

Lord Justice Jackson
Review of Fixed Recoverable Costs

30th January 2017

Members of the Review Committee,

Kain Knight is the longest established firm of costs lawyers in the country, with offices in Bishops Stortford, London, Canterbury and St. Austell. We undertake work across the entire range of costs litigation from low level personal injury matters to multi-million commercial claims spanning multiple jurisdictions. The firm receives circa 5,000 instructions per annum predominantly from solicitors and insurers but also from other commercial entities as well as members of the general public. Having been established for over 40 years, the company has dealt with and adapted to various changes to both practice and procedure however, the proposed fixed recoverable costs reforms are likely to have the most wide-ranging impact, not only on the legal costs industry but on the legal industry as a whole.

The Government has recently announced a consultation for a proposed fixed costs scheme in relation to Clinical Negligence claims concerning claims for damages of £25,000 or less. If what is proposed is implemented then only after a period of reflection and analysis of the schemes success can proper consideration be given as to whether any wider fixed costs regime can truly be justified.

We hope that our comments below assist the Committee with its Review.

Outstanding assessment of key costs reforms

Although it has been more than 3 years since the implementation of a number of Lord Justice Jackson's key proposals, insufficient time has passed for the stakeholders to properly assess their impact; indeed, no formal review has yet taken place. The current position on those proposals, as we see it, are as follows:

- Costs budgeting –
 - This proposal has undoubtedly had the largest impact to date owing to its effect on the everyday work of solicitors and the judiciary. At the outset there was of course a significant degree of resistance to the entire concept, however, solicitors are clearly now more comfortable with the idea of budgeting. At the inception of the regime, solicitors were deferring to our expertise although as time has progressed they are increasingly undertaking the drafting of budgets themselves. Kain Knight regularly delivers seminars to its clients and it is apparent from the engagement at all levels, from junior to partner, that costs budgeting is being accepted as a more important part of the whole case management process than it was 3½ years ago.

- Although we are being instructed on matters that have been costs managed, generally our opinion is that clients are settling matters using approved budgets as a basis for negotiations. It is usually only on those matters where the parties are significantly apart on any attempted negotiations where we are then instructed. Costs budgeting therefore appears to be having the intended effect of reducing the number of claims that have to proceed to detailed assessment.
 - The procedural rules and the relevant forms have evolved to take account of various issues that have arisen in the application of the budgeting regime. Indeed, further rule changes are apparently imminent to address the *SARPD Oil* judgment and uncertainty concerning the application of the 1% and 2% allowance for the costs of the budgeting process. This evolution of the regime over a period of 3½ years was not unexpected given the drastic shift in practice required, however, it is clear that both practitioners and the judiciary are more *au fait* with the entire process and now is the appropriate time to assess its impact.
- New proportionality test –
 - Although the proportionality test was significantly changed in April 2013, various extra-judicial speeches at the time acknowledged that there would be some inevitable satellite litigation in order for guidance to be obtained on interpretation of the new rule. There has now been some judicial guidance on the new test at Costs Judge level, however, two cases are now on appeal. The appeal in *BNM v MGN* is to be heard by the Court of Appeal in October 2017, whilst the High Court appeal in *May v Wavell* was recently heard and judgment is awaited.
 - It has been stated that any fixed recoverable costs reforms will be significantly premised upon the application of the new proportionality rule. Until further guidance is provided by the Court of Appeal on its application, it would be inappropriate to press ahead with an extension of fixed recoverable costs.
 - Proportionality is being used as a very blunt tool by Judges at CCMCs to apply significant reductions to costs budgets. Accordingly, the two measures combined have led to a reduction in recoverable legal costs thus negating the proposition of fixed costs.
 - Removal of additional liabilities recovery –
 - One of the driving forces behind escalating the costs of litigation has historically been the cost of additional liabilities. These accounted for significant parts of claims against Defendants such as the NHSLA who lobbied vigorously for reform of the costs regime.
 - Unsurprisingly, shortly prior to the LASPO reforms there was an influx of new Conditional Fee Agreements and ATE policies being incepted. As a result, a number of those cases are only just reaching their conclusion. As Costs Lawyers preparing bills of costs we are increasingly seeing fewer bills with additional liabilities within them. The run-off of cases seeking additional liabilities needs to be allowed to finish and then a proper assessment can be undertaken of the impact on the levels of costs being sought.
 - Provisional assessment of costs –

- A criticism of the costs assessment process itself was that it was too expensive. For those costs claims which are valued up to £75,000, which do not settle following a costs management order, the Provisional Assessment regime applies. The costs of this process are themselves subject to fixed recoverable costs. The threshold to achieve a successful challenge by way of an oral hearing is high and accordingly significant judicial hearing time has been saved.
- If fixed recoverable costs are introduced at the levels suggested, it is very likely that the provisional assessment regime will become largely redundant.
- A significant number of the 5000 instructions Kain Knight receives each year are in respect of Bill of Costs preparation. The majority of such matters are captured by the Provisional Assessment limit of £75,000. From our case management system we are able to report that approximately 3% of these matters proceed to either a Detailed or Provisional Assessment the remainder settling through negotiation.

If, as is believed, the policies above have and will continue to have a significant downward effect on the amount of costs being sought by receiving parties, then in our opinion the four policies combined will serve to achieve the aims of the government regarding costs. As will be seen from our submissions below, the four policies will also serve to be a *fairer* approach to achieving the Government's aims as opposed to an extension to fixed recoverable costs which we consider to be a "one size fits all" concept which is unsuitable for multi-track litigation.

Chapter 3 of Lord Justice Jackson's Final Report, detailed at section 6.18, proposed the extension of fixed costs on the fast-track to non-personal injury cases. For reasons not known to Kain Knight this proposal was never put in to practice. In our opinion the logical step is to first consider extending fixed costs to all fast-track cases prior to making the extraordinary leap of attaching fixed costs to the realms of multi-track cases which are by definition more varied in nature and complexity and in turn carry greater costs burdens. Only once a fixed recoverable costs regime has been given an opportunity to be tested and properly reviewed on all fast-track cases should consideration be given to extending it to the broader horizon of multi-track cases.

Disadvantages of an extended fixed recoverable costs regime

We appreciate that the purpose of the Review is geared largely towards an assessment of the levels at which fixed costs should be implemented, however, the Committee cannot ignore the disadvantages of any proposed extension. We consider these to be as follows:

- One size does not fit all – multi-track claims vary widely from one to the next and simply referencing the value of the claim to determine the recoverable costs is too simplistic an approach to determining a fair contribution to a successful party's costs. In contrast Detailed Assessments do provide the opportunity for a proper adjudication on the fair contribution of costs to the successful party. It also allows for a proper examination of *all* the factors relevant to proportionality outlined in CPR 44.3(5), rather than effectively limiting consideration to the sum in issue in the proceedings.
- Lord Justice Jackson commented that fixed costs in personal injury cases has "*led to the resolution of hundreds of thousands of personal injury cases per year at proportionate*

cost” (Jackson LJ, Fixed Costs – The Time Has Come, 28th January 2016 speech, para 2.3), however, those cases are often conducted on a template basis only varying factually. This enables the claims to be delegated to more junior fee earners to be conducted at cheaper cost. This is not possible with the majority of multi-track claims which vary so widely.

- We appreciate that concerns have been expressed as to the high levels of costs inhibiting access to justice but equally, and more so in our opinion, low recovery of *inter partes*’ costs will only serve to diminish access to justice. Parties have always had to consider whether they can afford to lose a claim before pursuing it. As measures such as proportionality and costs budgeting have taken hold, parties are having to also consider whether they could afford any shortfall in actual and recovered costs even if successful. At least under these measures the levels of recoverable costs set are tailored to the particular claim having regard to all factors in CPR 44.3(5) and CPR 44.4(3). Under an extended fixed recoverable costs scheme, a wronged party with a valid claim will have to seriously consider whether they even commence a potentially successful claim because even if they are successful they will have to meet a significant shortfall in costs, *ala May v Wavell*. Another prospect is that the a wronged party may encounter difficulties in finding firms prepared to take on their case as the firms are unable to work within the confines of the recoverable amounts.
- Lord Justice Jackson has acknowledged that “*the complexity of law and procedure contribute to high costs*” (Jackson LJ, Fixed Costs – The Time Has Come, 28th January 2016 speech, para 2.2). This is not going to change and thus the cost to a successful party will always be high yet they will suffer on their *inter partes*’ costs recovery and they will most likely have to meet significant shortfalls in legal fees. The alternative is that some firms will agree to limit their fees to the recoverable costs regime but will end up rushing tasks to work within the confines of the fixed recoverable costs or they will seek to cease working once a thresholds is met. This could potentially lead to a drop in standards as legal teams struggle to work within the fixed costs limits. Conversely it is quite possible that the number of professional negligence claims will increase.
- Lord Justice Jackson has expressed concern that “*remuneration on a time basis rewards inefficiency*” (Jackson LJ, Fixed Costs – The Time Has Come, 28th January 2016 speech, para 2.2). For the reasons stated above, the answer to this problem is that thorough Costs Management coupled with Detailed Assessment proceedings act together as an appropriate check on any such inefficiency. A party has the opportunity to conduct litigation in a proportionate manner thus ensuring access to justice and in the event they fail to do so, the party will be penalised at the subsequent Detailed Assessment hearing.
- It is appreciated that fixed recoverable costs regimes work within other jurisdictions, however, we respectfully submit that in those jurisdictions the entire litigation process is not as adversarial as in England and Wales, which is widely recognised as an international legal centre for litigation. An inevitable consequence of such an adversarial system is increased costs on both sides which both parties are aware of but via costs

budgeting they know where a line may be drawn at least from an *inter partes* perspective.

- Certain claims within the multi-track will not have any obvious financial value against which a matrix of fixed costs could be applied. This is evident from our Costs Lawyers' individual experiences and the empirical data extracted from our case management system both of which indicate various factors seem to influence results such as: locality of the receiving party's solicitors; seniority of fee earner(s); scope of disclosure; specific directions; and conduct of the opponent amongst many others but there is no clear correlation between costs and damages. There does not seem to be any obvious solution to this problem but costs and case management on a prospective basis must be given a chance to prove its worth.
- Above, we commented that Claimants with a potentially successful claim will be forced to make a choice as to whether they can even proceed and take the risk of bearing a significant shortfall in costs even if they win. For Defendants, there is no choice, they are faced with a claim and have to respond. The Defendant may well successfully defend a claim but will usually have to pick up a significant shortfall that has been brought about by the Claimant's choice to pursue proceedings. Under qualified one-way costs shifting, if it is to persist, the Defendant even if vindicated will not recover anything in personal injury litigation.
- The proposed matrix is based upon the Form H budgeting phases. In our extensive experience the boundaries between certain phases can often be blurred, with some tasks such as "advising on quantum" not even strictly falling within any of the phases. The result will be parties allocating tasks to certain phases to justify having "*substantially started*" a phase to then avail themselves of the accompanying costs for that phase. This will undoubtedly lead to further satellite litigation, as will the interpretation of the proposed "*substantially started*" test for recovery of a partially completed phase.
- As alluded to earlier, much has been made of the certainty to be derived from fixed recoverable costs, however, we consider that Defendants will often use this to their advantage knowing that in most cases the Claimant only has a finite funds from which to fund the litigation. We consider that this will result in Defendants being less likely to settle claims and pushing more matters to trial thus increasing the pressure on the Court system. We have seen this on a smaller scale with the introduction of fixed costs for Provisional Assessment where paying parties, knowing that their exposure is limited to £1,500 plus court fees and VAT, are more willing to push matters through to the initial paper assessment. Consequently many courts are unable to meet the publicised 6 week turnaround for Provisional Assessments.
- Further on the issue of certainty, the current system of costs budgeting provides all parties with an idea of their potential exposure once a costs management order is made. As mentioned above, the phase totals provided for within a budget are arrived at by considering all of the relevant factors rather than only the sums in issue. This must be a fairer method of analysis to parties in litigation.

- A significant attraction of the current system, not least on the international stage, is the ability to recover a sum that at least bears some resemblance to the actual costs incurred by a successful party. Should fixed recoverable costs be extended to cover all cases valued up to £250,000 this may force litigants to re-think where they will wish to pursue their claims.

Should the government decide to press ahead with the extension of fixed recoverable costs, consideration will need to be given to the appropriate transitional provisions. If they are only to apply to cases issued from a certain date, then there will no doubt be a flurry of cases issued shortly before any imposed deadline. Alternatively, the Government may wish to consider only applying fixed costs to post-issue costs for a certain period however, some claims may have a very long pre-action tail which would somewhat defeat the purpose of a proposed fixed recoverable costs scheme as Detailed Assessments will still be necessary.

Highly pertinent to the issue of fixed costs regime would be the requirement for defined "escape routes" to address scenarios where a party uses the regime unfairly by litigating in a manner that increases costs beyond the permitted thresholds. To this end, if the regime ceases to apply on an indemnity basis assessment of costs, we suspect there will be numerous applications by receiving parties, whose cases do not reach trial, for such orders. This would have the potential to overload the court system with further, unwelcome satellite litigation.

As mentioned above, our firm has its own bespoke case management system from which a wealth of data and statistical information on levels of legal costs claimed and recovered is stored. We would be pleased to share any data or information which the Committee may require to assist its Review.

Yours faithfully,

A handwritten signature in dark ink, appearing to read "Kain Knight", with a stylized, cursive script.

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