the following website: [http://www.judiciary.gov.uk/about\\_judiciary/cost-review/index.htm](http://www.judiciary.gov.uk/about_judiciary/cost-review/index.htm).

## 3. FUNDAMENTAL QUESTIONS WHICH EMERGE FROM THIS REPORT

3.1 A number of fundamental, but interrelated, questions emerge from the preliminary report. I shall highlight some of those questions in this section of chapter 2.

### (i) Cost shifting

3.2 Abolition? In the course of Phase 1, I have detected no serious body of opinion, which supports total abolition of the cost shifting rule. It must be conceded, however, that a number of areas of litigation function perfectly smoothly without any cost shifting rule. The question therefore arises whether there are any other areas in which the abolition of cost shifting would be of overall benefit to court users. In considering this question, readers might gain assistance from (a) the academic research summarised in chapter 9 and (b) the experiences gained from regimes where currently there is no cost shifting, as described in chapters 49-51 and 60.

3.3 Modification? Assuming that cost shifting remains, the next question which arises is whether the rule should be modified in its effect. Two principal modifications which arise for consideration are identified in the two following paragraphs.

3.4 One way cost shifting. The first possible modification would be to introduce one way cost shifting. One way cost shifting means that when the defendant loses, he pays the claimant’s costs; when the claimant loses, each side bears its own costs. Such a system would self-evidently benefit claimants. Ironically, such a system would also benefit defendants in certain areas. A one way cost shifting regime would be cheaper for defendants than a regime under which they recover costs when they win, but pay ATE premiums (as well as all the other costs) when they lose: see chapter 25. A crucial consideration, however, would be the need to provide incentives for claimants to accept reasonable offers.

3.5 Partial cost shifting. The second possible modification, which merits consideration, would be to move from the present system of full<sup>9</sup> cost shifting to one of partial cost shifting. By partial cost shifting, I mean that the winning party should recover part only of its costs and should pay the balance itself.

(ii) Fixed costs

3.6 Should the existing range of fixed costs be extended? The question here is whether costs should be fixed for a wider range of cases than are currently provided for by CPR Part 45.

3.7 There are two different types of fixed costs. The difference between them is of some importance:

- (i) Fixed costs which are the product of a genuine attempt to estimate the actual (reasonable) costs of the winning party.
- (ii) Fixed costs which are deliberately set at less than the actual (reasonable) costs of the winning party.

I shall refer to these two categories as “type 1” and “type 2” respectively.

3.8 Type 1 fixed costs. The fixed costs in CPR Part 45 section II are an example of type 1 fixed costs. In the ordinary way, it is expected that the lawyer will recover whatever is due from the other side under Part 45 section II, and that the lawyer will not claim anything further from his own client. It is intended that over time the lawyer will break even and make an appropriate profit from such cases on a “swings and roundabouts” basis.

3.9 The policy arguments in favour of such a regime include:

- (i) The claimant/client retains all of his damages intact.
- (ii) Certainty is introduced into the costs system and expensive assessment hearings are avoided.

3.10 The policy arguments against such a regime include:

- (i) The devil is in the detail, namely in devising proper fixed costs figures for (a) each type of case and (b) each stage at which that type of case might be resolved.
- (ii) The fixed costs require regular review, which past experience suggests may not happen.

3.11 Type 2 fixed costs. It is perfectly possible to have (and some jurisdictions do have)<sup>10</sup> a regime in which the fixed costs are only intended to meet part of the winning party’s bill. The client is expected to pay the rest.

3.12 The policy arguments in favour of such a regime include the following:

- (i) Some litigants (e.g. small businesses) may regard the risk of incurring indeterminate costs liability to the other side if they lose as worse than the risk of failing to recover all their own costs if they win. A party can control the costs

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<sup>9</sup> Subject to deduction of unreasonable or disproportionate items.

<sup>10</sup> See Part 11 of this report.

which he incurs. A party cannot control the costs which the other side may be running up. Nor can a retrospective detailed assessment achieve such control.

- (ii) Such a regime achieves certainty in those categories of civil litigation where it is impracticable to establish type 1 fixed costs. Certainty is a commodity which many litigants (especially commercial litigants) crave and which is singularly lacking in civil litigation.
- (iii) If both parties know that, win or lose, they will be paying at least part of their own costs, there will be an incentive for economy on both sides.

3.13 The policy arguments against such a regime include:

- (i) It is unjust that the party who is vindicated should bear part of his own costs. The claimant, if successful, should keep all of his damages intact. The defendant, if successful, should walk away from the courtroom no poorer than when he arrived.
- (ii) In a fixed costs regime a wealthy party can generate much expense by procedural manoeuvres and thus grind down the other side, which will never recover all of its costs.

3.14 It should be noted that type 2 fixed costs are one variant of partial cost shifting (discussed in paragraph 3.5 above). This is not, however, the only way of achieving partial cost shifting.

### (iii) Personal injuries

3.15 Policy questions. Personal injuries litigation gives rise to a number of policy questions. In particular:

- (i) Is it ever right that claimants should suffer any deductions from damages for personal injuries, in order to cover costs?
- (ii) Is there any way that the high costs currently incurred in respect of processing personal injury claims can be reduced, whilst ensuring that proper compensation reaches claimants?

3.16 Should claimants receive damages free from any deduction for costs? Even in a costs recovery regime, it is normal for successful claimants to suffer some deductions from their damages, namely, items of costs disallowed on assessment. See, for example, Appendices 9, 11, 13, 14 and 15. In the past it has been accepted that personal injury claimants were, conceptually, in no different position. Thus in CFA cases prior to April 2000 claimants were liable to lose up to 25% of their damages in respect of deductions for success fees and ATE insurance premiums. Furthermore, deductions from damages are not unusual in legally aided cases. Nor are such deductions unusual overseas.<sup>11</sup> Under the current CFA regime, however, the claimant usually receives 100% percent of his damages without any deductions by the lawyers.

3.17 The point has forcefully been urged by APIL and others that 100% retention of personal injury damages is now an established principle, from which there should be no retreat. Damages for personal injuries, unlike damages in respect of other matters, are sacrosanct. The alternative view, which has been urged by some, is that

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<sup>11</sup> For example, personal injury claimants under the Hong Kong SLAS suffer deductions of 6% or 10%, depending upon the stage at which the case is resolved: see chapter 18.

personal injury claimants should not be treated differently from other claimants; furthermore if personal injury claimants know that, come what may, they will never have to pay any costs, then the costs rules are not imposing appropriate incentives upon claimants to encourage reasonable conduct.

3.18 This is clearly a question of principle, which must be addressed during Phase 2. It should be noted that there is a halfway house between the two extreme positions. One intermediate view is that general damages for pain and suffering and, possibly, special damages in respect of past losses could be subject to deduction, but damages in respect of future care and future accommodation needs should never be subject to any deduction.

3.19 Reducing the costs of personal injury claims? The data gathered during Phase 1 indicates that very substantial sums are being spent upon the resolution of personal injury claims, the majority of which (but not all of which) are relatively straightforward in legal terms. The question must be asked whether the same compensation or, ideally, more compensation<sup>12</sup> could be transferred to claimants at lesser cost.

#### (iv) Controlling the costs of “heavy” litigation

3.20 The particular problems of “heavy” litigation. Complex civil claims (often arising out of business transactions), in which large sums of money are at stake, give rise to a different set of problems. I refer here to commercial litigation, mercantile litigation, substantial Chancery claims, construction cases, high value professional negligence cases and so forth. The underlying transactions have usually generated a mass of written documents and an even larger mass of electronic material. Costs in this category of litigation may be very substantial. In some instances, they may dwarf the sums at stake.<sup>13</sup> In other instances, those substantial costs may nevertheless be proportionate. Indeed in exceedingly high value litigation, it could be said that costs are more proportionate than anywhere else. For example, “The Lawyer” has pointed out that in the recent *Buncefield* litigation the claimants’ costs of £16 million in respect of the negligence issue represented some 2% of the value of the claim.<sup>14</sup> Nevertheless it is, self-evidently, necessary to control the costs of heavy litigation.

3.21 The overarching question. A number of proposals have been made in the course of Phase 1 as to how the costs of heavy litigation might be controlled. These proposals are discussed in chapters 40 to 48 below. The over-arching question, however, in respect of all these proposals is whether (a) the full “Rolls Royce” service should be delivered, regardless of cost, or (b) the amount of investigation undertaken in the course of such litigation should be commensurate with the sums which are in issue between the parties.

3.22 Commercial Court. The Commercial Court’s Long Trials Working Party has recently been grappling with similar issues<sup>15</sup> to those which my assessors and I have been confronting in relation to heavy cases generally. Different views have been

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<sup>12</sup> The Law Commission’s 1998 recommendations for increasing general damages for personal injuries have never been fully implemented: see *Damages for personal injury: non-pecuniary loss*, Law Com 257 (1998).

<sup>13</sup> For example, in one such case which I tried last year, the claimant obtained judgment for approximately £6 million, whereas the total costs incurred by both parties amounted to some £22 million.

<sup>14</sup> “The Lawyer” online, 29<sup>th</sup> April 2009: <http://www.thelawyer.com/buncefield-proves-trial-fees-can-be-cut/1000551.article>.

<sup>15</sup> Specifically with reference to the Commercial Court.



expressed as to whether any recommendations emerging from the present Costs Review should affect the Commercial Court, or whether the procedures and costs rules of that court should be regarded as beyond the bounds of this review. I sense that the majority view (subject to what may emerge during Phase 2) is that the Commercial Court is currently overhauling its own procedures, with one eye very firmly on costs, and that this review should be concentrating primarily upon litigation outside the Commercial Court. I shall return to this issue, however, in chapter 32.

(v) Recoverability of additional liabilities

3.23 One recurrent source of concern for defendants is the liability which has been imposed upon them since April 2000 for (a) success fees under CFAs and (b) ATE insurance premiums. As can be seen from the later chapters of this report, such liabilities can be very extensive and (according to some submissions) crippling for defendants.

3.24 The competing arguments. Many on the claimant side contend that the current regime, at long last, provides access to justice for claimants who would otherwise have no means of redress (especially since the retraction of legal aid in 2000). Many on the defendant side maintain that the price of this access to justice (at least under the current rules) is too high. The Media Lawyers Association contend that their members' costs liabilities in publication cases are so great as to infringe their rights under ECHR Article 10. The NHSLA contend that litigation costs under the present regime are imposing an unacceptable drain upon the funds of the NHS. And so forth.

3.25 The three questions. The above arguments give rise to three questions:

- (i) In principle, should success fees and ATE premiums continue to be recoverable at all under costs orders?
- (ii) If yes, then should this recovery be subject to some, and if so what, restrictions?
- (iii) If no, then how should access to justice be secured for claimants who currently benefit from the full recovery regime?

3.26 In addressing those questions, it is necessary to consider not only the financial positions of the parties and the burdens cast upon them, but also the other functions of the costs rules. In particular, one function of the costs rules is to provide an incentive for reasonable litigation behaviour. If the rules transfer the entire costs of litigation onto the shoulders of defendants, then it may be said that two adverse effects follow:

- (i) The cost rules impose no proper incentive upon claimants to act reasonably.
- (ii) The costs rules impose excessive pressure upon defendants to settle unmeritorious claims.

3.27 The above considerations are some of the matters that must be addressed during Phase 2 in relation to the "recoverability" issue.

(vi) Assessment of costs

3.28 Mechanism for assessing costs. To the extent that the full cost shifting rule survives, there must be a mechanism for assessing those costs which have been

reasonably and proportionately incurred by the winning party. At the moment we have two mechanisms, neither of which are immune from criticism.

3.29 Detailed assessment. This procedure (formerly known as “taxation”) was traditionally the assessment procedure adopted in the majority of cases. It has the advantage of being carried out by specialist judges, who are well versed in the intricacies of costs. It has the disadvantage that those specialist judges have no prior involvement in the litigation, the costs of which they are assessing. It has the further disadvantage that the current procedures for detailed assessment are regarded by some as neither satisfactory nor cost effective. The crucial issues in relation to detailed assessment are whether the procedures should be reformed and, if so, how.

3.30 Summary assessment. The alternative mechanism, summary assessment, has the benefit of being immediate and of being undertaken by a judge who is familiar with the case. However, it has the drawback that not all judges who undertake summary assessment have substantial experience or expertise in the realm of costs. Nor is sufficient time always allowed for the exercise at the end of the substantive hearing. One obvious benefit of summary assessment (regardless of the degree of expertise with which it is performed) is that the existence of summary assessment deters unmeritorious or purely tactical interlocutory applications. It also deters obstructive conduct (e.g. refusal of reasonable requests for further information or specific disclosure). On the other hand, in the view of some, those benefits of summary assessment could more safely be achieved by making substantial orders for payments on account of costs, leaving the balance to be agreed or (in default of agreement) determined by detailed assessment.

3.31 To some extent, the attractiveness of the final option (making an order for payment on account, leaving the balance to be determined later) depends upon the effectiveness of the procedure for detailed assessment. Thus the questions discussed above in relation to (a) detailed assessment and (b) summary assessment are intertwined.

#### (vi) Funding and access to justice

3.32 My terms of reference specifically (indeed one might say primarily) require me to consider access to justice. Therefore, funding mechanisms must be considered in conjunction with the costs rules. Indeed the two issues are closely interrelated.

3.33 Cost shifting. The cost shifting rule automatically provides funding for the winning party (at the expense of the losing party). Thus for any party who is confident of victory the cost shifting rule promotes access to justice. However, for any litigant who is uncertain about the outcome (and many litigants are uncertain, even if they have apparently strong cases) the cost shifting rule may inhibit, rather than promote, access to justice, because the litigant fears having to pay both sides’ costs. This fear may be exacerbated by the fact that, although the litigant can control what his own lawyers spend, he cannot control what the opposing lawyers spend.

3.34 After the event (“ATE”) insurance. ATE insurance is a mechanism which can protect the litigant against liability for the other side’s costs. However, such insurance comes at a price, sometimes a very high price.<sup>16</sup> It is then a matter for the cost shifting rules to determine upon which party that price should fall. Prior to April 2000, that price fell upon the insured party. Since April 2000, it has fallen upon the

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<sup>16</sup> See e.g. chapters 36 and 37.

opposing party.<sup>17</sup> Of course, to the extent that cost shifting is abolished or, alternatively, one way cost shifting is introduced, then the need for ATE insurance<sup>18</sup> abates.

3.35 Conditional fee agreements (“CFAs”). The present CFA regime provides funding for any party on a CFA, almost invariably claimants. This regime has the incidental merit of deterring weak cases, because solicitors are unlikely to take on weak cases on a “no win no fee” basis. On the other hand, there is a serious issue as to whether the present regime imposes excessive burdens upon the opposing parties (almost invariably defendants). Sometimes those opposing parties (e.g. regional newspaper publishers) have their own funding problems, which are greatly exacerbated by the present CFA regime.

3.36 What are the alternatives? If and to the extent that the CFA regime is overhauled, how will claimants who presently benefit from it fund their claims? A number of options have been canvassed. These range from contingency fee agreements (possibly in conjunction with an increased tariff for general damages in respect of personal injuries) to CLAFS and SLASs, as discussed in chapters 18 and 19.

3.37 Lying behind all these funding issues is the question how much litigation ought to cost. If means can be found of reducing the costs of the litigation process (as discussed in Parts 5, 6, 7 and 8 of this report), then the funding problems are diminished. One reason why Germany has widespread litigation funding available<sup>19</sup> is because the costs of the litigation process in Germany are far cheaper than in England and Wales.

#### 4. CONCLUSION

4.1 As set out above, this report is structured so far as possible to guide readers through the background material in an orderly sequence and to set out the facts and the issues objectively. This report is intended to provide the foundation for a constructive consultation exercise during Phase 2 of the Costs Review. No decisions will be made before the end of that consultation exercise.

4.2 At the end of the consultation period, the questions which I must address with the assistance of the assessors are complex and closely interrelated. The principal questions are identified in section 3 of this chapter. The remaining questions are identified in more detail in the following chapters of this report.

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<sup>17</sup> By the mechanism that when the opposing party wins, no premium is payable; when the opposing party loses, it has to pay the premium in an increased amount.

<sup>18</sup> At least in respect of opponent’s costs.

<sup>19</sup> Through legal expenses insurance.

## **CHAPTER 3. THE COSTS RULES AND THE COSTS WAR**

### **1. INTRODUCTION**

1.1 **The purpose of this chapter.** Many readers of this report will have a much more detailed knowledge of the minutiae of the costs rules than can be set out in this chapter.<sup>20</sup> However, this report is also intended to be read by non-lawyers who may not have a detailed knowledge of the costs rules. Accordingly, this chapter, rather than give a detailed account of the costs rules, sets out a brief overview of the rules and principles which govern the costs of civil litigation. Other chapters of this report set out specific aspects of the costs rules in greater detail. In particular, the detailed rules regarding the application of the costs rules in Chancery litigation are discussed in chapter 33 below.

1.2 **Background.** Prior to the introduction of the Civil Procedure Rules (“CPR”) on the 26<sup>th</sup> April 1999, the applicable rules of procedure were set out in the Rules of the Supreme Court and the County Court Rules. Under the previous regime, costs were an issue to be addressed at the conclusion of proceedings, with the court determining by whom costs were payable and the sum to be paid. The general approach was “winner takes all”, which many regarded as unsatisfactory. The CPR engendered significant change in relation to costs and the issue of costs now pervades all aspects of the civil litigation process. Indeed, the courts are obliged to have regard to the costs of a case when seeking to give effect to the overriding objective.<sup>21</sup> Furthermore, the courts now have greater flexibility with regard to costs orders and such orders may be more readily made against a successful party where this is justified (e.g. where the successful party has lost on a significant point despite winning overall). Disputes over costs are not uncommon and this is demonstrated by the so called “Costs War”. The history of the Costs War is set out in section 5 below.

1.3 **The meaning of “costs”.** The definition of “costs” is found in rule 43.2(1)(a). This rule provides that the term “costs” includes:

“...fees, charges, disbursements, expenses, remuneration, reimbursement allowed to a litigant-in-person under rule 48.6 [of the CPR], any additional liability incurred under a funding arrangement and any fee or reward charged by a lay representative for acting on behalf of a party in proceedings allocated to the small claims track...”

1.4 **The location of the costs rules.** The principal rules governing costs, as between the parties, in the civil courts are set out in rules 43 to 48 of the CPR. These rules are supplemented by the Practice Direction about Costs (“the Costs Practice Direction” or “CPD”).

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<sup>20</sup> A more detailed account of the rules and principles governing the costs of civil litigation is provided in Hurst PT: Civil Costs 4<sup>th</sup> Edition, Sweet & Maxwell (2007); and Cook MJ: Cook on Costs 2009, LexisNexis Butterworths (2009).

<sup>21</sup> Pursuant to rule 1.2 of the CPR, the courts are obliged to give effect to the overriding objective. The overriding objective involves dealing with cases justly (Rule 1.1(1)). Dealing with cases justly includes saving expense (CPR rule 1.1(2)(b)) and dealing with cases in a proportionate manner (CPR rule 1.1(2)(c)).

## 2. SOLICITOR AND OWN CLIENT COSTS

2.1 The retainer. The agreement between a solicitor and a client is termed a retainer. The retainer will usually set out the fees payable for the solicitor's services. Chapter 8 sets out, among other things, the charge out rates of various lawyers.

2.2 As between a solicitor and a client, the client is ultimately responsible for the payment of its own legal costs incurred in the course of litigation proceedings. However, in practical terms, this may not be the case if the client is, for example, instructing the solicitor under a CFA (i.e. no fee may be payable if the case is lost) or is funding the litigation through insurance or third party funding.

2.3 Professional duties and costs. Solicitors, like other professionals, are obliged to comply with extensive professional duties. In relation to costs, solicitors are obliged to comply with, among other things, the provisions of rule 2.03 of the Solicitors' Code of Conduct 2007 ("the Code").<sup>22</sup> Rule 2.03 (1) of the Code is set out below:

- "(1) You must give your client the best information possible about the likely overall cost of a matter both at the outset and, when appropriate, as the matter progresses. In particular you must:
  - (a) advise the client of the basis and terms of your charges;
  - (b) advise the client if charging rates are to be increased;
  - (c) advise the client of likely payments which you or your client may need to make to others;
  - (d) discuss with the client how the client will pay, in particular:
    - (i) whether the client may be eligible and should apply for public funding; and
    - (ii) whether the client's own costs are covered by insurance or may be paid by someone else such as an employer or trade union;
  - (e) advise the client that there are circumstances where you may be entitled to exercise a lien for unpaid costs;
  - (f) advise the client of their potential liability for any other party's costs; and
  - (g) discuss with the client whether their liability for another party's costs may be covered by existing insurance or whether specially purchased insurance may be obtained."

2.4 All costs information given by a solicitor to a client must be clear and confirmed in writing.<sup>23</sup> Solicitors are also obliged by the provisions of the Code to discuss with their clients whether the potential outcome of any litigation will justify the costs or risks involved (including the risk of having to pay an opponent's costs).<sup>24</sup>

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<sup>22</sup> The Solicitors' Code of Conduct 2007 is available at <http://www.sra.org.uk/solicitors/code-of-conduct.page>.

<sup>23</sup> Rule 2.03(5) of the Code.

<sup>24</sup> Rule 2.03(6) of the Code.

### 3. THE LEGAL SERVICES ACT 2007

3.1 The Legal Services Act 2007 (“LSA 2007”) received Royal Assent on 30<sup>th</sup> October 2007. The LSA 2007 is likely to promote radical change within the legal profession, and specifically in relation to the structure and regulation of firms offering legal services. The LSA 2007 introduces the following changes:

- it provides for the establishment of the Legal Services Board,<sup>25</sup> a body that will supervise the regulators of the legal profession (e.g. the Solicitors Regulation Authority);
- it creates the Office for Legal Complaints,<sup>26</sup> a legal services ombudsman to deal with consumer complaints in relation to the provision of legal services; and
- it permits two new types of legal practice: Legal Disciplinary Practices (“LDPs”) and Alternative Business Structures (“ABSs”).<sup>27</sup>

These two types of legal practice are discussed below.

3.2 LDPs. The term LDP is used to describe legal practices which provide legal services and are owned and managed by a combination of different types of legal practitioner (e.g. solicitors, barristers, legal executives, notaries etc.). LDPs may also be owned and managed by a minority (up to 25%) of non-lawyers subject to approval by the Solicitors Regulatory Authority. It is likely that LDPs will be permitted from spring 2009. LDPs do not allow the introduction of external capital by non-lawyer investors.

3.3 ABSs. The definition of ABS is wide and will permit a variety of business structures, including (a) multidisciplinary practices which offer both legal and non-legal services; and (b) equity ownership structures whereby non-lawyers, including commercial entities, can own firms that provide legal services. ABSs will allow the introduction of external capital by non-lawyer investors. It is unlikely that ABSs will be permitted until at least 2011 or 2012. ABSs have been the subject of much interest from both within and outside of the legal profession. In particular, certain private equity firms and large commercial organisations have expressed an interest in investing in the provision of legal and other services through the ABS regime.

3.4 Implications for the Costs Review. At the time of writing, I understand that the LDP regime is soon to come into effect and the ABS regime is unlikely to come into effect for a few years. It is, therefore, difficult to predict with any certainty what the effects of these regimes will be on the costs of civil litigation (if any). Many commentators believe that the LSA 2007 will encourage competition within the legal services market and that this may, in turn, improve efficiency and decrease the costs of legal services. Indeed, the 2005 Government White Paper<sup>28</sup> proposing ABSs identified the potential benefits to consumers resulting from improved efficiency in the legal services market, including:

“reduced prices: consumers should be able to purchase some legal services more cheaply. This should arise where ABS firms realise

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<sup>25</sup> See LSA 2007, section 2(1) and Schedule 1.

<sup>26</sup> See LSA 2007, section 114(1) and Schedule 15.

<sup>27</sup> See LSA 2007, Part 5 and Schedule 13.

<sup>28</sup> “*The Future of Legal Services: Putting Consumers First*” published in October 2005, available at: <http://www.dca.gov.uk/legalsys/folwp.pdf>.

savings through economies of scale and reduce transaction costs where different types of legal professionals are part of the same firm.”<sup>29</sup>

3.5 Business Plan of the Legal Services Board. In January 2009 the Legal Services Board published its Draft Business Plan.<sup>30</sup> This states that the Board’s vision as independent overarching regulator of the provision of legal services is to achieve:

- “a market that allows access to justice for all consumers, in particular bridging the divide for those whose incomes exceed legal aid thresholds but fall below the level required to purchase essential legal services;”
- “empowered consumers receiving the right quality service at the right place.”<sup>31</sup>

3.6 Improving access to justice is a regulatory objective. Improving access to justice is one of the regulatory objectives set out in section 1 of LSA 2007. Approved regulators, including the Bar Council and the Law Society, will be obliged under section 28 to promote the regulatory objectives. Regulated persons, including barristers and solicitors, will be obliged under section 176 to comply with the regulatory arrangements made by the approved regulators. It may be said that promoting access to justice has always been part of the professional obligations of practising lawyers. The effect of LSA 2007, however, is that this obligation will become part of the statutory scheme within which lawyers operate. Promoting access to justice is, of course, a broad concept. Nevertheless, it includes, so far as possible, conducting litigation at proportionate cost.

#### 4. COSTS BETWEEN THE PARTIES

##### (i) General

4.1 If the dispute is settled. If the parties to litigation reach a compromise, they may agree the amount of costs to be paid (either as a discrete item or as part of a rolled up settlement figure). Alternatively, they may agree that the litigation will be settled for £x plus costs to be assessed. In the latter case the costs will be assessed by a costs judge, a district judge or an authorised court officer. If the parties reach a settlement before commencement of proceedings, but are unable to agree the amount of costs, then the receiving party may commence “costs only” proceedings in order to ascertain the amount of costs due.<sup>32</sup>

4.2 If the dispute proceeds to trial. If the parties fail to settle their dispute and the matter proceeds to trial, then the issue of costs will fall to be determined by the court, unless agreed.

##### (ii) Costs orders and rule 44.3

4.3 The court’s discretion. Rule 44.3 (1) of the CPR provides that the court has discretion as to whether costs are payable by one party to another, the amount of those costs and when such costs are to be paid.

4.4 The “loser pays”, “costs shifting” or the “follow the event” principle. The general rule is that the unsuccessful party will be required to pay the costs of the

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<sup>29</sup> *Ibid*, page 40.

<sup>30</sup> See [www.legalservicesboard.org.uk](http://www.legalservicesboard.org.uk).

<sup>31</sup> See chapter 2, entitled “Our Vision”.

<sup>32</sup> See CPR rule 44.12A.

successful party (although the court may make a different order).<sup>33</sup> This is known as the “loser pays”, “costs shifting” or “follow the event” principle. It is also sometimes referred to as the “English rule”, when contrasted with the regime in the USA.<sup>34</sup>

4.5 In deciding what order to make, the court must consider all the circumstances, including: the conduct of the parties; whether a party has succeeded on part of his case (even if the party has not been wholly successful); and any payment into court or admissible settlement offer which is brought to the court’s attention.<sup>35</sup> The conduct of the parties includes: (a) conduct before (e.g. compliance with any relevant pre-action protocol) and during the proceedings; (b) whether it was reasonable for a party to raise, pursue or contest a particular issue; (c) the manner in which a party has conducted its case or a particular issue; and (d) whether a successful claimant exaggerated its claim.<sup>36</sup>

4.6 The order. The court retains discretion as to the form of the order, although rule 44.3(6) sets out certain orders that a court may make. Such orders include an order that a party must pay a proportion or stated amount of another party’s costs; or that a party must pay costs related to a specific time period, stage or distinct part of the proceedings.<sup>37</sup> The court may also order that the paying party pay an amount on account prior to the assessment (see below) of the costs.<sup>38</sup>

4.7 Deemed costs orders. While the court normally retains discretion as to costs orders, there are certain circumstances when a costs order will be deemed to have been made. Pursuant to rule 44.12(1) a costs order will be deemed to have been made on the standard basis (see below) where a right to costs arises. Instances of this are: (a) the defendant’s right to costs where the claim is struck out for non-payment of fees (rule 3.7); (b) the claimant’s entitlement to costs where a Part 36 offer is accepted (rule 36.10(1) and (2)); or (c) the defendant’s right to costs where the claimant discontinues a claim (rule 38.6).

(iii) Interpretation of rule 44.3 by the courts

4.8 The starting position. Prior to the introduction of the CPR in April 1999, Lord Woolf MR in the case of *AEI Rediffusion Music Limited v Phonographic Performance Limited*<sup>39</sup> provided guidance on how rule 44.3 should operate and its purpose. At pages 1522 to 1523 he stated:

“...[the new Rules] make clear that the general rule remains, that the successful party will normally be entitled to costs, they at the same time indicate the wide range of considerations which will result in the court making different orders as to costs. From 26 April 1999 the ‘follow the event principle’ will still play a significant role, but it will be a starting point from which a court can readily depart...The most significant change of emphasis of the new Rules is to require courts to be more ready to make separate orders which reflect the outcome of different issues. In doing this the new Rules are reflecting a change of practice which has already started. It is now clear that too robust an application

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<sup>33</sup> CPR rule 44.3(2).

<sup>34</sup> As to which see chapters 9 and 60.

<sup>35</sup> CPR rule 44.3(4).

<sup>36</sup> CPR rule 44.3(5).

<sup>37</sup> See CPR rule 44.3(6).

<sup>38</sup> CPR rule 44.3(8).

<sup>39</sup> [1999] 1 WLR 1507.



of the “follow the event principle” encourages litigants to increase the costs of litigation, since it discourages litigants from being selective as to the points they take. If you recover all your costs as long as you win, you are encouraged to leave no stone unturned in your effort to do so.”

4.9 The issue-based approach. In the case of *Johnsey Estates (1990) Limited v Secretary of State for the Environment, Transport and the Regions*,<sup>40</sup> Chadwick LJ (with whom Arden and Schiemann LJ agreed) set out a summary of the principles relevant to the application of rule 44.3:

“...(i) costs cannot be recovered except under an order of the court; (ii) the question whether to make any order as to costs - and, if so, what order - is a matter entrusted to the discretion of the trial judge; (iii) the starting point for the exercise of discretion is that costs should follow the event; nevertheless, (iv) the judge may make different orders for costs in relation to discrete issues - and, in particular, should consider doing so where a party has been successful on one issue but unsuccessful on another issue and, in that event, may make an order for costs against the party who has been generally successful in the litigation; and (v) the judge may deprive a party of costs on an issue on which he has been successful if satisfied that the party has acted unreasonably in relation to that issue...”<sup>41</sup>

4.10 In the case of *Aspin v Metric Group Limited*,<sup>42</sup> Chadwick LJ, summarising the previous authorities, held that:

“...in deciding what order to make on an issue-based approach, the court may decide that, in relation to an issue which the party successful overall has lost, that party should be deprived of his costs of that issue; or even, in a suitable case, that that party should pay the costs of the otherwise unsuccessful party on that issue.”<sup>43</sup>

4.11 Awarding a percentage of a party’s costs. Where awarding costs on an issue by issue basis is inappropriate, the court must still consider ordering a proportion of a successful party’s costs. In *Burchell v Bullard*<sup>44</sup> Ward LJ noted that the modern tendency is to consider the award of costs on an issue by issue basis.<sup>45</sup> However, the difficulty in the preparation of a bill of costs and the enormous complication of the process of detailed assessment may necessitate a departure from this tendency.<sup>46</sup> Accordingly, the court must consider alternative costs orders, the most obvious of which is to order that a proportion of a party’s costs be paid.<sup>47</sup> Ward LJ confirmed that the object of the exercise is to make a just and fair award of costs.<sup>48</sup> In the instant case Ward LJ concluded that the claimant was only entitled to 60% of the costs of the proceedings (i.e. the claim and counterclaim), because, while the

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<sup>40</sup> [2001] EWCA Civ 535; [2001] All ER (D) 135 (Apr).

<sup>41</sup> *Ibid*, paragraph 21.

<sup>42</sup> [2007] EWCA Civ 922.

<sup>43</sup> *Ibid*, at paragraph 22.

<sup>44</sup> [2005] EWCA Civ 358; [2005] All ER (D) 62 (Apr).

<sup>45</sup> *Ibid*, paragraph 29.

<sup>46</sup> *Ibid*, paragraph 29.

<sup>47</sup> *Ibid*, paragraph 30.

<sup>48</sup> *Ibid*, paragraph 44.

claimant was successful overall, a large part of the trial was taken up by the counterclaim on which the defendants had some success.<sup>49</sup>

4.12 Overall. The authorities set out above are only a small selection of the cases that have addressed the issue of costs. Various principles can be drawn from these and other authorities. In particular, the following are of note:

- the starting position is that the successful party is entitled to an award for its costs;
- consideration must be given as to whether a deviation from the starting position is required;
- whether the relative success of the parties is best reflected in an issue-based costs order or a proportionate costs order; and
- where it is practicable to do so, the court should make a proportionate costs order in preference to an issue-based costs order.<sup>50</sup>

(iv) The indemnity principle

4.13 The recovery of costs between the parties is subject to the indemnity principle (not to be confused with the indemnity basis of assessment – see below). While the successful party is unlikely to recover all of its costs, a party can never recover more than its costs (i.e. a party cannot profit from the recovery of its costs). The case of *Harold v Smith*<sup>51</sup> initially recorded this principle as follows:

“Costs as between party and party are given by the law as an indemnity to the person entitled to them: they are not imposed as a punishment on the party who pays them, nor given as a bonus to the party who receives them. Therefore, if the extent of the damnification can be found out, the extent to which costs ought to be allowed is also ascertained.”

4.14 This principle is not without controversy. For example, problems may arise where the solicitor is paid by a third party, where the work is conducted for a fixed fee or where the retainer or agreement between the client and solicitor is unenforceable. The role of the indemnity principle in the Costs War is set out in section 5 below.

(v) Costs estimates

4.15 Costs estimates. An estimate of costs, as defined in the CPD, is an estimate of the base costs (including disbursements) already incurred and the base costs (including disbursements) to be incurred, which a party, if successful, will seek to recover from the other party.<sup>52</sup> Importantly, a party who intends to recover the success fee under a CFA or an ATE insurance premium need not reveal the amount of such liability in the costs estimate.<sup>53</sup> This ensures that the party will not inadvertently disclose the solicitor’s or insurer’s opinion of the merits of the case (i.e.

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<sup>49</sup> *Ibid.* For a clear account of the leading authorities, see the judgment of Warren J in *Actavis v Merck & Co Inc* [2007] EWHC 1625 (Pat).

<sup>50</sup> See CPR rule 44.3(7) and *Multiplex Constructions (UK) Ltd v Cleveland Bridge UK Ltd (No. 2)* [2008] EWHC 2280 (TCC).

<sup>51</sup> (1860) 5 H & N 381; 157 E.R. 1229.

<sup>52</sup> CPD paragraph 6.2(1)(a).

<sup>53</sup> CPD paragraph 6.2(2).

a more risky case is likely to attract a higher success fee and/or insurance premium). The provision of costs estimates is intended to encourage the parties and help the court to manage the case in a proportionate way. Adverse costs consequences may flow from incurring costs considerably higher than the estimate: see paragraph 4.24

4.16 When must the costs estimate be filed? The court may order a party to file an estimate at any stage in the proceedings.<sup>54</sup> A party is obliged to file a costs estimate and serve a copy on each party when filing an allocation questionnaire or pre-trial checklist (listing questionnaire).<sup>55</sup>

(vi) The basis of assessment and the amount of costs

4.17 Assessment. If, after the court has determined that one party's costs are payable by another party, the parties are unable to agree the amount of the costs to be paid by the paying party, the court will "assess" the costs to be paid (i.e. determine the amount of the costs to be paid). Rule 44.7 of the CPR provides that the court may either (a) itself make a summary assessment of the costs or (b) order detailed assessment of the costs, to be carried out later by a costs officer or judge as appropriate. Summary assessment and detailed assessment are discussed further in chapters 52 and 53 respectively.

4.18 The two bases for assessing costs and the reasonableness test. Where the court is to assess costs this will be done on either the standard basis or the indemnity basis.<sup>56</sup> Regardless of the basis adopted, the CPR expressly state that the court must not allow costs which have been unreasonably incurred or are unreasonable in amount.<sup>57</sup> Therefore, for both the standard basis and indemnity basis there is a test of reasonableness.

4.19 The standard basis. Under the standard basis, the court will: (a) only allow costs which are proportionate to the matters in issue; and (b) resolve any doubt as to whether costs have been reasonably incurred or are reasonable and proportionate in amount in favour of the paying party.<sup>58</sup> Accordingly, under the standard basis there is the dual test of reasonableness and proportionality. The standard basis is the default basis of assessment where the court does not stipulate the basis on which costs are to be assessed.<sup>59</sup>

4.20 The meaning of "proportionate". Limited guidance as to the meaning of "proportionate" can be found in rule 1.1(2)(c)<sup>60</sup> of the CPR and section 11 of the CPD.<sup>61</sup> In the case of *Lownds v Home Office*<sup>62</sup> the Court of Appeal formulated a two-stage approach to ascertaining proportionality. First, the court should adopt a global

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<sup>54</sup> CPD paragraph 6.3.

<sup>55</sup> CPD paragraph 6.4(1).

<sup>56</sup> CPR rule 44.4(1).

<sup>57</sup> CPR rule 44.4(1).

<sup>58</sup> CPR rule 44.4(2).

<sup>59</sup> CPR rule 44.4(4).

<sup>60</sup> CPR rule 1.1(2)(c) provides that dealing with cases justly includes, *inter alia*, dealing with cases in a manner which is proportionate to (i) the sums involved; (ii) the importance of the case; (iii) the complexity; and (iv) the financial position of each party.

<sup>61</sup> CPD paragraphs 11.1 and 11.2 provide, among other things, that: (i) a fixed percentage cannot be applied to all cases to ascertain whether costs are proportionate; (ii) in any proceedings, certain costs are inevitable and necessary; and (iii) in a modest claim the proportion of costs is likely to be higher than in a large claim and may even equal or exceed the sum in dispute.

<sup>62</sup> [2002] EWCA Civ 365; [2002] 1 WLR 2450. See, in particular, paragraph 31.

approach and consider whether the total base costs claimed are disproportionate (considering, in particular, the factors in rule 44.5(3) – see paragraph 4.23 below). Secondly, the court should adopt an item by item assessment. If the total base costs are not disproportionate, then all that is normally required is that each item should have been reasonably incurred and of a reasonable amount. However, if the total base costs appear disproportionate, then the court must be satisfied that the work in relation to each item was necessary and, if necessary, that the cost is reasonable. The Court went on to note that:

“The fact that the litigation has been conducted in an insufficiently rigorous manner to meet the requirement of proportionality does not mean that no costs are recoverable. It means that only those costs which would have been recoverable if the litigation had been appropriately conducted will be recovered. No greater sum can be recovered than that which would have been recoverable item by item if the litigation had been conducted proportionately.”<sup>63</sup>

4.21 The indemnity basis. In contrast to the standard basis, there is no test of proportionality under the indemnity basis. Furthermore, the court will resolve any doubt as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party.<sup>64</sup> Accordingly, the costs that are liable to be paid by the paying party may be greater under the indemnity basis than under the standard basis.

4.22 Which basis? Generally speaking, costs may be awarded on the indemnity basis following an abuse of process or some other culpability or unreasonable conduct on the part of the paying party. For example, in *Cooper v P&O Stena Line Ltd*<sup>65</sup> indemnity costs were awarded in favour of the successful claimant where the defendant had insufficiently pleaded a serious allegation of fraud and had failed to properly investigate the claim to the extent that, had a proper investigation been conducted, it is likely that the defendant would not have defended liability. In *Amoco (UK) Exploration Co v British American Offshore Ltd (No 2)*<sup>66</sup> the judge held that the successful defendant’s costs should be awarded on the indemnity basis because of the claimant’s conduct. In particular, the proceedings arose primarily as a result of the claimant’s intention to put commercial pressure on the defendant in order to extricate itself from a contract, the claimant’s case constantly changed as the claimant sought to justify its actions and much of the claimant’s evidence was rejected. Indemnity costs can also arise where a claimant’s Part 36 offer is not accepted by a defendant and the claimant goes on to obtain judgment at trial which is equal to or better than the offer.<sup>67</sup> The CPR sets out other particular circumstances where a party may be awarded costs on the indemnity basis.

4.23 Factors to consider in determining the amount of costs. Rule 44.5 sets out the factors that the court is to consider in determining the amount of costs. Rule 44.5(3) provides that the court must, among other things, have regard to: (a) the conduct of the parties; (b) the sums involved; (c) the importance of the matter; (d) the complexity of the matter; (e) the skill, effort and knowledge involved; (f) the time spent on the case; and (g) the place and the circumstances in which the work was done.

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<sup>63</sup> *Ibid* paragraph 32.

<sup>64</sup> CPR rule 44.4 (3).

<sup>65</sup> [1999] 1 Lloyd’s Rep 734.

<sup>66</sup> [2001] All ER (D) 327.

<sup>67</sup> See CPR rule 36.14 (3)(b).

4.24 Differences between the costs estimate and the costs claimed. In assessing costs, the court may consider any estimate previously filed. The estimate may be taken into account when assessing the reasonableness and proportionality of any costs claimed.<sup>68</sup> If there is a difference of 20% or more between the base costs claimed by a party and that party's costs estimate and (a) the party has not satisfactorily explained the difference or (b) the paying party reasonably relied on that estimate, then the court may regard the difference as evidence that the costs claimed are unreasonable or disproportionate.<sup>69</sup>

## 5. THE COSTS WAR

### (i) Introduction

5.1 There is no doubt that litigation over costs has increased dramatically in recent years, and that this growth is one of the driving factors behind the present review. Whilst many such disputes concerned issues which would need to be resolved under any system which involves costs-shifting, the disputes over the enforceability of conditional fee agreements ("CFAs") have generated more litigation, arguably to less useful purpose, than any other. In this section I consider briefly the history of these disputes, which came to be known as "the Costs War".

### (ii) The 1990s

5.2 The 1990s. As will be apparent from chapter 16, the first legislation for CFAs was passed in 1990 and brought into effect in 1995. That legislation permitted lawyers to make CFAs with their clients and to charge success fees. At that stage, however, the success fee was not recoverable from the other side, and the period between 1995 and 2000, when the law changed, passed by uneventfully in terms of costs disputes over CFAs. It would, however, be a mistake to regard the 1990s as irrelevant to an understanding of the Costs War. The ground was laid in four trends during that decade, one in the world of costs and the others outside.

5.3 The indemnity principle. In 1993 a divisional court upheld a challenge by a losing party to a claim for costs based on an agreement under which the winner's solicitor was entirely dependent for payment on winning the case and recovering costs from her opponent.<sup>70</sup> The legal principle under which the loser was able to mount this challenge was the indemnity principle, which provides that a party who succeeds in litigation is entitled to no more costs from his opponent than his liability to his own solicitor.<sup>71</sup> Whilst the indemnity principle has remained the law since at least as early as 1860,<sup>72</sup> it had not previously featured much in disputes over costs at detailed assessment.

5.4 *Norman* seems to have alerted costs draftsmen to the existence and utility of the indemnity principle, and points of dispute including indemnity principle arguments began to appear much more often in the second half of the decade. Points of dispute sought to "put the receiving party to proof" that there was no breach of the indemnity principle. Issues were taken over the possible existence of agreements for

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<sup>68</sup> CPD paragraph 6.6(1).

<sup>69</sup> CPD paragraph 6.6(2).

<sup>70</sup> *British Waterways Board v Norman* (1994) 26 HLR 232.

<sup>71</sup> See paragraphs 4.13 and 4.14 above.

<sup>72</sup> *Harold v Smith* (1860) 5 H&N 381, 385.

contingency fees or for hourly rates lower than those being claimed<sup>73</sup> and it was often suggested that in the absence of a client care letter there was no retainer, and thus no right to costs at all. Costs and district judges were asked to order receiving parties to be put to their election either to disclose solicitor/client documents or prove their contents by some other means. The generation of points of dispute including such challenges as standardised “preliminary points” became an industry in its own right, a tendency reinforced by the advent of widespread use of the word processor.

5.5 Credit hire claims. At the same time a parallel industry developed in the field of credit hire claims. In the late 1980s some car hire firms spotted a gap in the market for a service whereby they agreed to hire a car to a person whose car had suffered an accident for which someone else was liable, and instead of charging the hirer immediately in the usual way, the hire company deferred payment of the charge and assisted the hirer to recover it from the wrongdoer by providing the services of a solicitor. When the claim was successful the hire company recovered its charges, the hirer received any due damages for personal injury and other losses and the hirer’s solicitor received his costs. The hirer did not have to provide cash for the hire and liability insurers faced charges for the hire of replacement cars that would never have been hired were it not for the scheme.<sup>74</sup>

5.6 Liability insurers responded initially by contending in challenges up and down the country that such claims were tainted by champerty, an argument that was finally resolved against them by the House of Lords in *Giles v Thompson* [1994] 1 AC 142. The insurers did not, however, give up and in a “*return to the charge by other means*”,<sup>75</sup> mounted a challenge alleging that the agreements were unenforceable by virtue of the Consumer Credit Act 1974. Again there were multiple challenges throughout the country, and this time the House of Lords held for the insurers. That was not the end of the industry as the result in *Dimond* could be avoided by different drafting, and quantum issues continued to be litigated. The House of Lords considered credit hire for the third time in *Lagden v O’Connor* [2003] UKHL 64; [2004] 1 AC 1067.

5.7 The automatic strike-out provision of CCR order 17 rule 11. The other round of “satellite” litigation which came close to paralysing claims in county courts in the 1990s was that which resulted from the well-intentioned but ill-conceived plan to overcome delays in that court by the automatic strike-out provision of CCR Order 17 rule 11.<sup>76</sup> The provision came into force in 1990 and led to a flood of litigation. In 1997, when the Court of Appeal gave judgment on many of the issues generated by the rule, it selected no less than 19 cases from over a hundred pending in that court, in order to have a sufficient range of test cases to resolve the issues.<sup>77</sup> The Court said:

“During the course of the present exercise we have identified more than 30 points of general application which still remain unresolved over six years after the introduction of the new automatic sanction. This lamentable history surely provides an object lesson of the reasons why draconian new rules should not be introduced into litigation practice

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<sup>73</sup> Culminating in *Bailey v IBC Vehicles* [1998] 3 All ER 570.

<sup>74</sup> This summary is taken from the speech of Lord Mustill in *Giles v Thompson* [1994] 1 A.C. 142.

<sup>75</sup> Per Lord Hoffmann in *Dimond v Lovell* [2002] 1 AC 384, 393.

<sup>76</sup> Automatic strike-out in the event that the plaintiff fails to apply for a hearing date within the time allowed.

<sup>77</sup> *Bannister v SGB* [1998] 1 WLR 1123.

without being first submitted to a widespread and appropriately critical consultation process.”<sup>78</sup>

5.8 The final trend from the 1990s of relevance to the Costs War was the rise of the “costs negotiator”. These were costs specialists, sometimes costs-draftsmen and sometimes not, employed by liability insurers to secure a reduction in the costs which the insurer had to pay successful claimants. From, it appears, about the mid-1990s, some negotiators agreed to carry out this service in consideration of a percentage of the amount by which they reduced the claims for costs made against the insurer. This fee arrangement created a substantial incentive to be aggressive in the defence of costs claims and to take every available point for that purpose. Since negotiators were acting on an industrial scale there were huge amounts at stake. The practice may also have operated as a perverse incentive to claimants’ solicitors to increase their claims for costs in order to make it easier to negotiate a reduction to a level that could be accepted by the negotiator without putting his earnings at risk. Anecdotally, costs negotiators are said to have played a major role in the early days of the Costs War.

5.9 The percentage of savings basis of remuneration was, however, dealt a considerable blow by a decision of the Senior Costs Judge that it was champertous and that, under a scheme agreed between one of the leading negotiators’ firms and a major insurer, the negotiators had no right of audience on assessment.<sup>79</sup> Whilst this decision may have led to those employed in the industry of challenging costs claims adopting a different business model, large specialist firms carrying out this work for insurers remain a very important part of the costs scene today.

5.10 By the turn of the century, then, the principal players on the defendant side in what became the Costs War had seen the advantages to be derived from deploying technical arguments not rooted in the merits of the underlying dispute and had honed the tactics that they would go on to use against CFAs.

### (iii) The Access to Justice Act 1999

5.11 “All or nothing” compliance. The ammunition for the Costs War was provided by Parliament itself. The Access to Justice Act 1999 (the “1999 Act”) inserted a new provision into the statute governing CFAs which provided that a CFA which satisfied all the statutory requirements should be enforceable, but that “*any other conditional fee agreement should be unenforceable*”.<sup>80</sup> No discretion was conferred on the courts to avoid this conclusion or to make the penalty for minor non-compliance proportionate to the “crime”: it was all or nothing.

5.12 Had the statutory requirements been of the simplest, it may be that the War would have been no more than a short skirmish. However, the Government decided to include in Regulations governing CFAs extensive client care provisions.<sup>81</sup> In so doing it was influenced by research which showed widespread ignorance among clients of the detail of CFAs under the 1995 regime, and overrode advice from the Law Society and the Senior Costs Judge that it was unnecessary to include such provisions in Regulations as the position was adequately covered by professional rules governing

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<sup>78</sup> Paragraph 1.5.

<sup>79</sup> *Ahmed v Powell* (unreported, 19.2.03).

<sup>80</sup> Section 58(1) Courts and Legal Services Act 1990 as replaced by section 27 of the 1999 Act.

<sup>81</sup> Conditional Fee Agreements Regulations 2000 (SI2000/692) (the “2000 Regulations”).

solicitors.<sup>82</sup> The new CFA provisions came into effect on the 1<sup>st</sup> April 2000, in something of a rush as the Government had given itself a deadline of abolishing legal aid for most personal injury work by that date.

5.13 This statutory combination of an all or nothing requirement of compliance and quite detailed client care provisions proved explosive. The potential for using the indemnity principle to mount against CFAs a series of challenges similar to those which had been made in the credit hire cases was immediately obvious and quickly exploited by defendants or, rather, by their liability insurers.<sup>83</sup>

5.14 The recovery of additional liabilities. What is less clear is whether liability insurers would have been motivated to initiate the Costs War if they had not been facing the massive increase in costs claims which resulted from other provisions of the 1999 Act. In the 1990s solicitors had been able to agree a success fee with their CFA clients, and an embryonic industry in the provision of after-the-event legal expenses insurance (“ATE”) had developed. Before April 2000 the successful CFA client had had to bear the success fee and the ATE premium, as neither was a recoverable head of cost. The 1999 Act changed that, however, and provided that, subject to rules of court, both success fee<sup>84</sup> and ATE premium<sup>85</sup> should be recoverable from an unsuccessful opponent as “additional liabilities”. This had the effect of making liability insurers bear the entire cost of both sides of personal injuries litigation. A successful claimant would recover from the defendant his traditional costs together with a success fee on his lawyers’ CFA(s) and an ATE premium. The ATE premium was calculated at a level sufficient to cover all the costs which the ATE insurer thought it would have to pay out in unsuccessful cases, together with administrative costs and profit. Likewise the lawyers’ success fees were calculated at a level sufficient to make up for the costs they failed to recover in cases which they lost. In this way, win or lose, liability insurers and those defendants, such as the Government and public authorities who self-insure, ended up paying all of both sides’ costs of the personal injury litigation process. This was a massive increase in the exposure of liability insurers operating in this market. The legislation also created certain opportunities for claimant lawyers to make windfalls (“success” fees for doing detailed assessments etc).

5.15 Probably, however, the Costs War would have happened, even if the 1999 Act had not increased the costs burden on liability insurers at the same time as enacting the rules which provided the War’s ammunition. Repeated exhortations from the higher courts to more altruistic behaviour count for little unless the court can accompany the exhortation with a sanction. The 1999 Act gave defendants an obvious weapon, of potentially tremendous value. Not only was it inevitable that it would be deployed: there was no impropriety in that deployment and no sanction which could be brought to bear on those who did so.

#### (iv) The War Itself – Phase 1 (2000-2003)

5.16 The new CFA regime came into effect on 1<sup>st</sup> April 2000 and applied only to CFAs made after that date. Since arguments about the costs payable by one party to

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<sup>82</sup> A full history of this period is set out in *Hollins v Russell* [2003] 1 WLR 2487 at 2497 to 2505.

<sup>83</sup> In fact the first reported successful indemnity principle challenge was based on a 1995 scheme CFA and not brought by an insurer: *Woods v Chaleff*, LTL 24.5.02.

<sup>84</sup> Section 27 of the Access to Justice Act 1999 inserted a new section 58A into the Courts and Legal Services Act 1990. See section 58A(6).

<sup>85</sup> Section 29 of the Access to Justice Act 1999.



another take place only when the substantive litigation has concluded, it would be some time before any challenges to the new regime would take place. Perhaps surprisingly, the first detailed assessment involving such a challenge referred to in a reported case was on 7<sup>th</sup> November of that year. It was *Callery v Gray* which went as far as the House of Lords.

5.17 *Callery v Gray*. *Callery* decided, *inter alia*, two points of principle which inevitably had to be resolved by the courts. The first was whether a defendant should pay additional liabilities when the relevant CFA had been made and ATE policy taken out before it had even been notified of the existence of the claim. The second was whether an ATE premium could be recovered at all where no substantive proceedings had been issued. Finally, appropriate figures for success fees and ATE premiums in straightforward low value road traffic accident (“RTA”) cases were decided. The claimants were almost wholly successful in their arguments before the Court of Appeal.<sup>86</sup>

5.18 The House of Lords gave permission to appeal but, having done so, by a majority decided that responsibility for overseeing the new regime lay with the Court of Appeal and that it would be inappropriate for them to interfere.<sup>87</sup> Almost all the speeches in the House, however, recognised the force of the defendant’s arguments and the potential for abuse of the system by solicitors and insurers operating in a regime where the market had virtually no role to play, as clients had no reason to dispute the level of either success fee or premium since they would not be called upon to pay either.

5.19 The defendant’s arguments in *Callery* were not, for the most part, grounded in the indemnity principle. They were arguments about the circumstances in which it was reasonable for defendants to have to pay additional liabilities to claimants funded under the new regime and the amount that they should have to pay. Unlike some of the arguments which were to follow later (from both sides), the defendants were not seeking a windfall benefit based on a technicality.

5.20 Nevertheless the knowledge that these challenges were being considered by the higher courts resulted in widespread difficulties on the ground. A large number of costs assessments were either wholly stayed pending the result or stayed as to the additional liabilities claims. At the very least, then, this created considerable uncertainty, concern and cash flow difficulties for claimants’ solicitors operating in the personal injury field as, since the virtual abolition of legal aid for these purposes, almost all their work was being done under CFAs. If their business model had been shown to be misconceived they faced substantial losses. The same is true of the claims management companies that were offering the public litigation funding schemes based on the model which was being tested in *Callery*. Although the Court of Appeal had expedited consideration of both the *Callery* appeals in a desire to put the earliest possible end to the uncertainty, the House of Lords did not give judgment until June 2002, nearly a year after the decisions of the Court of Appeal. Accordingly these fundamental doubts about the basis on which most claimant solicitors and ATE insurers were doing business continued until over two years into the new regime.

5.21 *Post-Callery*. Matters did not, however, improve for the claimant side of the profession. In the immediate aftermath of *Callery* there was a string of first instance decisions on more or less technical challenges by defendants based on the indemnity principle coupled with the application of the Conditional Fee Agreements

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<sup>86</sup> *Callery v Gray* [2001] EWCA Civ 1117; [2001] 1 WLR 2112; *Callery v Gray* (No.2) [2001] EWCA Civ 1246; [2001] 1 WLR 2142.

<sup>87</sup> [2002] UKHL 28; [2002] 1 WLR 2000.

Regulations 2000. Unlike *Callery*, where only additional liabilities but not base costs were at risk, these challenges relied on section 58(1) of the Courts and Legal Services Act 1990 for an argument that, by reason of non-compliance with the Regulations, the CFAs were wholly unenforceable with the result that either nothing at all, or at best only disbursements, was recoverable from the paying party. Examples were:

- Whether the Law Society's interim standard form CFA, hastily drafted against the tight deadline resulting from the short period between the promulgation of the Regulations and their inception, was enforceable. It wrongly said that only the amount of the success fee was not limited by reference to the damages, when the Regulation required it to specify this in relation to all the costs payable under the agreement.
- Failure to state clearly the amount of the success fee attributable to the fact that payment of the lawyers' fees would be postponed until the end of the case, so that they could not render interim bills.
- The adequacy of inquiries made into the availability of before-the-event ("BTE") insurance.
- Whether the Regulations required a solicitor who had no personal interest in recommending a particular insurance policy to say so expressly.
- Whether the duty under the Regulations to give certain consumer advice to the client could be performed by an agent, or only by the solicitor in question. This point challenged the *modus operandi* of what had by that time become the largest claims management scheme, The Accident Group, to which it was said that 700 or more firms of claimant solicitors had signed up. The point was claimed to affect 211,000 cases involving costs of over £1 billion.<sup>88</sup>

5.22 *Hollins v Russell*. These challenges worked their way through both levels in the county courts and were brought together in 6 test cases heard in the Court of Appeal under the name of *Hollins v Russell* in May 2003. The same insurer lay behind the defendant in five of these challenges. The Court dismissed all the challenges with some fairly trenchant criticism of them. It concluded:

"The court should be watchful when it considers allegations that there have been breaches of the regulations. The parliamentary purpose is to enhance access to justice, not to impede it, and to create better ways of delivering litigation services, not worse ones. These purposes will be thwarted if those who render good service to their clients under CFAs are at risk of going unremunerated at the culmination of the bitter trench warfare which has been such an unhappy feature of the recent litigation scene."<sup>89</sup>

5.23 Once again, whilst the challenges were making their way through the court system, insurers refused to agree costs in a large number of cases where similar points were available and, even where detailed assessment proceedings were issued, they were often stayed at the behest of the paying party. Indeed district judges had little alternative where there was a credible<sup>90</sup> technical challenge, since the effect of section 58(1) was that if the challenge were successful, possibly nothing at all was payable. The Court in *Hollins* recorded a submission by APIL<sup>91</sup> that some 40-60% of

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<sup>88</sup> Source: *Hollins v Russell* [2002] EWCA Civ 718; [2003] 1 WLR 2487 at [160].

<sup>89</sup> *Ibid* at [224].

<sup>90</sup> E.g. one upheld in another case by a district judge or, more compellingly, by a circuit judge.

<sup>91</sup> The Association of Personal Injury Lawyers, an exclusively claimant group.

all CFAs faced technical challenges of this sort, though many of these were said to “*evaporate as the date of detailed assessment approaches*”.<sup>92</sup>

5.24 *Hollins* was clearly intended to operate as a massive discouragement to the taking of technical points by defendants, though the language of the statute and the availability of the indemnity principle compelled the Court to reject a submission that it was simply not open to an unsuccessful defendant to rely on a flaw in an agreement between his opponent and his solicitor. The decision did have a salutary effect and the number of challenges, particularly of the highly technical variety, did diminish drastically. One decision in the case also limited the impact of enforceability challenges, even where successful. It was made clear that, even if a CFA was unenforceable, disbursements would be recoverable from an opponent where they had been paid from funds provided by the client, whether by way of loan (an exceedingly common arrangement, particularly under claims management company schemes) or from the client’s own pocket.<sup>93</sup>

(v) Legislative changes

5.25 At about the same time two other developments were taking place to stem, or limit the damage caused by, the Costs War. One originated in the Civil Justice Council and the other in Government.

5.26 Civil Justice Council: quasi-mediation. In December 2002 the Civil Justice Council organised a quasi-mediation involving all interested parties to try to agree a solution to the problems which were being experienced, particularly in the low value bulk RTA market. A measure of agreement was reached and there was a broad consensus on the shape of a scheme to fix costs in this area. The figures to go into the scheme proved, unsurprisingly, contentious and it was not until the following year that agreement was reached. This was only achieved by the production by some academic researchers of figures for actual costs in the type of claim under consideration.<sup>94</sup> On production of those figures agreement was reached quite quickly on what was to become section II of Part 45 CPR, the scheme for “fixed recoverable costs” in RTA cases settled for no more than £10,000 where proceedings had not been issued. The scheme applied to accidents occurring after 5<sup>th</sup> October 2003.

5.27 Following similar processes of quasi-mediation industry agreement was reached on an extension of the original fixed recoverable costs scheme. The original scheme had not included any figure for success fees, but this was now agreed at 12.5%. Further success fee figures were subsequently agreed for all RTA cases, for employers’ liability non-disease cases and finally for disease cases.

5.28 The “CFA Lite” regime. The other development originated in Government. In June 2003 the Government brought into effect, without formal consultation, a scheme which became dubbed the “CFA Lite” regime.<sup>95</sup> Under this scheme, in a nutshell, lawyers could make a CFA under which they agreed only to charge their clients no more than they recovered from the other side.<sup>96</sup> The *quid pro quo* of agreeing a CFA in these terms was that Regulations 2 to 4 of the 2000 Regulations,

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<sup>92</sup> Paragraph [46].

<sup>93</sup> Paragraph [115].

<sup>94</sup> See further chapter 9, paragraph 6.1.

<sup>95</sup> The Conditional Fee Agreements (Miscellaneous Amendments) Regulations 2003 (SI 2003/1240).

<sup>96</sup> This was the view at the time, though a later decision of the Court of Appeal made it clear that it was too narrow a view.

which had given rise to so much difficulty in practice, did not apply. At the same time the Government brought into force section 31 of the Access to Justice Act 1999, which enabled the Rule Committee to disapply the indemnity principle, and the Rule Committee amended the CPR so that the principle did not apply in CFA Lite cases. In fact, for technical reasons, there was very little intentional take-up of this scheme at the time.

5.29 Although the 2003 Regulations initially had little impact on the Costs War, the fixed recoverable costs regime undoubtedly did. This was largely because, as the figures were now agreed and, particularly following the agreement of fixed success fees, were seen to be reasonable, the incentive to mount extensive challenges was considerably reduced. This impact was increased by a court decision which held that the indemnity principle did not apply in fixed recoverable costs cases, so that even if the claimant's CFA were defective it would not affect the recovery of costs from the defendant.<sup>97</sup>

5.30 In June 2003 the Government initiated a further round of consultation on means of reducing satellite litigation over CFAs.<sup>98</sup> It wanted to consider ways of simplifying the Regulations still further. In fact, at a conference of interested parties called by the Civil Justice Council shortly afterwards, the more radical proposal of wholesale revocation of the 2000 Regulations emerged. Ultimately this took place in November 2005. The revocation was not made retrospective. Only agreements made after the date of revocation escaped the old regime.

#### (vi) The Costs War – Phase 2

5.31 Phase 1 of the Costs War ended in 2003. The combined effect of *Hollins*, in which the Court of Appeal made clear its determination to prevent CFA challenges where possible, and of the fixed recoverable costs regime was to diminish considerably the arguments over enforceability. However, they did not go away altogether.

5.32 Indemnity principle based challenges. This is not the place to set out all the decisions on CFAs which followed *Hollins*. Suffice it to say that the Court of Appeal did not always reject indemnity principle based challenges to the enforceability of CFAs. In *Spencer v Wood* [2004] EWCA Civ 352, in March 2004, it upheld a challenge based on breach of the regulation which required the CFA to specify how much of the success fee represented a charge for the postponement of payment of the lawyer's fees. In *Jones v Caradon Catnic* [2005] EWCA Civ 1821, in December 2005, the court upheld a challenge based on an argument that the CFA provided for a success fee in excess of the permitted 100%.

5.33 New matters considered by the courts. Other new matters considered by the courts in the period 2005-6 were whether a CFA could be retrospective and whether a CFA could be assigned. There were further quantum decisions including determination of the issue whether a different success fee could be allowed by the court for different stages of the case where the CFA provided for a single contractual success fee. All of these might be seen as issues arising from the legislation which had to be resolved by the courts at some stage or other, rather than as opportunistic satellite litigation.

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<sup>97</sup> *Nizami v Butt* [2006] EWHC 159 (QB); [2006] 1 WLR 3307.

<sup>98</sup> A Review Paper *Simplifying CFAs* issued in June 2003 and a consultation paper *Making simplified CFAs a reality* issued in 2004

5.34 *Garrett v Halton BC and Myatt v NCB*. A boost was given, however, to enforceability challenges by the decisions of the Court of Appeal in *Garrett v Halton BC and Myatt v NCB* [2006] EWCA Civ 1017; [2007] 1 WLR 554, handed down in July 2006. The judgment in this case rejected an argument that *Hollins* had decided that a breach of the Regulations would only be material if, with the benefit of hindsight, it could be said that harm had been done to the client or the administration of justice. It held unenforceable a CFA where a solicitor claimed to have no interest in the ATE policy which he was recommending when in fact, had he not recommended the policy, he would have been taken off the panel of solicitors for the claims management company that had referred the case to him. In *Myatt* the court held a CFA to be unenforceable where inadequate inquiries had been made as to the availability of BTE insurance.

5.35 In the period following *Garrett* the number of challenges on both these grounds increased considerably. The scope for *Myatt*-type challenges was limited in practice by difficulties for paying parties in establishing precisely what inquiries into BTE claimants' solicitors had made, and by a reluctance in the courts, based on *Hollins*, to order disclosure in this respect. However, such challenges did not die out altogether since insurers have access to a database from which they can, more often than not, establish whether a claimant has available BTE and, where this is so, they have good grounds for obtaining an order for disclosure of the inquiries that were made in this connection.

5.36 The *Garrett* challenge, based on failure to declare an interest in recommending an insurance policy, provided good ammunition for insurers defending claims brought by clients who had signed up for claims management schemes. This is because such schemes almost invariably have a tied insurance policy, and the practice before *Garrett* (i.e. in all cases still affected by the 2000 Regulations) had been not to declare such an interest. The Law Society-approved Accident Line Protect Scheme appeared to be fertile ground for such a challenge because the documentation which it required to be used had declared that there was no interest in the recommendation of the policy. Three appeals in relation to Accident Line were heard by the Court of Appeal in December 2008, *Tankard v John Fredericks Plastics Ltd* [2008] EWCA Civ 1375. It was held that in the three cases in question there was no interest to declare.

#### (vii) The War outside personal injury

5.37 Most of what may truly be called the Costs War was fought in the field of personal injury claims, but it was not wholly confined to those.

5.38 Housing disrepair claims. Challenges to CFAs used by solicitors acting for tenants in housing disrepair claims were common, albeit confined to a few defendant authorities since liability for such claims is not generally insured. Since legal aid continues to be available in principle for such claims one frequent ground of challenge was that the client was inadequately advised about the availability of legal aid. This ground has met with mixed success, depending of course on the advice actually given. A notable battlefield has consisted of a series of disputes between Birmingham City Council and a particular firm of solicitors in that city specialising in claims of this sort. A root and branch challenge by the City Council was rejected by the High Court in the most recent enforceability decision to have been made at the time of writing – *Forde v Birmingham CC* [2009] EWHC 12 (QB).

5.39 Defamation claims. A rather different battle has been going on in the field of defamation (which now must be taken to include privacy). Legal aid has never been

available for defamation claims, which have always been notoriously expensive. Accordingly, prior to the Access to Justice Act 1999, defamation claims had only been open to the very rich, those who could get the rich to fund them<sup>99</sup> or the few, like the police, whose trade union offered support for defamation actions. All this changed following April 2000 and the press began to face not only greatly increased litigation but, with recoverable success fees and very substantial ATE premiums, massively increased costs.

5.40 One concern which was peculiar to the media was the impact of such heavy costs on their right of freedom of expression, guaranteed by Article 10 of the European Convention on Human Rights. They argued that since, under the Costs Practice Direction, in determining whether costs are proportionate base costs and success fees are considered separately and the total is not subject to a test of proportionality,<sup>100</sup> the costs they have to pay in CFA backed litigation are by definition disproportionate and thus represent an infringement of their Article 10 rights.

5.41 In *King v Telegraph Group* [2005] 1 WLR 2282 the Court of Appeal considered a case where the defendant faced a bill of up to twice the reasonable and proportionate costs if it conceded or lost but would have to bear its own costs (estimated at £400,000) in any event as the claimant was impecunious and uninsured. The Court considered that the only way to “square the circle” in such a situation, given the known limit on general damages for libel, was to impose a costs cap which included the success fee. In subsequent cases, however, it has been relatively rare for such a cap to be imposed.

5.42 In *Campbell v MGN (No.2)* [2005] 1 WLR 3394 the House of Lords considered an argument that, in a media case, it was a disproportionate interference with the defendant’s Article 10 rights to allow the recovery of a 100% success fee where the claimant, a well-known model, could afford to litigate without a CFA in order to achieve access to justice. This argument was rejected by the House and an application to the European Court of Human Rights remains under consideration in that Court.

5.43 The Civil Justice Council has made various attempts to broker an agreement between both sides of the defamation world in a manner similar to that which succeeded in personal injury. Whilst an “industry” agreement was at times thought to be close, it was never actually achieved. Instead a number of private agreements have been made between some claimant solicitors and some media organisations to achieve a measure of certainty about recoverable costs in this field.

5.44 The Government has recently (24<sup>th</sup> February 2009) published a consultation paper on “*a number of proposals designed to place more effective controls on legal costs in defamation and some other publication related proceedings.*”<sup>101</sup> Of relevance in the present context are proposals to allow a period following notification of the existence of an ATE policy during which the premium would not be recoverable if the case settled, and to require the proportionality of costs to be assessed by reference to the total of base costs and additional liabilities.

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<sup>99</sup> Such as Neil Hamilton in his unsuccessful action against Mohamed Al Fayed.

<sup>100</sup> Paragraph 11.9.

<sup>101</sup> See chapter 37.

(viii) Conclusions on the Costs War

5.45 Unsurprisingly the feelings of the protagonists in the Costs War have run very high, and any attempt to explain its causes is likely to be controversial. However the following tentative points are made.

5.46 Read against the background of the credit hire and automatic strike-out litigation in the 1990s it is likely that much, if not all, of the War would have been fought even if the 1999 Act had not greatly increased the costs burden on liability insurers at the same time as enabling technical challenges to be made. The legislation provided opportunities for both defendants and claimants to gain windfall benefits, and those opportunities would probably have been exploited in any event.

5.47 Whilst decisions of the Court of Appeal seeking to reduce pointless satellite litigation had some effect, notably *Hollins*, the language of the legislation itself precluded the possibility of the courts ruling such litigation out altogether.

5.48 One suggested means of reducing satellite litigation is by abolishing the indemnity principle. This has been the foundation for many of the arguments advanced during the Costs War. Abolition of the indemnity principle has been favoured for some time by the Civil Justice Council, but is not universally shared.<sup>102</sup> The 2005 revocation of the 2000 Regulations which caused much of the difficulty has contributed to a reduction in such litigation, but as CFA-funded cases very often have a long tail, it will not completely eradicate the arguments as long as such cases continue.

5.49 Another damper on the Costs War was negotiation and agreement. The Civil Justice Council sponsored quasi-mediations were extremely effective. It is thought that they were effective partly because the resulting provisions of the CPR were agreed. Additionally, of course, the agreements resulted in certainty: it is well known that one of insurers' major requirements is certainty, so that they can be sure when setting premium levels that they can balance their books. Predictable costs introduced certainty, at costs levels which each side agreed were reasonable.

5.50 Despite the factors mentioned in the two previous paragraphs, lengthy detailed assessment hearings (largely devoted to legal arguments about recoverability and other technical challenges) still abound. See, for example, chapter 10, paragraph 17.9. This continuance of technical battles, albeit on changing fronts, appears to be attributable to the huge sums of costs which are in play. Both in the field of personal injury and in other areas, the Costs War is still being fought with some vigour. See, for example, the recent judgment of Christopher Clarke J in *Birmingham City Council v Forde* [2009] EWHC 12 (QB). This 54 page judgment was dealing solely with a preliminary issue concerning costs in a housing disrepair case. See also *Roach v The Home Office* [2009] EWHC 312 (QB). This judgment concerned the extent of recovery<sup>103</sup> to which claimant lawyers were entitled, having acted successfully on CFAs for the parents of two prisoners who died in custody. Taken collectively, the

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<sup>102</sup> See e.g. chapter 10 paragraph 14.4. Recently one experienced defence solicitor has argued: "the wholesale abolition of the indemnity principle is not a viable proposition, since, without it, parties would be able to claim costs which they argued were reasonable in all the circumstances, regardless of whether or not those costs had actually been incurred."

<sup>103</sup> Legal aid had been granted for representation at the two inquests. The issue was whether the costs of representation at the inquests could be recovered against the Home Office in the civil action. Such recovery would lead to significantly higher remuneration for the lawyers in respect of the inquests than they would derive from LSC funding: see paragraph 5 of the judgment.

law reports of the last decade present the unseemly spectacle of endless and expensive squabbles about how much money should be paid to lawyers.<sup>104</sup> Sometimes claimant lawyers secure windfalls. Sometimes defendants succeed on technical points so as to deny claimant lawyers any remuneration for work properly done. The question must be asked whether the Costs War either serves the public interest or benefits the profession as a whole. If the answer to this question is no, then consideration must be given to what further measures (beyond those already adopted) should be taken in order to stamp out such litigation.

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<sup>104</sup> In commenting on the issues raised in Phase 1 of the Costs Review, Professor Ian Scott (general editor of the White Book) stated: "*I do fear that the profession to which I belong has lost its soul and is far too preoccupied with making money. Further, I think it is capable by its actions of killing the goose that has laid the golden egg. Another thing I feel strongly about is the shocking squandering of scarce court resources on refereeing of disputes about costs.*"



## **CHAPTER 4. THE ROLE OF THE CIVIL COURTS**

### **1. WHAT COURTS DO**

1.1 **Role of the civil courts.** It is the role of the civil courts to resolve disputes between citizens, companies, local authorities, governmental bodies, overseas bodies falling within the jurisdiction and other entities entitled to bring or defend claims. “Dispute resolution” by the courts means something more than finding a solution which everyone can live with or imposing a solution upon reluctant parties. It involves:

- (i) receiving evidence on disputed matters and making necessary findings of fact;
- (ii) identifying and applying the relevant legal rules or principles;
- (iii) determining the issues fairly between the parties;
- (iv) upholding the rights of parties;
- (v) arriving at decisions which are in accordance with law and justice.

I shall refer to these five functions as “function (i)”, “function (ii)” etc. The correct resolution of civil disputes is important not only to the immediate parties, but also more generally for the public good.<sup>105</sup>

1.2 **Function (i).** Receiving evidence and making necessary findings of fact about past (and occasionally future) events is a core activity of courts. In judicial review proceedings evidence is given by means of written statements and each party lodges the documents upon which it relies, without making further disclosure. In most other civil litigation in England and Wales (a) evidence is given orally, so that disputed matters can be tested in cross-examination; (b) the trial is preceded by “disclosure” of relevant documents, which any party can then rely upon at trial. These processes assist the court in its fact finding role, except in those cases where the costs of such processes make it impracticable for the parties to proceed to trial at all.

1.3 **Function (ii).** The identification of relevant rules and principles precedes the commencement of litigation and forms the basis of the parties’ statements of case. However, the perception by the parties and the court of the relevant legal rules and principles may shift during the course of litigation.<sup>106</sup> The ultimate application of the legal rules and principles to the facts, as found, is a matter for the court when it gives judgment.

1.4 **Function (iii).** Determining the issues fairly between the parties is essentially a matter of due process. Each party must be given due notice of every other party’s case. Each party must be given a proper opportunity to present its own case. The whole proceedings must be contained within such limits, that neither the costs of proceedings nor their duration become a barrier which prevents the parties from being heard at all.

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<sup>105</sup> See Professor Genn’s Hamlyn Lectures 2008, which are discussed in more detail below.

<sup>106</sup> That perception sometimes shifts during the trial. It is not uncommon, at least in my experience, for the crucial authorities to be lodged during the course of trial in a supplemental bundle. On the other hand, for obvious reasons, it is unusual for the legal basis of either side’s case to change during appeal proceedings.

1.5 Function (iv). It is probably helpful to identify upholding the rights of parties as a discrete function of civil courts. The Human Rights Act 1998 is overarching and is the single most important statute in recent years. Both the Act and the European Convention on Human Rights (“ECHR”) require the effective operation of courts to uphold Convention rights. The Human Rights Act 1998 plays a significant part in most of the 11,000 or so cases per year which are commenced in the Administrative Court and, indeed, in much other civil litigation. The rights of individuals are not confined to those spelt out in ECHR. They are part of the web of the common law and are the product of a combination of rules and principles.<sup>107</sup> The accessibility of civil courts, which will enforce the rights of individuals, is implicit in all human rights jurisprudence and is made explicit in ECHR, Article 6.

1.6 Function (v). To arrive at decisions which are in accordance with law and justice is the ultimate aim of every proceeding in the civil courts. The law which the courts must apply comprises the common law, statutes, subordinate legislation and those international instruments which have become incorporated into domestic law. Justice is a broader concept, frequently invoked by statutes and the common law, but never defined.

1.7 Justice. This report is not the place for an essay on the nature of justice. Perhaps, however, it is legitimate to mention that the effective administration of justice, including civil justice, is vital to the well being of every community. This proposition can be demonstrated both at the theoretical level and as a matter of practical reality. At the theoretical level, legal philosophers from Aristotle<sup>108</sup> to Rawls have recognised the critical importance of justice to society. In Aristotle’s view,<sup>109</sup> justice embraces moral excellence and, more specifically, both corrective justice and distributive justice. Justice, like all virtues in Aristotle’s scheme of things, is a mean. Corrective justice seeks the mean between the loss suffered by the victim and the gain made by the wrongdoer. Distributive justice requires a proportionate sharing of benefits and burdens.<sup>110</sup> Rawls, writing over 2,000 years later, maintains that justice “*is the first virtue of social institutions, as truth is of systems of thought*”.<sup>111</sup> From this starting point, Rawls proceeds to develop his theory of justice as fairness and the role of justice in a well-ordered society. A survey of jurisprudence during the two millennia which separate Aristotle and Rawls is not called for, at least in this report. The simple point which I make is that most serious thinkers have recognised the critical importance of civil justice (as well as criminal justice). It is implicit in all such writings that the administration of justice should be accessible to those involved in conflict.

1.8 Practical importance of civil justice. At the level of practical reality, the importance of civil justice is self-evident. Sir Jack Jacob<sup>112</sup> stated in his 1987 Hamlyn lectures that:

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<sup>107</sup> See Dworkin “*Taking Rights Seriously*”, Duckworth, 1977, for a clear, if controversial, exposition.

<sup>108</sup> Aristotle was much else besides a legal/moral philosopher, but that lies even further beyond my terms of reference.

<sup>109</sup> Nicomachean Ethics, book 5; Eudemian Ethics, book 6.

<sup>110</sup> See also Hart’s analysis of justice and morality in chapter 8 of *The Concept of Law* (Oxford University Press, second edition, 1994), which seems to me to be a development of Aristotle’s thinking.

<sup>111</sup> “*A Theory of Justice*”, Oxford University Press, 1972.

<sup>112</sup> Senior Master and Queen’s Remembrancer, for many years senior editor of the *White Book* and foremost scholar of civil procedure during the 1970s and 1980s.

“the system of civil justice is of transcendent importance for the people of this country, just as it is for the people of every country.”

More recently, Professor Genn<sup>113</sup> returned to this theme in her 2008 Hamlyn Lectures,<sup>114</sup> which I shall refer to as “Genn lecture 1”, “Genn lecture 2” and “Genn lecture 3” respectively. In Genn lecture 1, she took the following propositions as her starting point:

“(T)he machinery of civil justice sustains social stability and economic growth by providing public processes for peacefully resolving civil disputes, for enforcing legal rights and for protecting private and personal rights. The civil justice system provides the legal architecture for the economy to operate effectively, for agreements to be honoured, and for the power of government to be scrutinised and limited. The civil law maps out the boundaries of social and economic behaviour, while the civil courts resolve disputes when they arise. In this way, the civil courts publicly re-affirm norms and behavioural standards for private citizens, businesses and public bodies.”

1.9 Economic importance of civil justice. The civil courts play a crucial role in sustaining and attracting economic activity. Commercial contracts must be capable of effective enforcement. For all major enterprises, occasional litigation is an incident of carrying on business. Therefore an efficient civil litigation process is vital for their operations. Furthermore, parties to international contracts choose English law, because they have confidence in the English courts. This in turn attracts both transactional work and dispute resolution to this country.

1.10 Civil litigation provides an essential backdrop. Most transactions between government and governed and most dealings between individuals or companies proceed smoothly, because all parties voluntarily comply with their legal obligations. When disputes arise, such disputes are usually resolved before the issue of legal proceedings or, failing that, before trial. This is generally because the participants can predict what the courts would decide. Those few civil disputes which proceed to trial fulfil a valuable public function in reaffirming the framework within which everyone must regulate their affairs. Professor Genn describes this as the “shadow” which judicial decisions cast.<sup>115</sup> Accordingly, “*a flow of adjudicated cases is necessary to provide guidance on the law and, occasionally, to make new leaps*”.<sup>116</sup>

## 2. ALTERNATIVE DISPUTE RESOLUTION

2.1 What is ADR? Alternative dispute resolution (generally known as “ADR”) is, by definition, the antithesis of the administration of justice by the courts. If one sets on one side arbitration<sup>117</sup> and bilateral negotiation,<sup>118</sup> ADR comprises a variety of

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<sup>113</sup> Dame Hazel Genn DBE QC, Dean of Laws and Professor of Socio-legal Studies at University College London.

<sup>114</sup> Lecture 1: “*What is civil justice for (and how much is enough)?*”; Lecture 2: “*ADR in civil justice: What’s justice got to do with it?*”; Lecture 3: “*Judges and civil justice*”.

<sup>115</sup> See Dame Genn’s comment in Lecture 1: “*Adjudication in civil justice has a critical public function in providing the framework or the “shadow” in which settlement of disputes can be achieved*”.

<sup>116</sup> Genn lecture 1.

<sup>117</sup> Essentially litigation before a “private” judge, sometimes - but not always - with accelerated procedures.

dispute resolution processes involving third party intervention. These will be discussed in chapter 43, section 6. The most common form of ADR is mediation. Mediation is a facilitative process, whereby parties are brought together and the mediator assists them in reaching a mutually acceptable resolution of their dispute. That resolution need not either reflect the parties' legal rights or mirror the judgment which would have been given by a court.

2.2 Merits of mediation. It should be said at once that mediation is an excellent method of resolving many forms of civil litigation. Indeed, I have undertaken some limited mediation training<sup>119</sup> and gained an understanding of its benefits. Mediation enables warring neighbours to resolve their differences without incurring the ruinous costs of litigation.<sup>120</sup> Mediation is the ideal mechanism for resolving countless disputes within families or family businesses and for resolving many other disputes between individuals. Often claims by individuals against insured defendants are satisfactorily concluded in this way. Many (but by no means all) judicial review proceedings can be satisfactorily resolved by some form of mediation: see *R (Cowl) v Plymouth City Council* [2002] 1 WLR 803.

2.3 Mediation is also highly effective in resolving business disputes. Occasional litigation in the Commercial Court, the Mercantile Courts or the Technology and Construction Court is an incident of doing business for many companies. Usually what these companies are seeking is a fair and reasonable resolution of their disputes, rather than a full trial or a minute dissection of their precise legal rights. Good case management often involves building a mediation "window" into the litigation timetable at an appropriate stage.<sup>121</sup> Indeed a mediated solution, rather than a judgment, often assists the parties in continuing to do business with one another thereafter.

2.4 Mediation is not a universal panacea. Although mediation is an invaluable supplement to the process of the civil courts, it is not a substitute for that process. There are many cases in which, for good reason, the parties desire the court to uphold their legal rights.<sup>122</sup> There are many business disputes in which, for good reason, one side or the other desires the court to enforce a commercial contract. Indeed the assumption that contracts will be enforced, if they are not performed, underpins all business dealings. There are many cases in which, however skilful the mediator may be, one or other side is simply unwilling to enter into a fair or reasonable settlement.<sup>123</sup> Mediation is a voluntary, not coercive, process. Therefore the proper functioning of accessible civil courts remains essential, even in the mediation age. Professor Genn is rightly critical of a culture which seeks to drive all litigants away from the courts and into mediation, regardless of their wishes and regardless of the circumstances of individual cases.<sup>124</sup> As demonstrated in Genn lecture 2, in appropriate cases mediation saves costs and promotes satisfaction on all sides. In

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<sup>118</sup> Settlement achieved by direct negotiation between the parties or their representatives has always been the mean by which the majority of all cases before the civil courts are resolved. Bilateral negotiation has existed long before "alternative dispute resolution" was invented and should not, save as a matter of semantics, be classified as ADR.

<sup>119</sup> Encouraged by HH Judge John Toulmin QC, who pioneered a form of mediation by TCC judges. However, I have never attempted such a mediation myself.

<sup>120</sup> As to the disproportionate costs of many neighbour disputes, see chapter 33 below.

<sup>121</sup> As to what an appropriate stage is, there is much debate and no universal answer. It is hoped that the research summarised in chapter 34 may be of some assistance both to parties and to judges in identifying the best moment for mediation in specific cases.

<sup>122</sup> E.g. under the Human Rights Act 1998.

<sup>123</sup> For example, in a professional negligence case where the defendant is adamant that he was not at fault, or in a case of alleged commercial fraud.

<sup>124</sup> See Genn lecture 2 *passim*.

inappropriate cases, however, mediation causes increased costs and becomes just another hurdle to be crossed before the parties can get to trial.<sup>125</sup>

2.5 The above observations are true both in high value cases and in low value cases. In high value cases (e.g. concerning the interpretation of a commercial or construction contract) the parties sometimes make it clear at the outset that they want the court's decision on some particular issue, or upon the case as a whole, and of course they are prepared to pay for it. In such cases it is the function of the court to get on with the task of trying the case as swiftly and economically as possible.<sup>126</sup> At the other end of the spectrum, e.g. a householder's claim for a defectively built extension, there may be no practicable alternative to litigation. The builder may be unmoved by threats to mediate.<sup>127</sup>

2.6 Summary. Mediation is now developing its full potential. It is rightly reducing the burden upon the civil courts and helping many parties to arrive at satisfactory resolutions of their disputes. Nevertheless, the proper functioning of accessible civil courts alongside mediation is vital for the wellbeing of society and the economy. Indeed mediation itself could not flourish, were it not for the existence of civil courts in the background, standing ready to enforce the parties' rights and to coerce reluctant parties.

### 3. CONCLUSION

3.1 As noted by a number of legal writers,<sup>128</sup> over the last half century there has been an increasing legalisation of the social world and a shift from democracy to "juristocracy". There has been an expansion of legal remedies and protections for citizens. There has been a multiplication of statutory obligations and rights, many of which can only be enforced in the courts. There has been a massive growth of judicial review.<sup>129</sup> The Human Rights Act 1998 has added a new dimension to the role of the civil courts, which are now forced to address policy issues, when carrying out the various balancing acts required by ECHR.<sup>130</sup> In relation to many environmental issues the courts now play a critical role.<sup>131</sup>

3.2 The growth of ADR, in particular mediation, in parallel with the above developments affords an invaluable new form of dispute resolution, which lightens the workload of the courts and inures to the benefit of the parties in very many

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<sup>125</sup> The Civil Justice Committee of the Law Society agrees with Professor Genn's analysis: see its discussion paper "*The multi-track. A time for Change?*", dated 24<sup>th</sup> February 2009.

<sup>126</sup> In such cases it has been my practice and, I believe, that of other judges to set a tight litigation timetable without any formal break for mediation.

<sup>127</sup> Small construction disputes are another disaster area, where costs can escalate far beyond the sum in issue. If the reality is (as sometimes happens) that one or other party is not willing to enter into a remotely reasonable settlement, then the litigation must be case-managed by an experienced judge to an early trial at the lowest possible cost. *Peakman v Linbrooke Services Ltd* [2008] EWCA Civ 1239 is an object lesson in what ought not to happen.

<sup>128</sup> See Genn lecture 3 and the works cited in footnote 37 thereto.

<sup>129</sup> There were 7,139 new judicial review claims started in the Administrative Court during 2008.

<sup>130</sup> "Now, however, the judges and more particularly those who sit in the final tribunal, have under the requirements of the Human Rights Act 1998 to address questions of broad social, even of moral, policy. That is particularly so under art. 8 of the European Convention on Human Rights ... That is a process that does not lend itself to orthodox legal analysis. Much will depend on the instincts and view of social priorities of the particular judge ..." per Sir Richard Buxton: *Sitting en banc in the new Supreme Court* (2009) 125 LQR, 288 – 293.

<sup>131</sup> See chapter 36 below.

situations. Nevertheless, ADR can only ever be a supplement to the civil courts. It can never supplant the burgeoning functions of those courts.

3.3 The existence and smooth functioning of the civil courts remains one of the bedrocks of society. If the civil courts are to perform their functions properly, one way or another, it is necessary that litigation costs should be contained within the means of all parties, namely claimants, defendants and all others brought into litigation. The costs rules have other important functions as well, in particular encouraging reasonable litigation behaviour. Such functions will be discussed later in this report. However, I take two propositions as the starting point for the present review of the costs of civil justice. First, the proper functioning of the civil courts is essential to the well being of society. Secondly, if the processes of the civil courts are so onerous that the parties cannot reasonably afford to litigate, then those courts are not functioning satisfactorily. In considering what the parties can reasonably afford, it is necessary to look not only at the costs burden falling upon claimants, but also at the costs burden falling upon defendants.



REVIEW OF  
CIVIL LITIGATION COSTS

## **PART 2: THE BASIC FACTS**

### **CHAPTER 5. HOW MUCH CIVIL LITIGATION IS THERE?**

#### **1. INTRODUCTION**

1.1 Establishing how many civil claims are brought and how many are contested is not easy. Some figures in the Judicial Statistics published by the Ministry of Justice (“MoJ”) are unreliable in a number of respects. For the purpose of his report “*Should the Civil Courts be Unified?*” (Judicial Office, 2008) (“the Brooke Report”) Sir Henry Brooke examined the published figures for 2007. Whilst stating that “the quality of the data...depends on the quality of the staff who make the entries, and of those who train and supervise them”, he came to the following conclusion:<sup>1</sup>

“This investigation showed that the statistics for District Registry claims are not worth the paper they are written on. While the Chancery statistics present fewer problems, on the QB side, only the columns for person injury claims, which I was told formed the bulk of QB High Court business (apart from TCC and Mercantile claims) outside London, are likely to show a true picture.”

1.2 My own experience confirms the unreliability of the published statistics in one specific respect. The Judicial Statistics 2007 record that, in respect of the London Technology and Construction Court (“TCC”) there were 7 trials in 2004 and 3 trials in 2005.<sup>2</sup> In fact there were 38 trials in the London TCC in the year 1<sup>st</sup> October 2004 – 30<sup>th</sup> September 2005. In other words those particular published figures are wrong by several hundred percent.<sup>3</sup>

1.3 The extent to which the published figures are accurate or inaccurate in areas not specifically investigated by Sir Henry Brooke or myself must be a matter of speculation. The MoJ advise me that the published figures can be relied upon as giving a reasonable order of magnitude; that the returns upon which the statistics are based may (in respect of regional court centres) have sometimes muddled up district registry figures and county court figures, but that the totals of the two sets of figures are likely to be broadly accurate.

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<sup>1</sup> The Brooke Report, Appendix J.

<sup>2</sup> Table 3.10 on page 51 of the Judicial Statistics 2007.

<sup>3</sup> It has subsequently been confirmed that figures for 2004 and 2005 were reported incorrectly to the Ministry of Justice. The errors will be rectified in future Judicial and Court Statistics reports.

1.4 In the absence of any more authoritative statistics, I shall set out in sections 2 to 5 of this chapter the picture which emerges from the published Judicial Statistics for 2007 (the most recent year for which figures are currently available). This must be read subject to the health warning above. I shall consider the broader picture, including the mass of claims which settle before issue, in chapter 6.

1.5 How many of the proceedings issued are contested? It has always been the case that only a small minority of cases proceed to trial. However, many cases which settle between issue and trial involve substantial costs. On many occasions such costs substantially exceed the value of the claim or the sum at stake. The focus of the present chapter, therefore, is not concentrated upon that minority of cases which proceed to trial. I am concerned to examine all cases which are contested for a period after issue, with the consequence that at least one party may incur substantial costs liability.

## 2. THE PUBLISHED JUDICIAL STATISTICS IN RESPECT OF THE COUNTY COURT

2.1 Judicial Statistics 2007. The picture which emerges is as follows. In 2007 there were 2,014,918 claims or petitions issued in the county courts, made up as follows:<sup>4</sup>

1. Specified money claims	1,410,581
2. Unspecified money claims	144,905
3. Claims for recovery of land	284,381
4. Claims for return of goods	8,470
5. Other non-money claims	99,636
6. Insolvency petitions	66,945
	<u>2,014,918</u>

2.2 Specified money claims. The 1,410,581 “specified money claims” in line 1 are (a) principally debt claims and (b) principally small claims.<sup>5</sup> The vast majority of debt claims are undefended and therefore costs are limited to the fixed costs specified in CPR Part 45, section 1. Defences were filed in 225,433 cases (i.e. 16% of specified money claims). The great majority of those defended actions were small claims, thus resulting in no significant costs orders.<sup>6</sup> It is therefore concluded that a relatively small proportion of cases in line 1 gave rise to disproportionate costs or to the sorts of problems with which the present review is concerned.

2.3 Unspecified money claims. The 144,905 “unspecified money claims” in line 2 fall into a number of categories, of which the largest is claims for personal injuries. Defences were filed in 98,763 of these cases (i.e. 68% of unspecified money claims). It can therefore be seen that the majority of cases in line 2 were defended and at least potentially gave rise to significant costs orders.

2.4 Claims for recovery of land. The 284,381 claims for recovery of land are, for the most part, claims for possession by landlords (usually for non-payment of rent) and by mortgagees (usually for failure to make mortgage payments). Defences were filed in 13,241 of these cases (i.e. 5% of claims for recovery of land). Thus it can be seen that the majority of cases in line 3 were undefended: thus in the landlord claims

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<sup>4</sup> Table 4.2 of the Judicial Statistics 2007.

<sup>5</sup> The number of specified money claims allocated to the small claims track in 2007 was 93,354.

<sup>6</sup> See CPR Part 27.



fixed costs were limited by CPR Part 45, section 1; in the mortgagee claims costs were generally governed by the terms of the mortgage.<sup>7</sup>

2.5 Claims for return of goods. The 8,470 claims for return of goods are principally claims brought by hire-purchase companies against hirers for non-payment. Defences were filed in only 747 cases (i.e. 9% of claims for recovery of goods). Thus it can be seen that the majority of claims in line 4 were undefended and therefore costs were limited to the fixed costs specified in CPR Part 45, section 1.

2.6 Other non-money claims. The 99,636 “other non-money claims” are a mixed bag of claims and include costs-only proceedings (under CPR rule 44.12A). Defences were filed in 3,772 cases (i.e. 4% of other non-money claims). However, many claims in this category would not involve the service of defences even if they are contested (e.g. costs-only proceedings, which are started under CPR Part 8). It is reasonable to infer that a proportion of claims in line 5 give rise to significant costs orders.

2.7 Insolvency petitions. The 66,945 insolvency petitions are for the most part uncontested. I understand that generally these do not give rise to disproportionate costs.

2.8 Conclusion. On the basis of the published Judicial Statistics (and subject to the caveats in section 1 above) it is reasonable to assume that approximately two million cases were commenced in the county courts during 2007. The vast majority of those cases either (a) were undefended or (b) proceeded on the small claims track (with the result that no substantial costs orders were made) or (c) proceeded to their conclusion on other tracks at proportionate cost (often fixed costs). However, approximately 10% of cases (say about 200,000 cases)<sup>8</sup> were seriously contested and, at least potentially, gave rise to significant costs orders. By far the largest single category of contested claims giving rise to significant costs orders were personal injury claims.

### 3. PUBLISHED JUDICIAL STATISTICS IN RESPECT OF THE QUEEN'S BENCH DIVISION (“QBD”)

3.1 Judicial Statistics 2007. The picture which emerges is as follows. There were 18,505 claims or originating summonses issued in the QBD (excluding the specialist courts)<sup>9</sup> in 2007, made up as follows:

Issued by the Royal Courts of Justice (“RCJ”) in London	4,794
Issued by district registries	<u>13,711</u>
Total	<u>18,505</u>

3.2 District registry figures. For the reasons identified by Sir Henry Brooke,<sup>10</sup> owing to administrative errors some county court claims will have been wrongly classified as district registry claims and some district registry claims will have been wrongly classified as county court claims. It is the opinion of the MoJ that more

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<sup>7</sup> For a more detailed breakdown of the claims for recovery of land and discussion of associated costs issues, see chapter 31.

<sup>8</sup> MoJ statisticians comment that this is a very rough ballpark estimate. It assumes, for instance, that every case in which a defence is served is treated as contested, regardless of how far the case progresses thereafter.

<sup>9</sup> The MoJ has confirmed that the figure of 4,794 shown in tables 3.1 and 3.2 of the 2007 Judicial Statistics does not include claims issued in the Commercial Court, Admiralty Court, TCC or Administrative Court.

<sup>10</sup> See paragraphs 1.1 – 1.3 above.

errors fall into the latter category than the former category; however, the overall total is likely to be about right.

3.3 Breakdown of district registry figures. QBD cases issued in district registries include a large number of personal injury cases and general common law claims, as well as mercantile cases and TCC cases. No breakdown by category of cases issued by district registries is given in the published Judicial Statistics. However, it can be seen from the TCC annual report for the year ending 30<sup>th</sup> September 2007 that the following TCC cases were issued<sup>11</sup> at principal court centres outside London:

Birmingham	213
Bristol	18
Cardiff	37
Exeter	3
Leeds	44
Liverpool (inference from incomplete statistics) approx	70
Manchester	147
Newcastle	16
Nottingham	7
	<hr/>
	555

No breakdown of the above figures is available as between High Court and county court TCC. However, on the basis of my experience, I would be unsurprised if the split is approximately 50/50. There are no published statistics for the Mercantile Courts, but overall their caseload may be similar to the TCC. If one takes the figure of 13,711 as representing the total number of QBD cases issued in district registries, it may be reasonable to assume that between 500 and 600 of those cases were proceeding in the specialist courts and the remainder in the general QBD. In 2007 neither the Administrative Court nor the Commercial and Admiralty Court operated outside London.

3.4 Analysis of the 4,794 cases issued by the RCJ general registry. Table 3.2 of the Judicial Statistics 2007 shows the following breakdown of the 4,794 cases issued in the general registry of the RCJ during 2007:

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<sup>11</sup> Sometimes issued in the general list and then transferred into the TCC.

Table 5.1: Breakdown of cases issued in the general registry of the RCJ during 2007<sup>12</sup>

<b>Queen's Bench Division</b>				
Proceedings started, <sup>(i)</sup> by nature and value of claim, 2007				<b>Number of claims</b>
<b>Nature of claim</b>	<b>Value of claim</b>		<b>Unspecified</b>	<b>Total</b>
	<b>£15,000 - £50,000</b>	<b>Over £50,000</b>		
Debt (goods sold & delivered, work carried out etc)	172	339	272	783
Breach of contract	100	214	362	676
Clinical Negligence	71	154	353	578
Personal Injury Actions	66	359	732	1,157
Other Negligence (inc. professional negligence)	21	61	123	205
Defamation (libel, slander)	43	45	145	233
Tort (e.g. nuisance, trespass, assault, wrongful arrest, etc.)	4	11	31	46
Recovery of land / property	-	-	10	10
Miscellaneous	375	223	508	1,106
<b>Total</b>	<b>852</b>	<b>1,406</b>	<b>2,536</b>	<b>4,794</b>

Source: High Court combined workload return  
Notes: (i) Figures given are for the Royal Courts of Justice only

Approximately 12% of those case issued resulted in default judgments. It is reasonable to assume that the majority of the remaining claims were defended and therefore potentially gave rise to significant costs orders.

3.5 Claims brought in the specialist courts at the RCJ in London. The specialist courts have their own registries, whose records reveal that the following claims were commenced during 2007:

Commercial Court	839
Admiralty Court	89
TCC	409
Administrative Court	11,293
<b>Total</b>	<b>12,630</b>

3.6 The majority of cases issued in the Commercial Court, the Admiralty Court and the TCC are contested and therefore give rise to substantial costs orders, on occasions running to many millions of pounds.

3.7 The Administrative Court is the busiest part of the QBD. The largest element of work in this court is judicial review (6,391<sup>13</sup> cases in 2007). Respondents to judicial review applications incur the costs of filing acknowledgments of service, which contain summary grounds of defence. Thereafter the case is considered on the papers or at a hearing in order to decide if permission to proceed with the case should be granted. In the majority of cases permission is refused, so that proceedings come to an end at that stage, usually (but not always) with costs which are proportionate to the issues at stake. Approximately 20% of judicial review cases proceed beyond the permission stage and, at least potentially, give rise to substantial costs orders.

<sup>12</sup> Table 5.1 in this chapter is the same as Table 3.2 of the Judicial Statistics 2007.

<sup>13</sup> This figure is taken from data supplied to me by the Administrative Court; according to Judicial Statistics 2007 the correct figure is 6,690: see Table 1.12 of the Judicial Statistics 2007.

3.8 The next largest category of work in the Administrative Court comprises statutory reconsiderations in asylum cases pursuant to section 103A of the Nationality Immigration and asylum Act 2002. There were 3,730 cases in 2007. These cases are dealt with on paper and the costs involved are modest in comparison to the importance of the issues at stake. The next largest category of work after that comprises statutory appeals and applications (525<sup>14</sup> cases in 2007). A substantial number of statutory appeals and applications are contested and thus potentially give rise to substantial costs orders.

3.9 Effect of the Tribunals, Courts and Enforcement Act 2007. As a consequence of the Tribunals, Courts and Enforcement Act 2007, some judicial review cases, statutory appeals and applications, which had hitherto been dealt with by the Administrative Court passed to the Upper Tribunal in November 2008. At the time of writing the percentage of such cases is not known. It should be noted, however, that most of the cases passing to the Upper Tribunal enter a “no costs” regime: the loser does not pay the winner’s costs in the Upper Tribunal.<sup>15</sup>

3.10 The remaining cases in the Administrative Court fall into a variety of categories, the largest of which is planning.<sup>16</sup> A significant proportion of these cases are contested and thus potentially give rise to substantial costs orders.

#### 4. PUBLISHED JUDICIAL STATISTICS IN RESPECT OF THE CHANCERY DIVISION

4.1 Sir Henry Brooke found the published figures for the Chancery Division to be more reliable.<sup>17</sup> According to Judicial statistics 2007, the number of Chancery cases started in 2006 and 2007 were broadly similar. The figures are as follows:

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<sup>14</sup> This figure is taken from data supplied to me by the Administrative Court; according to Judicial Statistics 2007 the correct figure is 532: see Table 1.14 of the Judicial Statistics 2007.

<sup>15</sup> See chapter 46 below.

<sup>16</sup> 201 cases in 2007 according to statistics from the Administrative Court; 203 cases according to the published Judicial Statistics 2007.

<sup>17</sup> The Brooke Report, Appendix J.

**Table 5.2: Breakdown of Chancery cases started in 2006 and 2007** <sup>18</sup>

**Chancery Division**

Summary of proceedings started, 2006-2007	Number of cases	
<b>Nature of originating proceedings</b>	<b>2006</b>	<b>2007</b>
<u>Claims, originating and non-originating proceeding issued</u>		
London	4,528	3,534
Outside London <sup>(i)</sup>	2,025	3,762
<u>Bankruptcy Court proceedings<sup>(ii)</sup></u>		
Bankruptcy petitions	13,559	12,479
Other Originating applications	6,550	8,261
<u>Companies Court proceedings<sup>(ii)</sup></u>		
London	9,696	9,099
Outside London	8,303	8,403
Patents Court appeals received	2	3
<b>Total</b>	<b>44,663</b>	<b>45,541</b>

Source: Chancery Division (multiple data sources)

Notes: (i) Contains estimated originating summonses as follows: 185 in 2006, and 349 in 2007

(ii) Excluding transfers from the Chancery Division

**4.2 Breakdown of claims, originating and non-originating proceedings, issued in London.** In 2006 there were 4,528 cases falling into these categories. In 2007 there were 3,534 cases falling into these categories. The breakdown of these cases is as follows:

<sup>18</sup> Table 5.2 in this chapter is the same as Table 2.1 of the Judicial Statistics 2007.

**Table 5.3: Breakdown of claims, originating and non-originating proceedings, issued in London<sup>19</sup>****Chancery Division**

Claims and originating proceedings issued in London by nature of proceedings, 2002-2007

<b>Nature of proceedings</b>	<b>2002</b>	<b>2003</b>	<b>2004</b>	<b>2005</b>	<b>2006</b>	<b>2007</b>
<b>Land</b>						
Contracts of sale and purchase	153	176	31	31	10	10
Landlord and Tenant	432	474	197	2	3	5
Mortgages and charges	47	33	26	12	-	-
Squatters and trespassers	29	46	5	-	1	2
Restrictive covenants	57	74	-	1	1	1
Other Proceedings	309	502	1,324	788	1,114	924
<b>Business and industry</b>						
Partnership	103	167	54	41	28	82
Business fraud claims	97	86	5	1	-	3
Contracts of sale & purchase of shares & business	137	120	59	28	14	1
Other Disputes	227	256	620	716	301	246
<b>Intellectual property</b>						
Confidential information	93	81	5	11	3	21
Passing off and trade marks	181	212	66	105	50	118
Patents and registered designs <sup>(i)</sup>	187	238	153	54	57	111
Copyright and design right <sup>(i)</sup>	207	306	195	148	120	172
<b>Professional negligence</b>						
Claims against solicitors	75	43	12	52	30	31
Claims against accountants	37	24	1	1	2	-
Claims against surveyors and estate agents	47	57	-	-	-	-
Claims against members of other professions	115	102	8	13	10	31
<b>Trusts, Wills and probate</b>						
Contentious probate actions	117	117	80	115	73	185
Disputes relating to Trust property	81	96	20	27	10	3
Variation of Trusts	63	74	4	8	2	-
Inheritance (provision for dependants)	73	82	8	15	10	43
Guardianship of minors' estate	51	32	-	-	-	8
Charities	35	42	2	-	1	-
Other application concerning Wills and trusts	183	240	175	318	214	237
<b>Other</b>						
Other debts, damages and accounts	355	360	995	1,701	1,102	343
Revenue appeals	37	54	4	16	-	12
Solicitors	37	49	-	15	10	9
Originating process not otherwise classified	359	390	-	-	1,362	936
<b>Total</b>	<b>3,924</b>	<b>4,533</b>	<b>4,049</b>	<b>4,219</b>	<b>4,528</b>	<b>3,534</b>

Source: Chancery chambers, bespoke contribution for this publication

Notes: (i) These matters are dealt with in the Patents Court

<sup>19</sup> Table 5.3 in this chapter is the same as Table 2.3 of the Judicial Statistics 2007.

4.3 A substantial proportion of the Chancery proceedings in London (currently running at about 4,000 per year) are contested at least for a period and thus potentially give rise to significant costs liabilities.

4.4 The proceedings in the Bankruptcy Court and the Companies Court (currently running at about 38,000 sets of proceedings per year) are for the most part of a routine nature, such as debtors' petitions for their own bankruptcy or uncontested winding up petitions in respect of companies.

## 5. OVERALL CONCLUSIONS RE CIVIL LITIGATION

5.1 High Court litigation. During 2007 approximately 75,000<sup>20</sup> cases were brought in the High Court. Out of these 75,000 cases, approximately 10% were contested and thus potentially gave rise to significant costs orders.

5.2 Overall numbers. As set out in section 2 above, the volume of county court litigation far exceeds the volume of High Court litigation. A fair overall summary of civil litigation in 2007 may run as follows: approximately 2.1 million civil cases were launched, of which at least 95% were brought in the county courts. Approximately 90% of all civil cases were concluded without any prolonged contest and at costs proportionate to the issues at stake. The remaining 10% of cases were contested (whether or not settled before trial) and potentially gave rise to significant costs liabilities. The extent of the costs liabilities arising in contested cases will be addressed in later chapters.

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<sup>20</sup> This figure is derived as follows: QBD 18,505 + specialist courts at RCJ 12,518 + Chancery Division 45,541 = 76,564. Bearing in mind the errors in published Judicial Statistics, 75,000 would appear to indicate the order of magnitude.

## **CHAPTER 6. THE BROADER PICTURE**

### **1. INTRODUCTION**

1.1 In chapter 5 I examined the number of actions which were brought in court. In the present chapter I shall examine the broader picture, comprising both claims which are settled before issue and claims which proceed to litigation.

1.2 Claims settled before issue. Claims which are settled before issue (to which I shall refer as “unissued claims”) by definition do not feature in the published Judicial Statistics. Nevertheless, they account for a substantial proportion of the costs incurred by claimants and defendants. The settlements negotiated in respect of unissued claims and the costs incurred in achieving such settlements are governed by the parties’ expectation of what would happen in the event of litigation. Accordingly such settlements are a direct reflection of both substantive law and the costs rules. This is confirmed by the research papers reviewed in chapter 9 below.

1.3 Where to find data. A number of organisations keep data relating to both issued and unissued claims. I shall examine some of that data in the following sections of this chapter.

### **2. LEGAL SERVICES COMMISSION**

2.1 The Legal Services Commission (“LSC”) provides funding for litigants who satisfy the means test and the merits test in certain limited categories of civil litigation, in particular housing, clinical negligence and judicial review. The funding provided by the LSC is still generally referred to as “legal aid”, even though Parliament has now introduced more exacting terminology.

2.2 Figures are published annually by the LSC showing the amounts paid out by the LSC in respect of cases concluded in that year. Although not apparent from the published reports, it is possible to identify how much of those costs relate to issued and unissued claims respectively. Some categories of payment by the LSC are not helpful for present purposes, for example payments re (non-clinical negligence) personal injury claims, because many of these are the rump of pre-April 2000 claims. However, the figures in respect of housing, clinical negligence and judicial review (categories for which legal aid is still available) are illuminating, because they provide a cross-section of claims and it is possible to separate out the costs referable to (a) claims issued and (b) claims resolved before issue. However, it should be born in mind that these figures are not comprehensive. Some claimants do not qualify for legal aid because of their means; some claimants eligible for legal aid in fact choose to proceed on CFAs. Also, all the figures below relate to legal aid certificates for actual or potential court cases and so do not cover cases resolved under the Legal Help scheme (which covers advice services and can include some initial correspondence and negotiation).

2.3 Claims concluded in 2007/08 in respect of which the LSC paid at least part of the costs. I set out in this paragraph four tables provided to me by the LSC which record payments made by the LSC in respect of unsuccessful and partially successful claims<sup>21</sup> concluded in 2007/08 (i.e. the financial year 1<sup>st</sup> January 2007 to 31<sup>st</sup> March

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<sup>21</sup> For which legal aid certificates had been issued.



2008). I shall refer to these as “category A”<sup>22</sup> claims. All claims in which the LSC failed to make full costs recovery are put into category A. Some claims in this category would have been abandoned by the claimant or dismissed by the court. Other claims in this category would have been partially successful, so that some costs recovery was made by the LSC. The costs figures shown primarily represent payments from the legal aid fund at prescribed rates but will include some *inter partes* costs. The columns headed CF, DIS and PC refer to counsel’s fees, disbursements and solicitor profit costs respectively.

**Table 6.1: Category A - All cases**

Category description	Volume	CF	DIS	PC	Total	Average cost	Counsel used
Welfare Benefits	33	46,223	3,065	58,371	107,658	3,262	27
Public Law	812	2,178,970	387,433	2,681,894	5,248,298	6,463	667
Consumer	541	1,225,986	423,166	1,678,069	3,327,221	6,150	414
Debt	318	486,237	115,614	930,248	1,532,100	4,818	243
Education	344	633,783	437,296	1,040,208	2,111,288	6,137	275
Employment	65	224,106	31,613	197,928	453,647	6,979	54
Actions against the police	411	770,975	329,697	1,294,586	2,395,258	5,828	301
Community Care	462	477,425	168,317	1,241,644	1,887,386	4,085	318
Personal Injury	579	1,197,582	754,851	1,950,740	3,903,173	6,741	306
Miscellaneous	1,323	3,067,931	1,226,408	4,337,598	8,631,936	6,525	939
Mental Health	167	383,661	89,909	544,964	1,018,534	6,099	121
Clinical Negligence	2,837	2,287,288	6,646,959	9,673,505	18,607,752	6,559	841
Immigration	1,042	1,292,070	253,868	1,731,261	3,277,200	3,145	845
Housing	9,153	7,497,643	1,705,615	13,253,778	22,457,035	2,454	5,716
Grand Total	18,087	21,769,880	12,573,812	40,614,793	74,958,484	4,144	11,067

<sup>22</sup> These claims are listed in table A on page 11 of the LSC’s published “*Statistical Information*” for the year ended 31/3/2008. The figures in the published table A are not quite correct and so necessary adjustments have been made in the tables set out in this paragraph.

**Table 6.2: Category A – Stage 1: Concluded before issue**

Category description	Volume	CF	DIS	PC	Total	Average cost	Counsel used
Welfare Benefits	20	10,990	466	15,226	26,682	1,334	15
Public Law	394	278,270	52,664	523,433	854,367	2,168	303
Consumer	213	145,632	53,330	242,939	441,901	2,075	149
Debt	54	49,513	4,224	112,895	166,632	3,086	39
Education	226	198,820	184,578	442,696	826,094	3,655	165
Employment	13	12,575	2,479	12,970	28,024	2,156	9
Actions against the police	227	139,407	71,813	422,270	633,490	2,791	147
Community Care	366	174,909	74,651	590,313	839,874	2,295	226
Personal Injury	280	97,327	127,845	513,285	738,457	2,637	111
Miscellaneous	395	348,442	361,627	688,842	1,398,911	3,542	265
Mental Health	95	118,014	35,726	209,911	363,651	3,828	68
Clinical Negligence	2,184	774,584	3,988,551	5,776,097	10,539,233	4,826	497
Immigration	303	137,696	24,334	276,057	438,087	1,446	209
Housing	2,281	811,475	379,652	1,914,426	3,105,553	1,361	1,281
Grand Total	7,051	3,297,657	5,361,939	11,741,361	20,400,956	2,893	3,484

**Table 6.3: Category A – Stage 2: Concluded after issue but before trial**

Category description	Volume	CF	DIS	PC	Total	Average cost	Counsel used
Welfare Benefits	7	15,072	1,368	32,095	48,535	6,934	6
Public Law	221	455,541	69,454	649,362	1,174,357	5,314	188
Consumer	135	302,649	113,473	496,015	912,136	6,757	98
Debt	135	111,937	38,355	255,147	405,439	3,003	96
Education	89	287,555	166,713	469,912	924,180	10,384	83
Employment	19	19,428	4,766	38,302	62,496	3,289	15
Actions against the police	106	187,152	129,466	418,131	734,750	6,932	86
Community Care	74	179,569	41,918	388,474	609,961	8,243	71
Personal Injury	155	165,619	207,417	579,529	952,565	6,146	83
Miscellaneous	448	923,511	376,453	1,600,558	2,900,522	6,474	317
Mental Health	43	76,429	10,007	132,642	219,077	5,095	33
Clinical Negligence	525	790,925	2,060,590	2,955,045	5,806,560	11,060	280
Immigration	537	498,490	134,973	837,999	1,471,463	2,740	450
Housing	2,912	1,844,118	539,824	4,203,787	6,587,728	2,262	1,737
Grand Total	5,406	5,857,995	3,894,778	13,056,997	22,809,769	4,219	3,543

**Table 6.4: Category A – Stage 3: Concluded at trial or on appeal**

Category description	Volume	CF	DIS	PC	Total	Average cost	Counsel used
Welfare Benefits	6	20,160	1,231	11,050	32,441	5,407	6
Public Law	197	1,445,159	265,316	1,509,099	3,219,574	16,343	176
Consumer	193	777,705	256,363	939,115	1,973,183	10,224	167
Debt	129	324,786	73,036	562,207	960,028	7,442	108
Education	29	147,409	86,005	127,600	361,014	12,449	27
Employment	33	192,103	24,368	146,656	363,127	11,004	30
Actions against the police	78	444,416	128,418	454,185	1,027,018	13,167	68
Community Care	22	122,947	51,748	262,857	437,551	19,889	21
Personal Injury	144	934,637	419,589	857,925	2,212,151	15,362	112
Miscellaneous	480	1,795,978	488,327	2,048,198	4,332,503	9,026	357
Mental Health	29	189,217	44,176	202,412	435,805	15,028	20
Clinical Negligence	128	721,778	597,818	942,362	2,261,958	17,672	64
Immigration	202	655,884	94,561	617,205	1,367,650	6,771	186
Housing	3,960	4,842,050	786,140	7,135,565	12,763,754	3,223	2,698
Grand Total	5,630	12,614,228	3,317,095	15,816,435	31,747,758	5,639	4,040

**2.4 Clinical negligence claims.** Tables 6.1 and 6.2 of the above tables show that there were 2,837 category A clinical negligence claims, of which 2,184 were dropped or settled before issue. Table 6.3 shows that 525 category A clinical negligence claims were dropped or settled between issue and trial. Table 6.4 shows that 128 category A clinical negligence claims went to trial. What is clear is that the great majority of category A clinical negligence claims, for which legal aid certificates were granted, were resolved before issue. Those that proceeded to issue or beyond (and thus got into the published Judicial Statistics) represented about 23% of the total. The average costs incurred by the LSC on category A clinical negligence claims which were resolved before issue amounted to £4,826. The average cost of category A clinical negligence claims which were resolved between issue and trial was £11,060. The average cost of category A clinical negligence claims which went to trial was £17,672. However, the category A clinical negligence claims which went to trial represent under 5% of the total number of claims for which legal aid certificates were issued.

**2.5 Judicial review and housing.** It can be seen from the above tables that the majority of category A judicial review and housing claims were resolved before trial, although the proportions that reached the stage of issue were greater.

**2.6 Claims concluded in 2007 in respect of which the LSC recovered all their costs.** I set out in this paragraph four tables provided to me by the LSC relating to claims<sup>23</sup> concluded in 2007, where the claimant was successful and recovered costs in full. I shall refer to these as “category B”<sup>24</sup> claims. The figures shown in these four tables are the costs paid by the defendants to the claimants’ solicitors (i.e. the inter-party costs), NOT the costs paid out by the LSC and subsequently reimbursed to the

<sup>23</sup> For which legal aid certificates had been issued.

<sup>24</sup> These claims are listed in table B on page 11 of the LSC’s published “*Statistical Information*” for the year ended 31/3/2008. The figures in the published table B are not quite correct and so necessary adjustments have been made in the tables set out in this paragraph.

LSC. They are often referred to as “APO” cases, which stands for “adjustment purposes only”.

**Table 6.5: Category B – All cases**

Category description	Volume	CF APO	DIS APO	PC APO	Counsel used	Total APO	APO Average cost
Welfare Benefits	11	9,645	32,495	2,285	9	44,425	4,039
Public Law	130	682,384	1,464,525	141,037	117	2,287,945	17,600
Consumer	245	504,182	2,277,593	717,718	223	3,499,493	14,284
Debt	48	93,170	299,371	29,932	35	422,473	8,802
Education	41	95,354	313,489	59,541	37	468,385	11,424
Employment	6	72,940	62,864	9,107	6	144,912	24,152
Actions against the police	286	735,245	3,787,245	569,601	228	5,092,090	17,805
Community Care	43	185,685	617,530	35,718	40	838,933	19,510
Personal Injury	691	3,937,910	14,665,029	3,778,951	476	22,381,890	32,391
Miscellaneous	198	866,254	2,624,497	570,012	180	4,060,763	20,509
Mental Health	12	16,469	59,574	9,392	11	85,435	7,120
Clinical Negligence	1,526	8,886,875	43,839,491	13,743,819	1,232	66,470,185	43,530
Immigration	248	427,227	841,417	80,632	185	1,349,276	5,441
Housing	1,478	1,457,889	6,939,850	1,004,359	1,073	9,402,098	6,361
Grand Total	4,964	17,971,230	77,824,969	20,752,104	3,852	116,548,303	23,479

**Table 6.6: Category B – Concluded before issue**

Category description	Volume	CF APO	DIS APO	PC APO	Counsel used	Total APO	APO Average cost
Welfare Benefits	4	928	9,501	548	2	10,977	2,744
Public Law	27	26,387	107,980	6,070	23	140,438	5,201
Consumer	32	38,960	260,005	64,377	20	363,342	11,354
Debt	1	0	946	0	0	946	946
Education	4	3,496	10,866	160	4	14,522	3,630
Employment	79	65,548	449,613	85,878	45	601,039	7,608
Actions against the police	11	9,188	63,246	4,637	10	77,071	7,006
Community Care	176	694,680	1,309,278	320,835	52	2,324,793	13,209
Personal Injury	28	34,619	136,753	18,980	27	190,352	6,798
Miscellaneous	5	4,654	14,441	684	4	19,778	3,956
Mental Health	410	476,173	4,385,985	1,350,693	208	6,212,851	15,153
Clinical Negligence	73	35,340	176,885	11,106	48	223,331	3,059
Immigration	233	89,496	782,993	119,832	118	992,321	4,259
Housing	4	928	9,501	548	2	10,977	2,744
Grand Total	1,083	1,479,468	7,708,493	1,983,799	561	11,171,760	10,316

**Table 6.7: Category B – Concluded after issue before trial**

Category description	Volume	CF APO	DIS APO	PC APO	Counsel used	Total APO	APO Average cost
Welfare Benefits	6	4,246	16,683	1,011	6	21,941	3,657
Public Law	78	183,761	716,347	77,993	69	978,101	12,540
Consumer	186	368,402	1,562,036	506,627	181	2,437,065	13,103
Debt	26	33,531	132,376	13,673	18	179,580	6,907
Education	28	43,913	207,171	34,899	24	285,983	10,214
Employment	2	4,377	22,685	2,100	2	29,162	14,581
Actions against the police	162	344,183	2,334,560	366,732	142	3,045,474	18,799
Community Care	28	65,743	376,480	19,361	26	461,584	16,485
Personal Injury	365	1,707,705	8,009,333	2,057,461	298	11,774,499	32,259
Miscellaneous	114	437,371	1,680,333	375,483	99	2,493,188	21,870
Mental Health	5	4,367	34,832	8,197	5	47,396	9,479
Clinical Negligence	905	5,234,378	26,505,673	8,851,241	824	40,591,292	44,852
Immigration	133	132,623	373,214	38,702	95	544,539	4,094
Housing	887	655,400	4,112,953	665,170	647	5,433,523	6,126
Grand Total	2,925	9,220,001	46,084,675	13,018,651	2,436	68,323,326	23,358

**Table 6.8: Category B – Concluded at trial or on appeal**

Category description	Volume	CF APO	DIS APO	PC APO	Counsel used	Total APO	APO Average cost
Welfare Benefits	1	4,471	6,310	726	1	11,507	11,507
Public Law	25	472,235	640,198	56,973	25	1,169,406	46,776
Consumer	27	96,819	455,552	146,714	22	699,085	25,892
Debt	21	59,639	166,049	16,259	17	241,947	11,521
Education	9	47,946	95,452	24,483	9	167,881	18,653
Employment	4	68,563	40,179	7,007	4	115,750	28,938
Actions against the police	45	325,513	1,003,072	116,991	41	1,445,577	32,124
Community Care	4	110,754	177,805	11,719	4	300,278	75,070
Personal Injury	150	1,535,525	5,346,418	1,400,655	126	8,282,598	55,217
Miscellaneous	56	394,264	807,411	175,548	54	1,377,224	24,593
Mental Health	2	7,449	10,301	511	2	18,261	9,131
Clinical Negligence	211	3,154,422	12,812,758	3,488,863	199	19,456,042	92,209
Immigration	42	259,264	291,318	30,824	42	581,406	13,843
Housing	358	712,993	2,043,904	219,357	308	2,976,254	8,314
Grand Total	955	7,249,858	23,896,727	5,696,632	854	36,843,216	38,579

**2.7 Clinical negligence claims.** Tables 6.5 and 6.6 of the above tables show that there were 1,526 category B clinical negligence claims, of which 410 were settled before issue. Table 6.7 shows that 905 category B clinical negligence claims were

settled between issue and trial. Table 6.8 shows that 211 category B clinical negligence claims went to trial or appeal (where judgment was given in favour of the claimant). It is clear is that approximately 27% of category B clinical negligence claims were resolved before issue. Those that proceeded to issue or beyond (and thus got into the published Judicial Statistics) represented about 73% of the total. The average costs incurred by the LSC on category B clinical negligence claims which were settled before issue amounted to £15,153. The average cost of category B clinical negligence claims which were resolved between issue and trial (the largest group – approximately 59% of the total) was £44,852. The average cost of category B clinical negligence claims which went to trial was £92,209. However, the category B clinical negligence claims which went to trial represent only about 14% of the total.

2.8 Overall picture in respect of clinical negligence. If one looks at the category A cases and the category B cases together, a clear picture emerges at least in respect of legally aided claims. The majority of weak clinical negligence claims were dropped or settled before issue. In the case of strong clinical negligence claims, however, the majority proceeded beyond the stage of issue but were settled in favour of the claimant before trial.

2.9 Judicial review and housing. It can be seen from the above tables that the majority of category B judicial review and housing claims were resolved before trial, although the proportions that reached the stage of issue were greater than in the case of clinical negligence.

### 3. DATA FROM A LIABILITY INSURER

3.1 The insurer's share of the market. The Insurer tells me that it has approximately 8% of the general insurance market. This figure may be applicable to the sector of the insurance market relating to personal injury liability, with the exception of employer's liability for disease.

3.2 Claims on the Insurer's books. In 2008 the Insurer received notification of 22,726 injury claims. Of these 12,795 claims<sup>25</sup> arose out of road traffic accidents and 9,771 related to employers' liability and public liability. Proceedings were served in only 6.22% of those cases.

3.3 Extrapolation. On the basis of the above figures, it may be reasonable to infer that each year approximately 284,000 personal injury claims (excluding employer's liability for disease) are notified to insurers. Of these approximately 56% relate to road traffic accidents, and approximately 44% relate to employers' liability and public liability. However, these figures are lower than other published data. It may therefore be that Insurer's claim figures represent less than 8% of the total.<sup>26</sup>

3.4 Number of issued claims. If the Insurer's experience of proceedings being served in only 6.22% of cases were typical, and if one assumes that the Insurer's figures represent 8% of the market, this would result in a total of 17,665 sets of personal injury proceedings being issued against insured defendants. Although the precise number of personal injury claims issued per year cannot be disentangled from the published Judicial Statistics, it is fairly clear from chapter 5 above that the actual number is substantially higher than that. It may therefore be that 6.22% is not a

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<sup>25</sup> A number of RTA personal injury claims may have been notified to a sister company and thus will not be included in these figures.

<sup>26</sup> On reading this paragraph in draft the Insurer suggests that although they have 8% of the insurance market, it is possible that their share of the personal injuries market is less.

typical figure across the board.<sup>27</sup> Nevertheless, it clear that the great majority of road traffic accident claims, employers' liability claims and public liability claims notified to insurers are either dropped or settled before issue.

3.5 Insurance data only part of the picture. Many public authorities and other large organisations are uninsured or "self insured". In other words, instead of paying substantial premiums every year, they meet claims as and when they arise out of their own resources. The large number of claims which are notified against these bodies and the smaller number of claims which are issued will not be reflected in the insurance statistics.

#### 4. PUBLISHED DATA

4.1 Fourth UK Bodily Injury Awards Study. This report,<sup>28</sup> which was published in October 2007 provides statistics for reported claims up to 2006. Insurers representing 90% of the motor insurance market responded. Therefore the figures shown should be grossed up to 100%, in order to estimate the total number of reported claims. According to table 2 on page 18 of the report, the total number of reported personal injury claims arising out of road traffic accidents in 2006 was 258,309. The total number arising in 2005 was 255,284.<sup>29</sup>

4.2 Compensation Recovery Unit ("CRU") data. The CRU records the following numbers of claims in the year 2006 – 2007:

Clinical negligence	8,575
Motor accidents	518,821
Employers liability	98,478
Public liability	79,841
Other	3,522
Liability not known	1,547
	<u>710,784</u>

4.3 The CRU records the following numbers of claims in the year 2007 – 2008:

Clinical negligence	8,876
Motor accidents	551,905
Employers liability	87,198
Public liability	79,472
Other	3,449
Liability not known	1,850
	<u>732,750</u>

4.4 The CRU figures are substantially higher than the figures suggested by the various insurers. However, the CRU figures will include (a) claims not reported by insurers to the ABI and (b) claims against uninsured and self-insured bodies.

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<sup>27</sup> On reading this paragraph in draft the Insurer suggests that other insurers may allow a higher percentage of claims to reach the stage of issue.

<sup>28</sup> Published by the International Underwriting Association of London in co-operation with the association of British Insurers (2007)

<sup>29</sup> I am advised by the actuarial consultancy who prepared table 2 that the figures include an element of actuarial projection. Thus, when table 2 was compiled, the figure for 2006 was intended to show the total number of claims arising from accidents in 2006 which would ultimately be reported.

4.5 Clinical negligence – a comparison. As previously mentioned clinical negligence is the only category of personal injury litigation for which legal aid has remained generally available after April 2000. However, some clinical negligence claimants (either through choice or because they are not eligible for legal aid) proceed on CFAs. By comparing the CRU figures with the LSC figures, it can be seen that very roughly half of all clinical negligence claims proceed on legal aid and the other half proceed on CFAs.

4.6 Non-personal injury cases. Data re claims notified but not issued outside the personal injuries field are not available to me. It can safely be assumed, however, that the issued claims which are recorded in the published Judicial Statistics represent a small proportion of the total number of claims made. The great majority will have been settled before issue.



## **CHAPTER 7. COURT FEES**

### **1. INTRODUCTION**

1.1 **Background.** The civil courts in England and Wales are predominantly self-financing and, to that end, most courts are largely funded by the fees paid by court users. The cost of operating the civil and family courts in England and Wales is currently said to be approximately £650 million per annum.<sup>30</sup> Court fees fund approximately 80% of this cost, while the remaining 20% is financed by the taxpayer (through the Ministry of Justice budget).<sup>31</sup> The sums paid by the taxpayer are used to “top up” any deficits in the fee income arising as a result of either: (a) fee income lost as a result of fee remissions;<sup>32</sup> or (b) situations where the fees charged do not cover the actual costs involved (e.g. civil proceedings in the magistrates’ courts). In the recent past there have been occasions when the civil justice system (if viewed in isolation from the family courts) has generated a surplus.<sup>33</sup>

1.2 **Policy.** The setting of court fees is subject to various policy considerations. In particular, it is intended that court fees should be set at a level which ensures that the fees cover the full cost of the court service they relate to. This policy seeks to ensure that, as far as possible, court users pay in full for the service they receive. This is known as “full-cost pricing”. It is a further policy consideration that, in order to safeguard access to justice, a system of fee remissions (financed by the taxpayer) should remain in place.

### **2. RELEVANT RULES AND LEGISLATION**

2.1 **Primary legislation.** The power to prescribe court fees is founded in primary legislation. The principal power<sup>34</sup> is set out in section 92(1) of the Courts Act 2003, which provides that:

“The Lord Chancellor may with the consent of the Treasury by order prescribe fees payable in respect of anything dealt with by- (a) the Supreme Court, (b) county courts, and (c) magistrates’ courts.”

Section 92(2) of the Courts Act 2003 provides that an order under section 92 may contain provision as to (i) scales or rates of fees, (ii) exemptions from or reductions in fees and (iii) partial or whole remissions of fees.

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<sup>30</sup> Such costs include judicial salaries, IT costs and accommodation expenditure.

<sup>31</sup> For further details see the HM Courts Service website (<http://www.hmcourts-service.gov.uk/infoabout/fees/index.htm>).

<sup>32</sup> In 2007/2008, 212,418 fee remissions were granted at a value of £27.5 million. See Ministry of Justice consultation paper: “*Civil Court Fees 2008*”. The consultation paper is available at: <http://www.justice.gov.uk/publications/civil-court-fees-2008-consultation.htm>.

<sup>33</sup> See Report by Sir Henry Brooke: “*Should the Civil Courts be Unified?*” (August 2008). At paragraph 75 Sir Henry Brooke notes that: “*In 2006 HM Courts Service published disaggregated figures for the first time which revealed that civil justice was showing a profit of over £30 million. Although this profit was diverted elsewhere during the year of account, the Courts Service’s published fee policies now evidence a determination that this should not be allowed to happen again.*” The report is available at: [http://www.judiciary.gov.uk/docs/pub\\_media/brooke\\_report\\_ucc.pdf](http://www.judiciary.gov.uk/docs/pub_media/brooke_report_ucc.pdf).

<sup>34</sup> The power to prescribe certain fees is set out in other legislation; for example, the power to order fees in company and individual insolvency proceedings is set out in sections 414 and 415 of the Insolvency Act 1986.

2.2 Section 92 further provides that the Lord Chancellor must consult with certain individuals (e.g. the Lord Chief Justice, the Master of the Rolls, etc.) and the Civil Justice Council before making an order in relation to court fees.<sup>35</sup> The Lord Chancellor must also have regard to the principle that access to the courts must not be denied.<sup>36</sup>

2.3 Secondary legislation. The court fees themselves are set out in various statutory instruments, also known as “Fees Orders”. The current court fees payable in relation to civil proceedings in the Supreme Court (i.e. the Court of Appeal and the High Court) and in the county courts are set out in Schedule 1 to the Civil Proceedings Fees Order 2008 (as amended).<sup>37</sup>

2.4 The fees. A variety of court fees are payable in respect of different types of court service. The fees vary depending on a variety of factors, including the value of the claim, the particular track the claim has been allocated to, the relevant court and the particular service or action required. Set out below are a selection of typical fees.

- The fees payable to commence proceedings in the High Court or county courts in respect of a money only claim are set out below.<sup>38</sup> In addition, the fees payable on starting proceedings in respect of a money only claim using the internet based Money Claim Online service are also listed below.<sup>39</sup>

<b>Sum claimed</b>	<b>Claim issued in a court: fee payable</b>	<b>Money Claim Online: fee payable</b>
less than £300	£30	£25
£300.01 - £500	£45	£35
£500.01 - £1,000	£65	£60
£1,000.01 - £1,500	£75	£70
£1,500.01 - £3,000	£85	£80
£3,000.01 - £5,000	£108	£100
£5,000.01 - £15,000	£225	£210
£15,000.01 - £50,000	£360	£340
£50,000.01 - £100,000	£630	£595
£100,000.01 - £150,000	£810	N/A
£150,000.01 - £200,000	£990	N/A
£200,000.01 - £250,000	£1,170	N/A
£250,000.01 - £300,000	£1,350	N/A
over £300,000 or an unlimited sum	£1,530	N/A

- The allocation questionnaire fees payable by the claimant (unless the action is proceeding on the counterclaim alone, when it is payable by the defendant) are set out below.<sup>40</sup>

<b>Track and sum claimed</b>	<b>Fee payable</b>
Small claims track for money claim of £1,500 or less	No fee payable
Small claims track for money claim exceeding £1,500	£35
Fast-track or multi-track claim	£200

<sup>35</sup> Courts Act 2003, sections 92(5) and (6).

<sup>36</sup> *Ibid*, section 92(3).

<sup>37</sup> (SI 2008/1053) as amended by the Civil Proceedings Fees (Amendment) Order 2008 (SI 2008/2853).

<sup>38</sup> Civil Proceedings Fees Order 2008 (SI 2008/1053), Schedule 1, Fee 1.1.

<sup>39</sup> *Ibid*, Fee 1.3 (N.b. the Money Claim Online service can only be used for claims up to £99,999.99).

<sup>40</sup> *Ibid*, Fee 2.1.

- The pre-trial checklist (listing questionnaire) fee is £100.<sup>41</sup> This fee is only payable in respect of cases on the fast-track and the multi-track, not the small claims track.
- The hearing fees payable by the claimant (unless the action is proceeding on the counterclaim alone, when it is payable by the defendant) are set out below.<sup>42</sup>

<b>Track and sum claimed</b>	<b>Fee payable</b>
Small claims track case where the sum claimed is:	
• less than £300	£25
• £300.01 - £500	£50
• £500.01 - £1,000	£75
• £1,000.01 - £1,500	£100
• £1,500.01 - £3,000	£150
• exceeds £3,000	£300
Fast-track case	£500
Multi-track case	£1,000

### 3. SUPREME COURT COSTS OFFICE STUDY OF COURT FEES

3.1 Background. In January 2009 the Supreme Court Costs Office (“SCCO”) conducted a review of the court fees payable in a selection of “typical” claims. The study considered the court fees payable for each of the typical claims over a ten year period. The typical claims were:

- a small claim of £4,000;
- a fast-track personal injury claim of £15,000;
- a high value personal injury claim exceeding £300,000; and
- a commercial claim exceeding £300,000.

I shall refer to these claims collectively as the “Typical Claims”.

3.2 For each of the Typical Claims, the SCCO calculated the court fees that would be payable under the Civil Proceedings Fees Order 2008 and the fees that would have been payable under the Fees Orders in force in 1999<sup>43</sup> and 2004.<sup>44</sup>

3.3 For the years 1999 and 2004, the SCCO considered the following fees: commencement fee; allocation questionnaire fee; listing questionnaire fee;<sup>45</sup> an application on notice fee; and a witness summons fee. For the 2009 year, the SCCO considered these fees and also included the fee payable in relation to a pre-trial checklist in their calculations.

3.4 Assumptions. In order to ensure that the fees payable for each of the Typical Cases remained constant and that the results were meaningful, the SCCO made the following assumptions: (1) only one application notice and one witness summons was made for each of the claims (in reality, it is doubtful [particularly in large commercial

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<sup>41</sup> *Ibid*, Fee 2.2.

<sup>42</sup> *Ibid*, Fee 2.3.

<sup>43</sup> County Court Fees Order 1999 (SI 1999/689) and Supreme Court Fees Order 1999 (SI 1999/687).

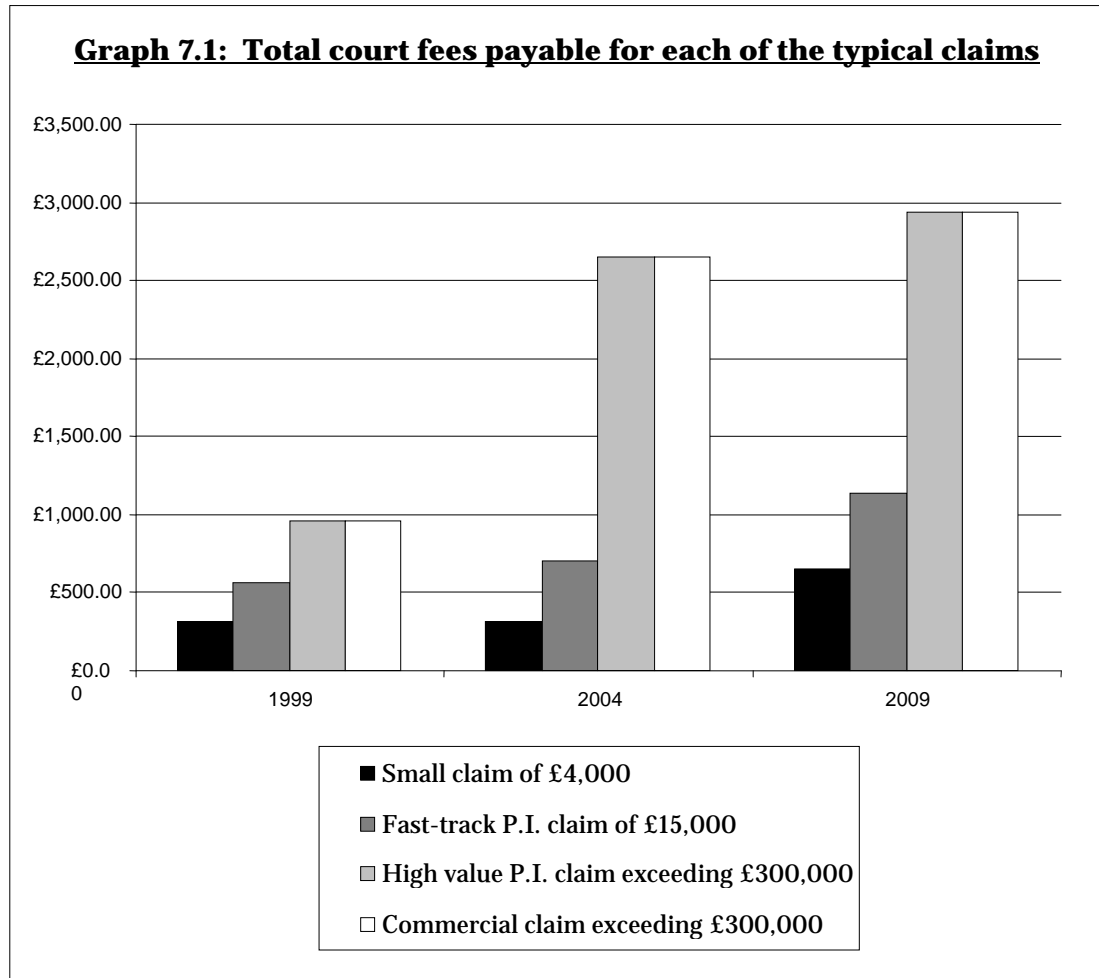
<sup>44</sup> Civil Proceedings Fees Order 2004 (SI 2004/3121).

<sup>45</sup> Now re-named pre-trial checklist fee.

cases] that only one of each of these fees would be incurred); and (2) each of the Typical Claims proceeded to trial.<sup>46</sup>

3.5 Analysis. The results of the SCCO review are attached to this report as Appendix 16. However, a summary of the results is shown in the graphs below.

3.6 Total court fees rising faster than inflation. The graph below illustrates the total court fees payable in each of the Typical Claims. As can be seen, court fees are rising substantially faster than the rate of inflation. This increase is particularly apparent in relation to higher value claims.



<sup>46</sup> In relation to these assumptions, the MoJ comment that in most small claims there would not be any witness summons or application notice; furthermore, in reality only about 50% of cases allocated to the small claims track and 25% in the fast track and multi-track proceed to trial.

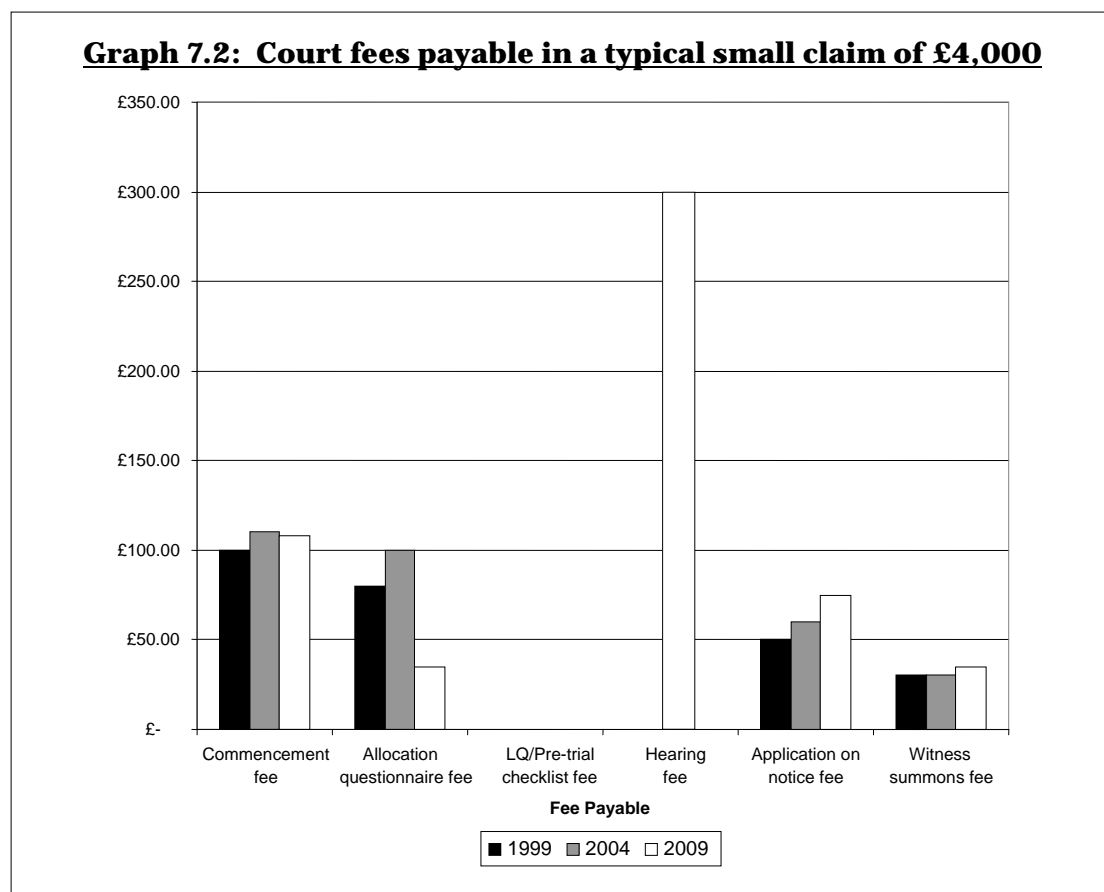
The approximate percentage increase in total court fees payable in each of the Typical Claims between 1999 and 2009 is set out below:

- a small claim – 112% increase;<sup>47</sup>
- a fast-track personal injury claim – 103% increase;<sup>48</sup>
- a high value personal injury claim – 206% increase;
- a commercial claim exceeding – 206% increase.

The Consumer Price Index (all items) rate of inflation during the same period was 18.9%. The Retail Price Index (all items) rate of inflation during the same period was 28.6%.<sup>49</sup>

3.7 As can be seen from the above graph, the court fees for a typical fast-track case which proceeds to trial now exceed £1,000.

3.8 Analysis of court fees payable. A more detailed picture of the changes in the court fees payable for each of the Typical Claims is revealed by the following four graphs. When reviewing each of these graphs and making comparisons between them it is important to have regard to the scale on the y axis, as this is not uniform across each of the graphs.

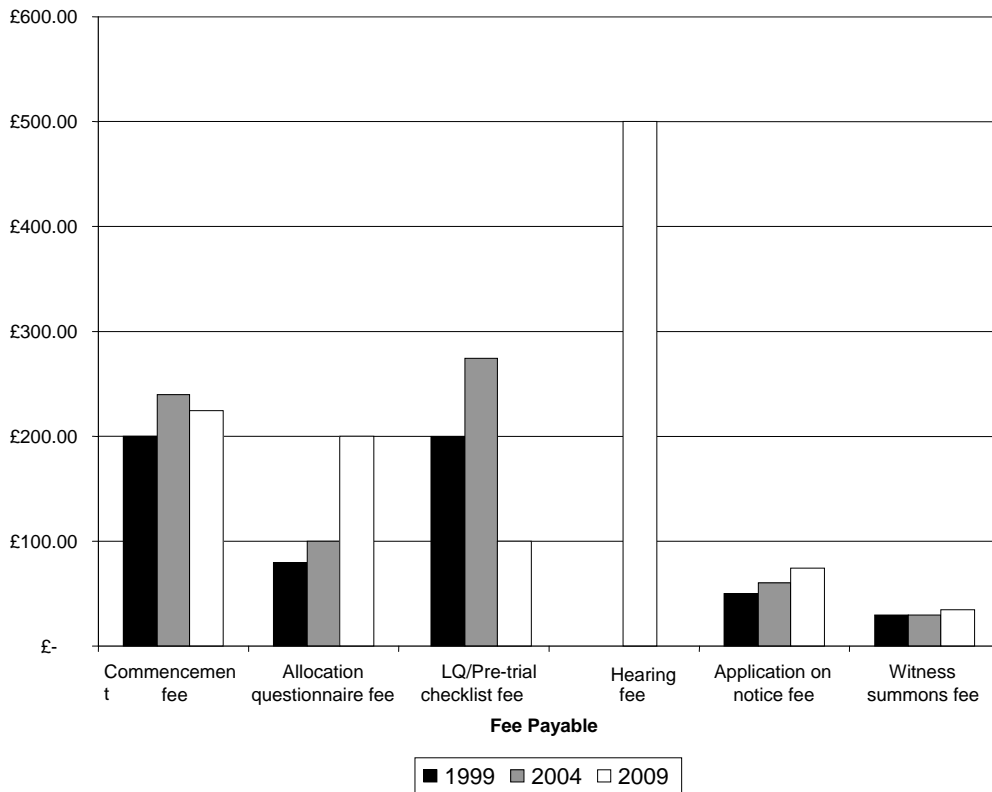


<sup>47</sup> The MoJ comment that there is a reduction of 3% in cases not requiring a hearing (a reduction of 20% if witness and application fees are excluded).

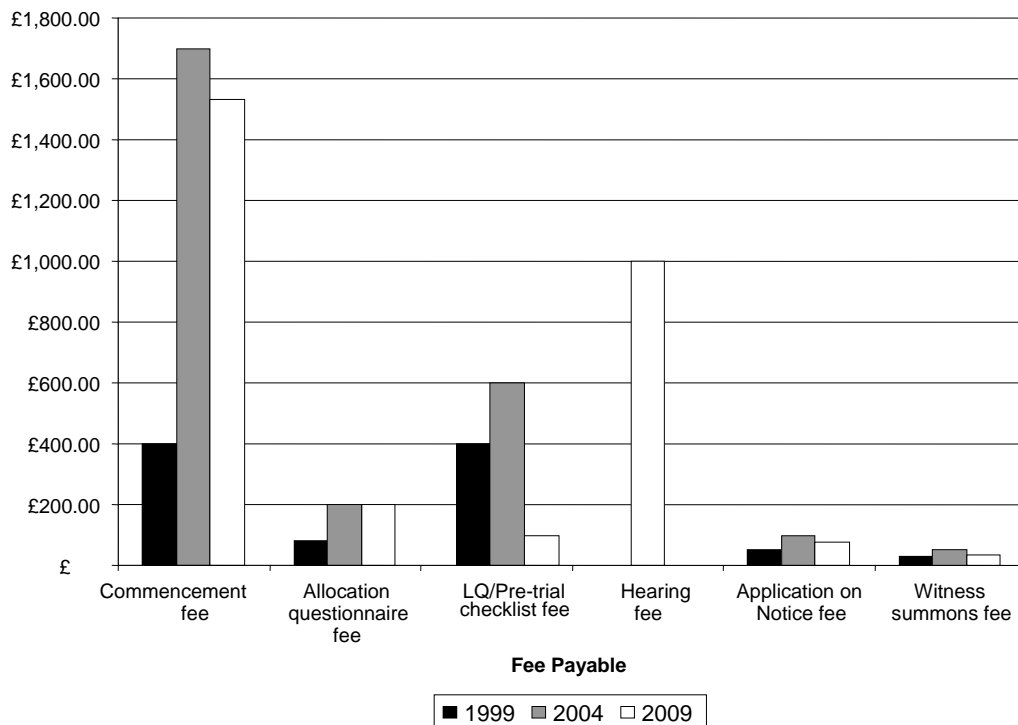
<sup>48</sup> The MoJ comment that there is a reduction of 4% in cases not reaching the listing stage.

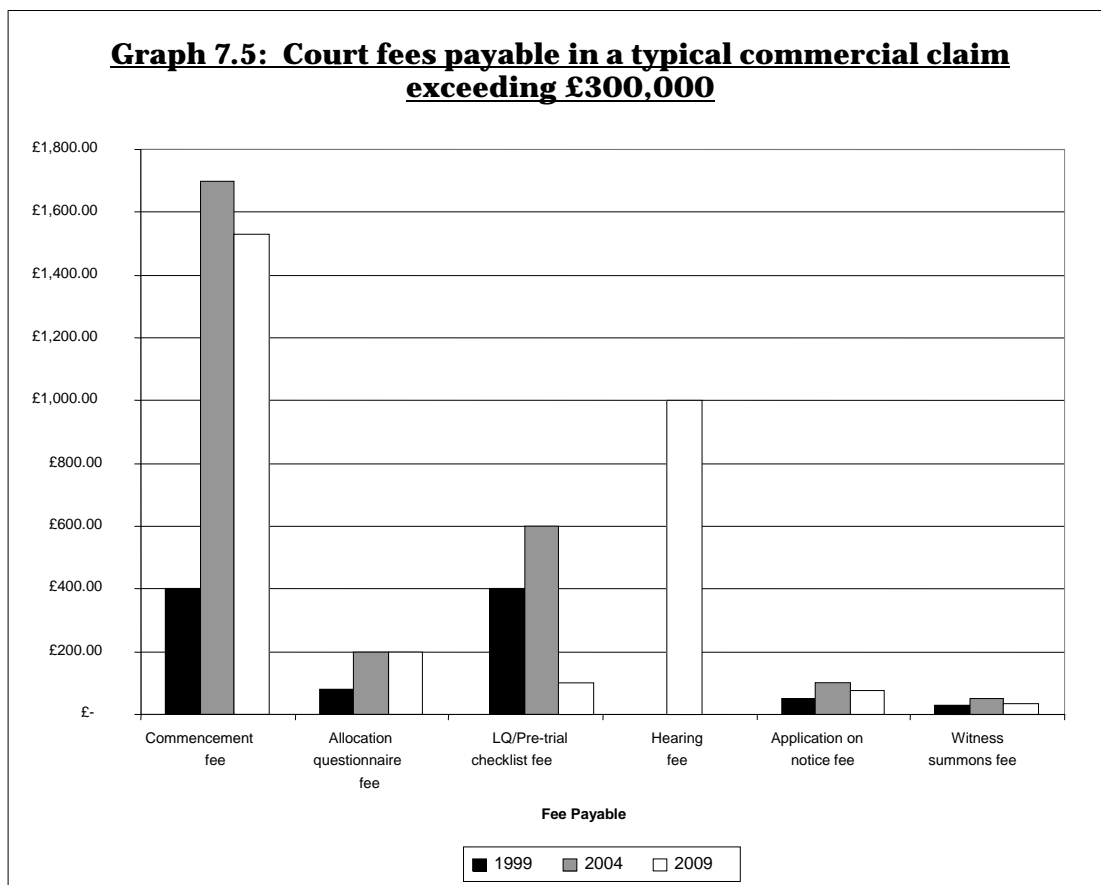
<sup>49</sup> These inflation figures were provided by the Office for National Statistics on 23<sup>rd</sup> February 2009. The figures show the Consumer Price Index (all items) and the Retail Price Index (all items) rate of inflation from January 1999 to January 2009.

**Graph 7.3: Court fees payable in a typical fast track claim of £15,000**



**Graph 7.4: Court fees payable in a typical high value P.I. claim exceeding £300,000**





**3.9 Conclusions.** While there is a clear overall trend that court fees are increasing, the above graphs identify that court fees have not uniformly increased. Indeed, in certain circumstances the court fee payable increased between 1999 and 2004 and then decreased in 2009 (see for example, the commencement fee payable for each of the four Typical Claims). The biggest fee increases since 1999 include: (1) the commencement fee payable in relation to high value claims; and (2) the listing questionnaire fee for mid to high value claims. In some instances the fee increase is extremely large. For example, the commencement fee payable in relation to high value claims has increased fourfold since 1999 and the listing questionnaire fee payable in relation to fast-track claims has more than doubled since 1999.

#### 4. THE MINISTRY OF JUSTICE'S CURRENT PROPOSALS

**4.1 The Ministry of Justice's strategy.** The Ministry of Justice ("MoJ") is currently working on a strategy to develop and reform the court fee system. The stated objectives of the strategy are to ensure that the court fee system: (a) meets its financial targets for costs recovery and not expenditure; (b) protects access to justice through a well-targeted system of fee concessions; and (c) achieves as close a match as possible between income and costs.<sup>50</sup> Future changes to the court system are likely to include:

- changes in the way fees are paid to help minimise the administrative cost to users and HM Courts Service;

<sup>50</sup> For further details see the HM Court Service website: <http://www.hmcourts-service.gov.uk/infoabout/fees/whywecharge.htm>.

- changes to the civil fees to improve the balance of cost and income, and to remove any over-recovery in that area of work; and
- the possibility of daily trial fees in larger civil cases.<sup>51</sup>

4.2 MoJ consultation paper: Civil Court Fees 2008. On the 10<sup>th</sup> December 2008 the MoJ published a consultation paper entitled “*Civil Court Fees 2008*”.<sup>52</sup> The consultation paper puts forward the following two main proposals:

- The first proposal involves increases in civil and family fees (particularly the fees associated with enforcement processes) in order to maintain full-cost recovery for civil business and align equivalent fees for civil and family business. The increases are focused towards the fees associated with enforcement as this is an area which recovers significantly less than its full cost. This proposal would have the following effects: for civil proceedings in the higher courts, an additional £21 million would be raised in a full year and this would return cost recovery to 100%; in family proceedings, income would be raised by £5 million in a full year and costs recovery would be raised to approximately 58% of the full cost.
- The second proposal involves the introduction of a simplified fees order for the magistrates’ court that increases fees to bring cost recovery for civil proceedings in the magistrates’ courts up from 55% to 100% of the full cost and would raise an additional fee of £12 million in a full year.

4.3 The consultation period ended on the 4<sup>th</sup> March 2009 and the MoJ plan to consider the responses and put forward firm recommendations for implementation in May 2009.

## 5. REVIEW

5.1 Submissions. Many of the submissions which I have received comment on the issue of court fees in the civil courts. A common theme in such submissions is that the concept of full-cost pricing (i.e. the scheme whereby litigants are obliged to pay for the court service they receive) is fundamentally wrong. Instead, there is a strong view that it is the function of the State to provide and fund the machinery for dispute resolution.

5.2 Comment. I see considerable force in all of the submissions that have been made in this regard. For the reasons set out in chapter 4 above, the civil courts play a vital role in the maintenance of social order and the functioning of the economy. The maintenance of the civil justice system and the proper resourcing of the courts<sup>53</sup> is the function of the State. Subject to any arguments which may be advanced during Phase 2, I would suggest it is wrong in principle that the entire cost or most of the cost of the civil justice system should be shifted from taxpayers to litigants. This is now particularly pertinent, given that court fees have increased in the last ten years substantially in excess of inflation.

5.3 Rent possession claims. Although possession claims were not included in the SCCO study, there is a separate concern that court fees for such claims are excessive. This is discussed in chapter 31.

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<sup>51</sup> *Ibid.*

<sup>52</sup> The consultation paper is available at: <http://www.justice.gov.uk/publications/civil-court-fees-2008-consultation.htm>.

<sup>53</sup> The extent and quality of resources provided for the civil courts is a major issue, but that falls outside of my terms of reference.



5.4 New proposals. The MoJ proposals (as set out in the consultation paper summarised in section 4 above) seek to transfer the full cost of certain categories of court business from taxpayers to the court users. This is part of a wider strategy of achieving full-cost pricing. For the reasons set out in chapter 4 and in paragraphs 5.1 and 5.2 above, and subject to any arguments which may be advanced during Phase 2, I would suggest that these proposals should be reconsidered.

5.5 Conclusion. I have set out above a summary of the views so far expressed and of my own provisional views concerning court fees, and specifically the policy of full-cost pricing. If others disagree, no doubt they will comment during Phase 2.

## **CHAPTER 8. WHAT DO LAWYERS EARN?**

### **1. INTRODUCTION**

1.1 It is clear that any complete answer to the question “are these costs reasonable?” must look at how those costs are generated and what is being paid for. Some of this money ends up in the pocket of lawyers – but how much? This is not a simple calculation for the court to make when faced with the task of assessing costs in a given case. Quite apart from the fact that it usually has neither the time nor the data required to do so, historically it has not been the function of the court to assess costs between the parties by reference to the relative earnings of the lawyers in the case. Judging whether the amounts awarded by way of costs filtering down to the lawyers is reasonable or not is no easier. Nevertheless a comprehensive review of costs in civil litigation demands an enquiry of this sort. It is necessary in such a review to ask and answer the question “What do lawyers earn?”.

1.2 Some might say any normative verdict as to the reasonableness of these earnings (and of fees charged) is not one for the court to make in any case – the choice is the clients’, and market forces can, and should, be left to play out in the conventional way. But there is a suggestion now that this market may be failing: with legal costs apparently escalating, some say access to justice is prohibitively expensive and that something should be done. Furthermore, in some areas there are concerns that market forces are not actually at work at all. With the growth of “no win no fee” agreements the remuneration of lawyers has not been dependent on what lawyers charge their clients, but on what they can successfully recover by way of costs from the unsuccessful opponent. It is necessary therefore to cross check the amount of recoverable costs against what lawyers are earning

1.3 The question of lawyers’ earnings is a vexed one. Some of the larger City solicitors’ firms have not been shy to reveal the increasing levels of profit per equity partner, the benchmark figure by which they tend to be ranked by the legal press. These figures appear astronomical to many and are in stark contrast to the pleas of poor pay made out by those carrying out legally aided work.

1.4 But these statistics must be set in context. First, the services provided by the City firms, whether relating to contentious or non-contentious work, are clearly bespoke. Expert advice on complex matters is often available around the clock, across a number of jurisdictions. Big teams can be assembled at short notice. In short, these firms can undertake work which many other firms simply cannot.

1.5 Moreover, the proportion of lawyers who are partners in big firms is relatively low – the total number of partners in the top 50 firms is just under 8,500, when there are over 100,000 practising solicitors, around 24,000 ILEX qualified legal executives and over 15,000 practising barristers in England and Wales.<sup>54</sup> What do other lawyers (most lawyers) earn? How does this vary by type of qualification, level of experience, practice area or location? What hourly rates are being charged and how do these vary? And what do individuals in comparable occupations get paid?

1.6 This chapter will attempt to provide some answers to these questions, by reference to publicly available statistical material.

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<sup>54</sup> See The Lawyer Annual Report 2008, and the websites of the Solicitors Regulatory Authority, the Institute of Legal Executives and the Bar Council, respectively.

## 2. LAWYERS' EARNINGS: A BREAK-DOWN

### (i) Solicitors – private practice

#### (a) Partners

2.1 Many firms now operate a two tier partnership system: new partners are first elected to salaried or fixed share roles before they join the equity “proper”. Anecdotal evidence suggests it might take a solicitor between 5 and 10 years from qualification to make partner (a promotion which in any case is far from guaranteed). The salaried partner phase might last an additional 2 to 5 years.

2.2 The earnings of equity partners in the top 100 firms are relatively well-known, since the firms generally release the figures themselves. The established system for sharing profits within firms is the “lockstep”, under which a given partner’s profit share increases with each year that they have been in the equity. Some more progressive firms are moving away from this system to a more meritocratic “eat what you kill” approach.

2.3 The Lawyer magazine produces an annual supplement detailing the top 100 firms’ financials - a summary of the 2008 data is set out in Tables 8.1 and 8.2 below. Profit margins are derived by dividing profit per equity partner by revenue per equity partner.

Table 8.1: Profit per equity partner (Top 100)

<b>Firm size (by turnover)</b>	<b>No of equity partners (average)</b>	<b>Profit per equity partner (average) £ks</b>	<b>Top of equity (average) £ks</b>	<b>Bottom of equity (average) £ks</b>	<b>Profit margin (average) %</b>
<b>Rank 1 – 25</b>	159	786	1,060	389	34
<b>Rank 26 – 50</b>	54	461	622	246	29
<b>Rank 51- 75</b>	32	390	515	185	26
<b>Rank 76 – 100</b>	22	353	474	200	28

Table 8.2: Average earnings per partner (equity and salaried, Top 100)

<b>Firm size (by turnover)</b>	<b>No of partners (average)</b>	<b>Earnings per partner (average) £ks</b>
<b>Rank 1 – 25</b>	244	622
<b>Rank 26 – 50</b>	94	328
<b>Rank 51- 75</b>	73	248
<b>Rank 76 - 100</b>	44	230

2.4 The average profit per equity partner (“PEP”) for the Top 100 is £497,500. This is to be compared with the statistics for partners’ earnings in Table 8.2 and in

Table 8.3 below.<sup>55</sup> The results of Table 8.2 show that the average earnings for a partner (whether equity or salaried) in the Top 100 firms are £357,000.

2.5 The average earnings figure of £357,000 referred to in paragraph 2.4 above is broadly consistent with the results of the Law Society's Private Practice Solicitors Salaries 2007 survey.<sup>56</sup> The results are summarised in Table 8.3. These figures provide a split between earnings for equity partners and salaried partners.

**Table 8.3: Earnings per partner (Top 100)<sup>57</sup> (Law Society figures)**

	<b>Firm size: 80 equity partners or more</b>
<b>Equity partner</b>	
Percentile 25	£198,750
Median	£325,895
Percentile 75	£500,000
<b>Salaried partner</b>	
Percentile 25	£104,250
Median	£178,900
Percentile 75	£206,471

2.6 The average number of partners in the Top 100 firms is 113 partners.<sup>58</sup> Applying, the Law Society figures for 80+ partner firms the median of £325,895 for equity partners is consistent with the average earnings of all partners in Table 8.2.

2.7 Looking at the Law Society figures for both equity and salaried partners together gives a lower aggregated median of £252,397. But given that the Top 100 firms fall towards the top of the Law Society data (because the average number of partners is measurably more than 80 for the Top 100), the percentile 75 figures for each group are likely to provide a more accurate figure for the Top 100 (the group where 25% of equity partners were earning over £500,000 according to the Law Society statistics). But even if the median figures of £325,895 and £178,900 are averaged with the £357,000 Table 8.2 figure, the average earnings across the partner sector for the Top 100 of firms are £287,265.

2.8 The results of Tables 8.2 and 8.3 therefore suggest that for the Top 100 firms partners' earnings are about £287,000 per/annum on average.<sup>59</sup>

<sup>55</sup> Law Society's Private Practice Solicitors Salaries 2007 and the Lawyer UK 200 Annual Report 2008.

<sup>56</sup> At the time of writing a 2008 survey is due shortly, but is not yet available.

<sup>57</sup> Law Society's "Private Practice Solicitors Salaries 2007" survey.

<sup>58</sup> The Lawyer UK 200 Annual Report 2008.

<sup>59</sup>  $(325,895 + 178,900 + 357,000) / 3 = £287,265$ . The statistical impurity of averaging median figures is recognised but this approach is retained for practical purposes at this stage.

2.9 The earnings of partners in firms outside the Top 100 are of course more representative of the sector as a whole. As at 31<sup>st</sup> July 2007 there were 134,378 solicitors on the Law Society Roll, of which 108,407 held practising certificates. The number of partners (equity and salaried) in private practice was 31,624.<sup>60</sup> The number of partners (equity and salaried) in the Top 100 firms is 11,387. So approximately one third of partners are employed in the Top 100 firms.

2.10 What then of partners' remuneration outside the Top 100 firms? The Law Society survey "*Private Practice Solicitors' Salaries 2007*" provides some useful data. The results are set out in Table 8.4 below.

Table 8.4: Earnings per partner (Outside Top 100)<sup>61</sup>

	Firm size			
	2-5 equity/ salaried partners	5-10 equity/ salaried partners	11-25 equity/ salaried partners	26-80 equity/ salaried partners
<b>Equity partner</b>				
Percentile 25	£39,280	£60,000	£81,120	£99,050
Median	£60,000	£80,000	£108,600	£154,526
Percentile 75	£85,878	£119,635	£149,860	£247,158
<b>Salaried partner</b>				
Percentile 25	£33,000	£38,990	£47,750	£67,171
Median	£35,094	£47,937	£58,579	£100,000
Percentile 75	£45,000	£61,850	£79,250	£122,752

2.11 If one assumes that the majority of the 80+ partner firms fall within the Top 100 (they plainly do), the range of remuneration for partners outside the group is wide, ranging from £33,000 for 25% of the salaried partners in the small partner (2-4) firms to over £247,158 for the top 75% and above equity partners in firms with up to 80 partners.

2.12 The results by way of averages are shown below in Table 8.5.

Table 8.5: Earnings for equity and salaried partners outside Top 100<sup>62</sup>

Equity Partner	£100,780
Salaried Partner	£60,400

<sup>60</sup> Fact Sheet Series – The Law Society.

<sup>61</sup> Law Society data: "*Private Practice Solicitors' Salaries 2007*".

<sup>62</sup> Calculated by averaging the median equity and salaried figures taken from the Private Practice solicitors' salaries 2007 data.

(b) Sole practitioners

2.13 Sole practitioners are to be considered within the context of partners.

2.14 The Law Society has produced some data on the remuneration of sole practitioners. The Solicitor Sole Practitioners Group<sup>63</sup> has 4,500 members. In 2007 there were 4,446 sole practitioners in private practice.<sup>64</sup> Membership of this sector is very diverse ranging from the sole practitioner working from home or in an office with no staff, to the sole practitioner with more than one office and several assistants. The range of work covers the very specialist niche practice to the more general high street practice. In addition this sector of the profession includes members whose main source of income may come from locum work and those who have a very small practice earning less than £15,000 gross fees per year.

2.15 The average remuneration for a sole practitioner is set out in the table below:

Table 8.6: Sole practitioners

	<b>Sole practitioner</b>
<b>Equity partner (i.e. the sole practitioner)</b>	
Percentile 25	£29,783
Median	£56,051
Percentile 75	£105,000
<b>Salaried partner</b>	
Percentile 25	£40,000
Median	£40,000
Percentile 75	£40,000

2.16 The aggregated median figure across both equity and salaried partners in this category is £48,000.

2.17 Results : Overall partner remuneration across all sectors.

- Taking into account the rough calculation for the average remuneration of a partner in a Top 100 firm (£287,000 – see paragraph 2.8) and the average remuneration for the rest of the sector, to include sole practitioners, the average level of remuneration for a partner is between £93,435<sup>65</sup> and £103,800.<sup>66</sup>
- On average remuneration of partners across the entire sector is therefore £98,616.

<sup>63</sup> One of eight Law Society recognised groups.

<sup>64</sup> Law Society Fact Sheet Series 2007 (issued 31<sup>st</sup> January 2008).

<sup>65</sup> Averaging the median figures in Tables 8.4, 8.6 with £287,000.

<sup>66</sup> Averaging the median figures in Tables 8.3, 8.4 and 8.6.

(c) Associates/Assistant solicitors

2.18 Associates or assistant solicitors form the backbone of the fee earning workforce, at least in the larger solicitors' firms. The average partner (equity and salaried) to associate ratio for the top 100 firms in 2008 was 1:5.3.<sup>67</sup>

2.19 Private practice solicitors' salaries have risen steadily over the past decade, particularly in London, driven up in part by the arrival of US firms with more generous budgets – though by reputation they tend to expect more from employees in return. However the change in the financial climate over the past 18 months is likely to halt this: instead redundancies are becoming a distinct possibility (and already the reality in a number of cases since the start of 2009).

2.20 Some key points can be drawn from the salary data available:

- Salaries of solicitors in private practice tend to be stepped fairly rigidly in accordance with their level of post-qualification experience ("pqe").
- Within firms, salaries do not tend to vary significantly by practice area, e.g. litigation/corporate/property/employment/etc.
- Salaries in London tend to be markedly higher than elsewhere in England and Wales (often close to double in the City firms).
- Bonus schemes vary: bonuses are generally related to a firm's performance and to hours billed by the individual in question, as measured against an annual target (e.g. 1,500) though increasingly other performance measures are also factored in. The level of bonuses tends to vary between 5% and 20%.
- Firms also tend to offer comprehensive benefits packages, including contributory pension schemes and private medical insurance.
- The Solicitors Regulatory Authority sets minimum salary levels for trainee solicitors: in central London this is £18,420 per annum and elsewhere it is £16,500 per annum. Again, trainee salaries in the bigger commercial firms in London are typically well in excess of this (often around double the minimum).

2.21 Table 8.7 sets out the typical range of salaries paid to solicitors in private practice in London in 2008.

2.22 Table 8.8 sets out the typical salaries paid to solicitors in private practice in other parts of England and Wales:<sup>68</sup> note that smaller/regional firms will tend to pay less (below the typical amount) than bigger/national firms in a given geographical area.<sup>69</sup>

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<sup>67</sup> Calculated using source data from The Lawyer Annual Report 2008.

<sup>68</sup> From Hays Legal: Guide to Legal Salaries 2008.

<sup>69</sup> Michael Page Legal Private Practice Salary Survey 2008.

**Table 8.7: Typical range of salaries paid to solicitors in private practice in London (in £ks)**

	<b>NQ</b>	<b>1 yr ppe</b>	<b>2 yr ppe</b>	<b>3 yr ppe</b>	<b>4 yr ppe</b>	<b>5 yr ppe</b>	<b>6 yr ppe</b>
<b>City</b>	55 – 66	59 – 73.5	65 – 86	69 – 92	78 – 102	85 – 107	95 – 112
<b>Holborn</b>	45 – 62	50 – 66	55 – 75	60 – 81	64 – 85	69 – 89	72 – 92
<b>West End</b>	38 – 52	45 – 55	48 – 60	52 – 64	56 – 67	60 – 75	62 – 80
<b>US Mid-Atlantic<sup>70</sup></b>	65 – 75	75 – 85	85 – 92	87 – 102	95 – 115	105 – 122	110 – 135
<b>US New York<sup>71</sup></b>	83 – 96	88 – 100	95 – 109	100 – 123	118 – 136	130 – 148	140 – 157

**Table 8.8: Typical salaries paid to solicitors in private practice outside London (in £ks)**

	<b>NQ</b>	<b>1 yr ppe</b>	<b>2 yr ppe</b>	<b>3 yr ppe</b>	<b>4 yr ppe</b>	<b>5 yr ppe</b>	<b>6 yr ppe</b>
<b>Bristol/South West</b>	37	39	41	44	48	52	56
<b>Cardiff/South Wales</b>	34	35	36	37	38	40	45
<b>West Midlands</b>	36	38	40	42	45	n/a <sup>72</sup>	n/a
<b>East Midlands</b>	32	33	36	38	41	n/a	n/a
<b>Manchester</b>	36	37	40	43	45	49	52
<b>Liverpool</b>	34	35	38	40	42	44	49
<b>Leeds</b>	34	36	39	41	44	47	50
<b>Sheffield</b>	32	33	36	38	43	46	49
<b>Newcastle</b>	32	34	36	39	43	45	48
<b>M1 corridor</b>	36	39	42	46	49	n/a	n/a
<b>Surrey</b>	35	37	40	42	45	n/a	n/a
<b>East Anglia/Essex</b>	34	36	38	41	44	n/a	n/a
<b>Thames Valley</b>	37	36	38	41	44	n/a	n/a
<b>Kent/ Sussex</b>	37	40	43	47	50	n/a	n/a

2.23 The average earnings in Table 8.7 for assistant/associate in the London region (City, Holborn and West End, excluding US firms) are £61,000-78,000.

<sup>70</sup> i.e. a US based firm paying salaries mid-way between a London City salary and a New York salary.

<sup>71</sup> i.e. a US based firm paying London based associates the same salary as New York based associates.

<sup>72</sup> Figures not available. All other references to “n/a” in this table carry that label.



2.24 The average earnings for assistant/associate are £41,800 outside of London (derived from Table 8.8).

2.25 The above figures are consistent with current Law Society data. The figures are set out below in Table 8.9:

Table 8.9: Assistant/Associate solicitor earnings per annum (in £s)<sup>73</sup>

	<b>Percentile 25</b>	<b>Median</b>	<b>Percentile 75</b>
<b>London</b>	47,737	66,000	89,806
<b>East Midlands</b>	29,795	36,040	44,000
<b>Eastern</b>	33,635	41,000	49,163
<b>Greater London</b>	47,737	66,000	89,806
<b>North West</b>	26,000	34,935	45,000
<b>North East</b>	28,192	37,782	45,000
<b>South East</b>	32,138	38,070	48,987
<b>South West</b>	30,000	35,363	44,466
<b>Wales</b>	25,000	31,980	39,370
<b>West Midlands</b>	36,448	45,000	51,795
<b>Yorkshire &amp; Humber</b>	28,463	32,925	38,000
<b>South</b>	31,000	37,000	47,029
<b>Midlands/Wales</b>	31,932	40,000	47,000
<b>North</b>	27,000	34,000	43,591
<b>All regions</b>	33,000	42,000	64,019

2.26 The average remuneration for assistant/associate solicitors is therefore £55,000<sup>74</sup> (derived from Tables 8.7 and 8.8). The Law Society data puts the median earnings of an assistant/associate at £42,000 (derived from Table 8.9).

2.27 Average earnings for partners and assistants/associates (including sole practitioners and newly qualified solicitors) can be distilled from the above data collectively.

2.28 The results are summarised below:

- Average partner remuneration: £98,616 (paragraph 2.17)
- Average assistant/associate: £42,000<sup>75</sup> (paragraph 2.26)
- The unweighted average of these two figures is £70,000.<sup>76</sup> However, allowing for the fact that partners only make up 31,624 of the 82,557<sup>77</sup> solicitors in private

<sup>73</sup> Law Society “Private Practice Solicitors’ Salaries 2007” survey.

<sup>74</sup> By arriving at a median for the results in 2.23 and averaging with the results in 2.24.

<sup>75</sup> Adopting the Law Society data for present purposes.

<sup>76</sup> An average of £98,000 and £42,000.

practice, one can conclude that the earnings of most solicitors will be less than £70,000.

2.29 The unweighted average figure of £70,000 is higher than the median figure divined from the Law Society's own statistics. They are set out below in Table 8.10. According to the Law Society figures the median earnings of all full-time private practitioners in 2007/2008 was £50,000. For private practitioners who were not partners, the median gross salary<sup>78</sup> was £45,000. For equity partners, including sole practitioners, median total pre-tax drawings for the year were £80,000.

**Table 8.10: Earnings in private practice 2007 (all grades) (in £s)<sup>79</sup>**

	<b>Percentile 25</b>	<b>Median</b>	<b>Percentile 75</b>
<b>All grades of solicitors</b>	35,000	50,000	80,000

2.30 It is of interest to analyse the earnings in private practice of solicitors by reference to the nature of the work they are undertaking. The figures are set out below in Table 8.11.

**Table 8.11: Earnings in private practice by reference to specialism (in £s)<sup>80</sup>**

	<b>Assistant / Associate</b>	<b>Equity partners</b>	<b>Salaried partners</b>	<b>All case workers (i.e. fee earners)</b>
<b>Business and Commercial affairs</b>	60,000	100,450	100,000	69,602
<b>Commercial</b>	44,787	86,450	63,500	55,575
<b>Crime</b>	35,000	70,110	47,337	43,520
<b>Employment Law</b>	40,449	70,110	47,337	43,520
<b>Probate Wills and Trusts</b>	37,000	70,000	50,000	45,000
<b>Family</b>	31,600	70,015	50,000	45,000
<b>Conveyancing (residential)</b>	36,000	70,000	48,000	40,000
<b>Personal injury</b>	37,580	69,700	52,232	40,000

2.31 Thus, apart from business/commercial work, the averages do not vary greatly between the disciplines of work.

<sup>77</sup> Statistics taken from Fact Sheet Series 2007 "Key facts on the solicitors' profession 2007" published 31 January 2008.

<sup>78</sup> This is the gross annual salary for the financial year 07/08 before deductions but inclusive of London Weighting and performance related payments where applicable.

<sup>79</sup> Private Practice solicitors' salaries 2007 data – The Law Society.

<sup>80</sup> Data supplied by Law Society – Private Practice Solicitors Salaries 2007 – figures used are medians for specialists within Table 7.

2.32 Some international comparators may also be of interest: Table 8.12 sets out typical salaries paid to lawyers overseas<sup>81</sup> in £ at exchange rates applicable on 26<sup>th</sup> January 2009.

**Table 8.12: Earnings converted into £ from local currency using exchange rates as at 26 January 2009 (in £'000s)**

	<b>NQ</b>	<b>1 yr pqe</b>	<b>2 yr pqe</b>	<b>3 yr pqe</b>	<b>4 yr pqe</b>	<b>5 yr pqe</b>	<b>6 yr pqe</b>
<b>Paris</b>	47	47	47	61	73	87	108.6
<b>Milan</b>	43	43	43	52	61	71	80
<b>Madrid</b>	27	27	27	35	41	49	58
<b>Brussels</b>	66	82	87	99	110	128	134
<b>Germany</b>	71	80	85	94	110	132	n/a
<b>Dublin</b>	55	60	70	78	83	98	105
<b>Moscow</b>	79 - 104	108 – 129	122 – 151	137 - 173	165 – 187	176 – 194	187 – 216
<b>Sydney</b>	26 – 33	29 – 36	36 – 43	40 – 47	45 –59	50 – 71	57 –81
<b>Dubai</b>	55	64	80	85	92	100	n/a

2.33 The results demonstrate that with the exception of Moscow, the average earnings of solicitors in England and Wales is broadly consistent with earnings in other parts of the world.

*(d) Solicitors – in house*

2.34 The remuneration of in-house solicitors is generally lower than that of lawyers in private practice. That said, in-house solicitors' salaries have also increased well above the rate of inflation in recent years, and in 2008 the average salary for an in-house lawyer was £114,000.<sup>82</sup>

2.35 Specific salaries vary according to level of post-qualification experience, geographical region and nature of the industry.

2.36 As before, solicitors based in or around London generally earn more than those employed elsewhere. Further, lawyers working in financial services are likely to be paid more than those in other areas of commerce or industry: this is partly due to higher basic salaries, but also because of more lucrative bonus structures, with bonuses of between 30 - 100 % of basic salary available (though the credit crunch

<sup>81</sup> From the Hays Legal "Guide to Legal Salaries 2008".

<sup>82</sup> Survey by Incomes Data Services, as cited in The Times, 21<sup>st</sup> January 2008.

may rein these in). An in-house solicitor working in financial services in London earns a basic salary comparable to that of a solicitor in private practice in a City firm.

2.37 Table 8.13 sets out a summary of the typical basic salaries paid to in-house lawyers in the private sector.<sup>83</sup> As with the tables above, these figures do not include bonuses or other benefits which can be significant. In-house lawyers, especially outside London, will often receive a car allowance of between £5,000 and £10,000 in addition to their salary,<sup>84</sup> a benefit not generally available in private practice.

**Table 8.13: Typical basic salaries paid to in-house lawyers in the private sector (in £ks)**

	<b>NQ</b>	<b>1-3 yr pqe</b>	<b>3- 5 yr pqe</b>	<b>5-7 yr pqe</b>	<b>7 – 10 yr pqe</b>	<b>Head of Legal</b>
<b>London – investment banking</b>	55	65	85	95	115	180
<b>London – other financial services</b>	55	65	72	85	100	160
<b>London - media</b>	42	47	67	81	82	103
<b>London – property / construction</b>	43	55	64	72	88	96
<b>London – hi-tech</b>	42	47	59	75	80	98
<b>London - manufacturing</b>	42	50	65	72	77	103
<b>London - pharmaceuticals</b>	48	52	67	77	102	150
<b>London - energy</b>	43	62	65	75	102	144
<b>London - retail</b>	41	47	62	74	78	118
<b>South East – financial services</b>	53	60	70	80	85	125
<b>South East - other</b>	40	50	60	70	80	110
<b>South West</b>	36	45	48	60	68	92
<b>East and West Midlands</b>	32.5	35.5	49	66	70	95
<b>Yorkshire and North East</b>	31	42	55	62	70	80
<b>North West</b>	38	45	58	70	85	110

2.38 Table 8.14 sets out a summary of the typical salaries paid to lawyers employed in the public sector.<sup>85</sup> Perhaps unsurprisingly, these are markedly lower than those paid in the private sector.

<sup>83</sup> Data drawn from the Hays and Michael Page 2008 legal salary surveys.

<sup>84</sup> Taylor Root “*In-house Commerce and Industry Salary Guide 2008-09*”.

<sup>85</sup> From the Hays Legal Salary Guide 2006.

Table 8.14: Typical salaries paid to lawyers employed in the public sector (in £ks)

	<b>NQ – 2 yr pqe</b>	<b>3-4 yr pqe</b>	<b>4-6 yr pqe</b>	<b>6+ yr pqe</b>
<b>London - Central Government</b>	30	40	47	60
<b>London - Local Authority</b>	26	35	40	50
<b>London - Charities</b>	28.5	35	45	52.5
<b>London - Housing Associations</b>	25	33.5	37.5	45
<b>South East - Local Authority</b>	26	32	35	41
<b>South East - Charities</b>	25	33.5	42	47

(ii) Barristers

2.39 As a general rule, barristers employed in solicitors' firms or in-house are paid similar amounts to solicitors occupying equivalent positions.

2.40 However, the vast majority of practising barristers (approximately 12,000 out of 15,000) are self-employed and their incomes are more difficult to ascertain. Further, income figures for self-employed barristers, where they are available, need to be adjusted to account for overheads such as rent, chambers' contributions, insurance, furniture, computer equipment and books, as well as the fact that self-employed barristers do not receive benefits such as paid leave, an employer pension scheme or health insurance.

2.41 In general terms, barristers' earnings will vary according to their level of experience (year of Call), practice area and geographical location. The Bar Council provides the following rough guide to barristers' income before deduction of any of the expenses referred to above:

Table 8.15: The Bar Council's guide to barristers' income before deduction of expenses (£s)

<b>Practice Area</b>	<b>Earnings in year 1</b>	<b>Earnings in year 5</b>
<b>Chancery / Commercial</b>	40,000 – 90,000	70,000 – 200,000
<b>Public</b>	20,000 – 40,000	40,000 – 90,000
<b>Crime</b>	10,000 – 30,000	40,000 – 90,000
<b>Family</b>	20,000 – 40,000	40,000 – 90,000
<b>General Civil</b>	20,000 – 50,000	40,000 – 120,000

2.42 The Legal 500 2007 edition also contained information of this kind: this is reproduced in Table 8.16:

**Table 8.16: The Legal 500's guide to barristers' income before deduction of expenses**

	<b>1 - 5 yrs Call</b>	<b>5 - 10 yrs Call</b>	<b>Senior junior</b>	<b>Silk</b>
<b>Criminal law</b>	25 – 50	35 – 100	65 – 250	140 – 600
<b>Common law</b>	30 – 100	50 – 200	100 – 300	150 – 600
<b>Commercial law</b>	40 – 150	100 – 350	250 – 1m	350 – 2m
<b>Tax</b>	40 – 300	100 – 500	200 – 1m	350 – 2m

2.43 In addition, in its Annual Report the Lawyer compiles average revenue per barrister figures (i.e. before any expenses) for each of the Top 30 barristers' chambers (ranked by turnover). The Lawyer also provides Chambers' contribution rates for each set. Table 8.17 summarises the relevant data for 2008.

**Table 8.17: Chambers' contribution rates for the Top 30 barristers' chambers**

<b>Chambers size (by turnover)</b>	<b>Revenue per barrister (average) £ks</b>	<b>Chambers expenses (average) %</b>	<b>Average gross earnings before other expenses £ks</b>
<b>Rank 1 – 10</b>	455.4	13	396
<b>Rank 11 – 20</b>	455.4	15	387
<b>Rank 21 - 30</b>	246	15	209.1

(iii) Legal executives

2.44 There are three levels of membership of the Institute of Legal Executives: student/trainee (ILEX), member (MILEX) and fellow (FILEX), each of which is achieved by completing ILEX approved qualifications.

2.45 Approximate salary information for legal executives based in London is set out in Table 8.18.<sup>86</sup>

**Table 8.18: Approximate salary information for legal executives based in London**

<b>Qualification</b>	<b>Salary range £</b>
<b>ILEX (Student)</b>	21,000 – 27,000
<b>MILEX (Member)</b>	26,000 – 40,000
<b>FILEX (Fellow)</b>	35,000 – 80,000

<sup>86</sup> Data from Taylor Root's Paralegals and Legal Executives Salary Guide 2008/09 – London.

### 3. HOURLY RATES

#### (i) Solicitors' charge-out rates

3.1 Hourly charge-out rates to clients for solicitors' firms vary by type of firm (City, national, regional etc.) and by the level of experience of the individual undertaking the work. There is also a small degree of variation across practice areas: hourly rates tend to be higher in niche or specialist areas of expertise, such as competition law. The rates charged by solicitors' firms have increased significantly in the last few years, in particular amongst City firms. Table 8.19 sets out approximate hourly rates for 2003 and 2007 for magic circle, City and national firms<sup>87</sup> as reported by The Lawyer on 19<sup>th</sup> November 2007.

Table 8.19: Solicitors' hourly rates (in £s)

	Magic circle partner	Magic circle 5 yr ppe	Magic circle NQ	City firm partner	City firm 5 yr ppe	City firm NQ	Nat. firm partner	Nat. firm 5 yr ppe	Nat. firm NQ
<b>2003 hourly rate</b>	375 - 450	245 - 280	175 - 185	325 - 375	215 - 225	150 - 155	185 - 250	135 - 195	100 - 140
<b>2007 hourly rate</b>	625 - 700	375 - 400	235 - 250	400 - 495	285 - 315	185 - 225	350 - 375	225 - 275	185 - 210

3.2 The following table provides a further snapshot of partners' hourly rates in three broad categories for the years 2007/2008.<sup>88</sup>

Table 8.20: Partners' hourly rates

	Magic Circle firms	Top London firms (outside magic circle)	Major and national law firms (Birmingham, Leeds and Manchester)
<b>2008</b>	£600-750	£375-£495	£300-£375
<b>2007</b>	£625-£700	£400-£495	£350-375

#### (ii) Guideline rates for summary assessment of costs

3.3 Guideline hourly rates to be awarded by the courts undertaking summary assessments have been established for some years now. They provide a useful benchmark for what a court may award a receiving party by way of hourly rates. As the name suggests they are guideline rates only. They are not guideline charge out rates. They are guideline rates as to the recoverable hourly rates between the parties.

<sup>87</sup> The "magic circle" of solicitors' firms is widely understood to refer to Clifford Chance, Slaughter & May, Allen & Overy, Freshfields and Linklaters. Some commentators also include Herbert Smith in this group. "City firms" refers to other large commercial firms operating principally from the City of London. "National" firms are those large firms whose operations are not solely or primarily focused in London.

<sup>88</sup> Source: The Lawyer 13<sup>th</sup> October 2008/Legal Budgets.

Recommendations are now made by the Advisory Committee on Civil Costs (“the ACCC”) to the Master of the Rolls annually as to the applicable year-on-year guideline rates for summary assessment. In making its most recent recommendations the ACCC collected data from a survey of some 1,500 firms taken from a 2007 Law Society database. The core survey data were generated from the 129 responses for the 2007 calendar year. The new guideline rates for *inter partes* summary assessments are set out below:

Table 8.21: Solicitors’ guideline rates for summary assessment (in £s)

	<b>Band A</b>	<b>Band B</b>	<b>Band C</b>	<b>Band D</b>
<b>London 1</b>	402	291	222	136
<b>London 2</b>	312	238	193	124
<b>London 3</b>	225-263	169-225	162	119
<b>National 1</b>	213	189	158	116
<b>National 2/3</b>	198	174	144	109

- Band A: post 8 yrs pqe
- Band B: post 4 yrs pqe (solicitors or legal executives)
- Band C: other qualified solicitors/legal executives
- Band D: trainee solicitors

3.4 For the claimant personal injury market in particular, where the majority of work is conducted under conditional fee agreements, the chargeable hourly rate recoverable in costs assessments will usually provide the benchmark for the chargeable hourly rate to the client (in respect of base costs). Claimant solicitors in this sector tend to offer “no win no fee” arrangements under which they seek to ensure that clients recover 100% of their damages with no deductions for costs. This necessarily has the effect of removing market forces that would otherwise apply from the sector. Solicitors’ charges are dictated by the level of costs recovered from the losing defendant rather than the lay client.

3.5 Research suggests that on average private practitioners on full time contracts worked a median average of 45 hours a week and typically billed for 1,440 hrs a year (27.6 hours a week, median).<sup>89</sup>

(iii) Barristers’ charge-out rates

3.6 The Legal 500, 2007 edition, provided approximate hourly charge-out rates for barristers based on level of experience and practice area – this is set out in Table 8.22. The published guideline hourly rates for summary assessment do not include any guidance on barristers’ hourly rates.

<sup>89</sup> From the Law Society’s Private Practice Solicitors’ Salaries 2007 data.



**Table 8.22: Approximate hourly charge-out rates for barristers (in £s)**

	<b>1 – 5 yrs call</b>	<b>5 – 10 yrs call</b>	<b>Senior junior</b>	<b>Silk</b>
<b>Criminal law</b>	30 – 100	45- 125	65- 250	150 – 350
<b>Common law</b>	40 - 100	70 – 180	120 - 275	170 – 350
<b>Commercial law</b>	50 - 175	100 - 250	175 - 350	300 – 1,000
<b>Tax</b>	50 – 200	150 - 275	250 - 500	350 – 1,500

#### 4. COMPARATORS

4.1 It is difficult to judge the earnings of one group of professionals in isolation. Set out below is some income information relating to other professions which might be considered comparable to the law, in that they require a degree of academic as well as vocational/on the job training leading to a widely recognised qualification. These are accountancy, architecture, medicine and veterinary practitioners.

4.2 In 2008 the mean gross annual earnings for full-time employees on adult rates who had been in the same job for at least twelve months were £26,020 according to the Annual Survey of Hours and Earnings (“ASHE”). According to the same survey legal professionals under the title “*Solicitors, lawyers, judges and coroners*” earned an average £54,979 gross.<sup>90</sup> This is a little over double the national average for employed workers.

##### (i) Accountants

4.3 To qualify as an accountant one must generally have an undergraduate degree and then complete roughly three years of on the job training, during which time exams are taken at regular intervals in accordance with a structured course of study.<sup>91</sup>

4.4 Probably the most widely recognised accountancy qualification in Britain is the ACA, a qualification bestowed by the Institute of Chartered Accountants of England and Wales (“ICAEW”).

4.5 Like lawyers, once qualified accountants can work in private practice (typically in tax, audit or business advisory departments) or can operate in-house, where they might aspire to financial director or other board positions in the long run.

4.6 Accountants’ salaries tend to vary in accordance with level of experience, geographical location and nature of the job.

4.7 The ICAEW recently published a survey on the earnings of ACA qualified accountants working in business (i.e. not in private practice). Some of the main findings were:<sup>92</sup>

<sup>90</sup> ASHE 2008 table 14.7(a).

<sup>91</sup> Qualifying as a solicitor involves obtaining a degree, followed by at least one further year of study (or two if the degree was not in law) and then two years on the job. The route to the Bar is the same, save that only one year on the job is necessary. ILEX qualification is more flexible: no degree is required and much of the learning can be done whilst working.

- The average gross salary of ACAs in business is £76,200, supplemented (for two in three) with an average bonus of £21,700;
- Basic salaries increased with ppe: from 0-4 years ppe the average was £48,600, 4-6 years £55,000, 6-9 years £64,300 and 9-19 years £80,300;
- Salaries varied by industry sector: average salaries were highest in banking and markets at £93,800, with media and insurance close behind (both at almost £90,000), construction at £76,500, retail at £71,400, with the public sector average lowest at £56,100. Bonuses awarded to ACAs in banking far outstripped those in other sectors (average of £64,600 bonus compared with average of £17,000 across other sectors);
- Average salaries were highest in London: £93,600 compared with £71,900 in the South East, £64,800 in the West Midlands, £62,600 in the North West, £60,600 in the South West, £60,000 in the North, £57,700 in the East Midlands and £54,200 in Wales.
- Salaries did not tend to vary a great deal according to the size of the organisation.

#### (ii) Architects

4.8 To become a qualified architect an individual must complete an architecture degree, which typically takes seven years and which incorporates some periods on the job.

4.9 In general terms architecture is a less lucrative profession than law or accountancy. According to a survey conducted by the Fees Bureau, average earnings for architects in the UK in 2008 are £42,250.<sup>93</sup>

4.10 Some other key findings from the survey were:

- Average earnings of partners/directors (excluding sole practitioners) were £55,000.
- Average earnings of salaried architects were lowest in private practice at £38,000; average in-house salaries were £50,000 in the private sector, £38,250 in local authorities and £44,644 in central government;
- Salaries tend to be higher in London than elsewhere, though this was less marked than in accountancy or law, with the uplift being generally no more than 10%;
- Earnings generally increase with age, though again on a less systematic basis than in accountancy or law, and the rises are smaller. Salaries of employed architects (as opposed to partners) tend to hit their peak between the ages of 45 and 55.
- In private practice earnings tend to increase with the size of the firm: this is significant where partners are concerned (average of £42,000 in 3-5 partner firm, £65,000 in a 6-10 partner firm and rising to £120,500 in a 51+ partner firm), less so for salaried practitioners (£36,000 in a 3-5 partner firm, increasing in regular amounts to £42,000 in a 51+ partner firm).
- As at 1<sup>st</sup> April 2007 data suggests the median average earnings of architects was £10,000 lower than that for all private practice solicitors at £40,000:

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<sup>92</sup> ICAEW and Robert Half Career Benchmarking Survey 2008.

<sup>93</sup> Taken from the Briefing Document on the Fees Bureau 2008 Earnings Survey.

Table 8.23: Table showing architects' median earnings compared to solicitors' median earnings

<b>Architect grades</b>	<b>Median earnings</b>	<b>Solicitor equivalent</b>	<b>Median earnings</b>
<b>Sole principals</b>	£37,000	Sole practitioners	£59,928
<b>Principals in partnership</b>	£54,000	Equity partners	£80,570
<b>All principals</b>	£50,000	All equity	£80,000
<b>Private practice salaried</b>	£36,000	Salaried partners	£50,000
		Associates/Assistants	£42,000

(iii) Doctors

4.11 Qualifying as a doctor requires the completion of an academic course of study which takes a minimum of five years in total. Junior doctors thereafter continue their clinical training on the job. In broad terms the career path in hospital medicine involves at least two years as a junior doctor, typically rotating through a number of departments, followed by training in a given specialism (in what are sometimes called registrar roles) with the goal reaching the level of consultant. Alternatively junior doctors may chose to become general practitioners, a career path which also includes an intermediary period of on the job training.

4.12 The level of basic salaries paid to doctors employed by the National Health Service is public information. The salary recommendations in the “*Thirty-Seventh Report (2008) of the Review Body on Doctors’ and Dentists’ Remuneration*” have been accepted and implemented by the Department of Health. A summary of these is set out in Table 8.24. This Table also includes data on the earnings of General Practitioners (many of whom are self-employed) taken from the “*GP Earnings and Expenses Inquiry 2006/07*” published in October 2008.

4.13 However it can be difficult precisely to determine what doctors earn for a number of reasons. First, the career structure is complex, in particular following the recent reform of the specialist training process.

4.14 Second, pay varies not only by role but also by grade within that role (of which there may be as many as ten) and other performance and non-performance related factors, such as years of service. There are many variables.

4.15 Third, junior doctors and registrars/doctors in specialist training working in hospitals often work additional hours over and above their contracted 40 hours and receive additional pay for this, based on an established supplement system. The typical supplement is approximately 50% of basic salary<sup>94</sup> but clearly the supplement received can vary widely.

<sup>94</sup> See [www.nhscareers.nhs.uk](http://www.nhscareers.nhs.uk) and the NHS Staff Earnings Estimates September 2008.

4.16 Further, consultants' salaries in particular can vary significantly depending on performance related awards. The estimated NHS salary of a consultant is £119,000,<sup>95</sup> but the range is broad.

4.17 Finally, once a doctor reaches consultant level they will often undertake a significant amount of private (non-NHS) work. Earnings from private practice are difficult to estimate, but it is suggested that they may be very considerable in certain cases.

**Table 8.24: Estimated earnings of doctors in private practice**

<b>Job</b>	<b>Earnings range</b>
<b>Junior doctor year 1</b>	£33,000 – 37,000 (including typical 50% supplement)
<b>Junior doctor year 2</b>	£40,500 - £46,000 (including typical 50% supplement)
<b>Registrar/doctor in specialist training</b>	£35,000 – 68,000 (including typical 50% supplement where applicable)
<b>Consultant (NHS work only)</b>	£70,000 - £100,000 plus awards of £2,000 - £35,000
<b>General practitioners – self-employed<sup>96</sup></b>	£107,667 average (after expenses, before tax)
<b>General practitioners - salaried</b>	£50,999

<sup>95</sup> NHS Staff Earnings Estimates September 2008.

<sup>96</sup> Self employed GPs are responsible for managing their own practice and the provision of GP services within it; salaried GPs are not.



REVIEW OF  
CIVIL LITIGATION COSTS

## **PART 3: RESEARCH, CONSULTATION AND INVESTIGATIONS RE COSTS**

### **CHAPTER 9. ACADEMIC RESEARCH AND LITERATURE RE COSTS**

#### **1. INTRODUCTION**

1.1 In this chapter I summarise some recent academic research into personal injuries and other litigation which may be relevant to the various costs models now under consideration.

1.2 I shall refer to the costs shifting rule traditionally adopted in the UK as “the English rule”, even though costs shifting has now been abolished in small claims and in ancillary relief proceedings. I shall refer to the rule that each side bears its own costs as “the US rule”, even though that rule is subject to a number of qualifications and exceptions in the USA. (In a later chapter, I shall examine employment tribunals in England and Wales where, in effect, litigation is conducted without cost shifting. This gives an opportunity to observe how English lawyers and parties behave under the US rule.) I shall use the term “contingency fees” to denote fees calculated as a percentage of monies recovered, with no fee payable if the client loses.

#### **2. THEORETICAL ANALYSIS OF THE EFFECT OF DIFFERENT COST ALLOCATION RULES**

2.1 A number of economists have considered the manner in which different cost allocation rules are likely to affect the behaviour of litigants. In this section I shall summarise some of the principal papers.

2.2 Where the parties have the same information. Where the parties have the same information, they may nevertheless differ in their opinions on liability. Theoretical analyses indicate as follows:

- (i) Where liability is admitted, the settlement figure is likely to be higher under the English rule.
- (ii) Where liability is in dispute, but the claimant has a strong case, the settlement is likely to be higher under the English rule.
- (iii) Where the claimant has a weak claim, the claim is more likely to be dropped, alternatively any settlement figure is likely to be lower under the English rule.

- (iv) Where both parties are optimistic of success, settlement is less likely to occur under the English rule.<sup>1</sup>
- (v) Where the parties choose their expenditure in the light of the costs rule, the English rule results in greater incentive to incur costs.<sup>2</sup>
- (vi) Where the parties choose their expenditure in the light of the costs rule, the English rule results in greater incentive to incur costs.<sup>3</sup>

2.3 Where the parties have different information. Where the parties have different information (which in practice is usually the case), the analysis becomes more complex. Nevertheless analysis suggests that the behaviour of the parties will be broadly similar to that set out above.<sup>4</sup>

2.4 Willingness of parties to negotiate. The willingness of parties to negotiate and the frequency with which they do so is inevitably affected by the cost allocation rules and the funding arrangements under which each side is bargaining. If one takes the traditional model of risk averse claimant suing risk neutral defendant (i.e. self-funding claimant against insured defendant) under the English rule, defendants are least likely to make offers. The frequency of offers increases if the parties are litigating under the US rule or the claimant has third party funding.<sup>5</sup> Alternatively expressed, the likelihood that the defendant will make an initial offer decreases as the claimant's level of risk increases.<sup>6</sup>

### 3. EMPIRICAL RESEARCH ON THE EFFECT OF DIFFERENT COST ALLOCATION RULES

3.1 Coursey & Stanley. In 1988 Coursey & Stanley devised a set of experiments to assess the effect of the costs shifting rule upon parties seeking to negotiate settlement. They took hypothetical cases and put questions to the parties to ascertain how they would act. Coursey and Stanley reached two principal conclusions. First, the English rule caused more settlements than the US rule. Secondly, when the bargaining environment was unfavourable to one party, that party received a worse settlement under the English rule than under the US rule. See Coursey D. and Stanley L. (1988): "*Pre-trial Bargaining Behaviour Within the Shadow of the Law: Theory and Experimental Evidence*", International Review of Law & Economics, volume 8, pp 349-367.

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<sup>1</sup> See sub-paragraphs (i) to (iv), see Posner R.A. (1973) "*An Economic Approach to Legal Procedure and Judicial Administration*", Journal of Legal Studies, volume 2(2); Shavell S. (1982) "*Suit, Settlement and Trial: a Theoretical Analysis under Alternative Methods for the Allocation of Legal Costs*", Journal of Legal Studies, volume 11(1).

<sup>2</sup> Coursey D. and Stanley L.R. (1988): "*Pre-trial Bargaining Behaviour within the Shadow of the Law: Theory and Experimental Evidence*", International Review of Law and Economics, volume 8(2).

<sup>3</sup> Hause J.C. (1989) "*Indemnity, Settlement and Litigation, or I'll be suing you*", Journal of Legal Studies, volume 18(1); Chen K. and Wang J. (2007) "*Fee-shifting Rules in Litigation with Contingency Fees*", Journal of Law, Economics and Organisation V23 N23, 519.

<sup>4</sup> See Bebchuk L.A. (1984) "*Litigation and Settlement under Imperfect Information*" 15 RAND Journal of Economics, 404 – 415; Gravelle H.S.E. (1993) "*The Efficiency Implications of Cost-shifting Rules*", International Review of Law and Economics, volume 13 (1); Chen and Wang *supra*.

<sup>5</sup> Swanson T. & Mason R. (1998) 18 International Review of Law and Economics 121 – 140.

<sup>6</sup> Kritzer (2001-2) "*Lawyer Fees and Lawyer Behaviour in Litigation: What does the Empirical Literature Really Say?*" 80 Texas Law Review, 1943 at 1955 – 1956.

3.2 Snyder & Hughes. Snyder & Hughes took advantage of the fact that in Florida there had been two different cost regimes. From July 1980 to September 1985 Florida adopted the English rule. Before and after this period Florida adopted the US rule. Snyder and Hughes looked at 10,325 medical malpractice cases to see how they fared. Of these cases 58% were litigated under the English rule and 42% were litigated under the US rule. Snyder and Hughes reached the following conclusions:

- (i) The expenditure required to achieve settlement or trial was between 40% and 60% higher in cases proceeding under the English rule than in cases proceeding under the US rule.
- (ii) Amongst cases that were not dropped, cases under the English rule were less likely to settle than cases under the US rule. However, when dropped cases were taken into account, the English rule made a case which had been commenced less likely to go to trial.

See Snyder E. & Hughes J. (1990): “*The English Rule for Allocating Legal Costs: Evidence Confounds Theory*”, *Journal of Law, Economics and Organisation*, volume 6, pp 345-380; Hughes J. & Snyder E. (1995): “*Litigation and Settlement Under the English and American Rules: Theory and Evidence*”, *Journal of Law and Economics*, vol. 28, pp. 225-250.

3.3 Conclusions from the above studies. The above studies suggest that more cases of low merit tend to be commenced under the US rule than under the English rule. Cases proceeding under the English rule are more likely to be settled or abandoned before trial than cases proceeding under the US rule. Those cases which progress to trial under the English rule are likely to be stronger than those which proceed to trial under the US rule. A separate consequence is that litigation costs are higher under the English rule than under the US rule.<sup>7</sup> The overall conclusion from this research is that the UK costs rule deters more claimants from beginning or continuing claims. The claimants so deterred probably comprise (a) claimants with relatively weak claims and (b) some claimants who have relatively strong cases but are fearful of costs liability (see Snyder & Hughes, page 378). This conclusion is expressed by the authors: “*Our findings cannot refute the claim that the English rule systematically distributes wealth from some plaintiffs to defendants*” (Hughes & Snyder page 248).<sup>8</sup>

3.4 The above conclusions assume that under the English rule both claimant and defendant are at risk as to costs. The extent to which those conclusions apply to litigation where claimants have CFAs and ATE insurance may be debatable. In that situation the claimant is not at personal risk, but the risks are shifted to his solicitors and insurers, both of whom have a role in decision-making.

3.5 Position under the English rule where one party has costs protection. Where one party has costs protection, but the other does not, the pattern of behaviour changes. This situation arises where one party has legal aid (now much rarer than in the past). The effect of such costs protection upon litigation behaviour was studied by Fenn and Rickman in 1999. They took a sample of 759 clinical negligence cases, in some of which claimants were legally aided and in some of which they were not. The

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<sup>7</sup> Marshall G. (2008) “*The literature on the Loser Pays rule: an Analysis of the Alternatives within the Ambit of the CFA with the Effect on Settlement Strategies*” 27 *Civil Justice Quarterly* 507.

<sup>8</sup> Similar conclusions apply to commercial litigation as to personal injuries litigation in this regard: see Kritzer (2001-2) “*Lawyer Fees and Lawyer Behaviour in Litigation: What does the Empirical Literature Really Say?*” 80 *Texas Law Review*, 1943 at 1959.

fact of legal aid shifted the bargaining power in favour of claimants and made settlement less likely to occur at an early stage. See Fenn and Rickman (1999): *The Economic Journal*, vol. 109, pp 476-491.

3.6 Effect of partial costs shifting. Under the Alaska Rules of Civil Procedure there is partial costs shifting. The winning party recovers a modest proportion of its costs from the losing party. Di Pietro and Cairns undertook a comparative study of litigation in Alaska and other states, in order to ascertain the effect of such a rule upon litigation behaviour. The overall conclusion was that the existence of a partial costs shifting rule did not have any marked effect. The number of cases started per 100,000 people appeared to be broadly similar in Alaska to the national average. This was true both for tort cases specifically and for general litigation. See “*Alaska’s English Rule: Attorney’s Fee Shifting in Civil Cases*” by Di Pietro & Cairns (1996) 13 *Alaska Law Review* 33.<sup>9</sup>

#### 4. RESEARCH ON CONTINGENCY FEES

4.1 Danzon & Lillard. Danzon and Lillard undertook a study of 5,832 medical malpractice cases proceeding in the US. Out of this sample, 43% were dropped without payment; 51% were settled with payment to the plaintiff; 7% were litigated to verdict with plaintiffs winning approximately one case in four. Some states imposed limits upon contingency fees and some did not. It was therefore possible to examine the effect of such caps. The data indicated that in states where caps were imposed:

- Cases dropped increased by 5%;
- Settlement sizes were reduced by 9%;
- The proportion of cases litigated to judgment diminished by 1.5%.

See “*Settlement out of Court: The disposition of Medical Malpractice Claims*” by Danzon & Lillard (1983) 12 *Journal of Legal Studies* 345-357.

4.2 Kritzer et al 1985. In this study the authors compared the behaviour of lawyers working for hourly fees with the behaviour of lawyers working on contingency fees. The overall conclusion of this study was that in low value cases the contingent fee lawyers devoted somewhat less time than the hourly fee lawyers; in the high value cases the contingent fee lawyers devoted somewhat more time than the hourly fee lawyers. The differences between low value cases and high value cases (with a cross-over point at claims of about \$30,000) are illustrated in figure 2 of the report. As the authors observed, “*such behaviour would be economically rational*”. See Kritzer and others “*The impact of fee arrangement on lawyer effort*” (1985) 19 *Law & Society Review* 251-277.

4.3 Kritzer 1998. This was another study comparing contingent fee lawyers with hourly fee lawyers. Kritzer converted the contingent fee earnings to hourly rates and then compared the two groups. This showed that the contingent fee lawyers did somewhat better overall than the hourly fee lawyers. However, under certain circumstances (filtering cases or high volume) contingent fee lawyers could earn substantially more than hourly fee lawyers. See Kritzer “*The Wages of Risk: The*

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<sup>9</sup> For further comment on the same Alaska study, see Kritzer (2001-2) “*Lawyer Fees and Lawyer Behaviour in Litigation: What does the Empirical Literature Really Say?*” 80 *Texas Law Review*, 1943 – 1983. A significant feature was that costs awards were only made in about half of the state cases and one quarter of the federal diversity cases where they were authorised by the rules, and the size of costs awards was in practice modest: see page 1951.



*Returns of Contingency Fee Legal Practice* (1997-1998) DePaul Law Review 267-319.

4.4 Kritzer 2002. Kritzer conducted a survey with lawyers in Wisconsin by correspondence (from which he received 511 replies), by semi-structured interviews (with 47 lawyers) and by observation (by visiting three firms). His conclusions included the following: contingent fee lawyers exercise a high degree of quality control when taking cases on initially, as illustrated by the acceptance rates set out in table 3 therein. Contingent fees are most often set at 33%, but there are some wide variations on this percentage, as set out in table 6 therein. Contingent fee lawyers generally depend upon a small proportion of cases generating high profits. Most of their profits are usually attributable to the top 10% of cases. Contingency fee arrangements do not generally lead to under-settlement of cases.<sup>10</sup> See Kritzer “*Seven Dogged Myths concerning Contingency Fees*” 80 Washington University Law Quarterly 739-794.<sup>11</sup>

4.5 Helland & Tabarrok 2003. The authors studied extensive data from 16 states, some of which had limits on contingency fees and some of which did not. In the case of Florida, a limit on contingency fees was introduced during the period under review. The data indicated that in states where there was a cap on contingency fees the time taken to achieve settlement increased by 21%; also more cases are dropped. This caused the authors to infer that “*limits on contingency fees cause a reduction in legal quality*”. Presumably this comment relates to the initial selection process. See Helland & Tabarrok “*Contingency Fees, Settlement Delay, and Low-Quality Litigation: Empirical Evidence from two Datasets*” (2003) 19 Journal of Law, Economics and Organisation 517-542.

4.6 Moorhead & Hurst 2008. Professor Moorhead and Senior Costs Judge Peter Hurst carried out a study of the operation of contingency fees in the USA. They concluded that contingency fees could operate effectively in England and Wales, either with or without cost shifting. The effect may be to narrow access to justice for lower value cases, but to broaden access to justice for multi-party and higher value cases. There is no evidence that contingency fees provide improper disincentives to settle. Contingency fees can operate efficiently with a system similar to Part 36 offers. Contingency fees do not necessarily promote high rates of litigation or frivolous claims. See Moorhead & Hurst “*Contingency Fees. A study of their operation in the United states of America*” (2008) Civil Justice Council report.

4.7 Moorhead & Cumming 2008. Moorhead and Cumming carried out a study on the use of contingency fees in employment tribunal cases. This study and its findings are summarised in section 4 of chapter 50 below, which deals with employment tribunals.

4.8 Finally, it should be noted that the fee arrangements between defendant insurers and their lawyers impact upon behaviour, although in a different way.<sup>12</sup>

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<sup>10</sup> Kritzer’s views are supported by G. Marshal in “*The Economics of Speculative Fee Arrangements*” (2002) 21 Civil Justice Quarterly 326. It is there suggested that consideration might be given to introducing percentage contingency fees into the UK.

<sup>11</sup> This article formed part of a robust debate between Professors Kritzer and Brickman. See, e.g., Kritzer (2004) “*Advocacy and Rhetoric vs Scholarship and Evidence in the Debate over Contingency Fees: a Reply to Professor Brickman*” 82 Washington ULQ 477.

<sup>12</sup> Fee arrangements may affect (a) the stage at which insurers instruct lawyers and (b) the subsequent conduct of the defence: see Kritzer (2006) “*The Commodification of Insurance Defence Practice*” 59 Vanderbilt Law Review 2053.

## 5. ANALYSIS OF LITIGATION BEHAVIOUR UNDER THE CPR AND CFAS

5.1 Old style CFAs. Under the old style CFA (which prevailed before April 2000) a successful claimant did not recover either the success fee or the ATE premium. Thus the claimant was at no risk if he lost, but would forfeit part of his damages in the event of success. During the window of time when old style CFAs, were in use Fenn and Rickman carried out a survey of 784 cases conducted by 20 different firms of solicitors. Two conclusions emerged from this study. First, subject to one exception (*viz* where there was a 100% success fee) similar cases were being pursued under the CFA regime to those pursued under legal aid. Secondly, where a 100% success fee was agreed, solicitors were willing to pursue riskier cases than under legal aid. See Fenn, Gray, Rickman & Carrier (2002) *Journal of Insurance and Practice*, pp 41-46. During the same period a survey of personal injury clients was carried out by Yarrow and Abrams. This showed that clients' understanding of CFAs was limited. Clients rarely shopped around. They were unaware that success fees varied between firms or that some firms may pay disbursements for clients: see Yarrow and Abrams "*Nothing to Lose?*", a report published in 2000 by the Nuffield Foundation and Westminster University.

5.2 New style CFAs. Under new style CFAs (i.e. post-April 2000), if successful, the claimant recovers the ATE premium and success fee from the defendant. If unsuccessful, the claimant incurs no costs liability to the defendant. Thus the claimant litigates risk free, although there is not a "one way" costs shifting rule as generally prevails in legal aid cases. The question arose as to whether this created a "compensation culture". In order to address this question Fenn, Vencappa, O'Brien and Diacon carried out a study of employers' liability ("EL") cases proceeding under new style CFAs. They took a large number of claims, so that the results would be statistically robust. Their conclusions were:

- (i) The overall costs of settling EL cases increased by 25% between 2000 and 2003. This appeared to be a consequence of front loading costs. The delay in settling EL claims pre-issue had increased following the Woolf reforms (pre-action protocols etc), but the litigation phase post-issue was shorter. Overall the delay to settlement had increased, because most cases settle pre-issue.
- (ii) Overall there is a lower propensity to litigate claims which are funded under CFAs with ATE. (NB claimant solicitors do bear risk, although claimants do not.) This appears to be one reason for the drop in civil litigation post the Woolf reforms.
- (iii) The cost of settling claims has increased by 32% since the introduction of the Woolf reforms. This appears to be primarily due to the effect of success fees and ATE premiums, which now fall upon defendants, but also to the front loading of costs pre-issue.
- (iv) The quality of EL claims seems to have declined since 2000. Data from the Compensation Recovery Unit shows a rise in the number of EL claims and public liability accident claims which closed without payment. On the other hand the authors do not find strong evidence of an increasing propensity to claim for work accidents.

See the written evidence presented by Fenn, Vencappa, O'Brien and Diacon to the House of Commons Select Committee on Constitutional Affairs in 2006.

5.3 Impact of the Woolf reforms on pre-action behaviour. Goriely, Moorhead and Abrams undertook a study of this topic in 2002. They conducted 30 interviews with

personal injury practitioners on both sides of the fence. They examined a number of closed files (a) in respect of cases concluded pre-April 1999 and (b) in respect of cases opened after May 1999. This study suggested that the median costs paid by the loser in standard fast track cases increased from £1,393 (pre-Woolf) to £1,576 (post-Woolf); the mean figure rose from £1,580 to £1,761. That was an increase of 11%, to be compared with an inflation rate of 8% over that two year period. This cost increase did not take account of success fees and ATE premiums. The authors concluded that the effect of the Woolf reforms was to increase costs in such cases. They also noted that there was an increase in damages commensurate with the increase in costs. See Goriely, Moorhead & Abrams “*More Civil Justice? The impact of the Woolf reforms on pre-action behaviour: Research Study 43*” published by the Law Society and the Civil Justice Council.

## 6. ANALYSIS DONE IN CONNECTION WITH FIXED COSTS UNDER CPR PART 45

6.1 Low value road traffic accident claims. CPR Part 45 section 2 sets out a scheme of fixed costs for road traffic accident claims up to a value of £10,000, which settle pre-issue. This scheme of fixed costs was agreed to by both claimant organisations and defendant organisations following research by Fenn & Rickman: see their report “*Costs of low value RTA claims 1997-2002*”, dated 31<sup>st</sup> January 2003, prepared for the Civil Justice Council. Figure 17 of that report shows a clear pattern of costs rising proportionate to damages up to a damages level of £12,000.<sup>13</sup>

6.2 Success fees in road traffic accident claims. CPR Part 45 section 3 sets the success fees in road traffic accident claims (of whatever value) at fixed percentages, depending upon the stage at which the case is concluded. This scheme was agreed to by claimant and defendant organisations following research by Fenn & Rickman: see their report “*Calculating ‘reasonable’ success fees for RTA claims*”, dated October 2003, prepared for the Civil Justice Council. In this exercise the authors looked at a large number of road traffic accident claims and attempted to calculate a “revenue neutral” success fee for each stage which litigation might reach. A revenue neutral success fee is one which over a sufficiently large number of cases (most won, but some lost) will yield the equivalent of the solicitor’s normal hourly rate. The success fees set out in Part 45 are derived from the revenue neutral success fees indicated in Fenn and Rickman’s paper, supplemented by some later calculations.

6.3 Success fees in employers’ liability claims. CPR Part 45 sections 4 and 5 set the success fees in employers’ liability and employers’ liability disease claims (of whatever value) at fixed percentages, depending upon the stage at which the case is concluded. This scheme was agreed to by claimant and defendant organisations following research by Fenn & Rickman: see their report “*Calculating ‘reasonable’ success fees for employers’ liability claims*”, dated March 2004, prepared for the Civil Justice Council. This report adopts the same methodology as set out in the previous paragraph.

6.4 Cost of obtaining medical reports. The cost of obtaining medical evidence constitutes a major disbursement in personal injury cases. Consideration has therefore been given to whether this is sufficiently consistent to become the subject of fixed costs. In 2006 and 2007 Fenn examined the costs of obtaining medical reports across a large number of personal injury cases and analysed the results in his report “*Estimating the costs of obtaining medical reports*”, dated March 2007 and prepared for the Civil Justice Council. This analysis shows a high degree of consistency: see

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<sup>13</sup> For a fuller account of the negotiations leading to what was, in effect, an industry agreement, see Peysner P. (2003) “*Finding Predictable Costs*”, 22 Civil Justice Quarterly 349.

table 8 thereof. The mean value (calculated with 95% confidence) for the cost of a GP report (a) as claimed lay between £259 and £270 and (b) as agreed lay between £237 and £247. Similar consistency was found in respect of the costs of GP records, consultant fees and consultant records. The figures for each are set out in table 8 of the report. Fees charged by A&E departments for reports and copy records were somewhat more variable. These data show that it should be possible to devise a set of fixed costs for medical reports and records in fast track cases.

6.5 Table 9 of the March 2007 report shows a breakdown of fees for GP reports and records. Just over half of each fee analysed went in “administration”. Therefore this is an area in which it may be sensible to look for savings.

6.6 Practical effect of the fixed costs rules in CPR Part 45. In 2006 and 2007 Fenn and Rickman analysed the practical effects of the fixed costs scheme for low value road traffic accidents set out in CPR Part 45, section 2 (referred to in paragraph 6.1 above): see their report “*Monitoring the Fixed Recoverable Costs Scheme*”, dated 4<sup>th</sup> February 2007. This report came to three principal conclusions. First, there was a dramatic drop in costs-only proceedings following the introduction of the scheme. This is graphically illustrated in figure 7 thereof. Secondly, the number of low value road traffic accident claims which reached the stage of issuing proceedings increased. This is shown in figure 8 of the report. A possible explanation is that solicitors in a number of cases were seeking to escape from the restrictions of the scheme. Thirdly, in respect of claims settled before issue, there was no significant change in the way that claimant solicitors handled such claims as a consequence of the scheme: see Part 2 of the report.

## **CHAPTER 10. VIEW OF STAKEHOLDERS AND COURT USERS**

### **1. INTRODUCTION**

1.1 **Meetings.** During January and February 2009 I met with representatives of a number of stakeholders and court users in order to ascertain the impact upon them of (a) the present costs rules and (b) any possible modifications of those rules. It was not possible for me to meet all interested persons and organisations during Phase 1,<sup>14</sup> but I shall have further meetings during Phase 2 (the consultation period) and anticipate receiving a wider spread of views and input then.

1.2 In the following sections of this chapter, I summarise the views expressed and information given at the meetings in January and February. In addition to the meetings specifically referred to below, I attended numerous seminars and other gatherings, at which a wide range of views were expressed. I shall not attempt to précis the presentations made or the views expressed on those occasions.

1.3 I also received written submissions from many persons and organisations other than those with whom I had meetings. These submissions are taken into account in the chapters to which they relate, but are not summarised in the present chapter.

### **2. GC 100 GROUP**

2.1 The GC 100 Group comprise the general counsel and company secretaries of the FTSE 100 companies. On 13<sup>th</sup> January 2009 I met with two representatives of the GC 100 Executive Committee. I shall refer to the GC 100 Executive Committee as “GC”. The views which the representatives expressed at the meeting may not reflect the views of the wider GC 100 membership, but do provide an indication of the issues that arise in the context of larger companies. They may be summarised as follows.

2.2 GC become involved in litigation principally in two ways. First, they are sued in consumer, personal injury, competition and other similar cases. Secondly, and much less frequently, they may be involved either as claimant or defendant in substantial litigation in order to resolve their own commercial disputes. In terms of costs, GC are more concerned about the first category of cases than the second category.

2.3 The overriding concern of GC is to avoid the introduction of “US style” litigation in the UK – i.e. no cost shifting, contingency fees, class actions, vast discovery, huge irrecoverable costs for defendants, the majority of settlement proceeds going to lawyers. GC view with abhorrence a regime in which litigation is conducted as a speculative business by lawyers in the name of plaintiffs who are enrolled through advertising campaigns.

2.4 GC believe that the present cost shifting rule should be retained in the UK, although they can see the attractions of a fixed recoverable costs regime, at least for cases of lower value. The cost shifting rule is an important discipline for the lower value cases, in which GC are usually reluctant participants. The cost shifting rule is also beneficial in the larger commercial cases. GC are content to pay adverse costs

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<sup>14</sup> Phase 1 has been primarily devoted to research and the drafting of this preliminary report.

orders when they lose as the *quid pro quo* for recovering their costs in those actions which they win.

2.5 Turning to disclosure, this is a major source of costs. New developments in e-disclosure are unlikely to make major inroads. The true costs lies in gathering, organising and reviewing material (most of which is held electronically anyway). GC consider that the costs of disclosure are burdensome, but are not convinced at the moment that there would be wide support to switch to a regime in which parties only disclose documents relied upon. The price (i.e. not discovering “smoking guns” in some cases) might be worth paying, but it is an important issue which would require extensive consultation.

2.6 In relation to the major commercial cases, GC believe that they receive good service from the courts. Court fees are modest. The UK is a good jurisdiction in which to litigate and the courts produce rational decisions. Legal services in London are expensive, but GC are able to negotiate with law firms and they get what they choose to pay for. The English and Welsh Bar is good value, because GC can consult “the top guru” in any field for his (handsome) fees but without significant overheads. Litigation in the Commercial Court is expensive, but GC consider that they get good value. This compares favourably with the experience of litigation in other jurisdictions.

2.7 In relation to lawyers’ charges GC would like to move away from hourly billing. Indeed this is possible for some transactional work, in respect of which GC can go out to tender to several law firms on a fixed fee basis. However, this has not proved practical for most litigation, because no-one knows where the case will go. No-one has yet suggested any viable alternative to hourly billing in litigation.

2.8 Following their meeting with me on 13<sup>th</sup> January 2009, the representatives of GC 100 Group reported the gist of that discussion to their Executive Committee, whose additional comments may be briefly summarised as follows. GC consider that more extensive powers of case management should be given to the courts. Parties should be able to report back to the court on the conduct of proceedings. The court should have greater power to impose penalties if either party has abused the process. GC would encourage more active use of judges’ existing case management powers.

### 3. MEDIA LAWYERS ASSOCIATION

3.1 The Media Lawyers Association (“MLA”) is an association of in-house lawyers from media organisations, including broadcasters and the press. The MLA has in the past expressed concern about the costs of publication proceedings.<sup>15</sup> Representatives of MLA sent written submissions to me about these matters in January 2009 and came to discuss them on 15<sup>th</sup> January 2009.

3.2 MLA are concerned that the costs of publication proceedings are excessive and disproportionate to such an extent that the media’s right of freedom of expression under Article 10 is being infringed. The costs of defending publication proceedings are beyond the means of many small and medium sized publishers; although affordable for larger publishers, such costs are a massive burden. The consequence of this is that (i) the media are deterred from publishing proper stories through fear of disproportionate costs; (ii) the media settle unmeritorious claims or

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<sup>15</sup> I shall use the term “publication proceedings” to denote claims for defamation, malicious falsehood, breach of confidence by the media, misuse of personal/private information and similar claims in respect of wrongful publication.

publish inappropriate retractions, again simply through fear of disproportionate costs. At the meeting on 15<sup>th</sup> January the MLA representatives kindly agreed to extract data from the records of their members, in order to substantiate their assertions about the level of costs.

3.3 Base costs. MLA are concerned that base costs are excessive because solicitors and counsel in publication proceedings charge hourly rates far above what is justifiable. Also the solicitors charge for an excessive number of hours work both pre-issue and post-issue.<sup>16</sup> Detailed assessments are ineffective as a means of controlling excessive base costs. Furthermore, detailed assessments in defamation cases are complex and can generate massive costs in their own right.

3.4 Success fees. Success fees are always sought in CFA cases of 100% at trial and beyond. That is grossly excessive. Claimants almost always win publication actions, either by settlement or judgment. Therefore the risk to claimant solicitors on CFAs is small. Success fees should not be recoverable in publication proceedings, alternatively should be much less than 100%.

3.5 ATE premiums. There is no real market for ATE in publication cases. As a result premiums are unreasonably high, for example £68,000 premium for cover of £100,000. The claimant pays no premium if the claim fails (a rare event); the defendant pays the premium if the claim succeeds (the usual outcome).

3.6 Comparison with other jurisdictions. As a result of the above factors, publication proceedings are many times more expensive in the UK than in other jurisdictions. This is confirmed by a recent study undertaken by Oxford University. See “*A Comparative Study of Costs in Defamation Proceedings across Europe*” (December 2008) published by the Centre for Socio-Legal Studies, Oxford.

3.7 MLA proposals. MLA consider that in publication proceedings hourly rates should be pegged at reasonable levels; that costs (including success fee and ATE premium – if recoverable, despite MLA submissions) should be capped prospectively; that judges should exercise greater control over the conduct of proceedings, in the exercise of their case management powers, in order to prevent excessive costs being incurred.

#### 4. EMPLOYMENT LAW ASSOCIATION

4.1 On 14<sup>th</sup> January 2009 I met a number of representatives of the Employment Law Association (“ELA”), of whom some normally worked for claimants and some normally worked for defendants. The views which they expressed were personal and not statements of the ELA’s position.

4.2 There appeared to be general consensus that the “no fee shifting” regime plus contingency fees worked reasonably well in the smaller employment tribunal cases. Legal aid is not available. Many claimants are out of work and simply cannot risk incurring liability for legal costs (their own or the other side’s). A claimant solicitor stated that he had only once had a costs order made against his client and on that occasion his firm had paid the costs awarded.

4.3 Views differed as to whether the “no fee shifting” regime was appropriate in the larger employment tribunal cases. The point was made that, because of the costs

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<sup>16</sup> See the speech of Lord Hoffmann in *Campbell v MGN* [2005] UKHL 61.

regime, there was no equivalent to CPR Part 36 in relation to employment tribunals. This meant that there was less pressure on parties to accept reasonable settlement offers.

4.4 There was disagreement as to whether blackmailing claims were a common problem. Blackmailing claims are weak claims brought to extract settlement because of the threat that the respondent would be put to huge irrecoverable cost.

4.5 The ELA representatives outlined their practical experience of pursuing and defending claims in employment tribunals. Their comments in this regard are digested in the “practical consequences” section of chapter 50, which deals specifically with employment tribunals.

## 5. ATE INSURERS AND BROKERS

5.1 On 20<sup>th</sup> January 2009 I had a meeting with about twenty major ATE insurers, underwriting agents and brokers in order to gain a general understanding of the ATE insurance market and to elicit their views on some of the issues raised by my terms of reference. Their factual exposition of ATE insurance and how the market operates is set out in the ATE insurance chapter and need not be repeated here.

5.2 Raising the small claims track limit. We discussed what would be the effect on premiums for fast track personal injury claims, if the small claims limit is raised from £1,000 to £5,000. The view of ATE insurers is that the pool of fast track personal injury claims would be much reduced in size; as a consequence ATE premiums would increase substantially for the surviving fast track claims.

5.3 Abolishing cost shifting. If cost shifting is abolished, the ATE market would disappear. Although other matters are sometimes covered by ATE insurance (e.g. own counsel’s fees or other disbursements), these matters alone would not be sufficient to justify the survival of ATE insurance. It was also suggested that lawyers would no longer offer CFAs in most cases.

5.4 Introducing a scale of fixed costs. ATE insurers do not believe that this proposal (although it involves modifying the cost shifting rule) would have any adverse effect on the market. Quite the contrary. If costs on the fast track and possibly above the fast track are fixed (as under the German system or similar), the insured risk would be defined and quantified. Therefore premiums would tend to come down. In answer to my questioning, the insurers asserted that any ATE insurance gains resulting from a fixed costs regime would be passed on to litigants rather than shareholders.

5.5 One-way cost shifting. If one-way cost shifting is introduced in defined areas, then (a) defendants would not have to pay ATE premiums in those cases which they lose and (b) defendants would not make any costs recovery in those cases which they win. It may be argued that in some defined areas, e.g. clinical negligence, ultimately all costs are borne by defendants or their insurers; therefore a one-way cost shifting would (a) be cheaper for defendants and (b) make litigation simpler for claimants. ATE insurers acknowledged the force of this proposition, but pointed out that a one-way cost shifting regime may encourage more unmeritorious claims. They also pointed out that success rates are significantly lower in clinical negligence claims than in general personal injury claims. ATE insurers maintain that they act as “filter” to weed out unmeritorious claims.



5.6 Costs of clinical negligence claims. Some ATE insurers maintain that the NHSLA drives up costs by, in the first instance, referring claim letters to the insured doctor only. If the letter of claim were also sent to an independent expert at the outset, many strong claims would be admitted promptly thus reducing (a) base costs, (b) success fee and (c) ATE premium (if staged or containing a discount for early settlement).

5.7 Legal expenses insurance. If individuals had stand-alone legal expenses insurance (as do most of the population in Germany) this may obviate the need for ATE insurance in individual cases as they arise. Only one of the companies attending the meeting, First Assist, also provides BTE products to both personal and commercial customers. These products include add-ons to household, motor and commercial policies, as well as stand-alone personal and commercial products. First Assist believe that such insurance is economically efficient and would like to see it more widely used. However, the other ATE insurers at the meeting maintained that there would be no substantial take up for such insurance within the UK and that this has been confirmed by their own research.

## 6. THIRD PARTY FUNDERS

6.1 On 22<sup>nd</sup> January 2009 I had a meeting with about twenty five representatives of major funders, intermediaries and other bodies involved in third party funding of litigation ("TPF"). The purpose was to gain an understanding of the TPF market and to elicit the views of funders on some of the issues raised by my terms of reference. Their factual exposition of TPF and how the market operates is set out in the TPF chapter and need not be repeated here.

6.2 Security for costs. It is the experience of funders that their arrival on the scene often precipitates an application for security for costs. Funders believe that such applications are litigation weapons commonly used by defendants for tactical reasons. Funders maintain that generally speaking orders for security for costs are inappropriate in cases supported by TPF.

6.3 Budgeting. Funders see accurate cost budgeting by solicitors as important to the development of TPF. They also believe that, because of their experience, they can sometimes assist the client in policing legal costs as the case progresses. All funders at the meeting on 22/1/2009 told me that they were more concerned about certainty of future legal costs than about the precise amount. It is the experience of one funder that on average the final costs of an action come out at about 10% above budget.

6.4 Funders believe that costs budgeting should be on the agenda at the first case management conference in every substantial case.

6.5 Effect of a scale costs regime. Funders expressed the view that a scale costs regime on German lines would introduce certainty and be highly beneficial to TPF. The point was made, however, that in larger cases it is important that the client invests the right amount of money in a case. This may be unrelated to the specified scale cost.

6.6 Effect of abolishing maintenance and champerty. In answer to my question, most funders expressed the view that they would exercise a greater degree of control over litigation which they funded, in the event that the common law doctrine of maintenance and champerty were abolished. They agreed in principle that it would be beneficial to replace the common law doctrine of maintenance and champerty with

a regulatory code, but warned that the detail may be difficult to draft. One advantage of a code over the common law would be that the boundaries would be clearly defined.

6.7 Effect of introducing contingency fees. Views differed about the effect of permitting lawyers to charge percentage based contingency fees. Some consider that this would decimate the TPF market. Others think that this would enlarge the range of options for litigants and thus promote access to justice.

6.8 Effect of abolishing cost shifting. All funders agreed that if cost shifting were abolished, then TPF would only be available for higher value cases. Accordingly the availability of TPF would be diminished.

## 7. COMMERCIAL COURT USERS

7.1 Meeting. On 22<sup>nd</sup> January 2009 I had a meeting with the Costs Sub-Committee of the Commercial Court Users' Committee ("the sub-committee"). As well as representation from law firms, the Bar and the judiciary, the sub-committee (like the full Users' Committee) includes significant representation from commercial clients, including from the banking, insurance, marine, corporate and commodity sectors. References below to the sub-committee should be taken to reflect the views of client users of the Commercial Court and not simply of lawyers practising in the Commercial Court.

7.2 Present costs rules satisfactory. The sub-committee express the strong view that, subject to certain specific matters discussed below, the present costs rules are satisfactory and should not be changed, at least in relation to the Commercial Court or in a way that could affect the Commercial Court. The sub-committee rightly point out that the Commercial Court enjoys a high reputation throughout the world; the majority of litigants who bring their disputes before the Commercial Court are from overseas. This indicates general satisfaction on the part of client users with the present procedures, including the costs rules. The Commercial Court makes a significant contribution to the UK economy. It is important that well - intentioned reforms to the rules should not undermine that state of affairs.

7.3 The Commercial Court is currently giving close attention to its own procedures and has been piloting the recommendations in the Report of the Commercial Court Long Trials Working Party under the chairmanship of Mr Justice Aikens ("the Aikens report"). Improvements in procedures can have a positive impact on costs. Following considerable feedback on the pilot from Commercial Court users, the Commercial Court judges are shortly to decide upon the manner and extent of the implementation of the recommendations. Recommendations include procedural proposals, such as limitation and focusing of disclosure, that are intended to lead to a reduction of costs. It would be inappropriate for the present Costs Review to recommend reforms which cut across the work which the Commercial Court is undertaking. Moreover, apart from procedural matters, it is important that the present Costs Review should not take steps that could jeopardise the, internationally respected, professional culture in the Commercial Court. The experience of Commercial Court users of other jurisdictions with a more aggressive litigation culture, is that that more aggressive culture is a main factor behind unpredictable and high costs.

7.4 Costs recovery on standard basis. The sub-committee believe that the present costs rules achieve the right balance, namely the default position that the winner

recovers standard basis costs. The sanction of indemnity costs should be reserved for cases of unreasonable behaviour. Although CPR Part 44 allows flexibility in awarding costs (which is beneficial), experienced solicitors can generally predict with reasonable accuracy what costs order the court is likely to make at the end of a case.

7.5 Summary assessments of costs. Views differ on the matter of summary assessments. Some sub-committee members believe that the judge is best placed to do a summary assessment at the end of a complex interlocutory hearing. The Commercial Court judge knows the details of the case in the way that a costs judge never will. There is the benefit of an immediate order without further argument. Other sub-committee members are concerned that this matter is sometimes dealt with too hurriedly and that there is inconsistency of approach between judges. Both the judge who does the summary assessment and the counsel who argues it (out of everyone in court) have the least proximity to the matter. Also they have insufficient information. Some sub-committee members could see force in the suggestion that there should be greater, and more robust, use of the power to order payments on account of costs, leaving the balance to detailed assessment. In practice the balance due would normally be agreed between solicitors. The issue of summary assessment of costs was the subject of recommendations in the Aikens Report and the Commercial Court judges are, as stated above, shortly to consider the manner and extent of any changes to Commercial Court procedures in this respect.

7.6 Contingent fees. The introduction of contingent fees charged on a percentage basis in the context of commercial litigation would be a retrograde step. It would put at risk the existing professional culture of practitioners, which culture is key to the international success and reputation of the Court and its attractiveness to overseas litigants. The evidence is that commercial parties choose the Commercial Court with its existing arrangements as to costs, as opposed to other jurisdictions with arrangements as to costs that include contingency fee arrangements.

7.7 Conditional fee agreements. Sub-committee members, including all client members, do not consider it desirable to encourage or accommodate CFAs in the context of commercial litigation. Any “access to justice” case for them is very limited in that context. Their use can unsettle the valuable dynamic, including in relation to settlement, by a balanced litigation framework that first involves some cost for each side and then offers a successful party the facility to shift reasonable and proportionate incurred costs. They can also prejudice the predictability that that framework offers. The use of CFAs in the Commercial Court is still rare, but is modestly increasing. In the opinion of sub-committee members, neither success fees under CFAs nor ATE insurance premiums should be recoverable under a costs order. In other words, in this respect the costs rules should revert to the pre-April 2000 position.

7.8 Court fees. The sub-committee regard court fees as a matter of great importance. They are strongly opposed to the proposal to introduce daily hearing fees.

7.9 More robust judicial case management? Sub-committee members differed in their views as to whether and where more robust judicial case management would reduce costs or add to costs. Sub-committee members also differed in their views as to the extent to which disclosure should be confined in commercial litigation. These are issues of procedure which, as already stated, the Commercial Court judges are currently considering following the feedback from Commercial Court users in relation to the piloting of the Aikens recommendations. The members of the sub-

committee, including all client users, were unanimous that such issues are best dealt with by the Commercial Court and its users, rather than by the present Costs Review.

7.10 Budgeting and cost capping. Experienced solicitors are able to budget the costs of commercial litigation with reasonable accuracy. Sub-committee members do not believe that budgets should be used for cost capping as a matter of routine. The court already has adequate powers to impose costs caps in those cases where capping is appropriate.

7.11 Level of charges. Whilst useful quantitative data is not realistically available, qualitative evidence in the form of client experience from the banking, insurance, marine, corporate and commodity sectors (as also reflected by law firm experience in those areas) included the following:

- (i) Hourly rates might be less in the US but on the whole more hours were spent, and the number of people on the team tended to be larger.
- (ii) Particular aspects of US procedure, notably oral discovery and the volume of motions, often increased overall costs of commercial litigation in the US as against England.
- (iii) Costs were prone to increases in the US by the presence of a more aggressive litigation culture there than in England. This led to more motions, sometimes apparently driven not by merits but by a desire to show strength.
- (iv) The key factor for clients was not however a cost comparison between the US and England but the quality of process and confidence in it. The Commercial Court attracted confidence that, in particular, the US state court system and the use of jury trial in commercial matters in the US generally did not. For some, this led to a preference within the US for arbitration over litigation.

7.12 Commercial litigation in Continental jurisdictions is cheaper than in the UK but it is an altogether different product. Owing to the absence of safeguards such as disclosure, cross-examination etc, and sometimes the presence of delay, these fora are not popular for commercial dispute resolution and any comparison is not a “like for like” comparison. Most commercial disputes in Continental Europe are referred to arbitration, and many of those arbitrations go to London.

7.13 Scale costs not appropriate in high value cases. Sub-committee members consider that a system of scale costs (whether or not based upon the German model, where the entire litigation product offered is quite different from that available in England and from the Commercial Court) would be inappropriate for high value cases of the kind brought in the Commercial Court. In brief, their reasons are:

- (i) In the Commercial Court, one case tends to be unlike another and each case has its own procedural demands. A scale costs system would work against the procedural flexibility these cases require.
- (ii) In particular, scale costs systems simply do not cater for the difficulties of multi-party litigation, where the value of issues as between different parties may differ and depend on a quite complex set of possible outcomes. This is a powerful factor in favour of the flexible approach in the Commercial Court.
- (iii) A system of scale costs would cause a loss of the beneficial dynamic currently offered by a system that allows recovery of costs actually incurred (subject to the limits of reasonableness and proportionality).

- (iv) Experience of jurisdictions where a system of scale costs is used is that it can distort behaviour. The example was given of inflated claim amounts where scale costs applied; another example is where the scale costs exceed the value of the work done.
- (v) It is not possible to attribute monetary values to all disputes, and some of the solutions designed to address this problem can lead to unpredictability. In some jurisdictions using scale fees but allowing some additional costs to temper the lack of relationship with costs incurred, the result again can be an element of unpredictability. Unpredictability can lead to satellite litigation.

7.14 In Commercial Court litigation costs are generally speaking proportionate. It is the experience of sub-committee members that in the great majority of Commercial Court cases costs are proportionate to the sum or matter in issue. This is not however to encourage complacency – cost can be reduced and that is one of the reasons for the work on procedure that is in hand following the piloting of the recommendations in the Aikens Report. Further, in commercial cases clients are often in a better position to impose cost controls (client accountability generally is one of the areas addressed in the Aikens Report). At my request a number of law firms and companies represented on the Commercial Court Users Committee have prepared a schedule giving details of costs claimed and costs recovered in their most recently concluded cases in the Commercial Court and other courts (over the last two to three years). It can be seen that in most of these cases the costs involved were substantially less than, and were proportionate to, the sums at stake in the litigation, and that a relatively high proportion of costs claimed were recovered. The latter part of the schedule includes details of costs claimed and costs recovered in recent cases in other courts. I append this schedule as Appendix 9.

## 8. ASSOCIATION OF BRITISH INSURERS

8.1 Meeting. On 19<sup>th</sup> January 2009 I met with representatives of the Association of British Insurers (“ABI”) and representatives of three insurers who belong to ABI. For convenience I will refer to the people at this meeting as “insurers”. In this section I summarise the gist of what they said. Our discussion concentrated upon personal injury claims. These fall into three principal categories, namely road traffic accident (“RTA”), employers’ liability (“EL”) and public liability (“PL”).

8.2 Frontier Economics research. During the course of our meeting a research paper by Frontier Economics dated 2007<sup>17</sup> was delivered and briefly discussed. This paper contains an analysis of 18,200 personal injury claims within the bracket £1,000 to £25,000 between March 2005 and April 2007. This shows that:

- In EL and PL cases, on average, the costs payable to claimant solicitors slightly exceeded the damages paid to claimants.
- In RTA cases, on average, the damages paid to claimants exceeded the costs payable to claimant solicitors, but only by a small proportion.
- Most EL and PL cases are done on CFAs, with the result that success fees plus ATE premiums have to be paid as well as base costs. On the other hand, most RTA claims are funded by BTE insurance. Thus in about 70% of RTA cases success fees and ATE premiums do not have to be paid.

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<sup>17</sup> A revised version of the Frontier Economics report was provided to me following the meeting. This is at Appendix 28.

- There is a substantial difference between (a) the costs sought by claimant solicitors and (b) the costs finally paid (i.e. the costs agreed between the parties or assessed by the court). This is typically in the region of 30%.
- The cases analysed by Frontier Economics comprise both cases settled before issue (the majority) and cases in which proceedings were issued (the minority).

8.3 Insurers maintain on the basis of this evidence and on the basis of their general experience that the transaction costs of processing personal injury claims are excessive. Such claims are generally far less complex and of far lower value than, for example, flood claims. Yet persons whose homes have been flooded are able to resolve their claims without legal assistance. Insurers accept my point, however, that flood claimants are making claims on their own policies, which constitutes an important difference.

8.4 Most personal injury claims are uncontested and do not require lawyers. Insurers point out that in about 90% of RTA claims and 80% of EL claims there is no dispute on liability. Insurers maintain that they could deal with the claimants in such cases directly and resolve quantum fairly without any need for legal intervention. They contend that there should be a sift mechanism whereby only cases which raise genuine issues on liability or quantum should go down the “legal” route. Insurers contend that, bearing in mind the high volume of personal injury claims, this would achieve massive cost savings.

8.5 Raise small claims track limit to £5,000. At the moment the small claims track limit for personal injury claims is £1,000, whereas for other claims (apart from housing) the limit is £5,000. At least 80% of all personal injury claims are below £5,000. Thus the reform suggested in the previous paragraph could be achieved simply by raising the small claims limit to £5,000 in all personal injury cases where liability is admitted. This would remove a huge swathe of cases from the costs regime of the fast track.

8.6 Would any savings be passed on to the public? Insurers maintain that, because of market forces, any savings achieved in legal costs would be passed on to the public via reduced premiums. In answer to my challenge, they referred to the Irish experience where recent process reforms have reduced the legal costs for which insurers are liable. As a result of those reforms and other factors, motor premiums in Ireland dropped 45% between 2003 and 2006: see the press release of the Irish Insurance Federation dated 9 May 2006. Insurers also rely upon the IUA Fourth Bodily Injury Awards Study, which states that legal costs account for 10.1% of current premium rates across the whole motor market. Insurers also state that if the involvement of lawyers could be eliminated in uncontested, straightforward personal injury cases, some of the money saved could be passed on to claimants, for example by a 25% increase in the levels of general damages.

8.7 What safeguards could be provided to unrepresented claimants? Insurers suggest that a number of safeguards would be possible: for example, an ombudsman scheme or independent solicitors (paid for by insurers) to advise claimants before they accept offers of settlement. It is already the case that telephone advice is available to many litigants on the small claims track (for example, from BTE insurers or trade unions). Insurers also suggest that the process of assessing damages be simplified, so that claimants would be able to assess their own likely damages.

8.8 Simplifying the assessment of damages. Insurers demonstrated during the 19<sup>th</sup> January meeting the “Colossus” system for assessing general damages in respect of personal injuries. Data concerning the injuries, the symptoms, the effect upon the

particular claimant's lifestyle and so forth are keyed into the system, which then generates a range for general damages. In arriving at its range of figures, apparently the system applies "in excess of 12,000" rules. Colossus is used by major UK insurers, including Norwich Union, Axa, RSA, Allianz, Fortis and LV as well as the Motor Insurers Bureau. Furthermore Medical Reporting Organisations "(MROs)" generally provide medical reports in a format that can be uploaded into Colossus. The majority of all medical reports now come from MROs, rather than direct from practitioners.

8.9 The present purpose of the Colossus system is to assist insurers in predicting the likely level of damages in individual cases and formulating settlement offers. Insurers suggest that a system of this character could be considered by an appropriate committee chaired by a senior judge and then adopted by the courts. The computer would then generate guideline figures for each case. Obviously, adjustments could be made to the guideline figures according to the circumstances of each case. The advantages of such a system would be:

- It would be simpler to use than the present tools (JSB guidelines, reported decisions and *Kemp*) and would make the level of general damages far easier to predict.
- Lawyers and litigants would all have access to the same computer programme.
- The system could be made publicly available through the internet and thus claimants could readily ascertain their likely level of damages.

8.10 Overseas experience. Insurers state that a number of overseas jurisdictions have "points" systems or similar systems which make the assessment of damages for personal injuries more precise; thus it is easier in those jurisdictions to predict what damages will be awarded by the courts in any given case. Insurers draw attention to France, Spain, Italy, Portugal and Ontario. In Spain, doctors are trained to assess patients by reference to the "medical scale" which is used by the courts. I shall discuss the system for assessing personal injury damages in overseas jurisdictions in chapter 27 below.

8.11 Special damages. Insurers assert that in the great majority of low value personal injury cases special damages are not complex. They usually comprise taxi fares, medical expenses, loss of earnings, damage to clothing and similar matters. Claimants could readily deal with matters of this nature on the small claims track without legal representation.

8.12 Referral fees. These can go up to £1,000 per case. Insurers believe that the high level of fees being paid by claimant solicitors for referrals reflect the high level of costs which are currently being allowed. If the costs allowed to claimant solicitors come down, then referral fees will follow suit.

8.13 Hourly rates. Insurers consider that the hourly rates being paid to claimant solicitors are too high. There is a substantial discrepancy between the hourly rates of claimant solicitors and the hourly rates of defendant solicitors, as can be seen from the tables set out in section 4.2 of the Frontier Economics report.

## 9. ASSOCIATION OF PERSONAL INJURY LAWYERS

9.1 Meeting. On 26<sup>th</sup> January 2009 I met three representatives of the Association of Personal Injury Lawyers ("APIL").

9.2 Group actions. APIL has serious concerns about the rules governing group actions, principally CPR Part 19 section 3. APIL believes that these rules require a complete overhaul. However, group actions are not within the practice of the representatives at the 26<sup>th</sup> January meeting. APIL kindly agreed to set up a separate meeting concerning the costs of personal injury group actions.<sup>18</sup>

9.3 ABI statistics. APIL are sceptical about the ABI statistics referred to in paragraph 8.2 above. They will respond to the Frontier Economics research when they have had the opportunity to consider it.<sup>19</sup> However, they make the general point that some ABI data are statistically flawed. Also there has been a steadying of costs in recent years.

(i) Small claims track limit

9.4 Legal representation needed in claims above £1,000. APIL would be strongly opposed to raising the small claims track limit for personal injury cases from £1,000 to £5,000.<sup>20</sup> They point out that according to a MORI survey of 2005/6, some 64% of people would not pursue a personal injuries claim without a solicitor. Personal injury claimants are one-time users of the litigation system and would be greatly disadvantaged in dealing with insurers. Indeed statistics show that on average cases settle for a sum 53.14% higher than insurers' initial offers. Such gains for claimants could not be achieved without the assistance of solicitors.

9.5 APIL accept that the general limit for claims in the small claims track is £5,000. However, they maintain that personal injury claims are very different from debt claims, consumer claims and the like. APIL are aware of a recent low value fatal accident claim, which insurers successfully kept in the small claims track. The deceased's family were then left to deal with the case on their own, while the defendant's insurers were represented by a substantial city firm. Defendants' insurers will routinely send along representation. There was huge inequality between the parties.

9.6 APIL do not agree with my tentative suggestion that the above problems could be overcome in any case where the insurers admit liability and agree to treat the claimant as their own insured. The reality is that insurers would always try to knock a bit off. There is no public confidence in insurers. The public have had experience of payment protection policies and critical illness cover. In any adversarial system insurers always try to settle for less than a claim it is worth. Unless there is a huge culture change, insurers would always pay the minimum. APIL are concerned about the vulnerability of clients in the personal injuries area. It is essential that personal injury claimants receive (a) fair compensation in every case and (b) rehabilitation etc in appropriate cases.

9.7 Difficulty of quantifying damages. In lower value, less complex cases, APIL accept that quantifying special damages in personal injury cases can generally be straightforward. Assessing general damages for personal injuries is far more difficult and claimants need the assistance of lawyers. This is another reason for keeping personal injury claims between £1,000 and £5,000 in the fast track.

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<sup>18</sup> This further meeting occurred on 22<sup>nd</sup> April. See paragraphs 9.25 to 9.28 below.

<sup>19</sup> APIL's response to the Frontier Economics report, which was sent to subsequently, is at Appendix 28.

<sup>20</sup> The Government has recently consulted on this issue. The consultation paper and the responses are summarised in section 3 of chapter 24 below.



9.8 APIL do not accept that the Colossus system is a simple or reliable tool for assessing general damages for personal injuries. It is APIL's experience that awards of damages in court are always higher than the figures generated by Colossus. However, APIL accept that it would be theoretically possible to create a software system that would generate fair figures for general damages. This may, however, be cost prohibitive. If a working group is set up to create such a system, APIL would be willing to nominate a representative to serve on the working group.

9.9 Allocation problems if the small claims limit is raised to £5,000. If the personal injuries limit for the small claims track is raised to £5,000, there would often be doubt as to whether a particular case falls within the small claims track or the fast track. Allocation hearings would become more complex. This is a further argument against raising the limit.

(ii) What costs of litigation are being incurred?

9.10 Survey. APIL kindly agreed to carry out a survey of practitioners on APIL's executive committee to obtain a picture of the current costs of personal injury litigation. Each participant firm would be asked for details of the ten most recent cases resolved by settlement or judgment. The survey questions were agreed during the meeting.

9.11 Results of survey. The results of the survey were subsequently analysed by APIL on spreadsheets. Those spreadsheets are annexed to this report as Appendix 12.

9.12 Costs not disproportionate. APIL accept that in low value personal injury claims costs sometimes far exceed damages. But this is a consequence of points taken by the defence. Claimants have the right to establish their claims. Costs in those contested cases should not be condemned as disproportionate. It is often defendants who define the issues in litigation. Defendants also fail to narrow the issues, at an early stage, or make binding admissions on the points which can be agreed, resulting in excess costs. The court should control costs by more effective case management. There is no need for cost capping, save in exceptional cases.

(iii) Possible reforms of the costs rules

9.13 Costs shifting rule. APIL would oppose the abolition of costs shifting and the introduction of percentage contingency fees. There is, however, an urgent need for a complete overhaul of the costs rules and procedures dealing with collective actions.

9.14 Damages sacrosanct. In APIL's view the damages awarded to a claimant are sacrosanct. No deduction should be allowed. APIL would oppose any reform whereby success fees or ATE premiums become irrecoverable. That regime benefited "middle England" (which had previously been poorly served) prior to April 2000, because people who were ineligible for legal aid gained access to justice and were able to recover 75% of their damages. But nowadays claimants expect (due to a CFA system introduced by Government) to recover 100% of their damages, as this is a well publicised practice.

9.15 One way cost shifting. APIL can see that one way cost shifting in personal injury litigation may be a good idea. However, this is a matter which APIL would wish to consider further.

9.16 Fixed costs in fast track. The present system of assessment enables costs to reflect the circumstances of the particular case. APIL fear that if fixed costs are introduced, insurers would mess claimants around. This would force claimant solicitors to do extra work for no remuneration. Claimant solicitors are required to do their best for each individual client and to ensure that their actions do not conflict with professional rules.

9.17 Banning referral fees. APIL originally opposed the introduction of referral fees. They also fought against claims management companies, who bring no added value to a case. If referral fees are banned, personal injury claimants could readily find appropriate solicitors in their area through the accreditation scheme introduced by APIL in September, 1999. This provides quality assurance criteria for personal injury practitioners' individual skills and expertise.

(iv) Miscellaneous

9.18 Hourly rates. The business models of claimant and defendant solicitors are wholly different. Claimant solicitors bear a variety of costs that do not fall upon defendant solicitors. A disparity between claimant and defendant hourly rates is inevitable.

9.19 The new process. APIL support the new process being developed by the MoJ. A large proportion (70 to 75%) of personal injury claims will fall within it, thus reducing the front loading of costs.

9.20 Defendant conduct. Defendants are increasingly disregarding pre-action protocols. There should be effective sanctions for such breaches.

9.21 New code. APIL and FOIL have agreed a new code for handling high value personal injury cases. It applies to claims above £250,000. The code is currently being piloted (for 12 months from July 2008) and is working well. It is APIL's experience that the claims handlers dealing with large claims are better and easier to deal with.

9.22 Subsequent meeting re collective actions. On 22<sup>nd</sup> and 23<sup>rd</sup> April 2009 I attended the APIL annual conference in Newport and took the opportunity to meet a group of claimant solicitors who specialise in collective personal injury actions. They expressed to me APIL's view that in the context of group claims the court should have the power, upon application by the claimants, to order that there should be no cost shifting. The effect of cost shifting is that some meritorious group actions cannot proceed, because (a) the clients are understandably unwilling/unable to accept any risk of adverse costs, however low; (b) ATE insurance cover or legal aid<sup>21</sup> is simply not available.

9.23 The solicitors informed me that in those cases where ATE insurance is obtained, the premiums can be substantial (although the opportunity for obtaining ATE cover on a deferred and conditional basis is becoming more normal). Such premiums are payable by the defendants when actions are won or settled, but not payable at all if an action is lost. There must therefore be a question as to whether the cost shifting rule inures to the benefit of either party in cases which go forward with the benefit of ATE insurance.

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<sup>21</sup> With its concomitant costs shield.

9.24 I raised with the APIL solicitors the question how group personal injury actions could be funded in the absence of a cost shifting rule. Some stated that such actions could still be conducted on CFAs, even though successful claimants would not recover their costs from defendants. The claimants' legal costs (including any uplift) would come out of the damages (i.e. effectively a contingency arrangement). From the clients' point of view, the prospect of foregoing part of their damages<sup>22</sup> in the event of success is more attractive than the prospect of open-ended liability for the defendants' costs in the event of defeat.<sup>23</sup>

9.25 The APIL solicitors made the further comment that in jurisdictions where contingency fees work (a) damages are higher and (b) the judiciary streamline/reduce the amount of work needed to be undertaken by lawyers who bring the cases.<sup>24</sup>

## 10. FORUM OF INSURANCE LAWYERS

10.1 Meeting. On 28<sup>th</sup> January 2009 I met four representatives of the Forum of Insurance Lawyers ("FOIL"). Members of FOIL act for insurers in respect of all manner of claims, such as personal injuries, professional negligence, commercial etc. The discussion at our meeting focused on personal injury claims, because that is where FOIL believe that most problems arise.

10.2 Inevitable disparity between claimant and defendant costs. FOIL accept that their business models are very different from the business models of claimant solicitors. Insurance solicitors always get paid for cases. They do very little speculative work. They have a regular flow of new matters. They have educated clients, who do not require lengthy explanations of the issues. Therefore insurance solicitors are bound to charge less than claimant solicitors. Any scale of fixed costs would have to include different figures for claimants and defendants.

### (i) Escalation of costs

10.3 FOIL state that personal injury litigation has become an industry now. It is important that any new system does not create opportunities for exploitation. An example is pre-action disclosure, which has now become a revenue generator. The old notion of generalist firms, doing personal injury work when a client happened to come in with such a claim, is out of date. The majority of claimant personal injury firms are now factories.

10.4 The Woolf reforms have not worked in relation to costs. The civil justice system still has the problem of excessive and unpredictable costs, as it did in 1999. The introduction of CFAs and the recoverability of additional liabilities has magnified the problem. Courts do not exercise rigorous control by case management, as envisaged by Lord Woolf. There are no sanctions for failure to comply with pre-action protocols.

10.5 The courts could generate better behaviour by means of firmer case management. Insurers have achieved this on the defence side, by imposing fixed fees

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<sup>22</sup> i.e. a sufficient sum to cover their own costs.

<sup>23</sup> If the defendant is, say, a pharmaceutical company employing City solicitors, the adverse costs liability may be very substantial indeed.

<sup>24</sup> One of the solicitors commented that a hearing in a pharmaceutical group action which may take several days in England is completed in a matter of hours in the US.

for cases. This was introduced seven or eight years ago. Initially defence solicitors thought that this would not work. However, they have now adapted their systems so as to operate on fixed fees. Most of the routine work is done by junior lawyers and paralegals, who are supervised by a small number of experienced lawyers. Insurers have collective CFAs with many solicitors. These provide that if the insured wins a case, then the solicitors can charge on an hourly basis.

10.6 Referral fees (which offer no obvious benefit to the process) have had a detrimental effect upon behaviour and increased costs. Furthermore the courts assess costs “top down”, instead of “bottom up” as they should. The concept of proportionality is meaningless. FOIL regard the Court of Appeal’s decision in *Crane v Cannons Leisure* [2007] EWCA Civ 1352 as iniquitous and further increasing costs.

(ii) One way cost shifting

10.7 In response to my question FOIL can see that one way cost shifting (confined to personal injury cases where the defendant was insured or a substantial enterprise) may be beneficial. Defendants lose the great majority of such cases. What they pay out in ATE premiums on cases which they lose probably exceeds what they recover in costs on those few cases which they win. One way cost shifting would may be beneficial (a) to claimants, who would no longer have to take out ATE insurance, and (b) to defendants/insurers, who would save money in the long run. The administration costs and profits of ATE insurers would thus be cut out for the benefit of both sides in the personal injuries litigation.<sup>25</sup>

10.8 FOIL agreed to do some research upon two matters: (i) whether one way cost shifting would be economically viable from the point of view of defence insurers; (ii) what would be a reasonable incentive to introduce into the system in order to induce claimants to accept reasonable offers. The existing Part 36 regime would no longer suffice, if only defendants were on risk as to costs. In relation to the second point, following the meeting FOIL sent me their proposed incentive scheme as follows (assuming one way costs shifting, so that the claimant is not at risk of an adverse costs order):

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<sup>25</sup> In a note sent to me after the meeting, FOIL suggested that if one-way fee shifting is introduced then recoverable success fees would also have to go. It seems to me, however, that this is a separate issue.

**Table 10.1: FOIL's proposed incentive scheme**

<b>DAMAGES AWARDED</b>	<b>COST CONSEQUENCES</b>	<b>Reasoning</b>
Equal to or greater than claimant's offer	Defendant pays claimant's costs with uplift	Claimant's offer was reasonable. Defendant caused hearing by not accepting claimant's offer
More than 10% higher than defendant's offer AND Less than claimant's offer	Defendant pays claimant's costs on standard basis	Award is higher than defendant's offer. Defendant caused hearing by not making a reasonable offer
10% higher than defendant's offer	Claimant receives costs to date of offer only	Claimant 'wins' more than defendant offer by pursuing to a hearing but parties should have been able to reach agreement
Equal to or lower than defendant's offer	Claimant receives costs up to date of offer and suffers a 10% penalty in damages	Defendant's offer was reasonable. Claimant caused hearing by not accepting defendant's offer.

**(iii) Fixed costs**

10.9 FOIL believe that there should be fixed costs for all cases in the fast track. At the moment claimants can escape the existing fixed costs regime, for example by issuing proceedings despite receipt of a reasonable settlement offer.

10.10 FOIL agreed (subject to approval of their insurer clients) to release the details of the fixed fees paid by insurers to FOIL members for handling personal injury cases. These data could be used by the present Costs Review in drawing up a scheme for fast track fixed costs.

**(iv) Small claims limit**

10.11 FOIL believe that the small claims limit for personal injury claims should be raised to about £2,500, so long as there is an overhaul of the fixed fees that go with the present regime. This issue has been much debated with the MOJ. The present £1,000 limit has never been raised in line with inflation.

10.12 It would not be feasible to raise the limit to £5,000 unless the assessment of general damages for personal injuries became much simpler. The present Colossus system is unlikely to be satisfactory to all stakeholders. However, such a system could be made satisfactory if an authoritative body such as the JSB laid down the criteria to go into the software system. If this were done, then the assessment of general damages for personal injuries would become much more straightforward. Uncontested personal injury claims up to £5,000 could then proceed in the small claims track, but there should also be provision for a claimant to recover the costs of some advice from a solicitor. Also this area ought to be limited to simple soft tissue injuries, not more serious injuries such as fractures.

10.13 In low value personal injury cases, it might be possible to have a system whereby insurers admit liability within x days and thereafter treat the claimant as an insured. Indeed this already exists in some instances. It is called "third party capture" and is strongly opposed by APIL. It is worth considering whether third

party capture could be put on a formal basis, with adequate safeguards for the claimant's rights.

(v) Assessments of costs

10.14 Summary assessment. In the experience of FOIL, summary assessments of costs are often perfunctory and unjust. The standard form costs schedule gives little detail. The guidance given by the Court of Appeal in *1-800 Flowers Inc v Phonenames Ltd*<sup>26</sup> is rarely followed in practice. If a more streamlined process of detailed assessment could be developed, then summary assessments should be abolished. In any event there will be far fewer summary assessments, if a comprehensive scheme of fast track fixed costs is introduced.

10.15 Detailed assessments. In the opinion of FOIL, outside the Supreme Court Costs Office experienced costs judges are few and far between. Not all regional costs judges have the same skill or commitment as costs judges in the SCCO. Moreover, there are many local practice directions concerning detailed assessment. These often increase costs rather than save them.

10.16 FOIL believe that the procedure for (a) detailed assessments and (b) assessing the costs of detailed assessments requires an overhaul. Also schedules of costs and bills should be verified by statements of truth. A receiving party should only be awarded the costs of the detailed assessment, if it recovers 90% or more of the figure claimed. These latter two measures would wipe out exaggerated bills. The issue peculiar to personal injury cases is that there is no expectation that the client will be charged by the lawyer. Accordingly bills are routinely claimed on an indemnity basis, making no discount for the inevitable solicitor and own client element of the work done.

11. COMMERCIAL LITIGATORS

11.1 Meeting. On 29<sup>th</sup> January 2009 I had a meeting with four city solicitors, representing the Commercial Litigators Forum Committee (a body which includes representatives of all the major London litigation practices) and the City of London Law Society Litigation Committee. I shall refer to these solicitors as "the commercial litigators".

11.2 The commercial litigators take a less optimistic view than the GC 100 Group and the Commercial Court Users' Costs Sub-committee. The commercial litigators believe that litigation in the Commercial Court and substantial commercial litigation in other courts is unduly expensive and that process reforms are required to bring down costs.

11.3 Unsurprisingly, the commercial litigators, as a group of four highly experienced city solicitors, do not agree on every point. I shall set out in this section of the chapter the gist of the views which they expressed, concentrating on common ground.

11.4 Disclosure. The costs and scale of disclosure in commercial litigation is now a major source of concern to clients. This is partly a function of the sheer volume of documents, emails and other electronic material which business activities now generate. The process of retrieving written and electronic material and sifting

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<sup>26</sup> [2001] EWCA Civ 721.

through that material (before one starts giving disclosure) is a massive exercise. Vast masses of documents are then disclosed. The quantity is often increased because it is easier for solicitors to hand everything over than to sift through the material, item by item, applying the standard disclosure test.

11.5 Knock-on effect of extensive disclosure. Once disclosure has been completed, the stage is set and all subsequent costs are magnified. First, the lawyers have to wade through the vast mass of material disclosed by the opposition. After that, both factual and expert witnesses feel the need to address issues arising out of the documents disclosed by both parties. By the time that trial approaches, the case has mushroomed. The trial bundle, the witness statements and the expert reports run to inordinate length. Counsel feel the need to address all this material, with the result that skeleton arguments and written submissions become lengthy and convoluted.

11.6 How can we cut the Gordian knot? The commercial litigators feel that something radical needs to be done to cut back disclosure in commercial cases. The more difficult question is how to do this. One view is that we should adopt the approach set out in the IBA Rules or perhaps the German approach to disclosure (as to which see chapter 55). The alternative view is that the IBA rules and the German rules are both too radical. Litigants, and in particular overseas litigants, bring their disputes to the London Commercial Court precisely because they value the thorough investigation which takes place in English litigation. Disclosure is an integral part of that investigation process.

11.7 Has the Commercial Court Long Trials Working Party (“LTWP”) found the answer? The commercial litigators fear that the answer is no for two reasons. The first reason is that the LTWP only looked at options that would not require rule changes. The second reason is sheer lack of judicial resources. Commercial Court judges, working under considerable pressure, do not have time before CMCs to read into cases sufficiently, in order to control disclosure with appropriate rigour (as envisaged by paragraphs 60 – 68 of the LTWP report). The Commercial litigators tell me that they have never attended a Commercial Court CMC at which the judge is so well versed in the facts and the issues that he or she could make “surgical” orders in respect of disclosure (LTWP report, paragraph 60). Nor, in practice, are counsel sufficiently on top of the case for that purpose.

11.8 A possible solution. I was not a Commercial Court practitioner when at the Bar and have never sat in the Commercial Court as a judge. I therefore suggest with some diffidence the following approach, in order to deal with the concerns expressed by the commercial litigators:

- In every document-heavy case a disclosure assessor (“the assessor”) is appointed either by agreement between the parties or (upon application) by order of the court.
- The assessor will be a commercial solicitor or commercial silk of many years’ experience, who is able and willing to devote, literally, weeks to resolving disclosure issues. He will read many of the documents on both sides. He will sit as assessor with the judge at CMCs when disclosure is on the agenda. He will deal with many disclosure issues alone, unless either side wishes the matter to be raised before the judge.
- It will be the function of the assessor to limit disclosure to documents which may genuinely affect the court’s decision on any of the issues in dispute.
- In the first instance both sides pay the assessor’s costs in equal shares.

- The assessor should have contractual immunity from suit, but be bound by all the usual duties to the court owed by solicitors and counsel.

Although the assessor may charge many thousands of pounds for his services, this mechanism may save the parties a huge amount of costs both in relation to disclosure and in relation to the later stages of the litigation.<sup>27</sup>

11.9 This proposal (which I floated during the 29 January meeting) was regarded by the commercial litigators as a possible way forward meriting further consideration. They pointed out that a number of highly experienced and competent city solicitors retire from firms in their mid-fifties and may (a) welcome work of this nature and (b) perform it extremely competently.

11.10 Witness statements. One reason why witness statements are immensely long is the anxiety of solicitors. If the courts were more flexible about allowing supplementary oral evidence, then witness statements could be kept significantly shorter. The commercial litigators do not agree as to how far such flexibility should extend.

11.11 Docketing. The commercial litigators strongly believe that the Commercial Court should adopt the American system of docketing. Each case should be assigned to one judge, who manages and tries it from beginning to end. This would have the effect of reducing costs. The commercial litigators do not see how effective docketing could be achieved in the Commercial Court, so long as Commercial judges are required to go on circuit, sit in the Criminal Division of the Court of Appeal etc for part of each term. I noted the views of commercial litigators in this regard, but explained that my terms of reference do not extend to judicial deployment.

11.12 Contingency fees. The general view of the commercial litigators (in some cases with reluctance) is that percentage-based contingency fees should be allowed. The “ethical” argument has gone, now that we have CFAs. Also the UK would retain cost shifting and would not allow the excessive damages awards that are made in the USA. (punitive damages, jury awards etc). Contingency fee agreements are necessary for two reasons: (i) For some clients, this is the only way that they can achieve access to justice. (ii) In respect of median sized cases (c £1 million) even well resourced clients may not regard it as worthwhile to proceed on any basis other than contingency fees. However, the point was made that probably contingency fees would seldom be used in major commercial litigation. They are more suited to a situation where a firm has a large turnover of smaller cases. Even in the USA contingency fees are not a common feature of large commercial cases.

11.13 One of the commercial litigators made the further point by email after the meeting that the judge should fix a maximum limit above which recoverable costs could not rise. Commercial clients want certainty. The requirement that recoverable costs be “proportionate” is not sufficient, as the parties do not know how that will be applied in any individual case.

11.14 Consequential matters re contingency fees. It should be mandatory that the client receives independent advice before entering into a contingency fee agreement. If a costs order is made in favour of the client, such costs should be assessed on the conventional basis, rather than by reference to the contingency fee.

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<sup>27</sup> I have subsequently that the US Federal Court operates a system very similar to this for high value, document heavy cases: see chapter 60.



11.15 Summary assessment. The commercial litigators expressed misgivings about the summary assessment process. Summary assessments are expensive to prepare for. The work done by one party (and sometimes the work done by all parties) is wasted. The present form of costs schedule is time-consuming to prepare and not particularly helpful. This could be improved. Summary assessments are not always performed with consummate skill.

11.16 In the view of the commercial litigators, it is generally better for the judge to order a payment on account of costs and then leave the balance to detailed assessment at the end of the case (in default of agreement). An alternative approach, which some regard as preferable, is for the judge to make a provisional assessment of 70% or 75% of the costs claimed. Thereafter that assessment becomes final, unless either party requires a detailed assessment. If a detailed assessment is required, whichever party does worse than the provisional assessment bears the costs of the detailed assessment.

11.17 Detailed assessments. The commercial litigators point out that the process of detailed assessment in a complex case is itself immensely expensive. One view is that the present elaborate procedure should be abandoned and instead the receiving party should simply lodge schedules of time spent by fee earners together with the various invoices rendered to the client (after all, these documents were sufficient to satisfy the client). The alternative view is that such an approach does not enable the costs judge to determine what costs were reasonably incurred. We should retain a Rolls Royce system of detailed assessment, because that is an incentive towards reasonable settlement and thus it usually saves the parties both time and costs.

## 12. WHICH?

12.1 Meeting. On 30<sup>th</sup> January 2009 I attended a meeting at the offices of “Which?”.

12.2 What is Which? Which? (otherwise known as the Consumers Association) is the largest consumer organisation in Europe with about 700,000 members. Which? publishes a range of consumer magazines and books. It provides legal advice to subscribers through its branch “Which? Legal Service”. That service is regulated by the SRA and the Bar Council.

12.3 Which? also litigates on behalf of consumers in appropriate cases. For example, Which? may bring test cases or even a group action. Which? recently brought a group action on behalf of consumers, who had bought replica sports shirts. This litigation is discussed below.

12.4 Experience of small claims track. Which? tell me that their feedback from members who have used the small claims track is generally favourable. Inevitably some district judges are more user-friendly than others. Nevertheless the county court small claims track is, in effect, a “people’s court” and generally it works pretty well. This feedback is important, as it comes from a body which monitors legal services critically and is not slow to criticise where criticism is due. The feedback is also important because the costs of litigating on the small claims track are proportionate. There is, effectively, no cost shifting save in exceptional cases. Individuals can litigate on the small claims track without employing lawyers.

12.5 Which? have in the past published papers on the conduct of lower value personal injury claims by lawyers and others. However, Which? have no current

views on where the line should be drawn between the small claims track and the fast track in respect of personal injuries.

12.6 Consumers are generally averse to litigation. It is the experience of Which? that consumers are generally averse to litigation. Many individuals are unwilling to litigate, even if they have well founded claims worth several thousand pounds.

12.7 Consumers favour ombudsman schemes. Consumers like the ombudsman service and regularly use it. Which? often advise members, who have complaints re banks etc, to use the Financial Ombudsman Service ("FOS"). There is a high take-up of that service. It is "process driven" and well organised. Users are generally satisfied with the handling of matters by the FOS.

12.8 The sports shirts litigation. In 2003 the Office of Fair Trading ("OFT") fined JJB Sports plc ("JJB") and other companies for breaches of chapter 1 of the Competition Act 1998. The OFT's decision was upheld by the Competition Tribunal ("CAT") and subsequently the Court of Appeal. In August 2007 Which? brought a claim in the CAT against JJB under s. 47B of the Competition Act 1998 on behalf of consumers who had bought football shirts in 2001-2002. About 1,000 claimants were registered in the group action. In the final settlement each claimant recovered £20. In addition JJB agreed to pay £10 compensation to other persons who could prove purchase during the relevant period. Although the total compensation paid out by JJB is not known, realistically it will not exceed £30,000.

12.9 Costs of the sports shirt litigation. Which?'s solicitors acted on a CFA with a substantial success fee. Unfortunately Which? are unable to tell me the costs of those solicitors. However, it has been asserted by commentators that those costs "are likely to reach several hundreds of thousands of pounds". If that should prove to be correct, then the group action, although successful, has involved disproportionate cost. This is an issue to which I shall revert in the chapter on group actions.

12.10 Defamation proceedings. Finally, in their capacity as a publisher, Which? expressed concern about the high costs of defamation proceedings.

### 13. CLAIMANT PERSONAL INJURY SOLICITORS

13.1 Meeting. On 4<sup>th</sup> February 2009 I attended a meeting with a substantial firm of claimant personal injury solicitors ("the solicitors") at their office.

13.2 Statistics and cost figures. The solicitors tell me that 92% of all personal injury cases which they undertake fall within the bracket £1,000 to £25,000 (the revised fast track limits). The majority of those cases fall towards the bottom of that bracket, namely below £5,000. The solicitors kindly produced a set of tables setting out the average base costs per case in respect of (a) employer's liability accident cases, (b) employer's liability asbestos cases, (c) employer's liability other disease cases and (d) road traffic accident cases. These details are set out Appendix 10, in respect of the period May to December 2008. In that period the solicitors brought many thousands of personal injury cases to a successful conclusion.

13.3 Appendix 10 sets out separately the percentage of cases settled pre-issue, the percentage settled post-issue and the percentage which went to trial, with separate costs figures against each category. It should be noted that cases which went to an approval hearing are included in the "trial" category. The "trial" percentage appears to be high in asbestos cases. This is because many fatal claims fall into that category,

with the result that approval hearings are required where the dependents include children. The cases analysed in Appendix 10 fall into the following categories:

Employer's liability accident cases	65%
Employers' liability asbestos cases	5%
Employers' liability other disease cases	7%
Road traffic accident cases	23%

13.4 Insurers delay settlement. Those tables demonstrate that early settlement is the key. Costs are run up because insurers fail to admit liability and/or settle early. Many insurers deny liability and refuse to settle or admit liability as a "try on". Frequently no-one at a sufficiently senior level within the insurers engages with the issues. At the pre-issue stage very low grade staff are usually handling claims – in effect call centre staff. Too often the solicitors have to issue proceedings, simply in order to bring about meaningful negotiations.

13.5 In order to bring down costs there needs to be an effective incentive system to force defendants to settle early or admit liability: e.g. 25% interest in cases where the defendant fails to do better than a claimant's offer. Lord Woolf originally proposed an effective incentive system, but that got watered down. Another approach would be to make settlement discussions between sufficiently senior personnel on both sides compulsory in personal injury cases.

13.6 Pre-action protocols. Insurers regularly fail to comply with pre-action protocols. There should be effective sanctions for such non-compliance, for example reversal of the burden of proof.

13.7 Costs war. Insurers are now reluctant to agree reasonable costs figures. Instead they have embarked upon a costs war.

13.8 Fixed costs. There is no need for a fixed costs scheme for many reasons, including that the present level of costs is not disproportionate, particularly where cases settle early as many do and many more could with appropriate incentives as outlined. Fixed costs are harmful to personal injury claimants for many reasons. In particular, they are a disincentive to defendants to hone down the issues. It becomes beneficial for defendants to make claimant solicitors "run around to prove things". Also, claimant solicitors being on a fixed budget may be desperate to settle. Thus many solicitors are keen to settle and may under-settle. This is illustrated by tables showing settlements achieved for miners' claims by different firms of solicitors (as set out in a Parliamentary written answer by Mr Mike O'Brien: Hansard 27/10/2008). It is suggested that the varying levels of compensation achieved by different firms of solicitors reflects differing degrees of effort put into pressing their clients' cases. Under-settling will be even more widespread where fixed costs are lower than the actual costs required to pursue the case properly and professionally. In addition, a survey of 1,000 successful personal injury claimants in 2007 shows that they would not support a fixed costs scheme.

13.9 Factors causing increased costs. In addition to delayed settlement as outlined, a number of other factors contribute: lengthy defendant witness statements; medical reports where insurers instruct a different medical expert; escalating court fees; and court questionnaires and procedural hearings, both of which could be dispensed with in many more cases.

13.10 General. Cost shifting should be maintained. However, one way cost shifting might be beneficial, as this would reduce ATE premiums (though ATE insurance would still be needed to cover own disbursements). Contingency fees should not be allowed in litigation. These have been introduced by accident in employment tribunals and they do not work there.

13.11 Conditional Fee Agreements. CFAs are successful particularly with the prescribed success fees in personal injury cases. The present system of CFAs should be maintained.

#### 14. ASSOCIATION OF LAW COSTS DRAFTSMEN

14.1 Meeting. On 5<sup>th</sup> February 2009 I had a meeting with representatives of the Association of Law Costs Draftsmen ("ALCD"). Since 1<sup>st</sup> January 2007 the ALCD has been an authorised body, under schedule 4 of the Courts and Legal Services Act 1990, as amended. Many ALCD members have rights of audience in costs matters and the right to conduct costs litigation.

14.2 Costs draftsmen. Some costs draftsmen are employed in-house by major City firms of solicitors. The majority, however, are in independent practice either as sole practitioners or in firms of costs draftsmen. They act both for receiving parties and for paying in parties in relation to detailed assessments. They also prepare schedules of costs for summary assessments (schedules which are sometimes put to good use, but which I am told are more often ignored altogether). They deal with costs in all types of civil litigation.

14.3 General observations. The long-standing system for recovery of costs by the winning party is sound and should not be disturbed. In the vast majority of cases costs issues are resolved by agreement between the parties. The cost shifting rule should be preserved both for policy reasons (victor should retain fruits of victory) and for pragmatic reasons (discourage frivolous claims, encourage settlements etc).

14.4 Indemnity principle. This principle has been abolished in certain areas. Subject to those exceptions, the ALCD believes that the indemnity principle should be retained. It is "an important controlling feature on costs". Indeed this can be illustrated by clinical negligence litigation. Market forces hold the rates of defence solicitors down to about £150 per hour. Claimant solicitors, working on CFAs (where the indemnity principle does not apply) charge about £400 per hour – before success fee.

14.5 Contingency fees. The ALCD are opposed to the introduction of contingency fees in the UK. However, on discussing the issue during our meeting, they concede that contingency fees may be appropriate in the context of business litigation.

14.6 Conditional fee agreements. The whole CFA regime has been a disaster, having been introduced as a knee jerk reaction to the loss of legal aid. Many solicitors filter out risky cases and take on safe ones with, nevertheless, attractive success fees. Many solicitors have made substantial profits out of the CFA regime, at the expense of the man in the street. Thus CFAs promote access to justice, but at a great price. They also generate endless satellite litigation. There is no control over hourly rates in a situation where the clients are indifferent to the rates charged. The system of success fees requires drastic revision. ALCD suggest:

Costs to letter of response	12.5%
Issue of proceedings	25%
Listing	50%
Trial	100%.

14.7 Before the event insurance. This works well, except that it leads to lack of choice for the claimant. He may be forced to use a solicitor many miles away. BTE should be expanded, e.g. by making it a compulsory element of motor insurance. The claimant should be allowed to choose his solicitor.

14.8 Case management. There is a need for much more effective case management by the court. At the moment judges do not use their powers to control the costs of litigation, and they ought to do so. No sanctions are imposed for delay, even though delay increases the cost of litigation. Judges should insist upon cost budgeting and require regular costs updates from parties. If judges do not have sufficient costs expertise, costs draftsmen could be brought in to assist the court. (Costs draftsmen already assist the SRA in applications for remuneration certificates.) A costs draftsman brought in to assist the judge might be given the title “costs assessor”.

14.9 Guideline hourly rates. The guideline hourly rates issued to assist judges with summary assessment have a curious history and they have not been calculated in a satisfactory way. To make matters worse, these rates tend in practice to be used on detailed assessments (as well as summary assessments). The use of such rates precludes consideration of the circumstances of the specific case or of the firm of solicitors involved.

14.10 Detailed assessment. The ALCD is concerned about one major court centre, where the costs of detailed assessment are increased by case management directions. Examples are the requirement for meetings between the parties and the requirement for further negotiations between the parties, even on the date fixed for hearing. More generally the ALCD is concerned that the costs of detailed assessments have escalated in recent years to no useful purpose.

## 15. TRADE UNIONS

15.1 Meeting with trade union representatives. On 6<sup>th</sup> February 2009 I met with representatives of Unison, Unite and the TUC. Unison represents public sector employees and has about 1.4 million members. Unite represents (a) private sector employees providing public services and (b) public sector employees. Unite (formed by a merger of the Transport & General Workers Union and Amicus) has about 1.9 million members. The TUC has about 6.5 million members. So Unison and Unite together make up about half of the TUC membership.

15.2 Level of personal injury damages in UK. The level of personal injury damages in the UK is lower than in many other countries. This was demonstrated by a survey which the TUC carried out in 2005. Ten years ago the Law Commission recommended that general damages for personal injuries should be substantially increased. This has not happened.

15.3 The role of trade unions in relation to personal injury claims. Unions provide and fund legal representation for (a) members claiming industrial injuries compensation from the Department of Work and Pensions and (b) members claiming criminal injuries compensation. Unions also provide and fund representation for

members claiming damages for personal injuries in claims on the small claims track (where there is no cost shifting and so no scope for CFAs).

15.4 In respect of personal injury claims on the fast track and the multi-track, unions support their members by means of CFAs. Both Unison and Unite have collective CFAs (“CCFAs”) with a number of solicitors. Unison also has a collective ATE agreement with insurers. Unite has chosen to self-insure in respect of ATE insurance. Where personal injury claims are successful, the solicitors look for their costs to the other side. Where personal injury claims are unsuccessful, (a) the solicitors bear their own costs; (b) disbursements plus opponents’ costs are met from ATE insurance or ATE self-insurance. Thus trade unions no longer have to bear the legal costs of members who bring personal injury claims on the fast track or the multi-track. In that respect trade unions are substantially better off than they were prior to April 2000. Up until April 2000 trade unions funded personal injuries litigation on behalf of members, subject to such costs recovery as they made from the other side. Indeed a substantial part of trade unions’ funds went in supporting such cases.

15.5 Claims management companies. Claims management companies are a real problem. They advertise for claimants and snap up business, without checking whether individuals have the benefit of trade union membership. They only ever suggest pursuing civil claims and never look at other options, such as claiming industrial injuries compensation. Some of the practices of claims management companies have been quite frightening: going to hospitals, cold calling claimants, sending round “scan vans” etc. They advertise on daytime television programmes, which persons off work are likely to see. The only interest of claims management companies is how much money they can make out of claims. They encourage claims that would not otherwise be brought, such as slippers and trippers.

15.6 Trade unions contrasted with claims management companies. Trade unions on the other hand do not solicit for business (e.g. by putting up poster in workplaces). Instead they wait for members to contact them in respect of potential claims. Trade unions look at all the options for a member who has been injured. Their main objective is to ensure that the same accident does not happen again and they visit the workplace to check that preventive measures are being taken. Indeed a survey of Unison members confirms that one reason why they pursue claims is to ensure that similar accidents do not happen again to other people.

15.7 Defendant insurers drive up costs. Insurers have low-grade staff handling claims pre-issue. Furthermore, many insurers do not allocate claims to individual members of staff. Instead, a query on a letter is dealt with by whoever picks up the file. Time and again insurers fail to comply with the personal injuries pre-action protocol. Very often they simply do not respond at all to the letter of claim. Alternatively, the response is very brief. Insurers do not give reasons for denying liability and do not supply relevant documents. The case *Grant v Hewitt* (Newcastle-upon-Tyne county court, case no. 5NE15007) affords a classic example of insurers’ behaviour driving up costs. The insurers put forward all sorts of spurious defences in respect of a low value RTA claim, driving up the claimant’s costs, before caving in on the morning of trial. The claimant received damages of £1,386 and his costs were assessed at some £26,000.

15.8 Need for effective sanctions. There need to be effective sanctions against defendant insurers who do not comply with the protocol. At the meeting we discussed what sanctions might suffice. One possibility would be to add a percentage to the damages. It is better for sanctions to inure for the benefit of claimants (i.e.

extra damages) rather than for the benefit of their lawyers (indemnity costs). An alternative sanction would be for judgment to be entered for the claimant or for the burden of proof to be reversed. In that regard, the trade unions think that Master Whitaker's scheme for mesothelioma is excellent and works very well.

15.9 The new process for personal injury claims. The unions fear that insurers will not comply with the new process, in the same way that they have failed to comply with pre-action protocols. The unions are uncertain if the new process will work. Unison fear that it may drive down damages, because it provides fixed costs for the pre-action stages.

15.10 Fixed costs. The unions do not favour fixed costs. They are not beneficial to claimants, as graphically illustrated by the recent miners' cases.

15.11 Need for better case management. The trade unions are concerned that (with one or two exceptions) judges are not using their powers under the CPR effectively. They are not enforcing the rules or imposing sanctions in respect of breaches.

15.12 Small claims track limit. The trade unions would be strongly opposed to raising the small claims track limit in respect of personal injuries above its present level of £1,000. Over 40% of Unison's personal injury claims are settled for less than £2,500. Over less than 60% are settled for less than £3,500. These claims should stay in the fast track. The unions do not accept that the costs of such claims are disproportionate. The ABI statistics about disproportionate costs are suspect.

15.13 General. Costs shifting should be retained. Percentage contingency fees cause problems in employment tribunals and their use should not be extended to litigation. The unions believe that the present regime of CFAs provides access to justice. Further progress needs to be made by defendant insurers in delivering early rehabilitation.

## 16. TECHNOLOGY AND CONSTRUCTION COURT

16.1 Meeting. On 10<sup>th</sup> February 2009 I attended a meeting with TCC judges and representatives of TECBAR and TeCSA. The views which they expressed are recorded in chapter 34 and will not therefore be repeated in the present chapter.

## 17. LIVERPOOL MEETINGS

17.1 Meetings. On 17<sup>th</sup> February 2009, I had four meetings with district judges ("DJs") and court users in Liverpool and Merseyside.

### (i) Liverpool District Judges

17.2 Work of Liverpool DJs. The principal fast track work of the Liverpool DJs consists of road traffic accident ("RTA") claims, and a number of tripping cases. All Liverpool DJs do detailed assessments as well as summary assessments. Detailed assessments which last longer than a day are assigned to the DJs who are designated as regional costs judges.

17.3 Concerns of Liverpool DJs. The Liverpool DJs are concerned that since April 2000 a costs industry has developed, which pays out handsome sums to lawyers, experts and assorted middlemen. The costs which are now in issue, having regard to

success fees, are so substantial that both parties are willing to expend substantial sums on litigating costs issues. Detailed assessments can last for a matter of days. The principal focus in detailed assessments is no longer the traditional questions (what time was reasonable, what rates were appropriate and so forth), but rather technical challenges to the recoverability of costs. These technical issues are fought out with great vigour on both sides. In the opinion of the Liverpool DJs the costs war, which consists of novel debate about technical issues, has continued unabated despite the introduction of the new regulations in November 2005.

17.4 Nature of claimant solicitors. The DJs tell me that most personal injury claims are no longer handled by old-style high street firms of solicitors. The majority of claims are handled by “factory” firms who process high volumes of claims. They purchase cases from claims management companies or, alternatively, obtain cases from advertising. Such firms are driven by a business ethic and their work is structured to maximise returns. When solicitors purchase cases they may pay £500 or more per claim. When they advertise for cases they may offer “cash back” deals to claimants in return for instructions in their cases.

17.5 Quality of work. Very often witness statements are badly drafted and inaccurate. Cases may be prepared without any face-to-face meeting with the client.

17.6 Maximising returns. CPR Part 45 section II prescribes fixed recoverable fees (“predictive costs”) for RTA claims up to £10,000, which settle before issue. The DJs state that solicitors endeavour to escape from predictive costs by issuing proceedings as soon as possible. They further state that solicitors will move cases swiftly to trial in order to secure a 100% success fee (although it would seem to me that an early trial must be just as much in the interest of the clients).

17.7 Medical reports. The DJs are concerned that fees for medical reports often appear to be excessive. They are also concerned that a substantial proportion of fees for medical reports are paid to middlemen, namely medical reporting organisations (“MROs”). The DJs are also concerned that both hospitals and doctors’ waiting rooms exhibit advertisements for personal injury claims.

17.8 Counsel. The DJs have noted that counsel specialising in fast-track personal injury claims can recover substantial fees for disposal hearings of modest length. They stress that this is perfectly legitimate and in accordance with entitlement. Counsel do the cases well. Nevertheless, counsel specialising in high volume fast-track personal injury claims would appear to be amongst the top earners at the Liverpool Bar.

17.9 Detailed assessments. Detailed assessments are now big business. It is possible for the parties to expend £15,000 costs in relation to a detailed assessment of costs. Such hearings are principally devoted to technical arguments concerning validity of CFAs, recoverability of costs, premature issue and similar points. Nevertheless, the DJs also have to examine the files, so far as practicable. The DJs are concerned that the present system of time recording in 6 minute units is open to abuse. A simple phone-call or a one-line letter will be put down as one unit, costing £20. The DJs, at my request, opened one personal injuries file at a random page. This was an attendance note reading “Searching for West Midlands Ambulance Service – 12 minutes”. The address of the ambulance service was then set out. The DJs pointed out that, in reality, the legal executive concerned would have simply said to a secretary “find the address of the West Midlands Ambulance Service”. For a fee earner to charge £40 (+ success fee) for such a simple administrative task is not appropriate. The DJs informed me that a huge number of similar inappropriate



entries are to be found in personal injury files. If the same letter is sent to (for example) ten witnesses, each letter will be recorded as one unit. Many of the simple letters which are put down as one unit are generated automatically by computer. The DJs are also concerned at the excessive amount of time recorded in files as having been spent reading straightforward medical reports, “reviewing” the case and so forth. They consider that the present system of remuneration for personal injuries litigation rewards inefficiency. They also point out that fee earners in all firms of solicitors are given targets for recorded billable hours, and that such targets are easy to meet in the context of personal injuries litigation. The DJs emphasise that not all firms of solicitors operate in the manner described, but many of the “factory” firms do so.

(ii) Liverpool Civil Court Users Committee

17.10 Extraordinary General Meeting. The Civil Courts Users Committee (“the users”) kindly held an extraordinary general meeting on 17<sup>th</sup> February 2009. I would estimate that about 30 people were present. They were solicitors, barristers and law costs draftsmen.

17.11 BTE Insurance. The users tell me that BTE insurers do not in practice make payments in respect of the personal injury claims which they support. They receive premiums from all insured. If a claim arises, they may “sell” the claim to a panel solicitor. Alternatively, they may arrange for the case to be conducted by one of their panel solicitors pursuant to a CCFA. Some BTE insurers also provide ATE cover. The premium for such insurance is only payable if the case is won, and such premium is then recoverable from the defendant’s insurers.

17.12 Disagreement with the views expressed above. The users do not agree that personal injuries litigation is a “gravy train”. They do not agree that such litigation amounts to profiteering. They point out that referral fees are not recoverable from the defendant. Furthermore, when a case is lost both solicitors and counsel bear the costs.

17.13 High costs caused by defendants. The users point out that if defendants made reasonable offers promptly, claims would be settled without any need for substantial costs. The remedy lies in the hands of defendants’ insurers. In the general run of cases, insurers offer too little and too late. Insurers make their offers by reference to a computerised system, which is parsimonious. One claimant counsel informed me that he beat the insurers’ offers in the vast majority of cases. One defendant solicitor informed me that in 95% of cases insurers’ offers were accepted. In response to my inquiry, he agreed that in the case of many insurers (although not his insurer clients) this meant that the claims were being settled for less than the court would award.

17.14 Disposal hearings. In most personal injury cases where liability is conceded, damages are assessed at disposal hearings. Such hearings are short and are conducted on written evidence. The client is not present. In practice, settlement at the door of the court is rare, not least because it is difficult for the lawyers to take instructions. Counsel pointed out that the present case law creates an ethical dilemma. If the case settles before the hearing commences, the solicitor’s success fee is 12.5%. If the hearing commences, the success fee becomes 100%. They pointed out that a possible and rational solution would be to introduce a system of staging in place of the present extremes. One defendant solicitor pointed out that, in a number of cases, insurers over-offer in order to avoid the high success fee consequent upon a disposal hearing.

17.15 Will the costs war run on? Some users share the view of the Liverpool DJs that the costs war will run on indefinitely because of the large number of cases and the substantial sums at stake. Other users take the view that the costs war is diminishing because there are fewer opportunities to challenge CFAs under the new regulations. However, there will continue to be challenges by insurers to what they see as inflated amounts claimed. It was also pointed out that, under the new regulations, there has been a significant rise in challenges to smaller aspects of bills. Having regard to the number of cases, large sums turn on those smaller items and they give rise to extensive satellite litigation.

17.16 Carver v BAA Plc. The users all consider that the Court of Appeal's decision in *Carver v BAA Plc*<sup>28</sup> is an unfair decision. The decision creates uncertainty and makes life difficult for claimants. It has the effect of suppressing damages. This view, expressed by the Liverpool users, coincides with the comments made by many court users during Phase 1.

17.17 Lack of effective case management by DJs. One experienced court user stated that DJs do not carry out effective case management as envisaged by the CPR. Indeed, there is less case management now than there was in the early days of the CPR. A great deal of costs could be saved by proper case management. All the Liverpool court users agreed that judges are generally not imposing effective sanctions for breaches of the pre-action protocols. The users conceded, however, that there is better case management in respect of EL disease cases.

17.18 There was some discussion about costs management, at the end of which I took a vote. A substantial majority of the users consider that in cases above £100,000 in value, judges should engage in costs management as well as case management through all stages of litigation.

17.19 Non-personal injuries litigation. There was a brief discussion about non-personal injuries litigation. One solicitor from a commercial firm informed me that a claimant's threat to obtain ATE insurance is a powerful bargaining weapon. He had recently encountered a case where one party was about to obtain ATE insurance at a premium of £100,000. The threat to do this immediately caused the defendant to capitulate. The users also told me that they see a lot of cases in which defendants' solicitors act on discounted CFAs (no win, low fee). On occasions, both parties to a case have CFAs and ATE insurance.

17.20 Clinical negligence litigation. There was some discussion of clinical negligence litigation. Views differed as to whether a 100% success fee (as always in practice claimed) was appropriate. As to the split of clinical negligence work between legal aid and CFAs, one member thought that the split was now 50/50; another thought that the split was now 60/40, with CFA in the majority.

### (iii) The Merseyside district judges

17.21 Workload. The Birkenhead county court has a huge workload. In 2007 there were 18,885 claims issued under CPR Part 7. In 2008 there were 25,436 such claims issued. The great majority of these cases were low value RTA personal injury claims. There are also some credit-hire cases (where the claimant is suing for damage to his vehicle and hire costs in respect of a replacement).

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<sup>28</sup> [2008] EWCA Civ 412.

17.22 Disposal hearings. Liability is usually admitted in RTA personal injury claims. In those cases where quantum is not agreed, damages are generally assessed at disposal hearings held pursuant to paragraph 12.4 of the practice direction supplementing CPR Part 26. Such hearings last about 10 minutes. Each case is usually concluded at that stage, unless there is a particular reason to adjourn to a full hearing with oral evidence. Counsel's fee for a disposal hearing is £400 (to which is added a 100% success fee). Counsel may have ten or twelve briefs in a day. However, if he "loses" (i.e. fails to get a costs order in his client's favour) in any case, then he will be paid nothing for that case. Counsel will also receive £125 (plus 100% success fee) for having drafted the particulars of claim in each such case. Counsel and solicitors conduct the disposal hearings extremely well and efficiently.

17.23 High costs incurred in claims that go to disposal hearings. It can be seen from the above that substantial costs are incurred on cases that go to disposal hearings. However, the counsel and solicitors who appear at the disposal hearings earn their fees. It is generally the fault of the defendants' insurers that such large costs are run up. They make offers which are too low, often by about £200 or £300, and then end up incurring additional costs running into thousands of pounds.

17.24 The RTA claims industry. The DJs pointed out that a huge industry has grown up around RTA claims. This industry involves lawyers, doctors, engineers, accident management companies, garages, car hire companies, MROs, etc. One DJ recently saw a claim for fees by an MRO, where the doctor's fee note was accidentally included. The doctor's fee amounted to £90, which was only 37.5% of the total being charged by the MRO for the medical report.

17.25 The manner in which large claimant personal injury firms work. The work in the large personal injury solicitor firms is done by junior staff, who are known as "litigation assistants", "litigation executives", "paralegals" or "legal assistants". They are treated as grade C and process cases by reference to case management systems. Each day the computerised diary tells them what letters need to be sent in respect of individual cases and these letters are duly generated in standard form. Three different one line letters may be sent to the claimant on the same day about different matters. Each letter is charged as one unit. The root problem is that solicitors are charging on a time basis (in units deemed to be 6 minutes) rather than by reference to the particular job. The solicitors' files are structured so as to maximise costs recovery. Because each letter is treated as a unit, it pays the solicitors to write as many letters as possible.

#### (iv) Separate group of court users

17.26 Final meeting. My final meeting on 17<sup>th</sup> February was with a group of thirteen solicitors and law costs draftsmen. They were (with four exceptions) different from the user committee members, who had been present at the morning meeting. I shall refer to them as "the practitioners". Discussion at this meeting focused upon non-personal injury litigation. I shall now summarise the views which the practitioners expressed.

17.27 Small business disputes. Small and medium sized enterprises ("SMEs") struggle to meet the costs of litigation. Quite often litigation between SMEs grinds to a halt because the parties simply cannot meet the costs.

17.28 Disclosure. Even in small business disputes disclosure can be a source of substantial costs. In business litigation between SMEs the bundles may be in the region of 5 ring files. The practitioners can see arguments for and against limiting

disclosure along the lines of the IBA rules (each party discloses the documents relied upon and any other documents specifically ordered). The best course may be for the rules to identify restricted disclosure and standard disclosure as options, without making either the default position. It is in the best interests of clients for the opposing solicitors to have a sensible dialogue about how disclosure can be limited, but unfortunately this does not always happen.

17.29 BTE. Most combined commercial policies have BTE cover. BTE insurers insist that any claim by their insured, if intimated before the issue of proceedings, is handled by a panel solicitor, who may or may not be local. Often a claim does not cost the BTE insurer anything. The BTE insurer simply invokes its CCFA. This may provide for no win, no fee or (more often) no win, low fee (e.g. £90 per hour). In the latter case the solicitors may require top up payments from the insured.

17.30 CFAs in business litigation. The use of CFAs in business litigation is starting to increase. Banks and mortgagees sometimes look to CFAs to reduce the costs of litigation. This has been triggered by the House of Lords' decision in *Campbell v MGN*.<sup>29</sup> However, solicitors may be reluctant to accept CFAs in such cases because of the difficulty of assessing the risks. They would want counsel also to act on CFAs in such cases.

17.31 ATE cover for business litigation. Insurance against liability for adverse costs is not normally included within BTE cover. ATE insurance is generally required for this purpose. ATE insurers will do a careful assessment of the risks involved in each individual case. Quite often they charge an up-front fee for making such assessments.

17.32 Non-personal injury fast track cases. In the practitioners' experience not many non-personal injury claims in the bracket £5,000 to £15,000 claims proceed in the fast track. This is because the trials are usually expected to last longer than a day and so the cases are allocated to the multi-track. This gave rise to discussion as to whether there should be a special procedure for dealing with low value multi-track cases. Views differed as to the desirability of having a highly streamlined "no frills" procedure for such cases.

17.33 Breaches of pre-action protocols. Most of the practitioners are concerned that breaches of pre-action protocols usually go unpunished. Such matters are usually dealt with at the end of the case, when people have forgotten the details of the pre-action skirmishes. It would be best if applications could be made to the court pre-action to deal with any failure to comply with the protocols.

17.34 ATE insurers repudiating. The practitioners are concerned that ATE insurers sometimes repudiate cover if a case is lost. This is because quite often after an adverse judgment the ATE insurers say that the circumstances are quite different from those stated when ATE cover was taken out. The solution would be a statute requiring ATE insurers to pay out to the successful party in any event. That would leave the insurers to seek their remedy against their own insured, if they can prove that the insured misled them.

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<sup>29</sup> [2005] UKHL 61; [2005] 1 WLR 3394.

## 18. MOTOR ACCIDENTS SOLICITORS SOCIETY

18.1 Meeting. The Motor Accident Solicitors Society (“MASS”) did not send in any written submission to the Costs Inquiry. However, their chairman and executive director kindly came to see me for a general discussion of the issues on 19<sup>th</sup> February 2009. I shall refer to the chairman and executive director as “the MASS representatives” and will now briefly summarise their comments.

18.2 Volume of work. There are about 500,000 road traffic accidents per year resulting in personal injuries. Solicitors firms belonging to MASS are estimated to handle about 400,000 per year of these cases. Precise statistics of MASS Member firms’ case numbers are not available.

18.3 “Factory” firms doing claimant personal injury work. I read out the description of certain factory firms doing personal injury work, which had been given to me in Liverpool (see paragraphs 17.4, 17.9 and 17.25 above). The MASS representatives agreed that this is a fair description of some firms but they believe that such firms whilst they do exist form a minority, rather than a majority, of motor accident firms. The problem is not necessarily the size of the firm in terms of cases conducted, but their professional standards and the primacy of the clients’ interest over commercial concerns. Also there is the issue of proportionality which requires firms to build to a certain scale and to invest in systems and technology as well as ensure that all parts of the process are conducted and overseen professionally. It would be wrong to label all large firms as sacrificing professionalism for commercial concerns; this is not MASS’ experience. Without scale, systems and technology and the professional use of paralegal support it would be impossible to have greater proportionality of costs. They also point out that where a case falls within the predictive costs regime, the opportunities for abuse as described in Liverpool do not arise. However, it is reported by some organisations that there is anecdotal evidence that some disreputable solicitors take steps to force their cases out of the predictive costs regime. MASS disapproves of such practices and discourages them. However, huge referral fees charged by introducers, many of which are insurers, encourage such practices in order to conduct motor PI work profitably. Without the control of referral fees, or even an outright ban, there will be continued pressure on firms to maximise their fees in order to continue to make a profit.

18.4 The MASS representatives regard referral fees as a necessary evil of the present system; and they regret the way in which advertising has developed. They have even seen solicitors firms offering free holidays as incentives for personal injury claimants to instruct those firms. The MASS representatives believe that referral fees do lie at the heart of the problem. There is also something distasteful about offering huge sums of money to represent accident victims. Solicitors, unlike claims management companies, can offer direct inducement to an accident victim in return for their instructions. The MASS representatives believe this to be wrong. There needs to be single oversight and regulation of claims management companies and solicitors which limits referral fees to the cost required to properly advertise or attract work rather than allow extortionate referral fee inflation with its potentially adverse impact on professional standards and reputation. The Legal Services Act 2007 includes power under Schedule 19 for the Claims Management Services Regulator to be regulated under the Legal Services Board. The schedule contains powers to replace the Secretary of State, who currently oversees the Claims Management Services Regulator with the Legal Services Board, with consequential amendments to the Compensation Act 2006. The Solicitors Regulatory Authority is already regulated by the Legal Services Board. There is also a need to ensure that insurers are consistently regulated under a ‘mirror’ framework with regard to referral fees by the

Financial Services Authority. It is MASS' view that consistent regulation of referral fees would prevent unfair competition between the different parties engaged in the practice, and would also provide a consistent enforcement framework for banning the activity, should this be decided upon.

18.5 Avaricious BTE insurers. Many BTE insurers “sell” claims for as much as they can get. They may have annual auctions or annual informal discussions with solicitors, in order to negotiate referral fees for the coming year. Those solicitors then have to recover the referral fees as well as their own overheads and profits from the claims which they have “purchased”. The conduct of such BTE insurers tends to drive up the cost of personal injuries litigation; for example, by encouraging firms to find ways out of the fixed recoverable costs regime into an hourly rate regime.

18.6 Unscrupulous liability insurers. MASS believe that defendants' insurers under-settle claims when they can get away with it. The front line staff are nothing like old style claims managers. They have no discretion and can only offer the sums indicated by Colossus or similar computer systems, or by other manual systems or procedures. These sums are too low and result in large numbers of accident victims' claims being under-settled. Apparently, when cases go to trial MASS members invariably achieve higher awards than the “Colossus offers”. It is believed that some insurers have incentive schemes for rewarding staff who negotiate low settlements.

18.7 Third party capture. MASS are particularly concerned about third party capture. They are aware of cases where liability insurers have grossly under-settled claims, because they negotiated direct with the injured person before any solicitor was instructed on his or her behalf. Their membership is in favour of an outright ban on third party capture or at least proper regulation.

18.8 The future. MASS hope that the “new process” being developed by the MOJ, with active participation by MASS, will overcome some of the problems of proportionality, but only if coupled with an outright ban on referral fees or at least some regulation of the level of these fees to reflect the true and legitimate costs of acquiring work. This will leave a fee level which will allow solicitors to professionally represent accident victims within the fixed fee. This will apply to road traffic claims up to £10,000. MASS also believe that there may be further scope for fixing costs in the fast track; but absolute care and caution needs to be taken. They advocate a test and review of the present streamlined process being developed before there is any extension of it.

18.9 MASS believe that the small claims track limit for personal injury claims should remain at £1,000. However, MASS believe proper quantification of compensation levels for PI is vital and can potentially be achieved by on-line quantum assessment tools or legal texts. However, there is wide range of value particularly in lower value PI claims which makes precise quantification of these cases difficult. Hence the wide bands applying for minor injuries in the Judicial Studies Guide. MASS does not believe therefore that a prescriptive and judicially approved on-line quantum assessment tool is the answer, attractive though this may be at first sight.

18.10 Every case is different. The MASS representatives emphasised that every case is different. Injuries affect individuals in different ways. The victim should always be at the centre of the process. MASS are conscious that, given the way some claims are handled (on both sides), the victim is not always centre-stage. They would welcome any reforms which put the victim at the centre of the process.

## 19. BTE INSURERS

19.1 Meeting. On 20<sup>th</sup> February 2009 I met with a number of BTE insurers, in order to gain an understanding of how that sector of the market works. The gist of what the BTE insurers told me is set out in chapter 13 below.

## 20. LAW SOCIETY

20.1 Meeting. On 24<sup>th</sup> February 2009 I attended a discussion meeting at the Law Society's offices, hosted by the Law Society Civil Justice Committee. The meeting focused upon pre-action protocols and the post-issue case management of multi-track cases. A wide range of views were expressed, which I take into account elsewhere in this report.

20.2 Use of depositions. One issue discussed at this meeting (not raised at earlier meetings) was the beneficial effect of depositions in appropriate cases. In the US deposing witnesses is a regular procedure, which sometimes generates excessive costs but sometimes saves costs. A number of solicitors expressed the view that the use of depositions in appropriate cases in this country would be beneficial. If the court orders that a key witness should give his evidence and be cross-examined on deposition, that evidence may well crack the case (one way or the other) and thus lead to a saving of costs. Senior Master Whitaker pointed out that under CPR rule 34.8 the court has power to order that a person give evidence by deposition. Traditionally this power has been exercised in situations where the witness cannot attend trial, for example because he/she is dying.<sup>30</sup> However, Senior Master Whitaker now orders depositions in other cases where he believes that this course may have the effect of shortening litigation. This is often successful. Senior Master Whitaker believes that the court's power to order depositions on a wider basis is derived from CPR rule 3 (2) (m). No-one has ever challenged the legality of such an order.

## 21. CONSUMER FOCUS

21.1 Meeting. On 25 February 2009 I met with two representatives of Consumer Focus. This body was formed on 1st October 2008 following a merger between the National Consumer Council, Energywatch and Postwatch. Consumer Focus is a statutory body, set up under the Consumers, Estate Agents and Redress Act 2007. It is sponsored by the Department for Business, Enterprise and Regulatory Reform.

21.2 Assessors. Consumer Focus expressed concern that my panel of assessors does not include a consumer representative, as such. They noted, however, that Michael Napier QC, who is one of the assessors, was for many years a board member of the National Consumer Council.

21.3 Retraction of legal aid. Consumer Focus accept that, realistically, the full extent of legal aid which existed in the late twentieth century is not going to be restored. Therefore the challenge now is to put in place cost rules, which (a) enhance access to justice and (b) are effective to prevent abuses. Also the rules must provide a framework which facilitates the provision of funding for litigation by the private sector.

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<sup>30</sup> The notes to rule 34.8 in the White Book suggest that the use of depositions is confined to such cases.

21.4 Contingency fees. Consumer Focus have no final view on this issue. However, they recognise that contingency fees may be adaptable for use in our civil litigation system. Subject to proper controls, contingency fees may enhance access to justice.

21.5 Unfair commercial practices. The Consumer Protection from Unfair Trading Regulations 2008 (“the 2008 Regulations”) prohibit a number of unfair commercial practices. However, the only remedy for breach is regulatory enforcement. Individuals who are affected by such practices have no civil remedy. Consumer Focus believe that there should be such a civil remedy. Any claim for such a remedy would be likely to fall within the small claims track.

21.6 Small claims track. The anecdotal evidence which Consumer Focus have received suggests that litigants in person who bring or defend claims on the small claims track are generally satisfied with the process. These comments accord with the comments previously made by Which?<sup>31</sup> There is, however, a problem concerning enforcement of county court judgments. Consumer Focus are also concerned that court fees are now too high, a concern which others share.<sup>32</sup>

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<sup>31</sup> See paragraph 12.4 above.

<sup>32</sup> See chapter 7.



## **CHAPTER 11. SURVEYS AND COSTS DATA**

### **1. INTRODUCTION**

1.1 Need for up to date data. Up to date information about the costs currently being incurred in civil litigation is a pre-requisite for the current Costs Review. The need for hard data is implicit in the first, second and fourth bullet points of my terms of reference.

1.2 Steps taken during Phase 1. I have sought to obtain relevant data by two means during Phase 1 of the Costs Review: first, by means of judicial surveys; secondly, by putting out a general request<sup>33</sup> for information to solicitors and other court users. The judicial survey, by definition, only catches cases which come to trial or some other contested hearing. The information provided by solicitors and other court users embraces a wider spread of cases, including those which settle before issue.

1.3 Appendices to this report. The results of the judicial surveys are set out in Appendices 1 to 8 to this report. Some of the information provided in response to my general request is set out in later Appendices. In order to avoid duplication and overload, I do not append all of the data supplied. Nevertheless, my assessors and I have taken all of that information into account in the course of our deliberations during Phase 1.

### **2. JUDICIAL SURVEYS**

2.1 Period. Subject to one exception, the judicial surveys were carried out during the four week period, 19<sup>th</sup> January to 13<sup>th</sup> February 2009 (“the survey period”). The one exception is the West Midlands survey which spans five months, namely November 2008 to March 2009.

2.2 Questions asked in the surveys. Judges were asked to provide details of every case in which they made a summary assessment of costs, a detailed assessment of costs or an order for interim payment on account of costs during the survey period. As to the details requested in the survey, it is impossible to devise a perfect questionnaire and no such claim is made in this case. Experience shows that any questionnaire form which is produced will be said by some to be too long, by some to be too short and by some to be asking the wrong questions. I have used slightly different questionnaires for each of the eight groups of judges. In each case the questionnaire has been drafted in consultation with representatives of the relevant group of judges, in order to elicit information which (a) that category of judges is likely to be able to provide (having regard to nature of their work) and (b) that category of judges is likely to be willing to provide without finding the whole exercise too burdensome.

2.3 In the following paragraphs I shall give a brief description of the eight judicial surveys, by reference to the appendices in which the results are set out.

2.4 Appendix 1: district judges. Appendix 1 contains details of 699 cases dealt with by district judges and deputy district judges during the survey period. Cases are grouped together by reference to geographical area. In some entries the ATE

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<sup>33</sup> The general request can be read on the judiciary’s website: [www.judiciary.gov.uk](http://www.judiciary.gov.uk) . This general request was supplemented by more specific requests made to particular organisations during January 2009.

premium is not shown separately, but is included within the disbursements figure. I am told that this is probably the case in instances where a success fee but no ATE premium is shown.

2.5 Appendix 1a. It can be seen that the cases listed in Appendix 1 include 280 successful personal injury claims. A separate analysis of those 280 cases has been included at the end of Appendix 1, and is entitled "Appendix 1a". Appendix 1a comprises six columns. Columns 2 and 3 of Appendix 1A identify the court and the damages awarded. Column 4 sets out the base costs and disbursements, including any ATE premium. Column 5 sets out the total costs (i.e. base costs, disbursements, any ATE premium and any success fee). Column 6 shows the same total costs figure, but including VAT. It can be seen from this analysis that the total damages awarded in those 280 cases amounted to £1,317,046. The total costs, excluding VAT, awarded to claimants in those 280 cases amounted to £2,098,489. The total costs figure, including VAT at 15%,<sup>34</sup> was £2,364,469. Thus for every £1 which the insurers paid out in damages, they paid out £1.80 in costs.<sup>35</sup>

2.6 Appendix 2: circuit judges. Appendix 2 contains details of 128 cases dealt with by circuit judges and recorders during the survey period. The information captured is essentially the same as that obtained in the district judges' survey. In some entries the ATE premium is not shown separately, but is included within the disbursements figure. I am told that this is probably the case in instances where a success fee but no ATE premium is shown.

2.7 Appendix 3: Queen's Bench judges. Appendix 3 contains details of 12 cases dealt with by Queen's Bench judges during the survey period. The low number of cases in this and certain other spreadsheets probably reflects the rarity of occasions upon which judges in the relevant category were asked to assess costs or interim payments on account of costs.

2.8 Appendix 4: Queen's Bench masters. Appendix 4 contains details of 25 cases dealt with by Queen's Bench masters during the survey period.

2.9 Appendix 5: Chancery judges. Appendix 5 contains details of 19 cases dealt with by Chancery judges during the survey period.

2.10 Appendix 6: Chancery masters. Appendix 6 contains details of 30 cases dealt with by Chancery masters during the survey period.

2.11 Appendix 7: Costs judges. Appendix 7 contains details of 64 detailed assessments of costs dealt with by costs judges in the Supreme Court Costs Office during the survey period.

2.12 Appendix 8: West Midlands costs survey. Appendix 8 sets out details of 143 cases dealt with by circuit judges, recorders, district judges and deputy district judges in the West Midlands during the five month period, November 2008 to March 2009. The data in this appendix have been excluded from Appendices 1 and 2. In this appendix ATE premiums are, with two exceptions, included within disbursements. The sole purpose of the two columns headed "ATE" is to pick up the two cases where ATE premium figures are available separately.

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<sup>34</sup> In some categories of litigation claimants are registered for VAT and so do not claim this tax on assessment of costs, but this is not the case in personal injuries litigation. Therefore in each of the 280 cases under consideration the defendants' liability insurers would have had to pay VAT at the (temporarily reduced) rate of 15%.

<sup>35</sup> This £1.80 figure includes, of course, court fees and VAT.

### 3. INFORMATION PROVIDED BY SOLICITORS AND OTHER COURT USERS

3.1 In the following paragraphs I shall give a brief description of those appendices which set out data provided by solicitors and other court users, in response to my general request for information. The sequence of the appendices has been determined by considerations of practicality and the need to assemble all appendices in a short period of time, rather than by considerations of logical perfection.

3.2 Appendix 9: recent commercial cases. Appendix 9 is a schedule of recently completed cases provided by the Commercial Court Users Committee. See chapter 10, paragraph 7.14.

3.3 Appendix 10: recent personal injury cases. Appendix 10 is a table of cases provided by a firm of personal injury solicitors who act for claimants. The table summarises cases completed in the period May to December 2008. There is no overlap between this table and the cases in the APIL schedule (Appendix 12). This appendix is dealt with in chapter 10, paragraphs 13.2 and 13.3.

3.4 Appendix 11: recent commercial cases, not in Appendix 9. Appendix 11 is a schedule of commercial cases recently completed by a City firm which did not contribute to Appendix 9.

3.5 Appendix 12: APIL schedule. This is a schedule of recently completed cases, which practitioners on APIL's executive committee kindly prepared following the meeting on 26th January: see chapter 10, paragraph 9.13. This schedule gives details of 65 recently concluded cases.

3.6 Appendix 13: recent TCC cases. This is a schedule of recently completed cases provided by the Technology and Construction Solicitors Association. See chapter 34, paragraphs 3.1 and 3.2.

3.7 Appendix 14: recent Court of Appeal cases. This is a schedule of recently concluded appeals to the Court of Appeal. The details were provided by a number of solicitors from different areas of practice. See chapter 39, paragraph 1.2.

3.8 Appendix 15: recent Chancery cases. This is a schedule of recently concluded Chancery cases. The details were provided by a small number of firms practising in the Chancery Division. See chapter 33, paragraph 1.4.

3.9 Appendix 16. Appendix 16 sets out the results of the study of court fees carried out by the Supreme Court Costs Office. This is dealt with in chapter 7, section 3.

3.10 Appendix 17: publication claims resolved in 2008. This is a schedule of all libel and privacy claims against nine media organisations, which were resolved by settlement or judgment during 2008. The nine media organisations fall into the following categories: national newspaper groups, broadcasters, news agencies and local newspaper publishers. This schedule was kindly provided by the Media Lawyers Association ("MLA"), following my meeting with the MLA on 15<sup>th</sup> January. See chapter 10, paragraph 3.2.

3.11 Appendix 18: one week's cases of a liability insurer. This schedule sets out the details of all cases resolved by one liability insurer during the week 2nd – 6th February 2009. This coincides with the third week of the four week judicial survey.

The types of cases included personal injury claims and some professional negligence claims.

3.12 Appendix 19. Appendix 19 comprises the three electronic disclosure cost models which are discussed in section 6 of chapter 40.

3.13 Appendix 20: cases handled by one costs drafting firm since 2003. This appendix summarises personal injury cases handled by one costs drafting firm on behalf of claimant solicitors between 2003 and 2008. It can be seen that costs were settled in 66.6% per cent of these cases without any points of dispute<sup>36</sup> being served.

3.14 Appendix 21: sixteen graphs provided by NHSLA. The National Health Service Litigation Authority (“NHSLA”) has provided to me sixteen graphs, based upon cases resolved over the last seven years. The graphs are labelled “graph A1”, “graph A2” etc in the top right hand corner. These graphs will be summarised in section 4 below.

3.15 Appendix 22: data provided by MPS. The Medical Protection Society (“MPS”) has provided data concerning claims resolved over the period 2003 to 2007, both in the UK and overseas. The data is supplied in three sections, labelled “Appendix A”, “Appendix B” and “Appendix D”. I shall refer to those three sections as “Appendix 22A”, “Appendix 22B” and “Appendix 22D”.

3.16 Appendix 23: two years’ cases of a liability insurer. Appendix 23 sets out details of all personal injury cases settled by one liability insurer during 2007 and 2008. The claims relate to employers’ liability and public liability. Details of each case are given. Where damages are shown as £0, this simply means that the amount of damages paid cannot now be ascertained without undertaking a manual check.<sup>37</sup> The first page of the appendix is a helpful summary<sup>38</sup> of the data. It can be seen that in cases up to £15,000 (until recently the fast track upper limit) costs substantially exceeded damages.

3.17 Appendix 24: one year’s cases of a liability insurer. Appendix 24 summarises all personal injury claims resolved by one liability insurer during 2008. The claims relate to employers’ liability and public liability. During the year this insurer resolved 1,593 claims. Again, costs exceed damages in respect of the lower value claims. Bearing in mind that these are “ordinary” personal injury claims (not clinical negligence) a surprisingly high number of these claims were not settled until after issue. This may support the repeated complaint from claimant lawyers that insurers delay unduly in admitting liability on straightforward claims. Alternatively, it may be argued that proceedings were issued prematurely.

3.18 Appendix 25: data from Compensation Recovery Unit. Appendix 25 sets out data derived from the Compensation Recovery Unit (“CRU”). This shows the total number of (a) successful and (b) unsuccessful personal injury claims in the following categories:

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<sup>36</sup> Points of dispute are, in effect, the defence served by the paying party in detailed assessment proceedings: see chapter 53, paragraph 2.17.

<sup>37</sup> This is explained in an email responding to my queries, although it is not apparent from the schedule.

<sup>38</sup> Cases where damages are shown as £0 (because the amount is unknown) have been omitted from this analysis.

- Road traffic accident (“RTA”);
- Employers liability;
- Public liability;
- Clinical negligence;
- Other.

Appendix 25 provides these figures for the years 2005 to 2009. In relation to the year 2008/9, the success rate of 53% shown for employers liability claims appears anomalous (although arithmetically correct on the figures supplied). I have therefore asked that the figures be re-checked. Pending confirmation, this percentage should be viewed with caution.

3.19 Appendix 26: one year’s cases of a liability insurer. Appendix 26 sets out the details of all the cases of one liability insurer in respect of which costs payable to claimants were resolved during the year 1 December 2007 to 30 November 2008. It can be seen that the costs of 11,185 cases were resolved during that year. To get a complete picture of those 11,185 cases it is necessary to place sheets 1 and 2 next to each other. Total figures are set out on sheet 3. The details of costs only proceedings concluded during the year are set out on sheets 4 and 5.

3.20 Appendix 27: two and a quarter years’ cases of the same liability insurer. Appendix 27 shows the average costs claimed against, and paid by, the same liability insurer<sup>39</sup> during the nine quarters from August 2006 to October 2008.

3.21 Appendix 28: report by Frontier Economics and APIL response. Appendix 28 comprises a report by Frontier Economics dated January 2009 and APIL’s response to that report. The original Frontier Economics report was commissioned by the Association of British Insurers (“ABI”) and relied upon by ABI in support of their submissions to Phase 1. Appendix 28 contains an updated version of the material produced by ABI during the meeting on 19<sup>th</sup> January 2009: see chapter 10 paragraph 8.2. APIL expressed reservations about the Frontier Economics report and subsequently sent their response to it. This is included in Appendix 28.

3.22 Explanation re liability insurers. Each of the liability insurers who have contributed data for appendices are different, save that the same insurer has contributed the data contained in Appendices 26 and 27.

3.23 Appendix 29. Appendix 29 is a summary of the statutory regulation of contingency fees in individual states of the USA. These regulatory provisions are discussed in section 2 of chapter 60.

3.24 Appendix 30. Appendix 30 is a summary of the principal federal legislation in the USA which provides for fee shifting. This legislation is discussed in section 2 of chapter 60.

#### 4. DATA PROVIDED RE CLINICAL NEGLIGENCE CLAIMS

4.1 It may be helpful at this stage to summarise some of the data concerning clinical negligence claims. I do this because there is not a separate chapter in the report concerning clinical negligence.

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<sup>39</sup> The same liability insurer as in Appendix 26.

4.2 Graphs provided by NHSLA. The 16 graphs supplied by the NHSLA are based upon claims resolved by settlement or judgment (usually the former) over the last seven years. The graphs may be summarised as follows:

- Graph A1 shows claimant costs and defendant costs, each as a percentage of damages paid for each year between 2001 and 2008. It can be seen that the widest disparity was in 2007/8, when claimant costs were over twice as high as defence costs. After that the next widest disparity is in the present year, when claimant costs are coming out just under twice as high as defence costs. The claimant costs are the amount of costs actually paid, rather than the amount claimed.
- Graph A2 shows absolute values for defence and claimant legal costs over the same seven year period. The defence costs are divided into cases won by claimants (which consumed most of the costs) and cases won by defendants. It can be seen that the gap between claimant and defence costs has progressively widened over the last seven years.
- Graph A3 shows absolute values for damages paid, claimant legal costs and defence legal costs over the same period.
- Graphs A4 and A5 show claimant and defence costs as percentages of damages for (A4) claims below £1 million and (A5) claims above £1 million respectively.
- Graphs A6 to A10 show claimant and defendant costs in cases where (a) the claimant is funded by Before the Event Insurance (“BTE”), (b) the claimant is legally aided, (c) the claimant is on a CFA. Essentially, these graphs show that costs are lowest in BTE cases and highest in CFA cases.
- Graphs A11 to A15 show costs details re individual cases, where each case is shown as a dot. These graphs show that total costs were lowest in cases where the claimant was self funded.
- Graph A 16 shows the success rates of claims by funding types. It can be seen that claims funded by BTE have the highest level of success; claims funded by legal aid have the lowest level of success.

4.3 To complete the NHSLA data, it may be helpful to set out the number of current claims being dealt with by the NHSLA and how they are being funded. The figures are as follows:

BTE	847
CFA	3,743
Legal aid	4,697
Self funded	798
Method of funding unknown	1,453
Total	11,538 <sup>40</sup>

4.4 Data provided by MPS. The data provided by MPS comprises Appendices 22A, 22B and 22D.

<sup>40</sup> Parliamentary written answer, 11<sup>th</sup> March 2009.

- Appendix 22A provides a summary of all cases in the period January 2003 to December 2007, in which (i) MPS paid damages to claimants and (ii) MPS have a record of the costs which they paid to claimants. There are a total of 2,468 cases in this category. The MPS deals with claims in England and Wales, as well as a number of other jurisdictions as set out. Appendix 22A shows how the total sums paid out were split as between (a) damages, (b) claimant costs and (c) defendant costs. It can be seen that, although there are fluctuations according to type of claim, in England and Wales overall less of the payout goes to claimants as damages than is the case in other jurisdictions. It can also be seen that in the lower value claims claimant costs are substantially higher than in other jurisdictions. Appendix 22A gives similar details re dental claims.
- Appendix 22B presents the same information as Appendix 22A, but in the form of graphs.
- Appendix 22D provides a summary of all UK cases which were closed during the period 1<sup>st</sup> January and 30<sup>th</sup> June 2008. It can be seen that 529 medical cases and 470 dental cases were closed in this period. Focusing on the medical claims, it can be seen that 121 cases (23%) were settled by a payment of damages. 160 claims were resolved without any damages being paid (although I have no details of these claims, experience suggests that many of these may have been “drop hands” settlements – i.e. each side bears its own costs). 248 “pre-claims” were closed. This last entry means that 248 possible claims (previously notified) did not mature, so that it was felt safe to close the files. These would often be cases where solicitors investigated but then concluded that the claims should not be pursued.

4.5 APIL schedule. The APIL schedule (Appendix 12) gives details of 61 recently concluded personal injury claims, of which six were claims for clinical negligence. Those six were numbers 2, 14, 29, 32, 35 and 37. Three of these claims were settled before issue and three were settled after issue “during pleadings”.

4.6 Late settlement of clinical negligence claims. When one looks at the MPS data, it is striking how many meritorious claims are not settled until after commencement of proceedings. The same picture emerges from the APIL schedule. The same picture emerges from the Legal Services Commission data, set out in chapter 6. On one view, the data from these three sources may be said to support the complaint made by many claimant firms that defence organisations delay unnecessarily in accepting liability/settling meritorious claims.<sup>41</sup> If this is the case, it may help to explain why the costs of clinical negligence litigation are so high. On the other hand, I understand that this is vigorously denied by clinical negligence defence lawyers, who maintain (a) that they have much less time to investigate claims than the claimants’ advisers and (b) that proceedings are often issued prematurely.<sup>42</sup> I hope to explore these matters during Phase 2. I do not at this stage draw any conclusions.

4.7 Disparity between claimant and defendant legal costs. It is not in dispute that in clinical negligence litigation claimant legal costs are higher than defence legal

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<sup>41</sup> MPS say that proceedings are often issued prematurely. In a number of instances they are willing to settle but, for good reason, no formal admission of liability can be made. If this is the case, there would appear to be failures of communication on one or other side, or possibly on both sides.

<sup>42</sup> See further chapter 43, section 3. Unfortunately the meeting convened by clinical negligence defence lawyers to discuss this and similar issues was fixed for a date when I was unavailable. I hope that there will be a re-run of that meeting during Phase 2.

costs.<sup>43</sup> The reason why this is so is one of the matters which will have to be explored in Phase 2. Claimant lawyers contend that they face substantial costs which do not fall upon defence lawyers: for example, checking out cases which are not in the event pursued; the entire costs of those cases which are lost; marketing; doing the additional work which always falls upon claimants (establishing the basic facts, preparing trial bundles etc. etc.). Claimant lawyers contend that the way in which cases are defended also racks up costs: for example, defendants' failures to make admissions and their failure to instruct independent experts at the outset. Defence lawyers, on the other hand, contend that the hourly rates charged by claimant lawyers are excessive, because they are not properly controlled upon detailed or summary assessment; claimant lawyers charge for too many hours work; success fees and ATE premiums are too high, because they are not held down by market forces. Defence lawyers point to the stark disparity between the costs in BTE cases (where market forces operate to bring down costs) and the costs in CFA cases (where market forces do not operate to bring down costs). I will not recite all the arguments advanced on each side at this stage. There is clearly an issue as to why the stark disparity exists between claimant and defendant costs. This is an issue upon which I shall welcome submissions and further data during Phase 2.

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<sup>43</sup> The same observation is true in respect of ordinary personal injuries litigation (i.e. non-clinical negligence). However, different considerations arise in that context and those matters are discussed in chapter 26 below.





REVIEW OF  
CIVIL LITIGATION COSTS

## **PART 4: THE FUNDING OF CIVIL LITIGATION**

### **CHAPTER 12. LEGAL AID**

#### **1. INTRODUCTION**

1.1 Purpose of this chapter. The purpose of this chapter is twofold. First, to provide a brief account of the legal aid regime for the assistance of those readers who may not have experience of legal aid. Secondly, to identify aspects of the legal aid regime and rules which may be relevant to the issues that arise for debate in Phase 2 of the Costs Review.

1.2 Historical background. The birth of the welfare state under Attlee's Government saw the inception of a comprehensive, funded system of legal aid. Prior to this, legal help in civil cases relied largely on the goodwill of lawyers. In 1914, a change in the Rules of the Supreme Court allowed for litigants of modest means with a strong case to be assigned a lawyer to investigate their case and report to the High Court or Court of Appeal. The judge then had discretion to assign counsel or a solicitor drawn from a list of volunteers willing to work without remuneration. This scheme continued until 1925 when administrative responsibility transferred from the courts to the Law Society, where it remained until 1988.

1.3 The Rushcliffe Committee report in 1945 paved the way for a modern legal aid system. The report focused on improving civil legal assistance by ensuring that litigants of suitably modest means would be provided with lawyers, drawn from the private sector, to represent them in court. The Legal Aid and Advice Act 1949 implemented the Rushcliffe recommendations, with the civil scheme emerging in 1950. The scheme is now celebrating its 60<sup>th</sup> anniversary.

1.4 In order to overcome the conflicting position of the Law Society as both the provider of funds and the representative of the profession receiving them, the Legal Aid Act 1988 created a non-departmental public body, the Legal Aid Board, to inherit the administrative role of the Law Society in legal aid. This was subsequently abolished by the Legal Aid Board (Abolition) Order 2001 (SI 2001/779) and replaced with an independent government agency, the Legal Services Commission ("LSC") under the Access to Justice Act 1999 ("the 1999 Act").

1.5 Context of the 1999 Act reforms. Although the legal aid scheme operating under the Legal Aid Act 1988 was probably the best and certainly the most expensive scheme of its type in the world, over time it became clear that the system was no longer sustainable. Both the volume of cases funded and average case costs rose steadily throughout the 1980s and 1990s, leading to an exponential rise in the overall

cost of the scheme. Legal aid expenditure (including crime) rose to £1.5 billion by 1997 and is over £2 billion today.

1.6 There was also a strong feeling that funding was not necessarily being directed at the right cases. Non-family certificates were dominated by the funding of mainstream personal injury claims – the Legal Aid Board (the “Board”) issued over 100,000 of these per annum at the height of the scheme in the mid 1990s. There was much less emphasis on social welfare cases, such as housing disrepair and possession. Overall the scheme was not proactive and the Board was essentially a passive funder making decisions on the applications which it received. There was no formal planning or sense of priority. Access to justice was dependent essentially on lawyers choosing to practise and to provide legal aid services in a particular area.

1.7 The 1999 Act. All this changed under the Access to Justice Act 1999. This created the new legal aid scheme for civil cases, the Community Legal Service, run by the LSC. The rest of this chapter considers the scheme as it operates today under that Act, with particular reference to aspects of the scheme relevant to costs.

## 2. ENTITLEMENT TO CIVIL LEGAL AID

2.1 Scope. Prior to the 1999 Act, almost all proceedings before the civil courts were within the scope of civil legal aid, with the notable exception of defamation proceedings. Perhaps the most controversial part of the 1999 Act was the list of exclusions in Schedule 2, paragraph 1. This listed case types generally outside the range of legal aid, both for advice and litigation services. By far the most significant exclusion was personal injury (other than clinical negligence), but there were other important exclusions for business cases, boundary disputes, company and trust law. Most of the exclusions were on the basis of the subject area being a “low priority” for the scheme. However, personal injury cases were excluded specifically because of the availability of other funding mechanisms in particular new style CFAs.<sup>1</sup> None of the exclusions are absolute. Categories of cases can be brought back in by directions from the Lord Chancellor under section 6.8 and individual cases can also be funded on an exceptional basis under section 6.8(b) of the 1999 Act.

2.2 The new scheme preserved the previous rules under which full civil legal aid was not available for funding representation before most tribunals. Mental health and immigration tribunals were the main exceptions to this. For other tribunals, such as those covering employment and welfare benefit issues, legal aid could provide initial advice to the client, but the scheme would stop at the door of the tribunal. Exceptional funding under section 6.8(b) made some inroads into this principle, since that section allows representation in individual cases to ensure a fair hearing as required by Article 6 of ECHR. The biggest impact of exceptional funding has, however, been in funding representation for families in inquest proceedings as part of the State’s compliance with its investigative obligations under Article 2 of ECHR.

2.3 Financial conditions. Legal aid has always been a means tested benefit. Only clients whose financial resources make them eligible under the regulations are entitled to receive services. Entitlement depends on an assessment of the client’s gross income, disposable income (after allowances including housing costs and tax) and disposable capital. Entitlement can also be derived from receipt of income support and certain other prescribed benefits. Those whose disposable income or disposable capital are above prescribed limits are required to pay a contribution

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<sup>1</sup> See chapter 16.

towards the cost of their case, dependent on how far above the minimum limit they are. Contributions from income are payable periodically

2.4 While most financial limits are absolute, certain services are non-means tested and for some cases there are discretionary waiver powers, for example to allow funding for victims of domestic abuse who are outside normal eligibility limits.

2.5 The statutory charge. The charge under section 10(7) of the 1999 Act provides that where a legally aided client has successfully recovered or preserved money or property in funded proceedings this must first be used to repay any deficit on that client's account with the Legal Aid Fund. This effectively turns legal aid in successful cases from a gift into a loan and puts the legally aided litigant in the same position as someone who has funded their costs privately. The impact of the statutory charge is heavily influenced by the underlying costs regime. In non-family cases recovery of damages is usually accompanied by full recovery of costs and, in such cases, the claimant's solicitor will typically confirm that they are retaining *inter partes* costs in full and so need to make no claim on the fund. In that situation there is no deficit on the client's account and no application of the statutory charge, so that the client keeps his or her damages in full.

2.6 The main impact of the statutory charge is, therefore, in family cases where it is unusual for costs to follow the "event". Often it is the matrimonial home, or a lump sum to buy a home, that is the most valuable recovery for the legal aid client. In those cases the statutory charge applies, but enforcement of the charge is postponed. The charge is registered on the property like a mortgage, although the client has no on-going obligation to make repayments, and the fund is repaid with interest when the property is eventually sold.

2.7 The "Funding Code" (the "Code"). The Code was one of the major innovations of the 1999 Act, and has no direct equivalent in any overseas legal aid schemes. The Code is a set of rules drawn up by the LSC, but approved by Ministers. Any changes to the Code, which involve substantive rather than procedural change, require approval of both Houses of Parliament under section 9(6) of the 1999 Act.

2.8 The Code also defines a range of "levels of service". These are essentially different types of legal aid, the most important of which are "Legal Help for advice services" and "Legal Representation for civil legal aid in court proceedings". The Code then sets merits criteria which vary according to the level of service, nature of case and stage of proceedings. The Code is the embodiment of priorities for civil legal aid. So whilst almost all cases under the Code have prospects of success criteria, different hurdles apply for different case types. For example whereas a clinical negligence claim will only be funded past the investigative stage if the prospects of success are at least 50%, a domestic violence or housing possession case needs only "borderline" prospects of success – broadly similar to a good arguable case or reasonable prospects of success.

2.9 The Code allows for a more sophisticated and structured approach to merits decisions, taking into account considerations such as alternative funding and alternatives to litigation. The Code also allows for considerations such as whether a case has a "significant wider public interest" and whether cases raise "significant human rights issues". For further details of the Code and related guidance see the LSC's website.<sup>2</sup>

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<sup>2</sup> See [www.legalservices.gov.uk](http://www.legalservices.gov.uk).

2.10 Private client test. Prior to the Funding Code the statutory test for civil legal aid, which was almost word for word unchanged from the 1949 to 1988 Acts, required only “reasonable grounds” for taking and defending proceedings and it not being “unreasonable” for legal aid to be granted (compare section 1(6) of the Legal Aid and Advice Act 1949 with sections 15(2) and 15(3) of the Legal Aid Act 1988). These tests were always open to wide interpretation, the final say being by a panel of lawyers drawn from private practice considering appeals against refused applications. Broadly the statutory tests were applied consistently with what became known as “private client test” namely that legal aid should be provided only for cases which were sufficiently strong that a reasonable privately paying client, who could afford to proceed but did not have super abundant means, would be prepared to litigate using their own resources.

2.11 Digression re private client test. As an aside, one could speculate whether something similar to the private client test should also be considered as part of the underlying aims of a costs regime. On one view, it may be the function of the civil justice system, and the costs rules in particular, not to facilitate access to justice for all possible cases, but for those cases which are sufficiently worthwhile, such that a claimant who could afford to do so would be prepared to invest their own money in the case (as between solicitor and private client). The aim would then be to ensure that the quantum of costs was always proportionate to what was in dispute in the case.

2.12 In the modern litigation world dominated by CFAs, the private paying client has become something of a fictional character (perhaps he or she always was). For most types of litigation it is very rare for individual clients to invest their own money in support of litigation, and even less likely if in doing so they would face full liability for *inter partes* costs.

2.13 Cost benefit. The Code did not entirely abolish the private client test, but where possible replaced a broad discretion with more strict and objective criteria. This is most clear in the cost benefit criteria for damages claimed in non-priority areas. These require a minimum ratio of damages to costs which depend on the prospects of success, reflecting the principle that if the case has only a 50/50 prospect of success, no client would wish to proceed unless the likely rewards of the case were very much higher than the likely costs. This is reflected in the Code criteria as follows:

Prospects of success	Minimum damages to costs ratio
80% +	1:1
60% - 80%	2:1
50% - 60%	4:1

2.14 These figures equate closely to the profile of case which one might, at least in theory, expect to have been viable under old-style CFAs i.e. those where the uplift was not recoverable but would come out of client damages, so as not to absorb more than 25% of those damages.<sup>3</sup> For example, if a case has at least 80% prospects of success one would not expect a CFA uplift of more than about 15% - 25%. Provided the estimated damages are larger than the likely costs the client will be able to retain at least 75% of damages recovered. However, if a case is nearer a 50/50 prospects a 100% costs uplift is likely to be required. In order for that 100% costs uplift to take no more than 25% of damages, those damages would have to be at least four times as high as the likely cost of the case.

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<sup>3</sup> See further chapter 16.

### 3. THE MODERN SCHEME

3.1 Administration. The legal aid scheme is run by the LSC, a body with statutory powers including not just the funding of cases, but setting priorities, identifying areas of legal need and commissioning services to meet those needs through contract or other means (see sections 4 and 6 of the 1999 Act). The Board of Commissioners operates through regional offices, where most individual funding decisions are taken by Commission staff, with rights of appeal to independent funding adjudicators drawn from private practice. The central functions of the LSC are carried out from its head office in London.<sup>4</sup>

3.2 Despite these wide powers, the rules and funding of the scheme are (as one would expect) controlled by Government under a wide-range of statutory powers exercised by statutory instrument, directions and guidance. In one respect however, the Commission remains genuinely independent – ministers have no role in relation to individual funding decisions (see section 23 of the 1999 Act). This limitation of powers was one of the cornerstones of the original scheme and is as important today as it was sixty years ago – perhaps even more so when such a high proportion of cases remaining within the scope of legal aid involve proceedings against the Government.

3.3 Contracting. Almost all legal aid is delivered by means of contracts between the LSC and providers (solicitors' firms and other advice agencies). For advice services funded under the legal help scheme, together with representation at mental health and immigration tribunals (collectively described as "controlled work") the contract controls the volume of work by the allocation of "matter starts". For most civil legal aid however, the contract simply operates as a license to do the work, individual cases being controlled primarily through the Code.

3.4 The LSC is currently consulting on the terms of its next generation of civil contracts which will run from 2010. These are likely to include new service standards and key performance indicators to ensure providers deliver the range of services needed to satisfy client needs.

3.5 Quality. Operating a fully contracted scheme has allowed the LSC to establish and insist on quality standards for legal aid work. The original scheme, known as franchising, was based largely on objective practice management standards – the supplier quality management or "SQM" system. Debate has more recently focused on more direct measures of quality of work including peer review, which is a powerful tool but expensive to administer. Other measures, such as the success rate of cases under the contract will be considered in the consultation on the new 2010 contract.

3.6 Advice services. Although representation in contested court proceedings was the main emphasis of the original legal aid scheme, over time more resources have been devoted to early advice with a view to avoiding proceedings. There has been a general rise in the number of people helped under the Legal Help Scheme in recent years – some 750,000 where acts of assistance were funded in 2007/2008.

3.7 Advice services are also commissioned by setting up Community Legal Advice Centres or Networks to deliver integrated services, primarily in social welfare law, in areas of identified need.

3.8 ADR. In contrast to the original legal aid scheme which was focused on court resolution, the 1999 Act emphasises the importance of helping people to resolve cases

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<sup>4</sup> At 4, Abbey Orchard Street, near Victoria.

without unnecessary or unduly protracted proceedings in court (see section 4(4)(c) of the 1999 Act). The rules and guidance of the Code are therefore strongly supportive of the wider use of ADR. Family mediation is funded by the LSC under direct contractual arrangements, whilst non-family mediation costs are an allowable disbursement under all levels of service. However, the great majority of legal aid cases conclude with neither side offering mediation or other forms of ADR. Requirements for minimum ADR usage are being considered as part of the consultation on the next generation of contracts.

3.9 Telephone and internet services. A major innovation of the modern legal aid scheme is to deliver a wider range of services by telephone and online. These are available under the heading of “Community Legal Advice” (previously known as “CLS Direct”). The service includes the direct provision of advice in social welfare and family law, finding a legal aid provider in a client’s area, a range of legal information leaflets and links to numerous other advice services.<sup>5</sup>

#### 4. LEGAL AID AND COSTS

4.1 Remuneration. Historically legal aid remuneration was governed by hourly rates. While standard fees have been introduced for almost all advice services and for a range of family cases, non-family litigation is still usually paid for on an hourly rate basis.

4.2 Prior to 1994 legal remuneration was based on the same hourly rates as would be recoverable *inter partes* (subject to the reduction referred to below). Since then legal aid hourly rates have been prescribed for most cases, but these prescribed rates apply only to payments from the Legal Aid Fund and do not limit recoverability of costs *inter partes*. This is an important exception to the indemnity principle. A claimant lawyer in a legal aid case, who is successful, can therefore recover *inter partes* costs of exactly the same amount as in a privately funded case.

4.3 Differential between won cases and lost cases. There is therefore a very significant differential between (a) the rates paid for legal aid work in unsuccessful cases (prescribed rates are often of the order of £70 per hour with some provision for uplifts) and (b) the rates payable where costs are successfully recovered (in the discretion of the court but potentially £200 or more per hour in London). In this way legal aid has for many years operated as a form of limited contingency funding, though a less extreme form than CFAs. Legal aid in effect operates for non-family litigation as a banker, by providing payments on account as the case progresses, and as an insurer, by guaranteeing a minimal level of remuneration should the case be unsuccessful.

4.4 Costs reduction. When the legal aid scheme was first set up in 1949 all remuneration in legal aid cases was subject to a 15% reduction. This was applicable both to payments from the fund and to costs recovered *inter partes*. This policy reflected the fact that prior to the statutory scheme, the burden of supporting poor litigants had fallen entirely on the legal profession through *pro bono* services. With the setting up of a publicly funded regime, it was reasonable to expect a proportion of legal aid work to be done effectively on a *pro bono* basis. The levy was reduced from 15% to 10% before being abolished altogether by the time of the Legal Aid Act 1988. In any event such a system would be less justifiable with the introduction of

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<sup>5</sup> For further details see [www.communitylegaladvice.org.uk](http://www.communitylegaladvice.org.uk).

prescribed legal aid rates and the consequent substantial gulf between legal aid payments from the fund and *inter partes* rates.

4.5 Costs protection. The cost protection rules are another aspect of the scheme which has remained largely unchanged since 1949. The current rule derives from section 11 of the 1999 Act. The starting point is that the court's power to make a costs order is the same in a legal aid case as in any other case. However, where the court makes such an order, the liability of the legally aided client to pay those costs is strictly limited. A legal aid client can only be made to pay such costs where this is reasonable, taking into account all the circumstances including the client's means. By definition a financially eligible legally aided litigant will have limited means, such that it is seldom reasonable for a substantive liability to apply. Further, a successful opponent would need to apply to the court to assess the reasonableness of any enforcement of a costs order and would incur further costs in making such application. Consequently, such applications are rarely made.

4.6 The practical effect of legal aid costs protection is close to complete immunity for legal aid clients from *inter partes* costs orders. The usual order made by the court, commonly known as a "football pools" or "lottery" order, gives the opponent liberty to apply. However, in practice the opponent would only make such an application on the basis of a very substantial increase in the legally aided party's means.

4.7 The practical effect of the legal aid rules is, therefore, that in funded cases one way costs shifting is the norm. Whilst this was considered a bold innovation under the 1949 Scheme, it became a very well established and, most would argue, essential part of the system. This was therefore the regime which operated for the great majority of personal injury claims prior to the advent of CFAs. Although the system can be criticised as being unfair to opponents because of their inability to recover costs, the system can reasonably be defended on pragmatic grounds. There is no true access to justice if clients of limited means are fully exposed to *inter partes* costs orders.

4.8 Costs against the fund. As well as being unable to recover costs in full from a legal aid client, a successful opponent has no general right to recover costs from the Legal Aid Fund. This can only be done in very limited prescribed circumstances, essentially where costs are ordered on an appeal or where lack of a costs order would cause the opponent severe hardship.<sup>6</sup> If the fund were more generally liable for adverse costs, funds would have to be diverted away from the support of eligible claimants.

## 5. ISSUES FOR THIS REVIEW

5.1 Legal aid reform is not the main focus of this report. Indeed there has been no shortage of fundamental reviews of legal aid in recent years (most recently Lord Carter's Review: "*A Market Based Approach to Reform*", July 2006). However, legal aid remains a crucially important aspect of the civil justice scheme within which the costs rules must operate. Three aspects of the legal aid scheme seem to me to be particularly relevant to the wider issues addressed in this report:

- (i) Contingent funding. The way in which legal aid remuneration is heavily dependent on the outcome of the case, a system which is well established, may

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<sup>6</sup> See Community Legal Service (Costs Protection) Regulations 2000.

be an indication that there is nothing inherently objectionable in remuneration being payable dependent on results. However, CFAs clearly create a more extreme form of contingent funding than remuneration in legal aid cases.

- (ii) One way costs shifting. As explained above legal aid costs protection made one-way costs shifting the norm for most personal injury litigation for the best part of 50 years. In light of this it may be harder to argue that one way fee shifting is inherently unfair or undesirable. The right of successful defendants to recover costs from claimants in all categories of case is not necessarily sacrosanct in this review, but must be considered on its merits. This is discussed further in Chapters 25 and 46.
- (iii) Proportionality. It is ironic that the legal aid costs benefit criteria, which enforce proportionality between costs and damages and were designed to be consistent with the old style CFA regime, might have well suited mainstream personal injury claims. However, personal injury was removed from scope of legal aid on the introduction of the Funding Code. The contrast between (a) the range of requirements for a case to receive public funding under the Funding Code and (b) the simpler requirement of good prospects of success necessary to launch a case on a CFA, is striking. This suggests that it may be arguable that the recoverability of success fees and premiums have allowed litigation to move too far away from considerations of proportionality, which were central to almost all types of funding prior to April 2000. This is considered further in Chapter 47.

5.2 Whilst I do not invite views on the legal aid scheme in general, I would welcome comments in the second phase of this review relating to those aspects of legal aid which have a direct connection with costs.



## **CHAPTER 13. BEFORE-THE-EVENT INSURANCE**

### **1. INTRODUCTION**

1.1 This chapter is based upon information given to me by a number of “before-the-event” insurers and intermediaries at a meeting on 20<sup>th</sup> February 2009. As can be seen from chapter 10, by that date a number of stakeholders had recounted their experience of such insurance. The chapter was shown in draft to the participants in the 20<sup>th</sup> February meeting and gave rise to a number of conflicting comments. I have digested these as best I can in the revised text.

1.2 Before the event insurance (“BTE”) is sometimes referred to as legal expenses insurance (“LEI”). When BTE is taken out by individuals, it usually comes as a subsidiary add-on to some other insurance or service. When BTE is taken out by businesses, it may take the form of a stand-alone policy or it may form a separate, but substantial, part of some more general insurance policy. Most BTE policies carry access to free legal advice by telephone.

1.3 For historical and cultural reasons LEI has never been as widely taken up by private individuals in the UK as it has been in Germany.<sup>7</sup> There is no imminent prospect that individuals in England and Wales will be willing to pay substantial premiums in order to purchase stand-alone BTE cover. I am told by FirstAssist that they do offer one stand-alone policy for individuals, but the take-up of this policy is miniscule.<sup>8</sup>

1.4 In this chapter I shall use the abbreviation “IN” to denote the person or company insured under a BTE policy.

### **2. BTE FOR INDIVIDUALS**

2.1 Add-on to motor insurance. Legal expenses insurance is offered as an add-on to motor policies. The premium is usually in the region of £20<sup>9</sup> and many motorists are willing to pay this. If IN has a claim falling within the small claims track (e.g. damage to his vehicle or the irrecoverable excess under his policy), then insurers will provide legal support and representation at any hearing. If IN has a personal injuries claim or other uninsured losses which take his case above the small claims track, then insurers will often<sup>10</sup> refer the case to one of their panel solicitors to conduct under a CFA or CCFA. In return, insurers will receive a referral fee. In those few cases on the fast track or multi-track which are subsequently lost, either insurers or the panel solicitors will meet any adverse costs order. I understand that, overall, BTE insurers receive more money than they pay out in respect of RTA claims made by their insured. BTE insurers often require IN to instruct solicitors who are based far away from IN’s home. BTE insurers do not accept the point (which has been made to me by a number of district judges) that lack of contact between claimant and solicitors

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<sup>7</sup> I am told by Arag plc, who have provided LEI in Germany since 1935 and in the UK since 2006, that LEI became popular in Germany after the Second World War when there was no legal aid available. Also the German civil justice system with its regime of predictable costs is a more benign environment, in which LEI can flourish. See further chapter 55 below.

<sup>8</sup> The take-up was higher in the early 1990s, when the policy was actively promoted.

<sup>9</sup> Insurers make the comment that most of this premium goes to intermediaries in commission etc.

<sup>10</sup> Insurers emphasise that there are many different types and models of BTE policies and the description given in this paragraph does not apply to them all.

impairs the quality of case preparation. They maintain that for straightforward fast track RTA cases telephone and email contact between IN and the appointed solicitors is quite sufficient.

2.2 Add-ons to house or contents insurance. BTE is an optional extra on house and contents insurance policies. The cost is usually in the region of 5%<sup>11</sup> of the total premium. A typical additional premium for BTE in many household insurance policies is £15-20. IN is covered in respect of a number of claims that might be made against him:<sup>12</sup> for example, claims by visitors who suffer injury and possibly claims by persons whom IN negligently injures away from the home.<sup>13</sup> IN may also be insured in respect of legal expenses for certain claims which he brings as claimant: for example, property disputes with a neighbour,<sup>14</sup> claims re goods or services received, employment claims or even (depending upon the terms of the policy) personal injury and clinical negligence claims. In many of these cases the BTE insurers pay the claimant's solicitors on a conventional hourly rate basis,<sup>15</sup> recovering costs from the other side if they win<sup>16</sup> and paying out adverse costs if they lose. For obvious reasons, insurers like to have such cases conducted by panel solicitors in whom they have confidence (and with whom they will have negotiated rates).

2.3 BTE insurers state that (after deducting for duplication) about 10 – 15 million separate households<sup>17</sup> in the UK have BTE cover. According to the most recent Mintel Report, 22.7 million adults had taken out BTE as an add-on to motor or household insurance.<sup>18</sup>

2.4 Other add-ons. Occasionally BTE cover is provided as an incidental benefit of particular credit cards or bank accounts, but cover is usually limited to legal advice. Sometimes travel insurance includes cover for IN's own costs or the other side's costs in any litigation arising out of mishaps occurring during IN's travels.

### 3. BTE FOR BUSINESSES

3.1 Larger enterprises. Larger enterprises are inevitably involved in disputes and litigation from time to time. They generally prefer to meet the costs of such disputes and the consequential litigation as and when they arise. Larger enterprises generally do not take out BTE in respect of these matters, although they will obtain employer's liability insurance and public liability insurance.<sup>19</sup>

3.2 Small and medium sized enterprises. Small and medium sized enterprises ("SMEs") often do take out BTE cover. The policy available from a number of insurers is commercial legal expenses insurance. This may be taken out as a stand-alone policy or as a separate limb of a wider policy. The premium will depend upon

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<sup>11</sup> Some of this goes in commission to intermediaries.

<sup>12</sup> Under the liability section of the policy.

<sup>13</sup> E.g. persons whom IN injures by a badly hit golf ball.

<sup>14</sup> Boundary disputes are one example. These can be disproportionately expensive and insurers tell me that they seek resolution through mediation where possible.

<sup>15</sup> Without a CFA.

<sup>16</sup> Insurers point out that many neighbour disputes have a "drop hands" conclusion, whereby the insured may get the outcome sought but not an order for costs. Also there is effectively no costs recovery in employment tribunal claims.

<sup>17</sup> Out of a total of about 25 million households.

<sup>18</sup> Mintel Legal April 2008 Expenses Insurance UK Summary.

<sup>19</sup> Also professional indemnity cover in the case of firms and companies providing professional advice.

the size and nature of the company, but is unlikely to be less than £1,000.<sup>20</sup> The policy commonly covers the costs of defending employment tribunal claims, health and safety prosecutions etc; pursuing tort claims in respect of damage to property; possibly dealing with HM Revenue and Customs investigations; and similar matters. Cover in respect of construction disputes is excluded, unless IN pays a substantial additional premium. Likewise, cover in respect of contractual disputes arising in the course of business is excluded, unless IN pays a substantial additional premium.<sup>21</sup> I understand that, in practice, SMEs are unlikely to purchase such additional cover.

3.3 The effect of the above arrangements is that SMEs are often insured in respect of claims brought against them in employment tribunals (where generally there is no cost shifting – see chapter 50). However, in respect of the majority of business disputes which SMEs may litigate in the Mercantile Court, the county court or the High Court, BTE cover has not in practice been obtained.

3.4 In the absence of BTE cover, SMEs which litigate over business disputes must either (a) fund the litigation themselves or (b) proceed on CFAs (if they can find solicitors and ATE insurers willing to accept the risks).

#### 4. REVIEW

4.1 Range of BTE cover. There is a wide variety of BTE cover available on the market. I have only given a brief outline of some of the principal policies.

4.2 Basic distinction. There is, in my view, a basic distinction between:

- (i) BTE cover where insurers pay solicitors to act for the insured when a claim arises; and
- (ii) BTE cover where insurers will “sell” to solicitors claims which arise in return for referral fees and the solicitors will thereafter act on a CFA or CCFA.

I will refer to the first type of BTE cover as “BTE1” and the second type as “BTE2”. I appreciate that this distinction is not clear cut and that some policies will provide both types of cover.

4.3 BTE1. BTE1 insurance brings a number of benefits and serves the public interest. First and foremost, IN is able to bring or defend claims, which may otherwise be beyond his means. Secondly, insurers provide a stream of work to their panel solicitors. Insurers have an interest in keeping down costs. Accordingly, they will use their bargaining power to hold down hourly rates or to negotiate alternative fee structures, in the same way that liability insurers have done for many years.<sup>22</sup>

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<sup>20</sup> One insurer told me following the meeting that the premium is often less, if BTE cover is obtained as part of wider insurance.

<sup>21</sup> One insurer told me following the meeting that a substantial additional premium is not required for contract disputes cover, if the BTE insurance is part of a wider policy. Another insurer told me following the meeting that for some companies, such as building contractors, this cover will not be offered at all.

<sup>22</sup> See, for example, the information supplied by the ABI and FOIL set out in chapter 10.

4.4 BTE2. BTE2 insurance seems to me to be less beneficial than BTE1.<sup>23</sup> The litigation will be run on a CFA,<sup>24</sup> which simply drives up costs. The BTE insurers have no interest in the rates charged by their panel solicitors (they will not be paying those rates) and they have no reason to negotiate such rates downwards. Indeed the referral fee which BTE insurers charge will further drive up the costs which, one way or another, the solicitors must recover. IN could perfectly well instruct solicitors on a CFA without the intervention of BTE insurers.<sup>25</sup> On the other hand, BTE2 insurers do provide free legal advice by telephone. This is a valuable service, particularly in relation to consumer claims.<sup>26</sup>

4.5 Tentative conclusion. It seems to me to be in the public interest to promote a substantial extension of BTE insurance, especially insurance in the category BTE1. 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.

4.6 Proposal by the Bar's CLAF Group. The principal proposals by the CLAF Group are discussed in chapter 19 below. However, in the last section of its first report the CLAF Group make a proposal which merits serious consideration. The proposal is that compulsory BTE should be introduced, which would cover a wide range of accidents. The mechanism would be as follows:

- (i) Motorists should be required to take out BTE insurance in addition to third party liability insurance. Such BTE insurance would cover themselves, their passengers and any pedestrians whom they might injure.
- (ii) Employers, occupiers of business premises, operators of trains and others required to have public liability insurance should also be required to take out BTE cover in respect of personal injury claims suffered by themselves, employees, visitors, or customers.
- (iii) Such insurance would cover legal expenses only, not damages. Claims would be supported by insurers, subject to a merits test.
- (iv) BTE insurers will recover their costs, but no success fee or ATE premium, in respect of cases won. BTE insurers would pay the defence costs in respect of cases lost.

4.7 On the assumption that the CLAF Group's proposal is for BTE1 (which I think it is), not BTE2, this is a proposal which merits consideration during Phase 2. However, I look forward to hearing the comments of others

4.8 Request for comments. I look forward to hearing comments during Phase 2 on the following matters:

- (i) Whether stakeholders and court users agree with the above analysis.

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<sup>23</sup> One insurer commented on seeing this chapter in draft that the BTE insurer will pay disbursements and meet any adverse costs order if the case is lost, and this is a benefit. I understand, however, that the element of premium attributable to those risks may, at least under some policies, be treated as an "additional liability" within CPR rule 43.2(1)(o). This effectively would shift the costs risk back to the other party.

<sup>24</sup> Except on the small claims track.

<sup>25</sup> There is, of course, an argument that BTE insurers help IN to find an appropriate solicitor. On the other hand, a number of stakeholders have complained to me that BTE insurers require their insured to instruct inappropriate or non-local solicitors.

<sup>26</sup> See chapter 30, section 4.

- (ii) Comments on the feasibility and merits of the proposal put forward by the CLAF Group.
- (iii) Further suggestions from the insurance industry and others as to how a substantially more extensive take-up of BTE insurance (in particular BTE1) may be promoted.

## **CHAPTER 14. AFTER-THE-EVENT INSURANCE**

### **1. INTRODUCTION**

1.1 **Nature of ATE insurance.** After the event (“ATE”) insurance was developed during the 1990s. Such insurance covers a litigant against any future liability for the costs of an opposing party. Sometimes ATE insurance covers other costs risks, such as liability for own counsel’s fees, expert fees, court fees or other disbursements (in the event that they are not recovered from the other side). Use of ATE insurance was rare in the early 1990s, but increased after 1995 when CFAs were first permitted.

1.2 **Expansion of ATE insurance post April 2000.** From April 2000 onwards the use of ATE became widespread. This massive extension of ATE insurance occurred because of a rule change, which permitted the winning party to recover the ATE premium as a disbursement. The ATE premium is classified as an “additional liability” under CPR rule 43.2. At the date of finalising this report (1<sup>st</sup> May 2009) I am told by one of my assessors that there are now 36 ATE insurers, offering 54 products.

1.3 **Self insurance.** In the majority of cases the ATE premium is itself a disbursement covered by the policy. In other words, the insured does not have to pay the premium if he loses. If he wins the insured is liable for the premium, but will seek to recover it under any order for costs.

1.4 **Which party is insured.** ATE insurance is taken out by claimants far more often than by defendants. It is more difficult to define “winning” when the insured is defendant to a suit. Also defendants are more likely than claimants (a) to have pre-existing insurance or (b) to have sufficient resources to contest the claim. Nevertheless, defendants do sometimes secure ATE insurance. Indeed it is possible for both sides of the same action to have ATE insurance, if their respective insurers take different views of the merits.

1.5 **Meeting.** On 20<sup>th</sup> January 2009 I had a meeting with about twenty major ATE insurers, underwriting agents and brokers, in order to gain a general understanding<sup>27</sup> as to how the ATE insurance market now operates. This is set out below.

### **2. ATE INSURANCE IN PERSONAL INJURY CASES**

#### **(i) Road traffic accident cases**

2.1 The vast majority of road traffic accident (“RTA”) claims are settled in favour of the claimant without any need to issue proceedings. If proceedings are issued, the action is usually settled in favour of the claimant. A small minority of RTA claims go to trial, either on liability and quantum or on quantum alone.

2.2 In practice CFAs and ATE insurance go hand in hand. Both solicitors and insurers are on risk. In that small percentage of RTA claims which fail, the solicitors recover no payment for their own work and the insurers (a) forego the premium and

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<sup>27</sup> This review had to be general in its nature, given (a) the differing risk profiles of insurers and their agents and (b) the differing products in the market that reflect diverse underwriting approaches.

(b) incur liability for the other side's costs and the disbursements of the insured. Because the risk in any given case is low, the ATE premiums are generally modest.

2.3 Fast track cases. Insurers generally give delegated authority to their panel solicitors to issue ATE cover in respect of any fast track cases which they undertake on CFAs. The premiums vary from insurer to insurer. One insurer has a single flat rate premium, between about £250 and £400. Another insurer has staged premiums, namely £300 initially rising to £600 if proceedings are issued and go beyond the allocation stage. Another insurer has a flat rate premium of £394, discounted to £340 if liability is admitted within 6 weeks. This scheme provides an incentive which is beneficial to both claimants (who are relieved of stress) and defendants (whose liability for ATE premium is reduced).

2.4 Multi-track cases. Only a small minority of RTA cases are above the fast track limit (raised from £15,000 to £25,000 in April 2009). Insurers consider each case individually and set the ATE premium. This may be in the region of £1,300 to £1,600.

2.5 Recovery of ATE premiums. This is at the risk of the claimant or his solicitor. If the case is won, in practice ATE premiums of the kind normally charged are regarded as reasonable and are recovered in full on detailed assessment or summary assessment. This has been the position since the House of Lords' decision in *Callery v Gray* [2002] 1 WLR 2000.

#### (ii) Other personal injury claims

2.6 The other principal categories of personal injury claims are employer's liability, employer's liability (disease) and public liability. The ATE insurance arrangements are similar to those for RTA, but the premiums are higher. This is because the success rates in these areas (particularly public liability) are lower than in RTA cases. The premiums conventionally charged (whether flat rate or staged) are generally recovered in full. See *Rogers v Merthyr Tydfil CBC* [2006] EWCA 1134 (Civ); [2007] 1 WLR 808.

### 3. ATE INSURANCE IN OTHER AREAS

3.1 Libel. Premiums for ATE insurance in libel cases are higher than for other types of claim, sometimes in the region of 50% of the sum insured, if the action reaches trial. Insurers maintain that this is because libel litigation is notoriously expensive; the outcome is uncertain, especially in jury trials; and costs are disproportionate to damages. Insurers have on occasions paid out the full amount of cover under ATE policies.

3.2 The amount of the premium is critically affected by the time at which insurance is taken out. If insurance is taken out at the time of issue (by which time it is clear that there will be a serious contest) the premium is substantially increased. Insurers also have regard to the track record of the claimant solicitors who are seeking ATE cover.

3.3 Large commercial cases. The use of CFAs and ATE insurance is still relatively rare in Commercial Court litigation. Nevertheless ATE cover is available for large commercial actions. The premium is assessed on a case by case basis. It is usually in the range 35% - 45% of the sum insured, sometimes with an agreed discount for early

settlement. In practice, premiums at this level are generally recovered on detailed assessment.

3.4 The great majority of such actions are settled. When a settlement is under negotiation, ATE insurers are commonly invited to take a commercial view. As part of the overall deal, the solicitors may agree to reduce their success fee and insurers may agree to reduce the ATE premium. Subject to agreeing reasonable figures, it is in the interests of all parties to avoid a trial.

3.5 Small business disputes. ATE insurance is available for small business disputes. Indeed the use of ATE insurance for such disputes is increasingly common for such litigation. This aspect is discussed further in chapter 29.

3.6 Environmental claims. Environmental claims are frequently complex and involve much expert evidence. They have the potential to generate substantial and disproportionate costs. ATE insurance is available for such claims and is assessed on a case by case basis. The premiums may be substantial. See, for example, *Bontoft v East Lindsey DC* [2008] EWHC 2923 (QB), where the premium was set at 62%. *Bontoft* is discussed further in chapter 36.

3.7 Group actions. ATE is provided for group actions (or group claims preceding group actions). Examples are shareholder claims or (less often) pharmaceutical claims. One insurer, for example, is currently providing cover for a group action re birth defects and for a group action by servicemen against the Ministry of Defence. In group litigation a single premium is charged for the whole group, rather than individual premiums for each claimant. Premiums for group litigation are commonly in the range 30 - 40% of the sum insured.

3.8 Clinical negligence. Legal aid is still available for clinical negligence. As can be seen from chapter 6 on "The broader picture", some 4,363<sup>28</sup> legally aided clinical negligence claims were brought to a conclusion (whether pre or post issue of proceedings) in the year ended 30th March 2008. Nevertheless, CFAs combined with ATE insurance are used increasingly in this field. It is estimated that the number of clinical negligence actions being commenced on CFAs with ATE cover now exceeds the number of such actions being commenced on legal aid.<sup>29</sup> One ATE provider referred to premium rates for clinical negligence claims in the region of 20% - 25%. Some insurers offer a choice between staged and flat rate premiums.

#### 4. PARTICULAR ISSUES

4.1 Security for costs. When the court orders an insured party to give security for costs, it is hoped that the court will accept the policy as sufficient security. Sometimes this is accepted. Sometimes it is not accepted, because of the possibility of insurers subsequently avoiding.<sup>30</sup> One insurer provides a deed of indemnity or bond. The cost of the bond is separate from the cost of the ATE policy and is usually 10% of the value of the bond. If a bond is not provided, the only other option may be to pay the sum ordered (up to the limit of indemnity) into court. Insurers may take this course, if the alternative is discontinuance with an immediate costs liability.

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<sup>28</sup> This is the total of the category A cases and the category B cases.

<sup>29</sup> This opinion expressed by ATE insurers may not be correct: see chapter paragraph 4.5, which suggests a roughly equal distribution.

<sup>30</sup> See *Al-Koronky v Time-Life Entertainment Group Ltd* [2006] EWCA Civ 1123.



4.2 Control. ATE insurers (unlike CFA solicitors) have no control over the conduct of the case. Although ATE insurers only issue cover if the insured is more likely than not to “win”, there is little they can do if the prospects of success deteriorate. If insurers refuse to extend cover when the action reaches a new stage, the consequence may be that the client discontinues with an immediate costs liability falling on insurers. However, if the prospects are less than 51% and the case is not close to trial, then it is likely that the ATE insurer will refuse to extend cover. Whilst ATE insurers monitor cases as they progress, they have no control over the conduct of litigation. Insurers take that monitoring into account (a) when setting reserves and (b) when considering fresh proposals or fixing premiums.

4.3 Limited historical experience. The ATE insurance market changed substantially following the rule amendments of April 2000. Since ATE insurance has a “long tail”, many insurers have not yet “closed” the first year of cover post April 2000. Therefore insurers make the point that at the moment they do not have a body of experience to assist them in setting premium levels; the ATE insurance market is still immature. Whether the accumulation of such experience will lead to a raising or a lowering of premium levels remains to be seen. ATE insurers state that they do the best they can with the data available and that they engage actuaries to assist with analysis and setting premiums.

4.4 Premium levels. An issue which is sometimes raised is whether ATE premiums generally are unduly generous to insurers. In any given case, the insured demonstrates to the court the reasonableness of the premium paid by producing a statement as contemplated by the Court of Appeal in *Rogers v Merthyr Tydfil CBC* [2006] EWCA Civ 1134; [2007] 1 WLR 808. That, however, is separate from the wider question of whether ATE premiums generally are too high or about right. In relation to this issue, insurers make the point that there are now 36 ATE providers (insurers and agents/intermediaries) active in the field. They contend that market forces bring premiums down to a proper level. This argument may have more force in relation to personal injury and clinical negligence litigation (where many insurers offer cover) than in relation to niche areas (where fewer insurers are competing for business). On the other hand, it has been suggested that the decision in *Callery v Gray* approving a figure as a reasonable premium in road traffic cases at the time has set that figure as a base-line and has resulted in the eradication of downward pressure in the market; and that the requirement for a *Rogers v Merthyr Tydfil* statement does not in practice ensure that premiums are competitive.

## **CHAPTER 15. THIRD PARTY FUNDING**

### **1. INTRODUCTION**

1.1 **Litigation funding.** Third party funders provide financial support for litigation, on the basis that they receive a percentage of the sums recovered if the action succeeds, but nothing if the action fails. The funding of litigation by third parties, who have no interest in the dispute, has traditionally been characterised as maintenance or champerty<sup>31</sup> and such funding arrangements have been held to be unlawful. In recent years there has been a sea change in the approach of the courts, both in the UK and elsewhere. It is now recognised that many claimants cannot afford to pursue valid claims without third party funding; that it is better for such claimants to forfeit a percentage of their damages than to recover nothing at all; and that third party funding has a part to play in promoting access to justice.

1.2 **Case law.** It is not the function of this report to provide an anthology of recent cases.<sup>32</sup> The present state of the law was summarised by Coulson J in *London & Regional (St George's Court) Ltd v Ministry of Defence* [2008] EWHC 526 TCC at [103] (following Underhill J in *Mansell v Robinson* [2007] EWHC 101) as follows:

“a) the mere fact that litigation services have been provided in return for a promise in the share of the proceeds is not by itself sufficient to justify that promise being held to be unenforceable: see *R (Factortame) Ltd v Secretary of State for Transport (No.8)* [2003] QB 381;

b) in considering whether an agreement is unlawful on grounds of maintenance or champerty, the question is whether the agreement has a tendency to corrupt public justice and that such a question requires the closest attention to the nature and surrounding circumstance of a particular agreement: see *Giles v Thompson*;

c) the modern authorities demonstrated a flexible approach where courts have generally declined to hold that an agreement under which a party provided assistance with litigation in return for a share of the proceeds was unenforceable: see, for example, *Papera Traders Co Ltd v Hyundai (Merchant) Marine Co Ltd (No.2)* [2002] 2 Lloyd's Rep 692;

d) the rules against champerty, so far as they have survived, are primarily concerned with the protection of the integrity of the litigation process in this jurisdiction: see *Papera*.”

1.3 **Meeting.** On 22<sup>nd</sup> January 2009 I had a meeting with about twenty five people actively involved in third party funding of litigation (“TPF”), in order to gain an understanding as to how the TPF market now operates. This is set out below.

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<sup>31</sup> Although section 14(1) of the Criminal Law Act 1967 abolishes criminal and tortious liability for maintenance and champerty, section 14(2) provides that such abolition “*shall not affect any rule of that law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal*”.

<sup>32</sup> For a helpful account of the evolving case law and legislation, see Mulheron and Cashman “*Third-Party Funding of Litigation*” (2008) 27 CJQ 312.

## 2. WHAT THIRD PARTY FUNDING IS AVAILABLE?

### (i) The funders and their selection of cases

2.1 Funders. The largest providers of TPF in the UK are or include Allianz Litigation Funding, IM Litigation Funding, Claims Funding International Plc and Harbour Litigation Funding. A number of other providers of TPF are emerging. Therium Capital plc is a new funder backed by hedge funds. 1st Class Legal Ltd is a new funder backed by a large investment fund. Further funders are identified in the article previously cited.<sup>33</sup>

2.2 Need for ATE insurance. Funders do not provide ATE cover, although they require that ATE insurance is taken out in any litigation which they support. The funder is potentially liable for the other side's costs, at least to the extent of the funding which it has provided.<sup>34</sup> A number of brokers specialise in litigation funding and put together packages comprising litigation funding and ATE insurance.

2.3 Selection of cases. Since litigation funding is a commercial activity, funders need to win the majority of cases which they back. Funders must generate a sufficient return from those cases, in order (a) to cover their costs on "won" cases (in so far as not reimbursed by the other side), (b) to cover their costs of "lost" cases and (c) to earn a reasonable profit. In order to achieve this, funders select the cases which they back with some care. One funder states that it accepts about 10% of the cases which are proposed to it. All funders state that they only accept cases with good prospects of success. Some quantify good prospects as a 70% chance of success. Others regard percentages offered by counsel or solicitors as an uncertain guide and prefer to make their own assessment in the light of legal advice.

2.4 Success rates. The success rate is an obvious way of testing the funder's selection process. This is often a matter of commercial confidence. However, one funder has informed me that of the 53 cases which it has supported the success rate is 78%.

2.5 Minimum value. The minimum value of claims which funders are prepared to support depends upon the policy of the individual funder and may vary over time. The following minimum values were stated at the meeting on 22<sup>nd</sup> January 2009:

Claims Funding International	£25,000,000
1st Class Legal	£150,000
Allianz Litigation Funding	£500,000
IM Litigation Funding	£500,000
Harbour Litigation Funding	£2,000,000

### (ii) Types of cases

2.6 Personal injury cases. There is no TPF for personal injury claims. Rule 9.01(4) of the Solicitors' Code of Conduct 2007 prohibits a solicitor from acting in personal injury claims in association with a funder who will receive a percentage of

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<sup>33</sup> Mulheron and Cashman "*Third-Party Funding of Litigation*" (2008) 27 CJQ 312.

<sup>34</sup> See *Arkin v Borchard Lines Ltd* [2005] EWCA Civ 655 at [41].

the damages. However, that rule is currently under review by the Law Society and the Solicitors' Regulation Authority.

2.7 Insolvency cases. These are commonly supported by third party funding. Liquidators have always been entitled to assign causes of action without such transactions being struck down as champertous.

2.8 Commercial cases. Claims in the Commercial Court are usually for sums far above the minimum for TPF. The funders state that since 2005, when *Arkin*<sup>35</sup> was decided, the funding of commercial cases has become more common. Whilst this is no doubt true, I understand from the Commercial Court Users Committee that within the total caseload of the Commercial Court the use of TPF is still very rare. Further, in research conducted by Ipsos MORI, FTSE 350 businesses indicated that they are unlikely to use TPF as a means of funding litigation (74% of those interviewed responding that they were either "fairly unlikely" or "very unlikely" to use it).<sup>36</sup>

2.9 Small business disputes. The sums in issue in small business disputes are modest. The perception of funders is that costs tend to be disproportionate. This category of litigation is generally unattractive to funders and does not qualify for TPF.

2.10 Patent and IP cases. The funders to whom I spoke say that IP cases are unattractive to funders because of their legal and technical complexity. Also success in such a case may lead to a stream of royalties (rather than a lump sum), which fits less readily into conventional funding agreements and the funders' financial models. Nevertheless a small number of IP cases are supported by TPF.

2.11 Construction cases. Construction cases are often unattractive to funders because of their technical complexity or because they involve a mass of claims and counterclaims. It is the perception of funders that such cases often turn on oral evidence (what was agreed at site meetings etc.) and this is a further factor which is unattractive to funders. Nevertheless TPF is sometimes provided for such cases. One funder told me at the meeting on 22<sup>nd</sup> January 2009 that he was funding a Technology and Construction Court trial due to start the following week. Funders are more willing to support adjudication<sup>37</sup> because adjudications are confined by statutory limits and thus rapidly concluded.

2.12 Defamation. In defamation cases TPF is not normally available. The level of damages is generally too low. The outcome of such cases is difficult to predict because of the pivotal role of oral evidence in many defamation cases.

2.13 Professional negligence. Funders state that there is a growing use of TPF in this field. The defendants are insured, so that (a) enforcement is not a problem and (b) meritorious claims are likely to be settled. These features make professional negligence claims attractive to funders. On the negative side, there is a perception that difficulties in proving causation or quantum may undermine claims even where the breach of professional duty is clearly established.

2.14 Group actions. In group actions, even if individual claims are small, the overall sums at issue may be sufficient for TPF. Indeed group actions are sometimes

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<sup>35</sup> *Arkin v Borchard Lines Ltd* [2005] EWCA Civ 655.

<sup>36</sup> See page 23 of "*Litigation Funding: Understanding the strategies and attitude of Corporate UK*", commissioned by Addleshaw Goddard [http://www.fundingcontrol.co.uk/control\\_mori\\_brochure.pdf](http://www.fundingcontrol.co.uk/control_mori_brochure.pdf).

<sup>37</sup> Under the Housing Grants, Construction and Regeneration Act 1996.

supported in this way. The use of TPF in group actions is growing. However, there are still some concerns about its development.

### 3. PARTICULAR ISSUES

3.1 Effect on litigation of TPF. It is the experience of funders that the existence of TPF sometimes in itself promotes settlement. This is for two reasons. First, the defendant appreciates that the claimant has the resources to see the case through. In other words, where a strong party is pitted against a weak party TPF creates a level playing field and thereby promotes access to justice. Secondly, the defendant appreciates that an independent party (*viz* the funder and its advisers) has looked at the claim objectively and assessed that there are good prospects of success.

3.2 Control. Funding agreements do not generally give funders any control over the conduct or settlement of litigation. There is a fear that any mechanism of control could give rise to allegations of champerty. Nevertheless funders have the right to express views and they may make it clear that they wish to be involved in major decisions. Funders' only weapon is to withdraw (or not extend) funding, subject to the terms of the funding agreement. It was the experience of all funders at the meeting on 22<sup>nd</sup> January 2009 that in practice conflicts between funder and client are rare, and that differences are usually capable of resolution.

### 4. SHOULD THIRD PARTY FUNDING OF LITIGATION BE REGULATED AND, IF SO, HOW?

4.1 The present position. At the moment TPF is unregulated. The principal constraint upon the terms of funding agreements and the conduct of funders is fear of allegations of maintenance and champerty. The doctrine of maintenance and champerty is an aspect of the common law which was fashioned by judges in a different age, when such a doctrine was not seen as inhibiting access to justice.

4.2 Matters for consideration. The question now arises as to whether the common law doctrine of maintenance and champerty should be replaced by a statutory code regulating the funding of litigation by third parties. This is not a step which should be taken without analysing all the consequences.<sup>38</sup> However, if this course commends itself to Parliament, then the appropriate steps would be (i) to repeal section 14(2) of the Criminal Law Act 1967 and (ii) to authorise an appropriate body to issue a code of conduct binding upon all providers of TPF. Whether that body should be a rule making body like the Civil Procedure Rule Committee or the Secretary of State for Justice would be a matter for discussion.

4.3 Draft voluntary code. A draft voluntary code was produced by a small group of third party funders, with the encouragement of the Civil Justice Council. The draft has been under discussion for some time. Unfortunately, no version for public debate is yet available. I express the hope that a draft will be put into the public domain soon, so that it can inform debate during Phase 2 of the Costs Review.

4.4 Relationship with CFAs. One crucial difference between TPF and CFAs is that the payment made to third party funders is not recoverable from the other side, whereas the success fee paid under a CFA is so recoverable. It has been commented

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<sup>38</sup> The point has been made that the doctrine of maintenance and champerty serves a useful purpose when individuals (e.g. fraudulent directors) hide behind companies, while controlling litigation.

that this puts third party funders at a disadvantage. There is also a question whether a solicitor could properly recommend TPF in a case where a CFA is available.

4.5 Request for views. I should be grateful to hear the views of all concerned on the issues canvassed in this chapter.

## **CHAPTER 16. CONDITIONAL FEE AGREEMENTS**

### **1. INTRODUCTION**

1.1 **Payment by results.** This chapter considers the mechanism of Conditional Fee Agreements (“CFAs”) introduced by section 58 of the Courts and Legal Services Act 1990 (the “1990 Act”) as a new means of funding litigation. The mechanism enables lawyers to be remunerated on a “no win – no fee” or “payment by results” basis. CFAs were first introduced in 1995.<sup>39</sup>

1.2 **Reasons for introducing payment by results via CFAs.** In 1989, following upon a recommendation in the Report of the Review Body on Civil Justice (Cm 394, 1988), the Lord Chancellor (Lord Mackay) presented to Parliament a Green Paper on Contingency Fees (Cm 751, 1989). This examined the justification for restrictions then existing on the use of such fees and considered a number of options under which such agreements could be made enforceable under English law. This was followed by a White Paper (*Legal Services: A Framework for the Future* (Cm 740, 1989)) in which formal proposals for a system of payment by results by a form of contingency fees were made (in chapter 14 thereof). The proposals were in line with Government policy on regulation, competition and consumer choice. Two factors that also influenced the decision of Parliament to enact section 58 of the 1990 Act were:

- (i) The economic consideration for Government that increasing pressure on the cost of legal aid to the taxpayer led to constraints reducing the proportion of the population eligible for legal aid in civil cases.
- (ii) The access to justice consideration, highlighted by the Consumers Association (Which?) that coined the description of the so called “MINELAS” (Middle Income Not Eligible For Legal Aid Support) to describe the section of society that was “too rich” to qualify for legal aid but “too poor” to finance the costs of obtaining legal advice and representation in court. The first incarnation of CFAs (that I shall refer to as “Style 1 CFAs”) was intended to plug this legal aid/access to justice eligibility gap, allowing payment by results. Initially this was limited to three type of case only – personal injury, insolvency and applications to the European Court of Human Rights.

1.3 **Payment by results was not new.** The principle of a lawyer’s fee being linked to the outcome of the service provided was not a new phenomenon. In non contentious business (i.e. business not involving court proceedings) it has long been possible for solicitors to agree with the client that payment would depend on the outcome of the work done, for example the outcome of a company acquisition or a planning appeal. The same applies to tribunal proceedings and Criminal Injuries Compensation Claims. Also, in 1986, the Law Society had amended its Rules of Conduct to permit a solicitor to act on a contingency fee when representing a client in a foreign jurisdiction such as the USA, where contingency fees are allowed as a percentage deduction from the client’s damages. (The Solicitor’s Code of Conduct

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<sup>39</sup> The development of CFAs in England and Wales has been thoroughly charted and explained (with extensive references to published articles and research) by Professor Michael Zander QC in successive editions of his book “Cases and Materials on the English Legal System”. In the 10<sup>th</sup> edition (published in 2007) the relevant material is found in section 6 of chapter 6. The development down to (and anticipating) the significant changes made by the Access to Justice Act 1999 is well documented in section 4 of chapter 6 of the 8<sup>th</sup> edition (published in 1999). See also Zander “*The Government’s Plans on Legal Aid and Conditional Fees*” (1998) 61 MLR 538.

2007, Rule 2.04(i) still prohibits in England & Wales the use of a contingency fee in contentious proceedings “except as permitted by statute or common law”).

1.4 Ethical issues about conflict of interest. Despite the background mentioned in the previous paragraph, the concept of a solicitor or barrister being paid to win a case in court was a novel one, about which many people (myself included) were unhappy when it was introduced. The notion that a lawyer conducting litigation with the full panoply of duties to the court and to his client should also have a financial interest in the outcome of the case was alien to our legal culture.<sup>40</sup>

1.5 On the other hand by the 1990s there was a growing realisation that some form of payment by results in litigation would be required in order to facilitate access to justice. It was also appreciated that such a system might bring other benefits. First, a system of payment by results should discourage lawyers from pursuing weak cases. Secondly, such a system would provide incentives for lawyers in respect of the cases which they do pursue. A study carried out by the Law Society in 1993 (“*Personal Injury Litigation*”) found that a substantial proportion of potential clients saw the assimilation of interest between solicitors and clients as a benefit.<sup>41</sup> “*He’s putting his money where his mouth is*” was one comment in the survey. In a speech in 1994 the Master of the Rolls, Sir Thomas Bingham, said “*suppose in litigation conducted under a conditional fee regime, a substantial offer is made at an early stage; the offer is rejected and the case goes to trial years later and the client loses. In the United States both client and lawyer are better off if the offer is accepted; so would the client be in England; but the lawyer is much better off in England if the offer is rejected (because he will be paid for the extra work, win or lose).*”

1.6 CFAs and the Bar. In the early days of CFAs, many barristers were not sympathetically disposed towards the concept of a no-win/no fee system on both commercial and ethical grounds. The Personal Injuries Bar Association (“PIBA”) led the way for the Bar in developing a model CFA for use by barristers instructed in personal injury cases. I am told that today many firms of solicitors and barristers (and sets of chambers) have established relationships amounting to a teamwork approach to handling CFA cases, spreading the risk of winners and losers. However, on the basis that a barrister is a sole trader, the personal financial risk of a lost case is greater than for solicitors.

## 2. THE LEGISLATIVE PATH

2.1 Initial legislation. Following the Green Paper and the White Paper referred to above, provisions permitting CFAs in certain circumstances were included in section 58 of the Courts and Legal Services Act 1990. Section 58 operates as a statutory bar, preventing a lawyer’s retainer to be paid by results from being unenforceable on the grounds of public policy. In other words a properly constituted CFA will not be struck down as infringing the common law principles of maintenance and champerty. Section 58 allows the use of a conditional fee in “specified proceedings” and allows the lawyer to recover an increased fee in “specified circumstances” (i.e. success). In

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<sup>40</sup> See Kritzer “*Fee Regimes and the Cost of Civil Justice*” to be published in CJQ (2009). The page reference is not available at the time of writing this chapter. “*Fee regimes are deeply embedded in legal systems and become part of the broad legal culture encompassing potential litigants, lawyers and adjudicators. That is, fee regimes shape the understanding and expectations of participants.*” (page 18 of proof).

<sup>41</sup> This work appears not to have been published. However, it was referred to by Rodger Pannone, President of the Law Society, in a talk to the 1994 APIL conference, reported at (1994) 139 S.J. 560.



essence section 58 is a statutory concession that permits CFAs as a lawful species of contingency fee.

2.2 Implementation. The enabling provision of section 58 Courts and Legal Services Act 1990 was activated by the Conditional Fee Agreements Order 1995 (S.I. 1995/1674) specifying three types of permitted proceedings, namely personal injury, insolvency and ECHR applications. It also provided that the maximum increase on the normal level of fees the lawyer could claim in a successful case for “advocacy or litigation services” (to reflect the risk of losing balanced against the success of winning) would be 100%. The detailed provisions required to implement section 58 were contained in the Conditional Fee Agreement Regulations 1995 (S.I. 1995/1675).

2.3 Amendment with effect from April 2000. Section 27 of the Access to Justice Act 1999 amended section 58 of the Courts & Legal Services Act 1990, and sets out the current statutory definition of a CFA as follows:

“A conditional fee agreement which satisfies all the conditions applicable to it by virtue of this section shall not be unenforceable by reason only of its being a conditional fee agreement; but (subject to subsection (5)) any other conditional fee agreement shall be unenforceable.”

2.4 Development of Government policy. By the late 1990s it was Government policy, clearly articulated in a consultation paper entitled “*Access to Justice with Conditional Fees*” issued by the Lord Chancellor in March 1998,<sup>42</sup> to (a) extend the scope of CFAs to all civil proceedings (excluding family);<sup>43</sup> (b) remove legal aid support from personal injury cases (excluding clinical negligence); and (c) introduce “recoverability” The principle of recoverability meant that success fees and ATE premiums would be recoverable from the unsuccessful opponent (ensuring 100% of damages for the client). I will refer to CFAs with these features as “Style 2 CFAs”.

2.5 Success fees recoverable. Section 27 of the Access to Justice Act 1999 made amendments to the Courts and Legal Services Act 1990 enabling recovery of success fees. Section 58(A) provides that:

- “(6) A costs order made in any proceedings may, subject in the case of court proceedings to rules of court, include provision requiring the payment of any fees payable under a conditional fee agreement which provides for a success fee.
- (7) Rules of court may make provision with respect to the assessment of any costs which includes fees payable under a conditional fee agreement (including one which provides for a success fee).”

2.6 ATE premiums recoverable. Section 29 of the Access to Justice Act 1999 provides for recovery of insurance premiums:

“Where in any proceedings a costs order is made in favour of a party who has taken out an insurance policy against the risk of incurring a liability in those proceedings, the costs payable to him may, subject in the case of court proceedings to rules of court, include costs in respect of the premium of the policy.”

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<sup>42</sup> See further paragraph 4.1 below.

<sup>43</sup> This was done by the Conditional Fee Agreements Order 1998.

2.7 Detailed provisions for Style 2 CFAs were set out in the Conditional Fee Agreements Order 2000 (S.I. 2000/823) and the Conditional Fee Agreements Regulations 2000 (S.I. 2000/692). Further provisions to enable the recovery of success fees and insurance premiums by “membership organisations” are contained in the Access to Justice (Membership Organisations) Regulations 2000 (S.I. 2000/693). Provisions to enable the use of a collective conditional fee agreement (“CCFA”) in an appropriate situation are contained in the Collective Conditional Fee Agreements Regulations 2000 (S.I. 2000/2988).

2.8 Subsequent amendments. As a result of the considerable amount of satellite litigation<sup>44</sup> caused by technical challenges to the enforceability of Style 2 CFAs the CFA Regulations 2000 were amended twice. First, the CFA (Miscellaneous Amendments) Regulation 2003 (S.I. 2003/1240) came into force on 2<sup>nd</sup> June 2003, making express provision for a simplified CFA, reducing the likelihood of technical challenge. Secondly, the CFA (Miscellaneous Amendments No2) Regulations 2003 (S.I. 2003/3344) came into force on 2<sup>nd</sup> February 2004, making further amendments to the simplified CFA regime.

2.9 The above amendments were still insufficient to stem the flow of technical challenge litigation. This became such a problem that the decision was made to transfer the consumer protection measures contained in CFA agreements from the statutory basis of the CFA Regulations to the professional obligations of solicitors under the regulatory provisions of the Solicitors Costs Information and Client Care Code. The CFA Revocation Regulations 2005 (S.I. 2005/2305) therefore revoked the CFA Regulations 2000 with effect from 1<sup>st</sup> November 2005.

### 3. STYLE 1 CFAS

3.1 Deducting a percentage of client’s damages. Style 1 CFAs operated on the basis that the success fee and after-the-event (“ATE”) insurance premium would be deducted from the clients damages. To protect the client from suffering a deduction disadvantage that would disproportionately reduce the damages, the Law Society issued a recommendation to solicitors that a voluntary cap should be applied to ensure that the total deduction would be limited to no more than 25% of the damages recovered. The Law Society model CFA agreement actually incorporated a provision for the 25% cap (see Napier & Bawdon, “*Conditional Fees: a Survival Guide, Law Society*”, 1995). (There was already at least one example of damages being reduced by a levy, agreed by the client as a condition of funding – the legal aid statutory charge which has been in existence since the inception of the legal aid scheme. Allied to this was the provision that, at one time, required solicitors and barristers acting under a legal aid certificate, to pay a proportion (10%) of their recovered costs to the Legal Aid Board).

3.2 Benefits of Style 1 CFAs. There can be little doubt that, as Parliament intended, Style 1 CFAs enabled the “MINELAS” sector of society to gain access to justice that they would otherwise have been denied. There do not appear to have been complaints from clients represented on Style 1 CFAs about the price which they had to pay for access to justice, namely a deduction of up to 25% from their damages.<sup>45</sup>

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<sup>44</sup> This is summarised in chapter 3, section 5 entitled “The Costs War”.

<sup>45</sup> This observation has been confirmed by one of my assessors, Michael Napier QC, who has immense experience of acting for claimants and who served as President of the Law Society in 2000-2001.

3.3 Assessing success fees under Style 1 CFAs. The concept of CFAs up to a maximum success fee of 100% was based on the principle that, in a no win – no fee system, the winning cases had to pay for the losing cases. Guidelines to solicitors and barristers included in the Law Society’s “*Survival Guide*”<sup>46</sup> explained to practitioners how to strike the right balance in assessing the risk of win/loss and arriving at the correct success fee, whilst also ensuring that the likely level of damages would be sufficient to absorb the capped 25% deduction. The Law Society Guidebook contained (and still contains in its third edition) a “Ready Reckoner” that calculates mathematically the correct success fee to reflect the prospects of success. For example, a case where the chances of success are assessed at 75% requires a success fee of 33%. The 100% maximum success fee means that, statistically at least, the maximum justifiable risk is a 50/50 case. The “winners pay for the losers” concept is particularly sustainable where the lawyers taking the risk associated with no win – no fee have built up a “book” of CFA cases, allowing them to spread any losses against gains in successful cases. The concept is less reliable where lawyers rarely use CFAs. It becomes even more vulnerable due to the other variable factor, namely costs levels in different cases. The level of costs in one losing case may be much higher than the success fees recovered in several winning cases (or vice versa).

3.4 ATE insurance for Style 1 CFAs. The inextricable link between CFAs and ATE insurance, was established from the outset under the auspices of the Law Society’s “Accident Line” scheme. In the same way that for lawyers operating under CFAs the “winners had to pay for the losers”, so for ATE insurers the premiums received in winning cases needed to be sufficient to meet the costs paid out in unsuccessful cases. From the point of view of claimants under Style 1 CFAs, the ATE premiums represented part of the deduction<sup>47</sup> from their damages.

#### 4. STYLE 2 CFAS

4.1 Underlying policy. The extension of CFAs to nearly all civil cases by the Access to Justice legislation of the late 1990s reflected the thinking set out in the Government’s original consultation paper “*Access to Justice with Conditional Fees*” (1998):

- “1.2 A huge swathe of ordinary people on modest incomes are deterred from starting a legal action by the potential costs of litigation – their own costs and the risk of ending up paying the costs of the other side.
- 1.3 The current system does not encourage lawyers – who are paid the same, win, lose or draw, to weed out weak cases. This means that too many people undergo the strain of lengthy legal disputes for nothing.
- 1.4 At the same time the cost of the Legal Aid Fund goes up and up...on civil alone the costs had almost tripled.
- 1.6 ...The Government intends to promote access to justice for the majority of the population in England & Wales through the wider availability of conditional fee agreements. This will make access to the courts a reality for the majority of the population of England & Wales. Conditional fees ensure that the risks of

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<sup>46</sup> Referred to in paragraph 3.1 above.

<sup>47</sup> Subject to the overall 25% cap mentioned in paragraph 3.1 above.

litigation are shared between the lawyer and the client: clients do not pay their lawyer fees unless they win, and lawyers, when they win, receive a level of fees that recognises the risk they have taken.”

4.2 Recoverability. It seems that the Government decision to introduce recoverability of success fees and ATE insurance premiums was driven by the desire to ensure that claimants who would previously have received 100% of damages if supported by legal aid, should be no worse off if bringing a case on a CFA. The Style 1 CFA model where success fees and ATE premiums were deducted from the client's damages was therefore abolished.

4.3 Cultural shift. There can be little doubt that the combination of (a) removing legal aid for personal injury cases (b) extending CFAs to all civil cases except family and (c) introducing recoverability of success fees and insurance premiums caused a cultural shift in the role of CFAs as a core method of funding litigation. In personal injury cases the realisation that recoverability means, in effect, ‘no cost to you’ for the client led to entrepreneurial organisations advertising for clients and developing complex networks of financial arrangements that were less than transparent to clients. The ensuing litigation relating to the “Claims Direct” and “TAG” claims management organisations placed a heavy burden on the courts and tarnished the image of the no win – no fee system as a means of access to justice for consumers. Outside personal injury litigation, the use of CFAs has gradually increased. Indeed CFAs have started to be adopted even in commercial litigation, although CFAs in the Commercial Court are still rare.<sup>48</sup>

4.4. The principle of recoverability also provided the ammunition for the so called “Costs War”<sup>49</sup> in which liability insurers in personal injury cases challenged the enforceability of CFAs often by minute scrutiny of the wording of the agreement and the behaviour of claimant lawyers in arranging ATE cover. A successful challenge could mean that solicitors and barristers who had legitimately incurred substantial costs, comprising “base” (hourly rate) costs and success fee, in a winning case could lose everything (even the base costs) if guilty of a technical breach of the CFA regulations. Although the number of technical challenges have reduced since revocation of the 2000 Regulations in relation to cases started after November 2005, the lengthy attrition of the Costs War and the burden on both the courts and practitioners had the consequential effect of creating (for some) a negative impression of Style 2 CFAs.

## 5. REVIEW

5.1 Two views about CFAs. Amongst people to whom I have talked during Phase 1 of the Costs Review, two clear views about CFAs have emerged. The first view (held by the majority) is that CFAs have now become absorbed into our legal culture; and that in the post-legal aid era CFAs provide access to justice for large number of individuals who would otherwise be without a remedy. The second view (held by a minority) is that CFAs are injurious to the fabric of civil justice and should be abolished.

5.2 The majority view. The majority view is reflected in a report by the Civil Justice Council (“CJC”) entitled “*Improved Access to Justice – Funding Options and*

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<sup>48</sup> See chapter 10, paragraph 7.7.

<sup>49</sup> See chapter 3.

*Proportionate Costs; the Future Funding of Litigation – Alternative Funding Structures*.<sup>50</sup> The CJC stated the following as its second “key assumption”:

“The concept of ‘no win – no fee’ is now ingrained in the funding system. This paper accepts that it is current Government policy to continue to support the funding mechanism of Conditional Fee Agreements in their current form, and is written on the assumption that Government has no immediate plans to change this policy.”

It is now nearly 20 years since the Courts and Legal Services Act 1990 was enacted and nearly 15 years since the CFA system of funding civil cases was introduced as a concessionary form of contingency fee. The public, both branches of the legal profession and the courts have on a daily basis become used to the no win – no fee CFA system as a core method of funding litigation not only in personal injury cases but also more widely. Most lawyers and court users now accept that CFAs, at least in some form, should remain.

5.3 The minority view. An alternative view has been expressed to me by certain senior members of the profession, namely that CFAs are pernicious and should be abolished. The concerns of certain members of the Bar about CFAs were neatly summarised by the Personal Injuries Bar Association (“PIBA”) in its written submissions for Phase 1 of the Costs Review. In the concluding section PIBA states as follows:

“We note that in his Terms of Reference document, Jackson LJ states ‘before CFAs were introduced there were fears that CFAs would lead to irreconcilable conflicts of interest. My impression is that this has not happened. But no doubt people will tell me if this is wrong’.

Unfortunately, we do believe that this is wrong. CFAs lead to huge conflicts of interest but the only reason that we have not heard much about them is that in reality, the only way in which this system can operate is either to gloss over those difficulties or to ignore them altogether.

There is inevitably going to be a conflict of interest where the lawyer is financially interested in the outcome of the case. However, CFAs magnify this conflict of interest because, as we have said previously, it is in the lawyer’s interest to effect any settlement, rather than one which is genuinely in the interests of his or her client.

When CFAs were first introduced, the Bar Council’s CFA Panel advised barristers that when discussing settlement with clients, they were obliged to point out that it was in the barrister’s interest if the client did accept the money on offer. In practice, this becomes almost impossible.

Clients are very often reluctant to accept that they must bear a proportion of the blame for an accident and equally often have hugely inflated expectations as to what their claims are worth or as to what a realistic settlement value is, taking into account the risks on both sides. It becomes totally artificial for a barrister who considers that the other side have made a reasonable offer to advise his client to accept that offer while at the same time stating that it is in his or her interests that such an offer be accepted. These problems are magnified considerably when the settlement discussions are under pressure at the door of the

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<sup>50</sup> Published in August 2007.

court and even more so when the defendant makes a global offer inclusive of costs as occurs frequently.

If you ask an individual claimant lawyer what he thinks of CFAs, he may give a subjective answer depending on whether he has made or lost money out of them. However, taking an objective view of them, we believe that the system has brought the civil justice system into disrepute.”

5.4 My own provisional view. My own provisional view is that, following the retraction of legal aid, either CFAs or some other system of payment by results (contingent fee agreements, CLAF, SLAS, third party funding agreements etc.) must exist in order to facilitate access to justice. The underlying principle of payment by results has been absorbed into our litigation culture over the 14 year period since 1995. In the language of Professor Kritzer<sup>51</sup> the principle is already becoming embedded. A new generation of lawyers has grown up with CFAs. The real issue, therefore, is how CFAs or alternative “no win – no fee” arrangements should be structured, not whether they should exist. We should be aiming so far as possible for structures which provide incentives:

- (i) for lawyers to get the best possible results for their clients, whilst discharging their duties to the court and to other parties;
- (ii) for clients to propose or accept reasonable settlements; and
- (iii) for all parties to keep costs down to proportionate levels.

5.5 Criticisms. A number of criticisms have been made of CFAs in their present form. In particular, it is contended that claimants on CFAs have no interest in the costs being incurred on their behalf, because (win or lose) they will never have to pay those costs. Therefore an important discipline is lacking. Another criticism advanced is that the costs of litigation have been massively increased by CFAs. In cases with 100% success fees claimant lawyers recover twice their base costs. Also defendants (in addition to paying up to double the base costs) have to pay huge sums for ATE insurance in respect of cases which they lose.<sup>52</sup>

5.6 A separate issue which has been raised is whether success fees are being set too high (except, of course, in cases where they are fixed under Part 45). The allegation made by some is that success fees are set at a level which more than compensates lawyers for those relatively few cases which they lose. This is not an issue which can be debated in general terms. It needs to be considered by reference to individual categories of cases (personal injuries, defamation, etc).

5.7 Whether success fees and ATE premiums should continue to be recoverable and, if not, what alternative arrangements should be made will be discussed in chapter 47. In relation to the issues raised in this chapter, I look forward to hearing during Phase 2 of the Costs Review further comments and information bearing on the following questions:

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<sup>51</sup> See the reference in footnote 40 above.

<sup>52</sup> In his submission for Phase 1 of the Costs Review the Treasury Solicitor wrote: “*We as the Government’s solicitors find ourselves increasingly faced with claims of quite staggering amounts but are unable to challenge them because they are what the market has shown it will support and therefore we cannot point to cheaper alternatives.*”

- (i) Are CFAs in their present form satisfactory?
- (ii) If not, what reforms might be made in order to create appropriate incentives for all involved in the litigation process?
- (iii) What is the impact of CFAs on particular categories of litigation (beyond the impacts already identified in chapters 25 to 39 below).

## **CHAPTER 17. SELF FINANCING**

### **1. INTRODUCTION**

1.1 Little is known about how parties fund litigation once we move away from external arrangements such as public funding, conditional fee agreements and insurance. There is business criticism of the costs of legal services. That criticism has not generally translated itself into specific proposals for reform of matters such as allocating costs in litigation. It is sometimes said that mediation has a cost advantage over litigation, although detailed evidence supporting that proposition is absent.

1.2 At the other end of the spectrum it is said that cost, and a reduction in the availability of legal aid, are explanations for what is identified as an increasing number of litigants in person. That trend seems to impose greater demands on the courts and thus on the core cost of operating the machinery of justice.

### **2. ORGANISATIONAL SELF FUNDING**

2.1 Own resources. Many organisations draw on their own resources to fund legal services. Larger organisations may employ in-house lawyers, or others, to reduce legal costs. Baldwin's study of small claim courts found that the commercial and small business sector employ experienced persons in-house to conduct routine litigation: J Baldwin, "*Small Claims in the County Courts in England and Wales*" (Oxford, 1997), 30. That is confirmed by the number of sole traders, partnerships and larger companies which do not have legal representation but represent themselves in certain types of litigation in the courts, especially when defendants. Similarly, local authorities and housing associations commonly rely on having officers to represent them in matters such as housing repossessions because of rent arrears: see R Moorehead & M Sefton, "*Litigants in Person: Unrepresented litigants in first instance proceedings*" (DCA Research Series 2/05, 2005, 19, 37, 39, 63).

2.2 Representation in the higher courts. Once a dispute gets to the higher courts the organisation may turn to a law firm or counsel. For particularly heavy litigation the organisation may conduct a "beauty parade". Funding of litigation will often be as an ordinary business expense. Test cases may attract support from a trade association or other businesses facing the same problem. The internal controls which organisations impose on legal spend do not seem to have been the subject of systematic analysis.

2.3 Pressures to settle. There are a number of studies which demonstrate how businesses attempt to settle rather than litigate disputes, with other businesses. A classic study of engineering firms, mainly in South West England, found that "*the pressures to settle quickly are enormous: not only do negotiations, even over the phone, waste valuable time, but any outstanding dispute is an impediment to doing business in the future*": H Beale & T Dugdale, "*Contracts between Businessmen: Planning and the Use of Contractual Remedies*" (1975) 2 Brit J L & S 45, 59.

### **3. LITIGANTS IN PERSON**

3.1 Reasons for increase. Cost is generally advanced as an important reason for what is said to be the increase in unrepresented parties before the courts. There is some support for this in the leading study of the legal needs in the population and



how they are met: the second most common reason given for acting in person was the inability to find a lawyer. (The most common was that respondents did not think they had to be represented): see H Genn, et al, “*Paths to Justice*” (Oxford, 1999), 22. Cost was mentioned by court staff and by the small sample of litigants in person interviewed by Moorehead and Sefton, although cost was not the only or overriding reason for most to be self-represented: *op cit.*, 20.

3.2 Unrepresented parties and costs: Australian report. The policy issue as to whether unrepresented parties should recover costs was considered by the Australian Law Reform Commission in its report, “*Costs shifting – who pays for litigation*”, ALRC (75 Sydney 1995). The Commission considered the arguments against allowing unrepresented litigants to recover costs. First, the costs rules should not encourage parties to appear without legal representation. Proceedings involving an unrepresented litigant tended to be longer, placed greater demands on the courts and caused the other party to incur additional costs. The inevitable increase in legal costs for the opposing party, and the demands on the court resources, should not be encouraged. Secondly, an unrepresented litigant should not be able to recover costs which cannot be recovered by a represented litigant. A represented litigant had to bear the cost of having to use his or her own time and resources to instruct lawyers, receive advice and attend court, so why should an unrepresented litigant recover? (paragraph 17.3 of the report).

3.3 The Commission rejected those views. Its conclusion was that an unrepresented litigant should not be excluded from recovering his or her costs, which was especially important where the other party had been the subject of a disciplinary cost order. Legal representation should not be driven simply by costs allocation rules. An unrepresented litigant should be entitled to recover disbursements and to recover his or her own costs of preparing and presenting the case. To ensure that the interests of all parties and of the court system were taken into account, however, an unrepresented litigant’s own costs should generally be limited to lump sum amounts set out in a schedule, the amounts depending on complexity.

3.4 The Commission accepts that an unrepresented litigant should not be in a better position than a represented litigant. Accordingly, the lump sum amounts should be calculated on the basis that the costs recoverable by an unrepresented litigant:

- should not exceed the reasonable costs of a lawyer performing the work reasonably required to conduct the litigation;
- should not exceed the amount of costs actually incurred by the litigant;
- should not include costs that would not be recoverable by a represented litigant.

3.5 The position in England and Wales. The entitlement of a litigant-in-person to recover costs was established by the Litigants in Person (Costs and Expenses) Act 1975. That entitlement is currently regulated by CPR rule 48.6. Rule 48.6(3) provides that the litigant-in-person is allowed:

- “(a) costs for the same categories of
  - (i) work; and
  - (ii) disbursements,

which would have been allowed if the work had been done or the disbursements had been made by a legal representative on the litigant-in-person’s behalf;

- (b) the payments reasonably made by him for legal services relating to the conduct of the proceedings; and
- (c) the costs of obtaining expert assistance in assessing the costs claim.”

3.6 The rule applies both to individuals and to companies acting without legal representation. There is an attempt to maintain proportionality in that the costs must not exceed two-thirds of the amount which would have been allowed if the litigant-in-person had been represented by a legal representative. That limit does not apply to disbursements, which may be obtained in full. Where the litigant can prove financial loss the amount of costs to be allowed for any item of work is the amount proved as lost for time reasonably spent on doing the work. Otherwise it is an amount for the time reasonably spent on doing the work at the rate set out in the Costs Practice Direction<sup>53</sup> (presently £9.25 per hour). A litigant who is allowed costs for attending at court to conduct the case is not entitled to a witness allowance in addition to those costs. Evidence as to the operation of this rule and the Practice Direction would be welcome.

3.7 Inequality of arms. The point has been made in submissions for Phase 1 that the present costs rules create an imbalance, where one side has legal representation and the other side is acting in person. One party faces a huge costs liability if it loses, whereas the other party faces a much lesser risk (probably costs assessed at the rate of £9.25 per hour). Whilst I see the force of this point, having regard to the policy considerations mentioned above, I doubt that the rules could sensibly provide for litigants in person to recover costs at “lawyer” rates.

#### 4. REVIEW

4.1 During the course of Phase 2 of the Costs Review I look forward to receiving any comments or data bearing upon the issues discussed above. In particular, I should be interested in evidence concerning the operation of the rules concerning awards of costs to litigants in person.

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<sup>53</sup> Supplementing Parts 43 to 48 of the CPR.

## **CHAPTER 18. CLAF AND SLAS EXPLAINED**

### **1. INTRODUCTION**

1.1 **Nature of self-funding schemes.** This chapter considers self-funding schemes under which the costs of funding claims are re-cycled by means of a levy of some sort on successful claims, enabling a population of cases to be funded on a broadly cost neutral basis. Such a mechanism has never been put into operation in this jurisdiction, although there have been numerous proposals to do so and self-funding schemes have been set up in other jurisdictions with varying degrees of success.

1.2 Self-funding schemes are different in concept from individual funding mechanisms such as a conditional or contingency fee agreement between lawyer and client. A CFA can work for an individual claim in isolation, its success fee and premium being determined solely according to the risks of that individual case. By contrast self funding systems usually require a range of cases in which the stronger will tend to subsidise the weaker.<sup>54</sup> Professor Zander has pointed out:

“The concept avoids the main alleged danger of contingency fees of lawyers being tempted into unethical conduct because of the financial importance of winning.”<sup>55</sup>

1.3 **CLAF and SLAS.** Most self-funding schemes are put forward under the banner of either a CLAF or a SLAS. CLAF usually stands for “Contingency [or Contingent] Legal Aid Fund”. SLAS usually stands for “Supplementary Legal Aid Scheme”. These are not terms of art and cover a wide variety of funding options. For the purposes of this report, however, I will use the term CLAF when referring to a free-standing fund. The essential feature of a CLAF is therefore that once it is established it is expected to stand on its own feet and be fully self-financing. A SLAS on the other hand is a self-funding mechanism which is built into or added onto an existing publicly funded legal aid scheme, and administered by the relevant legal aid authority. In principle self-funding mechanisms could be introduced into any legal aid scheme across the board, in which case the effect would simply be to reduce the net cost of the scheme. Most proposals for a SLAS, however, propose it for individuals outside normal legal aid eligibility: the so-called “MINELAS”, who are too rich for legal aid but too poor to proceed privately.

1.4 **Background.** In 1978 Justice published its original proposals for a CLAF. 21 years later in 1997 in the run-up to the Access to Justice Act 1999 (“1999 Act”) and removal of personal injury cases from the scope of legal aid a range of proposals were made by the Bar Council, Law Society and the Consumer Association.<sup>56</sup> None of these proposals were implemented, as the Government chose instead to promote and enhance CFAs under the 1999 Act reforms (see chapter 16). However, provisions were included (but not as yet implemented) within the 1999 Act to provide for a CLAF or SLAS system.<sup>57</sup> It was also observed at the time that if there was indeed a

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<sup>54</sup> Admittedly this distinction becomes blurred when one considers a large solicitors firm running a basket of cases under CFAs to spread the risk of losing. However, the terms of each CFA must be justified on its own facts – see *C v W* [2008] EWCA Civ 1459 and earlier authorities.

<sup>55</sup> “*Cases and Materials on the English Legal System*” (Cambridge University Press, tenth edition, 2007), page 646.

<sup>56</sup> See “*CLAF – An idea whose time has come*”, Bar Council 1997; “*Proposals to link legal aid and conditional fees*”, Law Society 1997; CA Policy Paper on CLAF, 1997.

<sup>57</sup> The 1999 Act section 28. See next chapter.

sound business case for setting up a CLAF there was nothing to prevent this being done on a private commercial basis.

1.5 The CJC Report. In June 2007 the Civil Justice Council published its second report on the future funding of litigation and alternative funding structures.<sup>58</sup> This report included a detailed evaluation of a wide range of CLAF and SLAS options and recommended that a CLAF should not be established but that, subject to consultation and appropriate financial modelling, a SLAS should be set up and operated by the Legal Services Commission. The Government has chosen not to implement this proposal at the present time, there being insufficient evidence of need for a SLAS mechanism in light of the wide availability of CFAs.

1.6 Main policy issues. In this report I will not set out in detail the numerous possible varieties of CLAF or SLAS which could be established – these are discussed in more detail in the CJC report. It is however useful to summarise the main policy issues which would need to be addressed in setting up such a scheme, with particular reference to the impact on costs and cost shifting:

- (i) Should any self-funding scheme be set up as a CLAF or as a SLAS and, for a CLAF in particular, where should initial seed funding come from?
- (ii) From what source should the levy on successful cases come, and how should it be calculated? Most CLAF and SLAS models are based on a percentage levy on damages recovered, but other options include a levy on *inter partes* costs recovered.
- (iii) Who should be liable for other side's costs (assuming cost shifting applies)? This issue can be highly material to the viability of a CLAF or SLAS. A potential key advantage of a SLAS is to make use of statutory legal aid cost protection under section 11 of the 1999 Act.
- (iv) What should the remuneration regime be for lawyers operating under the scheme? For a SLAS the obvious answer is likely to be to use existing legal aid remuneration rates.

## 2. SELF FUNDING SCHEMES IN OTHER JURISDICTIONS

### (i) Hong Kong

2.1 The Hong Kong SLAS. The most famous self funding scheme is that operated by the Hong Kong Legal Aid Department, established in 1984. It is a SLAS in the true sense, funded by a levy of damages recovered. The levy is 10%<sup>59</sup> in respect of cases that proceed to trial and 6% in respect of cases settled before the brief for trial is delivered. Whilst applicants to the SLAS are means-tested the eligibility limits are higher than those which apply in the main Ordinary Legal Aid Scheme.<sup>60</sup> The SLAS scheme was started up with a \$1 million Hong Kong dollar loan (subsequently repaid) provided by the Jockey Club (which has a similar role to lottery funding in the UK). The scheme has been running profitably, in the sense of covering both its expenditure

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<sup>58</sup> “*Improved access to Justice – Funding Options and Proportionate Costs*”, CJC, August 2007.

<sup>59</sup> This figure was originally 12%, but was reduced to 10% in 2005.

<sup>60</sup> According to figures provided at a meeting with the Hong Kong Legal Aid Department in March 2009, approximately 50% of households are eligible for ordinary legal aid; approximately 70% of households are eligible for support from the SLAS.

and administration costs, for 25 years. The scheme covers a range of personal injury cases from road traffic to clinical and dental negligence.<sup>61</sup>

2.2 Number of cases supported. Despite its high profile, the scheme covers only a modest number of cases, the volume of which has fallen somewhat in recent years. The legal aid authorities have a cautious approach to assessing the merits of applications, but it also appears likely that significant numbers of more straightforward personal injury cases proceed by means other than the SLAS. It should be noted, however, that CFAs and contingency fee agreements are not permitted in Hong Kong. The following table shows the volume of cases accepted by the Hong Kong SLAS in recent years:

<b>Year</b>	<b>Applications received</b>	<b>Certificates granted</b>
1997	260	179
1998	252	157
1999	365	268
2000	211	204
2001	220	159
2002	162	124
2003	106	79
2004	120	85
2005	158	85
2006	137	127
2007	136	79
2008	146	95

2.3 Success rates and financial viability of the SLAS. The above figures are on a calendar year basis. The SLAS scheme's financial year, however, runs from 1<sup>st</sup> October to 30<sup>th</sup> September. In the year 2006-7 the success rate for cases supported by the SLAS was 90.5%. In the year 2007-8 the success rate was 87%. A high success rate is necessary for the financial viability of the fund. A substantial number of "won" cases may be necessary to cover the costs of both sides in one "lost" case. By way of example, the Hong Kong Legal Aid Department tells me that one heavy case which was recently lost cost the SLAS a total of some HK \$17 million.<sup>62</sup> The balance of the SLAS fund as at the end of December 2008 was HK \$90.3 million.

2.4 Mediation. Since 2<sup>nd</sup> April 2009 the SLAS has been empowered to meet the costs of mediation as well as costs of court proceedings. If the mediation is successful, it is anticipated that the defendant will reimburse the mediation costs as part of the settlement. If, however, for any reason the defendant does not reimburse the mediation costs, then the Legal Aid Department would deduct those costs (as well as the 6% levy) from the damages.

2.5 Perceptions of the SLAS amongst court users. The Hong Kong Law Society regards the SLAS as a valuable mechanism for promoting access to justice. I understand that the Law Society is pressing for the SLAS to be extended in two ways: first to widen the band of financial eligibility; secondly to widen the range of cases which the SLAS is empowered to support. There is, however, a perception amongst certain commercial solicitors<sup>63</sup> that when they are litigating against a SLAS supported

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<sup>61</sup> Originally the SLAS only covered personal injury claims. In 1995, however, with the aid of a HK \$27 million grant from the Hong Kong Government, the scheme was expanded to cover claims for medical, dental and legal negligence.

<sup>62</sup> This was an employers liability case, with senior counsel, junior counsel and expert witnesses on each side. The trial lasted over a month. There was no appeal.

<sup>63</sup> Expressed to me at a meeting of commercial solicitors on 25<sup>th</sup> March 2009.

claimant, the bureaucracy of the Legal Aid Department makes settlement negotiations difficult. The Department assesses a case at the outset and again just before trial. However, settlement between those two dates can give rise to difficulties. In the opinion of those commercial solicitors, a CLAF operated independently of the Legal Aid Department but upon the same principles as the present SLAS would be more advantageous.

(ii) Canada

2.6 Ontario. The Ontario Class Proceedings Fund (the “Fund”) was established pursuant to the Class Proceedings Act 1992 with seed funding of Cdn \$500,000, which was a grant made jointly by the Law Foundation of Ontario and the Attorney General of Ontario. The Fund meets adverse costs orders and pays disbursements<sup>64</sup> in class actions, but it does not pay fees to the claimants’ lawyers. If the action is successful, then the Fund recovers from the proceeds of the action (a) the disbursements which it has previously paid out and (b) 10% of the net proceeds of the action.<sup>65</sup> In Canadian class actions, the claimants’ lawyers invariably act on contingency fee agreements.<sup>66</sup> The amount of the lawyers’ remuneration is fixed by the court at the end of each case. The court may allow less remuneration than is provided for in the contingency fee agreement. The lawyers’ fees are also deducted from the proceeds of the litigation. The various deductions made from the damages (as itemised above) are partially offset by whatever costs are recovered from the defendants, either by order of the court or pursuant to the terms of the settlement.

2.7 Although successful, the Ontario Class Proceedings Fund operates on relatively low volumes. The larger and more meritorious class actions usually proceed without reference to the Fund. In 2007 the Fund supported two class actions (out of three applications). In 2008 the Fund supported nine class actions (out of 12 applications). I am told by counsel to the Class Proceedings Committee (which runs the Fund) that the Fund supports approximately 10% of all class actions.<sup>67</sup> The Fund has supported 89 class actions since commencement of operations in 1993. The balance held by the Fund as at 31<sup>st</sup> December 2008 was Cdn \$6,571,628.

2.8 I heard some concern expressed by the judiciary as to the high level of the deduction made by the Fund in cases where (a) the sum awarded to the claimants may be large and (b) the commitment made by the Fund may be modest (e.g. because the claim is strong and is settled early). The Fund, however, has no discretion as to what it deducts, since the figure of 10% is fixed by statute. I am told, however, that the Class Proceedings Committee is considering whether amendments to the 1992 Act should be sought, which would reduce the percentage deducted (a) in very high value cases and (b) in low value cases.

2.9 Quebec. Perhaps the most innovative and active self-funding scheme is the Fonds D’aide aux Recours Collectifs (“the Fonds”) which has been operating in Quebec since 1978. The Fonds is a form of subsidised CLAF to support class actions. Canada has a comprehensive class action regime, including the power of courts to

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<sup>64</sup> Disbursements are court fees, experts’ fees etc. Counsel’s fees do not constitute disbursements.

<sup>65</sup> The net proceeds of the action are the proceeds of the action after all costs have been deducted.

<sup>66</sup> In contingency fee agreements for class actions, the premium for success is a multiple of the normal fee, rather than a percentage of the sum awarded to the claimants: see chapter 61 below.

<sup>67</sup> Meeting on 9<sup>th</sup> April 2009.

award general “*cy pres*” damages which may remain unallocated to any individual claimant at the end of a case. The Fonds generates its income from a levy on these or on allocated damages.

2.10 Interestingly, the Fonds operates in a jurisdiction where there is only limited cost shifting.<sup>68</sup> In successful cases the claimant lawyers will reimburse the Fonds for the funding provided (which will have been at limited prescribed rates similar to those under our own legal aid regime) and receive payment by way of contingency fee out of all damages awarded together with limited *inter partes* costs.

### (iii) Australia

2.11 South Australia. The South Australia Litigation Assistance Fund (“SALAF”) was set up in July 1992 with a seeding grant of Aus \$1 million. Applications for assistance are considered by an Assessment Panel of the SALAF. If an application for assistance is approved, the SALAF pays the assisted party’s costs on an ordinary solicitor/client basis. In the event of success, the SALAF (a) recovers costs from the defendant and (b) deducts 15% of the judgment or settlement sum. If the assisted party is unsuccessful, the SALAF does not meet any costs order made in favour of the defendant. The SALAF has now operated successfully for some 19 years. Over that period it has received on average 85-90 applications per year.

2.12 Western Australia. The Western Australia Litigation Assistance Fund (“WALAF”) was launched in April 1989 with a seeding grant of Aus \$1 million.<sup>69</sup> The Fund encountered difficulties and ceased accepting applications in 1996. When I visited Western Australia on 27<sup>th</sup> March 2009, I was told that a new litigation assistance fund was in the process of being set up. It is anticipated that this fund will commence operations within the next few weeks.

2.13 Victoria. A charitable trust, “Law Aid”, is administered by the Law Institute of Victoria and the Victorian Bar Council for the assistance of civil litigants. Law Aid will meet the disbursements of an assisted party, including expert fees, witness expenses, court fees etc. Law Aid is dependent upon the barrister and solicitor acting either *pro bono* or on a “no win - no fee” basis. In the event of success, Law Aid deducts 5.5%<sup>70</sup> of the judgment or settlement sum.

2.14 It is a feature of the above schemes and of similar schemes set up in certain other states that the volume of applications is low. This is no doubt attributable to the fact that fee shifting applies in these jurisdictions. The schemes offer no form of cost protection to the assisted parties, who remain fully liable for any adverse costs orders. This clearly acts as a major deterrent to bringing claims. Detailed information on Australian funding systems can be obtained from the Queensland Public Interest Law Clearing House.<sup>71</sup>

### (iv) Northern Ireland

2.15 Legal aid remains available for personal injury claims in Northern Ireland and neither conditional nor contingency fees are available. This lack of alternative, more aggressive, funding models could make Northern Ireland an attractive location for a

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<sup>68</sup> In Quebec costs are awarded in class actions on the small claims basis.

<sup>69</sup> Paid jointly by the WA Lotteries Commission and the Public Purpose Trust.

<sup>70</sup> Law Aid has a statutory entitlement to deduct up to 10%, but 5.5% is the figure currently set by the trustees of Law Aid.

<sup>71</sup> See [www.qpilch.org.au](http://www.qpilch.org.au).

CLAF or SLAS. Whilst none has been established, several studies have indicated that such a system could well be viable. A 2001 study by the Legal Service Research Centre<sup>72</sup> based on existing legal aid damages claims was positive, provided there was careful screening of the merits of applications. However, a further study by Deloitte & Touche<sup>73</sup> was more sceptical, but was based on the premise that a CLAF or SLAS should accept liability for other side's costs.

2.16 The Legal Services Commission for Northern Ireland has been consulting on setting up a form of SLAS in the event that legal aid ceases to be available for personal injury cases. For the time being, however, while legal aid remains in place, the Commission plans to tighten up the merits criteria for legal aid by implementing a Funding Code similar to that operating in England and Wales.<sup>74</sup> That may create a more disciplined system within which a SLAS would be economically viable.

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<sup>72</sup> *Report on the feasibility of a CLAF scheme for Northern Ireland*, LSRC, July 2001.

<sup>73</sup> *Review of the Operation of Litigation Funding Agreements in Northern Ireland*, Deloitte & Touche, November 2002.

<sup>74</sup> See chapter 12 for more details.



**CHAPTER 19. IS THERE A CASE FOR A CLAF OR SLAS IN ENGLAND AND WALES?**

**1. ISSUES TO ADDRESS**

1.1 Evidence of need. In the right contexts, CLAF and SLAS are clearly viable funding mechanisms in theory. Experience overseas shows that they can also work in practice, but this is only apparent for small scale systems or specialist jurisdictions. Whatever the attractions of self funding mechanisms, there remains the question of why the Government would want to introduce them – in other words, what is the access to justice problem for which CLAF or SLAS is a solution? In a system currently dominated by CFAs where claimants bear no real personal costs risk and expect to keep 100% of any damages, it is difficult to sell the benefits of self-funding to the client. However this environment could change.

1.2 Seed funding. A key obstacle to the establishment of a CLAF is the need for an initial pot of money to get the scheme going, to bridge the time period before the first cases supported by CLAF come to be concluded and start to generate income for the fund. This is also an issue for a SLAS but can be mitigated or avoided, depending on how such a system is grafted on to an existing legal aid scheme. Experience of the Hong Kong SLAS and the Canadian “Fonds” show that schemes can start small and build up over the years.<sup>75</sup> However, to some extent seed funding is just a symptom of the greater problem of adverse selection – if there is a sound business case for a CLAF to be viable in the face of the competition, one would expect the problem of start-up costs to be soluble.

1.3 Adverse selection. This is the key difficulty for self funding systems. They depend on strong cases applying to and generating profits for the fund. If other funding mechanisms exist which are accessible and more attractive for either the lawyer or the client, it is almost inevitable that strong cases will be diverted away from the self funding system, and any predictions of self-sufficiency will soon disappear.

1.4 CFAs are currently the dominant life form in the ecosystem of litigation funding. They offer large rewards for lawyers and risk-free outcomes for clients. The individual profitability of a CFA will always tend to outweigh the communal risk-sharing of a CLAF or SLAS. For this reason the CJC report<sup>76</sup> concluded that there was little scope for a CLAF in England and Wales, but that a SLAS could still be considered for those categories of case where legal aid was still available and CFAs were less dominant.

1.5 Recovery of claimant costs. Almost all models of CLAF or SLAS assume that in successful cases claimant lawyers will take and retain full *inter partes* costs. It should therefore be noted that if there were any diminution in the principles or quantum of cost shifting in favour of claimants this might further call into question the viability of CLAF or SLAS options.

1.6 Liability for other side’s costs. One of the key policy issues for any CLAF or SLAS is who should be liable for adverse costs orders, the main contenders being the client and the fund, in either case potentially protected by insurance. It is obvious, and also borne out by the Australian schemes, that if clients remain fully liable for

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<sup>75</sup> See chapter 18, section 2.

<sup>76</sup> “*Improved access to Justice – Funding Options and Proportionate Costs*”, CJC, August 2007.

costs the deterrent effect will be huge such that access to justice will diminish considerably. However if the fund accepts liability, its exposure on losing cases effectively doubles. This will make it very much harder to demonstrate overall viability, as the various Northern Ireland studies have tended to show.

1.7 A possible solution to this problem is to use a SLAS which retains legal aid cost protection, so that successful opponents are generally unable to recover their costs. To maximise the chance of a CLAF or SLAS being viable, it would help to abolish cost shifting against claimants by one mechanism or another.

1.8 What types of case are most suitable? It is clear from both the theory and practical experience of self funding systems that their pros and cons vary enormously as between different case types. Key variables are the availability of CFAs and other funding mechanisms, and the existence of any evidence of access gaps/unmet need. This makes it hard, under the present costs regime, to see a role for self funding systems for mainstream personal injury cases. At the present time, however, it is uncertain whether or not the present costs regime will survive.

1.9 The CJC report identified group actions as perhaps the most promising area to consider for such reforms, bearing in mind the operation of the Canadian schemes. However, this is also an area where third party funding is already active and where contingency fees, if allowed, would probably also have an important role to play. The interrelationships between different funding mechanisms must always be considered. Funding options in this area may also be affected by substantive procedural reforms, on which the CJC has also been active.<sup>77</sup>

## 2. STATUTORY FRAMEWORK

2.1 Section 58B. If it is decided to introduce a CLAF, the necessary statutory framework is already available. Section 58B of the Courts and Legal Services Act 1990 (“the 1990 Act”) was inserted by section 28 of the Access to Justice Act 1999. Section 58B of the 1990 Act is not yet in force. However, it provides as follows:

### “58B Litigation funding agreements

(1) A litigation funding agreement which satisfies all of the conditions applicable to it by virtue of this section shall not be unenforceable by reason only of its being a litigation funding agreement.

(2) For the purposes of this section a litigation funding agreement is an agreement under which—

(a) a person (“the funder”) agrees to fund (in whole or in part) the provision of advocacy or litigation services (by someone other than the funder) to another person (“the litigant”); and

(b) the litigant agrees to pay a sum to the funder in specified circumstances.

(3) The following conditions are applicable to a litigation funding agreement—

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<sup>77</sup> See the recent CJC proposals in “*Reform of Collective Redress in England and Wales: A perspective of need*”: [http://www.civiljusticecouncil.gov.uk/files/collective\\_redress.pdf](http://www.civiljusticecouncil.gov.uk/files/collective_redress.pdf).

- (a) the funder must be a person, or person of a description, prescribed by the Lord Chancellor;
  - (b) the agreement must be in writing;
  - (c) the agreement must not relate to proceedings which by virtue of section 58A(1) and (2) cannot be the subject of an enforceable conditional fee agreement or to proceedings of any such description as may be prescribed by the Lord Chancellor;
  - (d) the agreement must comply with such requirements (if any) as may be so prescribed;
  - (e) the sum to be paid by the litigant must consist of any costs payable to him in respect of the proceedings to which the agreement relates together with an amount calculated by reference to the funder's anticipated expenditure in funding the provision of the services; and
  - (f) that amount must not exceed such percentage of that anticipated expenditure as may be prescribed by the Lord Chancellor in relation to proceedings of the description to which the agreement relates.
- (4) Regulations under subsection (3)(a) may require a person to be approved by the Lord Chancellor or by a prescribed person.
- ...
- (8) A costs order made in any proceedings may, subject in the case of court proceedings to rules of court, include provision requiring the payment of any amount payable under a litigation funding agreement.
- (9) Rules of court may make provision with respect to the assessment of any costs which include fees payable under a litigation funding agreement."

2.2 Steps required. If it is decided to introduce a CLAF, then the following steps would need to be taken:

- (i) Section 58B of the 1990 Act is brought into force.
- (ii) The Lord Chancellor makes regulations prescribing the requirements with which any CLAF must comply, in order to be permitted to fund litigation.
- (iii) The Civil Procedure Rule Committee makes rules governing the costs orders which may be made in litigation funded by a CLAF.

### 3. THE BAR COUNCIL'S RECENT PROPOSAL FOR A CLAF

3.1 Establishment of the CLAF Group. In November 2008 the General Management Committee of the Bar Council established a Policy Advisory Group ("PAG") and also the first sub-group of PAG, to be known as "the CLAF Group". Guy Mansfield QC is chairman of the CLAF Group. The remit of the CLAF Group is to inquire into the possibilities of creating a CLAF. The recommendations of the CLAF Group are intended to form part of the Bar Council's contribution to the present Costs Review.

3.2 First report of the CLAF Group. The First Report of the CLAF Group is dated 27<sup>th</sup> February 2009.<sup>78</sup> In this section of chapter 19 I shall refer to it as “the report”. The report is now published on the Bar Council’s website.<sup>79</sup> I shall therefore keep my summary of the report relatively brief.

3.3 CLAFs to supplement other funding arrangements. The report proposes that CLAFs should be set up to operate in tandem with conventional legal aid and CFAs, not to replace those other funding arrangements.

3.4 Proposal for charitable contingent funds. The report proposes that a number of non-profit making CLAFs be set up. These should be known as “charitable contingent funds” or “CCFs”. The case for setting up such CCFs is stated concisely in paragraph 33 of the report as follows:

“The conceptual objections to contingency fees are mitigated because the deduction goes to the fund which is an institution. This is contingency funding through an appropriately incentivised body which has an interest in not funding bad claims. It differs from CFAs and pure contingent fees for lawyers in that it is essentially non-profit making. It has no reason to abuse or distort the litigation process. The lawyers will be paid on a non-contingent basis and thus “disinterested” – subject perhaps to discounts for losing cases. It has none of the disadvantages of CFAs or TP funding which result in only the clearest winners being fought, and defendants being held to pay large success fees and ATE premiums. The latter are only justified because the cases are being run on an individual basis.”

3.5 It is proposed that several different CCFs be set up to operate in different areas, including the Administrative Court<sup>80</sup> and the Chancery Division. The CCFs should be run by private bodies, not the LSC.

3.6 Financial models. Although different financial models are possible, the one which has been assumed for present purposes is that the CLAF takes its contingent sum from the damages awarded. The deduction could either be a percentage of the damages or calculated like a success fee under a CFA. The former approach has the advantage of (a) being easier to understand and calculate and (b) being by definition proportionate.

3.7 It may also be appropriate for rules to provide that when an assisted party wins, the defendant makes a contribution to the CLAF on top of the normal assessed costs. Such a contribution would be markedly less than the success fees and ATE premiums which are currently imposed upon defendants. The report proposes that any additional contribution required from defendants be called “funding costs”. If funding costs are taken as a percentage of the award (possibly subject to a cap), they should be easily ascertainable and thus not generate satellite litigation.

3.8 Success fees and ATE premiums must cease to be recoverable. The report asserts<sup>81</sup> that in order for CCFs to flourish, success fees and ATE insurance premiums

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<sup>78</sup> “*The merits of a Contingent Legal Aid Fund: Discussion paper*”.

<sup>79</sup> <http://www.barcouncil.org.uk/assets/documents/CCF%20Paper%202%20April%202009.pdf>.

<sup>80</sup> I do not understand how the contingent sum would be calculated or what it would be deducted from in judicial review cases, most of which do not result in any financial award. However, no doubt this will be developed in Phase 2. The First Report of the CLAF Group is preliminary in nature.

must cease to be recoverable. In other words, the CFA regime which prevailed before April 2000 must be restored. This would be necessary in order that CCFs might compete on a level playing field with CFAs. The question whether success fees and ATE premiums should cease to be recoverable is a complex one, which requires separate consideration. It is discussed in chapter 47 below.

3.9 Start up funds. The report proposes that CCFs should be structured so that they are self-funding. Nevertheless, capital will be required to finance the start up of each new CCF. It is not at the moment clear to me where such capital should come from.<sup>82</sup>

3.10 Personal injury and clinical negligence litigation. Personal injury and clinical negligence litigation gives rise to particular policy issues, as the report recognises.<sup>83</sup> There is a serious question as to whether any funding regime is acceptable, which creams off more than a small percentage of the claimant's general or special damages for personal injury. This is a matter which will no doubt be debated during Phase 2 of the Costs Review.

#### 4. CONCLUSION

4.1 Summary. Self-funding mechanisms remain an interesting option for future reform. Their viability is however heavily dependant on:

- (i) any alternative funding options available;
- (ii) the underlying costs regime.

Both these topics are of course at the heart of this Review. Such reforms may heavily influence any future assessment of any CLAF or SLAS proposal.

4.2 In its report "*Improved access to Justice – Funding Options and Proportionate Costs*" dated August 2007 the CJC recommended that a SLAS should be developed further, operating for those types of case still within the legal aid regime; however the CJC recommended that a CLAF should not be established in England and Wales. The CJC's reasoning was as follows:

"Although there is considerable merit in the concept of a CLAF, there is insufficient evidence from other jurisdictions that a CLAF style scheme could be transported to this jurisdiction. CLAFs can be successful, but suffer variously from insufficient seed funding, adverse selection, and (even where successful) expansion into higher risk (losing) cases that reduce income and threaten the scheme. It is unlikely that a CLAF would be successful in England and Wales due to adverse selection in a system where conditional fee agreements are operating successfully."<sup>84</sup>

4.3 There appears to be a degree of consensus that it would be difficult for a CLAF to operate in direct competition with CFAs in their current form. A key question is whether, if recoverability of success fees and ATE premiums were abolished (as

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<sup>81</sup> See paragraphs 51 and 97 of the CLAF Group report.

<sup>82</sup> This is identified as a matter for further investigation at paragraph 96 of the report.

<sup>83</sup> See paragraphs 103 to 111 of the CLAF Group report.

<sup>84</sup> Recommendation 1 of the June 2007 Civil Justice Council paper, "*Improved Access to Justice*", paragraph. 19, page 11 ([http://www.civiljusticecouncil.gov.uk/files/future\\_funding\\_litigation\\_paper\\_v117\\_final.pdf](http://www.civiljusticecouncil.gov.uk/files/future_funding_litigation_paper_v117_final.pdf)).

considered further in chapter 47), a CLAF could be viable alongside old-style CFAs, as the CLAF Group believe.

4.4 At first blush, I see some attraction in principle in the CLAF Group's proposal for a CLAF. However, a great deal of detail needs to be worked out, in order to develop the outline set out in the Group's first report.

4.5 Request for comments. I request that during Phase 2 of the Costs Review the CLAF Group should develop its proposals in detail. I also invite comments from all court users and stakeholders on:

- (i) the CLAF Group's proposal for CCFs;
- (ii) any alternative proposals for setting up a CLAF or SLAS;
- (iii) any objections to setting up a CLAF or CLAFs, beyond the CJC's argument set out in paragraph 4.2 above.

## **CHAPTER 20. CONTINGENCY FEES**

### **1. INTRODUCTION**

1.1 **Meaning of “contingency fees”.** The term “contingency fees” in its broad sense means fees payable upon a contingency, the contingency normally being that the client wins the case. In that broad sense the fees payable under a CFA are one variant of contingency fees and a CFA is a “contingency fee agreement”. In common parlance, however, the phrase “contingency fees” is now used in a narrower sense: it denotes fees which (a) are payable if the client wins and (b) are calculated as a percentage of the sum recovered.<sup>85</sup> In this chapter and elsewhere in the report I shall use the term “contingency fees” in that narrower sense.

1.2 **Solicitors not permitted to act on contingency fees.** Section 59 of the Solicitors Act 1974 prohibits solicitors from entering into contingency fee agreements in relation to contentious business. Rule 2.04 of the Solicitors’ Code of Conduct 2007 provides:

#### **“2.04 Contingency Fees**

(1) You must not enter into an arrangement to receive a contingency fee for work done in prosecuting or defending any contentious proceedings before a court of England and Wales, a British court martial or an arbitrator where the seat of the arbitration is in England and Wales, except as permitted by statute or the common law.

(2) You must not enter into an arrangement to receive a contingency fee for work done in prosecuting or defending any contentious proceedings before a court of an overseas jurisdiction or an arbitrator where the seat of the arbitration is overseas except to the extent that a lawyer of that jurisdiction would be permitted to do so.”

1.3 **Barristers not permitted to act on contingency fees.** Rule 405 of the Code of Conduct of the Bar of England and Wales<sup>86</sup> provides:

“... a self-employed barrister may charge for any work undertaken by him ... on any basis or by any method he thinks fit provided that such basis is (a) permitted by law ...”

Whereas conditional fee agreements are expressly permitted by law, contingency fee agreements are not so permitted.

1.4 **Proposals for reform.** There have been a number of calls in recent years for the ban on contingency fees to be lifted. Professor Michael Zander has argued the case for contingency fees in a number of lectures and articles in recent years. In an article for the *Depaul Law Review*<sup>87</sup> Professor Zander wrote:

“Under both English-style conditional fees and American-style contingency fees, the lawyer’s fee is determined by the result. If

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<sup>85</sup> Some commentators use the more precise term “*damage-based contingency fees*” to denote contingency fees in the narrower sense. See e.g. Moorhead R and Cumming R (2008); “*Damage-Based Contingency Fees in Employment Cases: A Survey of Practitioners*”, available at: <http://www.law.cf.ac.uk/researchpapers/papers/6.pdf>.

<sup>86</sup> 8<sup>th</sup> edition, 2004.

<sup>87</sup> “*Will the Revolution in the Funding of Civil Litigation in England Eventually Lead to Contingency Fees?*” (2002) 52 *Depaul Law Review*: 259 at 294-295.

conditional fees are permitted, why not contingency fees? If contingency fees are banned because of fear that the lawyer might be tempted to stoop to unethical conduct to win in order to earn his fee, why does that same fear not apply to CFAs?

The case for the introduction of contingency fees in England has been developing slowly. Under the pressure of the current growing concern over the problem of costs, the issue is for the first time being treated as a live topic.

One obvious advantage is that, unlike CFAs, they do not have the built-in incentive for lawyers to pad their costs in order to earn higher success fees. Another is that whereas CFAs are impenetrably complex, contingency fees would be much easier to explain to the client. The regulation requiring that the CFA be explained to the client is completely unrealistic. Now that the success fee and the insurance premium are recoverable from the loser, it is also completely pointless, since the client has no reason for taking an interest in the mysteries of the CFA.

More important would be the linkage in contingency fees between the fee and the amount of the damages. As has been seen, one of the chief aims of the Woolf reforms was that costs be proportionate to the amount in dispute. However, in the ordinary routine case involving modest amounts, this is difficult to achieve because a good deal of work needs to be done whatever the case. But even in relatively low-level cases, there are great variations in costs. A contingency fee as a percentage of the damages, by definition, gives a proportionate relationship – though whether the proportion is reasonable would obviously depend on its level, which may or may not be regulated. Sometimes, no doubt, contingency fees can produce a disproportionate reward for the lawyers, but it seems this is not as common as is sometimes suggested.”<sup>88</sup>

1.5 Professor Zander expressed similar views in his 2002 Denning Lecture “*Where are we heading with the funding of civil litigation?*”<sup>89</sup> Professor Zander pointed out that contingency fees are permitted in every province in Canada; they have proved satisfactory in that jurisdiction, although costs recovery is effected on the conventional basis, rather than by reference to the contingent fee agreed between the claimant and his lawyer.

1.6 Civil Justice Council. The Civil Justice Council (“CJC”) has produced two reports entitled “*Improved Access to Justice – Funding Options and Proportionate Costs*”, one dated July 2005 (“the first CJC report”) and one dated August 2007 (“the second CJC report”). In the first CJC report recommendation 10 was as follows:

“In contentious business cases where contingency fees are currently disallowed, American style contingency fees requiring the abolition of the fee shifting rule should not be introduced. However, consideration should be given to the introduction of contingency fees on a regulated basis along similar lines to those permitted in Ontario by the Solicitors

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<sup>88</sup> Professor Zander cites the research of Professor Kritzer in support of this last proposition. I have summarised some of that research in chapters 9 and 60 of this report. Also Professor Kritzer will be presenting a paper and participating in discussions at the all-day London seminar on 10<sup>th</sup> July 2009, during Phase 2 of the Costs Review.

<sup>89</sup> Published at (2003) CJC 23.



Act 2002 particularly to assist access to justice in group actions and other complex cases where no other method of funding is available.”

1.7 In the second CJC report recommendation 4 was as follows:

“In multi party cases where no other form of funding is available, regulated contingency fees should be permitted to provide access to justice. The Ministry of Justice should conduct thorough research to ascertain whether contingency fees can improve access to justice in the resolution of civil disputes generally.”

1.8 Law Society. The Law Society was for many years opposed in principle to contingency fees.<sup>90</sup> In its recent consultation paper “*Litigation Funding*”<sup>91</sup> the Law Society acknowledged that there were arguments for and against permitting contingency fees. The Law Society invited the views of members on those issues and consequential matters.

1.9 The questions for this review. The questions which I must address in this Costs Review are (a) whether contingency fees should be permitted in England and Wales; if so, (b) whether any costs recovery should be assessed on the conventional basis or by reference to the contingency fee; (c) how contingency fee agreements (if permitted) should be regulated.

## 2. EXPERIENCE OF CONTINGENCY FEES IN OTHER JURISDICTIONS

2.1 Tribunals. The first jurisdiction to consider is close to home, namely tribunals in England and Wales. Proceedings in all tribunals other than the Lands Tribunal<sup>92</sup> and the Employment Appeal Tribunal are classified as “non-contentious” business.<sup>93</sup> Solicitors are therefore permitted to conduct tribunal proceedings on the basis of contingency fees.

2.2 Employment tribunals. The tribunals in which solicitors most frequently act on contingency fees are employment tribunals. The classification of the business of those tribunals as non-contentious is an oddity, to say the least. Conducting cases in employment tribunals is just like adversarial litigation.<sup>94</sup> Employment tribunals therefore provide a “laboratory” in which we can (a) test the operation of contingency fees in England and Wales and (b) see how such fee arrangements impact upon the behaviour of both parties and lawyers.

2.3 The use of contingency fees in employment tribunals is addressed in some detail in chapter 50 below: see in particular paragraphs 4.10 to 4.17. I will not reiterate what appears in that chapter. Overall, it can be seen that contingency fees make a modest contribution to access to justice; furthermore this form of remuneration is popular with some clients. On the other hand, contingency fee agreements may give rise to conflicts of interest and may give the solicitor an

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<sup>90</sup> See e.g. the Law Society’s memorandum published in the Law Society Gazette 237 (April 1970); the Law Society’s report “*Access to Civil Justice*” (July 1987). In April 1998 the Council of the Law Society resolved to support CFAs, although not contingency fees.

<sup>91</sup> Law Society, 18<sup>th</sup> December 2008.

<sup>92</sup> Still a separate tribunal at the time of writing, but due to be absorbed into the Upper Tribunal in June 2009.

<sup>93</sup> See the definition of “contentious” and “non-contentious” business in s. 87 of the solicitors Act 1974.

<sup>94</sup> This was my experience in the 1970s and 1980s and I am told that it is still the case.

excessive interest in settlement negotiations. When considering the empirical research on contingency fees in employment tribunals, as summarised in chapter 50, it must be borne in mind that these are tribunals in which effectively there is no cost shifting.<sup>95</sup>

2.4 United States of America. Contingency fees are both permitted and extensively used in the US. I set out in chapter 60 below how contingency fees operate in that jurisdiction. The use of contingency fees in the US has been the subject of much academic research. Some of that research is summarised in chapter 9, section 4, and also in chapter 60 of this report. The findings of that research do not lend themselves to pithy summary. The reader is therefore referred to those two chapters. Again it must be borne in mind when studying the research findings that in the US courts (except for Alaska) there is effectively no cost shifting.

2.5 Canada. Canada is particularly important for present purposes, because not only are contingency fees permitted, but also there is cost shifting. The costs regime in Canada and its practical consequences are described in chapter 61 below. Significant features which emerge from chapter 61 are the following:

- Costs shifting is effected on a conventional basis.
- In so far as the contingency fee or the success fee exceeds what would be chargeable under a normal fee arrangement, that is borne by the successful litigant. Canadian lawyers and judges regard it as unacceptable that a private arrangement between litigant and lawyer should have the effect of foisting additional costs liabilities upon the other side.<sup>96</sup>
- Contingency fees are generally thought to work satisfactorily in Canada and to promote access to justice.

### 3. THE ARGUMENTS FOR AND AGAINST CONTINGENCY FEES

3.1 Submissions received. I have received a large number of written submissions during Phase 1 of the Costs Review. The overwhelming consensus is that we should not adopt the total US system, i.e. contingency fees combined with no cost shifting. If cost shifting is retained, however, views are more evenly divided. In a recent survey of members carried out by the Professional Negligence Bar Association, 17% of respondents were in favour of contingency fees and 83% were opposed. However, a recent survey of litigation solicitors in London came to the opposite result, with 70% in favour of permitting contingency fees and 28% opposed. In a recent survey of a small number of clients carried out by a City firm, approximately half were in favour of contingency fees and approximately half were opposed.<sup>97</sup> The issue of contingency fees was discussed at a number of meetings during January and February 2009. The views expressed at those meetings are summarised in chapter 10 above.

3.2 Arguments in favour. The arguments advanced in favour of permitting contingency fees may be summarised as follows:

- The principle of no win – no fee has been established by CFAs, so there can be principled objection to contingency fee agreements.

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<sup>95</sup> See chapter 50, paragraphs 4.2 to 4.5.

<sup>96</sup> See chapter 61, paragraphs 3.4 and 3.5.

<sup>97</sup> All of the surveys referred to in this paragraph were carried out for the purpose of the present Costs Review and the results have been submitted to me during Phase 1.

- Contingency fee agreements are simpler than CFAs. They are easier to understand and would avoid some of the problems of CFAs.
- Contingency fee agreements offer less scope for conflicts of interest than CFAs.
- Many clients would prefer contingency fee agreements to CFAs.
- If CFAs are permitted as well as the existing funding mechanisms, this can only increase access to justice.
- Under a contingency fee agreement, the fees payable to the lawyer are always, and by definition, proportionate.
- Contingency fees give the lawyer a direct incentive to maximise recovery for his client.
- There is no danger of contingency fees creating a US type situation here. In England and Wales (a) juries do not assess damages and (b) judges are not elected.
- Contingency fees would “*remove from a reluctant judiciary the difficult task of seeking to regulate costs on a case by case basis*”.<sup>98</sup>
- Contingency fees work well in employment tribunals. They also work well in appeals to the VAT and Duties Tribunal.
- There can be no possible objection to sophisticated clients (e.g. large plcs with in-house counsel) entering into contingency fee agreements, if that is what both they and their solicitors want to do.

3.3 Arguments against. The arguments advanced against permitting contingency fees may be summarised as follows:

- Contingency fee agreements are liable to give rise to greater conflicts of interest between lawyer and client than in the case of CFAs.<sup>99</sup>
- It is wrong in principle for the lawyer to have an interest in the level of damages.
- If CFAs and contingent fees co-exist, lawyers would conduct lower value claims on CFAs and higher value claims on contingent fees. This dual system would maximise recovery for lawyers and give rise to a conflict of interest between lawyer and client.
- If part of the contingent fee is not recoverable from the other side (as is the case in all jurisdictions where contingent fees are currently permitted), then clients will lose part of their damages. This is unacceptable in personal injury cases - especially in so far as damages represent the cost of future care.
- Contingent fees create an incentive to settle a case early.<sup>100</sup>
- Contingent fees will only be viable if the level of general damages for personal injuries increases. That is not going to happen, as is apparent from the non-implementation of the Law Commission’s 1998 report.<sup>101</sup>

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<sup>98</sup> I can understand that there would be considerable benefit to parties in cutting out complex and expensive costs hearings. I would question whether the supposed likes or dislikes of the judiciary are relevant.

<sup>99</sup> I do not fully understand this argument.

<sup>100</sup> However, it may be said that contingent fees create less of an incentive to settle early than CFAs: see the submissions of the Personal Injuries Bar Association quoted in chapter 16 above.

<sup>101</sup> “*Damages for Personal Injury: Non-pecuniary Loss*” (1998) Law Com 257

- Contingent fees are only acceptable in the US because damages are extremely high and include non-compensatory elements. This is not the case here.
- The introduction of contingency fees would be damaging to the solicitors profession.
- The introduction of contingent fees would be contrary to the existing professional culture, which makes the Commercial Court attractive to overseas litigants.

3.4 Need for regulation. It appears to be generally accepted that if contingency fees become permitted, they should be regulated. Views differ as to the appropriate form of regulation. On one view, it is sufficient if the client takes independent advice before entering into a contingency fee agreement. On the alternative view, there ought to be fairly detailed rules about what a contingency fee agreement must and must not include (re percentage recovery, resolution of disputes etc.).

3.5 The option of CLAF or SLAS. The options of setting up a Contingency Legal Aid Fund (“CLAF”) or a Supplementary Legal Aid Scheme (“SLAS”) have been discussed in chapters 18 and 19 above. If one of these options is pursued, it would encompass the benefits of contingency fees, without some of the adverse features. In particular, lawyers in unsuccessful cases would not be left with heavy outlay and no recovery. Furthermore, because the CLAF or the SLAS would be non-profit making, neither that body nor the lawyers involved would suffer reputational damage for deducting a percentage of damages.

#### 4. REVIEW

4.1 During Phase 2 I look forward to hearing views on the following questions:

- (i) Should solicitors and counsel be permitted to act on contingency fee agreements?
- (ii) If so and if costs shifting remains,<sup>102</sup> what form should that cost shifting take? In particular, should the losing party pay the additional element of costs (i.e. the amount by which the contingent fee exceeds costs assessed on the conventional basis)?
- (iii) If contingency fee agreements are permitted, what form of regulation should be imposed?
- (iv) If the concept of lawyers working on contingency fees is unacceptable, do the considerations set out in this chapter militate in favour of setting up a CLAF or a SLAS, as discussed in chapters 18 and 19?

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<sup>102</sup> As to which see chapter 46.



REVIEW OF  
CIVIL LITIGATION COSTS

## **PART 5. FIXED COSTS**

### **CHAPTER 21. THE PRESENT FIXED COSTS REGIME**

#### 1. INTRODUCTION

1.1 Fixed and predictable costs. Parts 45 and 46 of the Civil Procedure Rules (“CPR”) contain provisions relating to both fixed and predictable costs. Both of these Parts specify the amount (or the method of calculation of the amount) that may be recovered from one party by another in respect of costs in certain circumstances. Part 45 section I and Part 46 prescribe fixed costs in the true sense. Part 45 sections II, III, IV and V set out predictable costs. The fixed costs prescribed by Part 46 apply only to fast track trials.

1.2 In this chapter I briefly summarise the provisions of these Parts. This chapter sets the scene for chapters 22 and 23. In chapter 22 I address the question of whether there should be a comprehensive fixed costs regime in the fast track. In chapter 23 I discuss whether the fixed costs regime could be extended beyond the fast track.

#### 2. FIXED COSTS IN UNCONTESTED CASES

2.1 Scope. CPR Part 45 section I sets out the amounts<sup>1</sup> which are recoverable in respect of solicitors' charges in specified categories of case, which the defendant does not contest.<sup>2</sup> Generally speaking, section I applies to: (a) money claims where, inter alia, judgment in default is obtained or summary judgment is given;<sup>3</sup> (b) claims where the court gave a fixed date for the hearing when it issued the claim and judgment is given for the delivery of goods;<sup>4</sup> and (c) uncontested claims for possession of property and similar matters.<sup>5</sup>

2.2 Elements of the fixed costs. The fixed costs comprise the following constituent elements:

- (i) Commencement costs: CPR rules 45.2 and 45.2A set out the fixed costs on commencement of a claim for the recovery of money, goods or land or a demotion claim. The amount of fixed commencement costs varies depending on

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<sup>1</sup> Unless the court orders otherwise.

<sup>2</sup> See CPR rule 45.1(1) and (2).

<sup>3</sup> CPR rule 45.1(2)(a).

<sup>4</sup> CPR rule 45.1(2)(b).

<sup>5</sup> See CPR rules 45.1(2)(c) to (2)(g).

the value of the claim (if applicable), who served the claim form (e.g. the court or the claimant) and the number of defendants.<sup>6</sup> Additional sums may be allowed in certain specified circumstances relating to the service of documents (e.g. service out of the jurisdiction).<sup>7</sup>

- (ii) Costs on the entry of judgment: CPR rules 45.4 and 45.4A set out the costs on the entry of judgment in a claim for the recovery of money, goods or land or a demotion claim. These provisions prescribe the amount to be included in the judgment for the claimant's solicitor's charges (generally, the aggregate of the fixed commencement costs and a specified amount, as set out in the CPR).<sup>8</sup>
- (iii) Fixed enforcement costs: CPR rule 45.6 prescribes the amount to be allowed in respect of solicitors' costs in relation to certain actions taken to enforce a judgment.
- (iv) Court fees: Any appropriate court fee will be allowed in addition to the above fixed costs.<sup>9</sup>

### 3. ROAD TRAFFIC ACCIDENTS

3.1 CPR Part 45 also provides for: (a) predictable recoverable costs in low value (less than £10,000) Road Traffic Accident ("RTA") claims which are settled before issue; and (b) predictable recoverable success fees in all other RTA claims.<sup>10</sup> I shall deal with each of these in turn.

#### (i) Predictable costs in low value RTA claims settled before issue

3.2 Scope. Part 45 section II sets out the predictable costs that are recoverable where: (a) the dispute arises from a road traffic accident;<sup>11</sup> (b) the agreed damages include damages in respect of personal injury, property damage, or both; and (c) the total agreed damages do not exceed £10,000.<sup>12</sup> CPR Part 45 section II does not apply if the claimant is a litigant-in-person.<sup>13</sup> Section II provides that the costs that may be recovered comprise (i) base costs, (ii) disbursements and (iii) success fees.<sup>14</sup>

3.3 Formula for calculating base costs. CPR rule 45.9(1) prescribes a formula to calculate the amount of recoverable base costs. The formula provides that the amount recoverable is the total of:

- £800;
- 20% of the agreed damages up to £5,000; and
- 15% of the agreed damages between £5,000 and £10,000.

The Practice Direction to Part 45 ("Part 45 PD") provides that in calculating the amount of the "agreed damages" account must be taken of: (a) both general and

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<sup>6</sup> See CPR Part 45, Tables 1 and 2.

<sup>7</sup> CPR rules 45.2(2) and 45.2A(2) and Table 4.

<sup>8</sup> See also Part 45, Table 3.

<sup>9</sup> CPR rule 45.1(3).

<sup>10</sup> The provisions of Part 45 do not apply to RTA claims within the small claims band.

<sup>11</sup> "Road traffic accident" is defined as "*an accident resulting in bodily injury to any person or damage to property caused by, or arising out of, the use of a motor vehicle on a road or other public place in England and Wales*" (CPR rule 45.7(4)(a)).

<sup>12</sup> CPR rule 45.7(2).

<sup>13</sup> CPR rule 45.7(3).

<sup>14</sup> CPR rule 45.8.

special damages (and interest); (b) any interim payments; (c) any deduction for agreed contributory negligence; and (d) excluding any amount that the compensating party must pay to a third party pursuant to a statutory requirement (e.g. NHS expenses).<sup>15</sup> Where a claimant instructs a solicitor practising in a geographical area specified in the Part 45 PD,<sup>16</sup> the base costs will be increased by an additional 12.5%.<sup>17</sup>

3.4 **Example.** The Part 45 PD provides the following example of the calculation of recoverable costs. Where the agreed damages are £7,523, the recoverable costs would be £2,178.45. This comprises £800 plus £1,000 (20% of £5,000) plus £378.45 (15% of £2,523).<sup>18</sup>

3.5 **Disbursements.** CPR rule 45.10(1) provides that the court may only allow a claim for specified types of disbursement. The specified disbursements include: (a) the costs of obtaining certain reports (e.g. medical or police reports); (b) an ATE premium; and (c) other disbursements arising as a result of a particular feature of the dispute.<sup>19</sup> In relation to point (d), the phrase “the costs of obtaining” has led to satellite litigation. The issue with the wording of the rule is still unresolved.

3.6 **Success fee.** Pursuant to CPR rule 45.11(1), a claimant who has entered into a CFA or CCFA may recover a success fee under that arrangement. However, the amount of the success fee is limited to 12.5% of the base costs calculated pursuant to the formula described in paragraph 3.3 above (excluding any increase arising as a result of the area in which the solicitor practices – see above).<sup>20</sup>

3.7 **The practical effect of section II.** Given the clear guidance in the rules, the amount of recoverable costs ought to be agreed between the parties. If no such agreement is reached, then the receiving party can issue costs only proceedings so that the court can assess costs. Alternatively, if the settlement requires approval, then costs can be assessed in the course of the approval proceedings.<sup>21</sup>

3.8 **Additional base costs in exceptional circumstances.** The court may allow claims for additional base costs if there are exceptional circumstances making it appropriate to do so.<sup>22</sup> If the court considers such a claim appropriate, it may either assess the costs or make an order for the costs to be assessed.<sup>23</sup>

#### (ii) Predictable success fees in all other RTA claims

3.9 **Scope.** Part 45 section III sets out the success fee under a CFA or CCFA that will be allowed to a successful claimant in RTA claims which are not covered by the predictable costs regime of section II and are not within the small claims band.<sup>24</sup>

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<sup>15</sup> Practice Direction to Part 45, paragraph 25A.3.

<sup>16</sup> The areas are: (within London) the county court districts of Barnet, Bow, Brentford, Central London, Clerkenwell, Edmonton, Ilford, Lambeth, Mayors and City of London, Romford, Shoreditch, Wandsworth, West London, Willesden and Woolwich and (outside London) the county court districts of Bromley, Croydon, Dartford, Gravesend and Uxbridge (Part 45 PD, section 25A.6).

<sup>17</sup> CPR rule 45.9(2).

<sup>18</sup> See Practice Direction to Part 45, paragraph 25A.5.

<sup>19</sup> CPR rule 45.10(2).

<sup>20</sup> CPR rule 45.11(2).

<sup>21</sup> See CPR rule 45.7(1).

<sup>22</sup> CPR rule 45.12(1).

<sup>23</sup> CPR rule 45.12(2).

<sup>24</sup> See CPR rule 45.15.

3.10 The recoverable success fee. A distinction is drawn between (i) solicitors' success fees and (ii) counsel's success fees. CPR rule 45.16 provides that the allowable success fee in relation to solicitors is: (a) 100% where the claim concludes at trial; or (b) 12.5% where the claim concludes before trial or is settled before issue. Rule 45.17 sets out the recoverable success fee in relation to counsel. That rule provides that the success fee will be: (a) 100% where the claim concludes at trial; (b) 50% for fast track claims that conclude 14 days or less before trial; (c) 75% for multi-track claims that conclude 21 days or less before trial; or (d) 12.5% in any other case.

3.11 Success fees in special cases. A party is permitted to apply for an alternative success fee<sup>25</sup> in certain circumstances, generally where the damages agreed by the parties or awarded by the court exceed £500,000.<sup>26</sup>

#### 4. SUCCESS FEES IN EMPLOYERS LIABILITY CLAIMS

4.1 CPR Part 45 section IV sets out the allowable success fee in employers liability claims and section V sets out the allowable success fee in employers liability disease claims.<sup>27</sup> I shall deal with each of these in turn.

##### (i) Employers liability claims

4.2 Scope. CPR Part 45 section IV applies to a dispute between an employer and an employee arising from a personal injury sustained by the employee during the course of his employment and the claimant has entered into a CFA or CCFA.<sup>28</sup> Section IV does not, however, apply to disputes relating to a disease or to RTA claims.<sup>29</sup>

4.3 The recoverable success fee. CPR rule 45.21 draws a distinction between (i) solicitors' fees and (ii) counsel's fees. In relation to solicitors, the success fee is (a) 100% where the claim concludes at trial; or (b) 25% (or 27.5% if a membership organisation has agreed to meet the claimant's legal costs) where the claim concludes before trial or is settled before issue.<sup>30</sup> In relation to counsel, the success fee will be: (a) 100% where the claim concludes at trial; (b) 50% for fast track claims that conclude 14 days or less before trial; (c) 75% for multi-track claims that conclude 21 days or less before trial; or (d) 25% in any other case.<sup>31</sup>

4.4 Success fees in special cases. A party is permitted to apply for an alternative success fee<sup>32</sup> in certain circumstances, generally where the damages agreed or awarded exceed £500,000.<sup>33</sup>

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<sup>25</sup> If the success fee would otherwise be 12.5% – see CPR rule 45.18(1).

<sup>26</sup> CPR rule 45.18.

<sup>27</sup> The provisions of CPR Part 45 sections IV and V do not apply to claims within the small claims band.

<sup>28</sup> CPR rule 45.20(1).

<sup>29</sup> CPR rule 45.20(2).

<sup>30</sup> CPR rule 45.21(a).

<sup>31</sup> CPR rule 45.21(b).

<sup>32</sup> If the success fee would otherwise be 25% or 27.5% in the case of solicitors or 25% in the case of counsel – see CPR rule 45.22(1).

<sup>33</sup> See CPR rule 45.22.



(ii) Employers liability disease claims

4.5 **Scope.** CPR Part 45 section V applies to a dispute between an employer and an employee (or the employee’s estate or dependants) relating to a disease afflicting the employee that is alleged to have been contracted as a result of the employer’s breach of statutory or common law duties of care during the course of the employee’s employment and the claimant has entered into a CFA or CCFA.<sup>34</sup>

4.6 **The allowable success fee.** Again, the CPR draws a distinction between the fees of counsel and the fees of the solicitor. The success fee varies depending on, among other things, (a) when the claim concludes; (b) in the case of solicitors’ fees, whether any membership organisation has agreed to meet the claimant’s legal costs; (c) the type of claim (either Type A,<sup>35</sup> Type B<sup>36</sup> or Type C<sup>37</sup>); and (d) in the case of counsel’s fee, the track the claim is allocated to.<sup>38</sup>

4.7 **Success fees in special cases.** A party is permitted to apply for an alternative success fee in certain specified circumstances, generally where the damages agreed or awarded exceed £250,000.<sup>39</sup>

**5. FAST TRACK TRIAL COSTS**

5.1 **Introduction.** Part 46 of the CPR governs the costs which the court may award as the costs of an advocate for preparing for and appearing at the trial of a claim in the fast track (excluding other disbursements or VAT).<sup>40</sup> Part 46 defines such costs as “fast track trial costs” and I adopt that definition in this chapter.

5.2 **The amount of fast track trial costs.** The amount of fast track trial costs prescribed by CPR Part 46 is set out in the table below.<sup>41</sup>

**Table 21.1: Fast track trial costs prescribed by Part 46**

<b>Value of the claim</b>	<b>Amount of fast track trial costs which the court may award</b>
No more than £3,000	£485
More than £3,000 but not more than £10,000	£690
More than £10,000 but not more than £15,000	£1,035
For proceedings issued after 6 <sup>th</sup> April 2009, more than £15,000	£1,650

<sup>34</sup> CPR rule 45.23(1).

<sup>35</sup> Claims relating to a disease alleged to have been caused by exposure to asbestos (e.g. asbestosis, mesothelioma and pleural plaques) (CPR rule 45.23(3)(c)).

<sup>36</sup> Claims relating to psychiatric injury or upper limb disorders alleged to have been caused by the work environment (e.g. repetitive strain injury, carpal tunnel syndrome and occupational stress) (CPR rule 45.23(3)(d)).

<sup>37</sup> Claims that do not falling within Type A or Type B (CPR rule 45.23(3)(e)).

<sup>38</sup> See CPR rules 45.24 and 45.25.

<sup>39</sup> See CPR rule 45.26.

<sup>40</sup> CPR rule 46.1.

<sup>41</sup> Source: CPR rule 46.2(1). The Advisory Committee on Civil Costs is to review fast track trial costs as part of its announced programme of work.

The court may not award a different amount unless (a) the court decides not to award any fast track trial costs or (b) as provided for in CPR rule 46.3 (see below).<sup>42</sup> Notwithstanding this restriction, the court may apportion the amount awarded between the parties to reflect their respective degrees of success on the issues at trial.<sup>43</sup>

5.3 Rule 46.3: The power to award a different amount of fast track trial costs. CPR rule 46.3 sets out the circumstances where a court may order more or less than the prescribed fast track trial costs. This power arises in the following circumstances:

- Additional legal representative: the court may award a further £345 where it was necessary for a party's legal representative to accompany the advocate at trial.<sup>44</sup>
- Additional liability: the court may award a further sum representing an additional liability (i.e. success fee or ATE premium).<sup>45</sup>
- Separate trials: where the court directs a separate trial of an issue, the court may award an additional amount in respect of the separate trial.<sup>46</sup> The amount awarded must not exceed two-thirds of the amount payable for that claim, subject to a minimum of £485.
- Litigants-in-person: where the receiving party is a litigant-in-person, the court will award: (1) two-thirds of the amount that would otherwise be awarded provided the litigant-in-person can prove financial loss; or (2) if the litigant fails to prove financial loss, an amount in respect of the time spent reasonably doing the work at the rate of £9.25 per hour.<sup>47</sup>
- Counterclaim: where the defendant has made a counterclaim and the claimant has succeeded on the claim and the defendant has succeeded on the counterclaim, the court will calculate the award that each party would have received but for the other's success and award the difference (if any) to the party entitled to the higher costs award.<sup>48</sup>
- Unreasonable/improper behaviour by the receiving party during the trial: the court may award to the receiving party an amount less than would otherwise be payable (as it considers appropriate).<sup>49</sup>
- Improper behaviour by the paying party during the trial: the court may award an additional amount to the receiving party than would otherwise be payable (as it considers appropriate).<sup>50</sup>

## 6. REVIEW

6.1 The majority of comments received during Phase 1 suggest that, overall, the fixed costs regimes in Parts 44 and 45 are working well, in the sense that they reduce

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<sup>42</sup> CPR rule 46.2(2).

<sup>43</sup> CPR rule 46.2(2).

<sup>44</sup> CPR rule 46.3(2).

<sup>45</sup> CPR rule 46.3(2A).

<sup>46</sup> CPR rule 46.3(3) and (4).

<sup>47</sup> CPR rule 46.3(5) and the Costs Practice Direction, section 52.4.

<sup>48</sup> CPR rule 46.3(6).

<sup>49</sup> CPR rule 46.3(7).

<sup>50</sup> CPR rule 46.3(8).

satellite litigation. There are, however, certain anomalies.<sup>51</sup> For example, in *Lamont v Burton* [2007] EWCA Civ 429; [2007] 1 WLR 2814 the claimant failed to beat a Part 36 payment in at trial, but still recovered more by way of damages and costs than he would have recovered if he had accepted the payment in. This was because the fixed success fee jumped from 12.5% to 100% when the trial started. Such anomalies tend to undermine the effectiveness of the Part 36. If success fees continue to be recoverable, consideration should be given to rule amendments which might eliminate such anomalies.

6.2 The wider question, however, is whether the mechanism of fixed costs should be extended to categories of litigation not presently covered by Parts 44 and 45. I shall address this question in the next two chapters.

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<sup>51</sup> See e.g. *Kilby v Gawith* [2008] EWCA Civ 812.

**CHAPTER 22. SHOULD THERE BE A COMPREHENSIVE FIXED COSTS REGIME IN THE FAST TRACK?**

**1. INTRODUCTION**

1.1 Woolf reforms. In his Final Report to the Lord Chancellor in July 1996: “*Access to Justice*”, Lord Woolf recommended that there should be a system of fixed recoverable costs in all cases allocated to the new fast track.

1.2 At that time the county court had costs scales depending on the amount in issue. Scale 1 applied to cases with a value of up to £3,000 and provided maximum amounts for certain steps in proceedings, including a main “preparation for trial” item capped at £1,315. Scale 2 covered other cases in the county court and was more liberal but still provided a tariff for individual steps in proceedings.

1.3 Lord Woolf advocated a radical approach: a matrix incorporating fixed figures for the recoverable costs of claimant and defendant, depending on the value of the case and the stage reached. At page 58 of his Final Report he said:

“My recommendations are as follows.

- (i) There should be a regime of fixed recoverable costs for fast track cases.
- (ii) The guideline maximum legal costs on the fast track should be £2,500, excluding VAT and disbursements.
- (iii) The costs payable by a client to his own solicitor should be limited to the level of the fixed costs plus disbursements unless there is a written agreement between the client and his solicitor which sets out clearly the different terms.”

1.4 Lord Woolf’s matrix. This is the version set out at page 52 of his Final Report.

**Table 22.1: Lord Woolf’s matrix**

BAND	Claimant	Up to and including allocation to fast track (40%)	Up to and including filing the listing questionnaire (70%)	Up to 48 hours before the trial (90%)		Advocacy
	Defendant	Up to and including allocation to fast track (25%)				
A	£5,000 ceiling and straightforward					
B	£5,000 ceiling and additional work factors £10,000 ceiling and straightforward					
C	£10,000 ceiling and additional work factors					

1.5 The proposal was controversial and although working parties attempted to estimate the work required to handle a typical case under the new system of pre action protocols and fast track procedure, there were concerns that this could not be done properly until parties used the new rules in practice. In the event the proposal was not implemented, save for the provisions of Part 46 setting fixed costs recoverable for fast track trials.

1.6 The reasons why fixed costs were not ultimately introduced were complex and in part political. There was considerable resistance from practitioners, who felt that the new CPR and protocol system was untried and that it should be allowed to “bed in” before the costs were determined. However it is noted that although the fixed costs were not implemented, they were an essential part of Lord Woolf’s proposals.

1.7 Predictable costs. In 2001 the Civil Justice Council held an inaugural Costs Forum, chaired by Lord Phillips, to discuss problems developing in the civil justice system over costs issues generally and the use of conditional fee agreements. That Forum concluded that moves should be made to produce fixed recoverable costs in road traffic accident (“RTA”) claims within the fast track limit, then set at £15,000.

1.8 Following extensive consultation with stakeholders and data collection and analysis by Professor Paul Fenn and Dr Neil Rickman, a negotiated solution was struck at Milton Hill House in December 2002, implemented as section II of CPR Part 45 with effect from October 2003. Those rules provide for fixed recoverable costs (commonly known as “predictable costs”) in RTA cases with a value of no more than £10,000 and which settle pre-issue, via a formula linking costs to the value of the settlement.

1.9 Although it was anticipated that predictable costs would be introduced in other types of personal injury claim and other areas of practice following this initiative, no further agreement was possible. The figures introduced in 2003 have not been reviewed, although the Advisory Committee on Civil Costs has announced that it plans to do so by October 2009.

1.10 There have only been two further developments in fast track fixed costs since 2003. These are limited to amendments to the fixed trial costs: an increase in line with inflation in 2007 and the creation of a further bracket for cases worth more than £15,000, to coincide with the increase in the fast track limit to £25,000 in April this year. The 2007 increase<sup>52</sup> was an interim measure pending a full review of the basis on which these costs are calculated. The Advisory Committee on civil Costs has been asked to examine fast track trial costs as part of its announced programme of work.

1.11 Proposals. I have canvassed views from my panel of assessors and it is our unanimous view that we should take forward this work and try to achieve a fixed costs system in fast track cases.

1.12 I approached District Judge Michael Walker, Secretary of the Association of HM District Judges, to form a sub-committee to devise a matrix, drawing on Lord Woolf’s initial proposals and subsequent experience. The sub-committee comprised District Judge David Oldham and District Judge Richard Chapman, as well as Colin Ettinger of Irwin Mitchell and Andrew Parker of Beachcroft LLP representing the views of claimant and defendant practitioners respectively. The sub-committee has also drawn on the expertise of Professor Paul Fenn, who has had access to data

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<sup>52</sup> The consultation paper “*Part 46 of the Civil Procedure Rules: Fast Track Trial Costs*”, which preceded this increase, is available at [www.justice.gsi.gov.uk](http://www.justice.gsi.gov.uk). The increase came into force on 1<sup>st</sup> October 2007.

submitted to me as part of the review and was also responsible for the research which led to the fixed recoverable costs regime.

1.13 The sub-committee has produced a matrix which, although not agreed, is illustrative of the sort of matrix that could be introduced to fix costs at all stages in the fast track. In this chapter I set out this matrix and explain how it might work, as well as examining the limitations and drawbacks identified by the sub-committee.

## 2. PROPOSALS OF THE SUB-COMMITTEE

2.1 The matrix. The version shown at Table 22.2 is the version proposed by the sub-committee, explained below. Not all elements are agreed – see paragraphs 2.11 to 2.15 below.

2.2 The figures set out in the matrix are purely illustrative and have been derived by Professor Fenn from data submitted to me. Whilst those figures do therefore reflect the costs incurred in cases sampled, it is right that I should record some reservations expressed by the sub-committee about those figures:

- (i) For certain types of case (RTA without PI and industrial disease), there are insufficient data to be able to populate all post-issue stages or to identify the saving resulting from early admission of liability. Figures have been included for just a single post-issue stage (see also Table 22.4 and paragraph 2.16 below).
- (ii) It is only possible to apply analysis to those cases within the sample that reach a particular stage: the result is that the cases analysed increase in severity across the stages and this may distort the figures. Such an effect is seen particularly in data collected by judges conducting summary assessments at fast track trials.
- (iii) Some of the figures appear anomalous, e.g. the figures derived for industrial disease cases seem low in comparison with those for EL accidents.
- (iv) There is an obvious “step” increase in costs from one stage to the next which, if not addressed, might lead to cases being litigated beyond an appropriate stage in order to gain extra revenue for the lawyer. As a result it might be necessary to “moderate” these figures in some way to ensure that there is sufficient incentive for both parties to settle early.

To some extent this last point is assisted by providing a reduction both pre- and post-issue for those cases where liability is admitted within the protocol period.

Table 22.2: Fast track fixed costs matrix proposal and illustration

Case type	Pre-issue settlement			Post-issue settlement <sup>53</sup>				
	Base fee	Plus % of damages	Less reduction for early admission of liability	Base fee		Plus % of damages	Less reduction for early admission of liability <sup>54</sup>	
				post-issue, pre-allocation	post-allocation, pre-listing	post-listing		
RTA (Non PI over £5000)	£626	4%	No data <sup>55</sup>	£1583			9%	No data
RTA involving PI								
No additional work factors	£1365	12%	£255	£1820	£2354	£3133	23%	£385
With additional work factors*	£1722			£2308	£2842	£3621		
Employer's Liability								
No additional work factors	£1747	9%	£203	£2563	£3391	£5396	17%	£673
With additional work factors*	£2012			£2711	£3539	£5544		
Public Liability								
No additional work factors	£1847	9%	£210	£2304	£3332	£5029	19%	£461
With additional work factors*	£2086			£2816	£3844	£5541		
Occupational disease	£1880	7%	No data	£1930			28%	No data

\* requirement for supplementary expert evidence (i.e. in addition to basic medical report)

<sup>53</sup> For cases which proceed to trial, the advocacy and other fixed costs permitted by CPR Part 46 should be added

<sup>54</sup> This is taken as an admission within the pre action protocol period, where proceedings are subsequently issued

<sup>55</sup> For this and other fields marked "no data", it was not possible to derive any meaningful results from the data supplied

2.3 Supporting “rules”. In applying the above matrix the sub committee agreed that certain rules would be needed. A number of these reflect the exception provisions identified by Lord Woolf himself in his Final Report:

- (i) For clarity and simplicity, the advocacy fees remain as a “bolt-on” as presently prescribed in the CPR.
- (ii) The costs of interim applications and injunctions should be summarily assessed “on the day” and therefore are outside the matrix.
- (iii) “Add-ons” need to provide for cases involving:
  - children and protected persons (a fixed percentage uplift), to include provision for court approval of any settlement;
  - expert evidence from more than one expert (this may be catered for within the matrix itself, otherwise a fixed percentage uplift);
  - multiple claimants or defendants (applying a percentage uplift varying by the number of additional parties required);
  - client not able to give adequate instructions in the English language (again, applying a fixed percentage uplift).
- (iv) There may be scope for capping some standard disbursements (for example there is an industry agreement, mediated by the Civil Justice Council, which caps medical agency fees in fast track cases). In this regard, it would be helpful for the Civil Justice Council to liaise with the Royal Colleges of Physicians and Surgeons in order to agree appropriate levels of fees. Subject to any specific agreements which may be reached, disbursements should not be fixed, but should be subject to a simple form of assessment, applying the usual tests of reasonableness.
- (v) There needs to be provision to deal with “unreasonable conduct” by the paying party. One option would be to permit the receiving party to apply for an order for summary assessment of costs outside the fixed costs matrix. Care would be needed to restrict the scope for satellite litigation.
- (vi) Similarly there must be an incentive for both sides to make good offers to settle, using CPR Part 36 or an equivalent system. Any rules for the application of fixed costs must make allowance for the operation of Part 36: this has not been adequately addressed in Part 45, Part 46 or Part 36 to date (see e.g. chapter 21, section 6).

2.4 The determination of fixed costs. The matrix presented in Table 22.2 envisages fixed costs for cases of different types and at different stages of the fast track process. In considering how such figures can be determined, some lessons can be drawn from the predictable costs for pre-issue RTA claims:

- (i) The scheme is clear and transparent, reducing the scope for satellite litigation. A review of the scheme in 2007 showed that litigation over costs in such cases had been reduced to negligible levels.<sup>56</sup>
- (ii) The level of costs was only agreed after the collection and statistical analysis of data from large numbers of settled claims, with a view to revealing the distribution of costs recovered by claimants in current practice. This enabled all parties to see the statistical relationship between the value of the claim and the

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<sup>56</sup> “*Monitoring the fixed recoverable costs scheme, Part I: the effects of the scheme on the outcome of claims*” Fenn and Rickman, 4<sup>th</sup> February 2007.



average costs. Background information about the nature and size of the samples used provided the parties with a level of confidence in the finding that the costs increased in proportion with case value.

- (iii) There was however some evidence that the scheme resulted in an increase in issued CPR Part 7 claims to avoid the fixed cost regime.<sup>57</sup> This incentive would be removed by extending predictable costs to post-issue settlements, so that all stages of a fast track case have fixed costs.

2.5 Practical issues. Taking into account these lessons and for the purposes of illustrating the feasibility of the proposed matrix, data on agreed profit costs have been collected from a number of organisations representing both claimants and defendants. In order to obtain large numbers of claims to ensure statistical confidence, Professor Fenn approached organisations known to have extensive computerised databases for management purposes. These data have been analysed to explore the feasibility of extending the previous methodology to claims settled post-issue as well as pre-issue.

2.6 Stages of the litigation process. While the sub-committee did consider the possibility of a number of different post-issue stages to be included in the matrix, in practice the data available did not consistently record the timing of settlements within the post-issue phase of litigation. It is however possible to identify those cases in which an allocation fee or a listing fee has been paid, so that costs can be estimated for cases settling after those stages have been reached. It is proposed that advocacy fees remain as a “bolt-on”, so no separate estimate has been made of the costs of cases decided at trial. However, see also the discussion at paragraph 2.16 below as to the extent to which statistical confidence could be improved by having just one post-issue stage.

2.7 Value bands and case types. The relationship between average profit costs and case value has been found in the past to be “non-linear” – that is, while profit costs tended to increase with case value throughout the fast track range, the rate of increase slowed at higher case values. This was the basis for the formula adopted for fixed recoverable costs, in which the costs increase by 20% of damages up to £5,000, and by 15% of damages between £5,000 and £10,000. The sub-committee did consider providing a further two value bands, that is up to £15,000 and up to £25,000, but this led to smaller sample sizes and limited confidence in the results produced. Instead Professor Fenn has identified formulae which apply a percentage of damages over a set amount linked to the type of case: because of the larger sets of data used to derive these formulae, a much greater degree of confidence can be attached to them.

2.8 The sub-committee were only able to access data in personal injury cases of various types. However, they identified several other types of case within the fast track and have tentatively identified which PI case type (and therefore which set of figures within Table 22.2) could represent the cost model for these other categories, by reference to the likely issues involved. These are shown in Table 22.3 below.

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<sup>57</sup> Op. cit., Fenn and Rickman, 4<sup>th</sup> February 2007.

**Table 22.3: Other case types and the potential PI cost model which could apply**

<b>Other case type</b>	<b>PI case type</b>
Clinical negligence	Workplace injury plus uplift
Other claim based in tort	Non-PI RTA
Defended debt claim	Non-PI RTA
Other claim in contract	Workplace injury
Defended claim for possession based on rent/mortgage arrears	Non-PI RTA
Housing disrepair	RTA with PI
Other claim involving property	Workplace injury
Chancery or other action	Workplace injury plus uplift

2.9 This matrix and the rules accompanying it are intended as no more than illustrative of how such a matrix could work. The figures are illustrative only but build on the existing fixed costs in the CPR.

2.10 Early admission of liability. The sub-committee considered that separate fixed costs should be applied where liability is admitted at an early stage from those in which liability was disputed. As well as reflecting the different costs incurred in such cases, this would provide a further incentive for defendants to admit liability early, consistent with the ethos of the CPR. The sub-committee has suggested that a reduction apply where liability is admitted within a defined time period, probably the relevant protocol period. Illustrative results are shown in the matrix, estimated from the same data used to estimate the relationship between profit costs and case value.

2.11 Not agreed. The sub-committee was not able to agree this matrix. There is an inevitable tension between the need for fairness to practitioners and the need for certainty and simplicity. For a matrix to be uniformly fair in every case, more boxes are needed than can easily be accommodated, whether as types of case or as stages in the proceedings: for example the claimant practitioner felt the period from allocation to pre-trial checklist to be too long to be capable of being covered by a single stage.

2.12 There was some agreement that if fixed fees are introduced, some form of matrix would be suitable, in line with Lord Woolf's original proposals. The judicial members were very happy with the principle and with simplicity as the governing factor, from their experience of fast track cases brought to trial. The defendant practitioner indicated that his firm had been operating a simple form of matrix with four post-issue staged fixed fees on fast track injury cases for several years.

2.13 Some of the concerns of the claimant practitioner are addressed in the "rules" at paragraph 2.3 above: for example, provisions for unreasonable conduct and for cases involving experts. In particular it was felt that disbursements should not be capped, as otherwise it might not be possible to find an expert who would work within the fee structure, accepting that any area where fees are not fixed or capped will create disputes and the risk of satellite litigation.

2.14 The claimant practitioner also felt that as access to justice is paramount, there is a risk that any structure of fixed costs for certain stages might be unfair on individual litigants or their lawyers, unless the costs mirrored all the possible stages in a fast track case.

2.15 It is considered that some compromise is needed. This was emphasised by Professor Fenn's very helpful input. Any figures entered into the matrix need to be based as far as possible on sufficiently large sets of data to be valid for a wide range of cases. If the data collected do not differentiate between numerous post-issue stages, it will be very difficult in practical terms to create a matrix with numerous stages.

2.16 Alternative option. As an alternative to the matrix shown at Table 22.2, the sub-committee considered whether there was a model which could be proposed with a greater degree of statistical confidence. Professor Fenn was able to indicate that he could produce an alternative with just one post-issue stage before trial, which would be derived from a much greater range of data. This is shown for illustrative purposes at Table 22.4. This has its own drawbacks: in particular, the possibility of claimants or their lawyers issuing proceedings simply to increase their revenue would need to be carefully considered and such behaviour restricted to the appropriate cases. However the alternative matrix is offered again as an illustration of the options:

Table 22.4: An alternative illustration with a single post-issue stage

Case type	Pre-issue settlement			Post-issue settlement <sup>58</sup>		
	Base fee	Plus % of damages	Less reduction for early admission of liability	Base fee	Plus % of damages	Less reduction for early admission of liability <sup>59</sup>
RTA (Non PI over £5000)	£626	4%	No data <sup>60</sup>	£1583	9%	No data
RTA involving PI						
No additional work factors	£1365	12%	£255	£2032	23%	£385
With additional work factors*	£1722			£2520		
Employer's Liability						
No additional work factors	£1747	9%	£203	£2920	17%	£673
With additional work factors*	£2012			£3068		
Public Liability						
No additional work factors	£1847	9%	£210	£2703	19%	£461
With additional work factors*	£2086			£3215		
Occupational disease	£1880	7%	No data	£1930	28%	No data

\* requirement for supplementary expert evidence (i.e. in addition to basic medical report)

<sup>58</sup> For cases which proceed to trial, the advocacy and other fixed costs permitted by CPR Part 46 should be added

<sup>59</sup> This is taken as an admission within the pre action protocol period, where proceedings are subsequently issued

<sup>60</sup> For this and other fields marked "no data", it was not possible to derive any meaningful results from the data supplied

2.17 Review mechanism. It has been a justified criticism of the existing fixed fees that no mechanism was built in for review and adjustment in line with inflation. Such failure undermines what is otherwise an effective method of keeping costs proportionate. Although the predictable costs under CPR Part 45 contain a limited element of inflation, in that they are linked to damages which themselves tend to increase in line with inflation, that was not the case with the fixed trial costs, which were reviewed and increased in line with inflation only after some eight years at static levels.

2.18 Such uncertainty over reviews is unsatisfactory. Any system of fixed costs would need adequate mechanism for review built in at the outset, ideally on an annual basis. Possibly the annual review could be undertaken by the Advisory Committee on Civil Costs, provided that committee has sufficient time and resources to take on this additional task. To avoid the need for any scheme to be the subject of a pilot, a commitment to collect data for the initial review would also be desirable.

2.19 Exceptional cases. Whatever system is introduced, there will need to be provision for exceptional cases in order to ensure that litigants are not deterred by the limits on recoverable costs from bringing meritorious claims. Although the fast track trial costs do not have such a provision (fast track trials are by definition limited to one day), there is an “escape clause” in the fixed recoverable costs rules, to be found at CPR rule 45.12.

2.20 Any such rule needs to strike a careful balance, in that it must have a sufficient deterrent effect on satellite litigation. In that respect CPR rule 45.12 has been successful: there is no record of any application for “escape” being pursued to a hearing.

### 3. REVIEW

3.1 There appears to be a strong case for some method of applying fixed costs in fast track cases at all stages. During Phase 2 of the Costs Review, I invite comments upon seven matters:

- (i) Whether some form of matrix of staged fees is the preferred solution.
- (ii) Whether there are other types of case that should be included in addition to those in the illustrative matrix at Table 22.2 and at paragraph 2.8.
- (iii) Whether there should be more or fewer stages in the matrix, by reference to the two examples at Tables 22.2 and 22.4.
- (iv) Whether the proposed “rules” adequately address the additional factors that would need to be built in.
- (v) Whether it is agreed that there should be a reduction for early admission of liability.
- (vi) How any counsel’s fees (other than in respect of advocacy) should be accommodated in a fast track fixed costs regime.
- (vii) What steps might be taken, with the assistance of the Civil Justice Council, to fix expert fees in fast track cases.

3.2 Additional data will be sought during Phase 2. See section 2, in particular paragraph 2.15, above. I request the co-operation both insurers and of claimant firms in this regard.

3.3 Although the sub-committee could not agree on all aspects of a matrix, there was agreement on the need for suitable mechanisms for review and to allow for exceptional cases. I would propose an annual review mechanism to be included in any such fixed costs regime.

3.4 In support of the advice of my panel of assessors, I observe that some form of fixed costs system works well in Germany (see chapter 55), where a matrix is applied to cases of a wider value range than our fast track; in Scotland (see chapter 54), where a diminishing percentage model is applied; and in New Zealand (see chapter 59), where the ABC/123 system is used. The latter was used to help justify the structure of the predictable costs scheme in CPR Part 45.

3.5 There seems little doubt that Lord Woolf's original concept of a fast track system with fixed costs at all stages now needs urgent attention. Whilst the recent increase of the fast track limit from £15,000 to £25,000 brings into its scope a range of cases not previously subject to such procedures, that increase was made in the knowledge that the fast track has fairly uniform procedures and therefore costs. It should be possible to devise a fair system of fixed costs for all cases within the new fast track limit.

**CHAPTER 23. SHOULD THERE BE A FIXED COSTS REGIME ABOVE THE FAST TRACK?**

**1. INTRODUCTION**

1.1 This chapter addresses “type 2” fixed costs. I have set out in chapter 2 section 3 a summary of the two types of fixed costs which are possible. In respect of fast track cases, an attempt is being made to achieve “type 1” fixed costs, as set out in the preceding chapter. Clearly such an endeavour would be impracticable in respect of multi-track cases. Therefore, the issue for debate in this chapter is whether there should be a “type 2” fixed costs regime for any categories of case which are above<sup>61</sup> the fast track. Any references to fixed costs in this chapter should (unless otherwise indicated) be taken as a reference to “type 2” fixed costs.

1.2 Policy arguments in favour. The policy arguments in favour of a fixed costs regime above the fast track have previously been mentioned. They include the following:

- (i) Some litigants (e.g. small businesses) may regard the risk of incurring indeterminate costs liability to the other side if they lose as worse than the risk of failing to recover all their own costs if they win. A party can control the costs which he incurs. A party cannot control the costs which the other side may be running up. Nor can a retrospective detailed assessment achieve such control.
- (ii) Such a regime achieves certainty in those categories of civil litigation where it is impracticable to establish type 1 fixed costs. Certainty is a commodity which many litigants (especially commercial litigants) crave and which is singularly lacking in civil litigation.
- (iii) If both parties know that, win or lose, they will be paying at least part of their own costs, there will be an incentive for economy on both sides.

1.3 Policy arguments against. The policy arguments against a fixed costs regime above the fast track have also been mentioned previously. They include the following:

- (i) It is unjust that the party who is vindicated should bear part of his own costs. The claimant, if successful, should keep all of his damages intact. The defendant, if successful, should walk away from the courtroom no poorer than when he arrived.
- (ii) In a fixed costs regime a wealthy party can generate much expense by procedural manoeuvres and thus grind down the other side, which will never recover all of its costs.

1.4 In this chapter I shall first briefly survey the approach to assessing or fixing costs in other jurisdictions (leaving detailed exposition until Part 11 of this report). I shall then review the options for England and Wales, including the alternative possibility of benchmark costs.

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<sup>61</sup> In this chapter, I shall use the phrase “above the fast track” to denote cases which are (a) above the fast track limits or (b) outside the fast track, because they fall into categories of case not assigned to tracks.

## 2. THE APPROACH IN OTHER JURISDICTIONS

2.1 Germany. In Germany there is a fixed costs regime for all types of litigation and all sizes of claim. This regime is explained in chapter 55 below. If, for example, the claimant succeeds in an action to recover €30 million, he will recover €343,020.35 in respect of costs. No doubt the claimant's actual costs will be higher and the claimant will have to bear that excess. It appears from my inquiries that the German system works well. Whilst accepting that every costs regime has drawbacks and anomalies, broadly speaking both practitioners and court users appear to be satisfied with the system. The German costs regime cannot of course be directly translated to England and Wales, because of the structural differences between the two civil justice systems: see chapter 55, section 4.

2.2 Other Continental jurisdictions. In other Continental jurisdictions, recoverable costs are reasonably predictable and are substantially below actual costs. See chapter 56 in respect of France and chapter 57 in respect of the Netherlands. The gap between actual and recoverable costs is greater in those two jurisdictions than in Germany. Also the costs rules in those two jurisdictions are less rigorous and precise than the costs rules in Germany.

2.3 Australia. As explained in chapter 58, some states in Australia have systems of scale costs, but New South Wales does not. Interestingly, practitioners under the scale costs system regard that as superior because of the certainty which it brings<sup>62</sup> whereas practitioners in New South Wales regard their system as superior, because recoverable costs are closer to actual costs.<sup>63</sup>

2.4 New Zealand. New Zealand has operated the "ABC/123" system since January 2000. This system is described in chapter 59. It is part way between a fixed costs system (as in Continental Europe) and a "recovery of reasonable costs" regime (as in England and Wales and in New South Wales). The system combines both predictability and a measure of flexibility.

2.5 Canada. Canada is currently in the throes of civil justice reform, as described in chapter 61. Part of the purpose of these reforms is to control the costs of litigation. As set out in chapter 61, tariffs play a significant part in the assessment of costs.

2.6 East Caribbean. The East Caribbean operates a system of fixed recoverable costs, using a costs matrix. This is described in chapter 62. The East Caribbean costs rules appear to be less efficacious than those in Germany, because of the amount of satellite litigation which they generate.

2.7 Scotland. Scotland does not have a fixed costs system as such. However, the fees recoverable in respect of work done are prescribed in regulations and tables, both for the sheriff courts and for the Court of Session. This regime is described in chapter 54. I am told that the Scottish costs rules are generally regarded as striking a fair balance between the conflicting interests in play, but that there is concern about the low level of costs recovery in respect of commercial litigation.<sup>64</sup> There are also

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<sup>62</sup> See the note of my discussion with the Western Australia Costs Committee in chapter 58.

<sup>63</sup> See the note of my discussion with costs assessors and practitioners in New South Wales in chapter 58.

<sup>64</sup> These comments about the Scottish costs rules are supported by Lord Gill's consultation paper *Scottish Civil Courts Review: a Consultation Paper* (November 2007), paragraphs 3.14 to 3.16 and the Response by the Royal Faculty of Procurators in Glasgow (March 2008), pages 9-10 (section 4 headed "Are the current rules for recovery of judicial expenses satisfactory?")



concerns about the costs of civil litigation generally. The whole of the Scottish civil justice system is currently under review by Lord Gill.

2.8 Overview. Although this report only looks in detail at nine foreign jurisdictions (treating Scotland as “foreign” for this purpose), it is clear that most civil justice systems around the world award to successful parties a much lower proportion of actual costs than we do. This is not, in itself, a decisive consideration. It may well be that, as a matter of policy, we are right and the rest of the world is wrong. It is, however, at least relevant to examine how other jurisdictions tackle these problems. In all civil justice systems the rule-makers are pursuing the same objectives, in particular:

- reimbursing costs to the vindicated party;
- certainty and predictability;
- flexibility to take account of the variety of civil litigation;
- encouraging fair settlements;
- providing incentives for reasonable litigation conduct;
- ensuring that neither the costs burden nor the costs risk is so great as to deter parties from pursuing proper claims or proper defences.

These objectives are in conflict with one another and self-evidently it is not possible to achieve all of them to the full extent.

2.9 Every civil justice system strikes its own balance between the conflicting objectives. None is perfect, but each merits consideration in the present Costs Review.

### 3. WHAT APPROACH SHOULD WE ADOPT IN ENGLAND AND WALES?

3.1 The basic question. The first and fundamental question (assuming that fast track costs become fixed) is whether all costs above the fast track should continue to be at large. In other words:

- (i) Should the successful party continue to recover its reasonable costs,<sup>65</sup> as retrospectively assessed and subject to the restrictions currently contained in the costs rules?
- (ii) Alternatively should some limit be placed upon recoverable costs, so that (a) the winning party bears more of its own costs; (b) the burden on the losing party is reduced; and (c) the costs risk of each party can be more accurately assessed?

3.2 That basic question is a matter of social policy, not abstract principle. The question must be confronted and answered before any re-writing of the costs rules can begin. The costs rules do not aspire to or reflect some Platonic ideal. The costs rules exist to facilitate access to the courts and to serve the needs and interests of all litigants and potential litigants in society as it now exists, and having regard to current economic conditions.

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<sup>65</sup> The requirement that costs, when assessed on the standard basis, should also be proportionate does not prevent recoverable costs from exceeding the value of the claim: see chapter 3, section 4.

3.3 For debate in Phase 2. I therefore invite a full debate about that basic question during Phase 2 of the Costs Review.

3.4 One possible answer. One possible answer to the basic question runs as follows. In some categories of litigation, the best interests of court users would be served by maintaining the current regime of recoverable costs being at large. In other categories, the best interests of court users would be served by introducing some form of fixed costs, predictive costs or tariff costs.

3.5 High value business claims. My distinct impression from the submissions and discussions during Phase 1 is that in major high value litigation (Commercial, Chancery, Mercantile, construction etc.) court users generally wish to maintain the present regime of recoverable costs being at large. If this impression is confirmed during Phase 2, then it would be inappropriate to introduce any form of fixed costs or similar into the realm of high value business litigation.

3.6 Personal injury claims above £25,000. In respect of personal injuries litigation above the fast track (i.e. claims above £25,000) particular policy considerations apply. It is generally regarded as unacceptable for any part of damages awarded for future care to be diverted to the claimant's solicitors, counsel or experts in order to meet costs not recovered from the defendant. Whether the entirety of a claimant's damages should be regarded as sacrosanct is a matter on which views differ. However, my impression from the submissions and discussions during Phase 1 is that, for higher value personal injury claims, the general view is that the present regime of recoverable costs being at large should continue. If this impression is confirmed during Phase 2, then it would be inappropriate to introduce any form of fixed costs or similar into the realm of higher value personal injury litigation.

3.7 Other mechanisms to control costs which are not fixed. On the assumption that certain areas of litigation (e.g. high value business claims or higher value personal injury claims) are ring fenced from any fixed costs or similar regime, this does not mean that legal and expert costs can continue to escalate freely. It will still be necessary to examine the procedural rules governing civil litigation and to consider what reforms may bring about more proportionate costs (as required by the second bullet point of my terms of reference). I shall tackle this task in later chapters.

3.8 Small business disputes and disputes between SMEs. Litigation in this category is discussed in chapter 29. My tentative view is that some form of fixed costs<sup>66</sup> or similar regime may well suit the best interests of court users in this category of litigation. Whether this perception is right or wrong may not be something that lawyers can tell me. During Phase 2 of the Costs Review, I invite court users in this category, including SMEs and organisations representing SMEs, to contribute their views on the issue.

3.9 If some form of fixed costs or similar regime for lower value business disputes<sup>67</sup> would suit the interests of court users, the question then arises as to what form of regime we should choose. If certainty or predictability is the main goal, then possibly the German model should be adapted. If court users generally would prefer a system which combines predictability with a measure of flexibility, then possibly the New Zealand system could provide inspiration.

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<sup>66</sup> i.e. fixed recoverable costs as between the parties, leaving costs as between solicitor and client at large.

<sup>67</sup> Below, say, £500,000 or £1 million.

3.10 Other areas of litigation. There are no doubt other areas of litigation above the fast track where court users generally are more concerned about the adverse costs risk if they lose, than about making full costs recovery if they win. If there are such areas of civil litigation, I hope that they will be identified during Phase 2 of the Costs Review.

3.11 Persons and bodies who contribute to the debate invited by this chapter should bear in mind that the present regime of recoverable success fees and recoverable ATE premiums may, possibly, not last for ever. See chapter 47 below.

#### 4. AN ALTERNATIVE APPROACH BENCHMARK COSTS

4.1 An alternative to fixed costs which has been floated is the concept of benchmark costs.

4.2 Lord Woolf's proposal. The possibility of introducing benchmark costs was raised by Lord Woolf in chapter 7 of his Final Report.<sup>68</sup> The proposal was that benchmark costs should be established for proceedings on the multi-track which had a limited and fairly constant procedure. Those costs would be awarded in every case, unless the receiving party established an entitlement to a higher figure.

4.3 The Senior Costs Judge's proposal. Senior Costs Judge Peter Hurst took this proposal forward at the request of Lord Woolf in 2000 and 2001. He produced calculations of benchmark costs for 14 different events in proceedings. Following consultation, in a report dated October 2001, the Senior Costs Judge proposed the following proceedings as suitable for benchmarking:

- Court of Appeal Civil Division: appeal on quantum; simple application for security for costs; application by solicitors to come off record.
- High Court judge / circuit judge: simple appeal from master / district judge.
- Master / district judge: application for extension of time; application by solicitors to come off record; simple application for security for costs; simple application without notice.
- Bankruptcy registrar / district judge: application for substituted service of bankruptcy petition; bankruptcy hearing adjourned to another appointment.

4.4 The figures which the Senior Costs Judge proposed in 2000 and 2001 will now have been overtaken by events. However, I should be interested to hear views on the principle of benchmark costs. Is this an approach which court users and practitioners would favour for multi-track proceedings, in the event that no form of fixed costs is adopted? It should be noted, however, as Senior Costs Judge Peter Hurst points out, that benchmark costs could only apply to a limited range of applications.

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<sup>68</sup> See paragraphs 35 to 37.

**5. REVIEW**

5.1 There are three possible approaches to assessing recoverable costs above the fast track:

- (i) Introduce some form of fixed costs, tariff costs or predictable costs across the board.
- (ii) Leave all costs to be assessed retrospectively by reference to the amount of work reasonably done.
- (iii) Divide litigation into categories, with a fixed costs or similar regime for some categories only.

5.2 Which of these approaches should be adopted is a question of policy. This question must be addressed having regard to the needs and interests of court users generally. I therefore hope that not only lawyers, but also other court users (i.e. those who actually have to pay the costs) will contribute to the debate during Phase 2 concerning issues raised in this chapter.

5.3 Finally, if fixed costs are rejected as a way forward, I should be interested to hear views concerning benchmark costs.



REVIEW OF  
CIVIL LITIGATION COSTS

## **PART 6: PERSONAL INJURIES LITIGATION**

### **CHAPTER 24. WHAT SHOULD BE THE UPPER LIMIT FOR PERSONAL INJURY CASES ON THE SMALL CLAIMS TRACK?**

#### **1. INTRODUCTION**

1.1 **The small claims track.** Rule 26.6 of the Civil Procedure Rules (“CPR”) sets out the scope of each of the three tracks (i.e. the small claims track, the fast track and the multi-track). While the small claims track is the normal track for any claim which has a financial value of not more than £5,000,<sup>1</sup> special provision is made for personal injury claims and certain claims made by a tenant against his landlord.<sup>2</sup>

1.2 **Personal injury claims and the small claims track.** Rule 26(1)(a) of the CPR provides that the small claims track is the normal track for:

“any claim for personal injuries where –

(i) the financial value of the claim is not more than £5,000; and

(ii) the financial value of any claim for damages for personal injuries is not more than £1,000...”

The phrase “damages for personal injuries” is defined as “damages claimed as compensation for pain, suffering and loss of amenity and does not include any other damages which are claimed”.<sup>3</sup> Such damages fall within the ambit of “general damages”.

1.3 Accordingly, the small claims track is the normal track for personal injury claims, where the damages claimed in respect of the personal injury (as restrictively defined in the CPR) do not exceed £1,000.

1.4 **Proposal.** It has been suggested by some that the upper limit for personal injury cases on the small claims track should be substantially increased above £1,000.<sup>4</sup> By increasing the upper limit for personal injury cases on the small claims

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<sup>1</sup> CPR rule 26.6(3).

<sup>2</sup> CPR rule 26.6(1)(a) and (b).

<sup>3</sup> CPR rule 26.6(2).

<sup>4</sup> See, for example, *Crane v Canons Leisure Centre* [2007] EWCA Civ 1352; [2008] 1 WLR 2549 at [1] where May LJ, suggests that the satellite litigation regarding costs which was the subject of the appeal arose “...in large measure because claims for personal injury in excess of £1,000 cannot be brought in the small claims track, as they should, since, in my view, the £1,000 should be substantially increased...”.

track from £1,000 to £5,000 (the normal upper limit for small claims), a significant number of personal injury cases would be taken out of the ambit of the fast track and would become subject to the small claims track regime. This proposal is not without controversy.

1.5 Throughout Phase 1 of the review I discussed the possible effects of raising the small claims track limit for personal injury claims from £1,000 to £5,000 with various stakeholders. Their views are reproduced in more detail in chapter 10. However, I set out a summary of their views, together with the views distilled from submissions I have been sent by interested parties, in section 2 below. I have also included within this summary the arguments for and against a change to the small claims limit as set out in the consultation paper “*Case track limits and the claims process for personal injury claims*” produced by the Department for Constitutional Affairs (now the Ministry of Justice) in April 2007.<sup>5</sup>

## 2. THE VIEWS OF THOSE CONCERNED

### (i) The arguments in favour

2.1 Disproportionate costs and the opportunity for costs savings. The majority of all personal injury claims are valued at below £5,000. The costs in lower value personal injury claims are often the most disproportionate and can exceed the amount claimed. By increasing the small claims limit for personal injury claims a large number of cases would be brought within the scope of the small claims track and a large number of claims would be removed from the costs regime of the fast track. The small claims track is considered by some to be a more efficient system and a more appropriate forum to hear lower value personal injury claims. The ABI informs me that the costs paid per year to claimant solicitors in relation to personal injury claims valued between £1,000 and £5,000 is as follows:

- Motor related claims: £984 million;
- Employers’ liability claims: £171 million.

Under the small claims regime such costs would not need to be paid and the costs savings may be passed on (a) to claimants in the form of increased general damages and (b) to the public in the form of reduced insurance premiums.

2.2 Straightforward claims. Many lower value personal injury claims relate to straightforward injuries (e.g. whiplash). Such injuries are relatively simple for a claimant to understand and it has been suggested that the small claims track is the proper forum for such claims. If the assessment of general damages for personal injuries were made simpler and more predictable (as suggested in chapter 28), then it may be feasible for personal injury claims above the present £1,000 limit to be pursued on the fast track.

2.3 BTE insurance. Many claimants have before-the-event (“BTE”) insurance as part of, for example, motor or household insurance policies. Such policies sometimes assist claimants by offering legal advice or representation in respect of claims brought on the small claims track.<sup>6</sup>

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<sup>5</sup> The consultation paper is available at: <http://www.justice.gov.uk/publications/cp0807.htm>.

<sup>6</sup> BTE insurers cannot simply assign or sell small claims to solicitors, since the CFA regime does not apply on the small claims track.

(ii) The arguments against

2.4 Complexity and access to justice. Personal injury cases may involve complex issues (e.g. issues of law or evidence) which require legal guidance. Indeed, by increasing the small claims limit to £5,000 many relatively severe and complex injuries would be brought within the scope of the small claims track. Claimants may not have the time, knowledge or qualifications to effectively pursue such personal injury claims as a litigant-in-person. Accordingly, claimants may not wish to pursue a claim without the assistance of a legal representative.<sup>7</sup> Given that the fees of such representatives are not normally recoverable in the small claims track, the claimant must pay for such services out of his own pocket. Claimants may not have the means or inclination to do so and accordingly this represents a significant barrier to justice. Trade unions would not have the resources to represent the huge number additional members bringing claims in the small claims track.

2.5 Inequality of arms. Given that the fees of legal representatives are largely not recoverable in the small claims track, many claimants would pursue their claims without the assistance of a solicitor. Conversely, “deep pocketed” defendants or insurers backing defendants may choose to instruct solicitors regardless of the fact that such costs are not recoverable. This would lead to an inequality of arms between the parties.

2.6 Undersettlement. It has been suggested that personal injury claimants, as inexperienced “one-time” litigants, are disadvantaged when dealing directly with legally represented defendants and insurers. Specifically, claimants are unable adequately to assess the value of their claim and, without the protection afforded by legal advice, could under settle their claims. An APIL membership survey<sup>8</sup> found that the difference between the averages of the first offer received (£1,729.40) and the final settlement sum (£2,648.48) was £919.08. This represents an increase of 53.14% on the average first offer. The conclusion drawn by APIL is that claimants assisted by independent legal advisers increased the amount of their compensation by over half. Such assistance would not be a feature of the small claims regime and, accordingly, many initial offers would be accepted leaving claimants under-compensated.

2.7 Practical difficulties. One stakeholder suggested that determining the correct track for personal injury claims would become more difficult and allocation hearings would become more complex.

2.8 Insurance premiums. As discussed in paragraph 2.2 above, an increase to the small claims limit for personal injury claims may lead to costs savings. Some stakeholders doubt whether any costs savings by insurers would be passed on to consumers in the form of reduced insurance premiums. On the contrary, given that the pool of fast track personal injury claims would diminish, after-the-event (“ATE”) insurance premiums would, as a result, increase substantially for the remaining fast track claims. This would restrict access to justice. Furthermore, BTE insurers may

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<sup>7</sup> A recent survey of clients by one personal injuries firm revealed that out of 650 clients, 455 said that they would not have pursued their claim if they had not had a solicitor. The firm states that 90% of the claims which it handles are below £5,000.

<sup>8</sup> APIL Membership Survey Research Report: “*Potential impact of the threshold limit for personal injury cases within the small claims court being raised to £5,000 – Analysis of responses*” dated March 2005. The report is based upon 782 responses received from APIL’s members and relates to 2,242 settled cases with a final award of below £5,000 in general damages.

be required to fund certain claims covered by BTE policies but without being able to recover such costs. Accordingly, BTE premiums would rise.

2.9 Loss of business. APIL's membership survey<sup>9</sup> (see above) suggests that almost 70% of all personal injury work consist of claims with general damages of less than £5,000. Solicitors firms that currently specialise in low value personal injury claims (i.e. below £5,000) would face a significant loss of business if the upper limit for small claims was increased. APIL suggests that the effect of the increase in the small claims limit in terms of lost business would be particularly acute in firms that specialise in Road Traffic Accident ("RTA") claims. APIL maintains that such firms would be "*decimated due to the loss of a significant amount of business*".<sup>10</sup> The reduction in the number of personal injury firms would create access to justice problems.

2.10 Inadequate resources. It has been suggested that if the limit were increased, more claimants would seek advice from legal advice centres. Currently, such legal advice centres do not have the capacity or expertise to advise litigants in person in personal injury cases. Indeed, it is further suggested that the courts would be unable to cope with a substantial increase in the number of unrepresented claimants in personal injury cases.

### 3. PREVIOUS CONSULTATION

3.1 Previous consultation. On the 20<sup>th</sup> April 2007 the Department for Constitutional Affairs produced a consultation paper entitled "*Case track limits and the claims process for personal injury claims*".<sup>11</sup> The consultation paper set out the arguments for and against a change to the upper limit of the small claims track for personal injury claims (some of these arguments are summarised in section 2 above). The paper then set out four possible courses of action: (1) raise the limit to £5,000; (2) raise the limit to £2,500; (3) raise the limit in line with inflation; or (4) preserve the same limit. The paper concluded that it would be more appropriate to maintain the limit at £1,000 and improve the claims process. Accordingly, the consultation paper sought views in this regard. The MoJ then published a post-consultation report<sup>12</sup> summarising the responses received.

3.2 The responses. In total 271 responses were received, 46% of these were from respondents in the legal profession, 20% were from the insurance industry and local authorities accounted for 13% of the responses. The majority of respondents (76%) agreed that the small claims limit for personal injury claims should remain at £1,000, with only a minority (22%) preferring an increase to the limit.

3.3 Conclusions. The conclusion of the post-consultation report was that the small claims limit for personal injury claims should remain at the current level of £1,000.

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<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*, page 8.

<sup>11</sup> The consultation paper is available at: <http://www.justice.gov.uk/publications/cp0807.htm>.

<sup>12</sup> The post-consultation report is available at: <http://www.justice.gov.uk/publications/cp0807.htm>.



#### 4. OPTIONS FOR CONSIDERATION

4.1 Options. One method of addressing the disproportionate costs in lower value personal injury claims would be to increase the small claims limit for such claims. There are essentially four options to consider:

- an increase to the small claims limit from £1,000 to £5,000;
- a lesser increase to the limit (e.g. an increase to £2,500);
- an increase in line with inflation; and
- no increase to the limit.

4.2 Safeguards. Increasing the small claims limit either to £5,000 or to some lesser amount would need to be accompanied by the introduction of appropriate safeguards for unrepresented claimants. These could include the following:

- Types of claim. The revised upper limit of the small claims track could be applicable only to certain types of claim. For example, uncontested claims relating to soft tissue injuries (thereby excluding more serious injuries).
- Revised system for assessing general damages. In order to obviate undersettlement of claims by unrepresented claimants, a software system for assessing and calculating the level of general damages in lower value personal injury cases could be devised. This system would make the assessment of general damages for personal injury cases simpler.<sup>13</sup>
- Provision for some form of legal advice. The small claims regime for personal injury claims could be revised so that claimants are able to recover the costs of a predetermined amount of legal advice.

4.3 Views. I would be grateful to hear the views of all those concerned on the options and the possible safeguards set out above during Phase 2 of the review.

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<sup>13</sup> As discussed in chapter 28.

**CHAPTER 25. SHOULD THERE BE ONE WAY COST SHIFTING FOR PERSONAL INJURY CLAIMS?**

**1. INTRODUCTION**

1.1 The vast majority of personal injury claims notified are either (a) resolved in favour of the claimant or (b) dropped before issue. Therefore, in practice, it is rare for personal injuries litigation to result in any costs being paid to defendants.

1.2 Claimants often take out ATE insurance in order to cover (a) liability for the other side's costs and (b) own disbursements in the event that the claim fails. Defendants are liable to pay such insurance premiums in all the cases which they lose (i.e. the vast majority of claims which are seriously pursued). Therefore defendants pay a high price for the luxury of costs recovery in those few cases which they win. On looking at the data which has come in during phase 1 of the Costs Review, it seems to me that a one-way costs shifting rule would (a) be cheaper for defendants than the present two-way rule and (b) reduce the burden on claimants. It is therefore necessary to look at this proposal and its implications in further detail.

1.3 The proposal. The proposal which I raise for consideration during Phase 2 is whether it would be more cost effective to remove the claimant's liability for costs in respect of unsuccessful cases. I shall refer to the claimant and defendant as "C" and "D" respectively. The proposal for consideration is as follows:

- (i) In cases which C wins, C recovers costs on the same basis as present.
- (ii) In cases which C loses, the court makes no order for costs.
- (iii) Because C is not at risk of an adverse costs order, he does not need to insure against such risk. Therefore that element of the ATE premium is no longer charged.

**2. ANALYSIS OF THE FIGURES**

2.1 It has not proved at all easy to obtain data which enable the financial effects of the above proposal to be quantified. Nevertheless one insurer, "X", did provide figures which shed some light on this issue.

2.2 Share of the market. X state that they have approximately 8% of the insurance market in respect of RTA, EL and PL personal injury liability. Since this represents a significant number of claims I have obtained from X such statistical data as are readily available. I am grateful to X for the material which they supplied and for their subsequent explanations by telephone.

2.3 Claims notified and claims paid 2008. During the year 1<sup>st</sup> December 2007 to 30<sup>th</sup> November 2008 there were 22,726 personal injury claims notified to X. I shall refer to this year as "2008", despite the displacement of one month. During 2008 X appointed costs negotiators to deal with costs payable to claimant solicitors in 11,185 personal injury claims. I understand that this does not represent the entirety of claims in which X paid out, since there would have been about 500 – 750 straightforward cases in which X paid out costs under the predictive costs regime without any need for assistance from costs negotiators. Thus it would seem that the total number of claims on which X paid out in 2008 were about 11,750. Clearly the

claims which X pay out in any given year are not the same as the claims notified in that year, although there will be some overlap.

2.4 Claims litigated during 2008. During 2008 proceedings were served in 1,414 cases (i.e. 6.22% of the total number of claims notified). Out of these cases 99 (i.e. 7%) proceeded to trial. The remaining 1,315 cases were settled before trial. Most of these settlements involved making payments to the claimant. However, I am told that in 50 or 60 cases there were “drop hands” settlements, meaning that each side bore its own costs. Turning to the 99 cases that went to trial, I am told that “one or two” of these resulted in the claim being dismissed with an order for costs in favour of the defendant. In the other cases the claimant either succeeded on liability or (much more commonly) liability was conceded. Thus in approximately 97 cases the real issue at trial was quantum. X tell me that in about 75% of the cases which they fight on quantum the court awards more than X’s Part 36 offer. Accordingly, an order for costs is made in favour of the claimants. In about 25% percent of cases the court awards no more than X previously offered, with the result that X gets an order for costs since the date of offer.

2.5 Claims resolved without litigation. It can be seen that about 94% of cases are resolved without the need for proceedings. In the majority of these cases X make a payment in settlement to the claimant. In the remaining cases the claimant does not pursue his claim, but incurs no costs liability because the claim has been dropped before issue.

2.6 X’s costs recovery in the year. It can be seen from the above figures that out of a total of some 22,000 or 23,000 notified claims, X end up obtaining costs orders in their favour in about 25 cases (approximately 0.1% of the total).

2.7 ATE premiums paid out by X in 2008. According to the data supplied during 2008 X paid out to claimant solicitors £2,976,541 in respect of ATE premiums. This ATE insurance would have insured the claimants against (a) their potential liability for costs to the other side and (b) their own disbursements if cases were lost. In practice counsel’s fees would not form part of those disbursements, because in all or virtually all cases counsel would have been on CFAs.<sup>14</sup> Thus in practice the ATE insurance is covering opponent’s costs, court fees and any expert fees.

2.8 Comparison. I do not know the precise amount of the total figure in the previous paragraph, which is referable to the risk of an adverse costs order. It is, however, a reasonable inference that if that element of the ATE costs could be saved, such savings would outweigh the amount of costs recovered by X in the very few cases which they win (i.e. defendant held not liable) or partially win (i.e. some costs recovered because proper offer made). In answer to my questions, the technical manager of X (who organised the compilation of data) inclined to the view that on the current figures one-way cost shifting would over all be cheaper for insurers than two-way cost shifting.

2.9 Opinion of medical defence solicitor. One solicitor who specialises in medical defence work informed me that, because of the high level of ATE premiums, defendants in clinical negligence cases would be better off under a one-way costs shifting regime than under the present costs regime. That solicitor promised to collate the figures and send in data to back up this opinion. At the time of writing no such material has been received.

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<sup>14</sup> I am informed by the Personal Injuries Bar Association that in low value personal injury cases counsel are required to proceed on CFAs. If any counsel insists upon being a disbursement, instructions will be transferred to some other barrister who is more compliant.

### 3. WOULD A ONE WAY COST SHIFTING REGIME BE ADVANTAGEOUS?

3.1 This question needs to be looked at from three perspectives, namely that of the claimant, that of the defendant and that of the public interest.

3.2 Claimant perspective. Under a one way costs shifting regime, the claimant would no longer be at risk of having to pay the defendant's costs. The claimant would no longer need to insure against that risk. These features may be thought advantageous. On the other hand, some incentive may need to be introduced into the rules (a) to discourage frivolous claims and (b) to encourage acceptance reasonable offers. If such an incentive is introduced, this may affect the merits of one way cost shifting from the claimant's perspective.

3.3 Defendant perspective. On the material which I have so far seen, the two way cost shifting rule appears to bring little benefit to defendants. On the other hand, it may be said that without such a rule (a) more frivolous actions would be started and (b) claimants would be less likely to accept reasonable offers. The incentives which the Forum of Insurance Lawyers ("FOIL") suggest would be necessary to prevent such conduct are set out in chapter 10 above. An alternative suggestion which has been made is that even under a one way costs shifting regime there should be a power to award costs against the claimant in exceptional circumstances.<sup>15</sup>

3.4 My own tentative view is that penalties of the kind suggested by FOIL may not be necessary. The fact that the solicitor is on a CFA already discourages (a) frivolous claims and (b) the rejection of reasonable offers. Furthermore the claimant must still incur (or insure against) court fees and expert fees,<sup>16</sup> which he will not recover if the action fails. In most personal injury claims ATE insurance is issued under delegated authority. I would question whether the risk of liability for adverse costs operates as a brake upon claimant conduct.

3.5 The public interest perspective. The personal injury litigation industry is populated by numerous interest groups and middlemen, all of whom have to meet their overheads and make a profit on top. If any layer of activity can be removed from the process (and insurance against adverse costs liability is one layer of activity), it may be thought that this will serve the public interest.

3.6 Request for comments. I would be interested to receive during the consultation period (a) views and (b) statistical data relating to the issue of one way cost shifting.

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<sup>15</sup> In areas where there is no costs shifting the residual power to award costs against parties who behave unreasonably is in practice seldom exercised: see chapters 49 – 51 below.

<sup>16</sup> Counsel fees are not a problem for claimants as (according to the PIBA) counsel are generally on CFAs.

**CHAPTER 26. CAN THE TRANSACTION COSTS OF PERSONAL INJURIES COMPENSATION BE REDUCED?**

**1. INTRODUCTION**

1.1 Focus of this chapter. In this chapter I shall focus upon “ordinary” personal injury claims, by which I mean road traffic accidents (“RTA”), employers liability (including occupational disease) and public liability claims. Clinical negligence claims tend to be more complicated, both in relation to liability<sup>17</sup> and quantum. Clinical negligence claims are outside the ambit of this chapter.

1.2 Claimants usually win personal injury cases. In great majority of personal injury cases claimants are successful on liability. This can be seen from many of the appendices to this report, but perhaps most clearly from Appendix 25.<sup>18</sup> Liability is generally conceded on behalf of the defendant well before trial and often before issue of proceedings.

1.3 Personal injuries litigation is generally fairly straightforward. The injuries suffered by claimants are often distressing. The correct computation of the damages due is always a matter of vital importance for the claimant and is often vital for his/her family as well. Nevertheless, despite the emotional content and importance of every case, the general run of personal injury cases is not hugely challenging work for skilled and specialist lawyers or paralegals to carry out.<sup>19</sup> Furthermore, the great majority of personal injuries work is indeed carried out by lawyers and paralegals who specialise in this area. Organisations such as APIL have done much to promote specialist skill and expertise in personal injuries work.

1.4 The cost of personal injuries litigation remains remarkably high. As can be seen from the appendices to this report, the costs of personal injuries litigation remains high. This is particularly true in respect of lower value claims: see, for example, Appendix 1a and the Frontier Economics report at Appendix 28,<sup>20</sup> if that report is accepted as accurate. It can also be seen from the appendices that, in the general run of cases, the claimant solicitor costs are substantially higher than the defendant solicitor costs (both sets of costs in practice being paid by the defendant’s insurers). In the circumstances, the question must be asked as to why such high costs are being incurred in respect of personal injuries litigation, particularly on the claimant side. I shall address this question in section 2.

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<sup>17</sup> Liability involves separate consideration of breach and causation, the interrelationship between which can be complex in clinical negligence litigation: see Jackson & Powell on Professional Negligence (6<sup>th</sup> edition, Sweet & Maxwell, 2007) at paragraphs 13-066 to 13-154. It is not unusual for claimants to fail on causation, even though they succeed in establishing breach.

<sup>18</sup> On average, over 90% of road traffic accident claims succeed and, in most years, over 70% of employers liability claims succeed. These two categories encompass the vast majority of all personal injury claims.

<sup>19</sup> I exclude from this observation high value cases which involve schedules of future loss etc.

<sup>20</sup> This report must be read subject to APIL’s criticisms, which are included in Appendix 28.

**2. WHY ARE SUCH HIGH COSTS BEING INCURRED IN RESPECT OF PERSONAL INJURIES LITIGATION, PARTICULARLY ON THE CLAIMANT SIDE?**

2.1 The rival views. Very different answers to this question are given by claimant representatives and defendant representatives. I shall summarise separately some of the answers given by those two groups.

**(i) The answers given by claimant representatives**

2.2 Expenses of obtaining work. Whereas defence solicitors receive a steady stream of work from their insurer clients, this is not so for claimant solicitors. Claimant solicitors must get work by marketing or alternatively by paying referral fees.

2.3 Time spent with clients. The claimant in a personal injury claim probably has no previous experience of litigation and is obviously concerned about his/her case. The claimant's solicitor must spend some time talking to the client. Liability insurers are repeat litigators and require much less contact with, or attention from, their solicitors.

2.4 Cash flow. Defendant solicitors are paid by their insurer clients on a regular basis. Claimant solicitors, on the other hand, have to wait for some time (sometimes years) after the conclusion of a case before they are paid. An indication of how long claimant solicitors have to wait for payment can be gleaned from Appendix 12 (the APIL schedule).

2.5 Attitude of defendants. Defendants define the issues in litigation. In the view of claimant representatives, defendants generate unnecessary costs by failing to respond properly to letters of claim; by failing to comply with the pre-action protocol; by failing to provide information which is in their exclusive possession (e.g. employer records); by denying liability in cases where there is no defence; and by refusing to make proper admissions.<sup>21</sup> Defendants put claimants to proof in respect of matters which ought to be admitted.

2.6 Necessary costs in every case. Claimants have the burden of proof and therefore claimant solicitors have more work to do than defendant solicitors. There are certain minimum costs which have to be incurred, regardless of the size of the claim: for example, taking the claimant's witness statement, requesting medical records, obtaining medical reports, etc. It is therefore inevitable that costs will be higher relative to damages in lower value cases.

2.7 Assessing general damages for personal injuries. This task is not straightforward and requires research. The computer systems used by liability insurers are unsatisfactory and invariably produce valuations which are too low.

**(ii) The answers given by defendant representatives**

2.8 No proper scrutiny of costs. Whereas liability insurers watch over the costs of defence solicitors like hawks, there is no-one watching over the costs of claimant solicitors. The claimants have no interest in the level of costs, because they will never

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<sup>21</sup> An analysis recently carried out by one trade union of cases concluded in 2008 shows that in 72% of successful cases there was no admission of liability within 4 months of the pre-action protocol letter.

have to pay those costs. The liability insurers can only exercise limited control, essentially for two reasons. First, it is prohibitively expensive to go to detailed assessment. Secondly, after-the-event, it is not easy to challenge items of profit costs which may be excessive.

2.9 Excessive hourly rates. The hourly rates charged by claimant solicitors are substantially higher than the hourly rates charged by defendant solicitors and are excessive. Indeed, the very fact that claimant solicitors are paid by the hour (whereas some defendant solicitors are on fixed fees) tends to encourage inefficiency on the claimants' side.

2.10 Referral fees. Claimant solicitors pay substantial referral fees to acquire business. They are only able to pay such fees because these are built into the solicitors' profit costs.

2.11 Exploitation. Some claimant solicitors exploit the rules, for example (a) by issuing unnecessary applications for pre-action disclosure (which is a revenue generator) or (b) by issuing proceedings prematurely (in order to escape the predictive costs regime for RTA claims). This is part of a process described by some as "cost building".

2.12 No competitive tendering. Claimant solicitors, unlike defendant solicitors, do not obtain work by competitive tendering. Thus claimant solicitors do not have the same incentive to devise and operate procedures which will hold down costs.

2.13 Excessive legal input. Some low value personal injury claims (for example where liability is admitted and the injury is straightforward) are not "legal" disputes at all. They could perfectly well be resolved direct between the claimant and the liability insurer without any input from lawyers (as are many other more complex insurance claims – e.g. following flood damage).

### (iii) One possible view

2.14 One possible view is that there is some force in the points made by both sides, and that cumulatively the matters which are complained of by both sides account for the remarkably high costs of personal injuries litigation. Whether or not this is the correct analysis is a question which I leave open at the moment.

2.15 Referral fees. In respect of referral fees, there appears to be a general view amongst solicitors on both sides of the fence that these are an unwelcome addition to personal injury costs which bring little benefit either to lawyers or to clients. The majority of solicitors do not accept the "access to justice" argument. They maintain that even if referral fees were banned and there were no claims management companies, injured persons could easily contact solicitors of appropriate expertise. Details of solicitors who are members of APIL are readily available on the internet. I have recently attended two large solicitors' conferences at which the merits of referral fees were discussed.<sup>22</sup> On both occasions a show of hands revealed that the overwhelming majority of solicitors present would favour banning referral fees.

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<sup>22</sup> A "costs" conference in November 2008 and the APIL Annual Conference in April 2009. At the APIL conference the "market forces" argument was canvassed (*viz* the argument that because solicitors are prepared to pay referral fees, referral fees should be regarded as acceptable). That argument did not find favour.

### 3. THE NEW PROCESS FOR PERSONAL INJURY CLAIMS

3.1 Consultation paper. The Ministry of Justice (“MoJ”) is concerned about the excessive costs of lower value personal injury claims. The MoJ’s predecessor, the Department for Constitutional Affairs (“DCA”), set out its original proposal for tackling the problem in a consultation paper dated 20<sup>th</sup> April 2007. This proposed developing a new “claims process for personal injury claims” in respect of all personal injury claims<sup>23</sup> up to the value of £25,000.<sup>24</sup> I shall refer to this as “the new process”. The essential elements of the new process are set out in the following paragraphs.

3.2 Notification of claim. The claimant or his solicitor (to whom I shall collectively refer as “C”) will notify the defendant of the claim as soon as C has the minimum information that the defendant or his insurer (to whom I shall collectively refer as “D”) need in order to reach a decision on liability. C will convey that information to D, using a standard form, referred to in the consultation paper as a “claim form”. This is not the same sort of document as the “claim form” by which litigation in court is commenced. In order to avoid confusion, I shall refer to the notification document proposed in the consultation paper as a “notification form”.<sup>25</sup>

3.3 Investigation of claim. Following receipt of the notification form, D will investigate the claim within a set period of time, during which C will do no further work on the claim. D will then respond, stating whether it admits liability; alternatively, stating why it needs more time; alternatively identifying any area of the claim that is problematic. In appropriate cases D will make an offer of rehabilitation at this stage. Early rehabilitation is a matter of crucial importance in many cases, principally for the benefit of the injured party but also, of course, potentially reducing the damages liability of D.

3.4 Steps following admission of liability. D’s admission of liability will be binding, except in cases of fraud. Upon receipt of such admission, C will obtain a medical report. C will instruct the appropriate medical practitioner using a standard form, as set out in Appendix 6 to the consultation paper. After checking the medical report for factual accuracy, C will send it to D as part of a settlement pack, including C’s offer to settle. D will then accept the offer or make a counter-offer within a set period.

3.5 Costs. Fixed costs (including a fixed success fee) would apply to the first stage of the process, leading to admission or denial of liability. These fixed costs would not include the cost of referral fees and would be limited to the work necessary to progress the case. No ATE insurance should be taken out during the initial period, because C would not, at that stage, be at risk of adverse costs. Accordingly, no ATE premium would be recoverable in respect of the initial period. There would then be further fixed costs provisions for the second (negotiation) and third (court assessment) stages of the process.

3.6 Response to consultation. During the consultation period, concerns were expressed about the effect of the new process upon the ATE market. The MoJ therefore accepted that ATE insurance could be taken out at the start of the initial period and that the ATE premium should be recoverable. Respondents also expressed concerns about the wide ambit of the new process. The MoJ therefore accepted that the new process should be limited only to road traffic accident claims

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<sup>23</sup> Excluding clinical negligence

<sup>24</sup> “*Case track limits and the claims process for personal injury claims*”, consultation paper CP 8/07.

<sup>25</sup> Various drafts of this notification form are appended to the consultation paper.



up to a value of £10,000. Having considered the responses to consultation, the MoJ made a number of further changes to the details of the new process, including the removal of any time constraint on when C should send the notification form. The setting of fixed costs for the various stages of the new process is to be referred to the Advisory Council on Civil Costs.

3.7 The stage now reached in developing the new process. The MoJ is currently working out the details of the proposed new process and is furnishing relevant documents to the Civil Procedure Rule Committee for consideration.

3.8 My own preliminary view. My own preliminary view is that a process along the lines suggested by the DCA in the original consultation paper makes eminently good sense. Such a process should save costs and resolve some of the problems which presently arise.<sup>26</sup> However, the details of that process are bound to be affected by whatever reforms are adopted following the conclusion of the present Costs Review. It may therefore be sensible to dovetail in the development of the new claims process with whatever implementation programme may be put in place following completion of the 2009 Costs Review. The introduction of two different packages of reforms addressing the same subject matter may be unsettling for both practitioners and court users.

#### 4. REVIEW

4.1 A major part of civil litigation costs is attributable to personal injury litigation. Many personal injury claims (particularly at the lower end) are relatively straightforward matters, which ought to be capable of fair resolution without the defendant's insurers paying out sums to lawyers and experts in costs comparable to what they pay out in damages to claimants.

4.2 During Phase 2 of the Costs Review I hope to move beyond the rhetoric of both claimant and defendant practitioners, and to explore with them how this might be achieved. The new "claims process for personal injury claims" being developed by the MoJ in conjunction with the Civil Justice Council and representatives from both sides of the industry is undoubtedly a constructive step. However, that new process is only applicable to road traffic accident claims up to £10,000, where the defendant admits liability within a defined period. There are many straightforward, low value personal injury claims which fall outside those parameters. Furthermore any new claims process now being developed will require amendment, if one or more of the following reforms are the result of the present review:

- The upper limit for personal injury damages in the small claims track is raised above £1,000.
- Success fees and/or ATE premiums cease to be recoverable as costs.
- A comprehensive fixed costs regime is introduced for all cases in the fast track (as recommended by Lord Woolf thirteen years ago, but not yet implemented).

4.3 Some countries (e.g. Ireland and New Zealand) have established tribunals to deal with personal injury claims, or certain categories of personal injury claims. I do not, at the moment, put forward any such proposal for debate. District judges are just as expert at resolving low value personal injury claims as any tribunal would be

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<sup>26</sup> For example, re pre-action disclosure (see chapter 41) and re selection of experts (see chapter 42).

and they have built up immense experience through conducting trials on the small claims track and the fast track.

4.4 During Phase 2 of the Costs Review I look forward to receiving comments from all concerned on three matters:

- (i) How the proposed new claims process would be affected, if any of the reforms canvassed in this report were to be adopted.
- (ii) How the new claims process might be built upon, in order to embrace all personal injury claims within the fast track limits.
- (iii) Any other constructive suggestions for co-operation between claimant and defendant solicitors, which might facilitate the swift and fair resolution of that vast mass of low value personal injury claims where (a) there is no defence on liability and (b) quantifying damages is straightforward.

## **CHAPTER 27. HOW ARE GENERAL DAMAGES FOR PERSONAL INJURIES ASSESSED IN OTHER JURISDICTIONS?**

### **1. INTRODUCTION**

1.1 The purpose of this chapter. In this chapter I shall review the method by which general damages for personal injuries are assessed in Italy, France and Spain. Each of these jurisdictions adopts a points-based system, which seems to work satisfactorily, although there may be criticisms of the manner in which the system is calibrated. It has been suggested that if England and Wales were to move to some variant of those Continental systems (at least in relation to lower value claims), then the assessment of general damages for personal injuries might become simpler, more predictable and less expensive. Another possible advantage of this reform is that the risk of undersettlement might be reduced.

1.2 In order to provide a basis for discussion during Phase 2 of the Costs Review, I shall now summarise the relevant laws of Italy, France and Spain. In the following chapter I shall address the question whether and how such an approach might possibly be adopted in England and Wales.

1.3 Rome II. Any consideration of general damages should be viewed against the background of the European Union's move towards harmonisation of laws across Europe. Of particular importance in this context is EC Regulation 864/2007/EC also referred to as "Rome II". Rome II was adopted into UK law from the 11<sup>th</sup> January 2009. Rome II provides that, in addressing a conflict of laws, the courts of all EU member states (excluding Denmark) must apply the same set of rules in determining the law that governs non-contractual obligations in civil and commercial matters.<sup>27</sup> Article 4(1) provides that the applicable law will be the law of the country in which the damage occurs. Contrary to the previous situation under English law, the assessment of damages will now be governed by the applicable law.<sup>28</sup>

1.4 In this chapter the intention is to consider the valuation of general damages in lower value claims. However, where it is of assistance in understanding the whole valuation process, I give details and use examples relating to the valuation of higher value claims.

### **2. ITALY**

2.1 The Constitution and the Civil Code. The Italian system of law is codified rather than based on common law. The relevant Articles for the recovery and quantification of general damages are as follows:

- Article 32 of the Italian Constitution: The Republic safeguards health as a fundamental right of the individual in the interests of the community and guarantees free treatment to injured parties.
- Article 2043 of the Civil Code: Any act either intentional or negligent which causes another party a wrong, requires the party that committed that act to compensate for the damage caused.

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<sup>27</sup> See Rome II, Article 1(1).

<sup>28</sup> Rome II, Article 15(c).

- Article 2059 of the Civil Code: Grants an injured party the right to recover non-economic (general) damages.

2.2 Italian Insurance Code. In terms of general damages incurred as a result of a road traffic accident, the details for the valuation of general damages are set out in the Italian Insurance Code (D.Lgs. 07.09.2005, n.209). Article 138 of that Code sets out the position relating to “biological damage due to serious injuries” and Article 139 sets out the position in relation to “biological damage due to minor injuries”. Article 139 provides:

“1. Compensation for biological damage due to minor injuries, caused by damage arising from the use of motor vehicles and vessels, shall be paid according to the following criteria and measurements:

a) in respect of permanent biological damage, a sum is paid for the after-effects of injuries equal to or greater than nine percent, the sum increases in a more than proportional way with respect to each percentage point of invalidity... the sum is reduced with an increase in the age of the injured party by 0.5% for each year over 11 years of age. The value of the first point is equal to €720.95 (this sum is updated annually).

b) in respect of temporary biological damage, a sum of €42.06 (updated annually) is paid for each day of total incapacity; in case of temporary incapacity of less than 100%, payment is made proportionately.”

2.3 The Code defines “biological damage” as: “*temporary or permanent injury to a person's mental and/or physical health detectable by medical examination, which has a negative effect on daily activities.*”

2.4 Article 139 of the Code also establishes a table of impairment to mental and/or physical health covering the range of invalidity from 1-9 percentage points. That table is in place and is used throughout Italy. For example, the table dated 30<sup>th</sup> June 2008 shows that a person aged 45, shown as having 9% invalidity, would be awarded €12,312.02. The same individual, shown as having a 3% invalidity, would be awarded €2,141.22. A typical claim for a whiplash injury is likely to have between 2 and 4 percentage points.

2.5 Article 138 of the Code sets out the position relating to “biological damage due to serious injuries”. Non-economic damages (i.e. general damages) are classified in Italy as biological damages, moral damages and existential damages. Biological damages are injuries, both physical and psychological, that are suffered as a direct consequence of the accident. Moral damage relates to psychological injuries and existential damage relates to the impact on the way of life.

2.6 The extent of the injuries sustained is assessed by a medical expert, who establishes a percentage of invalidity, related to the level of injury. The assessment of the percentage of invalidity is based on Tables of Forensic Medicine, which determine the value from 1-100 of every kind of injury. Examples are as follows:

- Paraplegia 85 points
- Blindness to 1 eye 28/30 points
- Loss of 1 leg 50-85 points (according to ability to use a prosthesis)

2.7 Once a percentage of invalidity is assessed it is usually applied to the Table of Biological Damages that is issued annually by the courts of Rome and Milan. The tables published in Milan are frequently referred to on a national basis.

2.8 A monetary value is then taken from the Table of Biological Damages and attributed to each point of invalidity. The age of the claimant is then factored into the calculation and the assessed damages are decreased proportionately the higher the claimant's age.

2.9 In addition, the claimant is entitled to recover compensation for each day of temporary inability following from the accident. Under the tables published by the court of Milan compensation is paid at a rate of €69.14 per day, dependent on the seriousness and length of the disability. The inability may be full or partial. The sum awarded will be decreased proportionately from 100%, according to the extent of inability.

2.10 This system means that claims can largely be resolved without recourse to the courts.

### 3. FRANCE

3.1 Interplay of Code and case law. French Law is largely codified. However, the law concerning the assessment of compensation for personal injury is a matter of case law. It is based on the principle of full compensation in the case of third party liability. The law concerning the assessment of personal injury compensation has therefore been created by the courts, but has given rise to legislative intervention in some areas. For example, the Law of 5<sup>th</sup> July 1985 sets out the principles behind full compensation in road traffic accidents.<sup>29</sup>

3.2 Whilst the law in relation to road traffic accidents has legislative force, the same principles for the calculation of general damages apply, whether the injury was caused as a result of a road traffic accident, or otherwise. The injury must be clear and self evident and the symptoms must be a direct result of the accident. It will be the victim's responsibility to provide evidence of the harm he/she has suffered and he/she should obtain a certificate from a treating physician at the earliest possible opportunity. That certificate is produced to the insurer to instigate the claim for the injury. The insurer will require the claimant to be seen by a medical expert at a later date.

3.3 Medical experts. Medical experts are specifically trained in medico-legal work and hold state diplomas. There are various lists of experts. There are court lists from which, if a case progresses to court, the judge may appoint an expert. There are also lists kept by each insurer. Often the same experts feature on both lists. If a claim is notified to insurers, they will instruct one of their listed medical experts to examine the claimant. This may lead to settlement of the claim.<sup>30</sup> If proceedings are issued, the court will appoint an expert from the court list to act as "*expert judiciaire*". Experts are expected to act independently, irrespective of who appointed them.<sup>31</sup>

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<sup>29</sup> Providing for no-fault compensation in certain circumstances.

<sup>30</sup> After the claimant has taken legal advice, if he wishes to do so.

<sup>31</sup> One leading claimant practitioner to whom I spoke expressed concern that some court-appointed medical experts tend to take a view which is unduly favourable to insurers. I do not know how widely this concern is shared.

3.4 Medical reports. The medical expert will examine the claimant and will report on certain specified areas of compensatable damage, assessing the level of injury that the claimant has suffered as a direct result of the accident.

3.5 The expert must consider the levels of permanent partial disability (“PPD”). This is the level of impairment that the claimant has incurred and is valued by the medical expert as a percentage figure (from 0 to 100% based on the severity of the injury incurred). That percentage figure is assessed against a medical scale (“barème du concours medical”, drawn up by insurers) that, whilst having no statutory force, is recognised by the court.

3.6 In addition to PPD there are elements of pain and suffering (“SE”) or aesthetic damage (“PE”). SE relates to the physical or psychological suffering incurred by the claimant until the point that the injury stabilises. PE relates to the disfiguration remaining after stabilisation of the injury. The medical expert will consider SE and PE separately to PPD and quantify them on a scale of 0 to 7. Again that scale is recognised but is not official.

3.7 Loss of amenities (including impact on the claimant's leisure activities) is also compensatable. The judge assesses this on the basis of the claimant's evidence

3.8 Calculation of damages. Once the percentage of PPD has been established, the value of the claim can be calculated, based on the fixed sum applicable to that percentage valuation. There is no national scale for valuation and the figures will depend on the jurisdiction in which the claim is brought. Each court of appeal has an unofficial scale for damages.

3.9 Once the valuation for PPD has been established, the valuations for SE and for PE can also be calculated. The judge can then allocate the amount of damages in relation to the scale rating that the medical expert has assigned to that element of the claim. Those fixed sums are all held on a database which was established by insurers and which is maintained by the public authorities.

3.10 Example. The total damages calculation is made on a cumulative basis as follows:-

Take as an example the case of a 45 year old person, who has broken his wrist. PPD is evaluated at 5%. The claim is within the jurisdiction of the Paris Court of Appeal where €750 is allotted for each percentage point.

PPD would be calculated at (5 x 750): €3,750.

SE is valued at 2/7 which has a fixed value of €1,000.

PE is valued at 1/7 which has a fixed value of €600.

Loss of amenities is allowed at a fixed value of €500.

The total award payable to the claimant for his or her general damages would be €5,850.

3.11 In France over 95% of claims in low value personal injury cases settle without court proceedings having been issued.

3.12 A leading claimant personal injuries practitioner in Paris, with whom I discussed this scheme,<sup>32</sup> expressed concern that percentage points allocated to claimants by medical experts are often too low and that it is effectively impossible to challenge the court expert's assessment before the judge.<sup>33</sup> She also expressed concern that the tariffs for particular levels of disability are set too low. She agreed, however, that if (a) it were possible to cross-examine the medical expert and (b) the French scheme were properly calibrated, this would provide a satisfactory method of assessing general damages for pain, suffering and loss of amenity.<sup>34</sup>

#### 4. SPAIN

4.1 Baremo system. The Spanish system again uses a points system, known as the Baremo system. This was introduced into law in 1995. Prior to the introduction of the Baremo scale, compensation would vary from province to province and even from court to court and was left largely to judicial discretion. The scale and the linked points system is seen as having introduced a fair system and has reduced the number of disputes over the level of damages to be paid.

4.2 The 8/2004 Act. The current system was fully established by the Civil Liability and Insurance for the use of Motor Vehicles Act 2004 ("the 8/2004 Act"). That Act clarified the existing law into the current system. Whilst the 8/2004 Act applies only to the valuation of damages following a road traffic accident, there is no other law in place that applies to different types of accident. As a result the courts have largely adopted the criteria set out in the 8/2004 Act as having far wider application.

4.3 The scale provided by the 8/2004 Act is updated annually by reference to the Consumer Price Index. The scale is binding. It is broken down into six distinct charts and those charts allow for significant flexibility in the calculation of damages, so that the assessment can be individualised to a person's specific circumstances.

4.4 Medical reports. It is necessary to obtain a medical report from a medical expert qualified in medico-legal work. That expert will assess the injuries sustained and will allocate points against specified areas of claim. There will be an overall number of points allocated against the level of injury.

4.5 During the investigation of liability a court appointed medical expert will often be appointed to provide an assessment for the purpose of valuing general damages. In addition, insurers have their own network of medical experts whom they engage (a) to assist in setting reserves for high value cases and (b) to assess the validity of claims which insurers doubt. Both claimants and defendants are entitled to instruct their own experts should the claim be contested.

4.6 The scale. As stated above, the scale breaks down into six distinct charts which can be sensibly grouped into 3 sections. Section 1 relates to compensation following a fatal accident; Section 2 relates to permanent injuries; and section 3 to temporary injuries.

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<sup>32</sup> On 17<sup>th</sup> April 2009.

<sup>33</sup> In her experience the views of the claimant's own expert tend to be dismissed. Furthermore, it is not possible to cross-examine the court expert.

<sup>34</sup> The practitioner also expressed concerns about the assessment of damages in respect of costs of future care, but that issue falls outside the scope of this chapter.

4.7 Section 1 includes tables 1 and 2. Table 1 sets out the basic compensation levels awarded following a fatal accident. These will be based on the age of the victim and their personal circumstances, such as whether they were married and had dependents. Table 2 allows for a correction factor to the basic award based on special familial circumstances or, for example, in circumstances where both of a child's parents have been killed.

4.8 Section 2 includes tables 3, 4 and 6. Table 3 sets out the basic level of compensation to be awarded for a permanent disability. This is based on the points as set out in the medical report. The points are weighted in that the value of each point increases as the number of points increase. However, there is also an age factor to be taken into account and the value of each point will decrease as the claimant's age increases.

4.9 Tables 4 and 6 are the correction factors that are to be taken into account when considering permanent injuries. Table 4 relates to factors such as the need to adapt a house or car, or the need for care. Table 6 relates to the claimant's specific circumstances, dependants etc.

4.10 Section 3 is covered by table 5 and that relates to temporary injuries. Compensation for such injuries is calculated as a fixed amount based on the length of time taken to recover. The relevant correction factors, age for example, are set out in the chart.

4.11 Once the insurance company have details of the injury, they can deal with any claims for temporary disability as soon as the injury has settled. Table 5 allows for payment on the basis of: number of days hospitalisation; number of days when the claimant could not manage to work due to their injuries or carry on with their normal life (*impedimento*); and number of days when they are able to work but have ongoing symptoms requiring treatment (*no impedimento*).

4.12 Example. An example of a calculation (in €s) for temporary disability is as follows:-

Hospitalisation 44 days at	64.57	2,841.08
<i>Impedimento</i> 180 days at	52.46	9,442.80
<i>No impedimento</i> 141 days at	28.26	3,984.66
Total Days of Loss 365 days		16,268.54
Correction factor of 10%		1,626.85
Total		€17,895.39

Persisting symptoms would be broken down into function and aesthetic for the determination of points. Thus, to continue the example:

Functional Sequelae	30 points at	1,397.72
Aesthetic Sequelae	8 points at	819.22
Sub Total		48,485.29
Correction factor of 10%		4,848.53
Total		€53,333.82



4.13 Most injury claims in Spain are now settled within 2 years of the relevant accident. The vast majority of cases are settled without court proceedings.

## 5. REVIEW

5.1 I have set out above a brief account of how personal injury damages are assessed in Italy, France and Spain in order to inform the debate during Phase 2. Each country has some variant of a points based system, which appears to make damages for personal injuries<sup>35</sup> more predictable in those jurisdictions than in England and Wales.

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<sup>35</sup> The levels of damages in those jurisdictions may be open to criticism, but that simply reflects how the systems are calibrated.

**CHAPTER 28. CAN THE ASSESSMENT OF GENERAL DAMAGES FOR PERSONAL INJURIES BE MADE SIMPLER AND MORE PREDICTABLE IN LOWER VALUE CASES?**

**1. INTRODUCTION**

1.1 The calculation of general damages can be a complicated and time consuming part of any claim, generating significant costs in the process. The process is also an uncertain one, thus giving rise to the risk of under-settlement.<sup>36</sup> This chapter (a) reviews the processes currently used to quantify general damages and (b) discusses whether those processes could be streamlined to make them more transparent, more user friendly and more accurate in outcome.

1.2 Current guidance. Claimants have both case law and the Judicial Studies Board (JSB) guidelines to assist them in quantifying claims. The use of case law is a time consuming process that does not always reflect “normal” settlement parameters. Those cases where general damages are assessed by the court are necessarily those that are out of the “normal” run of cases, in that they have reached trial.

1.3 The JSB guidelines, as we shall see below, are necessarily an imprecise tool. The guidelines cover a wide range of injuries and allow for broad brackets of general damage within which it is for the parties to negotiate settlement. Whilst they are a useful tool the guidelines are difficult to use in isolation without referring back to case law.

1.4 Software used by insurers. Many insurers use a software tool, either “Colossus” or “Claims Outcome Adviser” (“COA”), as a general damages calculator. These have been in use for many years by insurers. I am told that the majority of cases (for some insurers in excess of 90%) settle within the Colossus or COA recommended figures. Colossus and COA work on a points system, after information from the medical report has been fed into the system. The system generates a points figure from the information provided, which translates into a settlement bracket for negotiation purposes. The system is kept up to date by feeding back in the agreed damages figures post settlement. This enables insurers to carry out regular checks on the validity of the brackets, following which the system can be recalibrated where necessary. It may be thought unsatisfactory that these software systems, which exert a massive influence over personal injury settlements, have no direct<sup>37</sup> judicial input.

1.5 Risk of under-settlement. It is worrying that, according to claimant representatives, when cases go to a hearing, judges almost invariably award more than is predicted by the insurers’ software systems.<sup>38</sup> Furthermore, I have heard during Phase 1 some worrying (but confidential) stories relating to under-settlement of personal injury claims. I have an open mind at the moment as to the extent of this problem. This is an issue which I wish to explore further during Phase 2. If it is the case that our present system of evaluating personal injury claims is (a) expensive and (b) sometimes resulting in under-settlements, then it may be reasonable to look towards radical reform.

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<sup>36</sup> The risk of under-settlement is greater than the risk of over-settlement for two reasons. First, insurers have systems in place to prevent over-settlement. Secondly, the present CFA rules provide incentives for claimant lawyers to “win”, but those incentives do not differentiate between good settlements and under-settlements.

<sup>37</sup> There is, of course, indirect judicial input in that judges make awards of damages, which should be fed into the software systems.

<sup>38</sup> See chapter 10.

1.6 Approved points systems. Some European countries have adopted a variation on a “points system”, in order to create transparent systems for the calculation of damages. These points systems have judicial or legislative approval. They are not simply operated by insurers. Medical practitioners are specially trained to assess the level of disability suffered by the claimant and will give that level of disability a percentage valuation. That percentage valuation translates into a specified monetary value. The details of three of those systems are set out in the previous chapter.

## 2. JUDICIAL STUDIES BOARD (“JSB”) GUIDELINES

2.1 Function of JSB guidelines. In the latest edition of the JSB guidelines (9<sup>th</sup> Edition 2008) the introduction states that:

“As with the eighth edition our principal task in compiling the current work has been to update figures in accordance with our standard practice, which is to look back over the past two editions and assess the impact of inflation. It is still our policy to produce a result in “round” rather than “ragged” figures, though we are open to suggestions as to whether this is still a necessary or even desirable exercise.”

2.2 In the introduction to the previous edition (8<sup>th</sup> Edition 2006) it was noted that the figures were revised “*to take account of awards reported over the last two years and the impact of inflation*”. It is noted in that introduction however, that the data set of source material has shrunk as decisions of the High Court and circuit judges on general damages are now “few and far between”.

2.3 It is clear therefore that after the figures have initially been set, they have been updated by reference to both case law and inflation, but more recently principally by reference to inflation, due to a shrinking pool of reported judicial decisions.

2.4 Descriptions given and width of brackets. Whilst the guidelines are a useful tool for practitioners, they do not provide actual valuations. They set out a description of types of injury, which can be quite wide ranging and then allow for a bracket within which a particular injury may sit. By way of example, in chapter 6 of the 9<sup>th</sup> Edition the description and bracket for moderate neck injuries is as follows:

“Cases involving whiplash or wrenching–type injury and disc lesion of the more severe type resulting in cervical spondylosis, serious limitation of movement, permanent or recurring pain, stiffness or discomfort and the possible need for further surgery or increased vulnerability to further trauma. £8,750 to £16,000”

The guidelines for minor back injuries in the same chapter are as follows:

“Strains, sprains, disc prolapses and soft tissue injuries from which a full recovery or recovery to “nuisance” level has been made without Surgery:

- |      |                         |                  |
|------|-------------------------|------------------|
| (i)  | within about five years | £5,000 to £8,000 |
| (ii) | within about two years  | Up to £5,000.”   |

2.5 These guidelines are necessarily wide ranging. In respect of lower value claims, the lack of detail means that the JSB guidelines would be of only limited

assistance to a lay person in valuing their own claim. The JSB guidelines provide a useful starting point for professionals, who would then refer additionally to case law and to their own professional expertise in order to value the claim.

2.6 What the JSB guidelines have achieved. The JSB guidelines have undoubtedly brought greater certainty to the assessment exercise. However, it remains the case that individuals suffering from similar injuries may obtain significantly different levels of general damages, dependent on who is negotiating on their behalf or (rarely) the decision of the court. Whilst the JSB guidelines, therefore, provide a significant improvement upon the use of case law alone, they have not created a clear, transparent and simple method of calculating general damages.

### 3. COLOSSUS AND CLAIMS OUTCOME ADVISER

3.1 In this section I set out my understanding of the two systems mentioned in paragraph 1.4, based upon inquiries made by solicitors on behalf of the Costs Review. Colossus and Claims Outcome Advisor (“COA”) are used by most insurers as a tool for the assessment of general damages. Given the consistency of use among insurers it is estimated that more than 90% of lower value claims presented to insurers are assessed by this method.

3.2 Nature of the two systems. Colossus is a rules-based software system which, through a series of questions asked by the system direct, reduces a medical report to the relevant facts and provides an evaluation range for general damages. Many thousands of rules are applied which allows the system to distinguish between hundreds of injuries, their various treatments and possible complications. COA uses an object-based model of the human body encoded within the system to provide a valuation of general damages.

3.3 Introduction of the two systems. Colossus was initially developed in Australia to assist with the valuation of whiplash claims and following development to allow it to deal with other injury types, has since been used globally. It was introduced to the UK market in the early 1990s. For those insurers that have used the system for some time it is likely that, through licensing, they run Colossus on their own main frame system or web server systems. However CSC, the company that provides Colossus, also has a system that runs from a centrally hosted platform. CSC provides the centrally hosted platform, which makes access more flexible. Insurance Services Office Ltd (ISO”) introduced COA into the UK and US markets in 2000. Although it can be installed on insurers' servers, all current UK insurer users use the web-based system hosted by ISO.

3.4 For the purposes of this chapter the focus is on Colossus, on the basis that the principles behind each system are essentially similar. There will of course be differences in the rules applied and methodologies used between the two systems.

3.5 Colossus system. The Colossus system works by initially feeding in data taken from the medical report, such as the nature of the injury or injuries sustained, the nature of the treatment provided, the level of impairment and impact on lifestyle. The system is divided between two basic types of injury: (a) demonstrable, for example a broken leg; and (b) non-demonstrable, for example soft tissue injuries. Those two basic types will allow for different prompts to be followed and different, more injury specific questions to be asked.

3.6 The questions asked by the system fall under four broad headings: (a) trauma – pain and suffering; (b) permanent impairment; (c) temporary disabilities; and (d) loss of enjoyment of life. Under those four broad headings Colossus can consider many hundreds of individual components and in theory can ask and compute the answers to over 700 questions before arriving at a final assessment.

3.7 To reach the final assessment, Colossus takes the answer to each question and allocates the appropriate number of points to it. Those points are then collated to give the “severity rating score” for that particular claim. The system allows for some 300,000 individual points to be allocated, although that would represent the most severe and incapacitating of injuries. The points are not awarded using a pure linear methodology and will depend on the data that is input relevant to a particular injury. However, for a typical whiplash injury a severity point score of between 15,000 and 20,000 points may be expected. The severity rating is then converted by the system into a financial value for the claim.

3.8 Given the number of questions that the system is able to ask, it is sophisticated enough to tailor valuations to individual circumstances. Two claimants may suffer seemingly identical injuries, but the effect on lifestyle for one claimant may be more extreme than for the other. The Colossus system would make an allowance in the valuation in order to reflect those differences.

3.9 Once settlement has been achieved on a case, post settlement data is fed back into the system. This allows insurers to check whether the valuations which the system provides are kept up to date. The more information that can be fed back into the system, the more accurate (it is said) the valuations can be. Thus whilst the system can technically be used for cases of any value, it is of more use where there are high volumes of similar claims. Insurers work with CSC to calibrate the system in terms of the negotiation brackets around the valuation figures reached by Colossus. The calibration of brackets is considered on a regular basis.

3.10 Whilst Colossus is set up to deal with most types of injury, there are some injury types that it is not presently able to address. This does not mean that the system cannot be set up to deal with such cases, merely that currently it is not so set up. This is mainly due to the fact that the injuries do not occur with any great frequency. The system could, however, be set up to deal with rarer injuries if necessary.

3.11 In conclusion, therefore, Colossus and COA are tools that allow for sophisticated and personalised valuation of an individual’s claim. By using a rules-based software package, the system ensures consistency in valuation. If such a system is properly operated, it should mean that all claimants, whether represented or unrepresented, are treated in the same fashion. Although these systems have the benefit of consistency and precision, the wider question remains whether they are calibrated at “proper” levels. By “proper” levels, I mean levels which reflect the damages which judges would award in 2009 if all cases were litigated.<sup>39</sup>

#### 4. CAN THE ASSESSMENT OF GENERAL DAMAGES BE MADE MORE PREDICTABLE?

4.1 As can be seen from the previous chapter on the calculation of general damages in other jurisdictions, there are simpler, more consistent and ultimately

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<sup>39</sup> This is a purely theoretical scenario. The civil justice system would not have the resources to cope with the volume of trials, if every personal injury case were litigated to judgment.

more cost effective methods of calculating general damages, than the system currently used in England & Wales. Whether those systems are more or less generous to claimants depends upon how they are calibrated.

4.2 A points system? A basic points or tariff scheme allows for transparency. However, that may not be sufficiently flexible to allow for the varying impact that similar injuries may have on different individuals. It would therefore be an improvement on any basic tariff scheme to have a more sophisticated system in place, which would (a) take account of individual characteristics or vulnerabilities and (b) retain transparency and simplicity of use.

4.3 A software system? One approach would be to use a “Colossus type” general damages calculator and to adapt such a system for a wider and more authoritative application. Thus the general damages calculator would no longer be an insurers’ tool but should be easily accessible to all parties in the process, for example through the internet. I will discuss in more detail how that might work later in this chapter.

4.4 There may of course be a problem of perception around any general damages calculator system, as it may be seen as very much an insurers’ tool. However, as mentioned above, CSC (the company that provides Colossus) has produced a platform that it runs centrally, into which Colossus users can log. The system is therefore technically open to all users who wish to purchase a licence. Additionally ISO, the company that provides COA, has launched a system called PICAS<sup>40</sup> which is available for use by all stakeholders. Therefore, there is already a move away from the calculator as being purely an insurers’ tool. CSC is also developing a tool along similar lines to PICAS.

4.5 Any new system must be authoritative. It would be helpful for users of any new system to feed back settlement information or judgment details into the system. However, the process of considering that information and deciding whether increases are required in certain areas, or for the purposes of inflation, should be conducted by an independent body with representatives of all stakeholders in the process. That may include insurers, organisations representing victims, claimant and defendant solicitors and the judiciary. Alternatively, if thought appropriate, the working party could be drawn entirely from the JSB.

4.6 The attractions of such a system are twofold. First, the method of assessing general damages may become more transparent and less subjective. Thus the risk of under-settlements in individual cases should be reduced. Secondly, if the process is simplified, then settlements should be achieved more swiftly and the costs of the process should be reduced.

## 5. AVAILABLE SOFTWARE

5.1 PICAS. As already mentioned ISO's PICAS system is already in place and CSC's corresponding system is in development. PICAS is a system in its infancy but, I am told, is currently being used by some claimant solicitors and insurers with success.

5.2 PICAS is an attempt to digitise the entire system of general damages. It is currently limited to claims of a value up to £10,000. That figure reflects the fact it is currently used for fixed recoverable costs cases and also the fact that at the present

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<sup>40</sup> Discussed in section 5 below.

stage of development it only covers GP reports. As a system it need not be limited to claims of that value.

5.3 PICAS is able to function because medical agencies are developing systems for the standardisation of report format and the digitisation of medical report preparation. The introduction of those systems has initially been limited to GPs' reports but is likely to be extended to orthopaedic and other consultants' reports in due course.

5.4 The medical agencies' systems are compatible with COA. Also they will have been prepared following discussions with CSC and should therefore also be compatible with Colossus. Whilst not all agencies are developing and using the same systems, they should all work in a similar way. If as a result of future reforms to cut out "middlemen", medical reporting organisations ("MROs") no longer function, there is no reason why individual general practitioners and consultants should not write reports in a format compatible with whatever software system is then in operation.

5.5 I am told that PICAS is currently used by claimant solicitors in the following way. The solicitors obtain a medical report, evaluate general damages and take their client's instructions. The medical report will have been prepared using the medical agency's system, which allows all of the data elements of the report to be stored in a database. Once the solicitor has his client's instructions and permission to use PICAS, he enters a settlement range into PICAS and imports the data from the medical report stored in the medical agency's database into the COA system. COA then generates a valuation and if that valuation sits within or above the range that the claimant's solicitor has entered into the system, then settlement has been achieved. If it is below the range, a counter-proposal can be made by the solicitor and the matter will be escalated to a designated PICAS escalation point at the insurer with a view to resolving the matter promptly. If this fails, then normal negotiations take place.

5.6 If settlement is achieved, the PICAS system generates an email to a designated email address at the insurer's office and a cheque is requested.

5.7 The settlement data is fed back into COA to keep it up to date and the system is recalibrated on an annual basis looking at settlement figures across thousands of non-litigated cases.

5.8 Benefits. The system has a number of benefits for stakeholders in that the medical data are input direct by the medical expert and there can be no dispute as to data manipulation by either the claimant solicitor or the insurer. The medical expert must, however, be definite about his prognosis. For example, a prognosis of "12-18 months" will not be recognised. The doctor will need to say either 12 or 18 months or some period in between. However, this has not to date appeared problematic for any party and has removed the problem of interpretation.

5.9 I am told that another benefit is the speed at which claims for general damages can be settled. The system works well for the claimant solicitor, who gets a quick response to his own valuation. The system works well for the insurer, because the time spent by claims handlers in inputting data is greatly reduced as are negotiation times.

5.10 Drawback. All software systems currently used for assessing damages have been created without any judicial or other authoritative input. As I understand it,

they largely reflect recent settlements. If there could be judicial or other authoritative input into the system, this would provide a valuable safeguard against under-settlement.

## 6. CONCLUSION

6.1 In its 1998 report<sup>41</sup> the Law Commission considered and rejected a proposal for increased use of medical scoring.<sup>42</sup> The Law Commission also considered the role of computers in assisting the calculation of general damages. It did not, however, recommend legislation in relation to the use of computers in assessing personal injury damages.<sup>43</sup>

6.2 In its earlier consultation paper the Law Commission had noted the possibility of developing a scheme using computers, to enable judges to have easy access to information on past damage awards. Most respondents to the paper were in favour of the greater use of computers but concerns were raised about the ability to design such a system. It was on the basis that technology was not sufficiently developed that the Law Commission did not make recommendations for legislation in this area. However, the Law Commission did record the views of the consultees for “*consideration by those entrusted with developing information technology for the judiciary*”.<sup>44</sup>

6.3 The information set out above concerning Colossus, COA and PICAS may address some of the Law Commission’s concerns. During Phase 2 of the Costs Review, I invite comments upon three matters:

- (i) Whether a judicially approved points-based software system along the lines discussed above might be developed and, in due course, brought into general use.
- (ii) Whether under-settlement is currently perceived as being a significant problem, and, if so, whether the use of such a system might benefit claimants by reducing the risks of under-settlement.
- (iii) Whether the use of such a system might assist in reducing the (currently substantial) costs of handling lower value personal injuries claims.

6.4 The proposal upon which I invite comments is focused upon the use of such a software system for assessing general damages in personal injury claims falling within the small claims track and fast track (i.e. all claims up to £25,000 in value). Higher value claims are less susceptible to a mechanistic method of valuation. Nevertheless use of a points-based system has proved effective overseas, even in relation to serious personal injuries claims. It may, therefore, be possible at a later date to develop a points-based software system for achieving at least a preliminary valuation of general damages in the higher value cases.

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<sup>41</sup> “*Damages for Personal Injury: Non-pecuniary Loss*”, Law Commission Report no. 257, December 1998.

<sup>42</sup> See paragraphs 3.190 – 3.194.

<sup>43</sup> See paragraphs 3.195 – 3.202.

<sup>44</sup> Paragraph 3.202.





REVIEW OF  
CIVIL LITIGATION COSTS

## **PART 7: SOME SPECIFIC TYPES OF LITIGATION**

### **CHAPTER 29. THE MERCANTILE COURTS, SMALL BUSINESS DISPUTES AND INTELLECTUAL PROPERTY LITIGATION INVOLVING SMES**

#### **1. INTRODUCTION**

1.1 The subject matter of this chapter. This Chapter addresses three related topics, namely (a) the role of the Mercantile Courts, (b) small business disputes and (c) intellectual property litigation involving small and medium sized enterprises. I shall refer to intellectual property as “IP”. I shall refer to small and medium sized enterprises as “SMEs”. It is vital for the smooth functioning of our economy that business disputes (in the broad sense of that term) are resolved swiftly, in accordance with law and at proportionate cost. If it is known that the courts provide such a mechanism, then business people can order their affairs and enter into commercial contracts with greater confidence.

1.2 Mercantile Courts. The Mercantile Courts play a vital role in the civil justice system, because they are the natural forum for all business disputes which require specialist judicial management but fall outside the purview of the Commercial Court.

1.3 Small business disputes. I use the term “small business disputes” loosely to embrace two concepts: first, disputes between SMEs; secondly, lower value disputes between businesses of any size. Thus a claim by – say – IBM against a public authority for £100,000 in respect of goods or services supplied would be a “small business dispute” in the second sense.

1.4 One category of such disputes which has proved particularly intractable is intellectual property litigation. I shall address this separately in section 5.

1.5 Importance of efficient dispute resolution. The efficient resolution of small business disputes is a matter of obvious importance to the smooth running of commerce, industry and indeed the economy as a whole. As discussed below, the national economy depends in large measure upon the operations of SMEs. All businesses, large and small, need to know that if contracts are not adhered to they will be enforced by the courts. That is the backdrop against which businesses operate.

1.6 International ranking. The World Bank regularly monitors the performance of all legal systems, in order to report how effectively they enforce contracts. The World Bank’s “*Doing Business Report*” (2009) currently ranks the UK at 24<sup>th</sup>

position in the world for ease of enforcing contracts.<sup>1</sup> The World Economic Forum's "Global Competitiveness Report 2008-9" puts the UK 18<sup>th</sup> (out of 134 countries) for the efficiency of its legal framework.<sup>2</sup>

## 2. MERCANTILE COURTS

2.1 Establishment of Mercantile Courts. Mercantile Courts were established during the 1990's. Their purpose was and is to provide a modern, accessible and efficient specialist court service around the country to citizens, businesses and companies involved in commercial transactions and disputes.

2.2 The Mercantile Courts are regional courts of the Queen's Bench Division of the High Court with specialist judges sitting in main city centres. They deal with commercial disputes in a broad sense.

2.3 Mercantile Court business. Most of the cases which Mercantile Courts deal with relate to commercial or professional matters that give rise to disputes in contract or tort or to issues arising from arbitration claims and awards:

- sale of goods
- restraint of trade
- hire and leasing
- agency
- banking & financial services
- guarantees
- carriage of goods
- insurance & reinsurance
- markets & exchanges
- general commercial contracts, e.g. distribution and franchising
- professional negligence in a commercial context (e.g. accountants, financial intermediaries & advisors and solicitors)

There are no maximum or minimum financial limits upon claims or High Court and country court demarcations.

2.4 Locations. Mercantile Courts are now established in the following cities: Birmingham, Bristol, Cardiff, Chester, Leeds, Liverpool, London, Manchester and Newcastle.

## 3. SMALL BUSINESSES

### (i) General

3.1 Definition of SMEs. There is a definition of SMEs for the purpose of accounting requirements in sections 382 and 465 of the Companies Act 2006. By this definition, a small company is one with a turnover of not more than £6.5 million, a

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<sup>1</sup> This is below the USA, Germany, France, New Zealand and Australia, but above the Netherlands and Canada: see chapters 55 to 61, where the World Bank rankings for those countries are set out.

<sup>2</sup> This is below Germany, the Netherlands, Australia, New Zealand, Canada and France, but above the USA: see chapters 55 to 61, where the World Economic Forum's rankings for those countries are set out.

balance sheet total of not more than £3.26 million and not more than 50 employees. A medium-sized company has a turnover of not more than £25.9 million, a balance sheet total of not more than £12.9 million and not more than 250 employees. The European Commission defines SMEs as having fewer than 250 employees and an annual turnover of less than €50 million or an annual balance sheet total less than €43 million.

3.2 Statistics. According to the Small Business Association, small businesses employ 58% of the private sector workforce, contributing 50% of the UK GDP.

3.3 Detailed statistics for 2007 (which are for private and public businesses) are set out in the table on the next page (source: BERR Enterprise Directorate Analytical Unit). The table shows that businesses with up to 50 employees (a small business under the Companies Act definition) provide 35.5% of the total turnover figure given, and businesses with up to 250 employees (a medium business by the same definition) provide 49.2% of the total turnover figure given.

3.4 Put another way, of the 4,766,295 businesses in the UK, 4,758,155, or 98.8% qualify as SMEs.<sup>3</sup>

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<sup>3</sup> Similarly 99% of all enterprises within the EU fall within the EU definition of SME: see [http://ec.europa.eu/enterprise/enterprise\\_policy/sme\\_definition/index\\_en.htm](http://ec.europa.eu/enterprise/enterprise_policy/sme_definition/index_en.htm).

Table 29.1: Number of enterprises, employment and turnover in the whole economy by number of employees, UK, start 2007

	Number			Percent			
	Enterprises	Employment (thousands)	Employees (thousands)	Enterprises	Employment	Employees	Turnover <sup>1</sup>
<b>Whole economy</b>							
All enterprises	4,766,295	29,748	25,700	100.0	100.0	100.0	100.0
With no employees <sup>2</sup>	3,468,100	3,774	460	72.8	12.7	1.8	7.4
All employers	1,298,195	25,974	25,240	27.2	87.3	98.2	92.6
1-4	858,245	2,403	1,875	18.0	8.1	7.3	8.3
5-9	221,600	1,543	1,447	4.6	5.2	5.6	5.8
10-19	119,495	1,653	1,600	2.5	5.6	6.2	6.0
20-49	60,505	1,874	1,841	1.3	6.3	7.2	8.0
50-99	18,990	1,321	1,313	0.4	4.4	5.1	5.7
100-199	9,305	1,298	1,294	0.2	4.4	5.0	5.6
200-249	1,915	427	426	0.0	1.4	1.7	2.4
250-499	3,715	1,298	1,295	0.1	4.4	5.0	7.4
500 or more	4,425	14,157	14,150	0.1	47.6	55.1	43.4

Source: BERR Enterprise Directorate Analytical Unit

- All turnover figures exclude Section J (financial intermediation) where turnover is not available on a comparable basis.
- "With no employees" comprises sole proprietorships and partnerships comprising only the self-employed owner-manager(s), and companies comprising only an employee director.

(ii) Federation of small businesses

3.5 The Federation of Small Businesses (“FSB”) provides the following statistics and information about small businesses on their website (as at May 2008, the last update):

- There are 4.7 million small businesses in the UK (up from 4 million in 2003)
- 97% of firms employ less than 20 people
- 95% employ less than 5 people
- Over 500,000 people start up their own business every year
- Small firms employ more than 58 per cent of the private sector workforce
- 13.5 million people work in small firms
- Small firms contribute more than 50 per cent of the UK turnover
- 64% of commercial innovations come from small firms
- Small firms collect and pay Tax, NICs, VAT and other dues which help pay for public services

(iii) Legal expenses insurance

3.6 Generally. Legal expenses insurance as a general topic has been dealt with in chapter 13. As can be seen from section 3 of that chapter, the majority of SMEs do not have BTE cover in respect of claims which they may need to bring or defend in court.

3.7 FSB scheme. All FSB members have the benefit of BTE cover as part of their membership. Although members are not charged specifically for this benefit, the effective cost of this insurance is under £50 per year per member. This cover provides the business with access to the insurer’s call centre offering legal advice. It also (I understand) offers a limited level of insurance cover in respect of employment tribunal claims and disputes with HM Revenue and Customs. Litigation in court is not covered by the scheme, although the FSB may be able to assist members in arranging ATE cover on an *ad hoc* basis.

3.8 Need for more extensive BTE cover. In my view, a substantial extension of BTE cover in respect of business litigation in court, although expensive, would be very much in the interest of SMEs. The type of BTE cover which is of greatest benefit is BTE1, as defined in paragraph 4.2 of chapter 13. If an SME has pre-existing BTE cover and a dispute arises which is supported by such insurance (i.e. the claim or defence satisfies whatever “merits” test is applicable), the SME is in a very strong position. As claimant, it cannot be bullied into dropping a strong claim; as defendant, it cannot be bullied into settling a weak claim.

3.9 Request re Phase 2. During Phase 2 of the Costs Review I should welcome proposals as to how a substantial extension of BTE1 cover for SMEs could be achieved. Obviously such cover could not be compulsory for SMEs. However, it could be encouraged and its benefits could perhaps be made more widely known.

#### 4. MERCANTILE COURT LITIGATION

##### (i) The work of the Mercantile Courts

4.1 CPR Part 59. Litigation in the Mercantile Court is governed by CPR Part 59. This provides in CPR Part 59.1(2) that a claim may only be started in a Mercantile Court if it (a) relates to a commercial or business matter in a broad sense; and (b) is not required to proceed in the Chancery Division or another specialist list.

4.2 Mercantile claims are treated as being allocated to the multi-track under CPR Part 59.11(1). Parts 59.11(2)-(4) provide for the case management of claims by the Mercantile Court.

4.3 The Court fees payable in relation to the Mercantile Court are no different from those generally payable in civil proceedings which are set out in the Civil Proceedings Fees Order 2008.

4.4 Practice direction. The Practice Direction for Mercantile Courts which supplements Part 59 provides in paragraph 2.1 that a claim should only be started in a Mercantile Court if it will benefit from the expertise of a Mercantile judge.

4.5 There is no specific minimum or maximum limit on the value of claims which can be brought before a Mercantile Court, as opposed to the non-specialist High Court, under the rules.

4.6 Lower threshold for claims. I am told that Mercantile Courts would not generally deal with claims worth less than about £20,000. In the opinion of Mercantile judges, claims worth less than about £100,000 are not really cost effective in the Mercantile Court.

4.7 In practice, Mercantile Court judges may try small multi-track business claims below these financial limits sitting in other courts in the same court centre. An example is the informal county court Mercantile List that has been created in Birmingham to deal with commercial disputes of lower value which would benefit from the expertise of a judge with commercial experience.

4.8 Larger claims. At the other end of the scale, Judge Havelock-Allan QC states that several cases in the £1 million to £5 million bracket have been tried in the Bristol Mercantile Court. The Equitable Life With Profits Annuitants Group litigation<sup>4</sup> was started in Bristol and was only transferred out for reasons of venue. It is reported that the main practical constraint on trying very large value claims is length of trial. In court centres with a single mercantile judge, lengthy trials are not practicable because they interfere with other business such as shorter trials and case management hearings.

4.9 Judge Simon Brown QC states that most cases in the Birmingham Mercantile Court are worth about £1 million; cases of up to £4 million are not unusual, nor are quite complex cases worth around £500,000. In Birmingham, cases below £50,000 are transferred to a district judge with commercial experience sitting in the county court to case manage and try. The Mercantile Court does however sometimes do a lower value "test case" on consumer credit issues.

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<sup>4</sup> *Abeles v Equitable Life Assurance Society*, case 4Bs50418 in the Bristol Mercantile Court, case 2005 Folio 216 in the Commercial Court.

4.10 Case management. The Mercantile Courts, like the other specialist courts, provide hands-on case management, usually by the judge who will try the case. This provides an opportunity to control costs. At the moment costs estimates provided by the parties are lump sum figures. All mercantile judges believe it would be helpful if breakdowns of such costs estimates were provided as a matter of routine. This will be further discussed in chapter 48. Indeed a number of the issues discussed in chapters 40 to 48 below are of obvious relevance to case management in the Mercantile Courts. However, I will not cover in this chapter the same ground as is covered in those later chapters.

4.11 The 2008 Sir Henry Brooke Report. Sir Henry Brooke interviewed many Mercantile Court judges during the preparation of his report entitled “*Should the Civil Courts be Unified?*”, which was published in August 2008. Sir Henry’s report records a number of salient comments from the Mercantile Court judges as well as other information, which are set out below.

4.12 In the London Mercantile Court, Judge Mackie aims to resolve all cases within six months of receiving them. He case manages mercantile cases more aggressively than those coming before him in the county court, and he keeps costs to a minimum. He informed Sir Henry that in some of the smaller cases it is crucial to have a mercantile judge to get to the point of a commercial dispute. This can save traders for whom £100,000 is commercial life or death from ruinous costly litigation.

4.13 Sir Henry recorded the following information for Mercantile claims in Manchester. The issue rate for Mercantile claims was : December 2005-November 2006, 63 claims; December 2006-November 2007, 70 claims. The waiting times as at 16th April 2008 were for all trials of 1-5 days duration “immediately”.

4.14 The mercantile judges in Manchester conducted CMCs themselves as they found it much more convenient. It enabled them to direct cases to be heard by the appropriate judge on an individual basis.

4.15 Sir Henry was given the following statistics for mercantile business in Bristol:

	2005	2006	2007	2008*
New claims	52	59	49	11
Transfers in	11	6	17	2

\* first 4 months

4.16 Sir Henry reported that the Mercantile judge in Cardiff also case managed the Mercantile cases; and that the Cardiff Mercantile Court sometimes handled cases involving a few million pounds.

4.17 The report also contained figures for 2007-8, which were recorded as probably conveying a fairly accurate picture,<sup>5</sup> of Mercantile Court actions in three areas outside of London. The recorded figures for sitting days were:

Midlands	239.5
Northern	149
North-Eastern	53

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<sup>5</sup> There had been problems with obtaining accurate statistics in the course of preparation of the report.

4.18 Comment. The importance of the Mercantile Courts within the civil justice system is very substantial and is sometimes overlooked. Whereas the majority of all litigants in the Commercial Court are overseas companies which have chosen London as their forum,<sup>6</sup> this is not the case in respect of mercantile courts. For a very large number of business disputes which arise in England and Wales, the Mercantile Courts are the natural home.<sup>7</sup> Thus the Mercantile Courts have a pivotal role to play in the smooth running of the economy. Traders and businessmen must know that their contracts will be swiftly and economically enforced and that remedies will be available if their commercial rights are infringed; they must be able to order their affairs against that backdrop.

(ii) Costs of litigation in the Mercantile Courts

4.19 Request for information. On 2<sup>nd</sup> December 2008 I circulated a note requesting information to all mercantile judges. That note contained the following passage:

“It would be helpful if any records are available of the following:

- (i) In relation to some typical cases, (a) the sum which was in issue or the value of the rights in issue, (b) costs claimed and (c) costs awarded (excluding VAT).
- (ii) Any available breakdown of such costs as between profit costs and disbursements.
- (iii) In cases where a success fee or ATE premium was incurred by the winning party, what was claimed and what was awarded in respect of these matters.

If any statistical information is available about such matters from the records or databases of any members of your users committee, this would be extremely helpful.

I am interested in the above information in respect of three categories of case:

- (i) Cases settled before issue
- (ii) Cases settled post-issue and pre-trial
- (iii) Cases which go to trial (i.e. concluded by judgment or settled at court).”

4.20 Lack of response. At my request the above note was passed on to Mercantile Court User Committees. However, no data have been received in response to this request. Whereas similar requests to the Commercial Court and the Technology and Construction Court have generated the schedules at Appendices 9, 11 and 13, no

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<sup>6</sup> Paragraph 4 of the submissions by the Commercial Court Users Committee to Phase 1 of the Costs Review. The Commercial Court has a pre-eminent international reputation and makes a major contribution to the UK's invisible earnings. It is therefore no criticism of the Commercial Court to emphasise the pivotal role of the Mercantile Courts in relation to many domestic business disputes.

<sup>7</sup> Of course some business disputes go to the Chancery Division or the Chancery courts and some (especially if construction or IT related) go to the Technology and Construction Court.



schedule specifically dedicated to the Mercantile Courts is available.<sup>8</sup> Furthermore, only one Mercantile Court case<sup>9</sup> has been picked up (at least expressly) in the judicial survey at Appendices 1 to 8.

4.21 It is therefore unfortunately the case that, whereas Phase 1 of the Costs Review has generated a considerable amount of data about costs in most civil courts, little data are available in respect of the Mercantile Courts. This may be symptomatic of a wider organisational issue.<sup>10</sup>

(iii) Development of costs management in the Mercantile Courts

4.22 In chapter 48 below I raise for consideration the possibility of courts undertaking costs management as a separate exercise in addition to case management. Whether such an exercise is (a) feasible and (b) something which court users would welcome must be a matter for consideration during Phase 2.

4.23 If the proposals in chapter 48 were to be piloted, the Mercantile Courts may be an excellent forum in which to carry out such a pilot exercise. The parties to mercantile disputes are, generally, business people for whom litigation is a “project” being undertaken for a purely commercial purpose. They may possibly welcome the court’s support in constraining the whole project within the original budget figures.

4.24 I look forward to hearing the views of Mercantile Court users, practitioners and judges in relation to this issue.

(iv) Mediation

4.25 The overwhelming majority of all Mercantile cases which are issued will settle at some point before trial. Therefore the service rendered by Mercantile judges in such cases is one of case management, namely managing the litigation and orchestrating exchanges of documents and evidence until the parties reach the point when they wish to settle. In many cases, but by no means all, the parties will achieve settlement with the assistance of a mediator. I understand that it is the practice of Mercantile judges to build mediation windows into the timetable in appropriate cases.

(v) Should the Mercantile Courts offer a fixed costs regime for lower value business disputes?

4.26 The general question whether there should be a fixed costs regime for cases above the fast track is discussed in chapter 23. On the basis of the material which has been received during Phase 1, it seems to me that such a regime may possibly be welcomed by court users in respect of lower value business disputes.

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<sup>8</sup> However, cases 92 and 93 in Appendix 9 are Mercantile Court cases.

<sup>9</sup> Appendix 8, case 94.

<sup>10</sup> The Mercantile Courts are a federation of separate courts. They are not subject to central management like the Chancery courts (where Chancery liaison High Court judges are responsible for each region) or the TCC courts in the regions (which are overseen by Ramsey J, the High Court judge in charge of the TCC). Whether the organisation of the Mercantile Courts should be changed is firmly outside my remit. I shall not therefore discuss the important question whether such a reform would promote business litigation at proportionate cost.

4.27 Ipsos MORI survey. A survey of in-house lawyers was recently carried out by Ipsos MORI. The survey was commissioned by Addleshaw Goddard, who published a report containing the results (“the AG report”).<sup>11</sup> The vast majority of cases dealt with by those questioned were worth less than £1 million: see page 4 of the AG report. Costs were by far the biggest concern of most respondents: see page 6. The costs of losing (i.e. liability for other side’s costs) were a matter of particular concern: see page 8. Respondents accepted that the outcome of litigation was unpredictable and, by definition, difficult to assess. In relation to costs their attitude was different:

“In contrast, the financial risks of legal proceedings should be identifiable, measurable and, now, controllable. Being able to calculate the cost of the case as well as the cost of losing are the most important factors in determining whether or not to pursue it, according to respondents.”<sup>12</sup>

4.28 In the light of that survey, it seems to me that serious consideration should be given to creating a fixed costs or scale costs regime for business litigation of lower value. Each side would be able to predict and control the litigation costs, because (a) its potential liability to the other side would be fixed and (b) it could give a budget for the case to its own lawyers. The downside of this would be that if a party wins it would only recover a limited sum from the other side (albeit a known sum). Thus before any case is launched the finance directors on each side would be able to advise their respective boards: if we win the case will cost us £x; if we lose the case will cost us £y.

4.29 The evidence referred to in Mr Justice Arnold’s paper discussed below<sup>13</sup> suggests that such a costs regime might meet needs of court users more effectively than the present costs regime. I look forward to receiving both comments and further evidence on this proposal during Phase 2.

## 5. INTELLECTUAL PROPERTY LITIGATION INVOLVING SMES

5.1 SMEs from time to time need to bring or defend IP claims. The costs involved can be crushing. There has been concern for some time about how to control the costs in such cases. In this section I shall concentrate principally upon patent claims.

5.2 Patents County Court. In an attempt to address the problem of excessive costs, the Patents County Court (“PCC”) was set up in 1990, following the recommendations of a working group chaired by Sir Derek Oulton. During the first ten years the court was not a success for a number of reasons, not least its location in Wood Green and its procedures.<sup>14</sup> During the present decade the problems of the PCC have continued, but have taken a different form. Mr Justice Arnold has recently stated:

“The Patents County Court is now located in Breams Buildings off Chancery Lane. The current incumbent, His Honour Judge Fysh QC, is

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<sup>11</sup> *“Litigation Funding: Understanding the strategies and attitude of Corporate UK”*, commissioned by Addleshaw Goddard ([http://www.fundingcontrol.co.uk/control\\_mori\\_brochure.pdf](http://www.fundingcontrol.co.uk/control_mori_brochure.pdf)).

<sup>12</sup> AG report, page 8.

<sup>13</sup> See paragraph 5.8 below.

<sup>14</sup> For an analysis of the reasons why the PCC did not prosper in the 1990s, see the paper presented by Mr Justice Arnold to the Midlands Intellectual Property Society on 26<sup>th</sup> February 2009 (hereafter referred to as “the Arnold paper”).

widely respected. CCR Order 48A is history. And yet, despite Judge Fysh's best efforts, the Patents County Court has still not succeeded in providing small and medium enterprises with a venue in which patent litigation can be undertaken at affordable cost. Indeed, the abolition of the County Court Rules and their replacement by the Civil Procedure Rules has created a situation in which there is no difference at all between the jurisdiction and procedure of the Patents County Court on the one hand and those of the Patents Court on the other hand."<sup>15</sup>

Similar concerns have been expressed by the Chartered Institute of Patent Attorneys in their submissions to Phase 1 of the Costs Review.

5.3 Gowers Review. The Gowers Review of Intellectual Property was published on 6<sup>th</sup> December 2006. Many of those who contributed to the review expressed concern about the high costs of IP litigation. They stated that SMEs were deterred by high costs from participating in such litigation. The Gowers Review recommended<sup>16</sup> that the Department of Constitutional Affairs ("DCA")<sup>17</sup> should consider extending the fast track limits and procedure, so as to accommodate smaller IP disputes.

5.4 DCA consultation paper. The DCA published its consultation paper (CP 8/07) on 20<sup>th</sup> April 2007. The DCA rejected the proposal that the fast track could be adapted to accommodate IP cases. Nevertheless the DCA recognised that IP litigation was complex and inherently expensive. The DCA invited respondents to proffer "*views on whether intellectual property claims could be dealt with in a more efficient and cost effective way*".

5.5 Outcome of consultation. A range of suggestions were made in response to the consultation paper. In the document setting out its decision in the light of the responses the MoJ stated that it would consider with the judiciary whether all IP claims needed to be allocated to the multi-track.<sup>18</sup>

5.6 The Submissions by the Chartered Institute of Patent Attorneys. The submissions made by the Chartered Institute of Patent Attorneys ("CIPA") to Phase 1 of the Costs Review suggest that more radical measures may be required than those currently envisaged by the MoJ. CIPA writes as follows:

"13. Small and medium size enterprises are deterred from launching meritorious claims by the fear of being obliged to pay a large cost bill for the other side, if the inherently uncertain business of running the dispute means that it does not go as expected. Even the option of withdrawing is not without a costs risk. Such businesses might well prefer a regime where they are not liable for the other side's costs. They have some control over their own costs, and that gives greater certainty, even though the process in which they are engaged does have inherent uncertainties, as they cannot control what the other side may do and so what further action they may be called upon to do.

14. Indeed, some SMEs are deterred even from applying to protect their ideas, as they know that they will be unable to afford to enforce them, and they take the view that a patent is of no value if it cannot be used to stop others from copying the product. This view may be fairly

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<sup>15</sup> The Arnold paper, page 8.

<sup>16</sup> At recommendation 54.

<sup>17</sup> The predecessor of the Ministry of Justice ("MoJ").

<sup>18</sup> CP (R) 08/07, page 36, paragraph 7.

widespread among those companies in the business community which are not regular users of the patent system and this could well be causing the country some serious economic harm in the long term.”

5.7 This problem is now urgent, principally because of the burden of costs upon SMEs. In addition, patent work may be drifting away from the courts of England and Wales to the courts of Continental Europe, where litigation procedures are substantially cheaper.<sup>19</sup> CIPA tell me that their members, instead of attracting business to the UK, are often advising clients to litigate in other jurisdictions. In patent matters parties often have a choice of forum, because equivalent patents have been granted in a number of different territories.

5.8 Mr Justice Arnold's proposal. In his recent lecture to the Midlands Intellectual Property Society Mr Justice Arnold proposed that the PCC be reconstituted as a low cost forum, which is distinguished from the Patents Court by reason of having an upper financial limit. The PCC's procedures should be based primarily on written arguments; disclosure, experiments, written evidence and cross-examination should only be permitted upon application and where a cost-benefit test is satisfied; there should be a system of scale costs. Mr Justice Arnold asserts that the prospect of paying the other side's costs if they lose is a matter of greater concern to SMEs than the prospect of recovering only limited costs if they win. He cites compelling evidence in support of that assertion. The Patent Office and Trade Mark Registry have jurisdiction to determine certain disputes. They award scale costs to the successful party, representing a modest sum regardless of actual expenditure.<sup>20</sup> The Trade Mark Registry is a popular forum for trade mark disputes. Appellants from the Registry can choose between appealing to the Appointed Person or to the High Court. Approximately 90% of appellants choose the Appointed Person. One of the main reasons for this choice is that the Appointed Person operates a similar scale costs regime to the Registry.<sup>21</sup>

5.9 Debate re the PCC. Following Mr Justice Arnold's lecture and papers to similar effect by IP solicitors, there has been a debate about the future of the PCC. I attended a meeting of the Intellectual Property Court Users Committee on 28<sup>th</sup> April 2009, at which these issues were discussed. Court users made it clear that SMEs would much prefer a fixed costs regime to apply in respect of patent disputes of lower value.<sup>22</sup> There was also extensive discussion about how the procedures of the PCC might be streamlined, in order to reduce the overall cost of litigation in the PCC. This would involve imposing substantial restrictions upon disclosure, experiments, cross-examination and length of hearings, as well as a regime of fixed and limited recoverable costs. The point was made that SMEs litigate patent matters far more readily and far more often in Germany than in England, because of the simplified procedure and the fixed recoverable costs regime operated in the German courts (as to which, see chapter 55). At its meeting on 28<sup>th</sup> April 2009 the Users Committee set

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<sup>19</sup> As to which see Part 11 of this report.

<sup>20</sup> However, more than scale costs can be (and occasionally are) awarded in exceptional cases, e.g. abuse of process. Furthermore, if proceedings are started in the Patent Office or the Trade Marks Registry but are transferred to the High Court, then the CPR costs regime applies: *Kelly v G E Healthcare Ltd* [2009] EWHC 457 (Pat).

<sup>21</sup> See page 10 of the Arnold paper.

<sup>22</sup> Although lower value claims were not defined, I suspect that court users had in mind cases where the rights in issue were worth £1 or £2 million or less.

up a working group to draft proposals and recommendations in respect of the PCC,<sup>23</sup> which hopefully will be finalised by 31<sup>st</sup> July 2009.

5.10 CIPA's proposal. In its submissions for Phase 1, CIPA has proposed a scheme for affordable litigation in respect of patent matters. CIPA'S proposal is along the same lines as Mr Justice Arnold's proposal, but it involves creating a special "small claims track" for patent litigation.

5.11 My view. I see considerable force in Mr Justice Arnold's proposals and in the CIPA proposals. Provisionally, my preference is for the course proposed by Mr Justice Arnold and I note that the Intellectual Property Court Users Committee is now proceeding down that route. Fortunately, the deliberations of the working group set up on 28<sup>th</sup> April will run in parallel with Phase 2 of the Costs Review. Provided that I receive the working group's proposals and recommendations by 31<sup>st</sup> July 2009, I shall be able to take them into account in the final report.

## 6. REVIEW

6.1 Mercantile Courts and small business disputes. During Phase 2 of the Costs Review, I would be very grateful to receive information about the costs of Mercantile Court litigation, as requested on 2<sup>nd</sup> December 2008. I should also be grateful to receive any comments about the issues discussed above in relation to small business disputes and the Mercantile Courts.

6.2 Patent cases. In addition to reviewing the generality of such litigation, I should like to focus specifically on lower value patent cases. I request that the Intellectual Property Court Users Committee and its working group keep me informed of their deliberations. If the proposals identified above are to be taken forward in conjunction with the present Costs Review, I would like to receive a fully worked out scheme by 31<sup>st</sup> July 2009 (the end date for Phase 2 consultation). I should also like confirmation by that date that no primary legislation is required, alternatively the draft of any Bill that may be necessary.

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<sup>23</sup> The working group is having regard to the principles underlying the draft rules of procedure for the proposed European Patent Court. These principles and draft rules were agreed at a conference in Venice in November 2006.

## **CHAPTER 30. CONSUMER CLAIMS**

### **1. INTRODUCTION**

1.1 **Meaning of “consumers”.** All litigants are consumers of the services provided by the civil justice system. In that sense, many claims are “consumer claims” and many defences are “consumer defences”. It is consumers who bring personal injury claims, pay motor insurance premiums, purchase or rent homes and so forth. However, the term “consumers” is usually used in the narrower sense, to denote purchasers of goods or services. When such goods or services are defective, the claims made are referred to as “consumer claims”. I shall use the term in this narrower sense, in order to focus the discussion of this chapter.

### **2. LOW VALUE CONSUMER CLAIMS**

2.1 **Costs on the small claims track.** The vast majority of consumer claims are below £5,000 in value and thus proceed on the small claims track. Most litigants on the small claims track are unrepresented and therefore do not incur lawyers’ fees. They do, however, incur court fees (unless remitted). If the consumer loses a case on the small claims track, his or her costs liability is generally modest, even if the other side chooses to be represented by lawyers.<sup>24</sup>

2.2 **Consumer satisfaction.** Nobody likes losing and every case has a losing side (absent settlement). That said however, both the survey evidence and the anecdotal evidence suggest that, by and large, consumers are satisfied with the service delivered on the small claims track of the county courts.<sup>25</sup> The procedures are geared to litigants in person and hearings are conducted with an appropriate measure of informality, as explained in chapter 49. The strict rules of evidence are relaxed. Which? has carried out a survey of 1,000 claimants who used the small claims court.<sup>26</sup> In answer to the question “Would you use the small claims court again?”, 85% replied yes.<sup>27</sup> Consumer Focus have commented:<sup>28</sup>

“The small claims court has gone through considerable improvement in recent years, improvements which have purported to put consumers at the heart of service improvements. The survey and anecdotal evidence suggests that when proper consideration is given to the needs of consumers, consumer satisfaction generally follows.”

2.3 **Gap between reputation and reality.** As Consumer Focus have pointed out to me, there is a gap between reputation and reality. Courts are thought of by consumers as being intimidating and unduly expensive. The reality of the small claims track for those litigants in person who actually use it, is that the experience is less intimidating and less expensive than they expected. In order to promote access to justice for consumers at proportionate cost, it is therefore necessary to increase public awareness of the service which the county courts offer in this regard. It is hoped that current initiatives designed to promote public legal education will address this problem.<sup>29</sup>

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<sup>24</sup> See chapter 49.

<sup>25</sup> See sections 12 and 21 of chapter 7.

<sup>26</sup> Which? “*The Consumer Perspective of Resolving Disputes through the Law*” (2001).

<sup>27</sup> 55% “yes definitely”, “30% yes possibly”.

<sup>28</sup> When reading this chapter in draft.

<sup>29</sup> See in particular [www.plenet.org.uk](http://www.plenet.org.uk).

2.4 Other steps to promote access to justice at proportionate cost for consumers. As demonstrated in chapter 7,<sup>30</sup> civil court fees have been rising faster than inflation and in one year have actually generated a surplus for the court service. In order to promote access to justice for consumers at proportionate cost, there is a strong case for reducing court fees.

2.5 Unfair commercial practices. The Consumer Protection from Unfair Trading Regulations 2008 (“the 2008 Regulations”) prohibit a number of unfair commercial practices. Schedule 1 to the 2008 Regulations lists 31 unfair commercial practices. These include:

- falsely claiming that a product is able to cure illnesses;
- falsely stating that a product will be available for a very limited time in order to obtain an immediate decision;
- making a materially inaccurate claim about the risk to the personal security of the consumer or his family if he decides not to purchase the product in question;
- establishing, operating or promoting a pyramid promotional scheme.

2.6 Promoting access to justice at proportionate cost for victims of unfair commercial practices. The 2008 regulations are intended to protect consumers. Yet the only remedy for breach is regulatory enforcement.<sup>31</sup> Individuals who are affected by the prohibited practices have no civil remedy. Subject to what may emerge during Phase 2, I provisionally agree with the view of Consumer Focus that there ought to be a civil remedy available. It is not difficult to imagine breaches of the 2008 Regulations which it would be worthwhile pursuing: for example, a householder purchases a new burglar alarm system because the salesman wrongly states that the existing system is ineffective. If a civil remedy were available, the householder could pursue such a remedy on the small claims track at proportionate cost.

### 3. OTHER CONSUMER CLAIMS

3.1 Group actions. Many consumer claims are so small that they cannot sensibly be pursued in isolation. They must be pursued, if at all, by means of a group action. For example, in 2007 Which? pursued a group action against the retailers of football shirts for breaches of the Competition Act 1998. The action was settled on the basis that claimants who had joined in the action each received £20 and others who could prove purchase each received £10 from the retailers.<sup>32</sup>

3.2 The rules governing group actions and the costs provisions for such litigation will be discussed in chapter 38.

3.3 Consumer claims above the small claims track. A small number of consumer claims will be for sums in excess of the small claims track limits: for example, the purchaser of a defective microwave oven might suffer personal injury. Claims of this character have been dealt with in chapters 24 to 28 above.

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<sup>30</sup> See chapter 7 paragraphs 3.6 and 3.7, which examine a typical small claim. The court fees for that case have risen by 42% over the last ten years.

<sup>31</sup> Regulators have limited resources and will not be able to pursue every breach.

<sup>32</sup> See chapter 10, paragraph 12.8.

3.4 Small building disputes. Small building disputes can be particularly problematic. Firm case management, in order to focus the parties upon the real issues and to shut out irrelevancies, is essential to control the costs of such litigation. *Peakman v Linbrooke Services Ltd* [2008] EWCA Civ 1239 is a recent example of a small building case where costs ran out of control. As Goldring LJ pointed out:<sup>33</sup>

“It makes no sense at all for over £100,000 and over nine days (including the appeal) to be spent on what was a perfectly straightforward piece of litigation over a few thousand pounds.”

The court went on to criticise (a) counsel on both sides for the manner in which they had conducted the case and (b) the judge for failing to exercise proper control over the proceedings.

3.5 There are essentially three ways to tackle this problem. First, it is highly desirable that any small building dispute is referred to a circuit judge or recorder, who has experience and expertise in this field (i.e. he or she is authorised to sit in the Technology and Construction Court). Secondly, whenever possible, the parties should be encouraged towards a negotiated or mediated settlement. Thirdly, I would suggest that small building disputes are a classic example of the sort of litigation which would benefit from a fixed costs regime. The merits of fixed costs have been discussed in earlier chapters and that discussion will not now be repeated. However, if both sides realise that victory will only bring a modest fixed sum by way of costs (a) there will be strong incentive towards economy on both sides (b) neither party will end up with a crushing bill of costs as sometimes happens at the moment.

#### 4. BEFORE THE EVENT INSURANCE

4.1 As discussed in chapter 13, a number of individuals have before-the-event (“BTE”) Insurance, otherwise known as Legal Expenses Insurance (“LEI”). This generally comes as an add-on to other insurance, for example house insurance.

4.2 Advice. BTE is particularly important in respect of consumer claims. First, many BTE policies (even if they are not “BTE1”) will provide a telephone advice service. Often such advice is all that the consumer needs. If further action or representation is needed, the caller will at least be able to ascertain from the telephone advice service precisely what his policy covers.

4.3 Many BTE insurers have arrangements with solicitors firms, who handle requests for telephone advice in bulk. By way of example, one large firm of solicitors tell me that they operate a legal helpline for a number of BTE providers. The average length of each telephone call is eight minutes. The advice given is akin to the advice which a consumer may get from a Citizens Advice Bureau.

4.4 Representation. If the BTE policy covers representation in court, then the individual will be able to have representation even in a case on the small claims track. Although such representation is by no means essential, it is obviously an advantage, especially if the other party is a retailer or company appearing by a representative who “knows the ropes”.

4.5 Overview. I have expressed the view in chapter 13 that of the two types of BTE, the first type, BTE1, is very much more beneficial than BTE2.<sup>34</sup> Despite that

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<sup>33</sup> At paragraph 4.

<sup>34</sup> For the definitions of these types of insurance, see paragraph 4.2 of chapter 13.



observation, in relation to consumer claims both forms of BTE are of value. BTE2 will usually provide free telephone advice. Furthermore sometimes an insured with BTE2 may obtain free representation in cases on the small claims track (a category of case which the insurer cannot “sell” in return for a referral fee).

4.6 The problem of ignorance. One recurrent problem with BTE is that because the premiums are so low and the insurance is an add-on, many people do not appreciate that they have such insurance. They may therefore fail to make use of the legal helpline when the need arises. They may also fail to exercise any of their other rights under the policy. There is therefore a need to publicise not only the desirability of taking out BTE, but also the fact that many people have such insurance and should use it, when the need arises.

## 5. CONCLUSION

5.1 I look forward to hearing the views of practitioners and, hopefully, consumers on the issues discussed above during Phase 2. In particular, it would be helpful to receive comments on the following matters:

- (i) How greater public awareness of the user-friendly and inexpensive service offered by the county court small claims track to litigants in person could be generated.
- (ii) Whether access to justice at proportionate cost for consumers could be promoted by affording civil remedies for unfair commercial practices, as defined in the 2008 Regulations.
- (iii) Any proposals for reducing the costs of those consumer claims, which exceed the small claims track limit by a small margin.
- (iv) How greater take up of BTE and greater awareness of BTE might be promoted.

## **CHAPTER 31. HOUSING CLAIMS**

### **1. INTRODUCTION**

1.1 **Object.** The object of this chapter is to describe housing litigation; to identify where (if at all) disproportionate costs are being run up; and to identify possible modifications to the costs rules or the procedural rules which might facilitate access to justice at proportionate cost in this area of civil litigation. The chapter identifies possible reforms, together with arguments for and against.

1.2 **Housing claims.** Housing claims are diverse. There is no “typical” housing claim, but in this chapter, the term is taken to mean litigation between landlords and tenants (and *vice versa*); between mortgage lenders and mortgage borrowers (and, infrequently, *vice versa*); and between land-owners and trespassers. It is also taken to include claims by homeless people who seek to persuade or compel local housing authorities to provide them with accommodation. Accordingly this chapter is divided into three sections:

- Possession claims;
- Disrepair and harassment claims; and
- Homelessness appeals under Housing Act 1996 s204

1.3 **Complexity of the law.** Twentieth and twenty-first century legislation, from the Rent and Mortgage Interest (Restrictions) Act 1915 to the Housing and Regeneration Act 2008 has grafted a complex statutory framework onto the existing body of English and Welsh land law dating back to feudal times. Many of the Acts of Parliament are long, complicated, and, particularly in recent years, poorly drafted. The increasing use of complex and frequently amended statutory instruments to supplement provisions of the Acts makes the position worse. In his “*Access to Justice: Final Report*”, published in July 1996, Lord Woolf invited the Law Commission to carry out a review of housing law with a view to consolidating the various statutory and other provisions in a clear and straightforward form.<sup>35</sup> He also called upon the Department of the Environment (as it then was) to look at the reform of housing law as a matter of urgency. He said:

“...procedural reform can have only a limited impact on [housing law]...reform of the substantive law on housing could do more than anything to reduce cost and delay...the main source of difficulty is the complexity of the substantive law itself...”<sup>36</sup>

1.4 **The Law Commission Report “*Renting Homes*”.** The resulting Law Commission report *Renting Homes*<sup>37</sup> recommended:

- the adoption of a consumer approach to regulate the landlord-occupier relationship;
- the creation of a single occupation agreement for social housing that would remove the artificial distinctions between local authority and housing association tenancies;

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<sup>35</sup> p220.

<sup>36</sup> “*Access to Justice, Final Report*”, pp 197-9.

<sup>37</sup> Law Com No 284, November 2003.

- greater flexibility for renting in the private sector;
- a new regime for supported housing providing a ladder of opportunity for the most vulnerable to become fully integrated in the housing market; and
- that the new regime should apply to all occupation agreements, both existing and future, with the exception of Rent Act 1977 tenancies.

1.5 Although *Renting Homes* was generally well received, the Government has taken no steps to implement its proposals. This is unfortunate, when considering problems of access to justice and costs. Simplification of the substantive law, whether through implementation of the Law Commission Report or other root and branch statutory reform, would have a very considerable effect in reducing the cost of housing litigation and improving access to justice.

## 2. POSSESSION CLAIMS

2.1 Different statutory regimes. The principal factor determining the nature of any possession claim is the nature of the tenancy, and in particular whether or not there is security of tenure. Some tenants (e.g. secure tenants under Housing Act 1985, assured tenants under Housing Act 1988 and protected or statutory tenants under Rent Act 1977) enjoy very considerable statutory protection. In most cases, such tenants can only be evicted if a court is satisfied that a statutory ground for possession is proved, and that it is reasonable to make an order for possession. Even if a ground for possession is proved, the court has a choice between granting an outright possession order, making a suspended or postponed possession order, adjourning either for a fixed period or generally on terms, or even, in an extreme case, dismissing the claim. Other tenants (e.g. assured shorthold tenants under Housing Act 1988; introductory tenants under Housing Act 1996; demoted tenants under Anti-Social Behaviour Act 2003; family intervention tenants under Housing and Regeneration Act 2008 and common law tenants who fall within any of the exceptions to Housing Act 1985, Housing Act 1988 or Rent Act 1977) enjoy very limited security of tenure. In general, landlords of such tenants do not have to prove any reason for seeking possession. They only have to satisfy various procedural requirements (e.g. service of a valid notice and, in the case of some local authority tenants, completion of a statutory review process).

2.2 Other variables. However, even within any particular statutory regime, there can be huge differences between the complexity and length of possession claims. A claim for possession based upon arrears of rent, which are essentially undisputed, may be resolved before a court hearing (e.g. if housing benefit problems which are frequently the cause of rent arrears are resolved) or result in a county court hearing which lasts no more than five minutes. A claim for possession based upon disputed allegations of anti-social behaviour may result in a five-day county court hearing with housing officers and neighbours giving evidence.

2.3 Number of landlord and tenant possession claims.<sup>38</sup> In 2007, 146,963 landlord possession claims were issued in county courts in England and Wales. During that year, 107,352 landlord possession orders were made. During the third quarter of 2008:

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<sup>38</sup> Statistics in this and the next paragraph taken from Ministry of Justice Statistics bulletin "*Statistics on mortgage and landlord possession actions in the county courts - third quarter 2008*".

- 36,923 landlord possession claims were issued using the standard and accelerated possession procedures on a seasonally adjusted basis, 1% lower than in the third quarter of 2007 and 2% lower than in the second quarter of 2008.
- 28,086 landlord possession orders were made through the standard and accelerated possession procedures on a seasonally adjusted basis, 4% higher than in the third quarter of 2007 and broadly the same as in the second quarter of 2008.
- 40% of landlord possession orders made through the standard and accelerated possession procedures were suspended compared to 38% in the third quarter of 2007 and 40% in the second quarter of 2008.

2.4 Number of mortgage possession claims. In 2007, 137,661 mortgage possession claims were issued in county courts in England and Wales. During that year, 95,731 mortgage possession orders were made. During the third quarter of 2008:

- 38,511 mortgage possession claims were issued on a seasonally adjusted basis, 9% higher than in the third quarter of 2007 and 1% lower than in the second quarter of 2008.
- 29,516 mortgage possession orders were made on a seasonally adjusted basis, 24% higher than in the third quarter of 2007 and 3% higher than in the second quarter of 2008.
- 47% of mortgage possession orders were suspended compared to 45%.
- According to the Council of Mortgage Lenders (“CML”), during 2008 there were 40,000 repossessions (equivalent to 1 in 290 mortgages). The CML say that there were 10,400 repossessions in the fourth quarter (equivalent to 1 in 1,100 mortgages). At the end of 2008, 1 in 64 mortgages had arrears of 2.5% or more and 1 in 53 mortgages had arrears of three months or more. The CML predicts 75,000 repossessions in 2009.<sup>39</sup>

(i) Costs in possession claims generally

2.5 The general position. In general, and with the important exceptions of forfeiture of leases and mortgage possession claims, the normal rules about costs in the Civil Procedure Rules (e.g. CPR rule 44.3) apply to possession claims. For example, in *Hackney LBC v Campbell* [2005] EWCA Civ 613; 28<sup>th</sup> April 2005, a landlord claimed possession of a flat against a tenant and her son. The tenant defended and counterclaimed, saying that she had exercised her right to buy. Her son made a number of counterclaims, including the right to buy, and alleging nuisance, breach of repairing covenants, trespass and human rights violations. The trial judge dismissed Hackney’s possession claim and upheld the counterclaim in respect of the tenant’s right to buy. He dismissed all of the son’s counterclaims except for one. He ordered Hackney to pay the costs of both defendants. Hackney appealed. The Court of Appeal allowed the appeal. The judge had failed to follow the basic rule in CPR rule 44.3 that costs should follow the event. He appeared to have treated the tenant and the son as if they were in the same legal position. The son had failed on all but one of the claims raised in his counterclaim. The right course was to set aside the judge’s order and exercise the discretion afresh. The appropriate order was that there be no order as to costs on the son’s defence and counterclaim.

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<sup>39</sup> CML press release, 20<sup>th</sup> February 2009.

2.6 **Public funding.** Subject to the normal tests concerning eligibility and merits, public funding is available to tenants to defend possession claims. However, the view of many, including the Housing Law Practitioners' Association, is that recent changes to public funding have seen a large reduction in the number of solicitors prepared to do such work. *"Despite efforts by the Legal Services Commission, my experience of legal aid funding for housing work is one of managed decline, with organisations withdrawing from this vital area of law. I know from over fifteen years of working in housing law in a deprived area of south London that the demand for housing advice is far greater than the supply, and that tenants and other occupiers of housing are often unable to access advice."*<sup>40</sup> Anecdotally, district judges report greater numbers of unrepresented tenants and problems where adjournments have been granted specifically for tenants to obtain legal representation. Many fail to do so.

2.7 **Proceedings begun in the High Court.** If proceedings are issued in the High Court against Rent Act 1977 protected tenants, Housing Act 1988 assured tenants or Housing Act 1985 secure tenants, landlords are not entitled to recover any costs. These are sensible provisions since county courts are clearly the appropriate forum for the hearing of possession claims. It is extremely rare indeed for residential possession claims to be issued in the High Court.

2.8 **Small claims track possession claims.** It is rare for possession claims to be allocated to the small claims track.<sup>41</sup> However, if a possession claim is allocated to the small claims track, the fast track costs regime applies, but the trial costs are in the discretion of the judge and should not exceed the amount of fast track costs allowable in CPR rule 46.2 if the value were up to £3,000 – i.e. currently £485.

**(ii) Fixed costs in possession claims**

2.9 **Fixed costs.** Fixed costs apply to certain types of possession claims – unless the court orders otherwise. CPR rule 45.1 provides that fixed costs apply where:

- the defendant gives up possession and pays the amount claimed (if any) and the fixed commencement costs (CPR rule 45.1(2)(c));
- one of the grounds for possession is arrears of rent, the court gave a fixed date for hearing, a possession order is made (whether suspended or not) and the defendant has either failed to deliver a defence or the defence is limited to specifying proposals for payment of arrears (CPR rule 45.1(2)(d)); and
- the claim is brought under the accelerated procedure (CPR Part 55 section 2) against an assured shorthold tenant, a possession order is made and the defendant has neither delivered a defence nor otherwise denied liability (CPR rule 45.1(2)(e)).

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<sup>40</sup> Andrew Brookes, former chair, Housing Law Practitioners Association.

<sup>41</sup> The small claims track is discussed in chapter 49.

2.10 Amount of fixed costs. The amounts of fixed costs are set out in CPR 45.2A Table 2 and CPR 45.4A. They are as follows:

**Fixed costs on commencement of a claim for the recovery of land or a demotion claim**

Where the claim form is served by the court or by any method other than personal service by the claimant	Where – <ul style="list-style-type: none"> <li>the claim form is served personally by the claimant; and</li> <li>there is only one defendant</li> </ul>	Where there is more than one defendant, for each additional defendant personally served at separate addresses by the claimant
£69.50	£77.00	£15.00

**Costs on entry of judgment in a claim for the recovery of land or a demotion claim**

**CPR rule 45.4A**

- “(1) Where –
- (a) the claimant has claimed fixed commencement costs under rule 45.2A; and
  - (b) judgment is entered in a claim to which rule 45.1(2)(d) or (f)<sup>42</sup> applies, the amount to be included in the judgment for the claimant’s solicitor’s charges is the total of –
    - (i) the fixed commencement costs; and
    - (ii) the sum of £57.25.
- (2) Where an order for possession is made in a claim to which rule 45.1(2)(e) applies, the amount allowed for the claimant’s solicitor’s charges for preparing and filing –
- (a) the claim form;
  - (b) the documents that accompany the claim form; and
  - (c) the request for possession,
- is £79.50.”

2.11 The level of fixed costs. The level of fixed costs has remained unchanged for several years, but there has apparently been little pressure from public sector landlords for them to be increased. Three factors should perhaps be borne in mind. First, district judges have discretion to allow more than fixed costs, if appropriate. Secondly, public sector landlords may have a list of ten, twenty or even more possession claims listed before one judge on one day. In such circumstances, fixed costs may not be uneconomic. Finally, almost by definition, public sector tenants with rent arrears are likely to be among the most disadvantaged members of society and the least able to afford legal costs.

<sup>42</sup> I.e., demotion claims.

(iii) Possession claims based on rent arrears

2.12 Rent arrears. The most common type of possession claim brought by local authorities and registered social landlords against secure or assured tenants is based upon arrears of rent. They are frequently listed before district judges in county courts with time estimates of approximately five minutes per case. Many of the landlords are represented by legally unqualified housing officers. The proportion of tenants who attend court is depressingly low. It is not uncommon for landlords to indicate that “*they are only seeking a suspended order*” and that there is no reason for tenants to attend.<sup>43</sup> The proportion of such tenants who obtain legal representation is even smaller. Although there are increasing numbers of duty representation schemes at county courts,<sup>44</sup> representation by someone who has only had a limited time to obtain instructions is no substitute for representation by a solicitor who has had adequate time to prepare and investigate issues such as housing benefit problems in advance.

2.13 Court fees in rent possession claims. In view of the nature of rent possession claims by public sector landlords, legal costs are not a significant issue. However, court fees paid for the issue of such claims are seen by some as a significant issue. The fee for issue of a standard possession claim is £150. The fee for issue of a possession claim *via* Possession Claims Online is £100. It is not unusual for the level of arrears to be in the region of £500. From the court’s point of view, the claim may only involve issue, listing of a five minute hearing and drawing up a single order. The fee will either be borne by a cash-strapped public landlord, or, if it is recovered from the tenant, from someone who is likely to be in financial difficulties already. Such fees may seem to be disproportionate. Although no published statistics are available, it seems possible that such public sector landlords and tenants are subsidising other litigation, both in the county courts and in the High Court.<sup>45</sup>

2.14 Protocol for possession claims based on rent arrears. The Pre-action Protocol for Possession Claims based on Rent Arrears (the “Rent Arrears Protocol”) came into force on 2<sup>nd</sup> October 2006. The aim of the Rent Arrears Protocol is to encourage more pre-action contact between the parties and to enable court time to be used effectively. The Protocol requires landlords to:

- contact the tenant as soon as reasonably possible once he or she falls into arrears to discuss the cause of the arrears, the tenant’s financial circumstances, his or her entitlement to benefits and repayment of the arrears;
- attempt to agree an affordable sum for the tenant to pay off the arrears and (where appropriate) assist in arranging for direct payments to be made towards the arrears from the tenant’s benefit entitlement;
- provide the tenant with a full rent statement;
- take reasonable steps to ensure that information has been appropriately communicated;
- assist the tenant in connection with his or her claim for housing benefit and establish effective liaison with the housing benefit department;

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<sup>43</sup> However, the Rent Arrears Protocol encourages tenants to attend – see paragraph 2.14.

<sup>44</sup> Now existing at all but the smallest county courts.

<sup>45</sup> The comments in this paragraph form part of the wider concerns about the level of court fees, as discussed in chapter 31.

- refrain from taking possession action where the tenant has a reasonable expectation of eligibility for housing benefit and has provided all the evidence necessary for the claim to be processed;
- contact the tenant before the court hearing to discuss the current position with regard to the arrears and housing benefit;
- postpone the court proceedings where the tenant has reached an agreement to pay the current rent and arrears, so long as the tenant keeps to the agreement; and
- encourage the tenant to attend the court hearing.

2.15 If a landlord unreasonably fails to comply with the terms of the protocol the court may impose a sanction or sanctions in the form of costs and/or adjournment of the proceedings, or may strike out or dismiss the claim. If the tenant unreasonably fails to comply with the terms of the protocol, the court may take such failure into account when considering whether it is reasonable to make a possession order.

2.16 Comment. The Rent Arrears Protocol is of a different character from other pre-action protocols. In relation to many of the protocols there is ongoing debate as to whether the cost saving achieved by front loading in cases that settle before issue outweighs the additional costs incurred in cases which go to trial or which settle at a late stage. This concern may not arise in relation to the Rent Arrears Protocol. The general view is that the Rent Arrears Protocol has had a beneficial effect in reducing the number of possession claims which would otherwise have been initiated.

(iv) Possession claims where occupants rely on ECHR Article 8

2.17 ECHR Article 8. ECHR Article 8 adds nothing where a landlord seeks possession against a secure, assured or Rent Act tenant on a discretionary ground.<sup>46</sup> However, in relation to possession claims against occupants lacking security of tenure, there is considerable tension between the jurisprudence of the European Court of Human Rights in Strasbourg and the House of Lords. In *Harrow LBC v Qazi* [2003] UKHL 43; [2004] 1 AC 983, Lord Hope and Lord Scott said that contractual and property rights cannot be defeated by a defence based on Article 8. In *Connors v UK* Application no 66746/01; [2004] HLR 52, the ECtHR found that the power to evict without giving reasons which were liable to be examined on the merits by an independent tribunal amounted to a breach of Article 8. In *Lambeth LBC v Kay*; *Leeds CC v Price* [2006] UKHL 10; [2006] 2 AC 465, a majority of a seven member committee of the House of Lords re-affirmed the decision in *Qazi*. In *McCann v UK* App No 19009/04, 13<sup>th</sup> May 2008, [2008] HLR 40, the ECtHR again found a breach of Article 8, saying:

“The loss of one’s home is a most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude should in principle be able to have the proportionality of the measure determined by an independent tribunal.”

2.18 In *Birmingham City Council v Doherty* [2008] UKHL 57, 30<sup>th</sup> July 2008, [2008] 3 WLR 636, notwithstanding *McCann*, the House of Lords rejected an “attempt to undermine” the decisions in *Qazi* and *Kay*, but remitted the case to the judge in the High Court so that he could review the reasons that the council gave for

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<sup>46</sup> *Castle Vale Housing Action Trust v Gallagher* (2001) 33 HLR 810, CA.



-serving a notice to quit, resolve any disputed facts and decide whether or not the decision to terminate Mr Doherty's licence was reasonable. Lord Hope said:

“...it would be unduly formalistic to confine the re-view strictly to traditional *Wednesbury* grounds. The considerations that can be brought into account in this case are wider. An examination of the question whether the respondent's decision was reasonable, having regard to the aim which it was pursuing...would be appropriate.”

2.19 In *Ćosić v Croatia* Application no. 28261/06; 15<sup>th</sup> January 2009, the ECtHR found a breach of Article 8 where the national courts had confined themselves to finding that occupation by the applicant was without legal basis, but had made no further analysis as to the proportionality of the measure. It referred to an “absence of adequate procedural safeguards”.

2.20 Recent cases. Although this is an area in which the law is still developing, it is already clear that judges hearing possession claims in county courts have to grapple with defences raising both traditional public law defences (e.g. *Wednesbury* unreasonableness) and *Doherty* style unreasonableness, having regard to the aim being pursued. It is not inconceivable that in the near future, English and Welsh county courts will have to determine the proportionality of decisions to bring possession claims, perhaps including consideration of the occupants' personal circumstances. In the mean time, courts have been doing their best to try to follow *Doherty*. In *Hillingdon LBC v Collins* [2008] EWHC 3016 (Admin); 5<sup>th</sup> December 2008, HHJ Gilbert QC, sitting as a deputy High Court judge, was asked to give directions in a claim for possession against defendants without security of tenure who occupied caravans on a site provided by Hillingdon. He remitted the case to Uxbridge county court and gave directions for service of witness statements and disclosure. His judgment, running to 63 paragraphs and 47 pages, explains how courts should proceed post-*Doherty*. In *Wandsworth LBC v Dixon* [2009] EWHC 27 (Admin); 15<sup>th</sup> January 2009, HHJ Bidder QC, sitting as a deputy judge of the High Court, refused an application to set aside a possession order and/or to stay or suspend the execution of the warrant for possession made against a former joint tenant, whose sister had terminated the tenancy by serving a notice to quit. His judgment ran to 71 paragraphs and 20 pages.

2.21 Should the Rent Arrears Protocol be amended? If county courts are to consider such issues in an unregulated way, costs are likely to be very substantial. It may be that, as the ECtHR said in *McCann*, it will “*be only in very exceptional cases that occupiers would succeed in raising an arguable case which would require a court to examine the issue*”, but hard pressed local authorities and registered social landlords (“RSLs”) do not have the resources, either financial or legal, to engage routinely in such litigation. Costs are likely to be disproportionately high. Such cases would play havoc with possession lists in county courts. Given the decreasing numbers of solicitors with housing contracts, occupants are going to find it hard to get legal representation to run such defences. Good local authorities and RSLs already consider both the proportionality of any decision to evict and the personal circumstances of occupants before deciding to bring possession claims. Where proper, fair consideration is given, as in *Dixon*, it is highly unlikely that any public law defence, whether based on *Wednesbury* unreasonableness, a wider *Doherty* unreasonableness, or even (having regard to *McCann* and *Ćosić*) Article 8 disproportionality, would succeed. What is needed is not only that all local authority landlords and RSLs give early consideration to such issues, but also that occupants can raise such matters prior to issue of proceedings and that courts can see in a simple and straight-forward way what the position is. This could be achieved,

without primary legislation, by adding a second part to (and renaming) the existing Rent Arrears Protocol to provide that before issuing any possession claim:

- (i) Public bodies should write to occupants explaining why they currently intend to seek possession and requiring the occupants within a specified time (say 14 days) to notify the landlord in writing of any personal circumstances or other matters which they wish to be taken into account. In many cases such a letter could accompany any notice to quit and so would not necessarily delay the issue of proceedings;
- (ii) Public bodies should consider any representations received, and, if they decide to proceed with a claim for possession, give brief written reasons for doing so; and
- (iii) Attach a copy of their initial letter, any response from the occupant and the reasons for proceeding with the eviction to the claim form.

2.22 A proposal to amend the existing Rent Arrears Protocol was discussed at the Civil Justice Council Housing and Land Committee on 11<sup>th</sup> February 2009. The Committee agreed unanimously with the proposal and referred it to the Civil Justice Council committee, which is reviewing all pre-action protocols, for further consideration. If the Rent Arrears Protocol is amended in this way, it may have a significant effect in reducing costs. There is always, of course, the danger (as discussed in chapter 43 below) that well-intentioned amendments to protocols will drive up costs. However, it may be thought that these amendments would have the opposite effect.

(v) Mortgage possession claims and forfeiture of long leases

2.23 Indemnity costs. In general, costs in possession claims are awarded on the standard basis. However, mortgage lenders and landlords who seek to forfeit long leases are likely to have a contractual entitlement to costs on the indemnity basis.

2.24 Mortgage possession claims. The leading case on costs in mortgage proceedings is *Gomba Holdings (UK) Ltd v Minories Finance Ltd (No 2)*.<sup>47</sup> After default on mortgage payments, receivers were appointed by the lenders. However, the borrowers were able to raise sufficient sums to meet their liabilities. The lenders, in accordance with the terms of the mortgage, submitted mortgage accounts and receivers' costs to the borrowers. These included costs, charges and expenses involved in litigation. The total amount challenged was £1.8 million. The Court of Appeal set out the following principles:

- An order for the payment of costs of proceedings by one party to another party is always a discretionary order;
- Where there is a contractual right to costs, the discretion should normally be exercised to reflect that contractual right;
- The power of a court to disallow a mortgagee's costs sought to be added to the mortgage security is a power which does not derive from Supreme Court Act 1981 s51. It derives from the power of courts of equity to fix the terms on which redemption should be allowed. A mortgagor is required to show a clear case of unreasonableness if any of the mortgagee's actual costs, charges and expenses are to be disallowed; and

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<sup>47</sup> [1993] Ch 171; [1992] 3 WLR 723; [1992] 4 All ER 588, CA.

- A mortgagee is not to be deprived of the right to add costs to the security merely because of an order for payment of costs made without reference to the contractual provisions.

2.25 Practice Direction on Costs, section 50. The position as set out in *Gomba* has subsequently been incorporated into paragraphs 50.1 to 50.4 of the Practice Direction on Costs. These provisions supplement CPR rule 48.3 and give detailed guidance on procedure.

2.26 Normal practice. In practice, lenders normally seek a specific order that there be “no order as to costs” or that “costs be added to security”. Sometimes they simply make no reference to the costs at the hearing, relying on a mortgagee’s contractual right to add costs to the security. Occasionally, if judges consider that a mortgage lender has acted unreasonably, they specifically order that particular costs should not be added to security, but this is relatively uncommon. There is no evidence that main-stream lenders abuse their privileged position in relation to indemnity costs. There is however some anecdotal evidence that less reputable secondary lenders sometimes add unreasonable sums for costs to their security. Although the court may order that such disputed costs are assessed under CPR rule 48.3, this rarely happens. In view of the power to have such costs assessed, such abuse as there is does not merit a change in the law. In any event, any change to mortgage lenders’ contractual entitlement to indemnity costs would almost certainly require primary legislation.

2.27 Mortgage pre-action protocol. A new pre-action protocol for possession claims based on residential mortgage arrears (“Mortgage Protocol”) came into force on 19<sup>th</sup> November 2008. The Protocol does not alter the parties’ contractual or statutory rights and obligations, but does describe the behaviour which the courts will normally expect of the parties prior to the start of possession claims. It aims to ensure that lenders and borrowers act fairly and reasonably with each other in resolving any matter concerning mortgages and encourages more pre-action contact between lenders and borrowers in an effort to seek agreement, and where this cannot be reached, to enable efficient use of the court’s time and resources. For example, it provides that:

- lenders should consider reasonable requests from borrowers to change the date of regular payment or the method of payment;
- lenders should respond promptly to any proposal for payment made by borrowers. If lenders do not agree to such a proposal they should give reasons in writing;
- if lenders submit proposals for payment, borrowers should be given a reasonable period of time in which to consider such proposals; and
- if borrowers can demonstrate that reasonable steps have been or will be taken to market the property at an appropriate price in accordance with reasonable professional advice, lenders should consider postponing starting possession claims.

2.28 The Mortgage Protocol does not contain any specific sanctions, but concludes “Parties should be able, if requested by the court, to explain the actions that they have taken to comply with this protocol.” However, if non-compliance has led to the commencement of proceedings which might otherwise not have needed to be commenced, or has led to costs being incurred in the proceedings that might otherwise not have been incurred, the court has the power to make the orders in relation to costs and interest set out in paragraph 4.6 of the Practice Direction on

Pre-action Conduct, although when doing so, the court should bear in mind the contractual rights and obligations of the parties under the mortgage deed. It is too early to say what effect, if any, the Protocol is having in relation to costs in mortgage possession claims.

2.29 Forfeiture of long leases. Long leases normally contain a contractual entitlement to costs incurred in connection with forfeiture (i.e. termination of a lease during the fixed term). In *Church Commissioners for England v Ibrahim*<sup>48</sup> an assured shorthold tenancy included a clause that the tenant would “pay and compensate the landlords fully for any costs, expense, loss or damage incurred or suffered by the landlords as a consequence of any breach of the agreements on the part of the tenant in this agreement”. After the tenant had fallen into arrears with the rent, the landlords obtained a possession order. Relying on the terms of the tenancy agreement, they sought costs on an indemnity basis. However, they were only awarded costs to be taxed on Scale 1.<sup>49</sup> They appealed. Allowing their appeal, the Court of Appeal held that the principles set out in *Gomba Holdings (UK) Ltd v Minories Finance Ltd (No 2)* are not confined to mortgage cases. Although the award of costs is always a discretionary order, a party is not to be deprived of a contractual right to costs unless there is a good reason to do so. The mere fact that it was a straightforward possession action was not a good reason. Similarly, the bargaining strength of the landlord did not justify departing from the contractual basis for taxation. The plaintiffs were entitled to an order for costs on Scale 2, to be taxed on an indemnity basis.<sup>50</sup>

2.30 Reform? In *Billson v Residential Apartments Ltd (No 1)*,<sup>51</sup> (before *Ibrahim*), Lord Templeman stated, *obiter*, that the contractual right of lessors to indemnity costs was an issue which was “ripe for reconsideration”. However, this would again be something which would be likely to require primary legislation and the general entitlement to indemnity costs on forfeiture is not something which has met with criticism among the public or lawyers.

### 3. DISREPAIR, HARASSMENT AND OTHER CLAIMS BY TENANTS

3.1 Claims for breach of repairing obligations. Landlord and Tenant Act 1985 section 11 creates an implied covenant in most residential tenancies that the landlord should keep in repair the structure and exterior of the premises and keep in repair and proper working order the installations for the supply of water, gas and electricity and for sanitation and for space heating and for heating water in the premises. Breach of the implied covenant may result in an award of damages and/or an order for specific performance to remedy outstanding defects. Tenants may also have a cause of action based upon express repairing obligations or Defective Premises Act 1972 section 4. Although, legally, there is no difference between the obligations of private and public sector landlords, nowadays most claims for breach of repairing obligations are brought against public sector landlords – since most private sector tenants have assured shorthold tenancies, lacking security of tenure, any claim for damages or specific performance is likely to result in a counterclaim for possession. If there is simply an action for damages for breach of repairing obligations, with no

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<sup>48</sup> [1997] 1 EGLR 13, CA.

<sup>49</sup> This is a reference to the county court scales of costs, which were abolished by the Civil Procedure Rules 1998.

<sup>50</sup> cf *Contractreal Ltd v Davies* [2001] EWCA Civ 928; 17 May 2001, CA.

<sup>51</sup> [1992] 1 AC 494; [1992] 01 EG 91, HL; see also *Copall v Fryxell* (1991) Times, 31 December, QBD.

claim for an order requiring works to be carried out, the case will be allocated to the small claims track<sup>52</sup> unless:

- (i) the financial value of the claim is £5,000 or more, or
- (ii) the financial value of any claim for personal injuries is £1,000 or more, or
- (iii) there are abnormal circumstances.

If there is a claim for both damages and an order for works to be carried out, the case will not be allocated to the small claims track if either the cost of works or the damages claim is more than £1,000. In such circumstances the case will be allocated to the fast track, unless the financial value of the claim is more than the value fixed by CPR rule 26.6(4)(b).

3.2 Pre-action protocol. There is a Pre-action Protocol for Housing Disrepair Cases.

3.3 Funding of disrepair claims. Historically, the vast majority of disrepair claims were publicly funded through the grant of legal aid. Legal aid is still available for such claims (subject to the tenant's means). However, CFAs now provide an alternative method of funding such litigation. The judgment of Christopher Clarke J in *Birmingham City Council v Forde* [2009] EWHC 12 (QB) provides a clear and helpful account of the operation of CFAs in this area. Before the introduction of regulation of the claims management industry by the Compensation Act 2006, public sector landlords were concerned about the spread of housing disrepair cases carried out under conditional fee agreements. These landlords said that their litigation costs were increasing, particularly by having to pay success fees in instances where the claimant tenants would have been better advised to proceed with legal aid. The advent of statutory regulation with the Compensation Act 2006, together with decisions which limited the successful use of conditional fee agreements see e.g. *Bowen v Bridgend BC* SCCO ref. 0309853, has meant these issues have become much less prominent.

3.4 Costs. In general, there are few problems relating to costs in disrepair cases. A large proportion of such cases settle before trial. However there are issues for a few local housing authorities with large stocks of council housing. See e.g. *Birmingham City Council v Avril Lee* [2008] EWCA Civ 891, *Birmingham City Council v Crook* [2007] EWHC 1415 (QB) and *Birmingham City Council v Forde* [2009] EWHC 12 (QB).

3.5 Harassment and unlawful eviction. Harassment and unlawful eviction of tenants by their landlords or landlords' agents may give rise to claims for damages and/or injunctions. Claims may be based upon the implied covenant for quiet enjoyment, trespass or breach of Protection from Eviction Act 1977. In addition, Housing Act 1988 section 27 provides a cause of action where a landlord or any person acting on behalf of the landlord unlawfully deprives a residential occupier of the whole or part of any premises which are occupied. The real significance of section 27 is not the scope of the cause of action, which is narrower than the covenant for quiet enjoyment, but the way in which damages are to be assessed. Section 28 provides that damages are to be determined by subtracting the value of the premises if the tenant had remained in occupation from the value of the premises with vacant possession. Irrespective of their value, harassment and unlawful eviction claims must be allocated either to the fast track or multi-track.<sup>53</sup> The last couple of decades

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<sup>52</sup> See chapter 49 re the small claims track.

<sup>53</sup> See CPR rule 26.7(4) and the note to CPR rule 27.1(2).

have seen a decline in the number of such claims. It may be that the use of assured shorthold tenancies lacking long term security of security of tenure means that landlords can obtain possession through the courts more cheaply and quickly than in the 1980s. It may also be that Housing Act 1988 sections 28 and 29 have acted as a deterrent.

3.6 Funding and costs. Most tenants who bring claims for unlawful eviction and harassment receive public funding. There are no significant issues in relation to costs. However, given the reduction in the number of solicitors prepared to undertake publicly funded housing work, there are significant access to justice issues.

#### 4. HOMELESSNESS APPEALS (HOUSING ACT 1996 S.204)

4.1 Homelessness appeals. Housing Act 1996 Part 7 creates a statutory duty on the part of local housing authorities to secure accommodation for eligible homeless persons who are in priority need, have a local connection and are not intentionally homeless. Anyone who has made an application to a local housing authority as a homeless person who is dissatisfied with any adverse decision may apply for a review of that decision under Housing Act 1996 s202. If an applicant who has requested a review under section 202(a) is dissatisfied with the decision on the review, or (b) is not notified of the decision on the review within the time prescribed, he or she may appeal to the county court on any point of law arising from the decision.<sup>54</sup>

4.2 Funding and costs. Most homeless people who bring section 204 appeals receive public funding. There are no significant issues in relation to costs – section 204 appeals are generally cheaper than judicial review. However, given the reduction in the number of solicitors prepared to undertake publicly funded housing work, there are significant access to justice issues.

#### 5. CONCLUSION

5.1 Review. Although there is no such thing as a “typical housing claim”, it is possible to conclude that, with the exception of costs caused by the complexity of the law, there is no general problem of disproportionate costs being run up in housing cases. Housing is an area of law and practice where pre-action protocols work well and have had a positive effect in both reducing the amount of litigation and costs. The main problem is access to justice, with a marked decline in the number of solicitors and other organisations prepared to undertake publicly funded work on behalf of tenants. Ten years ago, Professor Hazel Genn<sup>55</sup> wrote that although difficulties with landlords were the most common type of justiciable problem reported by respondents to her screening survey, people with landlord and tenant problems were among those least likely to find their way to legal advisors. The position is undoubtedly worse now.

5.2 Comments invited. During Phase 2 of the Costs Review I look forward to receiving comments on the issues discussed above. In particular, I should be interested to hear from practitioners and others whether the protocol amendments canvassed in paragraph 2.21 above would (a) be beneficial to court users and (b) be likely to save costs.

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<sup>54</sup> Housing Act 1996 s204.

<sup>55</sup> Hazel Genn, *Paths to Justice* pp29, 32, 46, 64 and 251. She found that only 6% of those with problems to do with landlords went first to a solicitor (page 131).

## **CHAPTER 32. LARGE COMMERCIAL CLAIMS**

### **1. INTRODUCTION**

1.1 **The Commercial Court.** The Commercial Court was established in 1895 as a forum for the efficient management and trial of commercial litigation before judges with special expertise. The Commercial Court, like the Admiralty Court, now has a statutory basis, namely section 6(1)(b) of the Supreme Court Act 1981. The procedural rules for the Commercial Court are contained in CPR Part 58 and the accompanying practice direction. The procedural rules for the Admiralty Court are contained in CPR Part 61 and the accompanying practice direction. Much more detailed guidance as to the procedures of those courts is to be found in the Admiralty and Commercial Courts Guide.

1.2 **Standing of the Commercial Court.** The Commercial Court enjoys a formidable reputation for commercial dispute resolution. Although it has many competitors overseas, research by survey has shown that in 80% of cases in the Commercial Court one of the parties carried on business outside this jurisdiction and in 52% of cases both parties did. Thus a great many of the disputes handled by the Commercial Court involve overseas parties, who have chosen the Commercial Court in London as their forum.

1.3 **Importance to the UK economy.** The smooth functioning of the Commercial Court is a matter of importance to the UK economy. Commercial Court litigation generates invisible earnings. Furthermore, the reputation of the Commercial Court helps to sustain the direction of international business choice towards London.

1.4 **Large commercial cases outside the Commercial Court.** Some large commercial cases proceed in courts other than the Commercial Court, pre-eminently in the TCC (if they have an IT or construction element) or in the Chancery Division. The reforms recently piloted in the Commercial Court (discussed below) obviously merit consideration in respect of large commercial cases in the TCC or Chancery Division. Also there are separate chapters in this report relating to TCC and Chancery litigation

### **2. LONG TRIALS WORKING PARTY REPORT**

2.1 **Long Trials Working Party.** The Commercial Court Long Trials Working Party ("LTWP") was set up in January 2007 under the auspices of the Commercial Court Users Committee. The LTWP was established following the collapse of two lengthy, high cost trials in the Commercial Court and the ensuing public debate about the procedures of that court. The LTWP was chaired by Mr Justice (now Lord Justice) Aikens.

2.2 **Terms of reference.** The LTWP's terms of reference required it to:

"Consider all aspects concerning the management of heavy and complex cases in Commercial Court and report and make recommendations to the Commercial Court Users Committee including, if necessary, recommendations for changes in practice and/or to the Admiralty and Commercial Courts Guide (7<sup>th</sup> edition, 2006)."

2.3 The LTWP proceeded briskly with its work and published its report in December 2007. In the paragraphs which follow I shall briefly summarise some of the recommendations made in the LTWP report.

2.4 Pre-action protocols. Pre-action protocols promote exchange of information and, possibly, settlement before litigation commences, which is beneficial. However, pre-action protocol procedures also generate considerable cost. There should continue to be no pre-action protocol for Commercial Court cases. In complying with the more general Practice Direction – Protocols,<sup>56</sup> the parties should exercise constraint in pre-action procedures. The claim and response letters should be concise. Only essential documents should be supplied on each side. In appropriate cases it should be permissible to commence proceedings without following the pre-action procedures.

2.5 Statements of case and Lists of Issues. Statements of case, which have now become too long and prolix, should be limited to 25 pages, save in exceptional cases where additional length may be permitted for good reason. A judicially settled List of Issues (10 pages or less) should be prepared at the first CMC and should thereafter be updated as necessary. The List of Issues should become the keystone for management of all Commercial Court cases, with the pleadings being relegated to secondary importance.

2.6 Disclosure. The starting point will remain “standard” disclosure. However, the court should adopt a more “surgical” approach than before, where appropriate restricting disclosure by reference to the List of Issues.

2.7 Witness statements. Witness statements, which are currently too long and suffer from excessive drafting by lawyers, should be made as short as possible. A witness statement should be confined to matters about which the witness can give relevant evidence. Documents referred to should be identified by disclosure number or, better still, by hyperlink. Evidence-in-chief should be given orally where that would be helpful and, in appropriate cases, the court should order witness summaries rather than full witness statements to be served.

2.8 Expert evidence. Permission for expert evidence should be granted more restrictively in future, and only after the need for such expert evidence has been demonstrated by reference to the List of Issues. There should be a sequential exchange of expert reports, followed by the usual expert meetings.

2.9 Costs. The present costs rules should remain. Commercial Court judges should be encouraged to undertake summary assessments of costs up to the level of £250,000 (rather than the previous informal upper limit of £100,000). Costs capping is not generally appropriate in commercial litigation. However, costs estimates provided by the parties are helpful and the court should ask for these to be updated throughout the case. In relation to court fees, the LTWP is strongly opposed to the MoJ’s proposal in 2007 to charge daily trial fees.

2.10 Case management. Case management decisions must be taken by reference to the List of Issues and at appropriate times. It is not possible to set the whole litigation timetable at the first CMC. Trial estimates should be made by reference to what is reasonable, rather than by reference to the total number of witnesses which each side would like to call. No trial should be allotted more than 13 weeks. The court should consider at successive CMCs which issues should be tried and in what

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<sup>56</sup> Replaced with effect from 6<sup>th</sup> April 2009 by the Practice Direction on Pre-action Conduct.



manner. More use should be made of Progress Monitoring Information Sheets (the Commercial court equivalent to pre-trial checklists). In heavy and complex cases there must always be a pre-trial review conducted by the trial judge.

2.11 Trials. The judge must be allowed proper pre-reading time and receive appropriate assistance from the parties in relation to that exercise. Opening written and oral submissions should be limited in length. There should be time limits for the examination and cross-examination of witnesses. There must be proper control of, and a timetable for, closing submissions, both oral and written. Issues to be argued or abandoned in closing must be identified in advance.

2.12 Client accountability. Clients, in particular the senior management on both sides, must be kept informed of the progress of litigation and must assert responsibility for it.

2.13 Judicial resource management. There should be no change to the current arrangements whereby Commercial Court judges are available for general duties outside the Commercial Court. Heavy and complex cases should be assigned to two-judge teams.

2.14 Adoption of recommendations for trial period. The recommendations of the LTWP were adopted for a trial period commencing on 1<sup>st</sup> February 2008. It appears from journal reports that those procedures were effective in controlling the length and costs of the *Buncefield* litigation.<sup>57</sup> I understand that the experiences gained during that trial pilot exercise are currently being considered by the Commercial Court judges and the Commercial Court Users Committee. That consideration is likely to result in amendments to the Admiralty and Commercial Courts Guide.

2.15 Request for information. It would be helpful to receive during the course of Phase 2 some detailed information concerning (a) the effectiveness of the LTWP recommendations during the trial period and (b) any procedural reforms planned by the Commercial Court in the light of the recent pilot exercise. These matters must be dealt with in my final report.

### 3. THE RELATIONSHIP BETWEEN THE COMMERCIAL COURT'S REVIEW OF ITS OWN PROCEDURES AND THE PRESENT COSTS REVIEW

3.1 The overlap. There is an obvious overlap between:

- (i) the review which the judges and users of the Commercial Court are currently carrying out, namely a review of that court's procedures, with a particular focus upon controlling costs; and
- (ii) the review which the Master of the Rolls has asked me to carry out, namely a review of the rules and principles governing the costs of civil litigation (including "*whether changes in process and/or procedure could bring about more proportionate costs*") and making recommendations to promote access to justice at proportionate cost.

3.2 Rival views as to the interrelationship between the two reviews. The Costs Sub-committee of the Commercial Court Users Committee take the view that the review which I am carrying out should not cut across the work which the Commercial

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<sup>57</sup> "The Lawyer" online, 29<sup>th</sup> April 2009: <http://www.thelawyer.com/buncefield-proves-trial-fees-can-be-cut/1000551.article>.

Court judges and users are currently undertaking, with the benefit of their detailed knowledge of Commercial Court practice and procedures: see chapter 10, section 7. However, as can be seen from chapter 10, section 11, a number of commercial litigation solicitors in the City of London take a different view, which their representatives explained to me at a meeting on 29<sup>th</sup> January 2009. The solicitors in that second group believe that the procedures of the Commercial Court ought to be included in the review which I am carrying out, not least because of the second bullet point in my terms of reference.<sup>58</sup> Those solicitors propose a more radical approach towards (a) disclosure and (b) management of judicial resources than that recommended by the LTWP.

3.3 The minimum interrelationship between the two reviews. At the very least, the two reviews being carried out should inform one another. In particular:

- I found the meeting with representatives of the Commercial Court on 29<sup>th</sup> January and their written submissions provided for that meeting hugely informative. No doubt the judges and users of the Commercial Court will continue to keep me informed of their deliberations and of any proposed amendments to the Admiralty and Commercial Courts Guide. All of these matters are of obvious assistance and relevance to the problems concerning the costs of complex cases elsewhere in the High Court, which unquestionably do fall within my terms of reference.
- It may well be that the discussion of issues in this report and the collation of data in the appendices will be of assistance to the judges and users of the Commercial Court in formulating any appropriate amendments to the Admiralty and Commercial Courts Guide. That Guide, like other specialist court guides, is very much the “property” of the judges of, and practitioners in, the court concerned.

3.4 The wider question. A more difficult question is whether the interrelationship between the two reviews goes wider, requiring me in the final report at the end of this review to make any recommendations touching upon the procedures of the Commercial Court.

3.5 My approach. I have come to the conclusion that the Commercial Court is not a sacred territory, which falls outside the terms of reference set for me by the Master of the Rolls. On the other hand, the Commercial Court differs from all other domestic courts, not least in its high proportion of international work. Special considerations govern the procedures of that court. Those procedures are currently under review by judges and practitioners with a high degree of specialist knowledge and experience. All these are factors which I must keep well in mind. The correct approach is for me (a) to liaise with Commercial Court judges and practitioners during the consultation period and (b) to discuss with them the applicability to the Commercial Court of any proposals which may be emerging from the present Costs Review. Indeed, if one thing has emerged clearly from Phase 1 of the Costs Review, it is that one size does not fit all. It will be necessary during the consultation period for me to liaise with the judges and practitioners in all civil courts, in order to discuss with them the applicability of any proposals which may be emerging.

3.6 A number of specialist courts are currently reviewing their own procedures, for example the Patents County Court.<sup>59</sup> I must take careful note of all these developments and respect the expertise of the various specialists in their respective

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<sup>58</sup> Set out in chapter 1 above.

<sup>59</sup> See chapter 29, section 5.

fields. Nevertheless the recommendations in my final report must encompass all civil courts, including the Commercial Court.

#### 4. REVIEW

4.1 In Part 8 of this report I discuss a number of possible options for controlling the costs of litigation. The early chapters of Part 8 (in particular chapters 40 to 44) are largely focused upon substantial and complex cases, many of which are comparable to Commercial Court cases and involve extensive documentary evidence.<sup>60</sup> Indeed those chapters have been drafted with the benefit of seeing the LTWP report.

4.2 During Phase 2 of the Costs Review, I should welcome hearing the views of commercial practitioners and judges as to the extent to which the possible reforms canvassed in chapters 40 to 44 of this report might be applicable to the Commercial Court. I should also welcome hearing views from others as to the extent to which the recommendations of the LTWP might be applicable to large commercial cases proceeding in the TCC or Chancery Division.

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<sup>60</sup> Including, of course, electronically held documents.

## **CHAPTER 33. CHANCERY LITIGATION**

### **1. INTRODUCTION**

1.1 What Chancery litigation comprises. The Chancery Division undertakes a broad range of business and property work, much of which it shares with the Commercial Court, the Technology and Construction Court and the Mercantile Courts. For the purposes of this chapter, however, I will focus upon the work which is special to the Chancery Division. This includes:

- (iii) Disputes over property including rights and obligations over such property and contracts relating to such property; this includes the construction and rectification of contracts, transfers and other instruments.
- (iv) Commercial landlord and tenant.<sup>61</sup>
- (v) Disputes over wills and trusts, including charity cases. Where the validity of a will is in issue this type of dispute is known as a contested probate claim, governed by CPR Part 57.
- (vi) Claims under the Inheritance (Provision for Family and Dependants) Act 1975, which I shall refer to as “family provision claims”.
- (vii) Company claims, including shareholders’ disputes and minority shareholders’ claims and litigation concerning directors.
- (viii) Insolvency, both personal and corporate, including bankruptcy, liquidations, administrations and receiverships.
- (ix) Partnership matters, including limited liability partnerships and friendly societies, trade unions and clubs.
- (x) Court of Protection applications.
- (xi) Revenue matters.
- (xii) Intellectual property including patents, copyrights and trademarks.
- (xiii) Banking (outside purely commercial claims) including the enforcement of securities, indemnities and guarantees.
- (xiv) Enforcement of claims concerning breaches of rights by injunctions and equitable remedies including freezing and search orders.
- (xv) Constructive trusts and estoppel claims in non housing cases; the latter (housing cases) are covered by chapter 31.
- (xvi) Fraud in the context of Chancery matters including constructive trusts and tracing.
- (xvii) Professional negligence claims in relation to Chancery matters.

See chapter 5, Table 5.3 for a breakdown of Chancery claims in the High Court by reference to the issue of claim forms).

1.2 Not included within Chancery litigation, although there is sometimes a cross-over, are compulsory purchase, planning and other environmental law matters which may relate to land, or interests in land. Environmental claims are dealt with in chapter 36.

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<sup>61</sup> Residential landlord and tenant claims and housing claims are dealt with in Chapter 21.

1.3 The high cost of Chancery litigation. Because of the wide range of types of claim within the heading “Chancery litigation” the rules as to costs set out in the CPR, particularly those in rule 44.3, have a varied impact on these claims. One recurrent feature is the complexity both as to law and fact of many such claims even where the value of the claims is modest.<sup>62</sup> This means that costs, both in terms of amount and impact, will be a very significant factor in many Chancery cases. It is this general point which forms an overlay to what follows in this chapter.

1.4 Scheme of this chapter. This chapter looks, first, at the general rules which apply to Chancery litigation, and, secondly, at specific costs issues which affect Chancery litigation, particularly where the nature of the claim or the dispute introduces special rules. The chapter then looks at some of the practical consequences of the present rules and conventions upon Chancery litigation and those who are parties to it. Finally in this chapter, I shall review options for reform. Appendix 15 to this report sets out some costs awards in recent Chancery cases. The cases in this appendix were contributed by three firms of solicitors practising in the Chancery Division. None of these cases are included in the four week survey undertaken by Chancery judges and masters (19<sup>th</sup> January to 13<sup>th</sup> February 2009), the results of which are in Appendices 5 and 6.

1.5 Interplay between CPR and the older rules of practice. It should be noted that whilst the scope of this chapter is limited to the costs regime in place since April 1999 when the CPR came into force, some of the rules and conventions are much older and have had to adapt to the CPR. In some types of Chancery litigation there is, therefore, a potentially uneasy relationship between the starting point on the incidence of costs, namely CPR rule 44.3, and the practice which developed over many years prior to April 1999. Contested probate claims are a case in point, as will be seen below. Furthermore, as will also be seen below, because of the *prima facie* rule that the losing party is personally liable for the victor’s costs, those engaged in litigation in a representative capacity (e.g. trustees) have to take steps to protect themselves, as far as possible, against adverse costs orders, especially where those costs may not necessarily be taken out of the fund or estate which they hold.

1.6 Funding. No specific reference will be made in this chapter to conditional fee agreements (“CFAs”) as they are dealt with elsewhere in this Report. It should be noted, however, that Chancery litigation is usually outside the scope of public funding (family provision claims being one exception); and that the complexity and difficulty in predicting the outcome of many Chancery claims makes them inappropriate for CFAs, especially where ATE insurance is required. It follows that the impact of costs in much Chancery litigation will be on the pockets of the parties and any third party funders or, in trusts and estate claims, on the trust fund or estate which is in issue.

## 2. THE GENERAL POSITION AS TO COSTS IN CHANCERY LITIGATION

2.1 The general rule is that CPR Part 44 and the rules there set out will apply to the vast majority of Chancery claims, whether in the High Court or the county court. The material terms of Part 44 are summarised in chapter 3 above.

2.2 As will have been seen from chapter 3, in broad terms the general rule and the starting point when considering what costs order to make under rule 44.3 is that costs will follow the event, unless there are factors present which dictate another outcome. Factors such as pre- and post-claim conduct and the observance, or non-

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<sup>62</sup> E.g. the enforcement of the private rights of a householder.

observance, of the relevant pre-action protocol are all potentially significant when the court is considering what costs order to make. As will be seen below, the general rule that the costs follow the event has a particular effect on some types of Chancery litigation and may operate as a disincentive in such claims.

2.3 Also of equal application in Chancery litigation will be:-

- (i) The rules as to costs estimates<sup>63</sup>
- (ii) The importance of effective case management, especially in terms of case management conferences (“CMCs”) under Part 29.
- (iii) The effect on the overall costs of a claim caused by factors such as observance of pre-action protocols, the need for the statement of truth in pleadings, the obligations on disclosure, the production of witness statements and the use of experts, as directed by the CPR.

All these factors lead to Chancery litigation being expensive in terms of anything other than a claim of little complexity, even at the early stages. Further reference is made to this at paragraph 5.1 below, where the expense at the early stages of claims is considered.

### 3. PARTICULAR RULES AND CONVENTIONS WHICH APPLY TO COSTS IN CERTAIN TYPES OF CHANCERY LITIGATION

3.1 The web of costs rules and practice. Particular rules, or conventions, apply in the following Chancery claims. These modify (where applicable) the general rule that costs will follow the event under CPR rule 44.3. In some cases the principles are found in separate rules of court. In other cases the practice of the court has led to a different approach to the incidence of costs and, in effect, these are often cases where a “different order”<sup>64</sup> is likely to be made by the court. In many cases the conventions have been developed so as to avoid the risks and consequences of personal liability of a party for not only his costs, but also those of other parties. The examples given below may not be a comprehensive and exhaustive list, but are those most frequently encountered and are designed to illustrate the points just made.

3.2 Contested probate claims under CPR Part 57. In contested probate claims the following special rules and guidelines apply:

- (i) Where a notice to cross-examine is served under CPR rule 57.7(5), the losing defendant will not be liable for the claimant’s costs, unless that defendant has acted unreasonably in opposing the will being propounded.
- (ii) Under CPR rule 57.11 and paragraph 6 of the practice direction to CPR Part 57, special rules apply as to discontinuance; the costs of the claim on that discontinuance may come out of the estate. The automatically applicable rules as to costs on discontinuance in CPR Part 38 do not apply.

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<sup>63</sup> Under section 6 of the Costs Practice Direction. Recent authority, such as *Leigh v Michelin Tyre Plc* [2003] EWCA Civ 1766, has made the importance and significant effect of such estimates clear. In Chancery litigation the potential complexity of a claim may place a heavy burden on the solicitors for each party providing that estimate at the CMC stage, but the mandatory obligation is there and is increasingly viewed with importance in the Chancery Division.

<sup>64</sup> Under CPR rule 44.3(2)(b).

- (iii) Where the cause of the litigation has been the testator's fault (e.g. in losing his will) or where the circumstances of the case lead reasonably to an investigation (e.g. doubt over execution), the costs may come out of the estate. However, such guidelines do not override the starting point under CPR rule 44.3 that costs will follow the event and those guidelines are directed to whether the court should make a "different order" under CPR rule 44.3(2)(b).<sup>65</sup>
- (iv) Because of the general rule that the losing party will have to pay the costs of the winning party in contested probate claims subject to the exceptions above, the practice is that the person named as executor<sup>66</sup> in the last will is normally not going to be the claimant in view of that potential personal liability.

3.3 Appeal to the Court of Appeal in probate proceedings. In an appeal to the Court of Appeal in respect of probate proceedings, the general rule in CPR rule 44.3 does not apply: see CPR rule 44.3(3)(b). It is not clear why this special exception to the usual rule as to costs following the event remains. It may be that because of the "inquisitorial" function of the court as regards admission of wills to solemn form proof, there should be no disincentive to the parties to bring appeals to the Court of Appeal in probate claims. But the general principles as to costs in probate claims set out above are not so favourable to the losing party, and so the rationale of CPR rule 44.3(3)(b) is unclear. In any event the number of appeals to the Court of Appeal in contested probate claims is small, largely because most such cases will be decided on their facts.

3.4 Will or trusts construction claims where the issue in dispute lies between the trustees and beneficiaries. Construction claims may be brought where there are disputes over the construction of a will or a trust deed. The claim may be brought by the trustees seeking guidance (for example) as to the meaning of the trust instrument or will, or the claim may be by a beneficiary who wants his rights under the trust deed or will determined by the court. In such cases the costs of all parties normally come out of the trust fund or the estate of the deceased. There are also special rules as to:

- Trustees' and personal representatives' costs which, unless payable by another person (e.g. under an indemnity), will be paid out of the trust fund or the estate on the indemnity basis: see CPR rule 48.4. Those costs must be properly incurred: see Costs Practice Direction, paragraph 50A.<sup>67</sup>
- The costs attributable to issues between the parties which do not affect others interested in the estate, whether or not parties. For example, the costs of resolving a question of construction over a specific legacy will usually be borne as between those legatees and not by the other beneficiaries in the estate.<sup>68</sup>

3.5 Litigation between executors or trustees and outsiders in "hostile" litigation. Such litigation (e.g. defending claims by creditors, or for breach of trust) will follow the usual rules under CPR Part 44 rule 3. To protect themselves against a hostile costs order, the executors or trustees may use the *Beddoe* application referred to below. There is, however, an anomaly under the current terms of CPR rule 48.4: the "general rule" expressed in CPR rule 48.4(2) is not a completely correct representation of the true position at law. The true position is that in "hostile" litigation trustees or personal representatives are liable for the costs of the other

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<sup>65</sup> For a full and up to date review of the incidence of costs in contested probate claims see *Re Kostic decd. Kostic v Chaplin* [2007] EWHC 2909 (Ch) (Henderson J).

<sup>66</sup> If he has no beneficial interest in the outcome, e.g. being a purely professional executor.

<sup>67</sup> See generally Lewin, *Trusts* (18<sup>th</sup> edition, 2008) chapter 21.

<sup>68</sup> Williams, Mortimer & Sunnucks, *Executors, Administrators and Probate*, (2008 Edition) Chapter 66 paragraph 66-25. ("Williams & Mortimer").

(winning party) in the same way as any other litigant. They can only indemnify themselves out of the fund or estate, if the costs have been reasonably and properly incurred.<sup>69</sup> This is why, in order to protect themselves, such trustees etc. will seek the approval of the court under the *Beddoe* procedure before bringing or defending claims. To this extent the right of the trustee or personal representative to take costs out of the estate or fund under CPR rule 48.4 in hostile litigation may not in itself be sufficient protection.<sup>70</sup>

**3.6 Where trustees or executors face claims relating to their administration of the fund or the estate.** In such a case the usual rules under rule 44.3 will apply to the costs of the trustees or executors, in the sense that the claim will be a hostile one brought by a beneficiary. However, if the trustees or executors have acted reasonably in their administration, they will usually obtain their costs out of the estate.<sup>71</sup>

**3.7 The *Beddoe* procedure.** In trust and estate litigation special rules may apply, allowing trustees and executors to protect themselves as to adverse costs orders by use of CPR Part 64 and the *Beddoe* procedure.<sup>72</sup> This allows such representative parties to seek the directions of the court as to whether or not they should take certain action, or defend certain claims. To do this the application must be made in a separate Part 8 claim form from the claim in respect of which the directions are sought: see CPR Part 64 and the practice direction thereto. The costs of this separate application will usually come out of the fund or estate.

**3.8** Further special rules will apply so far as beneficiaries, or others concerned, may need to seek “prospective” costs protection under CPR Part 64 and the practice direction thereto. This enables beneficiaries to obtain an order that their costs should come out of the estate, irrespective of the outcome of the claim. The application to this effect will usually only succeed where the beneficiaries are bringing a “class” action against the trustees (e.g. for breach of duty in relation to investments) and (save in pension fund cases) if the likelihood is that the trial judge will order the beneficiaries’ costs out of the fund, or estate.<sup>73</sup> In pension fund cases the order is more likely to be made in view of the analogy with derivative actions by minority shareholders.

**3.9 Lloyd’s Names.** Of limited and somewhat esoteric interest are the special costs rules which apply where applications are made in estates where the deceased was a Name at Lloyds who died with “open years” not fully protected by estate

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<sup>69</sup> Trustee Act 2000 section 31(1); see Snell’s equity, 31<sup>st</sup> Edition, Chapter 7, paragraphs 7-69 – 7-81 for a full discussion of the *Beddoe* procedure.

<sup>70</sup> For the three types of litigation in which trustees may be involved, see *Re Buckton* [1907] 2 Ch 406 at 413 – 415. Paragraphs 3.4 and 3.5 of the text represent the three types of claim. The guidelines in *Re Buckton* were considered and applied in *McDonald v Horn* [1995] 1 All ER 961 at 970 – 971. In *D’Abo v Paget* (No. 2) (Costs) [2000] WTLR 863, these guidelines on trustees’ costs were endorsed in the post CPR world, albeit that “a *more robust attitude to costs*” is now appropriate in the light of the CPR and Part 44; see, *ibid*, paragraph 18.

<sup>71</sup> For a full analysis of the costs of executors and trustees see Williams & Mortimer, Chapter 66. The main issue in such cases is that the representative party (trustee/executor) will invariably want to ensure that his costs come out of the estate, whereas the beneficiary may often oppose this. Hence the costs protection steps taken referred to below.

<sup>72</sup> *Re Beddoe* (1893) 1 Ch 547. Modern guidance as to what stance the trustees should adopt in order to protect themselves as to costs in various types of claim by or against the estate or fund is found in *Alsop Wilkinson v Neary* [1996] 1 WLR 1220.

<sup>73</sup> See *McDonald v Horn* [1995] 1 All ER 961; Practice Statement [2001] 1 WLR 1082; CPR Part 64 and paragraph 6 of the practice direction thereto. Williams & Mortimer (above) at 66-10 and 66-23. The practice direction to Part 64 contains a model Prospective Costs Order; see page 1760, Volume 1 2009 White Book.



protection, or stop loss insurance, or other reinsurance of losses: see Estates of deceased Lloyds Names Practice Direction.<sup>74</sup> The procedure here is designed to save costs and to protect the personal representative against any future claims for over-distribution or maladministration by allowing the distribution of the estate of the deceased Name on terms which protect the personal representatives, notwithstanding that there may be open years and possible claims against the Name for losses on business his syndicates had underwritten. This particular aspect of procedure is still used, but nowadays less so than formerly, given the changes in Lloyds over the past decade or more.

3.10 Court of Protection matters. The costs rules are set out in Part 19 of the Court of Protection Rules.<sup>75</sup> The main rules are:

- (i) Where the proceedings concern the protected party's property and affairs, the general rule is that costs will come out of that person's estate; e.g. an application for a statutory will. (Rule 156)
- (ii) Where the proceedings concern that person's personal welfare in general, the general rule is that there will be no order as to those costs; e.g. deciding where that person is to live. (Rule 157)
- (iii) There is power to apportion the costs as between those two issues. (Rule 158)
- (iv) Departures from the general rules may be permitted having regard to matters such as conduct and the other factors set out in rule 159. To this extent these rules mirror the general principles under the CPR and Part 44, where there may be a departure from the general rule as to costs and set out in CPR rule 44.3(4) and (5).
- (v) By rule 160 the terms of CPR Parts 43 and 44 apply save as modified by the Court of Protection Rules.

It will be noted, therefore, that in this jurisdiction the costs rules adopt a different starting point from that set out in CPR rule 44.3.

3.11 Declarations as to restrictive covenants. Where declarations are sought under section 84(2) of the Law of Property Act 1925 as to the meaning and enforceability of covenants, there is a particular practice as to costs. This has survived the CPR Part 44. The practice was set out in *Re Jeffkins' Indentures* where Cross J. stated:

"I would add, on the question of costs, that a plaintiff seeking a declaration that restrictive covenants do not affect his property is expected to pay his own costs. He is also expected to pay the costs of any defendants who enter an appearance<sup>76</sup> down to the point in the proceedings at which they have had a full opportunity of considering the matter and deciding whether or not to oppose the application. Any defendant who then decides to continue, and appears unsuccessfully before the judge, does so at his own risk as to his own costs at that stage. Such defendant would not, however, be ordered to pay the plaintiff's costs."<sup>77</sup>

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<sup>74</sup> The practice is set out in the Chancery Guide paragraphs 26.50 – 26.55 and Appendix 11; 2009 White Book Volume 2 paragraphs 1A-200 and 1A-241.

<sup>75</sup> [2007] S.I.1744. Reproduced in Heywood & Massey, Court of Protection Practice, Part E.

<sup>76</sup> Now the acknowledgement of service.

<sup>77</sup> [1965] 1 WLR 375. This practice was applied most recently and post CPR in *University of East London v London Borough of Barking and Dagenham* (No 2) [2004] EWHC 2908 (Ch). It is important to recognise that since the introduction of the CPR the practice stated in *Re*

3.12 Discharge of restrictive covenants. Where application is made in the Lands Tribunal to modify or discharge restrictive covenants, special rules apply under Lands Tribunal Practice Directions 2006, paragraph 22.4. CPR Part 44 does not apply. Here the general rule is that because the applicant is seeking to “improve” his property by the application to discharge or modify the covenant affecting it, he will have to bear his costs of the application, even if he is successful. The losing objector will not have to pay the applicant’s costs, unless he has been unreasonable. The losing applicant will have to pay the costs of the objector. These rules are subject to questions of conduct and reasonableness and the effect of any offers. Where there are issues over whether objectors can oppose the application as a matter of standing, the costs will follow the event.<sup>78</sup>

3.13 Minority shareholder disputes. The costs rules in minority shareholder disputes may be summarised as follows:

- (i) In a derivative claim brought by a member of a company, other corporate body, or trade union, rule 19.9E provides that the court may order the entity for the benefit of which the claim is brought to indemnify the claimant against liability for costs incurred, either in applying for permission to bring the claim, or in bringing the claim, or both. This provision of the CPR is an embodiment of a pre-existing principle that was established in *Wallersteiner v Moir (No.2)*.<sup>79</sup> The normal procedure for obtaining an indemnity under rule 19.9E is for the claimant to apply without notice to a master for directions, soon after issuing his claim form.<sup>80</sup> The claimant’s application should be supported by an opinion of counsel as to whether or not there is a reasonable case.<sup>81</sup> The court can decide the application without notice or he may require notice to be given to some other minority shareholders.<sup>82</sup> The question for the court is whether there is a reasonable case for claimant to bring at the expense of the company.<sup>83</sup> If the master is satisfied that there is, he will approve the continuance of proceedings for a specified period (e.g. until the close of pleadings, or until trial).<sup>84</sup>
- (ii) In a personal claim brought by a member of a company, no special rule as to costs applies.<sup>85</sup>
- (iii) Chapter 3 of Part 28 of the Companies Act 2006 confers various rights in relation to takeover offers. In an application made by a shareholder pursuant to section 986(1) or section 986(3), a special rule as to costs applies. Section 986(5) provides:

“No order for costs or expenses may be made against a shareholder making an application under subsection (1) or (3) unless the court considers that—

  - (a) the application was unnecessary, improper or vexatious;
  - (b) there has been unreasonable delay in making the application; or

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*Jeffkins* must be set alongside the principles in CPR rule 44. 3 and the modern emphasis on pre-action disclosure.

<sup>78</sup> *Winter v Traditional and Contemporary Contracts Ltd* [2006] EWCA Civ 1740.

<sup>79</sup> [1975] QB 373 (CA).

<sup>80</sup> See *Joffe et al, Minority Shareholders*, 3rd edition (2008), at 1.83.

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*, at 2.73.

- (c) there has been unreasonable conduct on the shareholder's part in conducting the proceedings on the application.”
- (iv) In a “just and equitable” winding up petition brought by a member of a company, no special rule as to costs applies.<sup>86</sup>
- (v) In an “unfair prejudice” petition pursuant to section 994 of the Companies Act 2006, the normal rule as to costs is generally applicable. There are three main qualifications to this:
  - (a) In rare cases, where the petition is brought for the benefit of the company rather than for the benefit of the petitioner, the petitioner may be able to obtain an order for an indemnity under the principle in *Wallersteiner v Moir (No.2)*, discussed above.<sup>87</sup>
  - (b) Although the company will be a respondent to the petition, the “true respondent” is generally an individual or individuals within the company; i.e. other shareholders/directors. For this reason, it is unusual for the company to be ordered to pay any costs in relation to a successful petition.<sup>88</sup> But the other respondents may be so ordered.
  - (c) The court may make an interim order restraining the respondent shareholders or directors from using company funds to defend the proceedings.

3.14 Insolvency proceedings generally. The following rules apply:

- (i) By rule 7.33 of the Insolvency Rules 1986, the provisions as to costs contained in the CPR apply to insolvency proceedings, except where contrary provision is made.
- (ii) In a case where the costs of any person are payable as an expense of the liquidation, or out of the estate of a bankrupt, the amount of those costs is to be decided by detailed assessment unless that amount is agreed between the responsible insolvency practitioner and the person entitled to payment.<sup>89</sup>
- (iii) Rule 7.40 of the Insolvency Rules 1986 provides for a procedure whereby any party to, or any person affected by, insolvency proceedings may apply, otherwise than at the time of the proceedings, for an order allowing him his costs.

3.15 Trustees in bankruptcy, liquidators, receivers and administrators. The following rules apply:

- (i) A trustee in bankruptcy is normally entitled to recoup costs out of the bankrupt's estate. To the extent that the assets of the estate are insufficient for this purpose, a trustee in bankruptcy is generally in no better position than any other litigant. However, the court may refuse to make a costs order against a trustee in bankruptcy who has brought proceedings unsuccessfully, if satisfied that the

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<sup>86</sup> *Ibid*, at 4.118.

<sup>87</sup> *Ibid*, at 6.112.

<sup>88</sup> *Ibid*, at 6.128.

<sup>89</sup> Insolvency Rules 1986, rule 7.34(1).

trustee would have failed in his duty as trustee had he not brought the proceedings.<sup>90</sup>

- (ii) The position in relation to liquidators depends upon whether the liquidator litigates in the name of the company, or in his own name. A liquidator who litigates in his own name is generally in no better position than any other litigant, except that he will ordinarily be entitled to recoup out of the assets of the company the costs of litigation properly brought.<sup>91</sup> By contrast, a liquidator who litigates in the name of the company is not a party to the proceedings. A costs order may be made against him pursuant to section 51(1) of the Supreme Court Act 1981 but, as a matter of practice, such orders are rare unless the liquidator has acted improperly or unreasonably.<sup>92</sup>
- (iii) Where a costs order is made in favour of a liquidator or trustee in bankruptcy, those costs are generally assessed on the standard basis and in accordance with the factors set out in CPR rule 44.5.<sup>93</sup>
- (iv) An administrative receiver is in broadly the same position as a liquidator who litigates in the name of the company, although the courts appear to be somewhat more willing to make costs orders against administrative receivers than against liquidators.<sup>94</sup> In many cases the representative party (i.e. the receiver or liquidator) may apply to the court for directions as to what stance should be taken in respect of claims in order (a) to seek protection against adverse costs orders and (b) to ensure that the court will approve the costs of the liquidation or receivership in due course.
- (v) No special rules as to costs would appear to apply in relation to proceedings brought, or defended by administrators. It is clear that an administrator has power to bring or defend proceedings in the name of the company (as opposed to in his own name)<sup>95</sup> and, on that basis, it would seem likely that an administrator is in a position similar to that of an administrative receiver.
- (vi) Rule 7.39 of the Insolvency Rules 1986 provides that, where an official receiver or responsible insolvency practitioner<sup>96</sup> is made a party to any proceedings on the application of another party to the proceedings, he shall not be personally liable for costs, unless the court directs otherwise.
- (vii) Part 69 applies to Receivers appointed by the court and under rule 69.6 they have the power to apply to court for directions, which will include directions as to any litigation and the costs thereof. (See also Chancery Guide Appendix 10, at paragraph 1A-234 Volume 2 2009 White Book).

3.16 Pension fund litigation. The following rules apply:

- (i) As in the case of other litigation, where there are parties holding funds, in the context of pensions, it is necessary to distinguish between hostile and non-

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<sup>90</sup> For a detailed summary of the principles applicable to trustees in bankruptcy, see *Muir Hunter on Personal Insolvency*, at 3-1067.

<sup>91</sup> See e.g. *Lewis v IRC* [1999] 2 BCLC 666.

<sup>92</sup> See De Kerloy, *The Personal Liability of Liquidators and Administrative Receivers* (2000) 4 RALQ 23.

<sup>93</sup> Insolvency Rules 1986, r. 7.34 (5).

<sup>94</sup> *Ibid.*

<sup>95</sup> Totty and Moss on Insolvency, at C2-13.

<sup>96</sup> "Responsible insolvency practitioner" includes administrators, administrative receivers, liquidators, provisional liquidators, trustees in bankruptcy, interim receivers and supervisors of voluntary arrangements. Where the Official Receiver does work himself his costs are covered by CPR 48.6; see note at 48.6.5 to the 2009 White Book.

hostile litigation.<sup>97</sup> Litigation is hostile if it involves an allegation of impropriety. Non-hostile litigation generally arises out of a desire on the part of the trustees to obtain directions as to how to act upon, or to deal with the consequences of a past error; e.g. as to the exercise of a discretion.

- (ii) In hostile litigation, the normal rule as to costs applies unless either or both parties obtain a *Beddoe* order.<sup>98</sup> In this context, it is open to both the trustees of the pension fund and the members (beneficiaries) of the pension fund to apply for an order that their costs be paid out of the pension fund.<sup>99</sup>
- (iii) In non-hostile litigation, the normal approach of the courts is to order that the costs both of the trustees and the beneficiaries be paid out of the pension fund, even if no *Beddoe* order has been made. However, trustees may be ordered to pay costs themselves, if they are found to have behaved unreasonably or for their own benefit rather than for the benefit of the fund.<sup>100</sup>

3.17 Intellectual property (“IP”) claims. The following rules apply:

- (i) Generally, IP matters follow the usual rules in CPR rule 44.3.
- (ii) There are a few quirks, such as relating to amendments to particulars of objections before trial,<sup>101</sup> and a tendency to award indemnity costs if the claimant is required to prove matters unnecessarily.<sup>102</sup>
- (iii) Summary assessment is done when the bill is less than £100,000 for a day-long hearing. This can be unsatisfactory, because the skeleton bill provided for those hearings is so short that one cannot really argue effectively against the total.
- (iv) There is a practice to award interim payments of about 50% if there a detailed assessment is ordered, so long as the daily rate is less than £100,000. For costlier cases, the whole amount might be sent for assessment with little or no interim payment.
- (v) In the early days of the Patents County Court (pre-CPR) there was a requirement to plead the case very fully along a “continental” model. Such pleadings resembled skeleton arguments with evidence in them, as opposed to conventional pleadings of facts and issues. This led to massive front-loading of costs, because it removed the possibility of a case starting cheaply, and then settling early, as so much was invested at the beginning. This acted as a hindrance to early settlement, as costs became an issue. Under the CPR since April 1999 the conventional approach to pleadings has been adopted in both the Patents County Court and the High Court. Nevertheless, there is still concern about the high cost of litigation in the Patents County Court. This is addressed separately in section 5 of chapter 29 above.

3.18 Revenue cases in the Chancery Division. The following rules apply:

- (i) Generally, revenue cases are no different from other cases heard in the Chancery Division, with the normal rule being that costs follow the event under rule 44.3.
- (ii) However, HM Revenue & Customs still stand by a statement given by Peter Rees MP in 1980 where it was announced that what were then the two tax

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<sup>97</sup> See Ellison, *Pensions Law and Practice*, at 12.106 to 12.107.

<sup>98</sup> *Ibid.* See paragraphs 3.5 and 3.7 above.

<sup>99</sup> *Ibid.*

<sup>100</sup> *Ibid.*, at 12.107.3.

<sup>101</sup> See *v Scott-Paine Orders*; 2009 White Book Volume 2, 2F-67.

<sup>102</sup> E.g. that Microsoft owns the copyright in its Windows program; *Microsoft Corp v Electro-Wide Ltd* [1997] FSR 580.

departments would occasionally waive their rights to seek costs (or even consider funding a taxpayer's litigation costs) in cases of major public importance. The incidence of such arrangements has been notoriously haphazard and parties should not assume that HM Revenue & Customs would enter into such an arrangement lightly.

- (iii) One issue that tax litigants have considered, however, is the consequence of the decision of the Court of Appeal in *Agassi v Robinson* (HMIT) (Bar Council and Law Society intervening).<sup>103</sup> That case concerned the costs available to the then successful taxpayer. Mr Agassi had been advised by Chartered Tax Advisers, who were not solicitors. Under the licensed access rules, the Chartered Tax Advisers (as are qualified accountants) were entitled to instruct counsel direct in the higher courts provided that they had had conduct of the case when the case was first heard by the General, or Special Commissioners. It was held that because Chartered Tax Advisers were not authorised litigators, their costs could not necessarily be recovered by their client in the same way as if the costs had been incurred by a law firm. Instead, the client could recover only their disbursements (such as counsel's fees) and fees payable in respect of their expertise as tax advisers. It was noted by the court that the costs of instructing a law firm would have been considerably higher, although recoverable (subject to assessment on the standard basis) if an order for costs were made. Because of this decision taxpayers now have to weigh up the risk of incurring more in the way of professional costs with the possibility of recovering a greater proportion of the costs should they prevail in court.<sup>104</sup>
- (iv) From 1<sup>st</sup> April 2009, with the creation of the First-tier and Upper Tier Tribunals, very few tax cases will find their way into the High Court. With the judicial review function being extended to the Upper Tier Tribunal, the High Court will probably see only appeals against pre-April 2009 decisions of the predecessor tribunals. Thus the impact of the analysis of costs in Revenue cases above will be greatly diminished in future. Costs in the new Tribunals will be governed by separate rules outside the CPR. The present expectation is that in relation to tax appeals, the Upper Tribunal will establish a costs regime broadly similar to that currently applied in the Chancery Division. In relation to the first Tier Tribunal, the costs rules of the Tax Chamber are outlined in section 3 of chapter 46 below.

#### 4. AREAS OF CHANCERY LITIGATION WHERE THE GENERAL RULES AS TO COSTS UNDER CPR RULE 44.3 CAN CAUSE PROBLEMS IF OVERLOOKED

4.1 Situations where costs do not come out of a fund. There are certain types of Chancery litigation where costs may not always be ordered out of the estate of the deceased, or out of the trust fund and these create particular difficulties, not least in the perception of clients. There is often an expectation in the clients, either before they have received full advice, or if they have received inadequate advice, that the costs of the litigation will always come out of the estate or fund. Examples of such misconceptions arise in:-

- (i) Contested probate claims, unless falling within the exceptions referred to at section 3 above. Some litigants mistakenly believe that all parties' costs will come out of the estate of the deceased, whatever the outcome of the claim.

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<sup>103</sup> [2005] EWCA Civ 1507.

<sup>104</sup> The Revenue successfully appealed the case to the House of Lords on the substantive issue. Therefore, the costs point did not arise on that further appeal.

- (ii) Family provision claims under the Inheritance (Provision for Family Dependents) Act 1975. The normal rule in this type of litigation is in fact that the costs of the claimant and beneficiary defendant will follow the event under CPR rule 44.3. The personal representatives (unless acting unreasonably) will have their costs out of the estate.<sup>105</sup> The principles as to the incidence of costs will always be subject as between claimant and defendant beneficiary to any Part 36, or *Calderbank* offers (or even open offers) which are invariably made in these claims. As with contested probate claims, some litigants mistakenly believe that all parties' costs will come out of the estate of the deceased, whatever the outcome of the claim.
- (iii) Hostile litigation in trusts; e.g. for breach of trust by trustees. As with contested probate claims, some litigants mistakenly believe that all parties' costs will always come out of the trust fund in any event. Hence the need to obtain the directions of the court under CPR Part 64, or on a *Beddoe* application.

4.2 It is, therefore, an important task in practice for practitioners to ensure that parties are properly advised as to the likely orders as to costs which can be made. This includes ensuring that trustees (including charity trustees) are advised as to their personal liabilities for not only their own costs, but also the costs of other parties. Hence the protective steps referred to above, such as the *Beddoe* application. It is, however, a fact that the cost of the *Beddoe* application is itself another burden on the estate or fund.

4.3 It is in trust and estate litigation, where there is a fund, that the tension between the general rule in CPR rule 44.3 and the need to protect certain types of party from adverse costs orders exists.<sup>106</sup> Notwithstanding CPR rule 48.4 (costs of trustees etc. payable out of the fund on the indemnity basis<sup>107</sup>) there are other parties (e.g. beneficiaries suing for alleged breaches of trust or investment duties) who will often be exposed to costs risks, and the expense and difficulties of obtaining a pre-emptive costs order may not be attractive. In the absence of a "costs neutral" regime (as in ancillary relief claims)<sup>108</sup> the effect of CPR rule 44.3 will be an important factor in trust and estate litigation.

4.4 Issues arising. Two issues arise from the foregoing discussion:

- (i) Should the costs neutral regime (whereby costs come out of the fund or the estate, rather than the pocket of the losing party) be extended?
- (ii) Are there any circumstances in which the costs of a *Beddoe* application might properly be saved by judicious amendment of the rules?

4.5 Issue (i). In relation to the first issue, it may be helpful to examine the effect on family proceedings of the recent extension of a costs neutral regime. This is discussed in chapter 51 below. It will be noted from chapter 51 that extending a costs neutral regime has two material effects. First, parties are sometimes discouraged from running up extravagant costs, when they know that such costs will come out of the fund in which they will share (rather than from the losing party – i.e. hopefully

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<sup>105</sup> See *Re Fullard* [1982] Fam 42. See also, Francis, Inheritance Act Claims, Law, Practice and Procedure (Jordans) (looseleaf) chapter 15 paragraphs 15[36] - [38] for costs in such claims generally.

<sup>106</sup> The rationale is that in certain types of litigation about a fund it is just that the burden of the litigation should be borne by all those interested in the fund, rather than those who have brought the matter before the court.

<sup>107</sup> See chapter 3 for the different bases of assessment of costs.

<sup>108</sup> As to which, see chapter 51.

the other side). Secondly, offers to settle have less teeth, if costs are likely to come out of a common fund.

4.6 Issue (ii). This issue is very much one for Chancery specialists. I doubt that experience elsewhere in the civil justice system will be of assistance.

## 5. SOME OF THE PRACTICAL CONSEQUENCES OF THE IMPACT OF THE CURRENT COSTS RULES IN CHANCERY LITIGATION.

### (i) Front loading

5.1 Since the introduction of the CPR, the pre-action costs and the costs of the early stages of Chancery litigation have increased substantially. The cost of simply getting a claim ready, even at the pre-claim stage, is a major factor. The burden in Chancery litigation, particularly where there is often a large amount of evidence on which the claim will depend, often falls at the early stages of the claim. In Chancery litigation the burden is often a heavy one because of the complexity of the claim; e.g. a partnership action with a long history, or a breach of trust claim with complex issues concerning the trustees' dealing with the trust fund. If the burden does not fall immediately pre-action, then it will often fall either at the stage of pleadings, or at disclosure. This is because in many Chancery cases there will be a large amount of evidence that will need to be marshalled and this has to be exchanged at a very early stage of the claim. Anecdotally it seems that even £5,000 - £10,000 for solicitors' costs alone will often be an inadequate sum on account to allow a claim of any complexity to be presented in a pre-action letter. Beyond this the need to ensure the accuracy and truth of the pleadings and the burdens on disclosure and witness statements will usually lead to the client having to pay his solicitor's bill for an amount in the region of £50,000 for even modest litigation well in advance of any final hearing. A solicitor and own client costs bill for one party is frequently in the region of £100,000 in a Chancery claim of no particular complexity, after two or three days in Court. Frequently amounts are higher, and the longer the claim takes to hear, the bigger the costs bill. Interim applications will also increase the final bill. Even allowing for the effect of assessment of the receiving party's costs, most experienced counsel at the Chancery Bar would advise clients to budget for £175,000 - £200,000 overall in the event of losing and being subject to an adverse costs order after assessment of the receiving party's costs, in an average three day case, without a large number of expert witnesses and of modest complexity.

5.2 Front loading is often caused at a very early stage by the need to comply with the Practice Direction – Protocols (“the General Protocol”) (paragraph 4 being the most relevant) and, in particular, the pre-action letter with relevant attachments that has to be sent under that paragraph. At the time of writing (March 2009) the General Protocol remains in force. However, with effect from 6<sup>th</sup> April 2009 the General Protocol will be replaced by the new “Practice Direction – Pre-action Conduct” (the “new Practice Direction”). The new practice direction also requires information to be exchanged by letter. However, it includes the following paragraph, which is important:

“6.2 The parties should act in a reasonable and proportionate manner in all dealings with one another. In particular, the costs incurred in complying should be proportionate to the complexity of the matter and any money at stake. The parties must not use this Practice Direction as a tactical device to secure an unfair advantage for one party or to generate unnecessary cost.”



For the same reason expressed above as to the frequent complexity of Chancery claims, the costs incurred in preparing a pre-action letter (both under the General Protocol and under the new Practice Direction) is often a high one. Thus the burden will often fall on the potential claimant to marshal a large amount of evidence which has to be presented in, and together with, the pre-action protocol letter.

5.3 There is no specific pre-action protocol for Chancery litigation. At one stage, it was intended that there would be a specific protocol for probate claims. But beyond the drafting of one by the Association of Contentious Trusts and Probate Specialists (often still used as an “informal” template) it was never brought into force. Thus the policy would appear to remain that the General Protocol (now being replaced by the new Practice Direction) should be the template for most Chancery litigation. The exceptions are the specific protocols relating to professional negligence claims – which may give rise to Chancery issues such as defective conveyancing – and housing disrepair and rent arrears cases.

5.4 The absence of a specific protocol in, for example, contested probate, or family provision claims, can lead to a costly proliferation of correspondence on the merits of the case in both directions. It is hoped that paragraph 6.2 of the new Practice Direction will have the effect of reducing such excessive correspondence. An additional burden which arises in probate claims is the practice whereby, under the authority of *Larke v Nugus*<sup>109</sup> the party seeking to challenge the validity of the will is entitled to have a copy of the file and an account of the circumstances of the giving of the instructions for the will in dispute and its execution by the deceased from the solicitors taking instructions for, preparing and arranging the execution of that will. Whilst this extra cost may be strictly speaking outside the CPR, this is an additional cost at an early stage on potential parties and their solicitors which can all add to the burden of an adverse costs order. On the other hand, this procedure is more than justified by the costs saved and hostile litigation avoided in those cases where such disclosure satisfies the complainant’s concern.

5.5 A number of the written submissions received during Phase 1 of the Costs Review have identified pre-action protocols as a cause of additional and unnecessary cost. For example, an experienced practitioner writes:

“My work covers both professional negligence, where there is a pre-action protocol, and commercial chancery, where there is not. I have not found any significant disadvantage in bringing or defending a chancery claim without having gone through a formal protocol. In my view the protocols were important in effecting the necessary cultural change in the late 1990s, but I question the need for them today. I see a number of cases in which (i) it is plain from the outset that they will end up with litigation, so that the Protocol is merely another costly hurdle to be surmounted before proceedings are commenced or (ii) the Protocol could be used effectively but one of the parties merely pays lip service to the formalities so that the opportunity is wasted. I would prefer to see a more flexible regime in which there was no formal protocol but the parties were encouraged to engage in sensible correspondence before litigating, with the sanction that judge may adjust the costs order if it was clear that one party has failed at an early stage to cooperate, disclose relevant documents, or make sensible admissions.”

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<sup>109</sup> (1979). Reported fully in [2000] WTLR 1033.

Similar concerns about the protocols adding to costs, rather than saving costs, have been expressed by the Civil Committee of the Council of Circuit Judges. The question therefore arises whether (a) formal pre-action protocols should be dispensed with in Chancery litigation or (b) the new Practice Direction strikes the right balance or (c) a special pre-action protocol for Chancery litigation should be drawn up. The attraction of the third course is that, if court users so wish, the new protocol could be made less prescriptive, rather than more prescriptive, than the existing protocol and the new Practice Direction.

5.6 There is also an additional burden in many Chancery cases on litigants because of the need to have more than one case management conference (“CMC”) particularly in cases of complexity, in order to ensure that the case is being managed effectively. Whilst there can be no criticism of the overriding need under the CPR to manage cases effectively, the costs of CMCs can constitute a burden on the clients at an early stage of the litigation. This is particularly so where the effectiveness of the CMC is reduced by inadequate preparation by the parties’ advisers (if not on some occasions by the tribunal) and often because of the short hearing time available given the pressure on the daily lists of masters and district judges.

5.7 Finally the need to present as comprehensive a case as is possible in witness statements (given that they will have to stand unexpanded as evidence-in-chief) which are invariably drawn by the party’s solicitor, leads to a heavy burden of costs at that stage of the claim. The temptation to “overload” these statements often adds to the costs, especially in claims which invite a wide and lengthy setting out of issues, such as family provision claims, or partnership disputes.

(ii) Exhaustion of estates, the “Jarndyce v Jarndyce” syndrome

5.8 Without costs capping<sup>110</sup> and without a strict adherence to costs estimates<sup>111</sup>, much Chancery litigation (e.g. over wills, or family provision claims) can lead to the exhaustion of the fund, or the estate by the impact of costs. These costs can frequently outstrip the true value of what is at stake. Clients often appear immune to the true consequence of this as matters “of principle” often set in the context of a family dispute will take precedence. Hence the “Jarndyce v Jarndyce” syndrome which is still encountered in trust and estate litigation, where, as occurred in the novel “Bleak House” by Charles Dickens, the end of the litigation only came when the entire estate of the deceased had been swallowed up by costs. It may be said that the exhaustion of such estates is more to do with the practice (see above) of costs coming out of the estate as opposed to the effect of CPR rule 44.3. But it is still a feature of Chancery litigation that, quite apart from the potentially disproportionate effect of costs orders and amounts of costs, estates can be exhausted by costs. Family provision claims are one example of where this can happen. In the current economic climate where values of real property are declining, there is an increasing risk of a deficit on the estate account after any award and costs.

5.9 There have been suggestions in the context of family provision claims that the “costs neutral” regime recently adopted in ancillary relief claims (see chapter 51) might be suitable for family provision claims.<sup>112</sup> An alternative approach, which

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<sup>110</sup> As to which see also CPR rule 3.2(1l) in the context of estimates of costs and prospective costs cap orders.

<sup>111</sup> As to which see Costs Practice Direction paragraph 6.

<sup>112</sup> See the discussion of this point in Francis, Inheritance Act Claims (above) chapter 15 paragraph 15[38](g).

might merit consideration, is that only proportionate costs will come out of the estate and that all costs above the limit will be borne by the party incurring them (alternatively, by the losing party). If this approach is adopted, the court would have to specify at the outset what amount of costs can come out of the estate. This would necessitate a form of costs capping exercise (as to which see chapter 45).

5.10 Neighbour disputes. Linked to the foregoing is the problem of disproportionate costs being incurred. A common example of this feature of litigation is the domestic boundary dispute, or dispute over a domestic right of way. The value of the land in dispute, or the right of way, may be trivial. But the costs (often in tens of thousands of pounds) will have to be paid by the losing party. Once again the “principle” of the claim takes precedence. There appears to be no direct evidence to suggest that the costs rules in CPR Part 44 dissuade parties from engaging in such claims, even as far as the Court of Appeal. In one recent case Mummery LJ said:

“There are too many calamitous neighbour disputes in the courts. Greater use should be made of the services of local mediators, who have specialist legal and surveying skills and are experienced in alternative dispute resolution. An attempt at mediation should be made right at the beginning of the dispute and certainly well before things turn nasty and become expensive. By the time neighbours get to court it is often too late for court-based ADR and mediation schemes to have much impact. Litigation hardens attitudes. Costs become an additional aggravating issue. Almost by its own momentum the case that cried out for compromise moves onwards and upwards to a conclusion that is disastrous for one of the parties, possibly for both.”<sup>113</sup>

Many, if not all, judges who sit in the county courts have experienced such litigation between neighbours, where costs are enormous and all sense of proportion has been lost.<sup>114</sup> The effect of CPR rule 44.3 can in such cases be an invitation to both parties to ratchet up the costs in the hope of victory and the recovery of those costs.

5.11 Minority shareholder petitions. There is some evidence from both leading and junior counsel who deal frequently with minority shareholders’ petitions that the costs of the respondents incurred in defending each and every allegation in the petition may often be excessive. Even where the respondents are unsuccessful in resisting the petition, the order for costs against them does not reflect the fact that on many of the factual issues they have in fact won. “Issue led” costs orders are not always the answer in such cases and even an order awarding a proportion of the successful party’s costs does not address the fact the in reality most of the court time has been spent on evidence where the petitioner has lost.

### (iii) The use of Part 36 in Chancery litigation

5.12 Chancery litigation generally does not present any particular difficulty with regard to a pro-active and sensible use of offers under Part 36. There are some types of case to which the use Part 36 does not lend itself. For example probate claims where the “all or nothing” approach between the contested wills makes it hard to

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<sup>113</sup> *Bradford v James* [2008] EWCA Civ 837, at paragraph 1. Cited with approval in *Vale of Glamorgan Council v Roberts* [2008] EWHC 2911(Ch) (Lewison J at paragraph 6).

<sup>114</sup> I recall dealing with one such case, when sitting as recorder in the county court. The result of that case (achieved at huge cost) was that the disputed boundary strip was divided down the middle, with each of the warring neighbours being awarded one half of the strip.

make offers which have the desired cost protection effect. On the other hand, family provision claims do lend themselves to the use of Part 36. The same observations apply to *Calderbank* and open offers.

5.13 The question therefore arises whether any alternative procedure might be devised for probate claims, in order to encourage settlement.

(iv) Do the present rules as to costs in CPR rule 44.3 prevent just claims from being brought where the claimant is not well-off?

5.14 This question is not, of course, unique to Chancery litigation. There is always a concern in any litigation that the principle of “equality of arms” is being maintained. Hence the requirements as to filing and serving costs estimates and the potential use of cost cap orders. As stated at the outset of this chapter the simple fact is that Chancery litigation can be and often is expensive.

5.15 Inequality as between the parties often presents itself in cases of a Chancery flavour, invariably in a residential context where, for example, covenants, or other rights in or over land are under threat. There is anecdotal evidence (e.g. from experienced members of the Chancery Bar – especially those licensed to undertake public access work) that the impact of costs, especially under CPR rule 44.3 can inhibit claims from being brought which are strong and where justice ought in fairness to be done by the court restraining breaches of property rights.

5.16 Parties often feel unable to bear the potential costs risks when the other side’s costs are brought into account (public funding not being available in most Chancery claims) and will often either resign themselves to accepting and suffering the consequences of the breach of their rights, or settle early and for a small sum in compensation which may not fairly reflect the true value of the enforceable rights. The need to enforce rights is often too costly when not only that party’s costs must be borne, but also the other party’s costs in the event of defeat. Examples of such cases are the enforcement of breaches of freehold covenants against development, or of interference with rights of light to dwelling houses. There is also an additional element of cost encountered in interim applications where the applicant for an interim injunction will have to give the usual undertaking as to damages. Whilst this is an obligation quite unconnected in legal terms from costs, the potential scale of that undertaking when coupled with the overall costs risks, will dissuade many from enforcing their rights by interim injunction, and that usually means that no final injunction will ever be sought.

5.17 Whilst the court can allow only a proportion of a successful party’s costs (e.g. to reflect conduct, or the loss on particular issues) and whilst the court can deal with the amount of costs on assessment, the presence of the risk of having to pay the other party’s costs is an important factor in many potential parties deciding whether or not to embark upon or defend claims.<sup>115</sup> This is an area where some practitioners feel that a “costs neutral” regime might affect the perception of risk, without encouraging unnecessary litigation. (See chapter 9 on the effect of different cost allocation rules on litigants’ behaviour).

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<sup>115</sup> For a recent example of a limitation of the recovery of costs by the successful party to 66% of her costs (reflecting the “overt aggression” with which her case had been conducted) and an expression by the Court of Appeal of “concern” at the appellant’s solicitor’s base costs of just under £22,000 in connection with a small boundary dispute, see *Strachey v Ramage* [2008] EWCA Civ 804.

(v) The effect of the general rules as to costs on the settlement and mediation of Chancery claims

5.18 It appears that at the present time there is an increasing willingness to contemplate mediation at an early stage, often pre-claim. That desire is driven by the fact that to many potential litigants (especially in the commercial property world) costs are anathema and to be avoided almost at any price.

5.19 Senior junior counsel of long experience in commercial property matters, especially in the City of London, has indicated that the burden of costs as regards developer clients (not only as to that party but also the opposing party who is a site owner who may have plans to develop his site at a future date) dictates settlement at a very early stage, often at the pre-planning consent stage. Such clients usually see involvement in litigation, even at the pre-claim stage, as a sign of bad project management. To such clients costs avoidance is the key. Thus proactive and protective steps are taken, by the use of either indemnity insurance, or “good neighbour” letters, to accommodate, so far as possible, those whose rights may be infringed by development. Money will often be paid for the release of rights by way of compensation for interference, and many developers will find that a far more acceptable alternative than the risk of litigation and in particular its costs.

5.20 In private client cases (e.g. trusts and will disputes and family provision claims) the potential effect of hostile orders as to costs is often (so experienced counsel in this field advise) the catalyst for early settlement, with or without a formal mediation. This is another example of sensitivity to costs and experienced advisers will be aware of this and steer their clients accordingly away from confrontation.

5.21 There is, however, a risk that in some cases the current “mediation culture”, which is partly driven by the perception of costs risks,<sup>116</sup> may be seen by some as a denial of justice and that they should have their “day in court” whatever the consequences in costs. It is felt that such instances are more to do with the make-up of the party or parties than any direct consequences of the current costs regime in Chancery claims, or civil claims generally. Litigants in this category of case should not lightly reject mediation. The presence of an independent professional to whom they can present their case gives to the mediation process much of the feel of a “day in court”.

## 6. REVIEW

6.1 In *Ross v Caunters*<sup>117</sup> Sir Robert Megarry V-C described himself as “a mere Chancery judge adrift on the limitless seas of the common law”. As a mere common law judge, I must confess to similar feelings of awe and diffidence when surveying the vast and uncharted terrain of Chancery practice. Subject to that caveat, I do nevertheless raise a number of issues, as set out below, for debate in relation to the costs of Chancery litigation.

6.2 Should *Agassi* be reversed? Would it be desirable for rule changes or legislation to reverse the effect of *Agassi*, as set out in paragraph 3.18(iii) above? It appears that there are specialist areas of Chancery litigation where costs can be saved by using professionals other than solicitors to instruct counsel. At the moment the litigant sometimes has the invidious choice between (a) litigating at reduced cost or (b) litigating at higher cost in order to retain the full benefit of the costs shifting rule.

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<sup>116</sup> As to which see chapter 4.

<sup>117</sup> [1980] Ch 297 at 316G.

If the effect of *Agassi* is reversed, it may be possible to reduce costs in certain specialist Chancery matters without prejudicing the interests of the parties.<sup>118</sup>

6.3 The cost neutral regime and *Beddoe* applications. Picking up the issues discussed in section 4 above, should the costs neutral regime be extended in any respect? Are there any circumstances where *Beddoe* applications are currently made out of abundance of caution, but costs might be saved by dispensing with them? Alternatively, could costs properly be saved by dealing with more *Beddoe* applications on paper than is currently envisaged by paragraph 7.2 of Practice Direction B supplementing Part 64?

6.4 What should be done about pre-action protocols? The three options which occur to me are set out in paragraph 5.5 above. The best direction in which to move must be very much a matter for the Chancery community. One possible way of taking this forward would be to set up a protocol working group, specifically to decide in which direction the Chancery community wishes to go in relation to protocols. If the working group comprises representatives of all interest groups, one would expect its recommendations to be heeded by the Rule Committee and others with responsibility for pre-action protocols.<sup>119</sup>

6.5 Should there be a limitation on the amount of costs which can come out of the trust fund or estate? This issue is discussed in paragraphs 5.8 and 5.9 above. It might encourage economy on all sides if either by the rules or by direction in individual cases, the proportion of any fund or estate which could be taken as costs were restricted. To allow the entire fund or estate to be expended in costs, Jarndyce-style, may be thought to make a mockery of the process.<sup>120</sup>

6.6 What to do about neighbour disputes. The problem of neighbour disputes is discussed in paragraph 5.10 above. It gives rise to particular difficulties, because of the intensity of feelings, the low value often of the rights at stake<sup>121</sup> and the amount of work involved on both sides. Such cases are sometimes in the Chancery list of the county court and sometimes in the general list. They may be tried by circuit judges, recorders or district judges. One possible approach which occurs to me would be for the court to make a different form of cost capping order in these cases. The conventional cost capping order restricts recoverable costs to the reasonable costs of conducting the litigation, in other words it is designed to curb extravagant spending.<sup>122</sup> A special form of cost capping order might possibly be developed for neighbour disputes, which would cap the recoverable costs at – say – 50% of the value of the rights in issue or at a fixed sum of modest amount (e.g. £15,000). This would overcome the problem of the “ratchet” effect discussed in paragraph 5.10

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<sup>118</sup> A telling example is where accountant office-holders use in-house resources to carry out work such as disclosure and documentary research (normally carried out by solicitors) so as to avoid duplication and extra cost, only to find that the costs of doing so are irrecoverable under the current rules. See *SISU Capital Fund v Tucker* [2005] EWHC 2321 (Ch); [2006] BCC 463.

<sup>119</sup> Three years ago the TCC set up a protocol working group, chaired by Ramsey J, with representatives from all interest groups including the construction industry. The protocol amendments proposed by the working group in its carefully reasoned report were accepted without demur and were rapidly implemented. I see no reason why a similar exercise should not be successful in relation to Chancery pre-action process.

<sup>120</sup> If reform along these lines is pursued, it will be necessary to make provision for cases in which the only defendants to a claim against the fund are trustees having no personal interest in the outcome, where it would be unjust for them to be expected to defend without a full indemnity.

<sup>121</sup> E.g. re location of a boundary.

<sup>122</sup> See chapter 45.

above. It would provide a powerful incentive to economy in respect of costs and perhaps encourage the parties to settle or seek mediation.

6.7 Should there be a “Chancery fast track”? Some cases in the Chancery list of the county court are within the fast track value limits, but are not allocated to the fast track, because they fall within a specialist list. I understand that in Birmingham, and no doubt elsewhere, such cases are often tried by district judges. These actions have greater complexity than the general run of cases currently in the fast track (which are predominantly motor accident and personal injury cases – see Appendices 1 and 2). So the existing and proposed fixed costs for the fast track would not be suitable for them. Nevertheless, I raise for consideration whether it might be beneficial to create a special fast track for cases in the county court Chancery list up to say £25,000 in value.<sup>123</sup>

6.8 Minority shareholder petitions. Costs tend to mount in relation to such petitions for the reasons mentioned in paragraph 5.11 above. Again the question arises as to whether there should be a cap on recoverable costs? If so, should such a cap be related not to the reasonable costs of litigating every issue, but rather to the value of what the shareholders are arguing about?

6.9 Encouraging settlement of probate claims. I have referred in paragraph 5.12 above to the “all or nothing” approach between contested wills. The question arises whether any sensible rule change might promote settlement. One possible approach would be to cap the costs recoverable from the estate and from the losing party/parties at a stated percentage of the value of the estate. Another approach which might be considered would be for the circuit judge or district judge to offer a mediation service in relation to probate claims.<sup>124</sup> This would, of course, require training of judges. Also there would be deployment implications, because the judge involved in any failed mediation could not subsequently hear the case. However, mediation by judges has proved effective in family proceedings. It has also been shown to work in lower value building disputes,<sup>125</sup> resulting in a material saving of costs.

6.10 The role of conventional mediation.<sup>126</sup> Mediation has a valuable role to play in many Chancery disputes. However, it is not the universal solution to excessive costs, because failed mediations simply add to the costs – sometimes substantially. See paragraphs 5.20 and 5.21 above. The key issues are to identify (a) which cases would benefit from mediation and which cases are best accelerated to trial without wasting the parties’ efforts and resources on ineffective mediation; (b) at which point to build a mediation window into the case management timetable. If mediation takes place too soon, it may fail because the parties have not seen enough of the other side’s documents and evidence. If mediation takes place too late, then much of the costs will already have been incurred. Judges and practitioners may well feel able to answer the above two questions in any given case on the basis of feel and experience. Nevertheless, perhaps consideration should be given to gathering empirical evidence about the effects of mediation specifically upon Chancery cases.

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<sup>123</sup> This proposal is not revolutionary. There is already a simplified procedure under CPR Part 8, CPR Part 64 rule 2(d) and paragraph 5 of the practice direction to Part 64: under section 48 Administration of Justice Act 1985 the court can authorise action to be taken in an estate or trust on the basis of counsel’s opinion to the personal representatives or trustees. No defendant needs to be named. The application is dealt with on paper by the master.

<sup>124</sup> This would only be feasible if the judge concerned has (a) appropriate expertise; (b) sufficient time; and (c) a back up judge to manage the case if the mediation fails.

<sup>125</sup> See chapter 34, paragraph 2.10.

<sup>126</sup> I.e. not mediation by judges as discussed in the previous paragraph.

6.11 In this regard, it will be recalled that the Commercial Court investigated the impact of ADR upon commercial cases in the 1990s and set out the results in the Second Report of the Commercial Court Committee (1999). Professor Hazel Genn carried out a valuable study of mediation schemes attached to county courts.<sup>127</sup> More recently, King's College London has carried out a two year investigation into (a) the impact of mediation upon TCC cases and (b) the points at which settlement of such cases is most likely to be achieved.<sup>128</sup> Whether some form of research project into the impact and utility of mediation in the context of Chancery cases would be valuable, I hesitate to say. However, perhaps this is a matter which might be considered. Mr Justice Briggs, who has kindly read this chapter in draft, states that he strongly supports the proposal for empirical research in this area.

6.12 Conclusion. I look forward to hearing the comments of Chancery practitioners and court users upon all the above matters in the course of Phase 2.

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<sup>127</sup> "Court-based ADR initiatives" (2002).

<sup>128</sup> See chapter 34 before.



## **CHAPTER 34. TECHNOLOGY AND CONSTRUCTION COURT LITIGATION**

### **1. INTRODUCTION**

1.1 In this chapter I shall address cases which are commonly brought in the Technology and Construction Court (“TCC”). The great majority of such cases are construction disputes or are related to construction (e.g. arbitration appeals, challenges to adjudicators’ awards, professional negligence claims against architects or engineers etc). Some cases in the TCC relate to IT disputes and other matters. However, a common feature of all TCC cases is that the disputes between the parties involve much technical detail.

### **2. KING’S COLLEGE SURVEY**

#### **(i) What the survey comprised**

2.1 Setting up of survey. The Centre of Construction Law and Dispute Resolution at King’s College, London (“King’s College”) carried out a survey of TCC cases which came to a conclusion in the period 1<sup>st</sup> June 2006 to 31<sup>st</sup> May 2008.<sup>129</sup> The survey was set up by agreement between King’s College and the TCC judges, following an indication by the judge in charge that empirical data as to the effectiveness of mediation would be helpful.<sup>130</sup> Two large TCC courts participated, namely the London TCC<sup>131</sup> and the Birmingham TCC.<sup>132</sup> The Bristol TCC,<sup>133</sup> which has a lower caseload, also participated and 8 returns were received from Bristol.

2.2 Numbers of cases. The TCC’s reporting years run from 1<sup>st</sup> October to 30<sup>th</sup> September, so that statistics are not available for the precise period covered by the survey. However, on the basis of the figures given in the TCC’s two most recent annual reports available at the time of writing,<sup>134</sup> it is reasonable to assume that approximately 1,100 cases would have been started in the London TCC and the Birmingham TCC during the survey period and approximately 30 or 40 in Bristol. Cases concluded in the survey period would not be the same as cases commenced in that period, although there would be a substantial overlap. Not all TCC cases reach any form of reportable conclusion for the purposes of the King’s College survey.<sup>135</sup> How many cases did reach such a conclusion at London and Birmingham during the survey period is an unknown quantity. However, it may be reasonable to take a

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<sup>129</sup> Assistance with some of the final analysis of the survey responses and preparation of the graphs was provided by the Chartered Institute of Arbitrators (CI Arb), for which I am most grateful.

<sup>130</sup> See (2005) 21 Construction Law Journal 265 at 267. Nicholas Gould, a fellow of King’s College and a construction solicitor, was present at this lecture and kindly approached the TCC judges with proposals for the survey immediately afterwards.

<sup>131</sup> For this purpose the “London TCC” referred to is the TCC at St Dunstan’s House, adjacent to the Royal Courts of Justice. This only deals with High Court TCC cases. The Central London Civil Justice Centre, which deals with about 75 county court TCC cases per year was not part of the survey.

<sup>132</sup> The Birmingham TCC deals with both High Court and county court TCC cases.

<sup>133</sup> The Bristol TCC deals with both High Court and county court TCC cases.

<sup>134</sup> For the years ended 30<sup>th</sup> September 2006 and 30<sup>th</sup> September 2007.

<sup>135</sup> For example, the claim may not be pursued; there may be judgment in default of acknowledgement of service; or the parties may resolve their dispute without taking any further steps in the action.

figure in the region of 800 as the total number of cases in the London TCC, the Birmingham TCC and the Bristol TCC which reached a reportable conclusion for the purposes of the King's College survey during the relevant period.

**2.3 Form of the survey and response rate.** After each case was concluded, questionnaires were sent by the court to the solicitors involved. If the case was settled, the questionnaire was in form 1. If the case proceeded to judgment, the questionnaire was in form 2. The total number of responses received was 261, comprising 221 responses to form 1<sup>136</sup> and 40 responses to form 2. Since about 90% of all TCC cases settle before trial, it is unsurprising that responses to form 1 far exceeded responses to form 2. Bearing in mind that there were at least two parties in every case and sometimes more, the responses received represent a strong response rate, which is clearly statistically valid.<sup>137</sup>

**2.4 Questions in form 1.** Not all questions in either survey form elicited useful answers from the perspective of this Costs Review. In survey form 1, the following questions elicited useful answers:

- Question 1 re the nature of the case;
- Question 2 re the stage at which the action was resolved;
- Question 3 re how settlement was reached;
- Question 5 re why mediation was undertaken;
- Question 6 re the mediator's profession;
- Question 10 re what would have happened absent any mediation;
- Question 11 re costs saved by mediation.

**2.5 Questions in form 2.** In survey form 2 the following questions elicited useful answers:

- Question 1 re the nature of the case;
- Question 2 re attempts made to resolve the litigation;
- Question 4 re why mediation was undertaken;
- Question 5 re the mediator's profession;
- Question 10 re the outcome of the mediation;
- Question 11 re the consequences of the mediation.

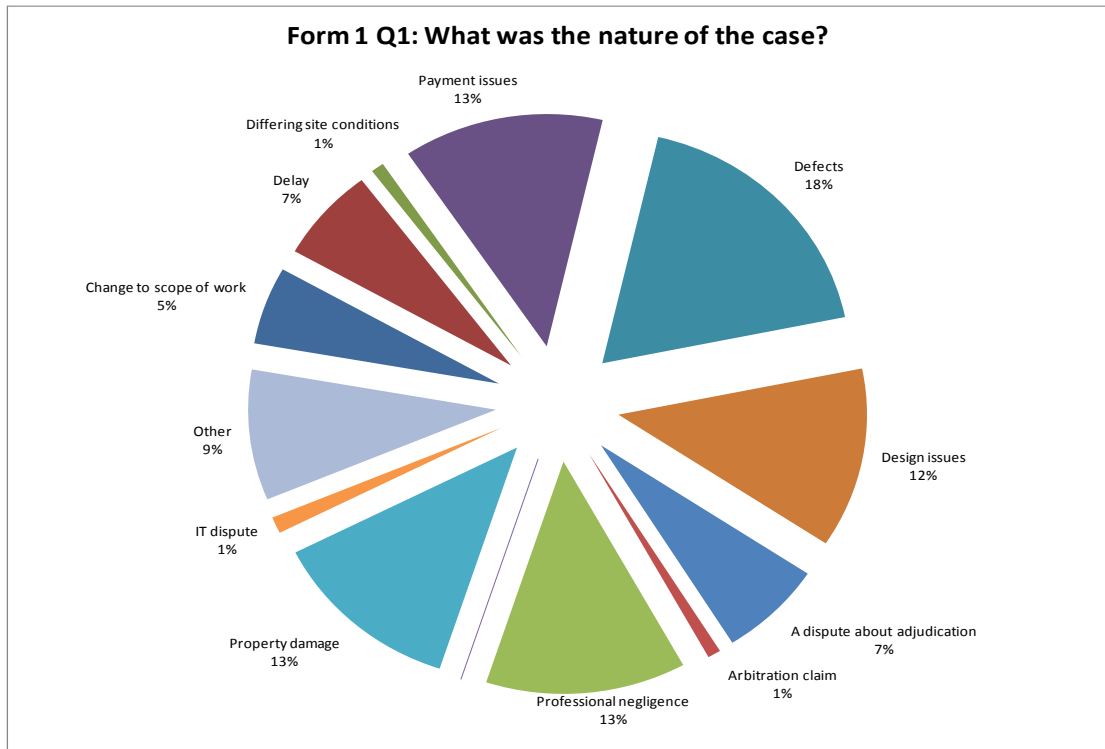
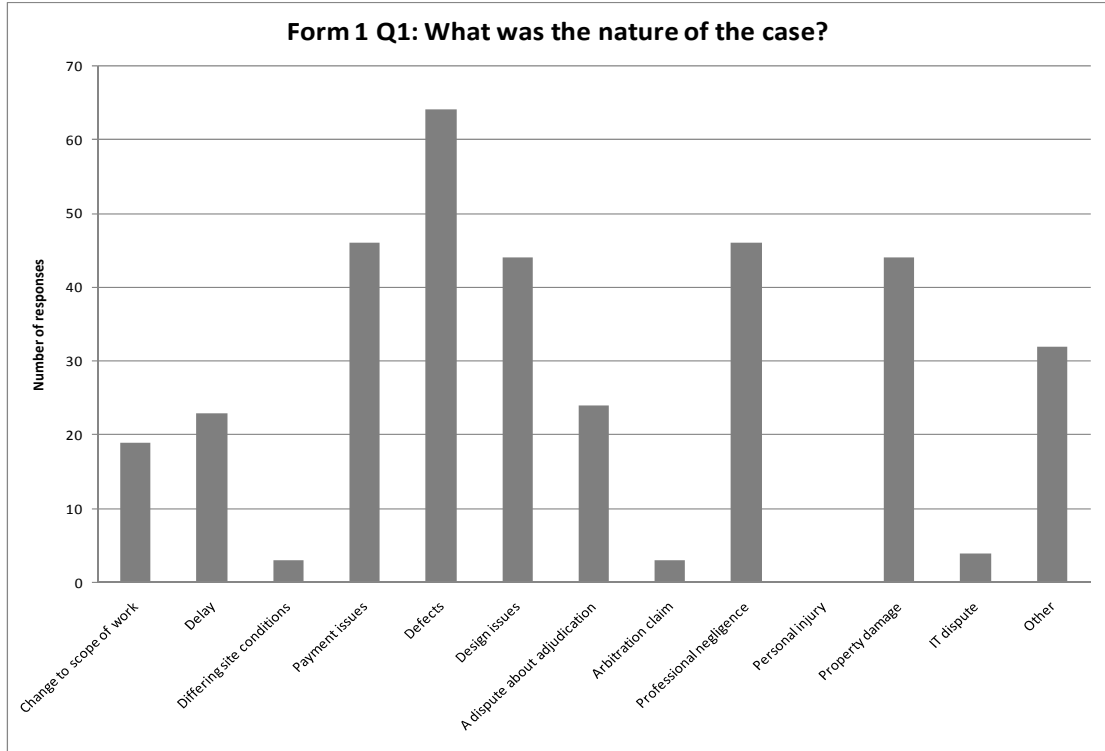
**(ii) Analysis of responses to form 1**

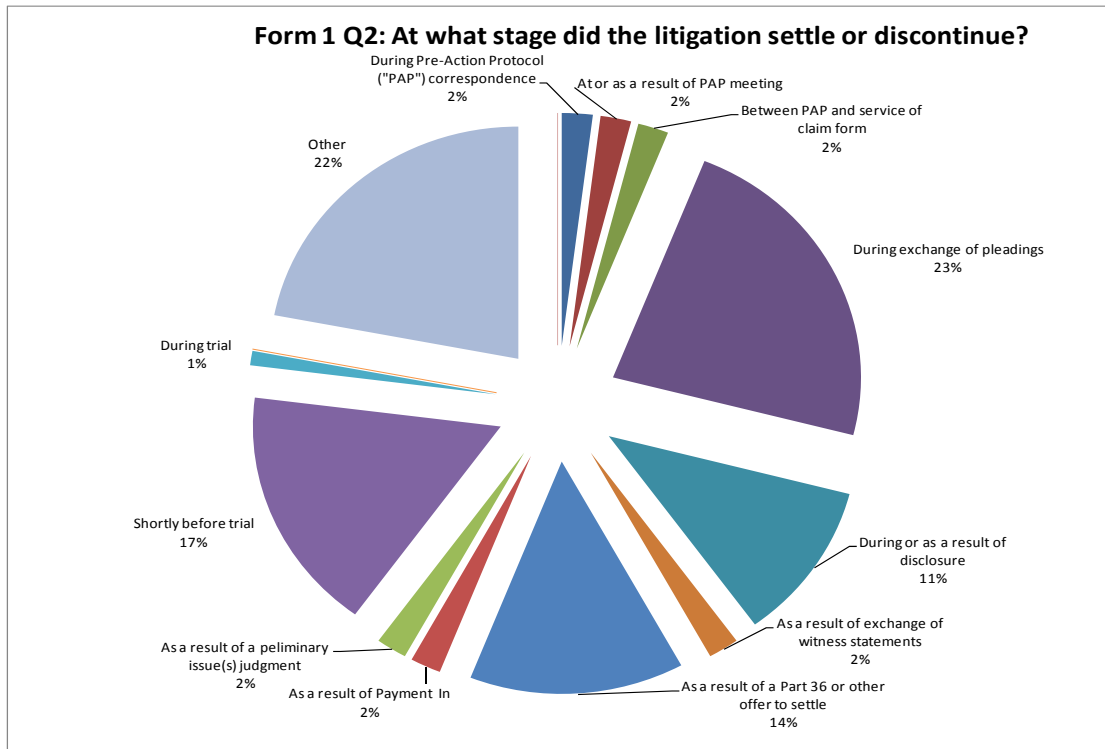
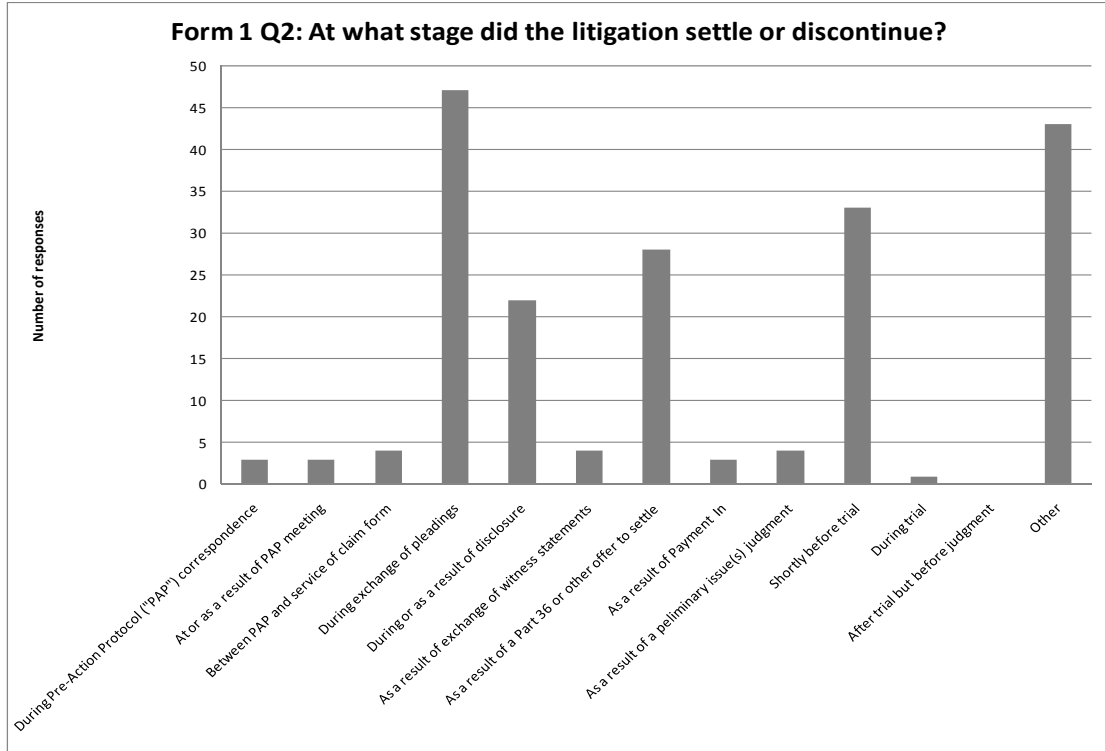
**2.6** King's College have analysed the responses to form 1 and summarised them in bar charts and pie charts as follows:

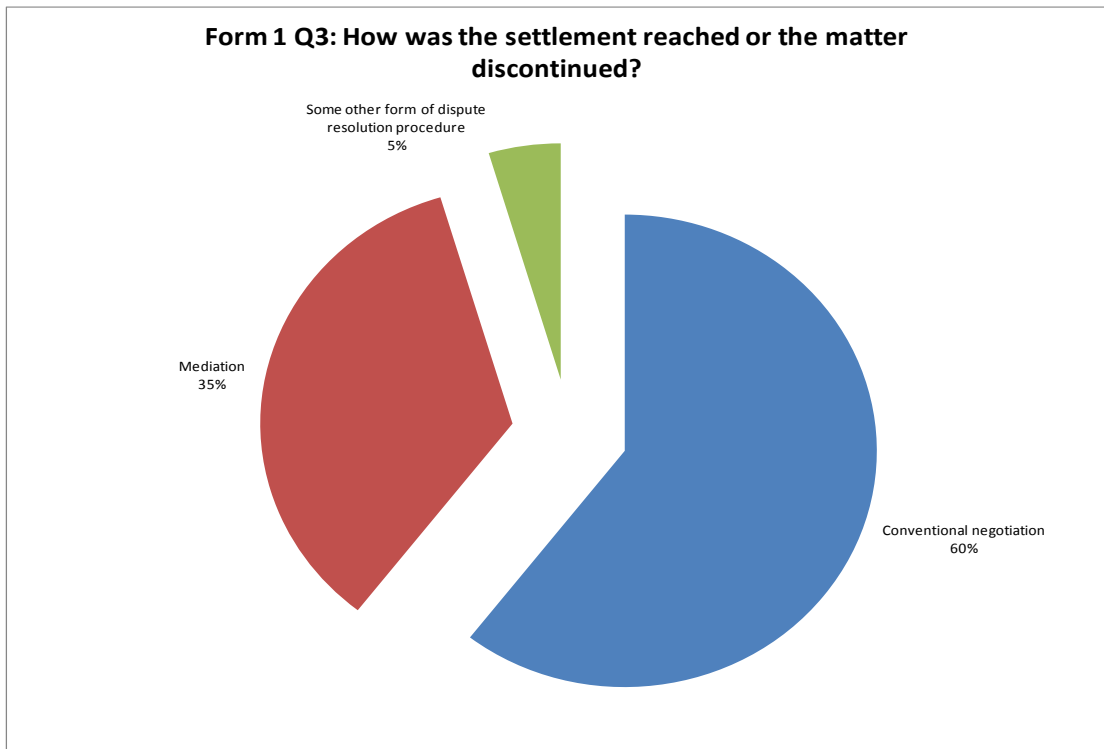
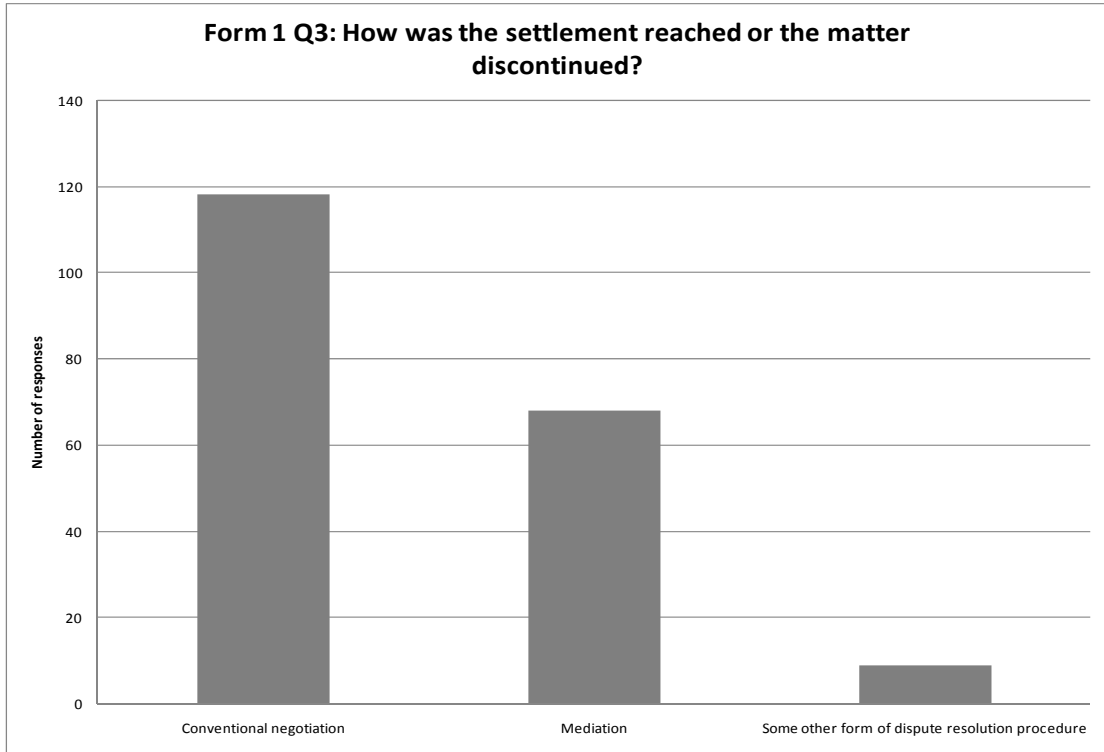
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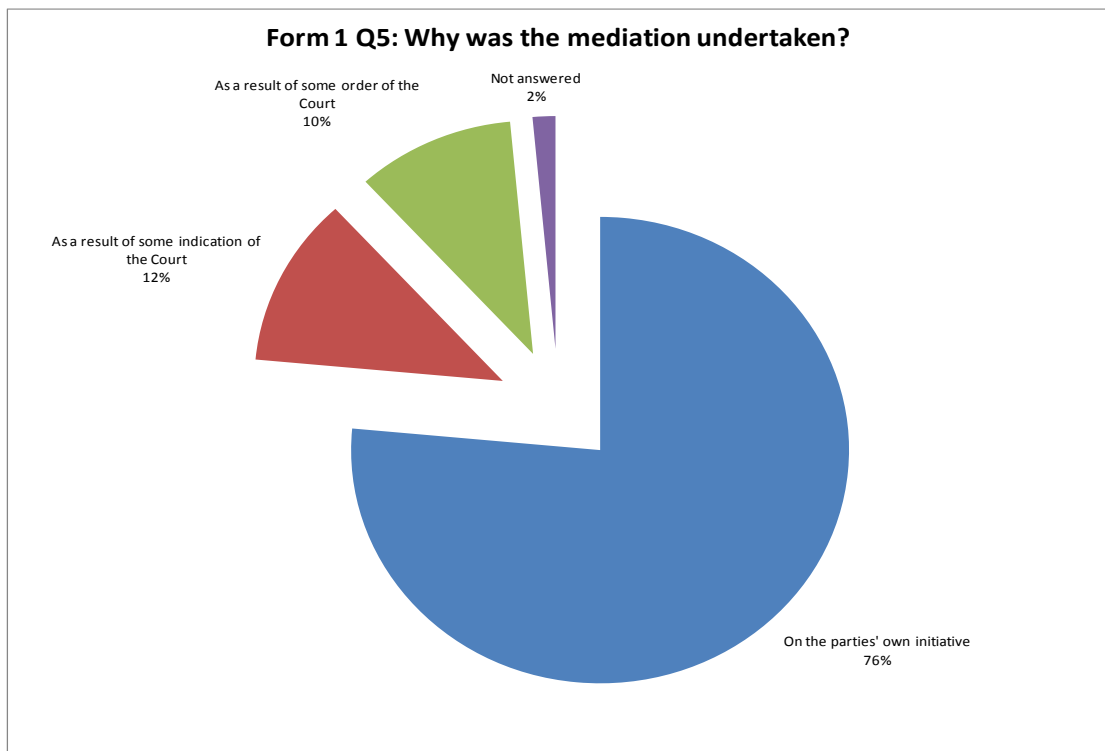
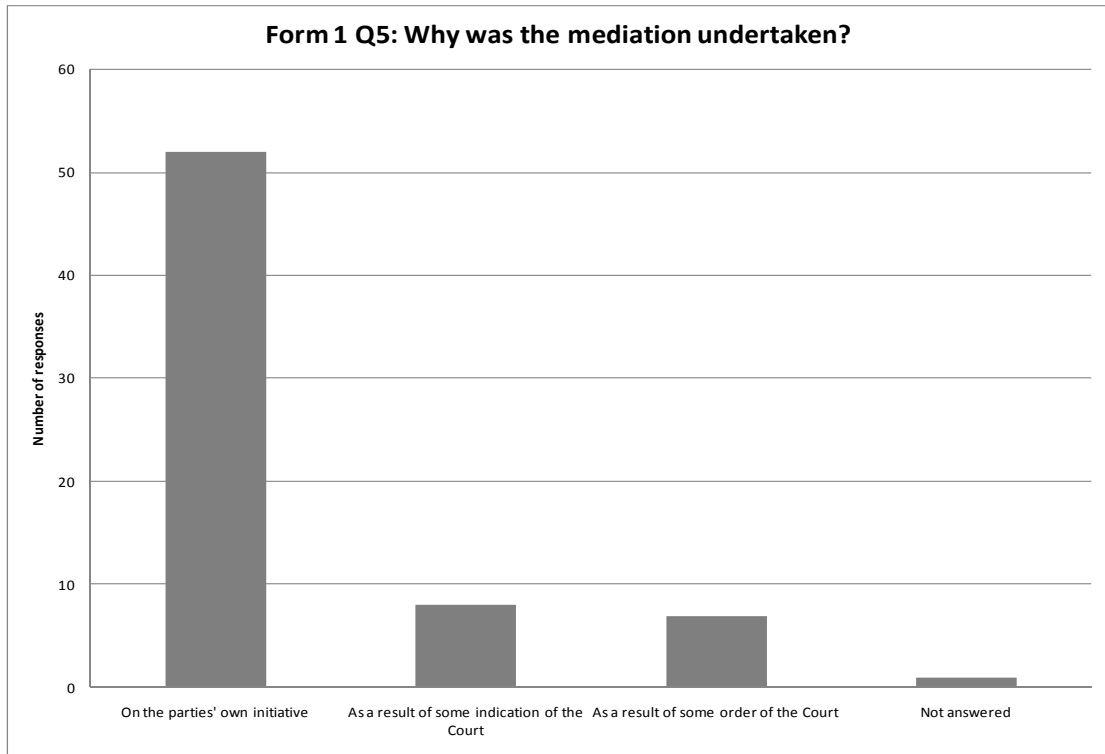
<sup>136</sup> It should be noted that 25 responses to form 1 were discounted, because spoiled or incorrectly completed. None of the responses to form 2 were discounted on this basis.

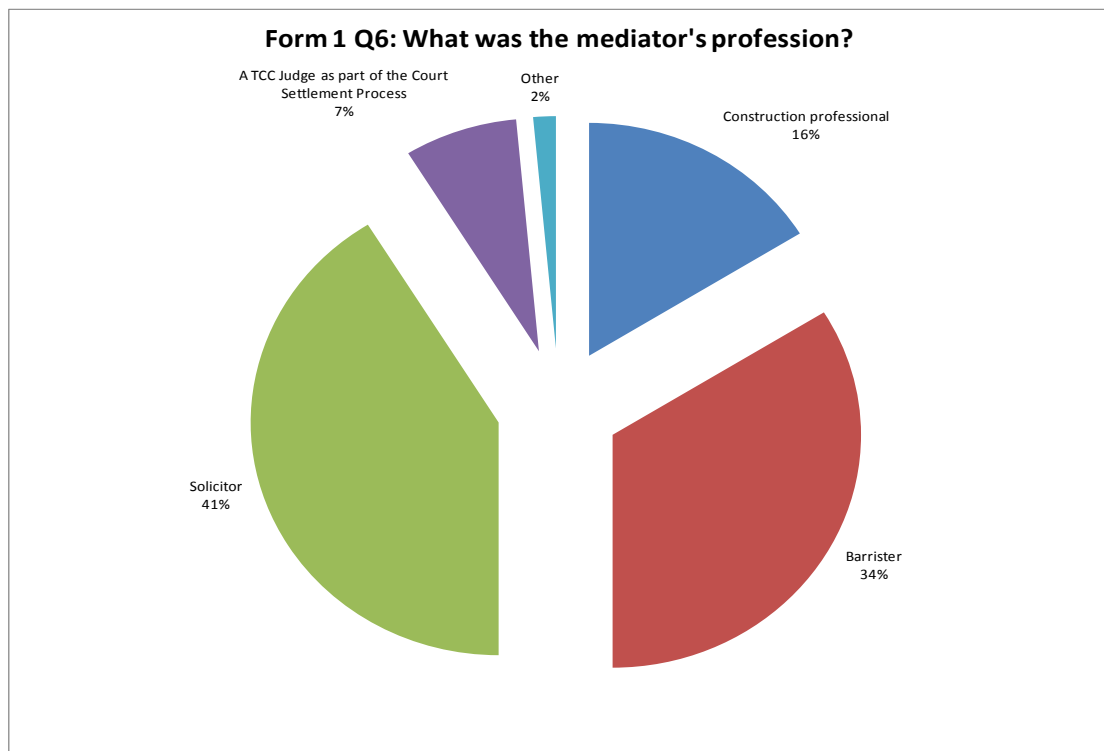
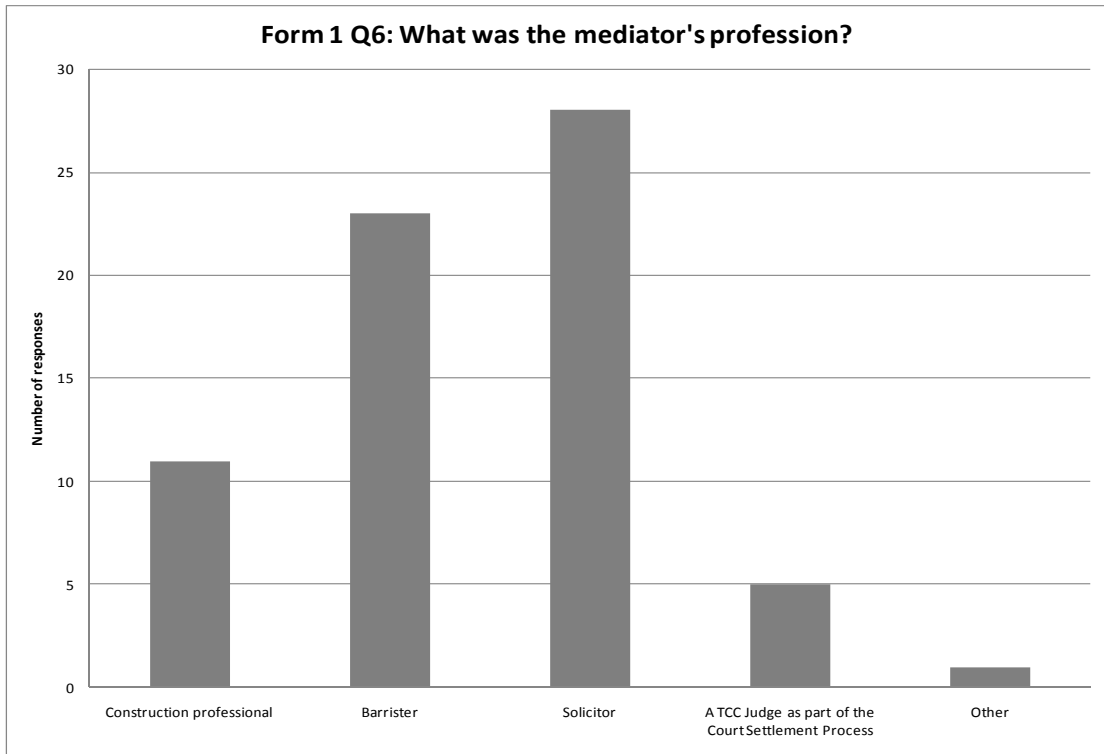
<sup>137</sup> A response rate of 5% is generally regarded as statistically valid. The response rate to the King's College survey was well in excess of that.

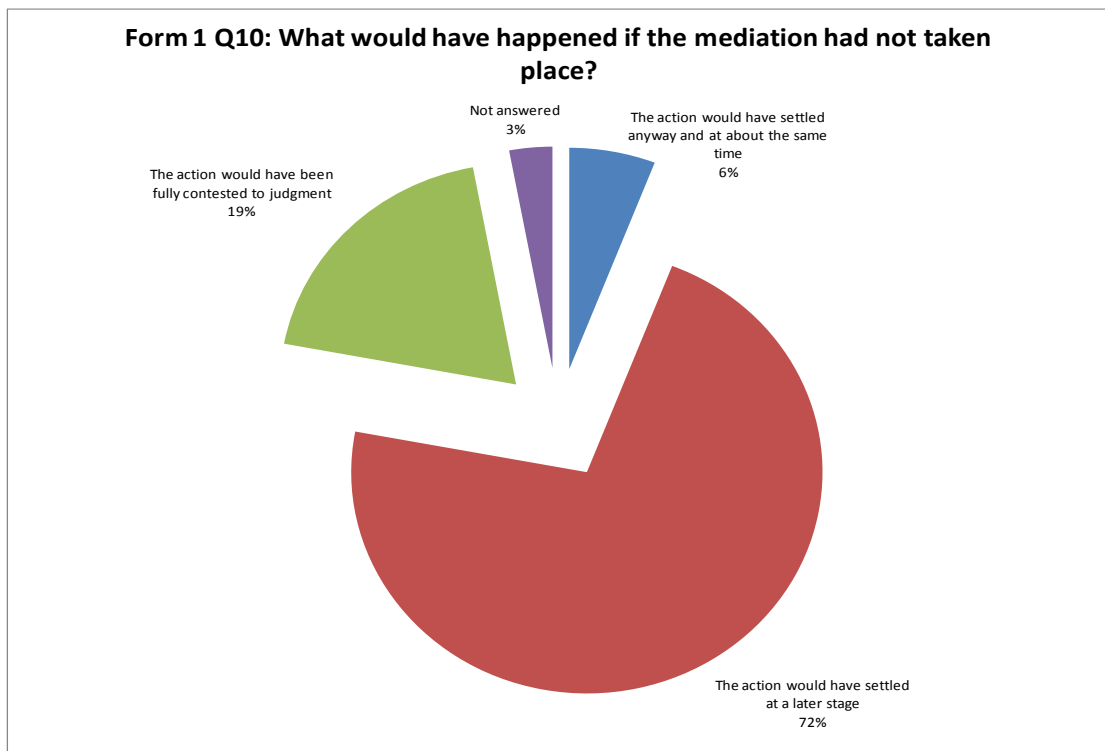
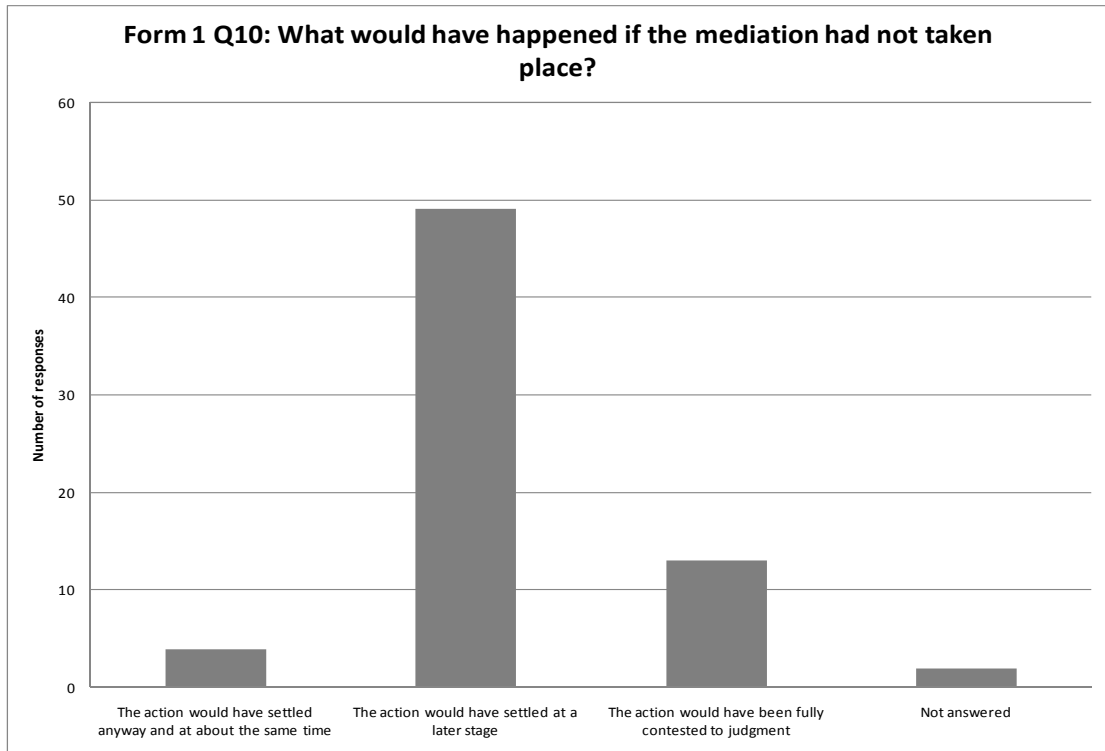




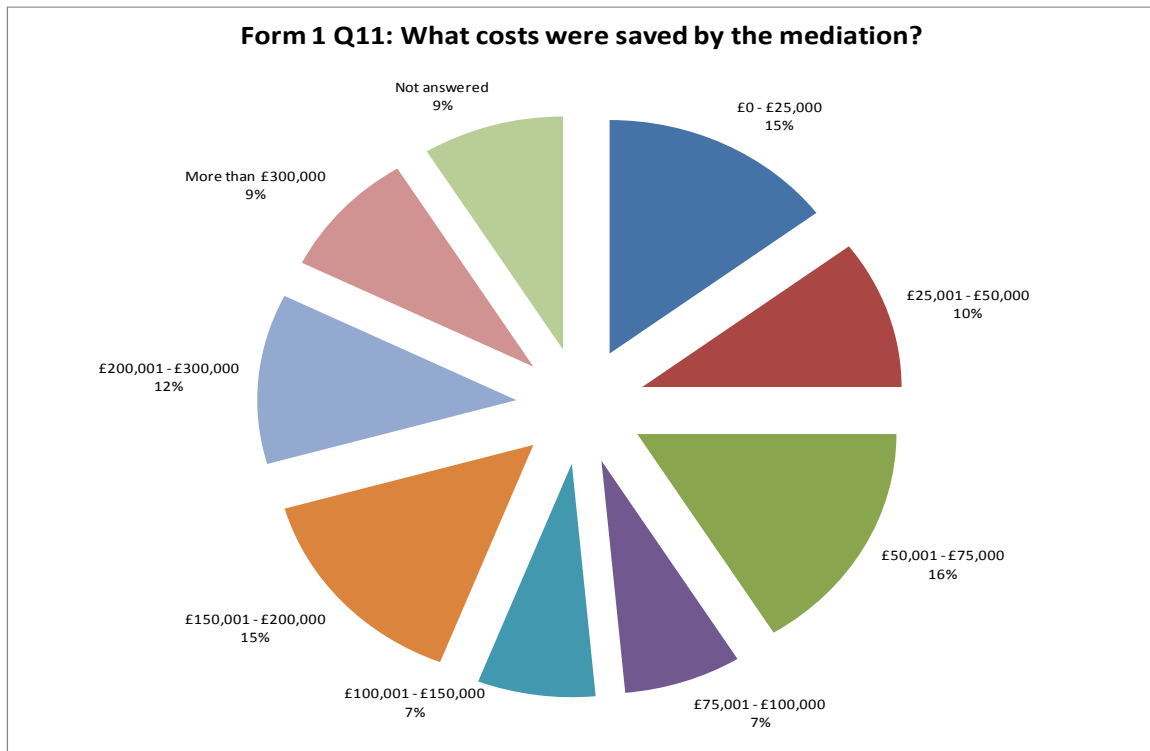
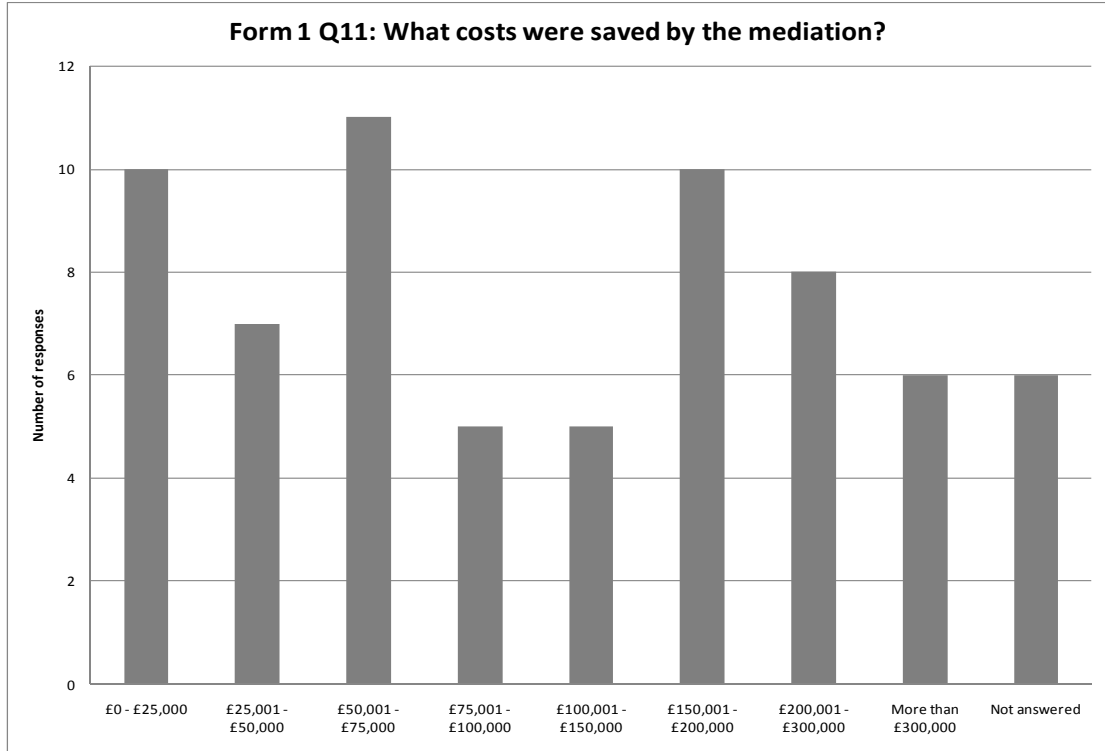












2.7 When settlement occurred. It can be seen from the responses to question 2 that there are four major points of settlement, namely:

- (i) During pleadings and disclosure (i.e. in the early stage of the litigation);
- (ii) Following a Part 36 offer or similar;
- (iii) Shortly before trial;
- (iv) "Other".

2.8 Settlements in category (i) are probably the product of parties crystallising the issues and reviewing the evidence. Settlements in categories (ii) and (iii) may often be prompted by fear of costs consequences. As to category (iv), quite a few of the cases classified as "other" settled after exchange of expert reports. The exchange of expert reports appears to be a more significant event than exchange of witness statements.

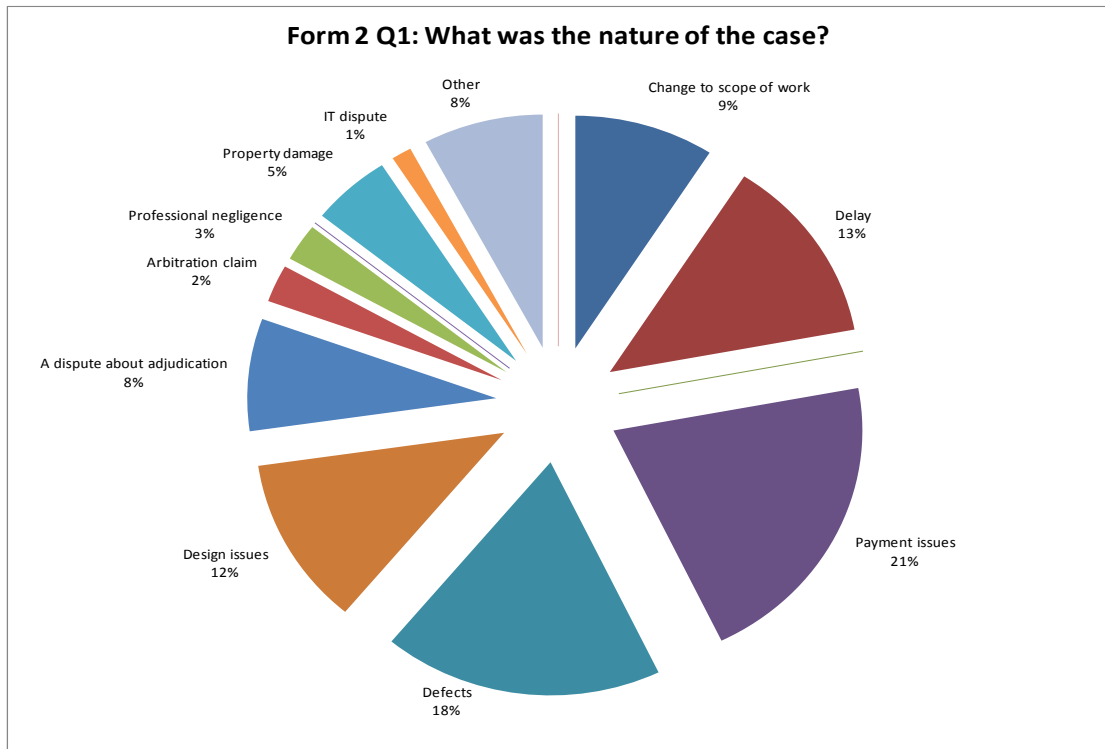
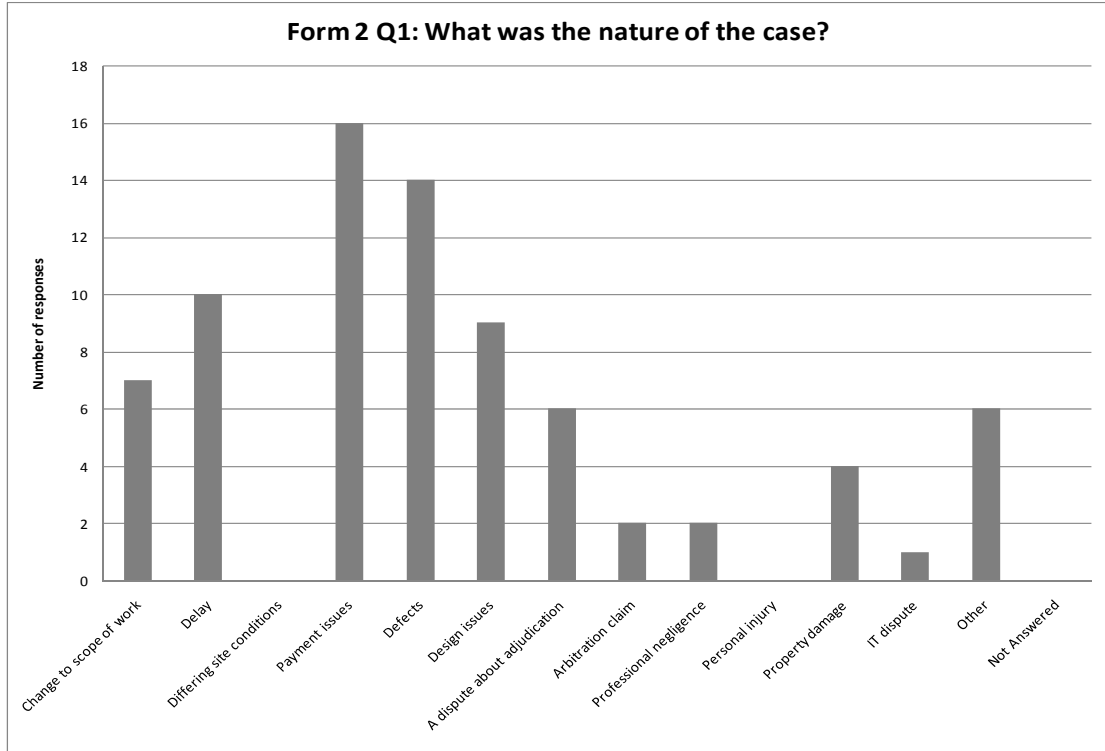
2.9 How settlement was achieved. It can be seen from the answers to question 3 that the majority of cases (60%) were settled through conventional negotiation. The next largest category of cases (35%) were settled through mediation. The great majority of the mediated cases would have settled anyway, but usually at a later stage: see the responses to question 10.

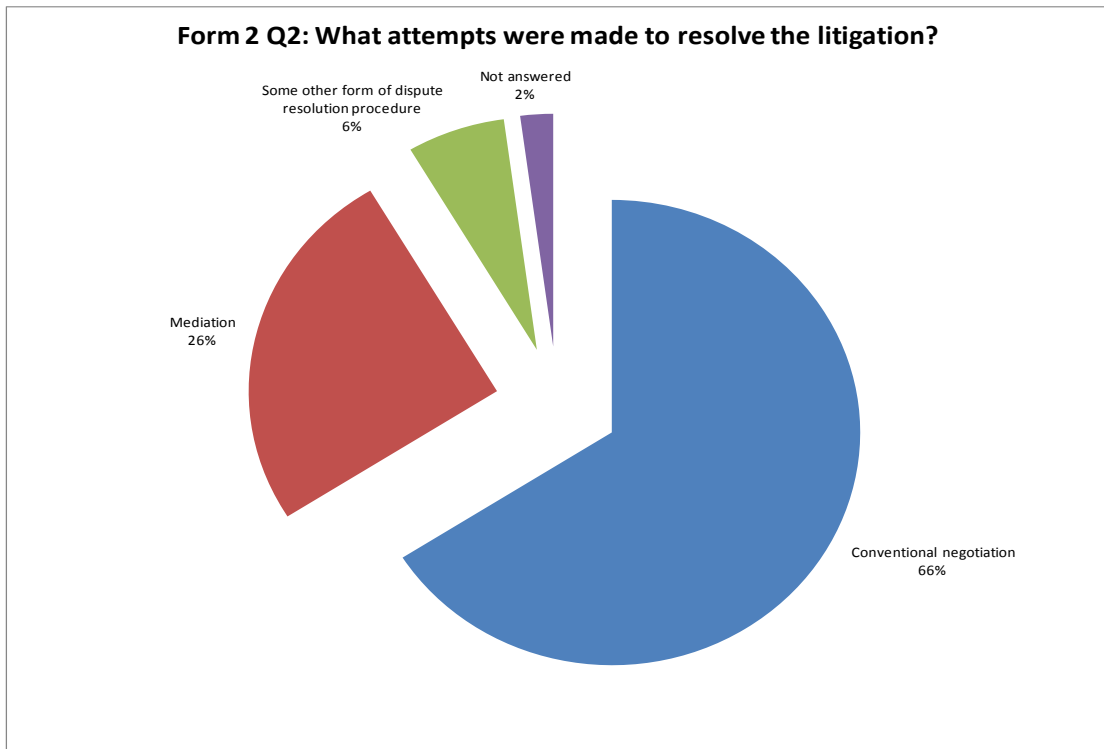
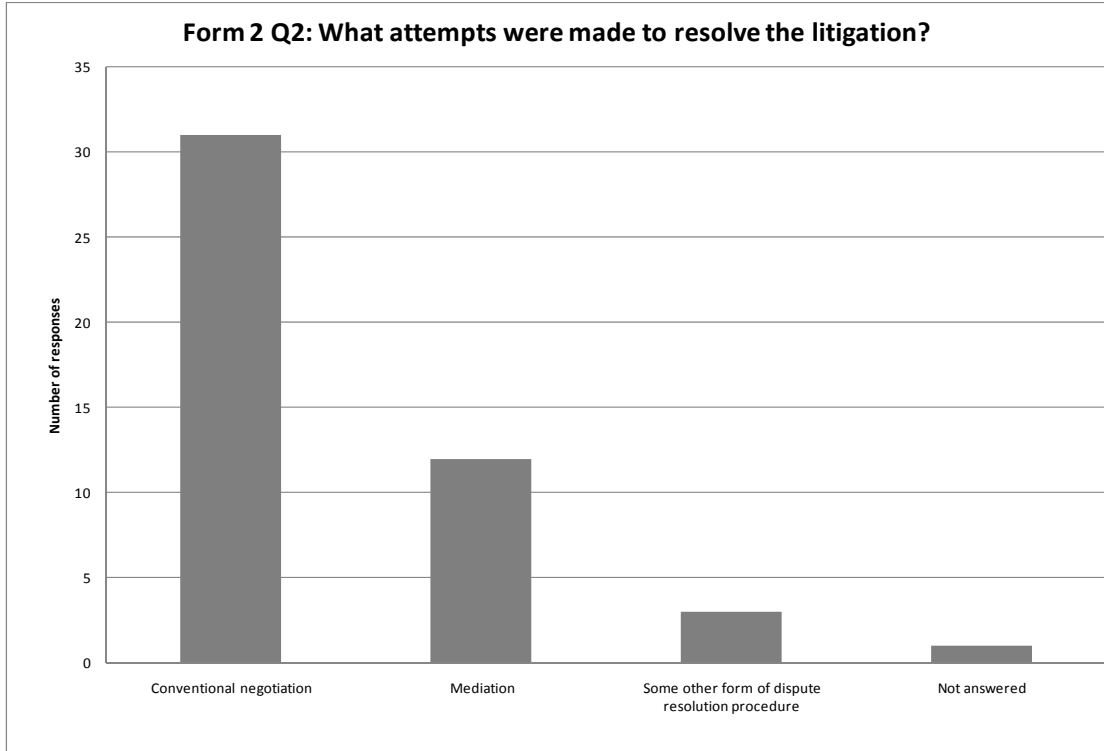
2.10 How mediations were brought about and conducted. It can be seen from the answers to question 5 that the great majority of mediations were undertaken on the initiative of the parties. Indications given or orders made by the court played relatively little part in promoting mediation. This is unsurprising, given that in TCC litigation the participants on both sides are usually businessmen. They and their lawyers are now well familiar with ADR and the parties usually have a fair idea how they wish to resolve their dispute. It can be seen from the answers to question 6 that "successful" mediators were usually lawyers, rather than construction professionals. By comparison of forms 1 and 2, it can be seen that TCC judges had a 100% success rate, although they only acted in a small number of the reported mediations. It appears from the questionnaire responses that proactive mediators (who commented robustly on the evidence and highlighted weaknesses in each side's case) were regarded as more effective than, and generally regarded as preferable to, purely "facilitative" mediators. This finding runs counter to the pronouncements of at least some mediation authorities.

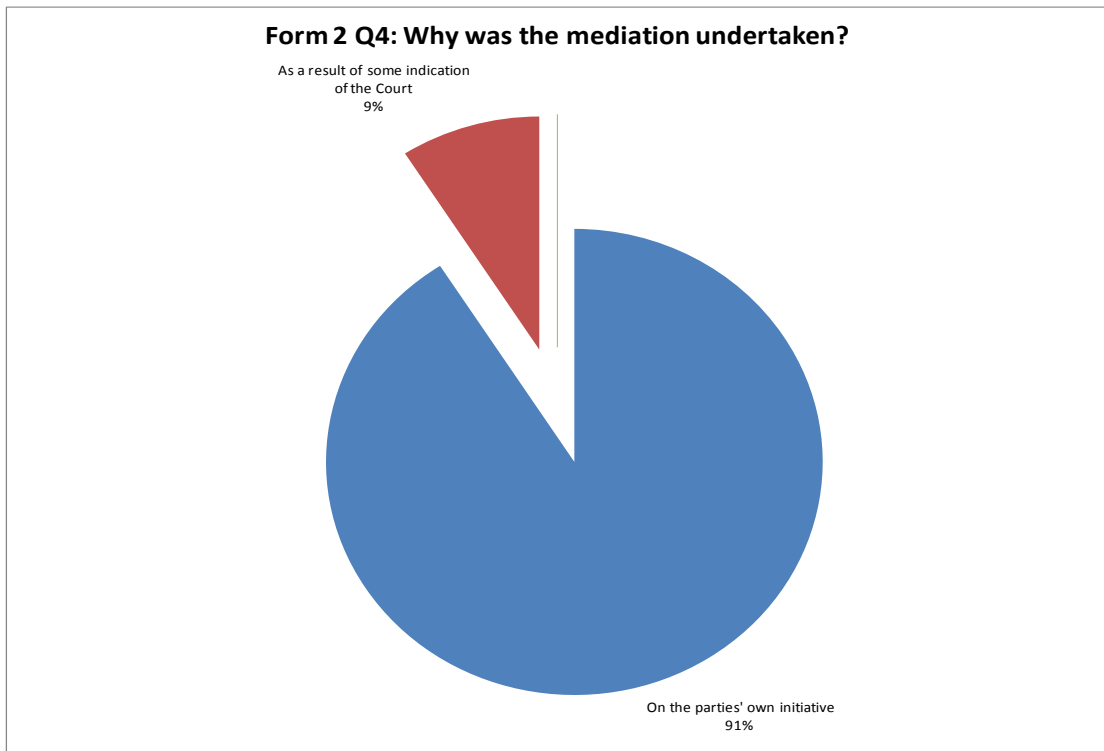
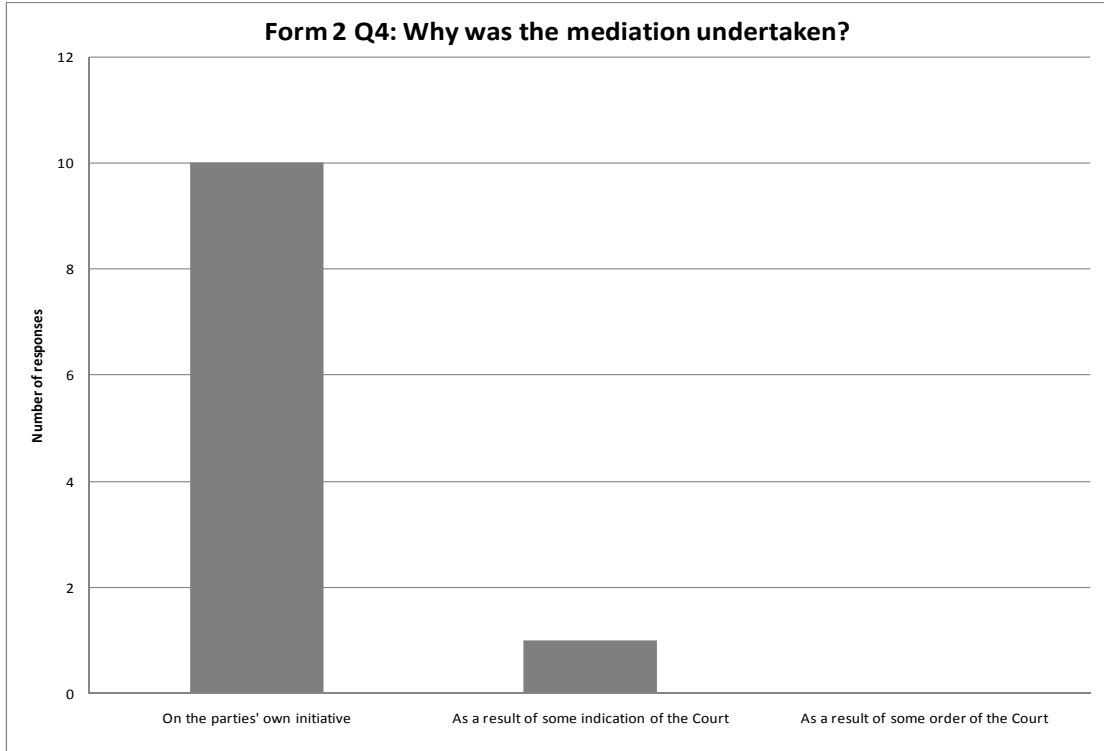
2.11 Cost savings achieved through mediation. These savings were substantial, as set out in the answer to question 11. In calculating such savings it is necessary to deduct the actual costs of the mediation from the notional cost of pursuing the litigation to settlement at a later date, alternatively to judgment.

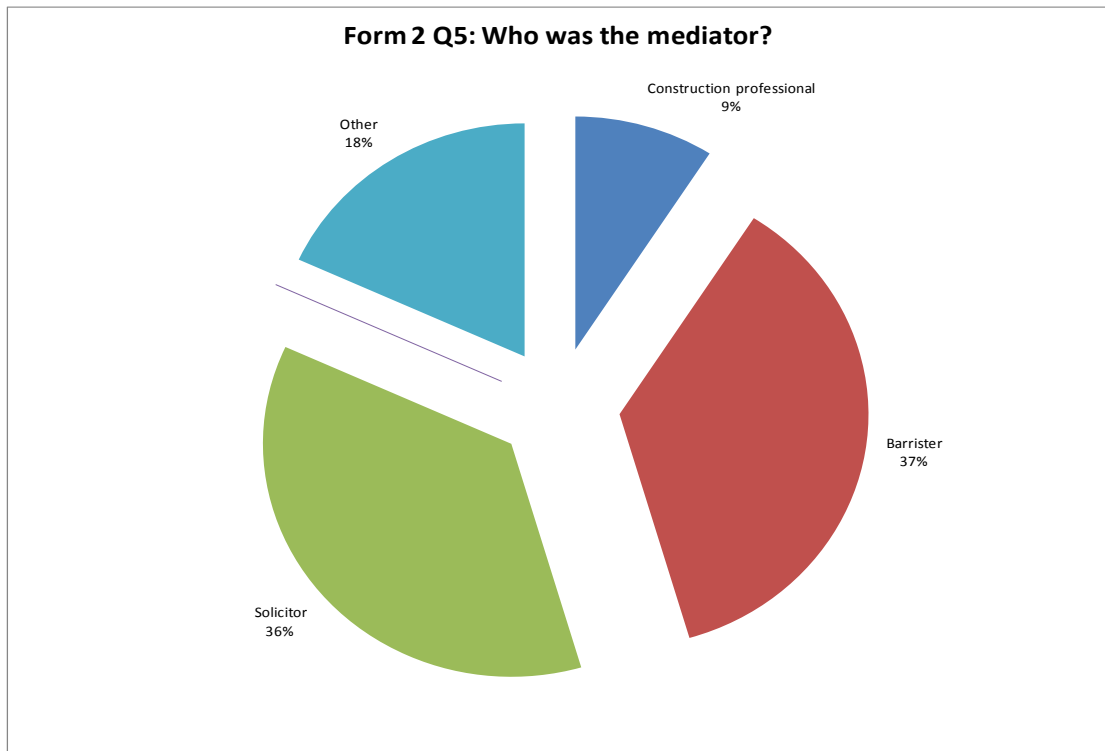
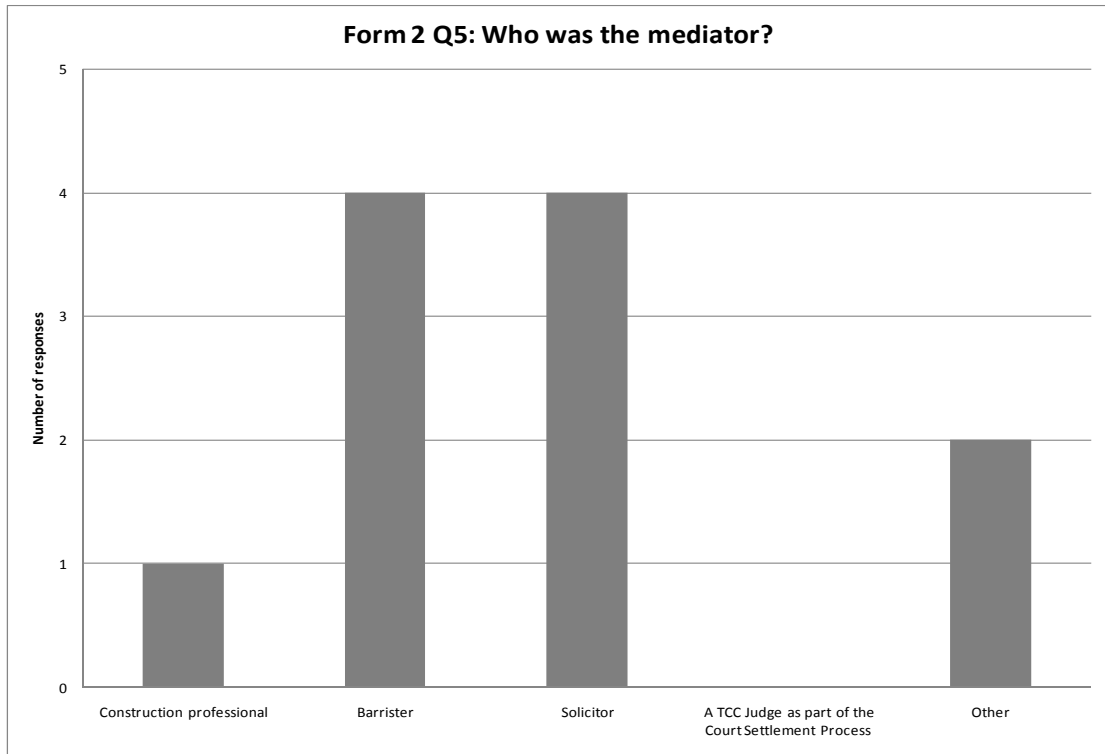
(iii) Analysis of responses to form 2

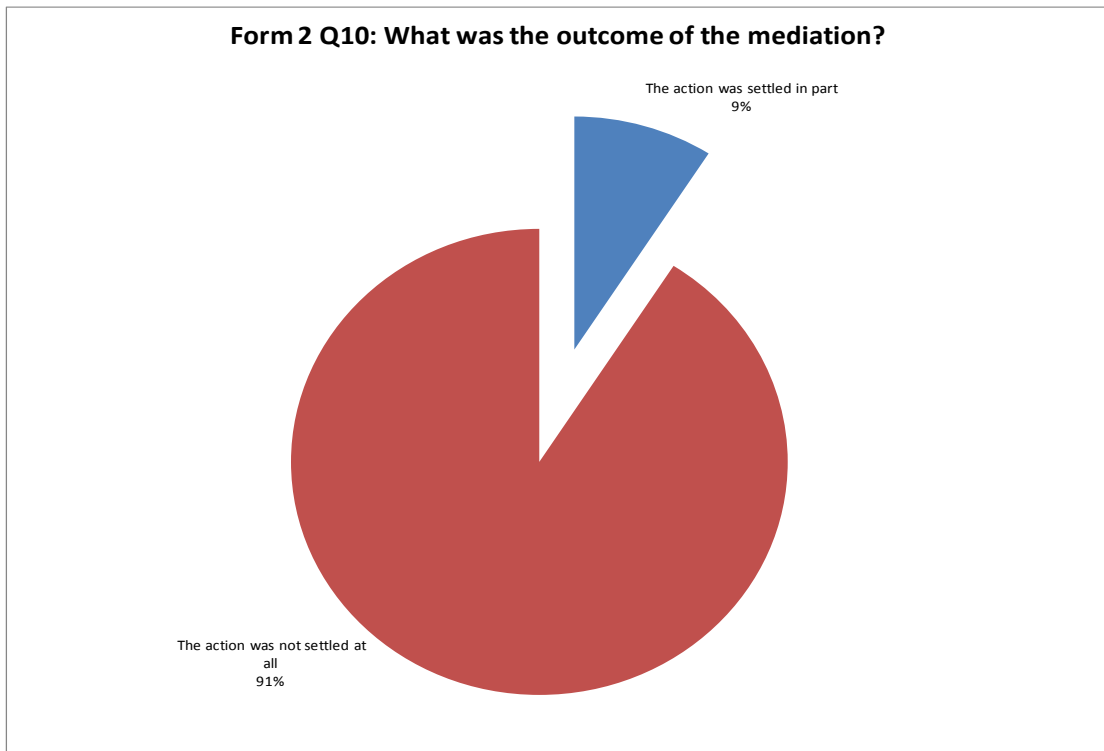
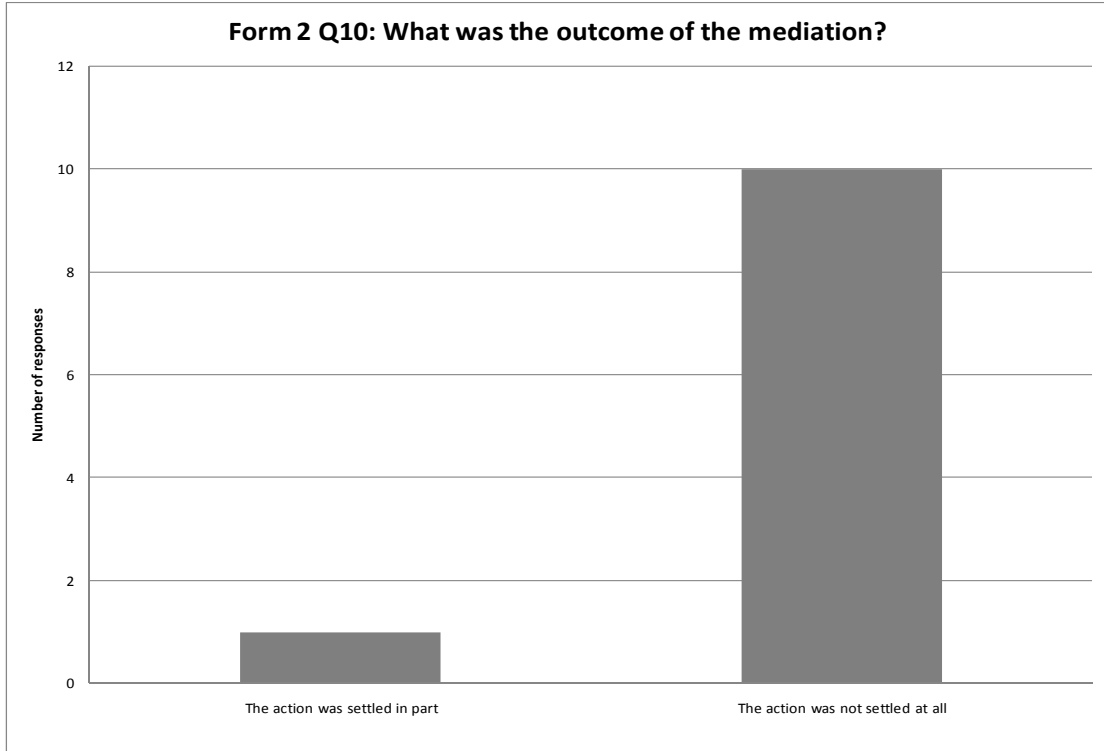
2.12 King's College have analysed the responses to form 2 and summarised them in bar charts and pie charts as follows:

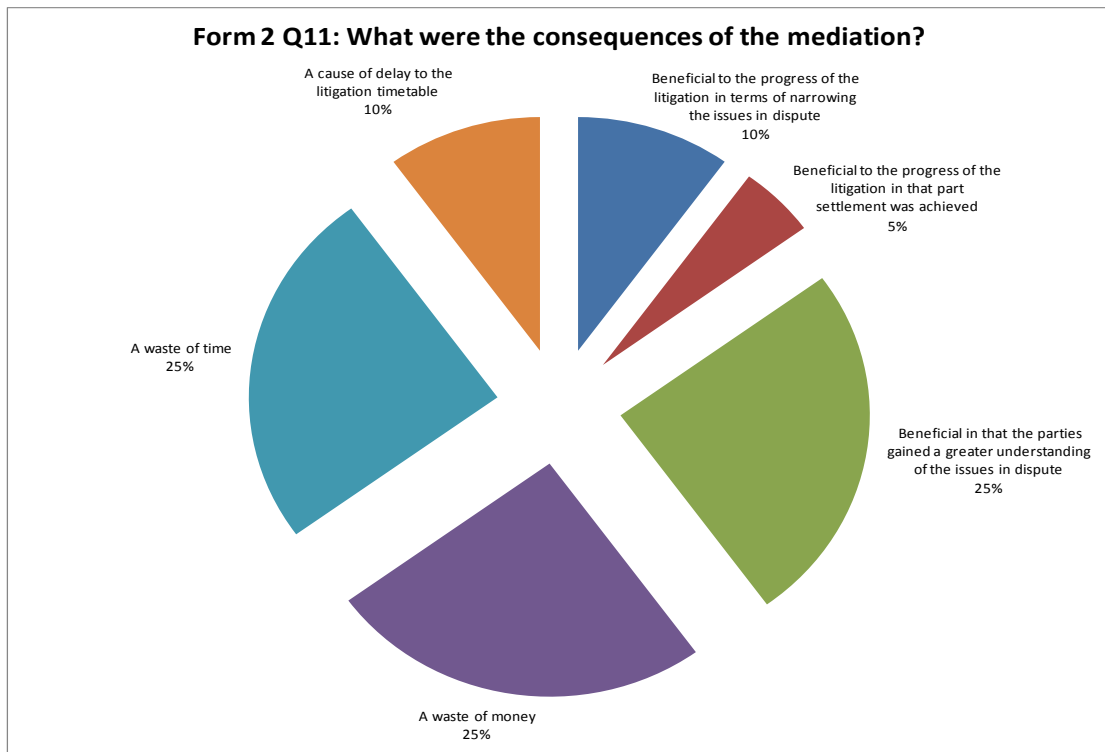
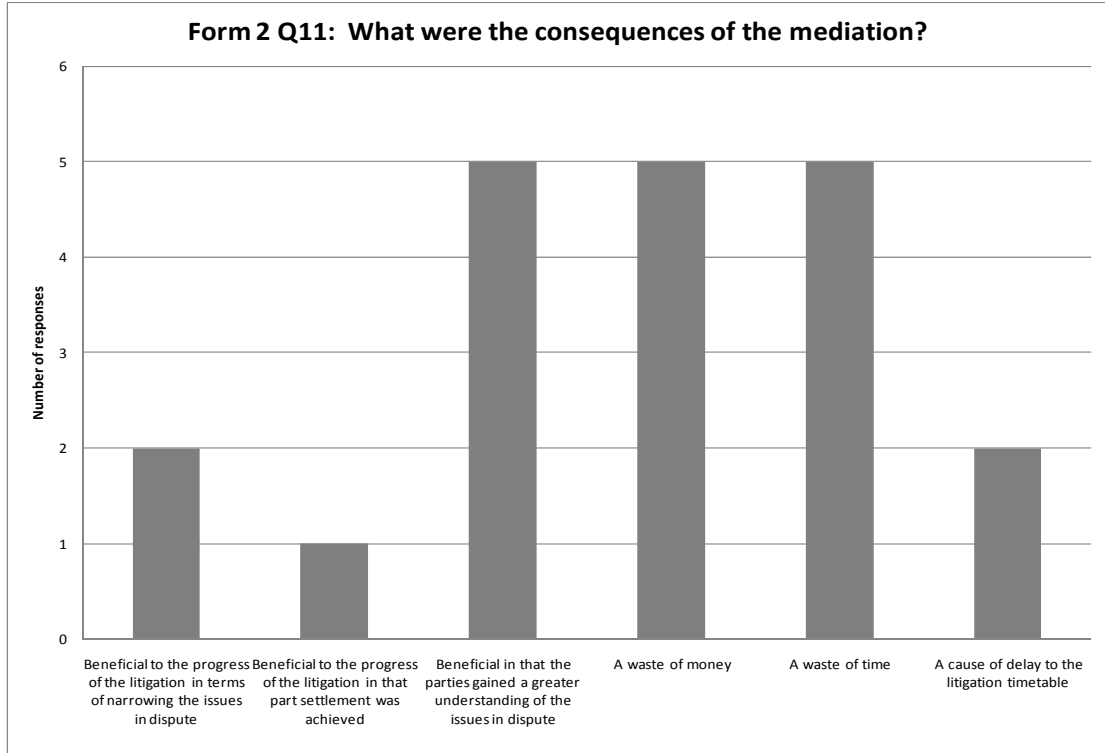














2.13 Types of case. If one compares the answers to question 1 in form 1 and in form 2, it can be seen that the spread of case types is broadly similar with one striking exception. That exception is professional negligence. Professional negligence cases seem to be much more likely to settle and much less likely to go to trial than other cases in the TCC.

2.14 It can be seen from the answers to question 2 that in cases which went to trial attempts (albeit unsuccessful) were usually made to achieve a settlement. The majority of those attempts (66%) took the form of conventional negotiation. The next largest category was mediation (26%).

2.15 Analysis of unsuccessful mediations. As Professor Genn points out in the 2008 Hamlyn Lectures, unsuccessful mediations involve both parties in substantial irrecoverable costs. *“This fact raises serious questions for policies that seek to pressure parties to enter mediation unwillingly”*.<sup>138</sup> The King’s College survey attempted to quantify the costs of unsuccessful mediations in relation to TCC cases. Unfortunately the answers to that particular question did not yield sufficient information to be statistically valid.

2.16 The unsuccessful mediations sometimes yielded incidental benefits, for example narrowing of issues or partial settlement or giving parties a greater understanding of the issues. On other occasions the unsuccessful mediations were regarded as a waste of time and money. Delay caused to the litigation timetable by failed mediations appears to have been rare. This is probably because, when appropriate, judges built a mediation window into the case management timetable.

#### (iv) Overall conclusions from the King’s College Survey

2.17 It is common knowledge, and it is apparent from the published statistics, that most TCC cases settle. The King’s College survey gives a valuable insight into when and how those cases settle. In particular, mediation is a valuable and costs saving mechanism, when properly used. Mediation promotes earlier settlements and in a small number of cases (which may be regarded as on the cusp) actually precipitates settlements which would not otherwise be achieved. However, mediation is not a vehicle for establishing parties’ legal rights or a shortcut to arriving at correct legal solutions. Where parties are unwilling to mediate and wish the court to resolve their dispute, that is what the court must do. If a judge forces such parties into mediation, that may be counter-productive and simply lead to wastage of costs. It is the function of the court to resolve all disputes which are brought before it swiftly, efficiently and at proportionate cost.

### 3. THE COSTS OF LITIGATION IN THE TCC

3.1 Costs schedule. The Technology and Construction Solicitors Association (“TeCSA”) have responded to my request for costs data by producing a schedule showing the costs incurred in recently completed cases. A number of firms who are active in TeCSA have contributed details of recently completed cases on their books. The schedule shows the costs claimed, the costs recovered, the nature and value of the claim. The schedule is appended to this report as Appendix 13.

3.2 Obviously, one does not know whether those recently completed cases are typical of a wider pool of TCC cases. Nevertheless, two comments can be made about

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<sup>138</sup> Lecture 2, page 14.

the schedule. First, the percentage of costs recovered by the winning party is generally quite high, often in the region of 75% or more. Secondly, in the majority of cases concluded the costs incurred appear to be proportionate to the sums at stake.

3.3 Exceptional cases. The above observations are not reasons for complacency. They do, however, set in context those few cases where the costs incurred are grossly disproportionate to the sums in issue.<sup>139</sup> Recent examples of cases in which costs incurred have been grossly disproportionate to the sums in issue are *Nigel Witham Ltd v Smith* [2007] EWHC 3027 (TCC) (main judgment); [2008] EWHC 12 (TCC) (costs judgment); *Multiplex v Cleveland Bridge (No. 6)* [2008] EWHC 2220 (TCC) (main judgment); (No. 7) [2008] EWHC 2280 (TCC) (costs judgment).

3.4 Commercial pressures for proportionate costs. Litigants in the TCC are (almost exclusively) businesses. Occasional dispute resolution is a necessary incident of construction projects and IT projects. The parties to such disputes have a choice of dispute resolution methods, *viz* litigation, arbitration, adjudication, expert determination and mediation. If they choose to bring their disputes to the TCC, they are looking for an efficient and cost effective resolution. The parties on both sides of the litigation are often “repeat players”, advised by specialist solicitors. As the senior in-house solicitor of one major contractor put it to me, the decision whether to bring a claim or to defend a threatened claim is an “*investment decision*”. It is unsurprising, therefore, that most (but not all) TCC cases are resolved at proportionate cost, usually by settlement but sometimes by judgment. The same in-house solicitor also pointed out that “proportionate cost” meant a cost proportionate to the importance of the issues at stake, not merely to the nominal value of the claim. For example, reputational issues may be involved (e.g. concerning health and safety), which justify investing in the litigation a larger sum than the amount which is being claimed.

3.5 Settlement. The majority of TCC cases settle. The role of the court in this regard is essentially one of case management: setting a realistic timetable for statements of case, disclosure, witness statements and reports; building a mediation “window” into the timetable if appropriate; sometimes determining preliminary issues; and so forth. It can be seen from the King’s College survey that certain points in the action are propitious for settlement negotiations, as identified in paragraphs 2.7 and 2.8 above. Most cases still settle through conventional negotiation. Nevertheless mediation plays a valuable role in two respects. First, mediation accelerates settlements. Secondly, in a small cohort of cases (which may be regarded as on the cusp) mediation facilitates settlements which would not otherwise be achieved: see the King’s College survey and paragraph 2.17 above.

3.6 Contested cases. Despite all the points made in the previous paragraph, there remains a hard core of cases where the parties do not wish to settle and the court’s decision is required. The function of the TCC in those cases is to manage the litigation to trial as expeditiously and economically as possible. There is almost invariably a good reason why the parties wish to obtain the court’s decision.<sup>140</sup>

3.7 Judicial survey. Little information about the costs of TCC litigation emerges from the judicial costs survey of January/February 2009. Case 1 in the circuit judges survey (Appendix 2) comes from the Bristol TCC. A number of other cases in the

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<sup>139</sup> Not every TCC case in which costs exceed the sum awarded should be characterised as disproportionate. See *Biffa Waste Services v Maschinenfabrik Ernst Hese GMBH* [2008] EWHC 2657 (TCC) at [47] per Ramsey J.

<sup>140</sup> In four years as a TCC judge I did not encounter more than one case in which both parties pressed on with litigation, seemingly for no rational purpose.

survey look as if they were TCC cases, because of the stated subject matter, but the entry in the “court type” column simply says county court or High Court. Some of these cases may have been in the TCC list of the county court or the High Court.

#### 4. PRE-ISSUE COSTS

4.1 Pre-action protocol. The Pre-action Protocol for Construction and Engineering Disputes sets out a procedure for pre-trial exchange of allegations and information, culminating in a meeting. Concern has been expressed by practitioners that protocol procedures involve excessive front loading of costs. The matter was considered by a working group chaired by Ramsey J in 2006, which recommended a number of changes to the protocol, including the insertion of paragraph 1.5 re proportionality. These amendments were duly made.

4.2 Continuing concern. I understand that some practitioners and judges are still concerned about the front loading of costs which the protocol generates. In extreme cases the costs of compliance with the protocol may amount to hundreds of thousands of pounds or more. Overseas litigants do not readily understand the hoops through which they have to pass before proceeding.<sup>141</sup>

4.3 Proposal. It has been suggested that a possible reform would be to have the “pre-action” process after issue of the claim form. In other words, the claim form would be issued and then the action could be stayed for as long as necessary for carrying out the protocol process. It is suggested that this reform would have the following benefits:

- The protocol process would be supervised (as far as necessary) by the court.
- If it appears that the protocol process is simply duplicating costs, the judge could order the action to proceed without further ado.
- The judge could control any abuses of the protocol process and resolve any issues arising, such as what documents should be disclosed.
- The costs incurred by both parties in complying with the protocol become part of the costs of the action.

4.4 The point is made by supporters of the above proposal that the Woolf reforms have achieved a cultural shift. There is now far more co-operation between parties than there was before 1999. Pre-action protocols have played an important educational role in achieving cultural change. The question now, however, is whether they are too expensive and whether they involve duplication of work and effort. On the other side, the point is made that thorough compliance with the protocol sometimes precipitates early settlement. In other words, at least in some cases front loading of costs actually saves costs.

4.5 Question for consideration. I shall be interested to hear during Phase 2 whether court users would support or oppose the reform suggested above.

4.6 Pilot exercise. If there is support for the above proposal, it could be piloted in the TCC. The results of such a pilot exercise could be taken into account when considering (a) whether to continue the scheme and (b) whether any other civil courts might adopt this procedure.

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<sup>141</sup> This was a major factor in the Commercial Court’s decision not to have a pre-action protocol.

## 5. CASE MANAGEMENT

5.1 General comment. The TCC, like the Commercial Court, has recently entered into a detailed dialogue with its specialist users concerning case management procedures. The result of this dialogue is the Second Edition of the TCC Guide, which came into effect in October 2005. It was slightly modified in the light of experience in October 2007.<sup>142</sup> It is not the function of the present Costs Review to re-open the lengthy debate which preceded the formulation of the Second Edition of the TCC Guide. Nevertheless any reforms emerging from the present Costs Review will impact upon the TCC. A number of specific comments about case management in the TCC are appropriate.

5.2 Avoid excessive interference. Good case management saves costs. Micro-management of cases (ordering meetings, lists of issues etc.) tends to increase costs. The view expressed by TCC judges and senior practitioners is that the court should be slow to override directions and timetables agreed between experienced specialist solicitors and counsel. That view accords with my own experience as a TCC judge.

5.3 Document management. One of the banes of TCC litigation is duplication of documents. Pleadings, contracts, witness statements, reports etc are copied many times over. Both practitioners and judges have commended to me the practice of international arbitrations, whereby documents become part of the trial bundle as they are lodged. For this to work, it is essential that every document has internal pagination. Subject to available storage space, there is no reason why the trial bundle should not be built up as the litigation proceeds. Each new document could be given its trial bundle reference when it first appears.

5.4 Disclosure. The judges and practitioners to whom I spoke favour retaining standard disclosure. They do not believe that the IBA approach of focused requests would achieve cost saving. Instead there would be massively long schedules supporting claims for specific disclosure. Nevertheless, the court should scrutinise each case at the first CMC, in order to determine whether standard disclosure is required or whether some more limited order may suffice. E-disclosure should be used in those cases where it will save money, but not in cases where it will generate excessive costs (through the need to employ consultants, set up systems etc). Disclosure is discussed more fully in chapters 40 and 41, where the options are set out. Whatever decisions emerge from consultation about those chapters will have to apply to all courts, including the TCC.

5.5 Lists of issues. TCC judges and practitioners are disinclined to follow the Commercial Court's approach in relation to drawing up lists of issues. There is a fear that this will become yet another stage in the procedure, adding further expense and duplication of effort. I see considerable force in this view in relation to TCC litigation. Provided that the case is properly pleaded (as to which see below), it is fairly obvious what the issues are. In four years at the TCC I do not recall any case in which lists of issues submitted by the parties were of any great assistance. If other judges and practitioners share my view, then paragraphs 14.4.1 and 14.4.2 of the TCC Guide could be revised. It might be more helpful if those paragraphs required the parties at the pre-trial review to identify what they perceived as the key issues in the case. A list of all issues which will contingently arise if this or that point is decided one way or the other is expensive to produce and yields little benefit.

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<sup>142</sup> See the First Revision of the Second Edition of the TCC Guide, which is published in Volume 2 of the White Book and is also available on the TCC section of the HMCS website.

5.6 Witness statements. There appears to be a consensus that witness statements are now too long and discursive. They traverse the documents unnecessarily. It has been suggested that the best way to deal with this is for the judge at the end of the case to give a ruling identifying all offending witness statements and stating that the costs of those statements should not be allowed on detailed assessment. A small number of robust judgments disallowing witness statement costs may send out an appropriate message. This would soon be heeded, since the solicitors and counsel who regularly practise in the TCC are a fairly small community. Issues re witness statements in heavy litigation are discussed more fully in chapter 42 below.

5.7 Responsive witness statements. It has been suggested that responsive witness statements should not be allowed, unless some genuinely new issue arises which the witness needs to deal with.

5.8 Statements of case. There is a concern amongst practitioners and judges that pleadings have become too lengthy. They recite endless narrative, instead of pleading material facts. Such pleadings can add greatly to the length and expense of a trial. Again, one proposed solution is that the judge at the end of the case should identify any offending pleadings and disallow the costs of such pleadings. An alternative course would be for the judge at an earlier stage to direct the party to re-plead its case.<sup>143</sup>

5.9 Request for comments. The views which have been expressed to me by TCC judges and practitioners have been distilled above. They chime with my own experience. However, I retain an open mind at this stage and would value the comments of all respondents during the consultation period. If judges are going to curb the excesses of witness statements and pleadings by means of retrospective costs orders, then perhaps a clear steer should be given in the rules.

## 6. FUNDING OF TCC LITIGATION

6.1 Conditional fee agreements. CFAs are not often used in TCC litigation. The restrictions imposed upon claimants by the terms of CFAs are unattractive to some commercial organisations, which wish to retain full control on a conventional basis. Nevertheless, it is thought that the use of CFAs will increase in the future, as the advantages of CFAs to claimants become more widely appreciated.

6.2 Should “additional liabilities”<sup>144</sup> continue to be recoverable? The present rules create a situation akin to one way cost shifting,<sup>145</sup> when the claimant has a CFA and ATE insurance, but the defendant has not. The point has been made that this might be appropriate in a minority of cases, for example where a group of householders are claiming against a housing development. However, in the general run of TCC litigation with commercial organisations on both sides, there is no obvious justification for imposing such a heavy burden upon the defendant.

6.3 Contingency fees. I have only briefly discussed contingency fees with TCC judges and users, and understand that there is no great enthusiasm for this reform. However, this is a matter which might be looked at again in the light of the Canadian experience. See chapter 61 below.

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<sup>143</sup> When at the Bar, I have seen this course taken in a professional negligence case, to the considerable benefit of both parties.

<sup>144</sup> Success fees and ATE premiums: see CPR rule 43.2.

<sup>145</sup> In the sense that the claimant is protected against an adverse costs order, whereas the adverse costs risk faced by the defendant is substantially increased.

6.4 Questions. During the consultation period I would be interested to hear the views of TCC users and judges on three questions:

- (i) Should additional liabilities cease to be recoverable as part of a costs order?
- (ii) If so, should any exception be made in “hard” cases or consumer type cases? If so, how should that be formulated?
- (iii) Should percentage contingency fees be allowed as a further option, provided that cost shifting is retained (as in Canada)?

## 7. REVIEW

7.1 During Phase 2 of the Costs Review I look forward to hearing the views of TCC court users, practitioners and judges concerning all of the issues canvassed above.

7.2 It would also be helpful to receive comments about the possible use of fixed costs in TCC cases. This topic is discussed chapters 22, 23 and 29. Although fixing of costs is not a device which generally commends itself to lawyers, it may be that court users would find such a reform attractive. I understand that many SMEs are more concerned about the risk of indeterminate liability for adverse costs if they lose than the risk of not making full recovery if they win. I therefore very much hope that construction companies and professional firms which litigate in the TCC will let me know their views on this topic during Phase 2.

## **CHAPTER 35. JUDICIAL REVIEW CLAIMS**

### **1. INTRODUCTION**

1.1 **Volume of work.** The Administrative Court is by far the busiest part of the Queen's Bench Division. Judicial review constitutes the largest element of that court's workload. In 2007 there were 6,391 judicial review claims started in the Administrative Court.<sup>146</sup> In 2008 there were 7,139 new judicial review claims started in the Administrative Court.

1.2 **Significant features of judicial review.** Five important features set judicial review apart from other categories of civil litigation:

- There is a requirement for permission before the claim can be pursued.
- Statements of case are less elaborate. They consist essentially of the claim form and the acknowledgements of service.
- There is ordinarily no disclosure by the parties.
- Evidence is given in writing and there is no cross-examination.
- Following the streamlined procedures of CPR Part 54, claims can come on for substantive hearing within a matter of months after issue.<sup>147</sup>

1.3 **Proportionality of costs.** Proportionality of costs is more difficult to assess in judicial review claims, because the remedies sought cannot generally be quantified in money terms.

### **2. COST OF JUDICIAL REVIEW PROCEEDINGS**

2.1 **Effect of permission requirement.** The effect of the permission requirement is that approximately 80% of judicial review claims are weeded out in the early stages. Such claims do not have sufficient prospect of success and they are brought to an end at (usually) modest cost.

2.2 **Less elaborate pleadings.** The claim forms may run to some length, but this is because they contain narrative of the facts. The formulation of the grounds of claim for judicial review ordinarily is, or at least should be, quite concise. Acknowledgements of service contain summary grounds of defence. Although there are exceptions, in the majority of cases the summary grounds of defence are condensed into a few pages or less. The parties do not serve requests for further information or responses to such requests.

2.3 **No disclosure.** The fact that ordinarily there is no disclosure is the overriding feature in relation to costs. The parties simply put forward the documents upon which they rely, subject to any direction by the court that some specific document or group of documents should be disclosed. During the eight years that I sat as an Administrative Court judge, I was not aware of the absence of disclosure becoming a source of injustice. Nor (so far as I can recollect) did counsel ever suggest that this was the case.

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<sup>146</sup> See chapter 5 above.

<sup>147</sup> The delays which have accumulated in recent years are the consequence of a backlog of work, rather than protracted interlocutory procedures.

2.4 Written evidence and streamlined procedures. It would be an oversimplification to say that the facts in judicial review cases are uncontroversial. Very often the judge is called upon to make findings of fact. He or she does so on the basis of the witness statements and the contemporaneous documents. Again I am not aware of concern that injustice is being caused by the absence of oral evidence and cross-examination.

2.5 Absence of the main costs drivers. It can be seen from the foregoing that the principal drivers of costs in “heavy” civil litigation are absent from judicial review proceedings. The consequence is that the costs of judicial review proceedings, although beyond the means of many litigants, are substantially reduced.

2.6 Level of costs. Little information about the costs of judicial review proceedings has emerged from the recent judicial. The Queen’s Bench judges who try judicial review cases are not normally called upon to carry out summary assessments at the end of hearings.

2.7 One firm of solicitors, who regularly conduct judicial review claims in the environmental area, have responded to my request for data re costs as follows:

“Amount of costs: generally, judicial review is relatively speaking inexpensive. We normally advise clients that it costs between £3,000-5,000 + VAT to lodge a paper application for judicial review, and then they should budget between £10,000-15,000 per side if permission is granted. In simple cases, one can come in at lower than the lower end of those figures. In complex cases, even at first instance, they can be much exceeded, though they tend not to be more than two to three times the amount stated. In order to give clients some certainty, it is often necessary to work on some sort of conditional fee arrangement i.e. some level of fees in any event, with the remainder at risk.”

### 3. PROTECTIVE COSTS ORDERS

3.1 Features of judicial review litigation. Two common features of judicial review litigation are that (a) many claimants are of limited means and (b) the defendants are public authorities which, despite the pressures on the public purse, can afford to defend litigation properly when the need arises. Some judicial review claims are supported by legal aid, but many are not.

3.2 Need for protective costs orders. Sometimes the claimants in judicial review proceedings are, or are supported by, groups who can raise the funds for litigation but cannot realistically afford to meet the other side’s costs in the event of defeat. It is only feasible for such claimants to proceed if the other side’s costs are capped at nil or, alternatively, at some modest fixed sum. In order to meet the particular needs of judicial review litigation the courts have developed protective costs orders (“PCOs”). These are a variant of costs capping orders.<sup>148</sup> There are three significant differences between PCOs and costs capping orders. First, it is claimants who seek PCOs, whereas it is normally defendants who seek cost capping orders. Secondly, there are now rules of court<sup>149</sup> regulating cost capping orders, whereas the principles upon

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<sup>148</sup> Costs capping in general is discussed in chapter 45.

<sup>149</sup> CPR rules 44.18 to 44.20.



which PCOs are made must still be derived from case law.<sup>150</sup> Thirdly, a PCO may cap the recoverable costs at nil or a very low sum, whereas a costs capping order limits recoverable costs to a sum representing the reasonable and proportionate costs<sup>151</sup> of conducting the case.

3.3 Principles upon which PCOs are made. In *R v Lord Chancellor, ex parte CPAG* [1999] 1 WLR 347 Dyson J formulated the principles upon which the court would make a protective costs order. Such orders were subsequently made on a number of occasions. In *R (on the application of Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2712 (Admin) the divisional court made a PCO limiting the claimants' potential costs liability to £25,000. In *R (on the application of Refugee Legal Centre) v SSHD* [2004] EWCA Civ 1296 the Court of Appeal made a PCO by consent, whereby there would be no order for costs in favour of either party whatever the outcome of the litigation.

3.4 In *R (on the application of Corner House Research) v Secretary of State for Trade and Industry* [2005] EWCA Civ 192; [2005] 1 WLR 2600 the Court of Appeal made a PCO providing that (a) the claimant should have no costs liability and (b) the claimant's recoverable costs should be capped at a figure to be determined by the senior costs judge. In the course of its judgment the Court of Appeal recast the guidelines given in *CPAG* and stated the principles as follows:

"74. We would therefore restate the governing principles in these terms:

1. A protective costs order may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that:
  - (i) The issues raised are of general public importance;
  - (ii) The public interest requires that those issues should be resolved;
  - (iii) The applicant has no private interest in the outcome of the case;
  - (iv) Having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved it is fair and just to make the order;
  - (v) If the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.
2. If those acting for the applicant are doing so *pro bono* this will be likely to enhance the merits of the application for a PCO.
3. It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above.

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<sup>150</sup> The only reference to PCOs in the rules is CPR rule 44.18 (3): "*This rule does not apply to protective costs orders.*"

<sup>151</sup> See paragraph 23A.5 of the Costs Practice Direction.

75. A PCO can take a number of different forms and the choice of the form of the order is an important aspect of the discretion exercised by the judge. In the present judgment we have noted:

- (i) A case where the claimant's lawyers were acting *pro bono*, and the effect of the PCO was to prescribe in advance that there would be no order as to costs in the substantive proceedings whatever the outcome (*Refugee Legal Centre*);
- (ii) A case where the claimants were expecting to have their reasonable costs reimbursed in full if they won, but sought an order capping (at £25,000) their maximum liability for costs if they lost (*CND*);
- (ii) A case similar to (ii) except that the claimants sought an order to the effect that there would be no order as to costs if they lost (*CPAG*);
- (iv) The present case where the claimants are bringing the proceedings with the benefit of a CFA, which is otherwise identical to (iii).

76. There is of course room for considerable variation, depending on what is appropriate and fair in each of the rare cases in which the question may arise. It is likely that a cost capping order for the claimants' costs will be required in all cases other than (i) above, and the principles underlying the court's judgment in *King* at paragraphs 101-2 will always be applicable. We would rephrase that guidance in these terms in the present context:

- (i) When making any PCO where the applicant is seeking an order for costs in its favour if it wins, the court should prescribe by way of a capping order a total amount of the recoverable costs which will be inclusive, so far as a CFA-funded party is concerned, of any additional liability;
- (ii) The purpose of the PCO will be to limit or extinguish the liability of the applicant if it loses, and as a balancing factor the liability of the defendant for the applicant's costs if the defendant loses will thus be restricted to a reasonably modest amount. The applicant should expect the capping order to restrict it to solicitors' fees and a fee for a single advocate of junior counsel status that are no more than modest.
- (iii) The overriding purpose of exercising this jurisdiction is to enable the applicant to present its case to the court with a reasonably competent advocate without being exposed to such serious financial risks that would deter it from advancing a case of general public importance at all, where the court considers that it is in the public interest that an order should be made. The beneficiary of a PCO must not

expect the capping order that will accompany the PCO to permit anything other than modest representation, and must arrange its legal representation (when its lawyers are not willing to act *pro bono*) accordingly.”

3.5 In *R (on the application of Compton) v Wiltshire Primary Care Trust* [2008] EWCA Civ 749 the Court of Appeal (Buxton LJ dissenting) upheld PCOs made in judicial review proceedings brought by a local resident to restrain the closure of hospital facilities. Waller and Smith LJJ held that the requirements set out in paragraph 74 of *Corner House* (interpreted with appropriate flexibility) were satisfied. Waller and Smith LJJ rejected the submission that (because certain *dicta* in *CPAG* were approved in *Corner House*) there was an additional requirement of exceptionality. However, they recognised that the *Corner House* requirements would only be satisfied in exceptional<sup>152</sup> or rare<sup>153</sup> cases.

3.6 In *R (on the application of Buglife – the Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corporation* [2008] EWCA Civ 1209 the claimant challenged by way of judicial review the grant of planning permission for the construction of a distribution hub at a site in West Thurrock. The claimant’s solicitors and counsel were acting on CFAs, although the claimant had agreed to pay legal costs prior to the CFA up to a maximum of £10,000 plus VAT. Sullivan J made a PCO in respect of the proceedings at first instance, limiting the recoverable costs of each side to £10,000. The claimant lost at first instance and was duly ordered to pay £10,000 costs to the defendants. The claimant obtained permission to appeal. The Court of Appeal, after hearing extensive argument, made a further PCO limiting the recoverable costs of each side in relation to the appeal to £10,000. The court held that the *Corner House* principles should be applied both in first instance proceedings and on appeal. The court rejected the contention that, because the claimant’s lawyers were acting on CFAs, there should be a more generous costs recovery in the event that the claimant succeeded.

3.7 Although the courts have continued to apply the *Corner House* principles, there have been expressions of discontent about the restrictive formulation of those principles. In 2006 a working group chaired by Maurice Kay LJ noted the difficulties created by the “no private interest” requirement. The working group recommended that the private interest, if any, should be a matter to be taken into account. The weight to be attached to it should be a matter for the judge.<sup>154</sup> It has been asserted in a number of decisions that the “no private interest” requirement should be flexibly applied: see *Wilkinson v Kitzinger* [2006] EWHC 835 (Fam) at [54]; *R (England) v Tower Hamlets LBC* [2006] EWCA Civ 1742; *R (Bullmore) v West Hertfordshire Hospitals NHS Trust* [2007] EWHC 1350 (Admin) at [19]; *R (Compton) v Wiltshire Primary Care Trust* [2008] EWCA 749 at [23]. In *Morgan v Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 107 the Court of Appeal held that despite one authority tending in the other direction,<sup>155</sup> it was impossible to ignore the criticisms of the narrow approach. Therefore the “flexible” approach to the *Corner House* guidelines should be of general application.

3.8 The position in Canada. In recent years Canadian judges and commentators have been grappling with the problem of costs in judicial review litigation. See

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<sup>152</sup> Per Waller LJ at paragraph 24.

<sup>153</sup> Per Smith LJ at paragraph 83.

<sup>154</sup> See “*Litigating the Public Interest*”, Report of the Working Group on Facilitating Public Interest Litigation (July 2006) at paragraphs 77-85.

<sup>155</sup> *Goodson v HM Coroner for Bedfordshire and Luton* [2005] EWCA 1172.

Tollefson “*When the Public Interest Loses: The liability of Public Interest Litigants for Adverse Costs Awards*”;<sup>156</sup> McCool “*Costs in Public Interest Litigation: A Comment Professor Tollefson’s Article*”;<sup>157</sup> Tollefson, Gilliland & DeMarco “*Towards a Costs Jurisprudence in Public Interest Litigation*”.<sup>158</sup> As can be seen from these articles, a no cost shifting rule was introduced for judicial review proceedings in the Federal Court.<sup>159</sup> In a number of provincial judicial review cases the courts have, in the exercise of discretion, refused to order an unsuccessful applicant for judicial review to pay costs, because of the public interest element of the case.<sup>160</sup>

3.9 I understand from discussions with judges and practitioners in Toronto,<sup>161</sup> that in practice successful respondents to judicial review claims quite often do not even ask for costs. If there is an application for costs, the general approach of judges is to make no costs order if the unsuccessful claim had a public interest element. Even if the claim was brought purely in the interests of the plaintiff, the court will still consider whether or not it is reasonable to make a costs order. In deciding this issue, the court will have regard to the means of the parties and the merits of the claim. If the court decides to make a costs order, it will probably award only a modest sum as costs. Thus it can be seen that the costs culture prevailing in Canadian judicial review proceedings is very different from that prevailing in England and Wales.

#### 4. REVIEW

4.1 The parties in judicial review proceedings. In typical judicial review proceedings the claimant is a person or body challenging some administrative decision. The claimant may be wealthy or may be of limited means. The defendant is typically a public authority, which has a deep pocket but many other calls upon its budget. Where the claimant is of limited means, but does not have legal aid, the question arises whether a PCO should be granted. As can be seen from the authorities, many judicial review claims are only viable if a PCO is made. In the absence of a PCO, the claimant lacks the funds to meet an adverse costs order and therefore dares not press on.

4.2 Does *Corner House* strike the right balance? In the circumstances described in the previous paragraph, the question frequently arises as to whether a PCO should be made. The issue which must now be considered is whether the *Corner House* principles (even if flexibly applied) strike the right balance between the interests of claimant and defendant. In relation to environmental cases, the working party chaired by Mr Justice Sullivan has argued that *Corner House* does not strike the right balance (as discussed in chapter 36 below). There is a strong case for saying that non-environmental judicial review claims should be treated in the same way as environmental judicial review claims.<sup>162</sup> At this stage of the report I am concerned with judicial review claims generally, rather than any sub-category of such claims.

4.3 The *Corner House* principles were formulated by the Court of Appeal after hearing extensive argument and citation of authority. The court considered and

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<sup>156</sup> (1995) 29 UBCL Rev 303.

<sup>157</sup> (1996) 30 UBCL Rev 309.

<sup>158</sup> (2004) 83 Canadian Bar Review 473.

<sup>159</sup> Federal Court Rules, rule 1618: “*No costs shall be payable in respect of an application for judicial review unless the Court, for special reasons, so orders*”.

<sup>160</sup> The Australian Federal Court adopted a similar approach in *Ruddock v Vadarlis* (No. 2) [2001] FCA 1865; (2001) 115 FCR 229.

<sup>161</sup> Meetings on 8 and 9 April 2009.

<sup>162</sup> See *Compton* at [20]; *Buglife* at [17]; *Morgan* at [33] and [47] sub-paragraph (iv).

referred to a wealth of authority, including reports by the Ontario Law Reform Commission and the Australian Law Reform Commission. Nevertheless, time has moved on since then. Concern has been expressed that the *Corner House* principles are (a) too restrictive and (b) unduly harsh on claimant lawyers with CFAs. It will therefore be appropriate to re-examine the *Corner House* principles during Phase 2 of this review.

4.4 Possible criticisms of *Corner House*. The following are possible criticisms of *Corner House*:

- (i) The circumstances in which a PCO should be made are defined too restrictively.
- (ii) There is no reason why the fact that the applicant has a private interest in the outcome should be fatal, provided that the “public interest” test is satisfied.
- (iii) The *Corner House* criteria put undue pressure on claimant solicitors to act *pro bono*. It is simply not practicable for firms specialising in this line of work to do cases *pro bono* as a matter of routine.
- (iv) If the existing CFA regime survives, then capping the costs recoverable by the claimant at the same level as the costs recoverable by the defendant creates substantial difficulties.
- (v) Any judicial review claimant, who has obtained permission to proceed with his or her claim, has a proper case which merits determination. A claimant of modest means who brings such a case against a public authority should not be at risk of a crushing adverse costs liability.

4.5 Suggestion for one-way cost shifting. It has been suggested by one firm of solicitors specialising in this area that, in judicial review claims concerning matters of public interest, the norm should be no costs orders against unsuccessful claimants. The solicitors propose, in return, that in cases where the claimant succeeds there should be no uplift. In other words the claimant’s solicitors and counsel should receive their basic costs with no success fee.

4.6 The above proposal merits consideration during Phase 2. However, it seems to me that there would need to be some incentive built into the rules to discourage weak or frivolous claims. Possibly in public interest cases there should be a presumption in favour of capping the claimant’s costs liability at a modest level which (a) is within the claimant’s means, but (b) would nevertheless deter frivolous or weak claims.<sup>163</sup>

4.7 Process reform. A striking feature of Phase 1 is that although many concerns have been expressed about the costs of civil litigation in general (front loading, disclosure, witness statements, trial length etc., etc.), no criticisms have been made about CPR Part 54 and the process for judicial review. I therefore proceed on the basis that in relation to judicial review I am solely concerned with the costs rules, rather than with any process reforms necessary to bring down costs.

4.8 Conclusion. I invite any comments which stakeholders or court users may wish to make during Phase 2 concerning the matters raised above.

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<sup>163</sup> One way cost shifting is discussed in more detail in chapter 25 (personal injury claims), chapter 36 (environmental claims) and chapter 46 (cost shifting generally).

## **CHAPTER 36. ENVIRONMENTAL CLAIMS**

### **1. INTRODUCTION**

1.1 In this chapter I shall examine the operation of the present costs rules in relation to three principal types of environmental claim, namely statutory nuisance proceedings, private nuisance actions and judicial review claims.

1.2 In private nuisance actions, typically, local residents are seeking to restrain some project or activity which interferes with their amenity. Statutory nuisance proceedings in the magistrates' court provide an alternative to private nuisance proceedings in the civil courts. In judicial review claims, typically, local residents or a pressure group are seeking to reverse an administrative decision which they believe will be damaging to the environment.

### **2. STATUTORY NUISANCE PROCEEDINGS IN THE MAGISTRATES' COURT**

2.1 The meaning of statutory nuisance. The matters that constitute a statutory nuisance are listed in section 79(1) of the Environmental Protection Act 1990 ("EPA"). Generally speaking, the common element to each matter is that it is prejudicial to health or a nuisance. For example, matters that are considered a statutory nuisance pursuant to section 79(1) include: smoke,<sup>164</sup> fumes or gases<sup>165</sup> emitted from premises; and noise emitted from premises;<sup>166</sup> in each case so as to be prejudicial to health or a nuisance.

2.2 Summary proceedings by persons aggrieved. Pursuant to section 82 of the EPA, persons aggrieved by a statutory nuisance can bring proceedings against the person responsible in the magistrates' court.<sup>167</sup> The local authority also may bring proceedings. So the usual course is to make a complaint to the local authority for it to investigate and bring proceedings. If the local authority does not do so, section 82 enables the aggrieved person to issue proceedings. If the magistrates' court is satisfied that the alleged nuisance exists or, although abated, is likely to recur, the court must make an order requiring the defendant to abate the nuisance within a specified time; and/or an order prohibiting a recurrence of the nuisance.<sup>168</sup> The court may also impose a fine on the defendant not exceeding level 5 on the standard scale.<sup>169</sup>

2.3 Costs of the aggrieved person. Criminal proceedings in the magistrates' court under section 82 of the EPA, unlike all other criminal proceedings, can be brought on a CFA: see section 58A (1) (a) of the Courts and Legal Services Act 1990. Where it is proved that the alleged nuisance existed at the date of the complaint, then (regardless of whether it still exists or is likely to recur at the date of the hearing) the court must order the defendant to pay an amount to the complainant to compensate him for the expenses properly incurred in bringing the proceedings.<sup>170</sup> The amount should be that which is "reasonably sufficient" to compensate the complainant.<sup>171</sup>

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<sup>164</sup> EPA, section 79(1)(b).

<sup>165</sup> *Ibid*, section 79(1)(c).

<sup>166</sup> *Ibid*, section 79(1)(g).

<sup>167</sup> See EPA, sections 82(1) and (4).

<sup>168</sup> EPA, section 82(2).

<sup>169</sup> *Ibid*.

<sup>170</sup> *Ibid*, section 82(12).

<sup>171</sup> *Ibid*.

2.4 Adverse costs orders. The complainant is not usually at risk of an adverse costs order in the magistrates' court under the statutory nuisance regime. However, any challenges to the magistrates' court decision go to the divisional court, where the claimant is at risk of an adverse costs order.

2.5 Other difficulties. Statutory nuisance proceedings give rise to problems of proof for the complainant because they are quasi-criminal. It is said that complainants encounter considerable problems as the rules on disclosure favour the defendant. The defendant may delay the production of evidence until late in the proceedings. Therefore, despite the superficial attraction of statutory nuisance proceedings, many complainants prefer private nuisance actions in the civil courts.

### 3. PRIVATE NUISANCE ACTIONS IN THE CIVIL COURTS

3.1 Nature of private nuisance actions. In the private nuisance actions with which this chapter is concerned, typically, local residents are seeking to restrain some project or activity which interferes with their amenity. The claimant normally claims damages in respect of past nuisance and an injunction to prevent future repetition. The defendant is normally a commercial organisation or public authority. A typical example (decided at the time of drafting this chapter) is *Watson v Croft Promo-Sport Ltd* [2009] EWCA Civ 15. In *Watson* the claimants alleged that noise from a race track near to their homes constituted a nuisance. They obtained (a) an injunction restricting future use of the race track to a specific number of days per year and (b) damages for the excessive noise which they had endured in the past.

3.2 Funding private nuisance actions. Such cases are nowadays normally brought on CFAs, supported by ATE insurance. By the time of trial the success fee is likely to be 100%. Furthermore, ATE insurance in this area is expensive. Thus the costs burden which falls upon the defendant if the claim succeeds is very substantial.

3.3 Bontoft. The recent case *Bontoft v East Lindsey DC* [2008] EWHC 2923 (QB) illustrates how the current costs regime operates. The defendant commenced refuse operations close to the claimants' homes. The claimants brought proceedings in the Queen's Bench Division, claiming an injunction and damages. The court awarded damages in lieu of injunction totalling approximately £75,000. The claimants then applied for costs. They obtained (i) an order for costs (subject to detailed assessment) less a deduction of £7,500 in respect of one particular issue and (ii) an order for an interim payment on account of costs in the sum of £130,000.

3.4 On the material presented to the court (and disregarding VAT), it appeared that the claimants' costs were approximately £104,646 (excluding success fee and ATE premium) and the defendants' costs were approximately £157,231. To the claimants' costs there had to be added a 100% success fee of £59,570 and the ATE premium of £97,362 + IPT. Thus it can be seen that the claimants' costs, inclusive of success fee (but for the moment ignoring the ATE premium), were at a similar level to the defendant's costs. The costs on each side substantially exceeded the amount of damages awarded. On the other hand it may be said that (a) costs of that order were necessarily incurred given the complexities of the action and (b) a 100% success fee was reasonable (nuisance claims sometimes fail and CFA solicitors could not operate in this field without a substantial uplift on those cases which they win).

3.5 Success fee in Bontoft. It can be seen from the above figures that in this instance the recoverable success fee did not give rise to any marked disparity between claimant and defendant costs. If *Bontoft* had been litigated under the pre-April 2000

rules re success fees the claimants would have paid the success fee out of their damages, but that payment would have been capped at 25% of the damages. Thus the claimants would have recovered £75,000 less a success fee of £18,750 = £56,250; the defendants' costs liability would have been reduced by £59,570.

3.6 The ATE premium in *Bontoft*. The ATE premium introduced a new dimension to the case. Material placed before the court at the end of the trial indicated that (a) the claimants had considerable difficulty in obtaining any ATE cover; (b) the premium for the actual cover obtained was 61.923% of the defendants' fees plus IPT. Thus the ATE premium alone exceeded the value of the claim. If this case had been litigated under the pre-April 2000 rules re additional liabilities, the claimants or their solicitors would have been liable for an ATE premium which would have extinguished the damages and left everyone out of pocket. On the other hand, under the current rules the defendant is left with a colossal total costs liability, which is more than five times the level of damages.

3.7 Should one way cost shifting be introduced? Cases such as *Bontoft* give rise to the question whether a one way fee shifting regime (subject to an exception in cases of unreasonable or frivolous conduct) might not be beneficial for all parties. A one way fee shifting regime, such as has always in practice prevailed in legal aid cases at first instance, would spare defendants the huge costs of ATE insurance in those cases which they lose.

3.8 If one way cost shifting is introduced, then it may be practicable to reverse the provision making "additional liabilities" recoverable. There would be no adverse costs risk to insure against at vast premiums. The claimant's solicitors and counsel could proceed on a CFA, on the basis that their success fee would come out of the damages (if any). Indeed, I understand that some solicitors<sup>172</sup> would be willing to proceed on CFAs in such cases with no success fee, provided that there was no risk of having to pay the other side's costs. Where success fees are payable under CFAs, they could be capped a 25% of the damages (as happened before April 2000).

3.9 Incentives needed. If one way cost shifting is introduced in such cases, there will need to be incentives (a) to deter frivolous claims and (b) to encourage acceptance of reasonable settlement offers. In considering appropriate incentives, it must be remembered that solicitors already have a substantial incentive to weed out weak claims before agreeing to act on CFAs.<sup>173</sup>

#### 4. JUDICIAL REVIEW PROCEEDINGS IN THE ADMINISTRATIVE COURT

4.1 Aarhus Convention. The UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (generally known as "the Aarhus Convention") came into force in October 2001. It was ratified by the UK and the European Community in 2005. The Aarhus Convention requires that there be proper consultation in respect of all administrative decisions which will affect the environment. Furthermore, Article 9 of the Aarhus Convention requires that members of the public with a sufficient interest must have

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<sup>172</sup> I do not know the position of counsel in this regard.

<sup>173</sup> One merit of CFAs which has been urged upon me in a number of recent written submissions is that they introduce an effective filter mechanism. Solicitors are usually scrupulous to weed out cases upon which they may be paid nothing. Indeed it is sometimes argued that CFAs inhibit access to justice because too high a standard is set for cases which go forward. If these arguments are valid, then it may be that no additional incentive is needed in respect of CFA cases.



access to a court or similar body in order to challenge developments which will have a significant effect on the environment. The procedures for access to justice must be “*fair, equitable, timely and not prohibitively expensive*”.<sup>174</sup>

4.2 Policy underlying the Aarhus Convention. The reasons for ratifying the Aarhus Convention and the public benefit of permitting interested persons to advance such challenges are discussed in numerous articles and reports.<sup>175</sup> There is an obvious public benefit in consultation with all interested parties concerning administrative decisions which impact upon the environment. There is also public benefit in permitting proper<sup>176</sup> judicial review challenges to such decisions. The arguments go beyond considerations of democratic legitimacy, important though those considerations are. The arguments are neatly stated by Steele as follows:<sup>177</sup>

“There are a number of things which citizens might offer to the decision-making process. One of these can be summarized as ‘situated knowledge’. Those who are closest to a problem and its effects may in certain respects have derived a greater understanding of that problem than those ordinarily required to resolve it. This might be expected to be the case with citizens who can be referred to as ‘affected parties’ – the people who will feel the effects of environmental problems most closely. However, other groups may provide the opposite and complementary virtue, of bread of reflection. These could be referred to as ‘interested’ parties. ‘Interested’ parties are often those who have reflected broadly about a particular set of problems, such as conservation or biodiversity, including non-governmental action groups such as environmental groups. So ‘interested’ and ‘affected’ parties are important components of the deliberating group, with almost opposing virtues to offer.

Furthermore, it is argued that dissenting views should be carefully considered where any claim to ‘knowledge’ is asserted, particularly in an area where there are many uncertainties. Scientific claims are increasingly debated in the public realm, and citizens are supposedly more able to gain access to information on the basis of which knowledge-claims can be asserted and questioned. It has been argued that civil society is thus increasingly well informed, and citizens increasingly aware that the claims of science are disputable. There is some difficulty with this claim, not least that scientific claims could equally well be seen as becoming increasingly closely associated with the industries which promote development, as those industries pay for more of the research. One suggestion here is that the public through its scepticism and willingness to question scientific claims, may provide important decision-making resources in respect of information, where those with responsibility for decisions choose to recognize this.”

4.3 Sullivan Report. A working party chaired by Mr Justice (now Lord Justice) Sullivan has concluded that the costs regime in the UK is prohibitively expensive, thus putting this country in breach of its obligations under the Convention: see “*Ensuring Access to Environmental Justice in England and Wales*” (May 2008),

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<sup>174</sup> Article 9(4).

<sup>175</sup> See, e.g., the Skeffington Report 1969; P. Stookes “*The Environment: Public Involvement and Constraints in Access to Justice*”.

<sup>176</sup> Frivolous or hopeless judicial review challenges will be weeded out at the permission stage.

<sup>177</sup> J. Steele “*Participation and Deliberation in Environmental Law: Exploring a Problem-solving Approach*” (2001) 21 Oxford Journal of Legal Studies (3) 415 AT 437.

hereafter referred to as “the Sullivan Report”.<sup>178</sup> The cost of judicial review proceedings in the UK is substantially higher than the cost of comparable proceedings in other jurisdictions subscribing to the Convention.<sup>179</sup> The Sullivan Report focuses on two aspects of costs, namely the other side’s costs and a party’s own costs.

4.4 Other side’s costs. I am told that, save in rare and exceptional cases, ATE insurance is not available in environmental judicial review claims. Therefore, unless the claimant has legal aid<sup>180</sup> or the benefit of a protective costs order, in the event of losing he is likely to incur a substantial liability for the defendant’s costs. The Sullivan Report proposes expanding the criteria for making protective costs orders (as to which see chapter 35 above), so that the claimant will be protected against liability for the other side’s costs in all cases falling within Article 9 of the Aarhus Convention.<sup>181</sup> The issues were considered by the Court of Appeal in *Morgan v Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 107 at [19] to [26], [35] to [40] and [47]. The Court favoured some modification of the criteria for making protective costs orders, having regard to the Aarhus Convention.

4.5 Own costs. Currently the only way that most members of the public could meet their own costs of bringing an environmental judicial review claim would be (a) with the benefit of legal aid or (b) under a CFA. A CFA is not feasible if a protective costs order is in place which caps both parties’ costs, as is pointed out in chapter 10 of the Sullivan Report. On the other hand the courts are reluctant to make a protective costs order in favour of the claimant without also capping the claimant’s costs: see *R (Buglife – The Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corporation* [2008] EWCA Civ 1209. Sullivan J recommended that in all cases falling within Article 9 of the Aarhus Convention the claimant, if substantially successful, should recover its costs, including any CFA uplift, free from any cap.<sup>182</sup>

4.6 One way cost shifting. There have already been cases in which the court has declined to make a costs order in a public authority’s favour, even though the authority had successfully defeated the claim.<sup>183</sup> This is because there were matters of ‘real public importance’ that needed to be resolved. See *R (on the application of Greenpeace Ltd) v SS for the Environment, Food and Rural Affairs* [2005] EWHC 2144 (Admin); *Friends of the Earth & Help the Aged v SS for Business, Enterprise and Regulatory Reform* [2008] EWHC 2518 (Admin). The test of ‘real public importance’ is not the same as the matter simply being of ‘public interest’. One possible option would be to expand the test and to introduce one way cost shifting for all environmental judicial review claims, leaving the “permission” requirement as a sufficient mechanism to weed out weak claims.

4.7 Options for reform. As our costs rules now stand, on one view England and Wales are not complying with the provisions of the Aarhus Convention, to which the

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<sup>178</sup> Available at [http://www.judiciary.gov.uk/publications\\_media/general/index.htm](http://www.judiciary.gov.uk/publications_media/general/index.htm).

<sup>179</sup> The Sullivan Report, paragraphs 15 – 20.

<sup>180</sup> Thus protected by section 11 of the Access to Justice Act 1999.

<sup>181</sup> The Sullivan Report, paragraphs 41 – 55 and Appendix 4.

<sup>182</sup> The Sullivan Report, paragraphs 70 – 71.

<sup>183</sup> The Supreme Court of New South Wales and the High Court of Australia adopted this approach in *Oshlack v Richmond River Council* (1998) 193 CLR 72, in which an individual unsuccessfully challenged a proposed development on environmental grounds. The judge made no order for costs and this was upheld on appeal.

UK has voluntarily signed up.<sup>184</sup> Three options for ensuring that there is compliance with the Aarhus Convention would be the following:

- (i) to introduce one way costs shifting;
- (ii) for protective costs orders to become the norm in environmental judicial review cases (where the claimant is of limited means), applicable only to the claimant's costs liability;
- (iii) for protective costs orders to become the norm in environmental judicial review cases (where the claimant is of limited means), with a substantially higher cap upon the defendant's costs liability than the cap upon the claimant's costs liability.

4.8 None of the above options may be palatable to public authorities. However, the burden upon them may be lessened if success fees cease to be recoverable (an option further discussed in chapters 35 and 47 of this report). It must be recognised that unless there are radical reforms along the lines suggested above, it is possible that England and Wales are in breach of their obligations under the Aarhus Convention.

4.9 There is an obvious case for harmonising the reform of the costs rules in environmental cases with the reform of costs rules for other judicial review cases: see *Compton v Wiltshire Primary Care Trust* [2008] EWCA Civ 749 at [20]; *R (Buglife – The Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corporation* [2008] EWCA Civ 1209 at [17]; *Morgan v Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 107 at [33] and [47] sub-paragraph (iv). It may therefore be the case that whatever expanded criteria are adopted for PCOs in environmental cases should then be extended to all judicial review claims. This is an issue which requires separate consideration during Phase 2.

## 5. CONCLUSION

5.1 During Phase 2 I look forward to receiving comments from stakeholders and court users on:

- the issues raised in paragraphs 3.7 to 3.9 above in relation to private nuisance actions; and
- the issues raised in paragraphs 4.6 to 4.8 above in relation to environmental judicial review cases.

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<sup>184</sup> See *Morgan v Hinton Organics (Wessex) Ltd* [2009] EWCA Civ 107 at [47] sub-paragraph (ii). In *Commission of the European Communities v Ireland* Case C-427/07 the Advocate General has commented on the scope and effect of the “prohibitively expensive” provision at paragraphs 87 – 99 of her opinion. In paragraphs 97 and 98 she suggests that the court's discretion not to order the unsuccessful party to pay the successful party's costs might achieve compliance. However, she suggests in paragraph 99 that such a discretion is not sufficient because the practice may change at any time.

## **CHAPTER 37. DEFAMATION PROCEEDINGS**

### **1. INTRODUCTION**

1.1 This chapter addresses costs in all types of publication proceedings<sup>185</sup> but is dominated by issues which arise in libel actions brought against media organisations. The number of defamation claims exceeds the claims in the other causes of action captured by this chapter and the media are organised as a group of defendants.

1.2 Other consultations. Costs in publication proceedings have been and continue to be the subject of public discussion and debate. The Ministry of Justice (“MoJ”) consulted on (a) conditional fee agreements, success fees and after-the-event insurance in publication proceedings in 2007<sup>186</sup> and (b) costs capping orders (in all civil litigation) in 2008, on behalf of the Civil Procedure Rule Committee.<sup>187</sup> The latter led to the new CPR rules 44.18 to 44.20 (inclusive) and section 23A of the Costs Practice Direction. The Government is currently consulting on controlling costs in defamation proceedings.<sup>188</sup> The issue of libel actions was also considered by the UN Human Rights Committee in its periodic review of human rights in the United Kingdom and Ireland.<sup>189</sup>

1.3 Current Ministry of Justice consultation. In the current consultation on “*Controlling costs in defamation proceedings*” the MoJ’s position is that unless there are compelling reasons not to, it will implement some or all of the four proposals put forward, namely (a) placing a limit on recoverable hourly rates, (b) mandatory cost caps or at least a requirement to consider cost caps, (c) linking the recoverability of the premium for ATE insurance with notification to the other party and (d) requiring the assessment of costs incurred under CFAs to consider the issue of proportionality when considering total costs (and not, as now, only base costs).<sup>190</sup>

1.4 Representations received. I received submissions from a few firms of solicitors which undertake a significant amount of CFA funded and/or claimant work (for ease I refer to these as “claimant firms” although in all cases they also undertake defendant work and the term is purely to distinguish them from media defendants), a provider of ATE insurance for publication proceedings, a firm of solicitors which acts for the regional press and the Media Lawyers Association (“MLA”), which represents many national newspapers, broadcasters and the Newspaper Society.

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<sup>185</sup> See definition, chapter 10, footnote 15.

<sup>186</sup> “*Conditional Fee Agreements in Publication Proceedings: Success Fees and After the Event Insurance*”: at <http://www.justice.gov.uk/consultations/docs/cp1607.pdf>. The response paper was published in July 2008.

<sup>187</sup> “*Civil Procedure Rules: Costs Capping Orders*”: at <http://www.justice.gov.uk/consultations/docs/costs-capping-consultation-letter.pdf>. The response paper was published in February 2009.

<sup>188</sup> “*Controlling costs in defamation proceedings*”, Consultation Paper CP4/09, published on 24<sup>th</sup> February 2009: at <http://www.justice.gov.uk/consultations/docs/controlling-costs-in-defamation-proceedings-consultation-paper-web.pdf>.

<sup>189</sup> United Nations CCPR: Consideration of Reports Submitted by States Parties under Article 40 of the Covenant Concluding Observations of the Human Rights Committee United Kingdom of Great Britain and Northern Ireland, Communication No.CCPR/C/GBR/CO/6 at paragraph 25.

<sup>190</sup> Footnote 188 above, paragraphs 6 and 14. The measures are proposed to apply to defamation proceedings and possibly other publication related proceedings: see paragraphs 46 – 48.

## 2. NATURE OF PUBLICATION PROCEEDINGS AND FACTORS AFFECTING COSTS

2.1 Before turning to cost specific issues in publication proceedings, a number of issues relating to the nature of, and procedures during, publication, and specifically defamation, proceedings are highlighted below. These may have an impact on costs.

2.2 The nature of publication proceedings. The common essence of all types of such wrongs is the publication of information to a third party. In human rights parlance the main causes of action engage Article 8 “*the right to respect for private and family life*” and Article 10 “*freedom of expression*” of the European Convention on Human Rights (“ECHR”). With the exception of misuse of private information claims, the proceedings are not generally conducted in those terms, but they are relevant considerations, not least because various interested parties have couched their concerns in Convention language, both Articles 8 and 10 and also Article 6 “access to justice”.

2.3 Remedies in defamation. Following the trial of an action, the only remedies available to a successful claimant in defamation are damages and an injunction restraining future repetition of the libel. There is now accepted to be a “notional” ceiling on general damages awards in defamation in the region of £215,000<sup>191</sup> or £250,000.

2.4 Most defamation claims are limited to claims for general damages; special damages claims are rare. The award of damages is to compensate the successful claimant for the loss of reputation suffered, hurt feelings and to vindicate him or her.<sup>192</sup> However, despite the compensatory element of damages, it is obvious that in defamation (and privacy), unlike commercial claims, the action is not just about money. A claimant may attach great value to winning his claim if the judgment vindicates him or her, even though in monetary terms the award is not substantial. This is a factor which makes applying the notion of proportionality of what is at stake, to the costs incurred more complex in (most) publication proceedings than in purely commercial disputes. Nevertheless, other things being equal, more serious libels result in larger awards of damages and the ratio of damages to costs incurred is a relevant consideration.

2.5 Damages in privacy. Misuse of private information has only recently emerged as a cause of action and there have been very few privacy claims which have gone to trial and resulted in an award of damages. Until Mr Max Moseley was awarded £60,000 in damages following trial,<sup>193</sup> damages awards by the courts were few in number and low in amount.<sup>194</sup> The costs of High Court litigation will inevitably be substantially higher than such awards, if privacy claims go to trial. As in libel, this adds complexity to considering proportionality of costs.

2.6 The purpose of this review is not to consider the substantive law, but such issues invariably impinge on costs considerations.

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<sup>191</sup> *Gur v Avrupa Newspaper Ltd* [2008] EWCA Civ 594; *Tierney v News Group Newspapers Ltd* [2006] EWHC 3275 paragraph 10.

<sup>192</sup> Gatley on Libel & Slander 11<sup>th</sup> Edition §9.1-§9.

<sup>193</sup> *Moseley v News Group Newspapers* [2008] EWHC 1777 (QB).

<sup>194</sup> *Lady Archer v Williams* [2003] EWHC 1670 (QB), £2,500 damages; *Campbell v MGN* [2002] EWHC 499 (QB) £2,500 damages; *Douglas v Hello! Ltd* [2005] EWCA Civ 595 £3,750 damages for each claimant; *McKennitt v Ash* [2005] EWHC 3003 (QB) £5,000 damages; *Applause Stores Productions Ltd v Raphael* [2008] EWHC 1781 (QB) £2,000 damages.

2.7 The conduct of defamation proceedings. The following procedural and conduct issues are worthy of note in defamation proceedings in that they have the potential to impact on costs.

2.8 High Court proceedings. Defamation proceedings must be commenced in the High Court unless both parties agree in writing.<sup>195</sup> High Court proceedings are more expensive than county court actions.

2.9 Jury trials. The parties enjoy a right to trial by jury, except in limited circumstances.<sup>196</sup> Jury trials inevitably last longer than trial by judge alone, with the concomitant impact on costs. This is a factor to bear in mind when comparing costs with other types of proceedings where jury trials have no role. Trials are sometimes split which allows a specific defence to be heard by judge alone.

2.10 The importance of the statements of case. Statements of case are important in all proceedings. Anecdotally, the significance attached to pleadings in defamation appears to be greater in this area of law than in other types of common law claims. This has the capacity to reduce costs by clearly defining the issues, but it also has the ability to increase costs through constant amendments and battles about pleadings. One submission received noted that one of the developments in libel law which that lawyer believed had added to costs was the requirement to plead a reply to a justification defence. This was not a criticism of the practice, but merely information about costs.

2.11 Interim applications. The importance of interim applications in defamation was noted by the Neill Committee in 1991<sup>197</sup> and there is every reason to believe that it remains true today.<sup>198</sup> The impact of interim applications on total costs of defamation actions (even if not other types of publication proceedings) is a factor worthy of consideration. One submission suggested that, as part of more stringent case management, some interim applications, for example meaning applications, could be dealt with on paper.

2.12 “Aggressive” litigating. Although I have little evidence<sup>199</sup> of practitioners adopting a more aggressive attitude to litigation in this area of law than in other areas of practice, the MoJ’s current consultation believes that one of the benefits of its proposals will be a reduction in aggressive behaviour.<sup>200</sup>

2.13 The MLA in their submissions to me adopted part of the speech of Lord Hoffman in *Campbell v MGN Limited* in which he stated that “*The second factor*

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<sup>195</sup> CPR 7 PD paragraph 2.9(1).

<sup>196</sup> Supreme Court Act 1981 s.69(1).

<sup>197</sup> The Supreme Court Procedure Committee, Report on Practice and Procedure in Defamation, July 1991, paragraph 1.1.3 (the “Neill Committee”) stated “...*more time is spent on preliminary skirmishing in defamation action than in other forms of litigation, either at the interlocutory stage or at the beginning of the trial before the jury is empanelled. This is in our opinion, and experience, largely because of the nature of the cause of action. In no other area of the law is there so much divergence in the circumstances from one case to another. It is hardly possible to imagine a ‘standard’ libel action*”.

<sup>198</sup> The current editors of Gatley on Libel & Slander (11<sup>th</sup> Edition) refer to the above section of the Neill Committee report and state “...*defamation remains a field in which a sound grasp of interlocutory tactics is frequently of crucial importance in determining the outcome, whether by forcing a favourable settlement before trial or by ensuring that if trial comes the litigant’s case is thoroughly prepared and his opponent’s properly understood*” at §32.1.

<sup>199</sup> I have only tried one libel action (2004). That action was conducted with considerable vigour on both sides.

<sup>200</sup> Footnote 188 above, at paragraph 13 on page 26.

*[giving rise to the blackmailing effect] is the conduct of the case by the claimant's solicitors in a way which not only runs up substantial costs but requires the defendants to do so as well. Faced with a free spending claimant's solicitor and being at risk not only as to liability but also as to twice the claimant's cost the defendant is faced with an arms race which make it particularly unfair for the claimant afterwards to justify his conduct of the litigation on the ground that the defendant's own costs were equally high.*"<sup>201</sup>

2.14 Similar criticism has been made recently by Mr Paul Dacre, Editor-in-Chief of the Daily Mail.<sup>202</sup>

2.15 In contrast, representations received from three claimant firms laid the blame at the door of media defendants for increasing costs. One claimant firm said that in their experience it was defendants which dragged out litigation and thereby caused an increase in base costs.

2.16 Specialist Lawyers. Publication proceedings are a specialised area of practice dominated by a small number of (generally) London based solicitors firms and a small group of barristers based in only a handful of chambers. The concentration of work in this field is noteworthy but there are no data currently available to establish whether it is greater than in other areas of practice like intellectual property.

### 3. STATISTICAL INFORMATION CONCERNING DEFAMATION PROCEEDINGS AND PUBLICATION CLAIMS

3.1 Data are not available for all types of publication proceedings. The MLA has kindly provided some data and these are set out in Appendix 17.

3.2 Defamation proceedings issued. One contributor has stated that most defamation claims are commenced in the Royal Courts of Justice (RCJ) rather than in the district registries. It may therefore be helpful to set out the number of defamation actions issued at the RCJ each year in the recent past. The figures are as follows.<sup>203</sup>

Table 37.1: Defamation actions issued at the RCJ

Year	No. of claims issued	Value of claim		
		£15,000 to £50,000	Over £50,000	Unspecified
2007	233	43	45	145
2006	213	24	39	150
2005	252	43	70	139
2004	267	30	31	206
2003	190	22	15	153

<sup>201</sup> [2005] UKHL 61 at paragraph 31.

<sup>202</sup> In a speech to the Society of Editors in November 2008, Mr. Dacre, criticised lawyers for running "*relatively straight-forward*" cases on CFAs and then running them for "*as long as possible*". I assume that "*relatively straight-forward*" means one which a claimant is bound to win. This proposal therefore puts matters in the hand of the defendant to control CFA costs.

<sup>203</sup> [www.justice.gov.uk/publications/judicialandcourtstatistics.htm](http://www.justice.gov.uk/publications/judicialandcourtstatistics.htm). In order to consider these figures in context, please see the statistics set out in chapter 5.

3.3 Data provided by the MLA. In Appendix 17 is a table of the anonymised data provided by the MLA. These data are of publication claims against MLA's members which were disposed of in 2008. The data show a total of 154 cases, of which 137 were libel claims, 15 were privacy claims and two were combined libel and privacy complaints.

3.4 The MLA highlighted the difference between damages paid and costs incurred. Of the 154 claims the total costs (paid or currently sought) were just over three times the total amount of damages paid. Of those 154 claims, seven were settled by payment of a global sum. Of the remaining 147 claims, for which there were separate values for claimant's costs and compensation (even where a value was zero), damages exceeded claimant's costs on 52 occasions.

3.5 The costs shown for claimants and defendants in the same case are not always on a like-for-like basis. The costs reflect the total liability to the paying party and for those cases funded on a CFA, this includes the success fee and ATE insurance premium (where applicable). In the data the claimant's costs are likely to include VAT where the claimant was not registered. In order to achieve like-for-like costs, it would be necessary to exclude VAT but this is not possible. The MLA's submission was that VAT alone would not account for the difference between the amounts of claimant and defendant costs.

3.6 CFA funded claims. There are no exact data of how many complaints each year are started on CFAs, or how many of the claims in the above table were funded by CFA agreements. The MoJ in a previous consultation estimated (or worked on the basis that) half of all publication proceedings were funding by CFAs.<sup>204</sup> The data provided by the MLA of claims disposed of in 2008 showed that of the total of 154 claims only 27 (or 17.5%) were CFA funded.

3.7 Data provided by one publisher. One publisher<sup>205</sup> to whom I spoke during Phase 1 mentioned its experience of defamation claims. In the last two years the publisher had been faced with two defamation claims. Both claims were settled after several months (in one case the period of time was three months) and following four and seven "rounds" of correspondence respectively. The amounts paid in compensation and the costs of each party in relation to those claims are set out in the table below.

Table 37.2: 2008 figures for a publisher's costs relating to defamation proceedings

<b>The publisher's costs</b>	<b>The other side's costs</b>	<b>The amount paid in compensation</b>
£6,000 (approximately)	£1,500	£15,000 (damages and costs were dealt with as one sum)
£9,000	£16,000 (£11,250 in costs plus half of the ATE premium of £9,500)	£5,000

<sup>204</sup> CFAs in publication proceedings, success fees and ATE (See footnote 186 above), paragraph 22.

<sup>205</sup> This publisher is not a news organisation and therefore not a contributor to Appendix 17.



#### 4. THE COST OF PUBLICATION PROCEEDINGS

4.1 The data from the MLA showed that out of the total of 154 claims, the claimant's total costs exceeded £100,000 in 15 cases and were between £50,000 and £100,000 in two cases. The same data showed that the defendant's total costs exceeded £100,000 in seven cases and were between £50,000 and £100,000 in five cases. It was clear from the data that costs on each side of £500,000 or even £1 million were not uncommon.

##### (i) Costs in non-CFA cases

4.2 I considered the 34 non-CFA actions in which both sides incurred legal expenses, those legal costs have been determined, the claimant's costs were £2,500 or more and some damages/compensation was paid.

4.3 The above criteria were selected out of all the non-CFA claims for the following reasons:

- (i) Data from claims where the costs are still to be resolved are likely to distort the review because the costs may be substantially reduced on assessment. (I would be grateful for any update which the MLA is able to provide on those cases in the next consultation round).
- (ii) Claims where the claimant's costs were below £2,500 are likely to have little to say about concerns about high costs in civil litigation, although that the cut-off point is arbitrary. (In any event, this group overlapped substantially with (iv) below.
- (iii) Claims where no damages were paid and/or a global sum was paid are excluded as one cannot distinguish between costs and damages.
- (iv) Claims where the defendants' costs were zero are also excluded. I assume that such claims are matters which were dealt with exclusively by in-house lawyers and did not consume a substantial amount of their time. By excluding those claims I note that I underestimate defendants' costs relative to claimant's costs. However, I have assumed from the fact that no costs were incurred, that these were claims where the defendant saw immediately that it made an error and admitted liability, i.e. these are not actions which would fall within the type of proceedings which the MLA perceives as "unmeritorious". Furthermore, including these claims would preclude any meaningful comparisons, by introducing infinite numbers in this respect.

4.4 Of those 34 cases, in five the difference in costs between claimant and defendant was not material (i.e. the higher costs were less than 1.1 times the costs of the other side), in 24 claims the claimant's costs exceeded the defendant's and in the remaining 5 the defendant's costs exceeded the claimant's.

4.5 In the 24 claims in which the claimant's costs exceeded the defendant's, the relative costs ranged from being approximately 1.1 times the defendant's costs to up to 24 times in one case (although this was something of an outlier). In considering those 24 cases, the claimant's costs were on average approximately 3.7 times higher than the defendant's.

4.6 As stated above, the data was anonymised and I do not know the complexity of issues raised, the stance taken by the defendant in each case or the degree of investigation which was required.

(ii) Costs in CFA cases

4.7 These data are more difficult to break down as the MLA provided total cost liabilities which, as set out in paragraph 3.5 above, mean that defendant and claimant costs are not on a like-for-like basis. The MLA has said that it will attempt to get more detailed data to me at a later date.

4.8 Adopting the same criteria as above for non-CFA cases, one is left with only nine claims to consider, mostly because a number of the CFA claims are still to have costs assessed. One of those nine was removed from consideration because the defendant's costs were so close to zero that it could distort the general picture given by the rest of this group.

4.9 Unsurprisingly the claimant's total costs exceeded the defendant's costs in all cases. This varied from a difference of a factor of 2.1 times to a factor of 11 times. It averaged approximately 4.9 times. In all these 8 cases, the claims were settled. It is not possible to tell whether the point of settlement was close to trial or not.

5. COMPARISON WITH OVERSEAS DEFAMATION COSTS

5.1 A recent study of costs in defamation proceedings in different jurisdictions was undertaken by the University of Oxford's Centre of Socio-Legal Studies ("the Oxford Study").<sup>206</sup> This study was commissioned by Associated Newspapers Limited.

5.2 Part of this study asked practitioners in the different jurisdictions to estimate costs for two different hypothetical libel actions, which were based on two actual claims in England. I do not know how representative those two claims actually were.

5.3 Without endorsing the conclusions or methodology of that study, the following conclusions from that report are worth highlighting, namely that two influential factors driving costs in this jurisdiction compared with others were the number of lawyers involved in each case (which in the UK were higher than other jurisdictions) and the length of court proceedings.

5.4 Ireland. Ireland is a common law jurisdiction, which has cost-shifting and, from the Oxford Study, has similar substantive law in defamation to this jurisdiction. It therefore appeared worthwhile to look at this jurisdiction with some care. In contrast to some of the other jurisdictions in the study e.g. Bulgaria where the study found that the hypothetical libel claims could conclude at trial for less than £600 in total!

5.5 In Ireland, defamation claims with a value of less than €38,000 are conducted in the county courts by a judge sitting alone. Higher value claims are conducted in a comparable manner to defamation claims in this jurisdiction.<sup>207</sup>

5.6 Ireland does not have conditional fee agreements or provide for success fees, but the study states that many lawyers act for non-wealthy clients on a "no foal, no fee" basis. This means that they will only seek to recover costs from the client in the event that the client is successful and to cap their costs at the level which is recovered

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<sup>206</sup> "A Comparative Study of Cost in Defamation Proceedings Across Europe", Programme in Comparative Media Law and Policy, Centre for Socio-Legal Studies, University of Oxford, December 2008.

<sup>207</sup> Oxford Study page 87, paragraph 5.

from the losing party. There were no data on the number of cases which are conducted on this basis.

5.7 In the two hypothetical claims, the practitioners estimated that total costs to trial for the simpler claim would be between €100,000 and €150,000 in the county court or €300,000 to €600,000 in the High Court and for the more complex claim would be €150,000 to €300,000 and €500,000 to €650,000 respectively.<sup>208</sup> This compared with base costs incurred in this jurisdiction estimated at £317,000 for the simpler claim and £2.4 million for the more complex claim.

## 6. NON-MEDIA DEFAMATION PROCEEDINGS

6.1 Smaller defamation claims. Not all defamation actions involve the traditional media. Recent trends in communications and media, in particular the rise of user generated content on the internet, are likely to mean that in the future libel actions (and possibly privacy claims) against non-media publishers will continue to be significant in terms of the number of claims issued (if not the value).

6.2 One submission highlighted the disparity of the effect of the substantive law and procedure of defamation proceedings on media defendants as opposed to defendants with limited means. In that firm's experience, the nature and practice of defamation in this jurisdiction has an unfair effect on impecunious defendants and in their view this was of greater concern than the complaints raised by media defendants.

6.3 A greater role for the county court? It is sometimes said<sup>209</sup> that defamation cases are restricted to the High Court. Whilst it is true that such cases cannot be commenced in the county court, they can be and sometimes are transferred to the county court. I am aware of a 3 day defamation trial is due to be heard in a county court outside London later this month. It may be that costs could be saved if more use were made of the power to transfer the less substantial defamation actions to the county court.

## 7. OVERVIEW OF SUBMISSIONS

### (i) Claimant firms

7.1 Almost all the claimant firms placed great importance on the role of CFAs in offering non-wealthy claimants access to justice. There was universal concern from firms who act on CFAs that proposals to limit their operation (whether by interfering with base costs, success fees, ATE insurance or all of these aspects) would have serious implications for access to justice for potential claimants. Two firms also stated that if firms were not properly remunerated for work done on CFA cases, there was a risk that no firm would be willing to act for such claimants. More than one claimant firm contrasted the position of ordinary claimants with the position of a well-resourced media organisation defendant.

7.2 One claimant firm believed that the costs of litigation needed to be addressed. Another said that costs were not excessive, relying upon the current requirements of reasonableness and proportionality.

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<sup>208</sup> Oxford Study p age 93, paragraph 9.

<sup>209</sup> E.g. paragraph 2 of the MoJ's recent consultation paper.

7.3 Two claimant firms thought that the courts already had significant tools available to them to control costs, including ultimate discretion under CPR rule 44.3. They suggested that the solution to high costs might lie in more forceful application of the current rules.

7.4 One firm raised concerns that the suggestions proposed by the MLA for controlling costs i.e. ways other than by CPR Part 44, could lead to inequality of arms, as claimants would be faced by well resourced media defendants who were free to spend even if such costs were not recoverable.

7.5 In response to the MLA's allegation that the CFA regime encourages unmeritorious claims, the claimant firms stated that it is not in their interests to do this. An unmeritorious claim is a weak one and if they lose actions conducted for clients on a CFA, then the losses to their firms are enormous if the case has gone to trial.

#### (ii) MLA

7.6 The MLA's position is that costs are excessive and this is exacerbated by the CFA regime. In particular, the MLA's view is that base costs are excessive, and in CFA cases this problem is compounded by success fees which are disproportionate to the risk assumed and ATE insurance premiums which are unreasonable.

7.7 The MLA's position is that the current regime is incompatible with the media's Article 10 rights<sup>210</sup> and that if cost-shifting is to remain in all civil litigation, then separate provisions should be made for all cases engaging Article 10 ECHR.

7.8 The MLA does not believe that detailed assessment is an effective method of controlling costs.

7.9 The MLA's proposals are that all cases which engage Article 10 should have mandatory cost caps, fixed recoverable hourly rates and that there should be no success fees recoverable, alternatively recoverable success fees should be much less than 100%.

7.10 One claimant firm cautioned against defining a costs regime by reference to Article 10. They felt that this could be open to abuse.

#### (iii) Role of case management

7.11 Representatives from both sides raised the prospect of more active case management as providing a means of controlling costs. I return to this below. It was one area of agreement in principle.

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<sup>210</sup> However, in *Campbell v MGN Limited* [2006] UKHL 61 at paragraph 28, the House of Lords held that the CFA regime was compatible with the ECHR.

## 8. BASE COSTS

### (i) Hourly rates

8.1 There is a perception that solicitors engaged in publication proceedings work charge a higher hourly rate than solicitors practicing in other non-commercial fields.

8.2 One claimant firm provided me with its hourly rates charged for cases taken on both CFA and non-CFA basis and also data on hourly rates allowed following detailed assessment in various cases in which it had acted. This was the only hard evidence on the subject of base costs. The rate charged for partners by that claimant firm was materially lower than the figure of £600 per hour for one firm's senior partner which has been referred to in other recent papers<sup>211</sup> and some of the figures provided by the MLA in which they stated that claimant solicitors regularly charged rates varying between £650 and £450 per hour for partners. I have not seen anything to suggest that such hourly rates are actually recovered from unsuccessful defendants.

8.3 I considered the information provided by one firm of its costs. The categories were not on a "like-for-like" basis with the banding in the Guideline Figures for the Summary Assessment of Costs and the post-code lottery factor is likely to have a significant impact on any attempt at such a comparison. A top claimant firm with an "EC" postcode should not be treated differently from such a firm with a "W" postcode. Notwithstanding these two problems, it is fair to conclude that the hourly rates were above the appropriate Guideline Figures for Summary Assessment.

8.4 Bearing in mind that this is a specialist area of law, it might be appropriate to provide more precise guidelines for recoverable hourly rates in respect of defamation and other publication proceedings than those currently available. Specific guidelines would apply to both claimant and defendant firms and would be known before work is done. This may introduce more uniformity into assessment of costs.

### (ii) Comparing base costs in CFA and non-CFA cases

8.5 In one CFA funded case drawn to my attention by representatives of both sides of the divide and where the total costs of the successful claimant were undoubtedly a substantial sum of money at around £388,000, the base costs on each side were comparable: the claimant's were approximately £132,000 and the media defendant's were approximately £136,000.

### (iii) Conduct

8.6 One of the complaints raised against CFAs is that the claimant does not exert the same control over base costs as a usual fee-paying client, having no incentive to do so.<sup>212</sup> There is logic in that position. However, one claimant firm argued that this fear was misplaced because cost assessment would not permit recovery of costs which were not properly incurred.

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<sup>211</sup> The Oxford Study, page 56: It reported that one West End based firm charged £600 per hour for its senior partner and £375 per hour for other partners. It also reported that another firm charged between £400 and £450 per hour for partners.

<sup>212</sup> OUP study.

8.7 Anecdotally, I am told that one of the problems is that there is duplication between solicitors and counsel in CFA cases.

8.8 Information was provided about a case where the defendant (who went on to lose) decided to instruct leading counsel for trial and only after that decision was taken, did the claimant decide to do the same in order to achieve a “level playing field”. I do not know how typical this is, but in that particular instance it was a decision of the defendant which added to total base costs.

## 9. COST CAPPING

9.1 New regime. From April 2009 the new CPR rules 44.18 to 44.20, to be read in conjunction with section 23A of the Costs Practice Direction, provide for cost capping orders in “exceptional circumstances”.<sup>213</sup> Cost capping in general is discussed in chapter 45 below.

9.2 MoJ’s proposals. The MoJ’s current review proposes that cost caps should be mandatory in defamation claims (and possibly other publication proceedings) or at least that there should be a mandatory consideration of cost caps in all such proceedings. In this regard, the MoJ’s position is that the pressures towards disproportionate costs mean that the need for costs capping will arise much more frequently in defamation proceedings than in general litigation, where cost capping is “exceptional” (the criterion in paragraph 23A.1 of the Costs Practice Direction); therefore defamation claims require different treatment from other civil litigation.

9.3 Current practice. On the information provided by the MLA concerning cases disposed of in 2008, only one case (number 4) is recorded as having been subject to a cost cap. This was agreed between the parties. This was one of the few cases which was disposed of by a trial rather than through settlement. As it is just one case, one cannot read too much into the co-incidence of these two factors. However, this fact may be relevant to the MLA’s contention that there are fewer trials because defendants feel compelled to settle owing to the cost consequences of losing.

### (i) Considerations specific to defamation proceedings

9.4 The MLA, which is in favour of mandatory cost caps, argues that this will save costs of detailed assessment after costs have been incurred.

9.5 More than one ‘claimant firm’ raised the prospect that cost caps would create an inequality of arms contrary to the overriding objective. Cost capping does not enforce capped spending and the concern was that a media defendant would be free to spend in excess of any mutual costs cap. This would also be a possibility for wealthy claimants but would not be for ordinary citizens.

9.6 One claimant firm thought cost capping was inappropriate to defamation proceedings because of their complexity. I note that Eady J (a very experienced judge in this field) in *Tierney v News Group Newspapers Ltd* (one of the few reported cases on cost capping in this area of law) spoke of the difficulties inherent in prospective cost capping in libel actions “because no case is like another and there are generally hidden traps around every corner”<sup>214</sup> and the fact that cases change shape as they head to trial which would require parties to return to court to vary the

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<sup>213</sup> CPD paragraph 23A.1.

<sup>214</sup> [2006] EWHC 3275 (QB) at paragraph 11, See also paragraph 15.

cost capping order.<sup>215</sup> More than one claimant firm raised objections to cost capping on the basis that they were likely to add to costs and delays and could result in satellite litigation. This appears to be a risk because of the sort of factors envisaged by Eady J in *Tierney*.

9.7 One submission stated (neutrally) that if the cost capping proposal were adopted it would probably mean that case management conferences which are currently heard by Queen's Bench masters would need to be heard by a specialist libel judge, with the necessary experience of libel costs.

## 10. CFAS IN DEFAMATION PROCEEDINGS

10.1 Outcome of Civil Justice Council's mediation. The operation of CFAs has been the subject of a mediation organised by the Civil Justice Council. This reached some agreements in principle between claimant firms and media groups. It gave rise to a protocol between Carter-Ruck and News International to be followed in all CFA cases brought by clients of Carter-Ruck against a company within News International.<sup>216</sup> David Price Solicitors & Advocates have an agreement with the BBC governing the conduct of CFA cases.<sup>217</sup>

10.2 Positions in representations. As stated above, claimant firms emphasise the role which CFAs play in achieving access to justice. The MLA maintain that CFAs are not necessary to secure access to justice and point to the fact that the majority of claims (shown in the data provided) were not brought on a CFA. This does not of course address the question of whether the CFA funded claims would, or indeed could, have been brought without that funding option.

10.3 Some firms which do CFA and non-CFA work said that the latter was more lucrative, once one factors in cases where a potential client comes seeking advice but which are not taken on.

### (i) Success fees

10.4 Following the Ministry of Justice's consultation in 2007, a majority of respondents supported the principle of introducing fixed staged uplifts for success fees. Furthermore there is evidence that staging success fees is becoming a norm in practice.

10.5 In that MoJ consultation process, a five staged fixed success fee proposal, as set out in the Theobalds Park Plus Agreement, received support from 10 out of 19 respondents. Others responded favourably but with some specific reservations.

10.6 One claimant firm stated in its submissions that if success fees were made irrecoverable then there was a risk that firms would be less willing to take on marginal cases.

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<sup>215</sup> *Ibid* at paragraph 15.

<sup>216</sup> This is referred to as the "Theobalds Park Plus Agreement". See Annex C to Ministry of Justice's "Conditional Fee Agreements in Publication Proceedings: Success Fees and After the Event Insurance".

<sup>217</sup> Annex D.

10.7 A staged success fees regime which allowed for different rates in exceptional circumstances was proposed by the Bar Council in response to the previous MoJ consultation.

(ii) ATE insurance

10.8 ATE insurance is addressed elsewhere.<sup>218</sup> However, there are issues which are peculiar to ATE insurance in publications proceedings.

10.9 Insurance is based upon the principle that the many pay for the few. There are only a limited number of claims in this area of law and only some of these are CFA funded. The main complaint of defendants is that the premiums are excessive. The other issues raised are staged premiums, an initial period for non-recoverability of premiums and the notification to the defendant of the policy.

10.10 Premiums and staged premiums. I have received information from different sources concerning premium levels in respect of ATE insurance cover for £100,000. It appears that where premiums are staged, the premium for the initial stage (settlement within 14 days of notification claim) will be low, possibly in the range £1,000 to £2,000. Where the action proceeds through all stages to trial, the premium may (depending on the apparent strength of the claimant's case) rise to around £65,000.

10.11 Level of cover. Another concern raised by defendants is that the level of ATE insurance cover is often insufficient. The MLA states that even cover of £200,000 is unlikely to meet a defendant's costs in defending an article to trial. Therefore either the successful defendant obtains only a marginal benefit in terms of costs recoverable or the claimant takes out additional cover (which can be up to £250,000) but the defendant is faced with the additional premium for that cover if it loses. No-one has provided any data on what these additional premiums cost.

10.12 Capping the recoverability of premiums. The courts cannot determine the premiums charged by insurance providers. The issue is whether there should be a cap on their recoverability. This was suggested by media respondents to the MoJ's consultation and they proposed that any premium's recoverability was capped at 30% of the level of cover. This would leave the claimant liable for the difference, although in practice, it appears that premiums are not recovered from losing claimants. This could have a material impact on the market for ATE insurance and it raises similar issues to those considered below in respect of a non-recoverability period.

10.13 Non-recoverability period. The Government's latest proposals for defamation proceedings envisage a period in which ATE insurance is not recoverable if a claim settles at an early stage.<sup>219</sup> The MLA support this. One claimant firm had no objections in principle to a period of non-recoverability of ATE insurance premiums. However, the counter-argument is that adopting this approach will push up premiums at later stages and may mean that some claimants cannot obtain insurance cover. This would occur because risks are spread over fewer claims and because it would be necessary for the insurer to have someone with knowledge of the case to assess the price of the premium on a case by case basis. This would increase costs and therefore premiums.

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<sup>218</sup> Chapter 14 above.

<sup>219</sup> This is similar to the proposal for first ATE recoverability in the scheme proposed in the response paper "*Conditional Fee Agreements in Publication Proceedings: Success Fees and After the Event Insurance*" (footnote 186 above), Annex B.



10.14 Notification. In its responses to the earlier MoJ consultation, the media suggested that ATE insurance should only be taken out after giving notice to the prospective defendant and giving that defendant an opportunity to object.<sup>220</sup> Insurers object to this on the basis that it would reduce the total pool of policies and thereby concentrate risks. However, the agreement between David Price Solicitors & Advocates and the BBC does provide for the claimant to give the BBC prior notice before it takes out insurance.

10.15 Mandatory ATE insurance. One “claimant firm” suggested that if the media saw CFA claimants without ATE insurance as a risk, a potential answer is to make it mandatory. Another stated that only a truly impecunious claimant would risk pursuing a claim to trial without ATE insurance. I do not have any data on the number of CFA claims which are brought without ATE insurance. Any information on this would be helpful.

10.16 The wider issue. The issues concerning success fees and ATE premiums in defamation proceedings are part of a much wider issue, which will be discussed in chapter 47 below, namely whether these sums should be recoverable at all.<sup>221</sup> If the answer is “no”, then careful consideration must be given to how access to justice can be secured for defamation claimants in the future. From the media’s point of view, the imposition of a tight cap upon the costs recoverable from claimants may be a price worth paying if success fees and ATE premiums cease to be recoverable. These are issues to be explored in Phase 2.

## 11. CASE MANAGEMENT AND MISCELLANEOUS

11.1 Greater use of case-management was a common theme appearing in many different representations submitted. However, few made specific recommendations for what measures by way of case management might be appropriate and effective.

11.2 One firm of solicitors proposed a system of prospective cost budgeting (rather than cost caps). It suggested that careful budgeting could replace detailed assessment (and therefore save costs at that stage). The proposal envisaged the court seeing and approving each side’s costs for each stage of proceedings. This would require more case management than currently is the norm but would probably save on detailed assessment. Costs management in general is discussed in chapter 48 below.

11.3 Cost budgeting could include agreeing whether leading and junior counsel would be used at trial. One claimant firm suggested that if the MoJ’s proposal that proportionality should be applied to total costs (and not just base costs) on assessment, then a decision about whether to engage leading counsel for a trial could (retrospectively) be the difference between a successful claimant and/or his lawyers being out of pocket, or not, if, upon assessment, the total costs were scaled back for being disproportionate. In contrast, if such decisions were approved/agreed prospectively, the parties would be operating from a position of certainty.

11.4 Other proposals for more stringent case management included assigning a case to a specific judge once the statements of case have been served; and for that

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<sup>220</sup> “Conditional Fee Agreements in Publication Proceedings: Success Fees and After the Event Insurance” (footnote 186 above), Annex B.

<sup>221</sup> Some of the difficulties of defamation proceedings under the present costs regime are illustrated by the decision of Coulson J in *Noorani v Calver* [2009] EWHC 592 QB at [36].

judge then to take a more pro-active role in deciding what preliminary issues could be determined and possibly dealing with more interim applications on paper.

11.5 The MLA proposed that negotiation or mediation should be more actively encouraged or even made compulsory. However, one claimant firm was sceptical about this. Mediation requires willingness on both sides to engage in give and take and this was not always apparent.

## 12. REVIEW

12.1 I look forward during Phase 2 of the Costs Review to hearing the views of all involved in publication proceedings on the issues discussed in this chapter.

## **CHAPTER 38. COLLECTIVE ACTIONS**

### **1. INTRODUCTION**

1.1 **Collective actions.** Collective actions may be either “opt in” (i.e. claimants must make a positive choice to participate) or “opt out” (i.e. claimants must make a positive choice to withdraw). Group actions under the Civil Procedure Rules (“CPR”) are opt in. Class actions in the USA, Canada and some other jurisdictions are opt out.

1.2 The Civil Procedure Rules preserve, in the main, the ordinary costs shifting rule for group litigation in England and Wales. In the first part of this chapter I shall review the modifications to the existing costs rules which have been made, in order to accommodate the requirements of group actions. I shall also review consumer collective redress, which is the subject matter of some group actions.

1.3 Later in this chapter there is discussion of possible reforms and of other possible approaches to the costs of collective actions, primarily the “no costs” rule. Attention is also given to additional mechanisms, which are relevant to costs in collective redress cases. One issue which arises is whether the existing cost shifting rules need modification on matters such as common costs and cost capping. Another is whether there is a need for different arrangements for collective redress. Should we follow other common law jurisdictions which have a no cost shifting rule in collective redress litigation? Although no common law jurisdiction has adopted one way costs shifting (the losing defendant pays), should we consider that as well? Finally, should other mechanisms be available to deal with costs in collective redress actions?

### **2. CPR AND COST SHIFTING**

2.1 There is some modification of the ordinary costs shifting rule in the principles governing costs under the group litigation order (“GLO”), contained in CPR rule 19.11. A special provision in the CPR provides for what are called “common costs”. As well there has been some variation in the ordinary costs shifting rule as a result of case-law. There has been criticism of the existing costs rules as a disincentive to collective redress: see, e.g. G Lagdon-Down, “*Product Liability: Safety First*” (2007) Law Society Gazette, 18<sup>th</sup> October 2007, 22. A particular gap in the existing rules is said to be collective redress for consumers.

2.2 **Common Costs.** CPR rule 48.6A triggers a special rule for costs once a court has made a GLO. In summary the group members are liable, severally, for an equal proportion of the “common costs” of proving the generic issues. A group member is also liable for the individual costs of his claim, namely proving the issues (e.g. quantum) relevant to his or her own claim. CPR rule 48.6A reads, in part:

“(4) The general rule is that where a group litigant is the paying party, he will, in addition to any costs he is liable to pay to the receiving party, be liable for –

- (a) the individual costs of his claim; and
- (b) an equal proportion, together with all the other group litigants, of the common costs.

(5) Where the court makes an order about costs in relation to any application or hearing which involved –

- (a) one or more GLO issues; and
- (b) issues relevant only to individual claims,

the court will direct the proportion of the costs that is to relate to common costs and the proportion that is to relate to individual costs.”

A group litigant is the party whose claim is entered on the group register. The common costs are the costs incurred in relation to the GLO issues; individual costs incurred in a claim while it is proceeding as a test claim; and costs incurred by the lead solicitor in administering the group litigation.

2.3 Under the rule, unless the court orders otherwise, any order for common costs against group litigants imposes on each group litigant several liabilities for an equal proportion of the common costs. Where common costs have been incurred before a claim is entered on the group register, the court may order a group litigant to be liable for a proportion of those costs.

2.4 Under CPR rule 48.6A (7), where a claim is removed from the register, the court may make an order for costs in the claim, which includes a proportion of the common costs incurred up to the date of removal. The rationale of this aspect of CPR rule 48.6A for discontinuing group members is set out in the judgment of Longmore LJ, speaking for the Court of Appeal in *Sayers v Merck SmithKline Beecham plc* [2001] EWCA Civ 2017; [2002] 1 WLR 2274, [19]:

“[A] group action of the kind with which we are concerned in the present case is essentially different from the typical action where a single claimant (or limited number of claimants) brings an action. Usually in such typical actions all issues of liability will be tried together whereas it is likely that in group actions certain common or generic issues will be tried on their own, before it is possible or sensible to apply the results to individual claimants. Meanwhile there may be different reasons why claimants may decide to leave the group once the action has started. Of course one reason may be that an individual claimant realises that his case is hopeless. But to have a *prima facie* rule that any discontinuing claimant should have a crystallised inability to recover common costs and a potential liability for the common costs of defendants at the end of the quarter in which he discontinued is too blunt an instrument and is unnecessarily favourable to defendants, when it is yet unknown whether the claimants as a whole are to be successful in the common issues which are to be tried.”

2.5 Professor Zuckerman has opined that the issue of common costs is “*inordinately difficult*”, and that “[*d*]ifficult issues may arise where, for example, the group is only partially successful on the common issues, or where the group wins on the common issues but group members vary in their levels of success in establishing their individual entitlements”: see Zuckerman on Civil Procedure, 2<sup>nd</sup> edition, Thomson Sweet & Maxwell, 2006, 525–526. Further thought may need to be given to the operation of the common costs regime. One particular question is what happens when the test claimant appointed under a group litigation order settles part way through the litigation.

2.6 Cost capping. Cost capping as a general topic is discussed in chapter 45 below. Special considerations arise in relation to group actions. The Civil Justice Council has recommended that there should be a rebuttable presumption for costs budgeting and capping in group litigation: see Civil Justice Council, *Improved Access*

to Justice: *Funding Options and Proportionate Costs*, London 2005, recommendation 7 on page 26.

2.7 Cost capping orders have already been a feature of some group actions. In *AB v Leeds Teaching Hospitals NHS Trust* [2003] EWHC 1034 (QB); [2003] Lloyd's Rep Med 355 the defendant applied for a cap in group litigation concerned with organ retention. The cap was in relation to costs from the date the timetable for group litigation was set, up to and including trial. Gage J agreed to cap the costs at just over half a million pounds. Gage J said that he could impose a cap under the court's general powers of case management in CPR rule 3.1. Among the factors to be taken into account in determining the cap were the proportionality of the damages sought, the proportionality of the separate elements, if the total was disproportionate, and the sums for which the parties' solicitors or funders had agreed to continue litigation.

2.8 In *Various Ledward Claimants v Kent and Medway Health Authority* [2003] EWHC 2551; [2004] 1 Costs LR 101 both the claimants' solicitor and the defendant agreed that a costs capping order should be made. The group litigation was brought by a number of alleged victims of sexual assault who claimed that the acts had been perpetrated by a consultant gynaecologist, since deceased, employed by the defendant. The claimants' solicitor came from the other end of the country to where they lived. The court said that the costs hitherto incurred were clearly disproportionate. The test for whether they should be recoverable was founded on necessity as well as reasonableness. Given the geographical problem with the solicitor, it was important to ensure that the paying party was not expected to pay more in costs than would have been the case if local solicitors had been employed. The court imposed a cap on generic costs, and the costs arising from the eight lead cases, in relation to each party's solicitors' and counsel's fees.

2.9 The implication of cost capping for access to justice has given rise to some discussion. In *Dawson v First Choice Travel*, HH Judge MacDuff (now MacDuff J) capped the claimant's costs in a group action at thirty percent of their £726,000 estimated costs. Judge MacDuff noted that before conditional fee arrangements, the very modest individual claims making up the group litigation would probably never have been brought. He said: "[a]ccess to justice does not mean that any claimant must be allowed to bring his claim, however small, at whatever cost, regardless of all sensible argument, and with no personal costs exposure": see M Mildred, "The Development and Future of Cost Capping" (2009) 28 CJQ 141, 146. Irwin Mitchell, which acted for the claimants in *Dawson*, issued a statement following the judgment to the effect that it hoped the courts would support its clients in ensuring costs-capping did not fetter access to justice. Indeed, the firm opposed the application on this basis during the hearing: see D Locke, "If the Cap Fits ..." (2007) Law Society Gazette, 30 August 2007, 30.

2.10 In their submissions to this review, a firm of solicitors with much experience in group actions, make the same point: if cost capping becomes widespread, there is a danger that defendants will be tempted to under-estimate costs, in order to restrict the ability of claimants to fund adequate and equal representation. They add that because of the imbalance of power between claimants' groups and defendants in the areas they litigate, capping defendants' costs may be necessary to facilitate access to justice, whereas capping claimant's costs is likely to restrict it.

2.11 Tentative view. My tentative view is that if the cost shifting rules remain as they are, costs capping should probably be the exception rather than the norm in

group actions. However, there may be a place for costs management<sup>222</sup> in group actions. A group action has the characteristics of a project, the costs of which can escalate out of control unless they are carefully managed.

### 3. CONSUMER COLLECTIVE REDRESS

3.1 Consumer collective redress. There have been few consumer collective actions in the UK. Costs are said to be one explanation, although the opt in model of the current rules in the CPR is an obvious disincentive. There is an interrelationship between the operation of costs rules and whether the collective redress regime is opt in or opt out (in other words, whether consumers have to choose to join in an action or whether a representative claimant can begin litigation in their name but they can opt out). The issues are summarised by Dr Christopher Hodges, who draws on the Leuven study, by J Stuyck and others, “*Study on alternative means of consumer redress other than through ordinary judicial proceedings*”, Catholic University of Leuven, 2007:

“The Leuven study notes that claimants who opt in bear up-front costs before the merits have been assessed, and this may be a significant disincentive to initiating an action, whereas for opt out, the potential members need only be notified once a settlement has been proposed. It notes that opt in “assists the defendant in knowing the size of the pool of potential claimants” (this is in some cases essential for reasons of insurance and requirements of sound business management). The study concludes that there are many factors (several relating to costs) that determine whether a collective action is practical and effective, but opt out is probably a decisive factor.

...

The position is certainly made easier in those states where, for example, consumer associations are given some exemption from liability for costs in collective cases, on the assumption that they are sufficiently responsible not to bring unjustified claims. However, the “loser pays” principle is generally firmly entrenched in European legal culture.”

C. Hodges, *The Reform of Class Representative Actions in European Legal Systems* (Oxford, 2008), 126-7 (footnotes omitted).

3.2 Illustrative of the current obstacles in England and Wales to consumer collective redress is the “football shirts” case. In brief, in 2003 the Office of Fair Trading (“OFT”) found that a number of sportswear retailers had entered into price fixing agreements in 2000 and 2001 in relation to replica football kit, infringing the prohibition in section 2 of the Competition Act 1998 (“CA 1998”). Financial penalties totalling £18.6 million were imposed. Appeals against the OFT decision on liability were largely rejected by the Competition Appeal Tribunal, although there was some adjustment on penalty: [2004] CAT 17; [2005] CAT 22. The Court of Appeal rejected the appeal of one of the retailers and the House of Lords subsequently refused leave to appeal: *JJB Sports Plc v Office of Fair Trading* [2006] EWCA Civ 1318; [2006] UKCLR 1135.

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<sup>222</sup> Discussed in chapter 48.

3.3 The consumer organization, “Which?”, then used powers in the Act to claim damages on behalf of a number of named consumers against one of the retailers, JJB. Section 47B of the CA 1998 enables designated bodies to bring representative damages claims on behalf of named consumers following an OFT or European Commission decision finding that a person has infringed competition law: Specified Body (Consumer Claims) Order 2005, 2005 SI No 2365. The case went before the Competition Appeal Tribunal in March 2007. In early 2008 it was settled. Under the settlement those who joined the Which? case were entitled to receive payment of £20 each. Those who did not join were able to claim £10 or £5, but had to present proof of purchase or the shirt itself, with the label intact. Because of proportionality issues in opt in cases, Which? has publicly stated that it is extremely unlikely that it would initiate another similar claim.

3.4 The claim made by Which? before the Competition Appeal Tribunal included a claim for exemplary or restitutionary damages in the sum of 25% of the JJB’s relevant turnover. However, *Devenish Nutrition Ltd & Ors v Sanofi-Aventis SA (France) & Ors* [2007] EWHC 2394 (Ch)<sup>223</sup> held that exemplary damages cannot be recovered in the main if a person has already been fined by a competition authority and that restitutionary damages are not available in competition actions. As a result Which?’s claim was limited to compensatory damages. As indicated the claim was on the basis of opt in, but only a small number of consumers did so (press reports said about 1,000). The upshot was that only limited damages were payable. It was reported that JJB set aside £100,000 to cover the settlement. As regards costs, JJB agreed to pay Which?’s reasonable costs. However, the parties could not agree on Which?’s reasonable costs and further proceedings before the Competition Appeal Tribunal ensued: [2009] CAT 2.

3.5 A potential consumer group action, which attracted some publicity, concerned a price fixing agreement between retailers in relation to dairy products. In December 2007 some of the retailers agreed to pay the OFT penalties of more than £116 million, to be reduced on condition of co-operation with the OFT.<sup>224</sup> One law firm explored the possibility of seeking collective redress on the back of the fines, as did Which? in the case of the football shirts. The firm concluded that, because of the relatively small amounts lost by each consumer, and the upfront costs of putting a case together, it was not feasible. The firm expressed the view that although it would still have been difficult given the small individual losses, had an opt out action existed the case would have been possible: see N Rose, “*Class Actions Will Make Claims Easier*” (2008) Law Society Gazette, 21<sup>st</sup> February 2008, 8.

3.6 Opt in or opt out? Policy questions. It can be seen from the foregoing that the opt in provisions of the CPR make it more difficult to bring collective redress actions on behalf of consumers. On the other hand, the question whether the regime for collective actions should be opt in or opt out involves many broad questions of policy. The opt out model is not without its critics: see, for example, C Hodges “*From Class Actions to Collective Redress: A Revolution in Approach to Compensation*” (2009) 28 CJQ 41, 54-60. There is a comprehensive review of the policy issues in Professor Mulheron’s book “*The Class Action in Common Law Legal Systems*”<sup>225</sup> at chapter 2. See in particular table 2.1, which sets out the pros and cons of an opt out regime. Whether the regime in England and Wales should remain opt in or should become

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<sup>223</sup> The first instance decision in respect of exemplary damages was subsequently affirmed by the Court of Appeal: see [2008] EWCA Civ 1086. However, the Court of Appeal’s decision was not available at the time of the Which? Litigation.

<sup>224</sup> OFT, Press Release, 7<sup>th</sup> December 2007.

<sup>225</sup> Hart Publishing, 2004.

opt out<sup>226</sup> is a question which lies outside my terms of reference.<sup>227</sup> This review is concerned with the cost consequences of whichever regime is adopted.

#### 4. POSSIBLE REFORMS OF THE CPR

4.1 The Civil Justice Council has recommended an opt out possibility for group actions under the CPR.<sup>228</sup> A representative claimant would be able to litigate on behalf of an identified group unless its members chose not to be associated with the case: “*Improving Access to Justice through Collective Actions*” (London, 2008), Recommendation 3. Full costs shifting would remain:

“[C]ost shifting is a deterrent against speculative or so-called blackmail litigation, unless the claimants are impecunious, in which case the courts’ existing powers to award security for cost should provide security for defendants against such blackmail claims” (p 179).

As previously mentioned, the question whether England and Wales should adopt an opt out model is a broad question of policy, which falls outside my terms of reference. Nevertheless, if an opt out model is adopted for collective actions, there are a number of implications for the CPR, including costs.

4.2 Security for costs. One aspect is security for costs. In cost shifting common law systems, with opt out collective actions, security for costs are generally permissible. Thus in Ontario, security for costs awards against the representative claimant are permissible where the capacity of the representative claimant to satisfy any adverse costs award, should the class’ claim fail, is crucial to the defendant. Awards, however, are modest: see R Mulheron, *Competition Law Cases under the Opt-out Regimes of Australia, Canada and Portugal: A research paper for the Department for Business, Enterprise and Regulatory Reform*” (London, 2008), 15-16 who discusses some of the case law. Similarly in Australia the federal legislation expressly preserves the ordinary powers of the court to order security for of costs in representative proceedings: *ibid*, 19-20.

4.3 Interim costs awards. Another possible aspect of CPR reform which has been suggested is the award of costs on an interim basis. In Ontario there are instances where on a claimant succeeding in obtaining the certification of a class – thus enabling the litigation to proceed – the defendant has been ordered to make an interim payment of costs: e.g. *Robertson v Thompson Corp* (1999) 43 OR (3d) 389. The advantage of an interim award of costs is that it eases the burden on the representative claimant. I am bound to say that (subject to whatever arguments may be advanced in Phase 2) I have considerable reservations about this proposal, both on grounds of principle and on grounds of fairness as between the parties.

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<sup>226</sup> The Civil Justice Council have proposed that, subject to judicial discretion in every case, opt out class actions should be permissible in England and Wales. See paragraph 4.1 below. Professor R Mulheron supports the opt out model with some detailed arguments and research: see “*Justice Enhanced: Framing an Opt-Out Class Action for England*” (2007) 70 (4) MLR 550-580; “*Reform of Collective Redress in England and Wales: a Perspective of Need*” (2008), a research paper for the CJC.

<sup>227</sup> I must confess, however, that after visiting the USA and Canada and after talking to judges and lawyers in those two jurisdictions (see chapters 60 and 61), I do have certain reservations about the desirability of introducing opt out class actions in England and Wales.

<sup>228</sup> See the previous paragraph and its accompanying footnotes.



## 5. A NO COSTS RULE

5.1 The Ontario Law Reform Commission Report. In its report, "*Report on Class Actions*", (Toronto, 1982) the Ontario Law Reform Commission ("OLRC") recommended a "no costs" rule, so that in collective redress litigation the normal rule would be that neither party would be awarded their costs. The OLRC believed that costs were the most important aspect of its considerations of collective redress. Its concern was the representative claimant in an opt out collective action regime. A representative of the group incurred the same risk of liability for costs as would be borne if the suit was brought in the form of an individual action. In the event that the suit was unsuccessful, the representative claimant alone was liable for the defendant's party and party costs. In addition to the liability for party and party costs, the representative would be responsible for the solicitor and client costs payable to his or her own lawyer, regardless of the outcome of the action. Consequently, if the action failed the representative claimant would be liable for two sets of costs. Even if the suit succeeded, and there was the usual award of party and party costs, the representative claimant would still have to pay to his or her own lawyer the amount not indemnified by the defendant.

5.2 Because collective actions were more complex than most ordinary litigation, the OLRC concluded that there was therefore a commensurate increase in ancillary expenses and lawyers' fees, which would augment the financial risk assumed by a representative claimant. A representative claimant would remain unsure of ultimate liability for own legal fees and disbursements, as well as the fees and disbursements of the defendant, until the end of a matter. Absent group members, who would be the beneficiaries of the efforts of the group representative and the group lawyer, would obtain a "free ride". Since absent members would not be parties to the action, they would not be liable for the party and party costs of the defendant should the action fail. Moreover, absent group members would not be obliged to contribute to the solicitor and client costs owed by the representative to the lawyer for the group, unless they have entered into agreements to do so.

5.3 Under a cost shifting regime the OLRC thought that there was little or no economic incentive for group members to contribute to the expenses and fees incurred in the action. Quite apart from the cost involved, only in some cases would it be feasible to arrange cost-sharing contracts between a representative and group members. Deducting the cost of litigation from an award was well-entrenched in American jurisprudence, but was not part of the Canadian case-law. In summary the OLRC concluded (volume 3, p 659):

"From the foregoing discussion, it may be seen that the application of the present costs rules to class actions deters individuals from coming forward to be representative claimants and, hence, prevents the initiation of class actions. This is most evident where the claims of the class members, including the putative class claimant, are relatively small. A modest claim will not defray the solicitor and client costs payable to the class lawyer after a successful action, let alone justify the risk of bearing party and party costs. But, while the costs rules are unquestionably a deterrent where claims are small, they may also effectively deter class actions even where claims are individually recoverable. A person with an individually recoverable claim is better advised to bring his own action against the defendant, rather than incur the more onerous financial costs of a class action, which can bring him no greater material advantage."

The views of the OLRC did not find favour with the legislature. Accordingly the cost shifting rule was retained in collective actions.

5.4 The British Columbia regime. British Columbia, unlike Ontario, adopted the recommendation of the OLRC and introduced a no costs rule for collective redress litigation. Section 37 of its Class Proceedings Act (RSBC 1996, c.50) (“OCPA 1996”) provides:

“(1) Subject to this section, neither the Supreme Court nor the Court of Appeal may award costs to any party to an application for certification under section 2 (2) or 3, to any party to a class proceeding or to any party to an appeal arising from a class proceeding at any stage of the application, proceeding or appeal.

...

(4) Class members, other than the person appointed as representative claimant for the class, are not liable for costs except with respect to the determination of their own individual claims.”

Exceptions were written into the legislation so that in a limited number of cases costs follows the event:

“37(2) A court referred to in subsection (1) may only award costs to a party in respect of an application for certification or in respect of all or any part of a class proceeding or an appeal from a class proceeding

- (a) at any time that the court considers that there has been vexatious, frivolous or abusive conduct on the part of any party,
- (b) at any time that the court considers that an improper or unnecessary application or other step has been made or taken for the purpose of delay or increasing costs or for any other improper purpose, or
- (c) at any time that the court considers that there are exceptional circumstances that makes it unjust to deprive the successful party of costs.

(3) A court that orders costs under subsection (2) may order that those costs be assessed in any manner that the court considers appropriate.”

5.5 The British Columbia courts have said that normally the no costs rule will be applied although the no costs regime does not apply when an action is dismissed before certification: see *Smith v Canada (Attorney General)* [2006] BCJ No 2081 (CA), [6]. A representative claimant must give notice of certification of a class action to all members of the class, in accordance with court directions. Apparently it is not uncommon for a defendant to be ordered to pay the costs of notification of a class. It should be noted that British Columbia has an opt out collective redress model.

5.6 The other side of the coin to the justification given by the OLRC for a no costs regime is the position of defendants. First, there is not the same disincentive to unmeritorious claims which a cost shifting rule offers. The British Columbia Court of Appeal has said, however, that unmeritorious litigation can be addressed under section 37(2) of the OCPA 1996: *Samos Investments Inc v Pattison* (2002) 216 DLR (4th) 646, [32]. Secondly, there is the comparable issue raised by claimants’ lawyers

regarding cost capping: a no costs regime may enable an unscrupulous defendant to engage in expensive, and unnecessary, litigation tactics. The claimant would need to respond, if it hoped to continue with the case, but with no possibility of recovering its costs. Potentially section 37(2) of the OCPA 1996 would apply. An examination of the case law has led Professor Mulheron to conclude that although something like section 37(2) of the OCPA 1996 provides some possible means for a representative claimant to overcome the no costs rule and transfer the financial burden to the defendant, “*the reality is that it has been less than successfully employed*”: R Mulheron, “*The Class Action in Common Law Legal Systems*”,<sup>229</sup> page 448.

5.7 “Public interest” litigation. As mentioned, Ontario did not adopt the recommendation of its OLRC. However, section 31(1) of Ontario’s Class Proceedings Act 1992 (“OCA 1992”) enables the court to order that a successful party should not be awarded its costs in a test case, a case raising a novel point of law or a matter of public interest. In *Ruffolo v Sun Life Assurance Company of Canada* (2008) 90 OR (3<sup>rd</sup>) 59, the judge refused to apply section 31(1) of the OCA 1992. Two claimants sued Sun Life for deductions made under long term disability plans, and intended to proceed under the OCA 1992 on behalf of all similarly situated. The claim was for \$10 million damages and \$1 million putative damages. The claim was supported by the Law Foundation of Ontario, a body established by statute with functions including financially assisting cases under the Class Proceedings Fund (see below). As a result of a class action certification conference, the parties agreed that the claimant’s case would be heard and if they were successful Sun Life would be bound with respect to the other insureds with identical policies. The claim was unsuccessful. The court held that section 31(1) of the OCA 1992 applied and the action could be regarded as a class proceeding although it proceeded as a test case. It further held that the effect of section 31(1) of the OCA 1992 was to encourage the court to recognise that class actions tend toward being test cases, the determination of novel points of law, or the adjudication of matters of public interest. Courts therefore should be alert to these tendencies. The case was a test case, but that was of no weight because Sun Life had cooperated in having the action proceed as it did. It involved a novel point of law, but in fact it turned heavily on the interpretation of the claimants’ respective contracts. After discussing the issue of public interest, the judge concluded:

[79] In exercising my discretion with respect to costs, I took these factors into account and attempted to make an award that would not discourage class proceedings or get in the way of the access to justice policies of the class proceedings legislation. However, I did not ignore the interests of the defendant Sun Life, and I thought that the submissions about the vulnerability of the claimants were somewhat overstated. The proposed group or class for whom the action was originally brought were all executives, and they were not disabled or vulnerable when the long-term disability insurance contracts were negotiated by their employers, who were free to negotiate insurance contracts that did not offset Canada Pension Plan benefits.

[80] Based on the above considerations, I conclude that this is not an appropriate case to make no order as to costs but that Sun Life’s claim for costs should be substantially reduced to reflect the presence of some public interest factors and to take into account the access to justice concerns of the Class Proceedings Act, 1992.”

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<sup>229</sup> Hart Publishing, 2004.

5.8 No costs and contingency fees. Generally speaking the United States' approach is that there is no shifting of lawyer's costs in litigation.<sup>230</sup> That applies to class actions as well.

5.9 One exception to the no costs approach in class actions is the American common fund doctrine. The implications of this for class actions is that where there is a recovery of a fund for the benefit of a class, the successful lawyers are entitled to be reimbursed their fees from the fund. Thus the burden which the representative claimant would have borne for attorneys' fees from his or her damages is effectively spread: see R Mulheron, "*The Class Action in Common Law Legal Systems*",<sup>231</sup> pages 440-1. The other side of the coin, however, is that where the claim fails, obviously there is no fund. A contingency fee means, however, that the representative claimant does not bear the costs. Rather, the risk is undertaken by his or her lawyer: see S Yeazell, "*Refinancing Civil Litigation*" (2001) 51 DePaul LR 183. It is important to note that in Ontario and British Columbia court supervised contingency fee agreements between a representative claimant and a class are permitted.

5.10 No cost shifting for common issues. Across Canadian cost shifting jurisdictions with collective actions, class members are immune from bearing any adverse costs award if the class loses on the common issues. The representative claimant is, of course, responsible for the costs. Class members remain liable, however, for the defendant's costs, if the class members lose on their individual issues: see R Mulheron, "*Competition Law Cases under the Opt-out Regimes of Australia, Canada and Portugal: A Research Paper for the Department for Business, Enterprise and Regulatory Reform*" (London, 2008), 15.

5.11 My own tentative view.<sup>232</sup> Having considered the issues and the rival views, my own tentative opinion is that the possibility of dispensing with costs shifting in the context of collective actions is a matter which merits serious consideration in Phase 2 of the Costs Review. A "no costs" regime in collective actions would bring the following benefits:

- (i) It would promote access to justice, in that claimants would not be exposed to the risk of adverse costs orders.
- (ii) It would be fairer for defendants than a one way cost shifting regime (as discussed in chapter 25 above and in section 6 below).
- (iii) If in practice defendants in collective actions are generally unsuccessful in enforcing costs orders,<sup>233</sup> a no costs regime may be better for defendants than cost shifting. Defendants would escape substantial costs liabilities in those cases which they lose.
- (iv) If there is no cost shifting, then the claimant lawyers would have to deduct their remuneration from any damages recovered. In other words, some form of contingency fees would be required. There may be no objection in principle to claimant lawyers being remunerated on a contingent fee basis,<sup>234</sup> provided that the extent of the lawyers' deduction from damages is (a) regulated and (b) assessed by the court.<sup>235</sup> Alternatively, if collective litigation in England

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<sup>230</sup> For a fuller account of the US costs rules, see chapter 60 below.

<sup>231</sup> Hart Publishing, 2004

<sup>232</sup> One reason for my caution in expressing this provisional view is that it is contrary to the recommendations of the CJC: see paragraph 4.1 above.

<sup>233</sup> A matter on which evidence may become available during Phase 2.

<sup>234</sup> As to which, see chapter 20 above.

<sup>235</sup> As in Ontario.

and Wales is funded by a CLAF or a SLAS,<sup>236</sup> there could be no principled objection to that fund taking a percentage of the damages.

5.12 If a no cost shifting rule is adopted in this context, then there must be built into the rules proper incentives to deter the commencement of unmeritorious collective actions. Serious consideration would need to be given to the form which such incentives should take.

5.13 Comments of Professor Mulheron. I have discussed the tentative view set out in the two preceding paragraphs with Professor Mulheron. She expressed her agreement with that tentative view and stated that research which she is currently carrying out should shed more light on these issues. Her views on this issue will be developed in a chapter entitled “*Costs-shifting, security for costs and class actions: lessons from elsewhere*” in *The Tenth Anniversary of the Civil Procedure Rules*, D. Dwyer ed., OUP, 2009 (forthcoming).

5.14 The APIL proposal. APIL have recently proposed that at an early stage of a group action the court should have power to order that there be no cost shifting.<sup>237</sup> This proposal has its attractions. In each group action the court could consider the nature of the claim and the circumstances of the parties, before deciding whether or not to order that, regardless of outcome, each side should bear its own costs.

5.15 Summary. There are thus three options to consider under this head during Phase 2: (a) the normal cost shifting rule applies in group actions; (b) there be no cost shifting in group actions; (c) in each group action the court should decide at the outset whether cost shifting applies.

## 6. ONE WAY COST SHIFTING

6.1 One way cost shifting. No jurisdiction has introduced full blown one way cost shifting, where the successful claimant would be awarded costs but the unsuccessful claimant would not have to pay costs to the defendant. However, the idea has had its advocates for public interest litigation. Under a one way cost shifting regime the successful defendant would have to demonstrate, as a pre-condition of being awarded costs, that there was no public interest in the litigation, or that it was frivolous and vexatious.

6.2 Law Reform recommendations. The OLRC explored the idea in its “*Report on the Law of Standing*” (Toronto, 1989). It recommended that to benefit, the public interest litigant would have to establish that a case raised issues of importance beyond the immediate interest of the parties; that a claimant had no personal or proprietary interest in the outcome of the litigation or, if such an interest existed, it clearly could not justify the litigation economically; the case did not present issues which have been previously judicially determined against the same defendant; and the defendant had a clearly superior capacity to bear costs (pp 153-4). Similarly, the Australian Law Reform Commission proposed a “*public interest costs order*”: “*Costs Shifting – Who Pays for Litigation*”, Report No 75 (Sydney, 1995). Under this one of the orders a court could make would be that, regardless of the outcome of the proceedings, a party would (a) not be liable for the other party’s costs, or (b) be liable to pay only a specified proportion of those costs, or (c) be able to recover all or part of his or her costs from the other party.

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<sup>236</sup> As to which, see chapters 18 and 19 above.

<sup>237</sup> See chapter 10 paragraphs 9.25 to 9.27.

6.3 One way cost shifting jurisprudence. One way cost shifting has not been incorporated into any collective redress legislation. However, there are exceptional cases where courts have effectively reached the equivalent outcome through the exercise of discretion. In *New Zealand Maori Council v Attorney General of New Zealand* [1994] 1 AC 466 the Maori people of New Zealand, through the Maori Council, challenged the government's proposal to transfer television assets because of what they said would be the adverse effects on the Maori language, protected by the Treaty of Waitangi. The Council was unsuccessful before the New Zealand courts and the Privy Council. However, in delivering the judgment of the Privy Council Lord Woolf held in relation to costs:

“There remains the question of costs. Although the appeal is to be dismissed, the applicants were not bringing the proceedings out of any motive of personal gain. They were pursuing the proceedings in the interest of taonga [the treasure of the language] which is an important part of the heritage of New Zealand. Because of the different views expressed by the members of the Court of Appeal on the issues raised on this appeal, an undesirable lack of clarity inevitably existed in an important area of the law which it was important that their Lordships examine and in the circumstances their Lordships regard it as just that there should be no order as to the costs on this appeal.” (485 G-H)

6.4 *British Columbia (Minister of Forests) v Okanagan Indian Band* [2003] 3 SCR 371, 2003 SCC 71 is another such case. Members of the four Indian Bands claimed that they had aboriginal title to lands and were entitled to log them. They filed a notice of constitutional challenge. The provincial government applied to have the proceedings remitted to the trial list instead. The Indian Bands argued that the matter should not go to trial, because they lacked the financial resources to fund a protracted and expensive trial. In the alternative, they wanted the court to order a trial only if it also ordered the Government to pay their legal fees and disbursements in advance whatever the outcome. The Supreme Court upheld a provincial court decision that there was a discretionary power to order interim costs. Lebel J for the majority said:

“[40] With these considerations in mind, I would identify the criteria that must be present to justify an award of interim costs in this kind of case as follows:

1. The party seeking interim costs genuinely cannot afford pay for the litigation, and no other realistic option exists for bringing the issues to trial – in short, the litigation would be unable to proceed if the order were not made.
2. The claim to be adjudicated is *prima facie* meritorious: that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.
3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.”

6.5 Three Canadian commentators have concluded that the most critical factor affecting the long-term health of public interest litigation was whether and to what extent there was a commitment to developing a coherent and distinct costs jurisprudence in public interest litigation: C Tollefson, D Gilliland, and J DeMarco, in

“Towards a Costs Jurisprudence in Public Interest Litigation” (2004), 83 Can Bar Rev 473, 476.

6.6 My own tentative view. Having considered the issues and the arguments, my tentative opinion is that, despite the Canadian and New Zealand jurisprudence,<sup>238</sup> to introduce one way cost shifting into collective actions in England and Wales would be a step too far. The position of claimants in such actions could be adequately protected by the removal of cost shifting, coupled with CFAs or contingency fees. The objective of the procedural rules must be (as always) to achieve a proper balance between the interests of claimants and defendants.

## 7. FUNDING FOR COLLECTIVE REDRESS

7.1 Public funding allocated by the Legal Services Commission (“LSC”) to group actions under the CPR is much less than it was. Group actions in England and Wales are now also financed by conditional fees backed by after-the-event (“ATE”) insurance, by law firms and by members of the group. In particular cases there is often a mix of these various types of funding.

7.2 Public funding. Over the last decade public funding through the LSC has been crucial for many multiparty actions. In September 2007 the LSC reported that it has funded the following number of actions since the introduction of the Access to Justice Act 1999 in 2000 (quoted in R Mulheron, “*Reform of Collective Redress: A Perspective of Need*” (Civil Justice Council, 2008), 74):

<b>Year</b>	<b>Number of Actions</b>
2000/01	133
2001/02	67
2002/ 03	45
2003/04	16
2004/05	20
2005/06	8
2006/07	4
<b>Total</b>	<b>293</b>

Of the 293 actions, the main categories were child abuse, 156; health, medical and pharmacological, 34; and prisoner actions, 27.<sup>239</sup> The LSC observed that the yearly reduction was primarily due to the decrease in the number of child abuse actions being brought: there had been substantial police investigations in the 1980s and 1990s of abuse in children’s homes, which resulted in claims, but the peak in these actions had passed. The LSC observed that there have been a limited number of major multiparty actions, defined as those which were either likely to cost the LSC more than £1,000,000, or where the total *inter partes* costs were likely to exceed £5,000,000. Medium multiparty actions are defined as where gross costs are likely to fall between £250,000 and £5 million.

<sup>238</sup> Both in New Zealand and Canada the courts deal with collective claims on behalf of indigenous peoples. These actions give rise to particular policy issues, which may well make one way cost shifting appropriate.

<sup>239</sup> The other 76 actions fall into miscellaneous categories.

7.3 The types of multiparty actions which have been funded by the LSC tend not to be consumer grievances i.e., about widely available goods or services. There have been some notable medical and pharmaceutical cases, but Professor Mulheron's analysis of major and medium sized legally-aided group litigation over the decade from 1995 demonstrates that, except in two of these actions, the number of claimants involved was in the hundreds, not the thousands. (The benzodiazepine proceedings which were abandoned, involved some 7,000 claimants,<sup>240</sup> and the MMR vaccine proceedings, also abandoned, involved some 1,350). There were seven employment-related claims, five abuse claims; and one financial claim. Of the three environmental claims, the Volchay Plant pollution action, which succeeded, had some 3,000 claimants, the Docklands nuisance claim,<sup>241</sup> which was lost, some 1,000.<sup>242</sup>

7.4 Under the LSC's Multi-Party Arrangements 2000, the LSC apportions costs by seeking to give effect to any costs sharing order made by the Court. Subject to that, and without prejudice to any *inter partes* costs order or agreement, generic costs are divided equally between all clients. Generic costs attributable to a particular group of clients are divided equally between the members of that group. This applies where there are issues in the action which relate only to that group, or where a group of clients continues with the action after others have discontinued or accepted offers of settlement. Generic costs are apportioned between clients *ab initio*, regardless of when they joined the action. Clients who leave an action before it is concluded, whether by discontinuing, accepting an offer of settlement or otherwise, are liable for their share of generic costs only up to the time they left.

7.5 The Lord Chancellor sets out budgets for the Community Legal Service Fund each year and for particular types of case, including group litigation. The Special Cases Unit of the LSC manages the budget and has the power to refuse funding where it is not affordable out of the funds available. Each funded group action is subject to strict budgetary control. Leading practitioners have criticised the consequent limit on funding, the controls such as the affordability review which operate if they obtain LSC funding, and the low hourly rates payable, all of which are said to operate as a disincentive to taking on multi-party claims: see J Robins, "*Multi-Party Actions: Under a Cloud*" (2007) Law Society Gazette, 19 April 2007, 16. In response the LSC says that it is still funding important multiparty litigation but that law firms are now more realistic about their proposed cases and costs. It has not had to refuse funding for any cases on the affordability ground. The fact is, however, that the amount of public money provided for collective redress in the past is no longer being spent.

7.6 Conditional fee agreements. Conditional fee agreements ("CFAs") and after-the-event ("ATE") insurance are dealt with elsewhere in the report. Their use in group actions under the CPR is supplemented in practice by contributions by the small number of law firms which undertake this type of litigation. Members of some of the groups themselves have also contributed.

7.7 Illustrative is the legal action brought against Equitable Life by some 400 with-profits annuitants, which settled a few weeks before trial in 2008. The policyholders had brought proceedings in the High Court in 2004 against the life assurance company, arguing they had been mis-sold annuities. An insurance broker

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<sup>240</sup> I was counsel in the benzodiazepine litigation during the early 1990s. My recollection is that the figure of approximately 7,000 claimants relates to the total number of claimants in three or four group actions proceeding in parallel, relating to different benzodiazepine drugs. However, I no longer have any records available to check this.

<sup>241</sup> *Hunter v Canary Wharf Ltd* [1997] AC 655.

<sup>242</sup> See R Mulheron, "*Reform of Collective Redress: A Perspective of Need*" (Civil Justice Council, 2008), 75.



assembled a syndicate of insurers to provide £1m of ATE cover for the then 900 potential claimants. £975,000 was raised and the law firm, Clarke Willmott, agreed to provide the remainder of £25,000. However, the action settled when insurers withdrew, followed by half the clients. What ensued is described as follows:

“The firm then created a special-purpose company with directors from the action group representing the clients. The court asked for each claimant to have sufficient money to cover their share of the estimated adverse costs of £5 million – £12,500 each. ATE insurance was also provided through Law Assist.

‘We had a company limited by guarantee and everybody was a member and had to hand over conduct of the case to the company’, explains [Robert] Morfee. ‘It worked extremely well and I’d certainly do to again.’ This meant that the group action didn’t suffer from ‘fragmentation’ – in other words, more clients walking away. Discipline, Morfee explains, was tough. ‘All decisions were taken by the company directors,’ he says. ‘The clients had to like it or lump it’’: see J Robins, “*Group Litigation: Strength in Numbers*” (2008) *Law Society Gazette*, 11 Dec 2008. 14.

7.8 The “atomic test” litigation is being heard at the time of writing. It concerns the atomic and thermonuclear weapons tests undertaken in the mid twentieth century. Nearly 1,000 veterans are claiming compensation against the Ministry of Defence for what they say are illnesses suffered, including cancers, skin defects and fertility problems, because of exposure to radiation from the tests. The current litigation is on the issue of whether the limitation period has expired. Francis Gibb, legal editor of *The Times*, has explained the funding arrangements for the case (*The Times*, 22<sup>nd</sup> January 2009):

“So how could they ever begin to fight their case? In 2002, when they first sought advice, there was legal aid. Proceedings were issued in December 2004. The Legal Aid Board then decided that the taxpayer could not afford such a claim. ... Ian Rosenblatt, senior partner of the London firm Rosenblatt, heard of the action. His firm was prepared to dig heavily into its own resources to finance the case but needed backing should it fail.

The possibility of a third party funder was investigated but the funder would have wanted some control over the action and a slice of the damages. In the event, a litigation broker, The Judge, came to the rescue with what was then the largest such insurance package agreed: cover of £5 million (for the MoD costs, expert witness fees and so on) if the case fails. Rosenblatt itself has worked without charge for three years on the case with 25 solicitors at one point, now 17 – racking up millions in costs, probably the largest no win, no fee claim mounted by a British law firm.

The firm acknowledges that the decision was a commercial one, as well as one of principle. They will stand to reap up to double their fees if the case succeeds.

...

[D]irectors of The Judge, say that the package is unprecedented. It benefits claimants additionally in that nothing will come out of the veterans’ damages if they win. To lose would be a ‘significant blow’ to the market in this kind of case.”

7.9 It has been said that conditional fees are more difficult in commercial group litigation. ATE insurance is not as readily available as with personal injury actions, where the market is more mature and the potential downside not so large: see J Robins, “*Multi-Party Actions: Under a Cloud*” (2007) Law Society Gazette, 19 April 2007, 16. Thus contributions by group members in such cases have been required. The executive chairman of one of the ATE insurers, Law Assist, has been quoted as saying that group litigation by investors in the face of the economic downturn is to be expected: see J Robins “*Group Litigation: Strength in Numbers*” (2008) Law Society Gazette, 11<sup>th</sup> December 2008, 14. It seems he attributes difficulties to procedural, rather than cost factors, in particular the absence of an opt out model: there is “*the administrative nightmare of recruiting people in the first place and then organising the management structure and decision-making. ... [It is] important to have one body of claimants so the case will either win or lose for everyone*”, thereby determining whether the insurance policy is triggered.

7.10 A special fund.<sup>243</sup> A number of proposals have been advanced in favour of a special funding mechanism for collective actions. In its report *The Future Funding of Litigation: Funding Options and Proportionate Costs: Alternative Funding Structures*, (June 2007) the Civil Justice Council recommended that a Supplementary Legal Aid Scheme (“SLAS”) should be established and operated by the LSC. It would claw back from successful actions a levy, akin to a contingency fee as understood in North American terms. Ideally the net gain to the SLAS from successful cases would cancel out the net loss of losing cases. The SLAS would attract the right range of cases through an effective merits filter. It would not be a stand alone scheme but an additional feature of an existing legal aid scheme. Various models were explored: (a) legal aid with a levy on damages; (b) legal aid with a levy on recovered costs; (c) a levy recoverable from opponents, but with cost protection remaining; and (d) a levy recoverable from opponents, and opponent’s costs being recoverable by insurance. The report concluded that the model C “*could be the best alternative for group action, perhaps combined with models [a] and [b] so that a small levy is spread amongst the different funding sources*” (paragraph 120).

7.11 Some law firms in England and Wales experienced in group actions seem unenthusiastic about a SLAS. The deduction from clients’ damages is an obvious objection, but there is also disquiet that a SLAS might lead to a comparable reduction in Government support for legal aid: see J Robins, “*Multi-Party Actions: Under a Cloud*” (2007) Law Society Gazette, 19<sup>th</sup> April 2007, 16.

7.12 Ontario Class Proceedings Fund. The nature of the Ontario Class Proceedings Fund has been explained in chapter 18 above. The Class Proceedings Committee of the Law Foundation administers the Fund. In considering applications for funding, that committee is directed by the Law Society Act R.S.O. 1990 and the related regulations to have regard to (a) the merits of a claimant’s case; (b) whether the claimant has made reasonable efforts to raise funds from other sources; (c) whether the claimant has a clear and reasonable proposal for the use of any funds awarded; (d) whether the claimant has appropriate financial controls to ensure that any funds awarded are spent for the purposes of the award; (e) any other matter that the Committee considers relevant; (f) the extent to which the issues in the proceeding affect the public interest; (g) the likelihood that the proceeding will be certified; and (h) the available money in the fund: see section 59 of the Law Society Act R.S.O. 1990. Under the case law the Law Foundation’s sole responsibility for paying costs is not to be a factor in the exercise of the court’s discretion about costs. The issues of entitlement, scale and quantum of costs must be determined without reference to

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<sup>243</sup> See further chapters 18 and 19 above.

whether the Law Foundation provided support to the applicant for certification. The scheme has a contingency element because it takes a 10% levy on awards and settlements in successful cases.

7.13 Third party funding. Third party funding is addressed in chapter 15 above. Regarding its implications for collective redress, Mulheron and Cashman give at least one example of a litigation funding agreement where a group of companies was claiming: R Mulheron and P Cashman, “*Third Party Funding of Litigation: A Changing Landscape*” (2008) 27 CJQ 312.

## 8. REVIEW

8.1 Issues arise in relation to specific changes of the existing CPR regime for group actions, such as putting cost capping or costs management on a more formal basis. There is also the controversial question of whether there should be any more radical change to the current CPR rules, in particular to create an opt out regime for appropriately certified collective claims. That broad policy question concerning collective redress is outside my terms of reference. Apart from those matters, however, the following possible amendments to the costs rules and issues merit consideration:

- (i) Instituting a no-cost shifting rule (“each side bears its own costs”), subject to two qualifications:
  - (a) cost shifting for frivolous or improper litigation tactics;
  - (b) implementation of the common fund doctrine, whereby a successful group or class’s legal fees is a first charge upon the damages payable by the defendant.
- (ii) Cost shifting for only part of the collective proceedings, for example, no cost shifting up to certification, but if the group or class wins certification the cost shifting rule applies after that.
- (iii) Implementation of the “common fund doctrine” for payment of lawyers’ fees.
- (iv) Public interest litigation, where the court has the power to order that no cost shifting should occur where a group representative brings a case on behalf of a group or class, on a public interest issue.
- (v) Using a lower costs scale, as implemented in Quebec for collective actions.<sup>244</sup>
- (vi) In what circumstances should indemnity costs orders be awarded against the lawyers bringing the group action? This arises in vexatious and unfounded litigation.

8.2 I look forward to receiving comments and any relevant data concerning the above matters during Phase 2 of the Costs Review.

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<sup>244</sup> See chapter 61.

## **CHAPTER 39. APPEALS TO THE COURT OF APPEAL**

### **1. INTRODUCTION**

1.1 **Permission to appeal refused.** The majority of all applications for permission to appeal to the Court of Appeal are refused. The costs to the applicants in such cases are modest. The costs to respondents are even less.

1.2 **Permission to appeal granted.** Appeals to the Court of Appeal generate additional costs for both parties, which in many instances were not anticipated at the outset of the litigation. Appendix 14 sets out the costs incurred in a cross-section of recent appeals and may give a reasonable picture of “average” costs of proceedings in the Court of Appeal.

1.3 **Process less expensive.** Absent exceptional circumstances,<sup>245</sup> the process at an appellate stage is inherently shorter and less expensive than the process at first instance. The time for disclosure is long past. Evidence has been adduced. The bundle for the Court of Appeal is a selection from previously exhibited documents.

1.4 The crucial factors governing the costs of appeals to the Court of Appeal are (a) the requirements of the court in relation to bundles, skeleton arguments, certificates and so forth; (b) the fees charged by advocates for written and oral argument.

1.5 The detailed practice before the Court of Appeal is currently undergoing radical revision. A draft new Practice Direction supplementing CPR Part 52 is currently before the Rule Committee. I hope that that new Practice Direction will enter the public domain during the course of Phase 2.

### **2. APPROACH TO COURT OF APPEAL COSTS IN THIS COSTS REVIEW**

2.1 It is striking that very little attention is paid to appeals in the written submissions which have been sent in for the purpose of Phase 1 of the Costs Review. It may well be that the principal problems are perceived as concerning first instance litigation, with all its attendant processes of pleadings, disclosure, exchanges of evidence and so forth.

2.2 I have come to the conclusion that the control of costs on appeal to the Court of Appeal, although an important topic in its own right, must be addressed after decisions of been made about what steps, if any, should be taken to control costs at first instance. Any process reforms made in respect of first instance litigation will impact upon appeals. Likewise any changes to the cost rules at first instance will impact upon the costs of appeals.

2.3 **Success fees.** If success fees become irrecoverable at first instance, then the same regime would apply on appeal. It can be seen from Appendix 14 that such a reform would impact upon two out of the 28 cases summarised in that Appendix.

2.4 **ATE insurance premiums.** If ATE insurance premiums become irrecoverable at first instance, then the same would apply on appeal. That would impact upon four of the 28 cases summarised in Appendix 14. In case number 10 the ATE premium

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<sup>245</sup> E.g. permission to adduce fresh evidence.

(£68,250) accounted for a major part of the costs recovered by the winning party (namely £142,804). In case number 24, although the sums involved are lower, it can be seen that the ATE insurance premium (£9,594) represented approximately one quarter of the costs paid to the winning party (£37,700).

2.5 Likewise, any decisions made about one way cost shifting, costs management and the other numerous issues canvassed in this report could be applied *mutatis mutandis* to proceedings in the Court of Appeal. Since, however, appeals to the Court of Appeal are a rarity (and generally only arise in meritorious cases),<sup>246</sup> it would not be right for considerations concerning the Court of Appeal to influence the costs rules at first instance. Putting the matter simply, the tail should not wag the dog.

2.6 Control of costs on appeal: the new procedure in Victoria. One matter which may be worth noting at this stage is the procedure developed by the Court of Appeal in Victoria in order to control costs. This is described in chapter 58, paragraph 4.16. I am told that this procedure is proving most effective. If such a procedure were to be adopted in England and Wales, it would probably be necessary to appoint persons of the calibre of Queen's Bench and Chancery masters, in order to carry out rigorous case management of appeals at an early stage. In the present economic circumstances, it would be unrealistic to make any such proposal. Nevertheless, it may be sensible watch the progress of the new procedure in Melbourne over the next few years, in order to see what can be learnt from the Victorian experience.

### 3. CONCLUSION

3.1 If any interested parties wish to make submissions concerning the costs of appeals to the Court of Appeal during the course of Phase 2, I will be pleased to receive them. It may be sensible for consultees to defer finalising their submissions until after the new Practice Direction to CPR Part 52 has been published.

3.2 My present and tentative view is that any recommendations which I may make in respect of costs in the Court of Appeal will be consequential upon decisions reached in respect of first instance costs.

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<sup>246</sup> I.e. cases strong enough to merit permission to appeal.





