Litigation Trends - The Jackson Effect
The Revolutionary Road
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The Jackson reforms, implemented in April, ushered in root and branch changes to the civil litigation system not seen since the Woolf Reforms. While every firm will tackle the challenges and opportunities of the new regime differently, we want to monitor emerging trends and shifts in the litigation marketplace, specifically how the new costs regime is being implemented, how firms are restructuring, and why. This exclusive online survey, conducted over the summer with the support and cooperation of London Solicitors Litigation Association (LSLA) members, will run quarterly, and is designed to provide a regular overview of how firms and practitioners are navigating Jackson LJ’s revolutionary road-map of change.

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 Barely seven months have passed since the implementation of the controversial Jackson Review, the biggest shake-up of civil litigation in a generation. While few could deny that the cost of justice and its proportionality to the issues at stake required urgent examination, the resulting reforms appear to have done little to convince disputes lawyers that positive change will be readily achieved. Indeed, the results of the inaugural NLJ/LSLA Litigation Trends Survey paint a gloomy picture of the impact of many of the key tenets of Lord Justice Jackson’s reforms.

Consider just two of the headline figures to emerge from the survey: 93% thought that access to justice would decrease as a result of the new regime while 69% thought the new budgeting measures would increase costs. If making civil litigation fairer, less expensive, and more accessible was the ultimate endgame for Jackson then there is clearly much work still to be done. Here, we analyse the key findings of the survey and give market reaction and context to how litigation lawyers are handling the Jackson revolution. While the feeling of frustration to emerge from most quarters is palpable, there at least seems to be some agreement on what is and isn’t working and (most importantly) what needs to be done to clarify those key question marks currently hanging over the reforms.

Strategic differences

While the day-to-day practices of most commercial firms have not changed dramatically, the Jackson Reforms and clients’ expectations have encouraged litigators to focus in greater detail on costs, to increasingly consider alternatives to straight forward time billing (such as fixed fees and capped costs), and to look more widely to the funding options available. The reality is that most commercial litigation practices had long been preparing for the essential elements of the Jackson Reforms with the key emphasis being on cost budgeting.

Clients are increasingly cost conscious and want certainty about the expense of legal services and tangible value for money from their lawyers

A sizeable majority (63%) of the respondents to our survey said they had reviewed their litigation strategy post 1 April 2013 (when the Jackson Review came into force) indicating that firms are thinking and acting on Jackson. (Although many are quick to make the point that they have always discussed costs issues with clients from the outset, providing them with the best information possible to enable them to make a fully informed decision before embarking on any form of dispute resolution.) There is also broad agreement that clients have become increasingly cost conscious and seek certainty of the expense of legal services and tangible value for money from their lawyers.

According to Georgina Squire, partner at Rosling King: “We try to restrict disclosure to cut down the costs and potential disclosure applications that may arise from standard disclosure and itemised lists. We are also restricting the content of witness statements of fact, which is again a cost saving.” Squire has nonetheless found that many opposing parties do not want to utilise the benefits of the reforms to restrict the costs of the litigation process, particularly on smaller value cases and adds that she still has battles at case management conferences over directions.

Whereas previously stage by stage budgeting in litigation was a matter between a firm and its clients, it has now been given a notably different profile in that it now involves the other parties and the court. Francesca Kaye, LSLA president and partner at Russell Cooke, says that, “the increased procedural steps and associated costs imposed by the Jackson reforms are perceived to add no value to the client and adversely affects the clients ability to pursue a claim or insist on its strict legal rights. This has further reduced access to justice for those of modest income including SMEs rather than increasing it.”

With increased access to justice one of the key aims of the Jackson reforms, comments such as these from senior litigators do not bode well for the implementation of the rules so far.

The new economic reality

One of the most contentious issues under the new regime is the position of conditional fee agreements (CFAs) and their related funding mechanism, damages-based agreements (DBAs.) From 1 April 2013 the “success fee” element of CFAs is no longer payable by the losing side in the majority of cases. Any success fee will be paid by the winning party, typically out of damages recovered. Moreover, while after-the-event (ATE) insurance can still be taken out at the litigator’s expense, ATE insurance premiums are no longer recoverable if taken out after 1 April 2013. Qualified one-way cost shifting (QOCS) – where defendants
are generally ordered to pay the costs of successful claims but will not recover their own costs if they successfully defend the claim – is being introduced for all personal injury claims as an alternative to ATE insurance. The MoJ has recently announced a consultation paper looking at similar costs protection in defamation and privacy claims. Under a DBA, lawyers are not paid if they lose a case but may take a percentage of the damages recovered for their client as their fee if the case is successful.

David Greene, NLJ consultant editor and senior partner at Edwin Coe, says: “We undertook a fair amount of work on CFAs. Undoubtedly our strategy will have to change in relation to the pursuit of claims, bearing in mind the inability now to recover from the defendant the success fee and the ATE premium. There is no doubt that work we undertook previously on that basis will no longer be commercially viable. However, we still think we will have to offer them…. they are part of modern practice and will continue to be so.”

Greene’s view is echoed by Guy Harvey, partner at Shepherd and Wedderburn: “Clients have got used to the idea of their lawyers ‘putting some skin in the game’ and find they like it. It is not something which can easily be snapped back.”

Just over half of survey respondents (53%) said they would continue to offer CFAs with the rest either ruling them out altogether or restricting their use. Respondents are increasingly looking to third party funding to allow clients to offset the costs of a partial CFA against their costs of obtaining ATE insurance should they wish to avail themselves of it. Those able to fund the dispute themselves, meanwhile, are more often choosing to do so rather than pay the success fee. Whichever way you look at it, clients clearly do not wish to pay the uplift from their damages.

“Most claimant clients are very unhappy with the outcome for them of the reforms,” according to Squire, summing up the prevailing market view.

However, while the new style CFAs at least maintain the relationship between the commitment of the client to pay a fee and the hours worked by the adviser, the position of DBAs is far less clear cut, a situation illustrated starkly by the survey results. A significant 71% of respondents said they had not started using, or did not intend to use, DBAs.

The over-riding reason for this was because of uncertainty within the DBA Regulations which appear to preclude partial or “hybrid” DBAs. A full DBA requires a substantial financial commitment from the firm acting, particularly in large cases and there are concerns it could lead to conflicts of interest arising between the client and solicitor.

The DBA regulations also do not mention whether solicitors acting under a DBA might be liable for adverse costs in the same way as third party funders. In the absence of solicitors indemnifying a client against an adverse costs order many respondents did not believe that solicitors should have such liability consistent with their position under a CFA. A firm’s potential liability is thus a primary consideration when assessing funding options under the new regime.

Richard East, partner at Quinn Emanuel Urquhart & Sullivan, says his firm would like to use DBAs but “like everyone else we need the flexibility of being able to combine CFAs and DBAs. At the moment the regime is not clear enough. Ideally you would combine a CFA requiring the client to pay you an element of your ordinary hourly rates, but, on success, claim a contingency payment. This way everyone is a winner. The law firm is sufficiently incentivised, but not so much that it is effectively taking the entire economic risk in the case. This also means that the law firm retains an independence and can advise the client properly on settlement.”

The MoJ is currently reviewing the DBA Regulations, a move backed by respondents to the survey, many of whom would strongly welcome amendments to allow partial DBAs. As Harvey concludes: “If hybrid DBAs became the norm, many more firms would embrace them. If a case has legs but the client cannot or does not wish to fund it going forward, third-party funding will be the growth market. If a case does not have legs, then why would it be attractive to us even on a DBA?”

### Budget daze

The economic reality of litigation post-Jackson is clearly not only confined to how cases are funded. The new rules provide that for all multi-track cases issued after 1 April 2013 the parties must exchange costs budgets on the (new) Precedent H form. The Jackson ethos is to control costs before they have been incurred and thus give a measure of certainty to both sides as they proceed with the dispute.

With costs and cost budgeting paramount to most firms’ litigation strategies post-Jackson, many litigators said they were looking at new opportunities to enhance capability with user friendly software and working with chosen cost specialists. Some firms have altered recording systems to allow them to enter time by the defined stage in the litigation, monitor the progress of costs against litigation stages/budget, and identify the party upon whom each attendance is made. The logic is that if these items are correctly completed when
time is recorded preparation time for the costs budget and any amendments is substantially reduced.

There is, nonetheless, a strong feeling that the costs allowance provided by the CPR for the preparation and maintenance of such budgets is insufficient in the majority of complicated claims, particularly where there are a number of contingencies to factor in. A difference in approach can be detected by firms doing lots of commoditised litigation and those focused on higher-end disputes.

Seamus Smyth, partner at Carter Lemon Camerons, says: “We have not rolled out significant internal training to our litigators or enhanced our IT and software infrastructure. At this stage our view is that the litigation which we do covers a sufficiently diverse range of individual and bespoke cases that any system imposed would be subject to so many variations and exceptions that it would be more trouble than it was worth.”

He adds: “Budgeting is likely to result in a massive amount of satellite litigation. In litigation other than commodity and factory litigation, ie litigation with any degree of complexity or unpredictability, the likelihood is that budgets will be so hedged around with assumptions that they become worthless.”

Impact of Jackson reforms on access to justice

Blind view painted by profession

“ As a claimants’ lawyer we do not believe that the Jackson reforms will increase access to justice. We have cases that we would have run prior to Jackson which we would now have doubt over.”  
David Greene, partner, Edwin Coe

“ Overall we do not think that the Jackson Reforms will increase access to justice. Both Woolf and Jackson have increased (and accelerated) the overall cost of litigation and that overall cost will have the effect of reducing, not increasing, access to justice.”  
Seamus Smyth, partner, Carter Lemon Camerons

“ The costs of litigation have become increasingly expensive. The Jackson Reforms do not alter the expense of instructing lawyers privately and, for those not involved in PI and clinical negligence claims, have potentially increased the expense of instructing lawyers on a CFA.”  
Sophia Purkus, partner, Fladgate

“ Do I think the Jackson reforms will increase access to Justice? No, quite the reverse.”  
Francesca Kaye, partner, Russell Cooke

“ I am of the view that access is lessened because for commercial claims the DBA structure is not workable. There isn’t enough in damages to pay any uplift and irrecoverable costs and hence why we do not offer it for claims under £2m damages. The CFA regime isn’t workable on smaller claims as there isn’t enough in damages to pay any meaningful level of uplift.”  
Georgina Squire, partner, Rosling King

Budgeting is likely to result in a massive amount of satellite litigation

But the crucial issue of what effect the new budgeting regime will have on costs throws up some worrying findings in our survey. A significant 69% of respondents thought that budgeting would increase costs with just a fifth (21%) believing costs would go down. The remaining 9% of respondents believed there would be no change. Kaye says: “Costs budgeting as a process is increasing rather than decreasing costs. Any court decisions about the amount of costs impacts on recoverable costs only. Clients who are able to will still be able to incur the costs they want to incur to pursue or defend a claim but will have to accept a reduced recovery under the cost management rules. This has an impact on access to justice for those for whom the shortfall in costs between the actual costs and recoverable costs is the difference between being able to pursue their claim at all.”

The Civil Justice Council is reviewing exemptions to the costs budgeting regime which mostly apply to higher value disputes. Irrespective of its findings, it is thought that costs budgeting will have less impact upon significant high value claims than upon the mid and lower value claims to which it applies because, under the new rules, costs that are disproportionate may be reduced or excluded even if they were reasonably or necessarily incurred (see under Being proportionate, right).

According to Sophia Purkus, partner at Fladgate: “The obligation upon the court to deal with cases ‘justly and at proportionate cost’ compels the court to actively assess the proportionality of costs at an early stage when, in many cases, the complexity and merit of a claim may be hard to assess definitively.”

Thus budgeting could lead to an increase in costs because parties will be conservative in their costs assessment to maximise recoveries. Purkus adds: “It is early days for the reforms and there is obviously some bedding in required. We have noticed that the courts have taken inconsistent approaches to the filing of costs budgets and whether they are actively involved in managing costs. We have had experiences where some district judges have been singularly uninterested in the budget or addressing costs issues and others where they have slashed costs sometimes without apparent consideration of the amount of time a solicitor is required to spend on individual stages of the litigation.”

Being proportionate

Inextricably bound to any discussion on budgeting is, of course, the issue of proportionality, one of Jackson’s headline reforms. The new test provides that costs incurred by a party are proportionate if they bear a reasonable relationship to the complexity of the litigation; the sums in issue; the value of any non-monetary relief in issue; any additional work generated by the conduct of the paying party and any wider factors involved such as public importance or reputation. As outlined already in this analysis, costs which are disproportionate can now be reduced or disallowed even if they were reasonably or necessarily incurred.

It is evident that much of the impact of the new rules will depend upon the training, resource and time available to judges to give clear markers on proportionality in small to medium sized cases where there is the greatest risk of costs being disproportionate. In high value litigation where the issues are of the ultimate importance to the parties, it is much less likely that proportionality will be in doubt. Nonetheless, there is a strong feeling among many litigators that guidance in this area is being directed by a handful of proactive judges and that a consistency of approach is hard to detect at present. There are also serious misgivings about the
implication that small and medium sized cases are generally less complex than higher value disputes.

Smyth says: “The difficulty is that it is naive to the point of being facile to suggest that because a case is small it is therefore easy. In fact, the reverse may well be the case because transactions involving large sums of money or valuable property are that much more likely to have been considered at the time of the transaction by lawyers on both sides. Smaller transactions are as likely to have involved lawyers.

“We do not think the new disclosure regime will decrease costs. If anything it will increase them”

“There is no reason in our view why a solicitor taking on a small but difficult claim and succeeding should not recover all of the costs properly incurred, just because the amount at stake was modest. If the effect of the proportionality test is to limit the costs that are recoverable, that degree of erosion of the recoverability principle is very much to be regretted.”

Inherent in this view is that it is unpredictable which costs a court will deem proportionate and that they may be limited even if reasonably and necessarily incurred. If recoverable costs are reduced then budgeting may increase leading to a conflict between proportionality and budgets.

As Smyth sums up: “The proportionality test will without doubt give rise to a great deal of satellite litigation and to arguments much more intricate than have hitherto been the norm about which party was responsible for generating costs over and above what the court regards as proportionate.”

Settling down

These continued cost uncertainties are given further impetus by the additional sanctions imposed by Jackson on formal settlement offers (Part 36 offers). Jackson imposes a new penalty to encourage settlement in relation to a claimant’s part 36 offer – an increase in damages. For claims up to £500,000 the sanction is calculated at 10% of claims between £500,000 and £1m it is 5%. This is subject to a £75,000 cap yet means that defendants are under strong pressure to accept the offer because of the potential adverse costs consequences if they don’t.

1. Have you stopped offering or restricted your use of conditional fee agreements (CFAs)?

   - Yes 34%
   - No 53%
   - Other 12%

   • We have not yet entered a post Jackson CFA
   • Never offered them
   • Clients are less attracted to them because the uplift is not recoverable.
   • We seldom used CFAs in any event. The changes are not really having an impact on us in this regard.

2. A majority (71%) of respondents said they would not use damages-based agreements (DBAs). The reasons given are summarised below:

   - Wait and see 16%
   - Risk and/or reward 5%
   - Uncertainty 6%
   - Not profitable/practical 3%
   - Focused on injunctive relief 2%
   - Clients don’t get to receive the full amount of damages 1%
   - Recoverable costs too low 1%
   - Client issues 1%
   - Not relevant 5%

3. What steps have you taken to prepare budgets in accordance with the new rules?

   - Recruited costs specialist(s) internally or externally 12%
   - Investment in software 13%
   - Internal training 55%
   - Other 18%

   • We have invested in software and undertaken internal training.
   • We have new software, held internal training and burnished our links with external costs specialists
   • A combination of internal training and internal IT development
   • developed our own product for use by us and others
   • External training.
   • Information gathering, familiarisation with new rules and procedures
Graham Huntley, partner at Signature Litigation, says: “In the short term there will be uncertainty on the part of some clients and advisers in situations where they would otherwise be clear as to their position on making an offer. In the medium term there will be uncertainty as difficulties in the application of the rules in some instances work their way through the courts. In the long run the increased sanctions will promote earlier settlement. Dealing with these issues in practice at the present time is simply an exercise that requires more time and expertise than perhaps was the case before.”

However, while litigators appear broadly satisfied with the amendments it is predicted by many that there will inevitably be a period of uncertainty while the unintended consequences of changing the rules are worked through.

Smyth says: “In a run-of-the-mill personal injury case, making a Part 36 offer may be straightforward and ascertaining retrospectively whether or not it was beaten may be equally straightforward. That tends not to be the case in the litigation with which this firm has to deal. We approve of the increased Part 36 sanctions, because the regime was one of the more successful facets of the Woolf Reforms and the use of Part 36 offers is wholeheartedly to be encouraged. If they promote settlement, good; if a knuckle-headed opponent refuses to accept, and then fails at trial to improve on the Part 36 offer, the fact of the offer will invariably be of enormous benefit to the offeror, even if it did not have its initial desired objective in achieving a settlement.”

**Getting disclosure**

Of course, one of the key reasons for costs spikes, budgeting and settlement uncertainties relates to the thorny issue of disclosure. The Woolf Reforms attempted to limit its scope yet in many cases disclosure continued to be given of documents which barely fell within the scope of the old CPR 31.6. The quantity of documents disclosed which had no considerable effect on the underlying claim was exacerbated by the dramatic increase over the last decade in the amount of documents stored electronically. Amendment of the rules is almost unanimously considered to be long overdue.

Purkis says: “Prior to the Jackson reforms, I had felt that disclosure in some cases was not receiving the scrutiny it should and that there was an apparent lack of involvement in the selection of documents by fee earners having a detailed knowledge of the claim.”

The Jackson reforms now offer a selection of disclosure options for all multi-track claims (except PI and clinical negligence cases) and require parties to consider at an early stage what form of disclosure is required.

However, it is thought in some quarters that selection of the appropriate means and scope by which disclosure is to be given, as well as increased client participation from the outset of the dispute process might elevate costs during the early stages of proceedings.

As our analysis demonstrates there are stark differences of opinion between litigation lawyers as to the impact of the new regime. Serious question marks still exist as to whether all parties to a dispute will share a sufficiently close common desire to limit the scope of disclosure. (See Box Debating Disclosure)

**“Both Woolf and Jackson have increased (and accelerated) the overall cost of litigation”**

**Accessing justice**

It is abundantly clear from the results of our survey and subsequent analysis that litigation lawyers, while acknowledging the need for a shake-up of the civil justice system, have deep-rooted concerns regarding how the central themes of the Jackson reforms will play out in practice.

And nowhere is this more graphically illustrated than by the most damning statistic to emerge from our survey – that an overwhelming 93% of respondents do not think the reforms will increase access to justice. As one of the key themes underpinning the entire Jackson Review, this is not something that can be dismissed lightly.

According to Smyth, the Woolf Reforms tackled procedure but not funding while the Jackson Reforms focused on funding over procedure. He believes a joint approach is required if the overall cost of litigation is to be reduced.

He says: “Both Woolf and Jackson have increased (and accelerated) the overall cost of litigation and that overall cost will have the effect of reducing, not increasing, access to justice. Controlling what element of those costs has to be borne by the client, is only one stage. If the total overall cost is not borne by the client and solicitors, counsel, insurers, third party funders etc
are reluctant to bear between them the whole cost (as is increasingly likely to occur in small and medium sized cases) the net effect will be for litigation to become prohibitively expensive, with the emphasis on prohibition.”

Greene is also of the view that access to justice will not increase as a result of Jackson. He gives the example of a case where his firm has been asked to help residents in central Newcastle on a case against the local authority for failure to regulate licence-holders. The area has been blighted by licensed premises and clubs to the extent that noise over the weekend and blighted by licensed premises and clubs to the extent that noise over the weekend and noise-blamed by licensed premises and clubs to the extent that noise over the weekend and

He says: “Prior to the Jackson changes we would have been able to undertake that case with a recoverable CFA and ATE. We now have some doubt as to whether we can pursue the case.”

On a more positive note it is hoped that new case management rules should assist with the smooth running of cases over time, despite being approached rather zealously by the judiciary at present, according to some litigators. The new rules on disclosure, while controversial, should assist with managing cases more effectively and at less expense.

While the costs management rules have increased front loaded costs according to many, it is hoped that once the initial round of decisions and appeals have been made that they will settle down and assist parties to earlier settlement. (Although some lawyers are already asking for a change to Precedent H – where anticipated costs are set out - to make it simpler and less prescriptive.)

Purkis says: “Access to justice involves not only facilitating a party to seek recourse for the damage done to it, but enabling a defendant to vindicate themselves in the face of an allegation wrongly made, all at as little expense to the winning party as possible.”

Few would deny that litigation has become increasingly expensive and, with the exception of PI and clinical negligence claims, the expense of instructing lawyers on a CFA has potentially increased. As outlined earlier in this analysis, the DBA regulations are in urgent need of amendment already with 71% of respondents having no interest in using them as currently defined. As Purkis concludes, “only time will tell how the reforms fare. I remember when the Woolf Reforms came into force. Over time the less advised provisions disappeared, those which were improvements rallied and slowly the rules moved to a place where we were relatively comfortable with them. No doubt the same will happen with the Jackson reforms.”

The big hope among litigators at all levels is that Purkis’s optimism is borne out sooner rather than later.

NLJ/LSLA survey details: 117 LSLA members completed our online survey which was distributed by e-mail to current LSLA members.