SEC Written Submissions to Review of Fixed Recoverable Costs by Lord Justice Jackson

January 2017

1. The South Eastern Circuit represents over 2,000 employed and self-employed members of the Bar with experience in all areas of practice and across England and Wales. It is the largest Circuit in the country. The high international reputation enjoyed by our justice system owes a great deal to the professionalism, commitment and ethical standards of our practitioners.

2. These are the written submissions on behalf of the South Eastern Circuit ("the SEC") to the review of Fixed Recoverable Costs by Lord Justice Jackson.

Summary

3. After careful consideration the SEC opposes the idea of fixed recoverable costs throughout the lower ends of the multi-track. We are not convinced that a system of fixed costs is the best or even an appropriate way to reduce the cost of litigation. Further, any system which operated fairly (in other words in a manner which did not make certain kinds of claims economically unviable to prosecute or defend or permit litigants to game the system by forcing the other party into excessive expenditure) would have to be so complex as effectively not to be a system of fixed costs at all or would lead to satellite litigation. In our view, while costs budgeting involves judicial and parties' resources, it is a far superior system in being able to tailor the result to the specifics of the individual case. Budgeting is still in its relative infancy and as parties and the Courts develop experience in carrying out costs budgeting, the process is likely to become quicker and more predictable. However, the SEC can see that fixed costs on the fast-track (claims of up to £25,000) is probably appropriate and, perhaps, desirable.

4. This is because fast-track claims:

   a. Are inherently simper, otherwise they would have been allocated to the multi-track.

   b. Are subject to simpler procedural rules and thus involve less and more predictable work, making the idea of broad-brush fixed costs more just and legitimate amongst stake-holders.

   c. Are at greater risk of disproportionate costs given the relatively low value of the claims.

   d. Constitute the great majority of non-small claims work. According to Civil Justice Quarterly Statistics, 80% of non-small claims cases are allocated to the fast-track.[1]

Objectives of Changes

5. We consider that the objective of any change should be to provide access to a fair trial at proportionate cost. In practical terms this means:

   a. That recoverable costs should be sufficient to ensure a litigant can afford to pay lawyers to both bring and defend a claim to trial, having regard to the value of the claim and the work required (by the Courts) to take a case to trial.

   b. That the rules should command the confidence and respect of litigants and lawyers, and so a party should not be overcompensated if successful neither should they receive so little of the real cost such that any victory becomes pyrrhic.

   c. As an adjunct to (a) and (b) above, the rules should be based on sound and comprehensive evidence of the actual cost of litigating all kinds of claims to which the rules will apply and the costs of those claims which are in practice allowed as part of a costs budget or on detailed assessment.

   d. The rules should be designed in such a way as to avoid "gaming", that is, manipulation by a well-resourced opponent and/or satellite litigation. Recent changes to the relief from sanction rules show the rationality of litigants taking an aggressive approach when the stakes are significant (see, eg, Kaneria v Kaneira [2014] EWHC 1165 para 61 and a reference to the Mitchell test possibly giving rise to "a culture of aggressive non-cooperation").

6. A proposed change should not be enacted if it does not show an improvement to the status quo when judged against the above criteria.

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[1] https://www.gov.uk/government/statistics/civil-justice-statistics-quarterly-july-to-september-2016, using the spreadsheet page 1.3, some 239,671 claims were allocated to the fast and multi-tracks between 2013 and 2015, of which 185,826 went to the fast-track, ie 77.5%.

Applying Fixed Costs to the Multi-track

7. It is respectfully suggested that applying fixed costs to the multi-track fails the above criteria.

8. We note that the fundamental driver for a move to fixed costs is the high cost of litigation. We do not dispute that litigation can be expensive and that it may be desirable to reduce its cost, but we are not persuaded that a system of fixed costs can by itself achieve that aim or has much part to play in doing so.

9. That is because a system of fixed costs does not reduce the cost of litigation. It reduces only the cost of *losing* litigation by reducing what the losing party may have to pay to the winning party. It does nothing to reduce what the losing party has to pay to its own lawyers or indeed what the winning party has to pay to its own lawyers. In fact, by reducing the inter partes costs recovery, for the winning party, the cost of litigation is *increased* and may well be increased to the point where the winning party makes no net recovery from the litigation at all.

10. The criticisms of the ways in which lawyers charge – such as the use of hourly rates – which have been made by Lord Justice Jackson may be valid, but a system of fixed recoverable costs does not address them. If there is to be a wholesale drive to reduce the costs of litigation then it must start with what lawyers charge to their own clients. By regulating only what may be recovered inter partes, the burden of that regulation falls entirely on successful litigants.

11. On the other hand, if the aim of a system of fixed costs is not to drive down the cost of litigation, but simply to provide a predictable outcome which is not intended to depart significantly from the costs which are currently allowed on detailed assessment in respect of such claims and which will avoid the cost of budgeting or detailed assessment, then we would support such an aim, but we doubt that it is in fact possible to devise a system which would operate fairly across all categories of claim which was not unworkably complex.

12. It is impossible to predict the complexity of a case based solely on its value. A claim on an invoice for £350,000 may be extremely simple; a clinical negligence claim for £35,000 may

be highly complex. We respectfully suggest that a system under which, in the former case, a claim which was settled pre-action generated inter partes costs of £12,000, whereas in the latter case a claim which went to trial would generate solicitors' and Counsel's fees of £18,750, would not command the confidence of litigants or lawyers. Only a small proportion of the minimum costs necessary in proving the claim in the latter scenario would be recoverable, such as to reduce the claimant's cash return to a minimal level and rendering the entire exercise futile. This would be an extremely regrettable outcome to a reform based on the laudable intention of making justice accessible.

13. Further, we consider that such a result cannot be justified simply on the basis of proportionality, because even the new proportionality rules in CPR 44.3 take into account the complexity of the litigation. Although the application of those rules is in its relative infancy, the cases being determined in the Senior Courts Costs Office show that Costs Judges accept that higher costs are justified in more complex cases, even where the damages are modest. For example, in *King v Basildon & Thurrock University Hospitals NHS Foundation Trust* (30 November 2016), Master Rowley assessed the claimant's costs of taking a clinical negligence claim to a three day trial, following which damages of £35,000 were awarded. His view was that base costs of £88,337.58 *"is almost always going to be proportionate for a clinical negligence case which reaches a three-day trial. It would only be the case that a very modest amount of damages might render such a level of costs to be disproportionate and I do not accept that £35,000 is a very modest amount of damages"* (para 18). The judgment does not record the location of the claimant's solicitors or the breakdown of that figure between solicitors/Counsel on the one hand and disbursements on the other, but even if with the proposed 15% uplift for work in London, it is likely that the solicitors' and Counsel's fees which Master Rowley considered proportionate were considerably more than the £21,562.50 which is the most which could be recovered under the proposed scheme.

14. Even in more straightforward cases, Costs Judges applying the new proportionality rules are allowing as proportionate costs which far exceed the proposed sums:
    a. In *BNM v MGN* [2016] EWHC B13 (costs), the Chief Costs Judge, Master Gordon-Saker, allowed base solicitors' and Counsel's fees of £31,300 as proportionate in a misuse of confidential information claim against a newspaper which settled at an early stage for £20,000. Under the proposed scheme, with the 15% London uplift, the amount allowed would have been £8,308.75.

b. In *May v Wavell Group plc* [2016] EWHC B16 (costs), Master Rowley allowed total base costs of £35,000 as proportionate in a straightforward private nuisance claim which settled for £25,000 shortly after service of proceedings. Under the proposed scheme, with the 15% London uplift, the amount allowed for solicitors' and Counsel's fees would have been £5,347.50.

15. We suggest that it is clear that, in all three of the cases referred to above, litigation which was of great importance to the claimants would not have been economically viable under the proposed scheme as the claimants' irrecoverable costs would have more than exceeded the damages recovered. There are many areas where cases have an importance which are greater than the amounts of money involved eg.: claims where fraud is alleged, perhaps by D against C; wrongful death claims – with no ongoing care costs; actions against the police and claims under the Human Rights Act 1998.

16. While Lord Justice Jackson considers the avoidance of "Balkanisation" a key aspect of any workable fixed costs system, we do not see how it can be avoided if the system is not to imperil access to justice.

Inequality of Arms

17. We are also concerned at the scope for a well-resourced defendant (or indeed a well-resourced claimant) to make litigation economically unviable for the other party by causing costs to be increased. While it is proposed that the court may add a percentage to the fixed costs if "substantial additional work was caused by the conduct of the other party", we have a number of concerns about how this would operate in practice:
    a. A litigant who is concerned that they are going to be left with substantial irrecoverable costs at the end of the case needs to know in advance the economic risk which they face. It is not right that they should be left at the mercy of a judge's decision at the end of the case. While the current system of detailed assessment is *ex post facto*, litigants at least know that, to the extent that the work which they require to be undertaken was reasonable and proportionate, they will recover the cost of it. Litigants under the proposed scheme will have no such comfort.
    b. The conduct complained of may be hard for the court to identify as unreasonable or meriting a percentage uplift. The most obvious conduct on the part of a defendant

will be to fail to admit liability at an early stage, but all of the material which will show that the defendant knew or ought to have known that it had no defence will be privileged. How is the claimant to show – or even know – that the defendant deliberately caused costs to increase in the hope of stifling the claim? How does the Court deal with a lengthy – but reasonable – Part 18 request, or interlocutory applications which could have been avoided but were not obviously unreasonable?

c. How "substantial" must the additional work be? This seems to us to be a recipe for satellite litigation, quite apart from the need for argument over what any percentage uplift should be.

d. How will the system deal with the litigant who does not engage in any conduct worthy of criticism, but exposes its opponent to inequality of arms through its resourcing of the litigation, for example by instructing City lawyers or leading Counsel? Allowance is generally made for that on detailed assessment and it is our general experience that such allowance is also made when undertaking costs budgeting, but it seems that no allowance will be made under the proposed scheme of fixed costs.

18. These concerns do not just apply to claimants seeking access to justice. We are concerned that a system of fixed costs which fixes the recoverable costs at too low a level could generate the sort of blackmail effect on defendants which Lord Justice Jackson criticised in relation to the former CFA regime. It is our view that, as a matter of principle, a defendant who is faced with and defeats a meritless claim should be able to recover its full reasonable costs from the claimant. If the defendant has acted reasonably in the litigation and instructed lawyers who have acted reasonably, then absent specific considerations such as qualified one-way costs shifting in personal injury claims (where the defendant is very likely to be insured), he or she should not be left out of pocket. It is entirely possible that fear of the irrecoverable costs involved in winning a claim would cause a defendant with a good defence to settle a meritless claim at an early stage, because doing so would be cheaper. If that is the effect of a system of fixed recoverable costs, then we respectfully suggest that such a system is not fit for purpose.

19. We also suggest that, by leaving disbursements other than Counsel's fees out of account, fixed costs fundamentally fail to achieve their aim. In many cases, experts' fees will be a substantial proportion of the total, but there will be no predictability as to the amount

which might be payable in respect of them. Ignoring disbursements also calls into question the linkage between the fixed costs and proportionate costs. A clinical negligence claim for £50,000 which results in a three day trial might well involve incurring experts' fees of £20,000 or more. If costs of £38,750 plus court fees (under the proposed scheme) would be proportionate in such a case, then why is that sum not proportionate in a claim of that value which does not require experts? What is the justification in such a case for restricting the lawyers' fees to £18,750?

20. An unintended consequence would also be the impact on the conduct of parties pre-action. Currently, most parties seek to avoid disputes and most disputes are resolved pre-action, in large part because parties are willing to spend time and money investigating and debating the claim prior to settling it and knowing that this time will be repaid in costs. If costs are now to be linked to achieving certain stages of the litigation, a well advised litigant would instead issue and do the work during the life of the claim. This would be undesirable – and contrary to the established trend of "front-loading" costs, but inevitable. A defendant might protest at non-compliance with a pre-action protocol and assert there was premature issue and there might be wasteful satellite litigation about the point. Allowing 50% of the fixed costs does not avoid these problems.

21. Rule 4 (fixed costs do not apply where indemnity costs are allowed) is also likely to lead to satellite litigation with arguments over the phase to which work should be allocated so as to bring it within or exclude it from the ambit of an order for indemnity costs. Where there is an issue of oral evidence, a competent lawyer will take a proof of evidence at the earliest moment (usually pre-action). If such a party later beats its own Part 36 offer made months after issue but well before statements are exchanged, should the cost of this preliminary proof fall within fixed pre-action costs, fixed statement costs or be allowed on the indemnity basis? Providing for this and the countless other variations is likely to make rules unhappily complicated or cause yet further litigation. Furthermore, although the draft rule refers to stages in respect of which indemnity costs have been awarded, an order for indemnity costs is unlikely to be expressed in terms of stages rather than a date. The date from which indemnity costs are payable may fall at a time when work was being undertaken on several stages. Will fixed costs be disapplied in respect of all of the work within those stages, regardless of whether it was in fact done before or after the date from which indemnity costs are payable? We suggest that that would be difficult to justify. On

the other hand, if full indemnity costs are only payable from that date, is the full fixed amount still payable in addition in respect of the work done before that date? That would also appear to be a windfall for the receiving party.

22. Further, the prospect of recovering indemnity costs on an hourly rate basis (as Rule 4 appears to envisage) is itself a complexity. It means that lawyers will still time record (and thus continues to promote the hourly rate which, it has been suggested, is a reward for the inefficient) and also deters innovative fee-arrangements such as DBAs (if there are to be fixed fees, a lawyer might wish to act on the basis of recovery of fixed fees and a X% of damages, that does not require time-recording but the rule on indemnity costs nonetheless makes this necessary).

23. It might be said that neat drafting can avoid these issues. The SEC respectfully disagrees. Multi-track claims inevitably constitute an enormously diverse range of disputes between different types of parties with different approaches to litigation. Any regime which attempts to apply a broad brush costs basis will have to navigate between excessively complicated drafting and failing to satisfy the criteria at paragraph 3 above. The SEC is familiar with the success of the IP Courts, but that success may be a result of the relative homogeneity of claims and the relatively small number of practitioners within that world. The new proposals have a far broader ambit.

24. Even if the SEC's view is unduly pessimistic, it is hard to see why this difficult exercise of creating and implementing fresh and complicated rules should be done. As shown at paragraph 2(d) above, relatively few claims enter the multi-track. The real problem is at the fast track. In the multi-track budgeting, done effectively, should prevent disproportionate costs. It means that at an early stage parties have a clear idea as to their likely costs recovery and liability. It is done on a bespoke basis by experienced local judges after the parties have had a fair chance to make relevant points. The redrafted provisions on proportionality apply and can be applied to the specific case. The SEC is aware that budgeting is still bedding down and has mixed popularity but believes that with time it should be effective in achieving the goals identified above. It should lead to more appropriate and refined outcomes than the much broader brush of fixed recoverable costs. The civil procedure system has not been short of change in recent years (with no reduction in sight) and there is much to be said for a period of calm. The Online Court is some years away, the SEC

proposes that fixed costs be piloted in the fast-track, and once the Online Court is up and running successfully the experience of fixed costs can inform any review of the position for smaller multi-track cases.

But if the Time Has Come

25. To the extent that fixed recoverable costs do apply (either in the fast-track or above) then the SEC proposes the following:

    a. Any figures should be based on a sound evidential footing of the actual cost of the sorts of claims which the scheme will cover, rather than what it is considered desirable that such claims should cost.

    b. Any figures should distinguish between the sums payable in respect of solicitors and Counsel. If a system of fixed costs is likely to lead to pressure on lawyers to conduct claims for the fixed amounts, then unless Counsel's fees are ringfenced, solicitors are likely to put pressure on Counsel to reduce their fees to the benefit of the solicitors. We see this in those areas where fixed fees already apply (instead of the N260 costs form, which shows counsel being paid the fixed advocacy fee, we understand various formats of "breakdown" tend to be supplied to the Court which do not need to set out whether the trial fee is being retained by solicitors).

    c. The rules should provide that where fixed costs apply, the Court should have regard to such costs when giving directions (eg limiting disclosure to necessary documents) and also when considering applications (eg allowing a more permissive approach to amending pleadings). Given the reduced costs available, the Court should recognise that the trial process will be one of investigation and discovery by both parties and lawyers culminating in the trial rather than, as is sometimes assumed, a process merely of proving cases well known to parties at the pre-action stage.

    d. Costs arising from applications should be assessed in the traditional way (to deter parties from attempting to submerge opponents in interim applications).

    e. Unless there has been culpable exaggeration, recoverable costs for both sides should be linked to the claimed amount. This is in contrast to the provisional indication that C's costs should be linked to the amount recovered. This is because the directions set and work done to prove the claim will be linked to the amount claimed, as will C's risk of adverse costs whilst the recoverable damages could be reduced for reasons independent of C's side. If the Court has told C to prepare a case on the assumption the claim is worth £X then the fact that C might recover less at £Y is not a good reason for C to only recover costs commensurate with a recovery of £Y. C has done

the work the Court told it to do. C should therefore recover the cost of that work. This is especially so when the reason for the recovery of £Y might be a case of contributory negligence, which could hardly be pleaded by C, or an expert not coming up to proof.

f. There should be a discretion for the Court to take a case outside of the fixed costs rules if appropriate. There are many circumstances in which that might be appropriate, for example the conduct of the other party, the instruction of particularly expensive lawyers or leading Counsel by the other party, a counter-claim bringing the money at stake beyond a particular limit, or a lead or test case.

g. The rules should be potentially applicable to cases where declarations or injunctions are sought (and thus applicable to boundary disputes). This can be done by either requiring claimants in cases where injunctions are sought to specify a value on the claim form or, at the Case Management Conference, the District Judge allocating it a notional value.

h. The linkage of costs to procedural phases of litigation (disclosure, witness statements etc) is likely to lead to satellite litigation about whether work was done prematurely and unnecessary complexity, especially since most sensible litigants will be working on various phases at different times (eg taking a proof of evidence pre-action). A slab approach to costs will also make settlement of borderline claims more difficult. Consideration should be given to whether a cleaner system might be to have 1/3rd of costs recoverable upon issue, 2/3rds 90 days after service, and the full amount 45 days before the trial or trial window.

i. Experts' fees should be additional, but also fixed at a set amount per expert.

j. Advocacy fees should be separate (this principal being well-established in the fast-track, in the extensive consideration of criminal legal aid funding and as supportive of a cadre of specialist advocates, which for generations has been recognised as a desirable aspect to our litigation system).

k. There should be a fee for taking advice on the merits. There is an argument that it is disproportionate to seek formal advice from counsel on merits at an appropriate and early stage of litigation. That argument would be meritorious were cases still handled by qualified solicitors, competent to judge merits themselves. However, it seems likely that fixed costs will lead to commodification of litigation and conduct by inexperienced staff. Counsel is often the only person able to give advice. There is anecdotal evidence from the junior bar that increasing numbers of cases fail because

steps which counsel would have advised (had she been consulted) have not been taken. This failure to make provision for impartial review evidence does injustice in two ways. Some cases are settled for less than they might win at trial. Others are withdrawn or, worse, fail at trial where they might, with diligence, have been won. Finally, advice on merits taken at an appropriate stage can also result in real costs efficiency by encouraging settlement.

l. There should be extra fees available – probably from HMCTS - when trials have been vacated at short notice because of listing arrangements.

Quantification

26. As we have already said, any viable system of fixed costs in which litigants and lawyers can have confidence must be based on sound evidence. We respectfully suggest that the evidential basis for the currently proposed figures is unclear. It is said to draw on the combined experience of the Costs Judges, but as set out above, those Costs Judges are in fact allowing sums significantly in excess of those proposed. The evidence which we have been able to obtain and our own experience is that the proposed figures are far lower than those being allowed on detailed assessment or on costs budgeting.

27. The SEC annexes to this paper analysis carried out by 4 Pump Court based on 63 approved budgets. The SEC is grateful to 4 Pump Court for making this information available.[2] Those figures are based on counsel's fees alone. It accords with the authors' own experience of budgeting. This reflects "on the ground" assessments of what is reasonable and proportionate. Those figures show that all litigation within the proposed scheme (which includes counsel and solicitor fees) would leave litigants with very substantial unrecovered costs which would imperil the viability of litigation.

28. A cynic or idealist might say that lawyers would just have to reduce their fees, but that ignores the reality that a set like 4 Pump Court operates in a fiercely competitive environment with a large number of able competitors and sophisticated (solicitor and lay) customers. Since these fees therefore represent a fair and competitive market rate, after scrutiny at a budget hearing, there is no good reason for the state to intervene further, and no likelihood that the costs charged would be limited to the recoverable levels, thereby unjustifiably tilting the playing field in favour of well-resourced parties.

[2] The SEC has permission to provide this information to Jackson LJ's review, but does not have permission to disseminate it more broadly. Accordingly the annexes are not available on the SEC's website.

Conclusion

29. The SEC has great sympathy with making litigation affordable. But it believes the current system of budgeting on the multi-track does this effectively (subject to the inevitable refinements and improvements which will come with time and which should make the process quicker, easier and more predictable, allowing budgets to be agreed in many if not most cases). A large number of difficulties arise with a much broader application of fixed costs, and yet they arise in respect of a relatively few number of very different claims. It is respectfully suggested that if there is to be reform should be on a gradual basis, piloted in fast-track claims in the first instance, and once the Online Court is running effectively, it might be appropriate to revisit the position to see if there are broader lessons for larger claims.

SOUTH EASTERN CIRCUIT

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