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LORD JUSTICE JACKSON'S COSTS REVIEW: THE FINAL REPORT - A SUMMARY

Lord Justice Jackson's Final Report following his Review of Civil Litigation Costs was published on 14 January 2010. The areas under review canvassed in the preliminary report in May 2009 were wide ranging and raised the prospect of contingency fee arrangements and a US-style costs regime where no costs shifting applies.

In addition to the way in which litigation is funded and costs dealt with at the conclusion of a claim, Jackson also looked into the procedural rules of the courts and considered how they might be improved to assist in reducing costs.

The report is over 500 pages long and any summary is selective, but the key recommendations likely to attract the greatest immediate comment are as follows:

Success fees and ATE insurance premiums should cease to be recoverable

The Report concludes that Conditional Fee Agreements (CFAs), of which "no win, no fee" agreements are the most common species, have been the major contributor to disproportionate costs in civil litigation. The lawyer's success fee and the after-the-event (ATE) insurance premium that is usually taken out when a CFA is entered into are presently recoverable from an unsuccessful defendant.

The Report recommends that success fees and ATE insurance premiums should cease to be recoverable. It will remain open to clients to enter into a "no win, no fee" agreement with their lawyers, but any success fee will be borne by the client, not the opponent.

Qualified One-Way Costs Shifting to be introduced

Particularly with an eye on personal injury claims, the Report recommends a costs regime whereby the claimant will not be required to pay the defendant's costs if the claim is unsuccessful, but the defendant will be required to pay the claimant's costs if it is successful. At the preliminary report stage much was made of the "loser pays" rule as a deterrent to unmeritorious claims. The one-way costs shifting recommendations that are made are therefore qualified such that unreasonable or unjustified party behaviour may lead to a different costs order. The Report leaves open the type of case that this recommendation should apply to as something on which further consultation is required. Personal Injury cases are one identified area. The rationale appears to be that personal injury litigation is dominated by ATE Insurers and by abolishing the two-way costs shifting rules, ATE insurance will be redundant. Given the views expressed as to ATE insurance as a driver for increased costs in civil litigation any area where ATE insurance is used to fund litigation (e.g defamation claims) can expect to see this rule introduced. However, it is acknowledged that the financial resources available to the parties may justify there being two way costs shifting in particular cases. We do not anticipate that this proposal will impact on large scale commercial or construction litigation.

In relation to collective actions, the Report recommends that cost shifting should remain (with the exception of personal injury collective actions) although it is also recommended that the court should have a discretion to order otherwise if this will better facilitate access to justice.

Introduction of Contingency fees

A contingency fee agreement is one under which the client's lawyer is generally paid a percentage of the settlement sum or damages award, if, but only if, their claim is successful, and then the lawyer is paid out of the settlement sum or damages awarded, usually as a percentage of that amount. Although very common in the US English lawyers are not presently permitted to act on a contingency fee basis in litigation.

The Report recommends that lawyers should be able to enter into contingency fee agreements but on the basis that the unsuccessful party in the proceedings will only be ordered to pay an amount that, had the action not involved a contingent fee, would reflect an award of the successful party's costs on a conventional basis, with any difference to be borne by the successful party. It is also an area where regulation is

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needed to protect clients.

Procedural Changes

- Disclosure

It is well recognised that in large complex cases disclosure can be a very expensive exercise. The Report recommends that measures be taken to ensure that the costs of disclosure in civil litigation do not become disproportionate.

- Witness Statements and Expert Evidence

Witness Statements and Expert Evidence to remain the same subject to tighter case management concerning the length of the statements and reports.

- Pre-Action Protocol

The Report acknowledges that the ten pre-action protocols for specific types of litigation perform a useful function by encouraging early settlement of disputes. However, the Practice Direction - Pre-Action Conduct, which applies to cases not subject to a specific pre-action protocol, is described as being unsuitable because it adopts a "one size fits all" approach which often leads to unnecessary and wasteful pre-action costs. The Report recommends that Sections III and IV of the Practice Direction be repealed and the following simple provision be included in order to encourage parties to engage in communications prior to issuing a claim:

> "In all areas of litigation to which no specific protocol applies there shall be appropriate pre-action correspondence and exchange of information."

The Report also recommends that costs sanctions continue to apply to curb unreasonable behaviour (for example, issuing proceedings with no prior warning to the defendant of the claim).

Large Commercial Claims Untouched

Following positive feedback from users of the commercial court that litigation was being dealt with by that court in a timely and cost efficient manner, no changes specifically to large commercial claims have been recommended. The recommendations on disclosure, witness statements and expert evidence may apply.

The Report states that if the recommendations are adopted costs payable to claimant solicitors by liability insurers will be significantly reduced. This will certainly be the case for liability insurers who deal with personal injury claims. Beyond that, the effects are as yet immeasurable. Many of the recommendations are that the courts be given wider discretion and take more active case management decisions.

There appears to be widespread support for Jackson's recommendations from the legal and business communities, but it remains to be seen whether there is political impetus. Given that the tax-payer (who ultimately bears the of costs of litigation against, for example, the NHS) is likely to be one of the major winners if the Jackson reforms are implemented, it would be surprising if the reforms are not prioritised. However, to the extent that primary legislation is required to carry through the recommendations, there is limited parliamentary time before the next general election. The challenge is now carrying through the impetus that has undeniably gathered around Lord Justice Jackson's Report.

If you would like any further information, please contact either of the following:

Steven Friel
DDI: 020 7293 4394
E: sfriel@dac.co.uk

Graham Ludlam
DDI: 020 7293 4462
E: gludlam@dac.co.uk

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DAVIES ARNOLD COOPER LLP

LONDON
6-8 Bouverie Street
London EC4Y 8DD

T +44 (0)20 7936 2222
F +44 (0)20 7936 2020
DX 172 London
E daclon@dac.co.uk

LONDON MARKET
85 Gracechurch Street
London EC3V 0AA

T +44 (0)20 7936 2222
F +44 (0)20 7936 2020
E daclon@dac.co.uk

MADRID
Serrano, 37
28001 Madrid

T +34 91 781 6300
F +34 91 576 8669
E dacmadrid@dacspain.com

MANCHESTER
60 Fountain Street
Manchester M2 2FE

T +44 (0)161 839 8396
F +44 (0)161 839 8309
DX 14363 Manchester
E dacman@dac.co.uk

MEXICO CITY
Av. Insurgentes 950-9
Colonia Del Valle
Ciudad de México, D.F. 03100

T +52 (55) 11 07 60 56
F +52 (55) 56 87 68 49
E dacmexico@dacmexico.com

www.dac.co.uk