

**Proposals for Reform of Civil Litigation Funding**  
**Implementation of LJ Jacksons recommendations**  
**(Consultation paper 13/10 November 2010)**

Following Lord Justice Jacksons report, the Ministry of Justice is consulting on implementing his recommended changes. Some of his recommendations are reserved for a subsequent consultation but this paper addresses those issues which warrant a higher priority. At the end of the consultation period (14<sup>th</sup> February 2011) the Government will confirm exactly what changes are to be made and when. Some of the proposed changes require primary legislation and others secondary legislation / CPR amendments.

I have set out below a very brief overview of the 100 page consultation paper in order to summarise those areas that are likely to have the greatest impact once implemented :

**Abolition of the recovery of success fees between the parties**

Subject to other proposals set out below (see note on Damages Based Agreements), it is being proposed that success fees would not be capable of recovery as against the paying party. It will be the client that pays a capped success fee.

Our opinion :

The 100% success fee for RTA cases that proceed to a final contested hearing was introduced into CPR by Law Reformers following consultation. LJ Jackson appears to be holding solicitors responsible for claiming this success fee notwithstanding that it was set at a level deemed appropriate at the time. Obviously it causes base costs to double but very often this is the fault of the paying party and their failure to make reasonable offers prior to a final hearing.

**Abolition of the recovery of ATE premiums**

LJ Jackson favours “One-way cost shifting” which effectively means that a losing Claimant does not pay the winning Defendants costs. For a Claimant this would mean that there would be no need to insure against adverse costs. However, many ATE policies cover own disbursements, therefore, there would still be a need for insurance (albeit cheaper due to its curtailed coverage) unless Claimants solicitors opt to effectively self-insure and pay the Claimants disbursements in losing cases.

Our opinion :

Surprisingly, this proposal was favoured by Defendants representatives during the initial consultation stages. It remains to be seen whether they maintain their view. This change would mean that in any case that a Claimant loses, the Defendant has to pay its own costs and disbursements. Clearly, Defendants representatives will need to undertake some calculations to assess whether this scheme would see them better off i.e an analysis of their outlay in all cases they win against their entire ATE outlay in cases which they lose. If this scheme is introduced, it would see an end to ATE insurance. Before the Event insurance will replace the need for ATE (as it has unsuccessfully attempted to do for some time now). In the absence of BTE, solicitors will be expected to “spec” cases once again.

### **Increase general damages by 10%**

This is proposed so as to enable Claimants to pay their solicitors success fee (which is no longer to be recoverable between the parties).

Our opinion :

Historically, damages are set at levels commensurate with the injuries, pain and suffering endured. This proposed change factors in another feature namely costs. Whether costs should be a factor in damages is a matter for debate. In principle, we do not oppose a general damages increase and there is little to be gained by contesting the premise on which this proposal is based. It may offend historic principles but nevertheless an increase has to be a good thing (considering that if the increase does not happen, success fees will remain payable from the Claimants damages in any event).

The problem for the Government on this issue is that if the increase is to account for success fee liability, those Claimants whose cases are not funded by way of CFA will receive a windfall. Again, we would approve of that but it flies in the face of the reason for the change.

Having regard to the entire package of proposed changes, it is likely that many firms of solicitors will opt out of CFA's completely and therefore, their clients will be 10% better off. Therefore, we anticipate that the proposal to increase general damages by 10% is only likely to be in cases which are funded by way of CFA.

### **“Proportionality of costs”**

This is currently a feature in standard basis costs assessments, however, it is an undefined feature. Secondary legislation has assisted in providing some definition but it is proposed that the concept be strictly defined so that Courts pay more attention to the principle than they currently do.

Our opinion :

Subject to the definition given, this appears to be a sensible proposal. There is currently too much uncertainty regarding the meaning of “proportionality” and whilst case law is supposed to assist, it doesn’t.

It is difficult to see how the concept of proportionality will be defined because there are often low value claims that generate substantial cost. The costs escalate because of opponents conduct and consequently, whilst costs may be clearly disproportionate (using a simple Damages –v- Costs comparison), they are in effect uncontrollable.

Therefore, when defining the definition, the process must take account of the reason why costs are ostensibly disproportionate.

In our view, there ought to be a rebuttable presumption that if costs outweigh damages, they are disproportionate. That presumption can be rebutted by the Claimant being able to demonstrate that costs were increased because of the manner in which the case (or any part thereof) was handled on behalf of the Defendant.

### **Damages Based Agreements (DBA’s)**

This refers to Contingency Fee Agreements. Such Agreements would permit an arrangement whereby the Claimants solicitors receive costs remuneration from the Claimant. However, unlike existing Contingency Fee Agreements (eg in Employment Tribunal matters) there is still an inter-partes liability. The Defendants would be primarily liable for costs but any shortfall could be taken from 25% of the Claimants damages.

Our opinion :

The idea that the Claimant should have to pay costs out of his damages is opposed by many.

Damages should be sacrosanct. Well this proposal would qualify that maxim to the extent that “75% of damages are sacrosanct”.

This has been tried previously (1995-1999) and seemed to work effectively. In many cases, nothing would be taken from the Claimant and it remains to be seen in what circumstances a solicitor may seek recovery from his client. If on the inter-partes costs assessment, costs are deducted on the grounds of disproportionality it is unlikely that the Government would permit recovery thereof from the Claimant.

### **Increase litigant in person costs**

Currently, litigants in person can recover an hourly rate of £9.25 in circumstances where they are unable to demonstrate financial loss. It is proposed that the hourly rate should be increased to £20.00.

Our opinion :

This seems a perfectly reasonable proposal but as the average hourly rate of an employee is less than £20.00, it is over-compensating some. Others who earn more than £20.00 per hour will just have to produce evidence. It is just unfortunate that general damages are not to be increased by the same 100% factor.

Matters to be subject to subsequent consultation / report :

### **Banning referral fees**

Our opinion :

This proposal would represent an anti-competitive and backward step. If referral fees are banned, CMC's are likely to be brought in-house. Very few firms of solicitors could afford such an acquisition and those that can will monopolise the market-place. Banning referral fees will not lead to claims being passed onto solicitors free of charge because CMC's require revenue. If they cannot sell their claims or receive any other type of benefit for a referral, the only option for them is to move in-house. This will see a large amount of smaller firms of solicitors excluded from the personal injury market. That consequence is not good for Claimants nor is it progressive for the legal system as a whole.

The current system facilitates access to justice and promotes competition. An outright ban or a cap on referral fees will not benefit anybody – it will simply result in monopolies and anti-

competitiveness which are concepts that should not play any part in the legal services industry.

### **Fixing costs**

Our opinion :

The current proposals outlined herein are largely workable and therefore, there is simply no need for costs to be fixed. A solicitor ought to be paid for the work done. If costs were fixed, there would be no incentive to provide a high quality service. Such an incentive is vital so as to ensure that standards are upkept. Firms must remain competitive in order that clients receive a 1<sup>st</sup> class service and this would not be the case if each firm were paid the same sum notwithstanding the quality of service provided.

The proposals set out herein should be tested before fixed costs are seriously considered. Such a backward and anti-competitive step ought to be adopted as a last resort.

### **Conclusion :**

Some of the proposed changes appear workable however, some are not.

It should be noted that all of these proposed changes have come about as a result of the current system being unsatisfactory but also noteworthy is the fact that the current system was introduced as a result of consultation such as this.

The Woolf reforms were at the time deemed by the Government to be groundbreaking and eminently progressive. However, now even Lord Woolf is not so sure. LJ Jackson is now doing what Lord Woolf did in 2008 by announcing the “greatest changes to litigation funding” but who is to say that LJ Jackson has got it right ?

Lord Young came along last year and played somewhat of a cameo role in the process (basing all his findings on a “Perception of a compensation culture”) but his report was littered with contradiction and factual inaccuracies.

The new proposed changes may indeed work perfectly well but if not, the Government needs to carefully choose the next candidate for the job of reform of litigation funding....I might

apply.

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