

NEW LAW JOURNAL

The cost of civil justice: time for review or revolution?

Lexis Nexis White Paper

Author: Elsa Booth

Contents

Woolf's vision	3
The Overriding Objective	3
Active case management	4
Settlement – a case management goal?	5
The heavy cost of Woolf	6
Front loading	6
Disclosure	7
Hourly billing	7
Rounding up ...	7
Woolf II: costs management ...	8
Cost shifting	9
CFAs	9
Fixing on a solution ...	9
Conclusion	10

Ten years on from the introduction of the Civil Procedure Rules 1998 (CPR), Lord Woolf is credited with not just changing the court rules but with changing the entire culture within which civil litigation is conducted. He sought to usher in a new kind of justice; a justice entwined with case management and procedure; a justice that would be meted out within a new climate of speed and economy, all of which is captured by the criteria within the Overriding Objective of CPR 1.

Yet ten years on from the new system being put in place, the court process is still marred by long delays and the cost of civil litigation is widely viewed as disproportionate, if not prohibitive. Costs were described as the 'central failing' by the Master of the Rolls, Sir Anthony Clarke, speaking in December 2008 in his speech 'The Woolf Reforms: a Singular Event or An ongoing Process?', prompting him to instigate the current wide-reaching and independent review of the costs of civil litigation by Lord Justice Jackson. Jackson LJ's initial report (Preliminary Report), released in May and running to nearly 700 pages, will now go out to Consultation, pending a Final Report in December 2009.

Yet if costs are indeed the 'central failing', many practitioners take the view that this is more symptomatic than causal, cost being the evidential consequence that has flowed from numerous other failings in the system. Hence, in the opening of his Preliminary Report, Jackson LJ states that the requirement to consider whether changes in process and/or procedure could bring about more proportionate costs 'necessitated a review of civil procedure stretching far beyond the cost rules'. It is not, therefore, surprising that the Master of the Rolls has dubbed him the new Woolf.

This article examines the extent to which the Woolf reforms have succeeded and failed; it examines the range of possible ways forward laid out in Jackson LJ's Preliminary Report and looks ahead to the findings which we hope to see within his Final Report: the critical changes that need to happen over the *next* ten years, asking whether a mere 'review' of the civil justice system is any longer sufficient; and whether it is now time for revolution?

Woolf's vision

Like all the legal system reforms that preceded it, Lord Woolf had three key aims: to minimise cost, delay and complexity. His ambitious overall vision, encompassing these three goals, as stated in the 1995 interim report, was 'to try and change the whole culture, the ethos, applying in the field of civil litigation'.

Through his uniform and purportedly simplified route through the courts drafted in 'plain English', procedural and substantive justice became inextricably entwined. Both Woolf Reports and the CPR which followed therefore included structural and procedural reforms, such as pre-action protocols, standard and specific disclosure. Every aspect of the CPR reinforced that for justice to be delivered effectively, it needed to be underpinned by good management; the process of litigation being transferred from the lawyers to the judiciary to oversee this management.

To an extent, it is this – the goal of good management – on which the success of the CPR can be measured and has been found to be wanting, since it is the very processes of case management which are held responsible for spiralling costs due to the amount of work lawyers are now required to do, under the CPR, to get a case to trial.

It is an assertion of this article, one explored more fully below, that for civil justice to have credibility over the *next* ten years, the way in which cases are managed – and the consequential costs attached to that management – needs radical reappraisal in order to bring about more proportionate costs.

The Overriding Objective

When examining the effectiveness of case management, the starting point is surely the Overriding Objective. The goal of good and active case management arguably manifested itself in this new cultural stamp which impressed itself on the entire system – the Overriding Objective: the guiding principle for all litigation when interpreting and applying the CPR.

The court's duty to manage cases is stated clearly within CPR 1.4 and the long list of case management powers are contained in rr 3.1-3.11. The court is not limited to those express powers, however, and to emphasise this, it is enabled by CPR 3.1 'to take any other step or make any further order for the purpose of managing the case and furthering the overriding objective'.

The Overriding Objective is as follows:

CPR1.1

Dealing with a case justly includes, so far as is practicable –

- (a) ensuring that the parties are on an equal footing;
- (b) saving expense;
- (c) dealing with the case in ways which are proportionate –
 - (i) to the amount of money involved;
 - (ii) to the importance of the case;
 - (iii) to the complexity of the issues; and
 - (iv) to the financial position of each party;
- (d) ensuring it is dealt with expeditiously and fairly; and
- (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

Applying CPR Part 1 in order to manage a case justly, therefore, includes a multiplicity of conflicting considerations, checks and balances which the judiciary has to weigh up within the parameters of their discretion. It is a juggling act but, as an ethos, one can sum it up as the application of justice in the form of an overarching principle for *all* cases, not just the individual case.

At a LexisNexis hosted debate on 17 March 2009 'The impact of the Civil Procedure Rules: Marking 10 years of the Civil Procedure Rules' (the LexisNexis CPR debate), a distinguished panel of experts, chaired by Lord Neuberger, debated and discussed the CPR and the extent to which they had achieved their aims. The panel consisted of Sir Anthony Clarke, Master of the Rolls; Professor Michael Zander QC, Simon Davis, Head of Commercial Litigation, Clifford Chance and District Judge Michael Walker, Secretary of the Association of District Judges. Professor Zander has been very critically vocal about the conflicting aims of the Overriding Objective and at the debate was strident in his suggestion that the judges had an 'uncontrolled and uncontrollable discretion'. Since this discretion was open to very little challenge in the form of appeal, he said it was an 'open sesame' for first instance judges to decide cases how they wanted, which resulted in inconsistent decision making and a 'destabilisation of the system'.

In support of this view, case management decisions, including strike out and summary judgment, are indeed the total responsibility of the judge at first instance and these decisions are generally upheld by appeal judges. Yet despite this criticism, the application of judicial discretion is considered by most to be, at worst, a mere kink in the system, rather than a major flaw. The Master of the Rolls took the pragmatic view that parties had to rely on the 'good sense' of judges to manage the cases well – although whether they *are* managed well, with the multiplicity of conflicting considerations imposed by the Overriding Objective, is the very point at issue examined below.

Active case management

At the LexisNexis CPR debate there was a great deal of positive comment about judicial case management. The Master of the Rolls suggested that one of the key successes of case management within the CPR is that there is no longer any latitude for 'letting sleeping dogs lie'; cases are no longer allowed to lie dormant. Or as Judge Walker put it, the 'aimless drifting' of a case had now ceased. Echoing a similar sentiment, though using more vigorous language, Simon Davis described the case management process as a case now being taken by 'the scruff of the neck' and moved forward rapidly to judgment.

Certainly, the introduction of the fast track procedure, with parties being given a fixed trial date 30 weeks ahead, is generally considered to be of benefit in focussing the minds of the parties. Judge Walker also alluded to other significant benefits such as single and joint experts in fast track cases and described Part 36 offers as 'one of Woolf's greatest inventions'.

Three of the four panel members at the LexisNexis CPR debate emphasised that active case management meant there was no longer any scope for the time-consuming, old style tactical interlocutory applications, designed to wear parties down. Instead, the Woolf reforms had rolled everything into one case management conference where parties were asked key questions; including settlement talks and the number of experts.

Simon Davis went so far as to suggest one of the fundamental aims of Woolf had been to prevent the ‘evil’ of parties settling at the court door and by this gauge there had been a marked degree of success. By way of anecdotal proof, Davis referred to the bear garden, the waiting area in the Royal Courts of Justice, which was now empty, no longer an arena in which interlocutory posturing took place on a daily basis. In fact, all agreed that the slew of interlocutory applications to bully a party into settling by driving up costs unnecessarily had abated. The Master of Rolls, in particular, highlighted that satellite litigation had diminished and suggested there was very little ‘interlocutory skirmishing’.

Yet while case management has undoubtedly had certain successes, as stated above, the fact remains that most of what is said in its praise – the absence of aimless drifting and an abatement of interlocutory posturing – suggests that ‘active case management’ seems to have morphed into, or has become little more than a case having ‘direction’. This is insufficient; case management where a case merely has a linear direction and a trial date end point is a long way from capturing Woolf’s initial aims and it is widely acknowledged that there is scope for far greater judicial involvement, a tighter control of cases – and therefore costs.

Hence, in his Preliminary Report, Jackson LJ states that a general theme in the submissions he received was that ‘the court could, and should, do more actively to manage cases and exert a greater control over the conduct (and therefore the costs) of proceedings. At the press conference on the release of the Preliminary Report, he said whether this criticism was justified was something he would be investigating in phase two, the consultation.

Among the array of suggestions for more pro-active management laid out within the Preliminary Report, we advocate a more effective use of sanctions and greater use of interim payment of costs.

As a corollary to this, in the LexisNexis CPR event, the Master of the Rolls arguably hit on the core of the matter when he suggested that active case management to settlement was the key. But to what extent are cases actively managed with a view to settlement? Isn’t it merely a case of settlement being given a passing nod? Anecdotal evidence from practitioners suggests that parties go through the motions of settlement talks, all the while racking up costs; that any attempt at the consensual is contrived. If this is the case, then the gulf between procedural pretence and reality needs to be exposed and addressed via robust case management. Furthermore, it would suggest that one of Woolf’s key aims, that of consensus in order to save cost, has not really succeeded.

Settlement – a case management goal?

Central to Woolf’s vision and the new culture ten years ago was the desire for disputes to be resolved consensually; this was addressed through imposing a duty on litigants and their representatives to assist the court in furthering the Overriding Objective (CPR 1.3). The active pursuit of a settlement rests on CPR 1.4(1)(e) and (f) – and active case management includes ‘helping the parties to settle the whole or part of the case’. Also, 3.1 and 26.4(1) which enables parties to make a written request with their allocation questionnaire for, or the court of its own initiative, order a stay of proceedings while settlement via ADR is attempted.

Yet while the interlocutory skirmishing might have abated, it remains doubtful whether cases really are managed with a view to settling. At the LexisNexis CPR debate, in Judge Walker’s view, the pre-trial process was less adversarial and he felt the duty to cooperate had made a huge difference. But the Master of the Rolls surely came closer to the reality in his more circumspect view that the duty to cooperate was worthwhile but it had not driven out the adversarial. Simon Davis also implied that cases were far from being managed with a view to settling when he said the judge should ask if settlement talks are taking place and hinted this was simply not happening often enough. He put it more pointedly when he said: the judge ‘should be looking them in the eye and asking whether it is being discussed’. Davis suggested that robust case management therefore meant asking the parties where they were on particular issues – robust case management meant being robust with the parties.

Robust judicial management of cases, with a view to settlement, would therefore seem to go a long way to fulfilling Woolf’s initial aims and reduce costs as a result. The Master of the Rolls suggested that only if parties are resistant to settlement should a trial date be set and where parties are open to settlement, structured settlement meetings should be built in – all of which suggests a firmer judicial hand is needed on the tiller.

Further investigation into judicial case management therefore needs to be carried out in phase two of Jackson LJ’s Report and hard evidence, beyond the anecdotal, needs to be gathered. It is an assertion of this article that unless settlement becomes the true goal of case management and pursued with vigour via active not slack case management, then the cost of civil litigation will continue to spiral and justice will most certainly not be open to all.

The heavy cost of Woolf

While robust case management towards settlement remains an ideal not a reality, it is logical to conclude that costs will continue to plague the civil justice system.

Aside from Part 45 (fixed and predictable costs) and Part 46 (fast track trial costs), costs lie in the discretion of the court regarding both the award and the amount. Rule 1.1(2)(c), states a court should deal with a case justly, which pertains in part to the amount of money involved and the financial position of the party. Yet in the damning words of Judge Michael Cook, author of the seminal text, *Cook on Costs*, 'the scheme has been spectacularly unsuccessful in achieving its aims of bringing control, certainty and transparency'.

The *unpredictability* of how much a case will cost is certainly an impediment to justice. The Overriding Objective asks for expense to be saved but as the Master of the Rolls pointed out at the LexisNexis CPR debate, there are no satisfactory methods to assess proportionality of costs, again suggesting the Overriding Objective is too unwieldy in its conflicting factors. A lack of transparency and certainty regarding costs is perceived by all to be a major flaw – hence the need for Jackson LJ's review

At the CPR debate, the Master of the Rolls hoped Jackson LJ would move civil justice forwards through examining the methods of assessing costs, the excesses of CFAs, the recoverability of insurance premiums and insufficient third party funding (see below). These, he said, were 'blots on the landscape'. Certainly, addressing the ills that are *causing* the disproportionate costs is crucial, one of which is the high quantity of pre-trial activity required under the CPR.

Front loading

The much-criticised amount of pre-trial activity – specifically disclosure – while aimed at bringing about prudent resolution to disputes via consensus is also attributed with raising costs. In apocalyptic speak at the LexisNexis CPR debate, Professor Zander said all he had predicted had 'come to pass'; Woolf had made a major change but in the wrong direction. His assertion that the massive amount of pre-trial material required, in the favour of lawyer's costs, impacted on the 97 per cent of cases that will settle, as well as the 3 per cent that would not, is a compelling one.

The longevity of the pre-trial stages and the consequence of this, the front loading of proceedings, have inevitably resulted in a detrimental impact on costs. As Simon Davis said at the LexisNexis CPR debate, pre-action protocols are sometimes abused by parties seeking to delay and generate cost in order to pressure the other party. The point of pre-action protocols – the duty to cooperate and not march blindly towards court – has therefore been undermined. Arguably, there should be provision for judicial intervention where this occurs. Certainly this point is picked up by Jackson LJ in his Preliminary Report where he reaffirms that 'the parties must not use pre-action protocols as a tactical device to secure an unfair advantage for one party or to generate cases'.

Across the board, though, practitioners acknowledge that disclosure in multi track cases – pre-action, standard, specific, and non-party – can be both abused and be burdensome, as demonstrated by the growing body of case law in this area. Although, in part, this is due to practical reasons; an expanding body of data and the lack of clear data retention policies across businesses. The front loaded approach to disclosure, when applied to e-disclosure, is especially troublesome (see below).

Also, after ten years under the new system, certain 'procedural bad habits' have taken root in the early presentation of cases; while witness statements frequently contribute to achieving early settlement, in practice these 'statements' have become tomes, running to hundreds of pages. The Commercial Court is, in fact, now trying to limit the length of the witness statements.

Writing in the New Law Journal (13 March 2009), Professor Zander asserted that while pre-trial activity meant cases that settle might do so on a better appreciation of the facts, he pointed out that pragmatically this is of 'little value if it adds significantly to the costs and makes little or no difference to the terms of the settlement. Even if it affects the outcome, it may do so at disproportionate cost'.

In his Preliminary Report, Jackson LJ therefore suggests it is time for a radical re-think in relation to pre-action protocols which is to be welcomed. We would support protocols being made less onerous and, in addition, a restriction being placed on recoverable costs in respect of the protocol period.

Significantly, pre-action protocols are one of the key issues which Jackson LJ states he would like to concentrate on during the consultation period and it is hoped that evidence-based research will be carried out in relation to this, especially in relation to disclosure, to assess to what extent this impacts on cost.

Disclosure

To reduce the cost of litigation and hence the amount of work involved, disclosure is the obvious target. As described by Jackson LJ in the Preliminary Report, reining in the costs of disclosure is and will be a 'controversial issue'. The growth of digital information has increased the cost of disclosure considerably; vast electronic bundles, with witness statements often marked up with hyperlinks, carry huge cost implications.

The rules for disclosure are contained in CPR Part 31. In 2005, a Practice Direction to Part 31 imposed obligations regarding electronic documents and it was provided that 'parties should, prior to the first case management conference, discuss any issues that may arise regarding searches for and the preservation of electronic documents'. Yet it is debateable the extent to which the time and expense of e-disclosure has been properly managed by the courts.

The question as to whether the courts are using their powers of management was brought into the spotlight in *Digicel v Cable and Wireless* [2008] All ER (D) 326. The *Digicel* decision was a salutary reminder, explored above in this article, about the need for active case management by both solicitors and the judiciary. Following standard disclosure, Digicel applied for specific disclosure of certain classes of e-documents and even though the entire disclosure process cost Cable & Wireless around £2m in fees and 6700 hours of lawyers' time, Digicel successfully argued the search had been reasonable. Initially, the parties had not discussed how they would undertake their searches, both had relied on keywords. Cable & Wireless did provide certain information about the disclosure that came before the court but resisted Digicel's attempts to obtain further information about the extent of their searches prior to the exchange of the list of documents. The court concluded that in acting unilaterally and in disregard of the Practice Direction, Cable & Wireless had exposed itself to the risk that the court would conclude its search was inadequate.

The Practice Direction to Part 31 shows that parties are expected and required to negotiate the extent of the searching and the basis on which it is carried out. Where they cannot agree, this should be referred to the court. The unfortunate case of *Digicel* underlines once again that there is a pressing need for clear and decisive case management at the first conference and, where necessary, directions.

Referring to the above fees level of £2m, in the context of multi track cases, Jackson LJ stated in his Preliminary Report that he had been told by those making submissions that this was 'by no means a large amount to be spent on disclosure'.

Jackson LJ has said that during the consultation process he will be addressing whether current standard disclosure is the right benchmark; whether justice can be achieved with a more restrictive scope of disclosure and whether there is a way to condense the various processes so documents are not reviewed en masse so many times.

Out of the spectrum of options considered by Jackson LJ, we support abolishing standard disclosure and limiting disclosure to documents relied upon, with the ability to seek specific disclosure, combined with a more rigorous case management. In heavy cases, we would support the option of a disclosure assessor.

Hourly billing

There are, of course, also a number of other more visible reasons for the apparently uncontrollable nature of costs in relation to pre-trial activity; the most obvious being the hourly billing model, which came under a great deal of critical attention in *BCCI* and *Equitable Life* cases. In a throw back to the fictional *Jarndyce v Jarndyce*, the *BCCI* case involved two years in court and 12 years of litigation. Such marathon hearings on costs risk, as Mr Justice Tomlinson told both the Lord Chief Justice and Lord Woolf, bring the legal system into disrepute.

At the LexisNexis CPR debate, the Master of the Rolls alluded to the futility of adhering to the hourly rate, irrespective of being paid at that rate. Hence, the hourly billing system is one of the many issues that will be examined by Jackson LJ. Although it is doubtful this aspect will be wide-reaching: the Preliminary Report lays out the wide range of earnings of solicitors and barristers and it seems unlikely that he will make judgments relating to such matters in his Final Report.

Rounding up ...

To conclude our overview of the CPR, which we consider to be integral to Jackson LJ's Preliminary Report, we assert that evidence is needed – hard statistical evidence – as to whether the pre-action protocols front load costs and consideration needs to be given to pre-trial steps which could be modified. (Arguably, although this is beyond the scope of the Preliminary Report, many improvements need to stem from the clients themselves in terms of their data retention, storage and management). As stated above, we would support protocols being made less onerous and, in addition, a restriction being placed on recoverable costs in respect of the protocol period.

We also assert that it is time for a more radical step in relation to disclosure; we support abolishing standard disclosure and limiting disclosure to documents relied upon, with the ability to seek specific disclosure, combined with a more rigorous case management.

Among the array of suggestions for more pro-active management laid out within the Preliminary Report, we advocate a more effective use of sanctions and greater use of interim payment of costs since active case management cannot merely be equated with a sense of 'direction' and end point. For justice to be accessible to all, there can be nothing fake about settlement moves; for this to be changed, the judge needs to be more robust with the parties in asking if settlement talks taking place and building settlement meetings in the structure. There should also be a role for the judiciary to intervene in relation to pre-action protocols where they are being abused to apply pressure to the parties.

Woolf II: costs management ...

Lord Neuberger who chaired the LexisNexis CPR debate alluded to litigation as a microcosm for life and summed it up by saying the CPR had achieved much and failed on some elements and certainly had a long way to go. So, what more needs to happen, specifically in relation to costs management, in Woolf II over the next ten years to address those elements which are clearly not working?

As costs are acknowledged to be the chief ill of the civil justice system – costs stemming from a multiplicity of failings in the system including front loading and slack case management – it is fair to say a great responsibility rests on Jackson LJ's shoulders in remedying the ills of the last ten years and setting the foundations for civil justice for the next ten. His remit is vast as demonstrated by the size of his Preliminary Report.

Currently, the court attempts to control costs by various means – estimates and cost capping orders – neither of which are sufficient. Certainly, cost capping is a practice which provokes widely differing judicial views, partly because it is feared it will give rise to further satellite litigation and it is debatable the extent to which wider use will be encouraged in the long term.

The Civil Procedure Rules Committee recently produced rules to govern cost capping (Civil procedure (amendment no 3) Rules 2008 – applicable from 6 April 2009), introducing a new CPR 44.18-20. However, they adopt a very conservative and 'safe' approach. The rules state that cost capping orders will apply to future costs which are defined in terms of costs incurred in respect of work done after the date of the costs capping order but excluding the amount of additional liability. So, there can be no attempt to reduce costs already incurred – hence, the order cannot be retrospective. Also, there is no power to cap any additional liability. Overall, it is likely that such orders will continue to be the exception not the norm.

The supplemental guidance in r 44.18(6) indicates that the court will look at all the facts of the case, including whether there is a substantial imbalance between the financial position of the parties, the costs incurred and to be incurred. Regarding the latter, the court is likely to take a failure to accurately estimate costs as an indicator that a cap might be required. As it only applies to inter partes costs, however, (the cap only restricts costs which a party may recover under an order for costs subsequently made) it can't be used to restrict a party with plentiful financial resources from spending on litigation. Rule 44.19(3) gives the court wide ranging management powers and may therefore direct parties to file a schedule of costs or file written submissions on all or any part of the issues arising. Again, though, it is of limited use and it seems will remedy few ills.

Jackson LJ, in his Preliminary Report, distilling points of note from cost capping jurisprudence, stated that while cost caps have a role to play in the effective management of costs, judges without the relevant expertise may find they are unable to make such orders. He pointed out that the issue of relevant expertise is a key consideration, given the difficulties in assessing the level of the cap and the cost consequences of getting it wrong. The submissions to him varied in their response and lingered on the obvious criticisms of caps being time consuming and expensive.

While we are aware that costs management should be part of a court's case management procedure, we would not support cost capping as the primary tool to active cost management.

Cost shifting

The other key question is whether there should be an abolition of the costs shifting rule, so that each party bears his own costs whatever the outcome? Certainly, there is effectively no cost shifting for small claims and most tribunals function without cost shifting.

The wider objectives of cost shifting were identified in Jackson LJ's Preliminary Report: the fact that the court can punish unreasonable conduct and can promote early reasonable settlement of cases. (The aim of the cost rules being to incentivise parties to make and accept reasonable settlement offers at the earliest opportunity.)

Submissions to Jackson LJ for the Preliminary Report cover a spectrum of issues and ask many questions; for example, the Forum of Insurance Lawyers response asked:

- should there be one way cost shifting from the loser pays so successful claimants recover costs but losers don't; or
- should there be a mixed system where the losing party pays no costs unless they failed to beat a formal offer or settlement or had behaved unreasonably?

The immediate result of changing the cost shifting rule – one which would go part way to dealing with hourly billing – is the possibility that clients will monitor legal fees with a greater scrutiny. However, it is doubtful whether we want our legal system to travel in a direction where a defendant, even with a sound defence, is required to settle due to fiscal necessity or a claimant is prohibited from launching a claim.

In his Preliminary Report, Jackson LJ tellingly concludes that the existing cost shifting regime should not be regarded as a 'sacred cow' but that its complete abolition does not appear a realistic option for the foreseeable future.

CFAs

The introduction of Conditional Fee Agreements (CFAs), insurance premiums and success fees are another controversial area and are attributed with increasing costs, since it is believed they encourage aggressive conduct and tactics. In November 2008, the Secretary of State for Justice, Jack Straw, even went as far as describing the behaviour of lawyers who ramp up fees as 'scandalous'. For personal injury claims, CFAs are the main source of funding and have been the cause of disputes between claimant's lawyers and the insurance companies since lawyers can charge up to double in the event that they win the case.

Jackson LJ's Preliminary Report makes the point that 'no win – no fee' is now embedded in our system and legal culture. His view expressed within is that following the retraction of legal aid, either CFAs or some other system of payment by results, allows access to justice.

It seems likely, therefore, that CFAs will continue but reforms will be introduced to incentivise claimants who, win or lose, currently never have to pay costs or have an interest in costs being incurred.

Similarly, with success fees and insurance premiums, Jackson LJ stated the question was whether the correct balance has been struck between the claimant and defendant; the appropriateness of the levels of success fees and after the event insurance premiums.

One step away from CFAs, contingency fees is another area that requires attention and continues to be debated. The fear they it would encourage frivolous litigation – or the reverse, limit access to justice in low cost cases – has always been an impediment; and in November 2008, the Civil Justice Council said it saw no need to change the position on contingency fees.

This view is also born out by Jackson LJ's Preliminary Report in which he stated that the overwhelming consensus in the submissions he received was that he should not adopt the total US system, ie contingency fees combined with no cost shifting. Although if cost shifting remains – as seems likely – views were more divided. The fact that it is felt such agreements are liable to give rise to greater conflicts of interest between lawyer and client, as with CFAs, it is unlikely they will be seen as a way forwards.

Fixing on a solution ...

At the centre of this maze is the significant and ongoing fact that there are no satisfactory methods to assess proportionality of costs. So one key question facing Jackson LJ is whether fixed costs should be introduced across the board. At the LexisNexis CPR debate, the Master of the Rolls felt that, with widespread judicial support, moving to fixed costs was a real possibility.

In his Final Report, Jackson LJ will therefore be examining the feasibility of fixed costs and also continuing to look at other jurisdictions, such as Germany where fixed costs are employed widely and litigation costs are purportedly lower (significantly, where there is no pre-trial disclosure. Also, there are more judges in Germany per head and the system is well funded). Interestingly, the system in New Zealand, also examined in his Preliminary Report, is part way between a fixed costs system and a recovery of reasonable costs' system, thereby giving a high level of predictability with some inherent flexibility.

Since proportionality, transparency and predictability are all lacking where costs are concerned and since the problem of spiralling costs flows from other deficiencies, all of which are addressed in this paper, we would assert that it is time for implementation of an expansion of the fixed costs regime.

In consultation with the costs team at Kings Chambers, we assert in this paper that it is time to implement a fixed fee regime on the basis that:

- before and after the event insurers would value a more stable platform upon which to make their reserves and calculate premiums; and
- provided any such regime is realistic, the legislature can bring about the requirement that costs be proportionate to the claim (or at least groups of claims).

Indeed, such stability might be just what the fragile after the event insurance market needs. As the Kings chambers' costs team point out, however, the greater task is obviously creating a regime that balances the requirement to control costs with the requirement to provide parties with access to justice. Clearly, any such balancing exercise will be an ongoing one, so the legislature ought to recognise that expanding any such scheme inevitably expands the obligation to keep the system under review.

Jackson LJ in his Preliminary Report asks whether there should be a comprehensive fixed costs regime in the fast track? Having canvassed views from the panel of assessors, he stated it was their 'unanimous view' that this should be taken forward.

We support this, along with the illustration matrix, showing how fixed costs might work, within chapter 22 of his Preliminary Report (Table 22.2).

The wider question as to whether or not there should be a fixed costs regime above the fast track is more complex and ways forward are suggested within the Preliminary Report. As indicated above, we would support a fixed costs regime above the fast track also – with a limit placed upon recoverable costs so that the burden of the losing party is reduced and the costs' risk of each party can be more accurately assessed.

While it might be appropriate for high value business claims in the commercial court to adhere to a recoverable costs regime, we would support the introduction of fixed costs in respect to higher value PI claims provided there is a cap or that these costs be made more proportionate via reforms in other areas across CPR, such as front loading (discussed above).

For lower value business disputes, we support fixed costs across the board. Again, for this to be a workable proposition, more substantial changes are needed to the CPR and their application. (Hence, in the German system, there is no standard disclosure (CPR31)).

Conclusion

In summary, looking ahead to the findings we hope to see in Jackson LJ's Final Report in relation to costs management, we assert that while we are aware that costs management should be part of a court's case management procedure, we would not support cost capping as the primary tool to active cost management.

We support reforms to the CFA system with a view to incentivising claimants who, win or lose, currently never have to pay costs or have an interest in costs being incurred.

Overall, we assert in this paper that it is time to implement an expanded fixed fee regime so before and after the event insurers have a more stable platform and costs be proportionate to the claim (or at least groups of claims).

In our view, a comprehensive fixed costs regime in the fast track – along the lines of the illustration matrix, showing how fixed costs might work, within chapter 22 of his Preliminary Report (Table 22.2) – is a key away forwards. We also support a fixed costs regime above the fast track – with a limit placed upon recoverable costs so that the burden of the losing party is reduced and the costs' risk of each party can be more accurately assessed.

All of the above ways forward, though, are entwined with reforms to the CPR system as a whole, as stated above. On this point, at the LexisNexis CPR event, Lord Neuberger suggested there was a problem with the way cases are allocated, the fact that a first instance judge didn't run with a case from beginning to end; that this would help case management. Whether a judge might be better equipped to manage cases actively if a judge was integrated and involved with a case is open to opinion. Reverting to such a system, akin to the US system of judicial case management, would create court delay but it would nevertheless be a bold step towards addressing this issue and ensuring firm management. After ten years of a less than perfect civil court justice resting on the CPR, the time is ripe for such bold moves to be considered and it is to be hoped that Jackson LJ – the new Woolf – seizes the opportunity to create Woolf II, a more powerful sequel to its predecessor in his Final Report in December.