



Jackson review of fixed recoverable costs

Q: What is the background to the current discussions?

A: In his 2010 Review of Civil Litigation Costs Final Report (Final Report), Lord Justice Jackson identified that the high cost of litigation inhibits access to justice which undermines the rule of law. As a result of the Final Report, a tariff of fixed recoverable costs (FRC) for the winning party in personal injury (PI) claims in the fast track up to £25,000 was introduced, as well as for intellectual property claims in the Enterprise Court up to £5,000. These fixed costs replaced the need for the assessment of costs at the end of a case. Although fixed costs were only introduced to a limited number of claim types, LJ Jackson envisaged them being rolled out further once they had bedded down.

Six years on, at a lecture given on 28 January 2016 to the Insolvency Practitioners Association, LJ Jackson recommended that the time was right to extend the existing FRC regime to all fast track cases (i.e. to include all non-PI cases) and also to the 'lower reaches' (up to £250,000) of the multi-track.

Q: According to LJ Jackson, how successful has the introduction of FRC in the fast track for PI claims been so far?

A: LJ Jackson states that FRC in the PI arena are working well. First, he feels that the legal profession is more willing to accept FRC than previously, because they removed the need for costs budgeting (itself a costly and time-consuming exercise). Second, he considers that the regime itself seems to work reasonably well, as shown by the high number of PI cases in the fast track as well as the continuing widespread advertising by solicitors for claimants.

Q: What does LJ Jackson now propose for the introduction of fixed costs to non-PI fast-track claims?

A: He feels that this should now be prioritised, given that the Ministry of Justice is 'broadly supportive'. He suggests that a good starting point would be the figures in the final Report, suitably adjusted for inflation.

Q: What about fixed costs in the multi-track?

A: In his January 2016 speech, LJ Jackson put forward a suggested grid of fixed costs for the fast-track with a value of £25,000-250,000. There are four bands of fixed costs, according to the value of the claim. The grid is broken down into the broad 10 recognised stages of an action, starting with pre-action costs all the way to trial and negotiation/ADR.

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Q: How is a 'one size fits all' fixed costs grid going to address the fact that some types of cases are more expensive to run than others?

A: LJ Jackson believes that it is essential to have a 'coherent structure' and not to have a fragmented system of fixed costs grids for different claims. However, if a particular area of work justifies higher costs, then LJ Jackson feels this can be provided by percentage uplifts in the Civil Procedure Rules themselves.

Q: How have these figures been devised?

A: By discussions between LJ Jackson and costs judges and practitioners. They are also based on the existing regime as well as experience from costs budgeting.

Q: What would happen if a party's conduct drives up costs?

A: If the court feels that 'substantial additional work was caused by the conduct of the other party', then it may add a percentage uplift to the FRC for all or part of the case to reflect this.

Q: Why does LJ Jackson think this is the way forward rather than the traditional approach of using costs assessments at the conclusion of a case?

A: LJ Jackson feels that costs shifting in itself drives up total costs, but the assessment of costs at the end of the litigation process drives those costs even higher. The only way to control costs is to do so in advance so that the parties know 'upfront' what adverse liability they face. This will, to his mind, remove the incentive to 'spend whatever you can'.

Q: What does LJ Jackson consider are the particular merits of fixed costs in the multi-track?

A: Fixed costs would:

- Ensure that a party's recoverable costs and adverse costs risks are proportionate.
- Provide certainty and predictability in that parties will know 'upfront' to what adverse risks they are exposed.
- Dispense with the need for costs budgeting and costs assessment leading to a corresponding saving of time and costs.

Q: What about costs budgets – will these still need to be prepared?

A: No, these will be superseded by any new FRC regime. Indeed this would be one of the advantages, in Jackson's opinion, saving the parties both time and costs.

Q: What is the initial reaction by stakeholders to LJ Jackson's call to further reform fixed costs?

A: Some concerns have been expressed, for instance:

- The Law Society supports 'the principle of fixed costs for lower value and less complex case'. However, it is 'extremely concerned' about FRC being applied to higher value claims and to highly complex cases. It also feels that a one-size-fits-all approach is 'unviable' for the legal profession, whilst recognising that FRC could 'help to resolve disputes more efficiently'. Overall, it supports FRC as long as certain conditions are met, for example appropriate IT and the possibility of an escape from the regime for complex or unusual cases.

- The Bar Council has also expressed concern about the viability for legal professionals to pursue. It has also highlighted that large corporations and governments may spend more money than is recoverable on disputes with individuals or smaller corporations. It also feels that determining costs based on the value of the case is not always appropriate since complexity can often demand more work than value.

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Q: Have there been any other developments to take the process forward?

A: Yes, on 11 November 2016, the Lord Chief Justice and the Master of the Rolls formally commissioned LJ Jackson to lead a new review of FRC. This reflects the government's commitment, outlined in September 2016, to a new costs regime. LJ Jackson's terms of reference are to:

- Develop proposals for extending the present civil FRC regime so as to make the cost of going to court more certain, transparent and proportionate for litigants.
- Consider the types and areas of litigation in which costs should be extended and the value of claims to which the regime should apply.

The review invites the views of practitioners, users of the civil courts and other interested parties. A consultation on the review is open until 16 January 2017. LJ Jackson is to then submit his report by 31 July 2017.

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