UK: Government Implementation of Jackson Reforms on the Costs and Funding of Litigation. Introduction of Contingency Fees and increased Mediation

The UK government made a series of announcements on 30 March 2011 about major reforms of funding[1] and reform of the civil justice system.[2] These broadly follow the recommendations of the 2010 *Review of Civil Litigation Costs* by Lord Justice Jackson and the Report *Common Sense, Common Safety* by Lord Young of Graffham.

The funding proposals are to be implemented in primary and secondary legislation and court rules; the county court proposals are available for consultation until 30 June 2011. The headlines are:

- Deconstruction of the CFA[3] experiment for funding claims, which has cost defendants and insurers a great deal, but replacement with contingency fees, albeit regulated and capped.
- Further moves towards mandatory mediation and ADR.

A. Funding and costs reforms

- The regime of conditional fee agreements (CFAs) that has existed since 1999 is to be made far less attractive for claimants and lawyers, by abolishing the recoverability of the CFA success fee element and the ATE (after-the-event) insurance premium. This will considerably reduce defence/insurance costs and reduce the 'CFA blackmail settlement' pressure. Claimants will have to pay success fees etc out of their damages.
- In order to balance this change for personal injury claims, non-pecuniary damages will be increased by 10%.
- But any success fees in personal injury cases will be capped at 25% of the damages (other than those for future care and loss).
- Qualified One Way Cost Shifting (QOCS) will be introduced for personal injury cases (but only for such cases – the government is 'not persuaded' by Jackson's ideas about extending QOCS to further types of cases[4]). Subject to some exceptions, in personal injury cases, claimants will be entitled to their base costs when they win, but not be liable when they lose. A major rationale for introducing

[1] *Reforming Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson's Recommendations. The Government Response* (Ministry of Justice, 2011), available at http://www.official-documents.gov.uk/document/cm80/8041/8041.pdf

[2] Consultation paper CP6/2011, *Solving disputes in the county courts: creating a simpler, quicker and more proportionate system. A consultation on reforming civil justice in England and Wales* (Ministry of Justice, 2011), available at http://www.justice.gov.uk/consultations/docs/solving-disputes-county-courts.pdf.

[3] Conditional Fee Arrangements, whereby lawyers essentially contracted on a "no win – no fee" basis in return for receiving enhanced (success) fees if they won the case. Such CFA arrangements could lead to lawyers receiving twice their normal fee if they won the case. CFAs are to be distinguished from US style contingency fees: a CFA did not involve the lawyer sharing in any part of the damages awarded.

[4] para 27.

the QOCS regime is that many claimants need no longer take out ATE insurance. It is unclear whether the QOCS regime will apply, as Jackson LJ recommended, to collective personal injury claims[5].

- A defendant who refuses a claimant's offer to settle that is not beaten at trial will have to pay not only base costs but also be subject to a sanction of 10% of the value of the claim.
- Contingency fees (called 'damages-based agreements', DBAs) will be allowed in civil litigation. They are currently allowed in employment claims. The government considers that 'the principle of no win no fee litigation has been well established by CFAs', and that a ban on contingency fees 'is no longer appropriate in a modern litigation system' provided that they are appropriately regulated.[6] The government also thinks that a wider availability of DBAs is necessary to balance its recent further large cut in legal aid.
- However, it is important to note that if a Plaintiff engages lawyers on a DBA basis, in the event of that Plaintiff winning his case the Defendant will only be liable for normal base legal costs – i.e. the normal lawyer's fee and not the contingency fee. Plaintiffs will have to pay any excess over the normal fee out of their damages. DBAs will be subject to the 25% cap in personal injury cases.
- A new test will be introduced, namely that costs can only be recovered from an opponent if they are reasonable and proportionate.
- The prescribed rates for recoverable costs for lawyers' time spent will be increased by inflation, backdated to the mid-1990s, which was the last time they were raised.

Background

Lord Young's Report[7] highlighted 'increasing concerns of a compensation culture'. The Ministerial decision has been taken by two Conservative ministers, Ken Clarke QC MP and Jonathan Djanogly MP, who comment:

> *'... access to justice for all parties depends on costs being proportionate and unnecessary cases being deterred. It is in no one's interest for cases to be taken to law aggressively or speculatively and for costs to be out of proportion with the issues to be resolved.*
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> *'Yet in recent years, the system has become unbalanced, fuelled to a significant extent by the way that 'no win, no fee' conditional fee agreements (CFAs) have evolved. They have played an important role in extending access to justice, but they also enable claims to be pursued with no real risk to claimants and the threat of excessive costs to defendants. It cannot be right that, regardless of the extreme weakness of a claim, the sensible thing for the defendant to do is to settle, and get out before the legal costs start running up. This is precisely what has happened and it is one of the worst instances of this country's compensation culture.*
>
> *'... The aim is to restore a much needed sense of proportion and fairness to the current regime – not by denying access to justice, but by returning fair balance to the system.'*

[5] In EJF's view, collective litigation is unsuited to personal injury cases, because in such cases the court needs to take account of individual issues such as causation and prior health conditions.
[6] Para 29.
[7] *Common Sense, Common Safety*

The government bases the case for change on evidence that emphasises the trend of increasing claimants' costs in personal injury claims over the past 5 years, both in relation to damages, and in relation to defendants' costs. as an example, the government quotes the following:

> *'A leading supermarket reported that the average costs paid out to claimants has increased by 40% between 2005 and 2010; 60% of the money paid out goes to claimant lawyers, and only 40% to the injured party. The figures for the NHS Litigation Authority (NHSLA) are similar. Over the same period, the claimants' costs paid have increased by about 45% (whereas the NHSLA's own legal costs have declined by about 30%). A general liability insurer has indicated that in 1999 claimant solicitors' costs were equivalent to just over half the damages agreed or awarded at 56%. By 2004, average claimant costs were 103% of the damages. By 2010 average claimant costs represented 142% of the sums received by the injured victims. The insurer also indicated that whilst average damages paid had increased since 1999 by 33%, average claimant costs paid (including disbursements and ATE premiums) have increased by 234%.'*[8]

The European Court of Human Rights held in November 2010 that the UK's regime of recoverable success fees breached defendants' article 10 rights on freedom of speech.[9]

B. Civil Justice Reforms: Emphasis on Mediation

The UK Government is consulting on a raft of reforms that continue the philosophy of resolving more claims through mediation, together with streamlined and lower cost litigation tracks, that was promulgated by Lord Woolf in 1995 and later enshrined in the 1999 Civil Procedure Rules. The primary aim is to aid economic recovery by promoting 'quicker, cheaper alternative dispute resolution where appropriate'. The major features are:

- significantly expanding appropriate non-court forms of dispute resolution by requiring all cases below the small claims limit[10] to have attempted settlement by meditation, and introducing mediation information/assessment sessions for claims above the small claims limit;
- a simplified claims procedure on a fixed costs basis, similar to that for road traffic accidents under £10,000, for more types of personal injury claim; and,
- a simpler and more effective enforcement regime.

Policy Background

In their comments, the Ministers say: 'What business, individuals and government need from the system is straightforward to state: just results delivered fairly, with proportionate costs and procedures and cases dealt with at reasonable speed.

> *'... there are too many claims being brought in to the legal system inappropriately. Once in the system they are being resolved too late, too expensively, with business in*

[8] para 20.
[9] *MGN Ltd v the United Kingdom* [2011] ECHR 39401/04
[10] The current limit for small claims cases is 310,000 (approximately euros 12,000)

particular exposed to high and disproportionate costs. Civil justice administration and processes have once again become overly complex, bureaucratic and inefficient.
'A newer burden on the system is the move towards a compensation culture, driven by litigation. …
'Together, these and the other proposals outlined in this paper should mean fewer cases coming to court unnecessarily, more rapid resolution, lower costs to participants and thus a system that delivers justice more effectively. Business, which has found the current system a real burden, stands particularly to benefit.'

Expenditure on the High Court and County Courts in England and Wales for the year 2009/10 was £363 million. In 2009/2010, the cost of running the civil and family courts in England and Wales was £619m. Of this, almost 82% was funded through court fees worth around £507.2m.[11]

More than three-quarters, or 87,000 of all claims allocated to the fast and multi-tracks are still settling between allocation and trial.

The government's current reforms of the system fall squarely within the government's primary strategy of enhancing private sector-led economic recovery. As the government states:

'Most individuals, small businesses and large corporations want to resolve their problems quickly, cheaply and in a confidential way. Our proposals are designed to respond to what matters to citizens.'

The principles behind the reforms are:

- Proportionality – that disputes should be resolved in the most appropriate forum, so that processes and costs are commensurate with the complexity of the issues involved.
- Personal Responsibility – that wherever possible citizens should take responsibility for resolving their own disputes, with the courts being focused on adjudicating particularly complex or legal issues.
- Streamlined Procedures – that procedures should be citizen and business friendly with services focused on the provision of timely justice.
- Transparency – to ensure that there is clear information on the dispute resolution options open to citizens so that they can take action early, make informed decisions and more readily access the most appropriate services.'[12]

The government continues to emphasise the importance of providing information to the public and SMEs about resolving disputes. It will enhance the content of "Directgov".[13] It will continue Money Claim Online (MCOL) and Possession Claim Online (PCOL), which are web-based services, enabling claims to be issued over the internet. It wants to encourage more actions to be commenced electronically, since it is both cheaper and more efficient.

[11] para 21.
[12] para 24.
[13] www.direct.gov.uk

Some of the detailed proposals

The consultation paper sets out a range of options to help achieve this goal. These *include:*

- Introducing a simplified claims procedure on a fixed costs basis, similar to that for road traffic accidents under £10,000,[14] for more types of personal injury claim;[15] exploring the possibility of extending the framework of such a scheme to cover low value clinical negligence claims; and examining the option of extending the upper limit of those simplified claims procedures to £25,000 or £50,000;
- Introducing a dispute management process and fixed recoverable costs by specific case types up to £100,000;[16]
- Increasing the upper jurisdiction threshold for small claims (excluding personal injury and housing disrepair) from £5,000 to £10,000, £15,000 or £25,000;[17]
- Requiring all cases below the small claims limit to have attempted settlement by mediation, before being considered for a hearing;
- Introducing mediation information/assessment sessions for claims above the small claims limit;[18]
- Encouraging greater use of online services;
- Providing a simpler and more effective enforcement regime;
- Implementing reforms on enforcement already approved by Parliament in the Tribunals Courts & Enforcement Act 2007, in Orders for Sale, Charging Orders, Attachment of Earnings and Information Requests and Orders processes;
- Introducing streamlining and efficiency reforms to the Third Party Debt Order and Charging Order processes;

[14] Extending the RTA PI Scheme from £10,000 to £25,000 would capture around 90% of all RTA PI claims: para 66.

[15] In 2009/10 the NHSLA received 6,652 claims and potential claims. The NHSLA does not deal with claims against GPs, dentists or other medical personnel not employed by the NHS. Statistics from the compensation recovery unit indicate that 10,308 clinical negligence claims were notified to them in 2009/10 (including Scotland and Wales). Total legal costs incurred in connection with NHSLA clinical claims closed in 2009/10 amounted to £163.7 million**.** Lower value clinical negligence claims received by the NHSLA (£1–£25,000) have an average settlement time of just over six months, although around 4% of cases received by the NHSLA go to court. Paras 79 and 80. It is proposed to develop a scheme for lower value NHS claims similar to the RTA PI Scheme. If successful it would be expanded to capture claims against GPS etc: para 82.

[16] This extends the pre-existing fixed recoverable cost scheme, which is currently capped generally at £5,000, but £1,000 for personal injury and housing disrepair claims. Although neither the Jackson Report nor the Government say this, the fixed costs system copies the tariff system of the German civil litigation system.

[17] The government favours an increased cap of £15,000, which would capture 83% of all defended cases currently allocated to a case management track: para 115.

[18] In the past two years more than 10,000 small claims mediation appointments have been conducted, for which the settlement rate was 73%, and of over 7,500 users that completed the on-line survey 98% were satisfied or very satisfied: para 141. 75% of specified debt cases are undefended: para 90. There were 230,000 repossession claims in 2009: para 94.

- Testing the public appetite for further enforcement reforms and jurisdictional changes;
- Introducing a number of jurisdictional changes in the civil courts, including the introduction of a single county court jurisdiction for England & Wales.[19]

The government has emphasised the importance of mediation:

> *'In our view there are many cases which could be better resolved through mediation and do not necessarily require judicial intervention….*
> *'We propose that this mediation stage should involve the parties in small claims cases being automatically referred to a mediation service. This means that for the first time mediation will be seen as part of the actual court process.'*[20]

Recognising the element of compulsion in imposing mandatory mediation, the government says:[21]

> *'We envisage a staged process with fixed costs applying at each stage, with those costs relating to different dispute values and/or different case types.'*

As an example, these stages might be:

1. **Triage** – what are the initial options available? For example, could the dispute be resolved by referral to an Ombudsman, a Regulator, or a trade association scheme? Or, does the matter require legal advice?
2. **Evidence gathering –** if stage 1 has not resolved the dispute, the parties/solicitors would attempt to resolve the matter and to strictly adhere to the timetable and directions set out in the relevant Dispute Management Process.
3. **Negotiation/settlement –** essentially a stocktaking stage, where most of the evidence has been gathered and the parties will be required to try to settle the claim via mediation or another dispute resolution process, which could be conciliation, arbitration or the parties arranging a settlement conference.
4. **Trial -** where the issue could not be resolved at the settlement stage, the parties would produce joint evidence packs (setting out the efforts made to settle the dispute and the evidence they wish the court to consider), and apply to the court for a final hearing.

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[19] A number of reforms proposed by Sir Henry Brooke's 2008 review of courts are proposed: increasing the financial limit on the equity jurisdiction of the county courts from £30,000 to £350,000, increasing the financial limit below which claims may not be commenced in the High Court from £25,000 to £100,000, extending the power to grant freezing orders to county courts, abolishing the need for the Lord Chancellor's agreement to High Court judges sitting in county courts, providing for a single county court for England & Wales.

[20] paras 149 and 152. The increased use is envisaged of paper-based and telephone determinations, as provided for under the European Small Claims Procedure: paras 158-162.

[21] para 87.