



JUDICIARY OF
ENGLAND AND WALES

COSTS CONFERENCE ON 7th MARCH 2017 (costskonfon7march)

KEYNOTE ADDRESS BY LORD JUSTICE JACKSON

THE REVIEW OF FIXED RECOVERABLE COSTS

This lecture has two main purposes. First, it is a progress report. Secondly the lecture is intended to set a framework for the future planned seminars.

ANNOUNCEMENTS BY THE LORD CHANCELLOR, THE LORD CHIEF JUSTICE AND THE SENIOR PRESIDENT OF TRIBUNALS

In a paper presented to Parliament on 15th September 2016 the Lord Chancellor stated: “Fixed recoverable costs are legal costs which can be recovered from the losing side by the successful party to a claim, at a prescribed rate. (For civil claims, these are set out in the Civil Procedure Rules). We will build on measures introduced in the last Parliament for low value personal injury claims, to limit the level of legal costs recoverable. These measures provide transparency and certainty for all parties and are designed to ensure that the amount of legal work done is proportionate to the value of the claim. We are keen to extend the fixed recoverable costs regime to as many civil cases as possible. The senior judiciary will be developing proposals on which we will then consult.”

In their joint statement “Transforming our justice system” dated September 2016 the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals stated: “More needs to be done to control the costs of civil cases so they are proportionate to the case, and legal costs are more certain from the start. Building on earlier reforms, we will look at options to extend fixed recoverable costs much more widely, so the costs of going to court will be clearer and more appropriate. Our aim is that losing parties should not be hit with disproportionately high legal costs, and people will be able to make more informed decisions on whether to take or defend legal action.”

THE PRESENT REVIEW

On 11th November 2016 the Lord Chief Justice and the Master of the Rolls commissioned me to carry out a review with the following terms of reference:

1. To develop proposals for extending the present civil fixed recoverable costs regime in England and Wales so as to make the costs of going to court more certain, transparent and proportionate for litigants.
2. To consider the types and areas of litigation in which such costs should be extended, and the value of claims to which such a regime should apply.

3. To report to the Lord Chief Justice and the Master of the Rolls by the 31st July 2017.

The Lord Chancellor has indicated in her statement of 15th September that the proposals resulting from this review will be the subject of consultation.

MY POSITION

My position is as stated in the note of 12th December 2016 announcing the proposed seminars:

“Although I hold the view that fixed recoverable costs would be beneficial for lower value cases, I will keep an open mind for the time being about what types and levels of cases should fall within such a regime and what the costs figures should be. The purpose of the seminars is to explore the issues and the conflicting considerations which are in play.”

PROGRESS SO FAR AND PLANS FOR THE FUTURE

A large number of written submissions have come in, which the assessors and I are working through. A team of judicial assistants are analysing recent budgets. There have been two seminars so far: one in Leeds focusing on property and chancery litigation; one in Manchester focusing on personal injury and clinical negligence litigation.

A curious omission from many of the submissions is recognition that (outside PI and clinical negligence) costs shifting is a two-edged sword. It both promotes and inhibits access to justice. Some litigants are enabled to litigate, because they know that they will get costs back at the end. Others are deterred by the fear of an adverse costs order. The ‘no costs recovery’ regime in employment tribunals promotes access to justice because of the latter factor. Somehow I have got to take account of these conflicting considerations in whatever I recommend.

One strong message which comes over in many of the submissions and also at the seminars is that (despite all the criticisms in the past) costs management is now working much better. It applies the new proportionality rule to the circumstances of each individual case. Many people are arguing that this does away with the need for fixed costs in the multi-track. The counter-argument is that for lower value cases, a fixed costs regime is simpler and cheaper.

Defendants and liability insurers are inclined to accept that costs management controls future costs. But they maintain that fixed costs would be better. Also they are worried about costs incurred before the CCMC. Initial analysis by my judicial assistants indicates that “incurred” costs represent about 31% of total costs on the claimants’ side and about 14% of total costs on the defendants’ side. These figures will no doubt change when the analyses are complete.

Another frequent message in this review is that one size doesn’t fit all. There is force in that point. I have therefore got to identify which types of case and which ‘levels’ of case are suitable for fixed costs. The Bar Council and many other respondents accept in principle¹ that all fast track costs should be fixed. (At the moment only part of the fast track has fixed costs.) In relation to the fast track, therefore, the main task is to identify what the figures should be and whether any process changes are required. Outside the fast track, there is much more controversy about which (if any) cases should have fixed costs. One view is that

¹ See the caveats in paragraphs 110, 138 and 227-8 of the Bar Council’s submission to the Fixed Recoverable Costs Review

costs management should take care of everything above the fast track. The alternative view is that lower value multi-track cases should have fixed costs.

Many people are arguing that the value of a claim should not be the sole determinant of whether it is suitable for fixed costs. One must also look at the complexity of the case, the number of issues, the number of experts and so forth.

If some lower value multi-track cases are to have fixed costs, should a new 'Intermediate track' be created to accommodate such cases? In that event, what should be the procedural rules for the Intermediate track? These are questions which I am considering with the assessors.

In lower value business disputes involving individuals and SMEs, some litigants may welcome a fixed costs regime combined with a streamlined process. Taking up a suggestion made in two of the written submissions, I am exploring the possibility (subject to the approval of the Rule Committee) of piloting such a regime on a voluntary basis. Also I hope to hear detailed discussion about the issues concerning lower value business disputes at the Birmingham seminar on 16th March.

'Lower value' has different meanings according to context. In the mercantile courts (I am told) 'lower value' means claims up to about £250,000. In personal injury litigation, on the other hand, the upper limit for 'lower value' claims would be well below that figure.

In relation to judicial review, the issues are complex. My previous recommendation for QOCS in this area was not taken up by the Government. A number of interesting suggestions have been made. One idea floated is that the optional fixed recoverable costs rules which apply to Aarhus cases might be developed and applied more generally to judicial review claims. In view of the high importance of these matters, I should like to make public law cases the main focus of the London seminar on 13th March. I hope to hear full argument on these matters and from all angles, including the views of claimants, public authorities, pressure groups and others involved in such litigation.

The Cardiff seminar on 5th April will cover (a) judicial review and (b) structural issues concerning fixed costs. Structural issues include whether any fixed costs regime should be drawn up by reference to Precedent H phases (not applicable to judicial review) or to chronological stages; what streamlining and process changes are required to make any fixed costs regime effective; whether an 'intermediate track' for such cases is a good idea; whether specific items of work should be ring fenced for counsel and how to achieve that.

I have not received any submissions from public authorities (other than the NHSLA in relation to medical claims). So I do not know what the views of public authorities are on pros and cons of developing fixed costs, for example in judicial review. Their views may become apparent at the London and Cardiff seminars.

The first two seminars in February were hugely informative and constructive. It is hoped that this lecture will be of assistance to people planning to attend the next three seminars. There is no point in those events simply covering the same ground as the Leeds and Manchester seminars.

My ultimate objective is to put forward a package of proposals which will promote access to justice and control costs, as well as being fair and workable.

Rupert Jackson
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7th March