



JONES DAY WHITE PAPER

THE JACKSON REPORT: COSTS OF CIVIL LITIGATION IN ENGLAND AND WALES

Major reforms of the English civil procedure rules may be in store following the recent publication of the Jackson report on the costs of civil litigation in England and Wales. Lord Justice Sir Rupert Jackson, a Court of Appeal judge, was tasked in November 2008 to review the rules and principles governing the costs of civil litigation and to make recommendations to promote access to justice at proportionate cost.

The resulting report, published on 14 January 2010, is more than 500 pages long and proposes widespread changes. Some would have a significant impact on commercial litigation, in particular the proposed abolition of costs shifting in certain cases and the proposed introduction of contingency fee arrangements (which have previously been prohibited).

The key proposals are summarised below (with hyperlinks to more detailed discussions).

RECOMMENDATIONS REGARDING COSTS

- [New rules on costs shifting](#): two-way costs shifting (whereby the unsuccessful party is ordered to pay the other side's costs) to remain in place for general litigation, but qualified one-way costs shifting should be introduced for certain categories of litigation including personal injury, clinical negligence, judicial review and defamation claims (where applicable, a losing claimant will not pay a defendant's costs but a losing defendant will pay the claimant's costs).
- The [introduction of contingency fee arrangements](#) (subject to certain conditions and the provision of independent advice).
- [Success fees and after-the-event \(ATE\) insurance premiums under conditional fee arrangements \(CFAs\) should cease to be recoverable](#). ATE premiums found to be unfair and unsatisfactory, often being more expensive to a defendant than one-way costs shifting.

- A consequential [10% increase in general damages](#) in specific categories of cases and a [25% cap](#) on the level of success fees. Justice Minister Jack Straw has subsequently suggested that in defamation cases the cap on success fees should be reduced to 10%.
- A [fixed costs regime](#) to apply in fast track (medium value) litigation and new guidance on costs in [collective \(class\) actions](#).
- [Costs of appeals](#) to be reviewed separately, with judicial discretion to order capped costs or no ability to recover costs.
- Clarification of the [concept of “proportionality”](#) in assessing recoverable costs and of the law in relation to [claimant Part 36 offers](#).
- More effective [costs management procedures](#) to be developed, including establishment of a [Costs Council](#).
- [Legal aid](#) to be preserved in its current form with a caution against further erosion of availability and eligibility.

RECOMMENDATIONS REGARDING CASE MANAGEMENT BY THE COURTS

- Large commercial claims: [docketing](#) (assigning cases to a named judge) to be encouraged.
- Disclosure: a [“menu option”](#) to replace standard disclosure in certain cases, the approval of the draft practice direction on [electronically stored information](#) and further training for judges and lawyers on [how to conduct e-disclosure more efficiently](#).
- More rigorous and effective use by courts of [case management powers](#), with less tolerance for unjustified delays and breaches of orders.
- Ambit and costs of [witness evidence](#) to be contained, with costs sanctions to prevent irrelevant evidence being adduced and the provision of witness summaries at an early stage, which should identify which pleaded points each witness will cover (not dissimilar to the German civil procedure principle of “Relationsmethode”).
- The use of [expert evidence](#) to be more rigorously controlled, including a requirement for prior consideration of the likely costs of any expert evidence and the possibility of concurrent evidence (multiple expert witnesses giving evidence together).

OTHER RECOMMENDATIONS

- [IP litigation to be reviewed](#) in relation to costs, transparency and the increased use of specialist judges.
- Campaign to [increase awareness of ADR](#) within the legal profession and the general public.
- Various changes to [pre-action protocols](#), including an ability to issue [pre-action applications](#) for breaches of pre-action protocols and changes to the [defamation pre-action protocol](#).
- [Personal injury litigation](#): working group to tackle task of calculation of damages in claims up to value of £10,000 and a [ban on referral fees](#).
- Promotion and regulation of [third party funding](#).

More detail on each these points is set out below. The Jackson report can be reviewed [here](#) and contains a Key Recommendations section at page 463.

For more information, contact [Craig Shuttleworth](#), [Robert Sully](#), or [Barry Fletcher](#) in Jones Day's London Office, or [John Majoras](#) at Jones Day's Washington Office.

RECOMMENDATIONS REGARDING COSTS

Qualified One-Way Costs Shifting for Certain Categories of Litigation

1. Lord Justice Jackson states that this proposed change should remove the need for ATE insurance. Qualified one-way costs shifting means that a claimant will not be required to pay a defendant's costs if the claim is unsuccessful, but the defendant will be required to pay the claimants costs if the claim is successful.
2. One-way costs shifting is expressed as "qualified" in the following sense: unreasonable or otherwise unjustified party behaviour may lead to a different costs order being made, and the financial resources of the parties may justify two-way costs shifting in particular cases.
3. Lord Justice Jackson believes that qualified one-way costs shifting should apply in the first instance to personal injury ("PI"), clinical negligence, judicial review and defamation/breach of privacy claims.
4. If the non-recoverability of success fees and after-the-event ("ATE") insurance premiums is implemented, and qualified one-way costs shifting is introduced for certain categories, further consultations are recommended on whether other categories of litigation should also involve qualified one-way costs shifting.
5. In addition, Lord Justice Jackson recommends that the following provision be introduced into the Civil Procedure Rules ("CPR") to protect claimants against adverse costs orders in these specific categories of cases:
"Costs ordered against the claimant in any claim for [personal injuries, clinical negligence, defamation/breach of privacy, or judicial review] shall not exceed the amount (if any) which is a reasonable one for him to pay having regard to all the circumstances including: (a) the financial resources of all the parties to the proceedings, and (b) their conduct in connection with the dispute to which the proceedings relate."

Permitted Use of Contingency Fee Arrangements

6. Lawyers (solicitors and barristers) in England and Wales are presently not permitted to act on a contingency fee basis in contentious business (Solicitors' Code of Conduct 1997 rule 2.04(1)).
7. A contingency fee agreement is described by Lord Justice Jackson as one under which the client's lawyer is paid only if the client's claim is successful, and the

lawyer is paid out of the settlement sum or damages awarded, usually as a percentage of that amount.

8. Lord Justice Jackson recommends that solicitors and barristers alike should be able to enter into contingency fee arrangements (on the Ontario model) provided that:
 - 8.1 The unsuccessful party, if ordered to pay the successful party's costs, is only required to pay an amount for costs reflecting what would be a conventional amount, with any difference to be borne by the successful party; and
 - 8.2 The terms of contingency fee arrangements are regulated. The regulations should:
 - 8.2.1 Introduce a requirement that clear and transparent advice and information be provided to a client on costs, other expenses and alternative methods of funding;
 - 8.2.2 Provide a maximum percentage of the damages that can be recovered in fees from the award; and
 - 8.2.3 Control the use of unfair terms and conditions.
9. As for the potential liability for adverse costs in litigation, agreement must be reached at the outset as to how any adverse costs order will be met. If the solicitors are to meet such an order, then this additional risk should be reflected in the percentage recovery to which the solicitors will be entitled in the event of success.
10. Regarding counsel's fees, this could be dealt with in one of two ways: (1) fees as a disbursement to be paid by the solicitors in any event; or, (2) counsel could also act pursuant to a contingency fee arrangement and be entitled to recovery of a percentage of the sums recovered. As for other disbursements, these may be paid by the client or borne by the solicitors. In the latter case, this risk should again be reflected in the percentage recovery which is agreed between the solicitor and client.
11. Lord Justice Jackson also recommends, as an additional safeguard, that no contingency fee arrangement should be valid unless countersigned by an independent solicitor, who certifies that he has advised the client about its terms.
12. Lord Justice Jackson considers that if his reform of the CFA regime is adopted (as set out below), contingency fee arrangements may be an attractive alternative for some claimants.

Conditional Fee Arrangements (“CFAs”): Success Fees and After-the-Event (“ATE”) Insurance Premiums To Be Irrecoverable

13. Lord Justice Jackson states:

“It must be frankly admitted that the conclusions reached in [relation to CFAs and ATE] will cause dismay to many lawyers”.
14. “No win, no fee” CFAs are identified as a major contributor to disproportionate costs in civil litigation. Lord Justice Jackson states that the two key drivers of costs under such agreements are: (1) the lawyer’s success fee; and (2) the ATE insurance premium (to cover the claimant against the risk of paying the defendant’s costs). He strongly recommends that success fees and ATE insurance premiums should cease to be recoverable from unsuccessful opponents, since ATE premiums are unfair and unsatisfactory, often being more expensive to an unsuccessful defendant than would be the case under one-way costs shifting. Success fees and ATE insurance premiums should instead have to be borne by the client.
15. Lord Justice Jackson makes alternative recommendations in the event that the recoverability of ATE insurance premiums is not abolished. He recommends:
 - 15.1 that there should be a limited period (akin to the 42 days allowed in CPR rule 44.12B in respect of defamation proceedings) in which the defendant has the opportunity to admit liability and avoid the cost of an ATE policy;
 - 15.2 no ATE insurance premium to be recovered for Part 36 risks;
 - 15.3 cap recoverable premiums at 50% of the damages awarded to a successful claimant;
 - 15.4 and, in cases where the ATE insurer is entitled to avoid, allow recovery from the insurer with rights against the policy holder preserved.
16. Lord Justice Jackson’s alternative proposals in respect of success fees (in the event that they are not abolished) are as follows:
 - 16.1 fixed success fees should be introduced into all areas of litigation where CFAs are commonly used;
 - 16.2 where a fixed success fee is claimed by the winning party, the paying party is entitled to be shown evidence that a CFA was in place for the material period so as to justify the charge of a success fee—where the winning party could have used other funding which would not have resulted in a CFA being used, that should be a valid reason for disallowing any claim for a success fee;

- 16.3 no success fee should be recoverable from the paying party (or chargeable to the client) for the pre-action protocol period;
- 16.4 any element of a success fee that provides for protection against the risk of the claimant not accepting a good Part 36 offer should not be recoverable from the paying party; and
- 16.5 where a two-stage success fee model is applied and a Part 36 offer is made and not beaten at trial, the receiving party should be limited to the level of success fee that applies at the last date when the party could have accepted the offer.

Consequential 10% Increase in General Damages for Specific Categories of Litigation and a 25% Cap on Amount of Success Fee that Litigant Should Pay

17. If CFA success fees and ATE premiums cease to be recoverable, it is likely that they will have to be paid out of the damages awarded to the successful client. To ensure successful claimants are properly compensated, Lord Justice Jackson recommends that awards of general damages should be increased by 10% in relation to nuisance, defamation and any other tort which causes suffering to individuals, and that a similar 10% increase be applied to general damages for pain, suffering and loss of amenity in personal injury (“PI”) claims.
18. In addition, he stipulates that the maximum amount of damages that lawyers may deduct for success fees should be capped at 25% of damages (excluding damages referable to future care or future losses). Justice Minister Jack Straw subsequently suggested on 19 January 2010 that in defamation cases the cap on success fees should be reduced to 10%.
19. Lord Justice Jackson reasons that this should leave successful claimants no worse off than under the current regime, whilst ensuring that defendants pay only normal and proportionate legal costs to successful claimants.

Fixed Costs in Fast Track Litigation

20. Lord Justice Jackson recommends that costs be fixed for fast track (medium value) PI cases.
21. For non-PI cases, he recommends a dual approach whereby: (1) costs are fixed for certain types of cases (RTAs not involving PI; housing claims); and (2) in other cases there is to be an upper limit on recoverable costs (he proposes a £12,000 cap for pre-trial costs, inclusive of counsel fees, expert fees and other

disbursements). This cap is to be increased by 12.5% when the solicitors are a London firm.

22. The proposed fixed costs rule will not apply in a case where a party acts so unreasonably that the court makes an order for indemnity costs against that party.
23. Lord Justice Jackson does not recommend that a general scheme of fixed costs be introduced into the multi track (higher value claims) at the present time, but that this should be reconsidered after experience has been gathered on the fast track.

Costs in Collective Actions

24. The default position in this category of cases should be:
 - 24.1 (a) in relation to group personal injury actions, that qualified one-way costs shifting shall apply;
 - 24.2 (b) in all other actions, that two-way costs shifting shall apply.
25. However, at the certification stage, the court, after considering the nature of the case and the funding arrangements of the parties, may direct that a different costs regime shall operate. And, whatever costs regime applies, the general rule in CPR rule 48.6A should apply: the individual litigant is liable only for his proportion of the common costs.
26. Rule 9.01(4) of the Solicitors' Code of Conduct 2007 should be amended, so as to permit the third party funding of collective personal injury claims.
27. Serious consideration should also be given by the Legal Services Commission to the establishment of a Supplementary Legal Aid Scheme dedicated to collective actions.

Appeals

28. Lord Justice Jackson recommends a separate judicial review of the likely costs of appeals after decisions have been reached on his recommendations in this report. However, pending that review, he recommends that appellate courts have discretionary power, upon granting permission to appeal or receiving an appeal from a no-costs jurisdiction, to order: (a) that each side bear its own costs; or (b) that recoverable costs be capped at a specified sum.

Clarification of the Concept of Proportionality in Assessing Costs

29. Lord Justice Jackson proposes how the principle of proportionality should be formulated and applied in relation to assessing recoverable costs in light of the

decision in *Lownds v Home Office* [2002] EWCA Civ 365 ("*Lownds*"). The CA in *Lownds* proposed a two-stage approach:

"There has to be a global approach and an item-by-item approach. The global approach will indicate whether the total sum claimed is or appears to be disproportionate having particular regard to the considerations which Part 44.5(3) states are relevant. If the costs as a whole are not disproportionate, according to that test, then all that is normally required is that each item should have been reasonably incurred and the costs for that item should be reasonable. If, on the other hand, the costs as a whole appear disproportionate, then the court will want to be satisfied that the work in relation to each item was necessary, and, if necessary, the cost of the item was reasonable."

30. This formulation is problematic: if it is determined that all items are both reasonable and necessary in amount, they are recoverable even though the result may be disproportionate. Lord Justice Jackson concludes that the application of the *Lownds* test in some cases is unsatisfactory. Lord Justice Jackson proposes instead that in an assessment of costs on the standard basis, proportionality shall prevail over reasonableness and the proportionality test should be applied on a global basis. The judge proposes the following definition (to be precisely defined by the Rule Committee) of proportionate costs for inclusion in the CPR:

"Costs are proportionate if, and only if, the costs incurred bear a reasonable relationship to: (a) the sums in issue in the proceedings; (b) the value of any non-monetary relief in issue in the proceedings; (c) the complexity of the litigation; (d) any additional work generated by the conduct of the paying party; and (e) any wider factors involved in the proceedings, such as reputation or public importance."

31. Lord Justice Jackson also states that the CPR should provide that the fact that costs were necessarily incurred does not make them proportionate.

Clarification of the Law in Relation to Part 36 Offers

32. Lord Justice Jackson recommends that *Carver v BAA Plc* [2008] EWCA Civ 412 ("*Carver*") should be reversed judicially or by rule change. Instead, it should be made clear that in any purely monetary case, "more advantageous" in CPR rule 36.14(1)(a) means better in financial terms by any amount, however small. It was held by the Court of Appeal in *Carver* that beating the defendant's

Part 36 offer by £51 was not “more advantageous” than accepting the slightly lower offer made a year previously.

33. In cases where qualified one-way costs shifting are proposed (PI, judicial review, defamation and related cases), if a claimant fails to accept a defendant’s adequate offer under CPR Part 36, the claimant should forfeit, or substantially forfeit, the benefit of one-way costs shifting.
34. Lord Justice Jackson states that as the law presently stands, claimants are insufficiently rewarded and defendants insufficiently penalised, when the claimant has made an adequate Part 36 offer which is not accepted by an obdurate or unreasonable defendant. To address this balance, he recommends an uplift of 10% of the financial value of any award when a defendant fails at trial to do better than the claimant’s offer (although this uplift may be scaled down in claims of more than £500,000).

More Effective Costs Management Procedures

35. Lord Justice Jackson recommends a gradualist approach to costs management in the courts. He recommends formal training in the linked disciplines of costs budgeting and costs management for solicitors, barristers and judges.
36. Appropriate rules should also be drafted setting out a standard costs management procedure, which judges should have discretion to adopt if and when they see fit, either of their own motion or upon application of the parties.

Establishment of a Costs Council and Abandonment of the Advisory Committee on Civil Cost

37. A Costs Council should be set up to undertake the following tasks each year:
 - 37.1 Set Guideline Hourly Rates for solicitors for summary assessments (which is the ACCC’s only current role) and detailed assessments of costs;
 - 37.2 Review the matrices of fixed costs for the fast track; and
 - 37.3 Review the upper limit of fixed costs for fast track cases.

Legal Aid

38. Although Lord Justice Jackson states that he would welcome the restoration of legal aid to at least pre-2000 levels, he does not make any recommendations in this respect. He does, however, stress the necessity of making no further cutbacks in legal aid availability or eligibility.

RECOMMENDATIONS REGARDING CASE MANAGEMENT BY THE COURTS

Large Commercial Claims: Docketing

39. Docketing (i.e. the assignment of one judge to a case from start to finish) should be more widely encouraged. Section D4 of the Commercial Court Guide (the “Guide”) should be amended so that docketing is no longer restricted to cases that are exceptional in size or complexity or have a propensity to give rise to numerous pre-trial applications. Lord Justice Jackson also recommends that section D8 of the Guide be amended to provide that the question of whether a case warrants assignment to a particular judge should be specifically considered at the first case management conference (“CMC”).

Disclosure

40. Regarding disclosure, Lord Justice Jackson recommends that section E2.1 of the Guide be amended to include a “menu option” as one of the alternatives open to the court when making disclosure orders. The menu would provide the court a range of possible orders, with no steer from the rules towards a particular outcome. With no default position, the parties and the court would be forced at the first CMC to turn their mind to the most appropriate process for the particular proceedings.
41. It is recommended that the “menu option” discussed above be incorporated into the CPR for (a) large commercial or similar claims and (b) any case where the costs of standard disclosure are likely to be disproportionate. Lord Justice Jackson does not think that the “menu option” is appropriate for PI and clinical negligence claims.
42. Lord Justice Jackson makes no recommendations on e-disclosure on the assumption that the draft “Practice Direction Governing Disclosure of [Electronically Stored Information](#)” will be approved.

E-Disclosure Training

43. E-disclosure should form a substantial part of training for solicitors, barristers and those judges who will have to deal with e-disclosure on the bench.

Case Management Powers

44. Lord Justice Jackson makes the following recommendations regarding case management:

- 44.1 measures should be taken to promote the assignment of cases to judges with relevant expertise;
- 44.2 a menu of standard paragraphs for case management directions for common cases should be prepared and made available to all district judges and on-line;
- 44.3 CMCs and Pre Trial Reviews (“PTRs”) should either be used for more effective case management or should be dispensed with and replaced with directions on paper; and
- 44.4 courts should be less tolerant of unjustified delays and breaches of case management orders. In addition, the courts should monitor the progress of parties to secure compliance and pre-empt the need for sanctions as is done, for example, in the United States.

Witness Statements

- 45. Lord Justice Jackson is also concerned about the high levels of costs generated in relation to the preparation of witness statements. To the extent that effective case management does not prevent parties from producing excessively long or partially irrelevant witness statements, costs sanctions should be applied to the responsible party (for example, a successful party is not to receive its costs of preparing the statement or an unsuccessful party is to pay its opponents costs on an increased basis).
- 46. Lord Justice Jackson recommends the possible adoption of one aspect of the “Relationsmethode” of German civil procedure, namely, if in any given case the court so directs, each party shall identify the factual witnesses whom it intends to call and which of the pleaded facts the various witnesses will prove. The filing of such a document (i.e. a footnoted or annotated copy of the pleadings) will be necessary groundwork for any CMC.

Expert Evidence

- 47. Lord Justice Jackson recommends that CPR Part 35 be amended to require that a party seeking permission to adduce expert evidence should furnish an estimate of the costs of that evidence to the court.
- 48. Lord Justice Jackson also recommends the procedure of “concurrent evidence” (also known as “hot tubbing”: in which multiple expert witnesses give evidence on the stand together) should be piloted in cases where all parties consent. If the results of the pilot are posi-

tive, consideration should then be given to amending CPR Part 35 to incorporate this procedure.

OTHER RECOMMENDATIONS

Intellectual Property Litigation

- 49. The proposals in the IPCUC Working Group’s final report for reforming the Patents Courts should be implemented. In addition, consideration should be given to bolstering the Patents Court Guide in relation to the (a) adequacy (and transparency) of statements of case, (b) a more robust style of case management and (c) an earlier narrowing of the issues.
- 50. There should be a small claims track for IP claims with a monetary value of less than £5,000 and a fast track for IP claims with a monetary value of between £5,000 and £25,000. More judges with specialist patent experience should be available to deal with small claims and fast track IP cases.
- 51. There should be consultation with court users, practitioners and judges, in order to ascertain whether there is support either for (a) an IP pre-action protocol or (b) the Patents Court Guide including guidance regarding pre-action conduct.

Campaign to Promote Awareness of ADR

- 52. Lord Justice Jackson recommends a “serious campaign” to ensure all litigation lawyers and judges are properly informed as to the benefits of ADR. This campaign should also seek to inform the general public and small businesses.
- 53. An ADR handbook should be prepared for use at all training sessions concerning mediation.

Pre-Action Protocols

- 54. The general protocol (sections III and IV of the Practice Direction Pre-Action Conduct (“PDPAC”)), should be repealed as it serves no useful purpose because “one size does not fit all” cases. However, parties should still be obliged to conduct sensible and appropriate pre-action correspondence and exchange of information.
- 55. Annex B to the PDPAC should form a new specific protocol for debt claims (between business claimants and individual defendants).
- 56. Parties should be permitted to make pre-action applications to court for breaches of the pre-action protocols, in a similar manner to the pre-action disclosure applications that are currently permitted.

Pre-Action Protocols in Relation to Defamation

57. Paragraph 3.3 of the defamation protocol should be amended to read:
- “The Claimant should identify in the Letter of Claim the meaning(s) he/she attributes to the words complained of.”
58. Previously, the protocol stated that it was only *desirable* for the Claimant to do this.
59. Lord Justice Jackson also recommends a reconsideration of the question of whether trial by jury should be retained in this context.

Personal Injury Litigation

60. As detailed above, Lord Justice Jackson recommends that the level of general damages in PI cases be increased by 10%.
61. Lord Justice Jackson recommends setting up a working group to explore the possibility of producing a transparent and neutral calibration of existing software systems to assist in calculating general damages up to the value of £10,000. Lord Justice Jackson believes that this could encourage early settlement of claims for acceptable amounts.

Ban on Payment of Referral Fees in PI Litigation

62. The proposed ban is to be implemented by either:
- (a) primary legislation; or (b) an amendment to the Solicitors' Code of Conduct 1997.
63. Alternatively, Lord Justice Jackson proposes that the amount of referral fees payable be capped at a modest figure of £200.
64. If either of the above is accepted, it is also recommended that serious consideration should be given to the question whether referral fees should be banned or capped in other areas of litigation.

Third Party Funding

65. Lord Justice Jackson recognises that third party funding is still in its infancy, but states that a satisfactory voluntary code is required, to which all third party funders should subscribe (in fact, a draft voluntary code is in the public domain and can be found on the Civil Justice Council web site). Lord Justice Jackson states that full statutory regulations may be required in the future if third party funding expands.

66. As for the regulation of the capital adequacy of third party funders, Lord Justice Jackson does not recommend full regulation by the FSA at this time, but that the voluntary code should contain effective capital adequacy requirements. In addition, the code should place appropriate restrictions upon funders' ability to withdraw support for ongoing litigation.
67. Lord Justice Jackson also recommends that funders should potentially be liable for the full amount of liability for adverse costs. Liability would be at the discretion of the judge in the individual case and potential liability should not be limited by the extent of the funder's investment.

LAWYER CONTACTS

For further information, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our “Contact us” form, which can be found at www.jonesday.com.

John M. Majoras

Partner

+1.202.879.7652

jmmajoras@jonesday.com

Craig C. Shuttleworth

Partner

+44.20.7039.5117

ccshuttleworth@jonesday.com

Robert J. Sully

Associate

+44.20.7039.5116

rjsully@jonesday.com

Barry J. Fletcher

Associate

+44.20.7039.5189

bfletcher@jonesday.com

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