Litigation Trends

Fees a crowd

When justice & politics collide

Published by New Law Journal in partnership with LSLA

New Law Journal LSLA

Fees a crowd!

It's over two years since the Jackson Reforms revolutionised the civil justice system with the biggest shake up of the litigation process in a generation. Jackson's remit was simple: to enable justice to be secured at a proportionate cost and few would disagree that his final report outlined a system that could, if interpreted sensibly, deliver this. So, what went wrong? In the latest of our exclusive series of online surveys conducted with the support of London Solicitors Litigation Association, the hostility towards the current state of civil litigation is palpable. The main driver is, of course, the unwelcome and ongoing hikes in court fees , which have increased court fees by over 600% in some cases. This is a governmental slap in the face for Sir Rupert Jackson and the entire philosophy underpinning the reforms. A whopping 90% of respondents to our survey feel the fee hikes will affect a client's decision to commence proceedings. If you factor in the finding that an almost identical amount of respondents (91%) believe that costs budgeting has increased the overall cost of disputes then it is clear that the profession is angry at how civil litigation 2.0 is currently playing out. Here, we examine how the competing forces of justice and politics are jostling for position in what has become a decidedly unsatisfactory post-Jackson disputes market.

Author: James Baxter

There are few issues where the legal profession appears to speak as one but the furore surrounding the court fees hike has certainly galvanized a collective and growing rage against the government. Litigants will now be charged an extra fee of 5% of the value of all claims worth more than £10,000, up to a maximum fee of £10,000. Senior judges have spoken out strongly against the increases with Lord Pannick saying that the hikes will do "inevitable and substantial damage to access to justice". There can be no doubting that, in times of austerity, the Ministry of Justice (MoJ) is under pressure to revisit the way court fees are charged, but this has to be balanced against the cost to justice and the attractiveness of the English legal system to both domestic and international litigants?

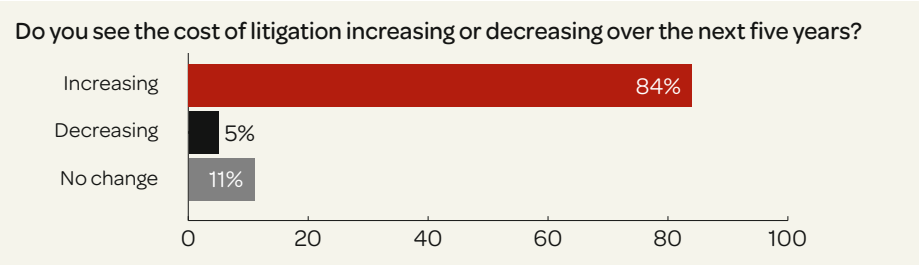
David Greene, partner, Edwin Coe, says: "The new fees reinforce the old adage of 'justice being open to all like the doors of the Ritz'. The Ritz is probably cheaper now than the Central London County Court but at least the Ritz does not run a monopoly; perhaps we should alter the old adage: 'The doors of the Ritz are open to all like the doors of the County Court.'"

Many lawyers fear that international rivals such as Singapore, New York or Dubai—with relatively attractive court fee tariffs—may scoop up disputes that would previously have headed here, thus losing the government money in the long run. And the irony that the increases pose the biggest problem for the very type of SMEs that the government says it wants to see flourish has not been lost on litigators.

Seamus Smyth, partner at Carter Lemon Camerons, comments: "I had two clients teed up to sue. One went ahead before D-day to save the difference between a £1,500 issue fee on Friday and a £10,000 issue fee on Monday but the other said that the new fee was so high that the client could not afford to proceed. I suspect many individuals and SMEs who are suing for £50,000 to £500,000 will be deterred by the new fees—particularly if the proposed defendant has just caused a £50,000 to £500,000 hole in the claimant's finances and the claimant is at the limit of its overdraft."

He added: "Telling the bank manager that they are advised they will get the £10,000 fee back in a year or so if successful is not going to cause the bank manager to open his coffers to an already-stretched SME."

Indeed, the increase in court fees come at the end of a package of Jackson reforms all of which have, according to respondents, increased the overall costs of litigation and not yet provided the intended benefits.The reforms have also brought forward the point at which many of the costs have to be incurred which has front loaded the process still further.



The new increased civil court fees thus provide an additional financial headache at the outset of any case. According to respondents, many clients are deciding that they cannot afford to pursue the case due to increased court fees being another front loaded cost to add to all the others.

Francesca Kaye, partner at Russell Cooke, says: "Many clients already cannot afford the cost and risk of proceedings and prefer to look at options short of issuing proceedings.

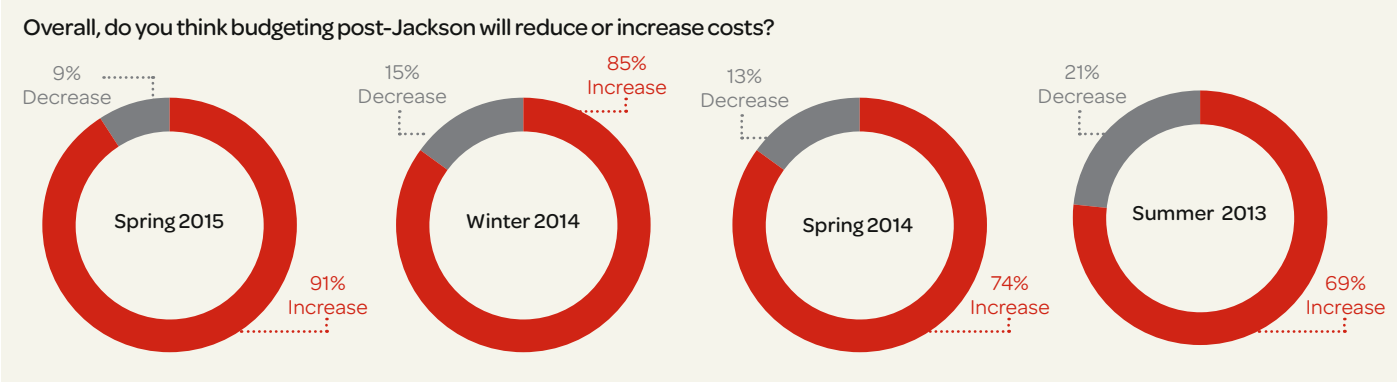
"However, often the realistic threat of proceedings and the associated costs forms part of the process of achieving a negotiated outcome and that threat is becoming less realistic. That leaves clients with nowhere to go as potential claimants and the balance swings towards the defendants who are more likely to resist negotiated settlements if they do not believe the claimant can afford to commit to the costs of proceedings, including the very significant increased court fees."

While the increase in court fees may drive down the number of unmeritorious claims which are pursued through the courts it will also have the likely effect of reducing the overall number of claims. If the intention is to ensure that the courts are self-funding then increasing the court fees to a level where the number of claims issued drops is unlikely to have the desired outcome, according to senior litigators.

Ted Greeno, partner at Quinn Emanuel Urquhart & Sullivan, comments: "Clients will think twice about litigating lower value cases, particularly where the defendant is likely to use the dispute as a cash flow tool to defer payment. The issue fee has to be paid up front and, if the defendant becomes insolvent before judgment is paid, that sum will be lost as well. No one wants to throw good money after bad and 5% of the claim is significant."

He adds: "For the larger cases, the risk is that international clients who have a choice of where to agree to litigate and will be reluctant to do so in the one jurisdiction in the world which imposes a tax on commercial litigation. They may choose to go elsewhere and, in the long term, this could well cost the Exchequer more than is raised by enhanced court fees. The prevailing view of the profession that enhanced fees would damage London's competitiveness was dismissed."

Unfortunately for the profession and potential litigants, the situation is likely to get worse, not better, with a further consultation on fee enhancement announced in July. The government reduced its projected income from the



fee increases to take account of the likely drop in litigation as a result. It is now also proposing hikes in fees in interim applications to the court and for possession claims.

As Neil Dooley, partner at Steptoe & Johnson, sums up: "It is clear that this is not the last hike in court fees…as a result, we will see more litigants in person and in my experience, this can often add to the costs because cases take significantly longer as judges need to give more latitude, meaning delays in the process."

Budget break

But if the government's desire to effectively tax court users and make a profit from the disputes process is the latest example of the spirit of Jackson not translating into reality, the thorny issue of costs budgeting remains an acute cause for concern among litigators more than two years since the new rules were introduced. Since 1 April 2013 parties must exchange costs budgets on the new Precedent H form with the Jackson ethos being to control costs before they are incurred and give more certainty to both sides as the dispute proceeds.

However, with 91% of respondents thinking the new regime has actually increased costs, something has clearly gone badly wrong.

According to Seamus Smyth, Form H has an inevitable distorting effect for claimants. He says: "In order not to be penalised for underestimating in any compartment (in the absence of set-offs between compartments), claimants are likely to pitch their budget at the generous end in each compartment. The cumulative effect of all those generously-pitched estimates is likely to make the overall total higher than anyone would have estimated for the total cost if asked to budget an overall total only."

Smyth believes that a budget with around six or seven total fee compartments—such as Letter Before Action, pleadings, documents, fact witnesses, experts, trial and contingencies—would be more manageable, particularly if the excess on one compartment could be set off against your saving in another.

He sums up: "Most of us do this general budgeting with clients anyway, without using Form H. Form H is a curse."

At the very least the new rules have introduced a significant degree of uncertainty to the litigation process. The recalibration of the infamous Mitchell costs ruling by the decision in *Denton v TH White Ltd; Decadent Vapours ltd v Bevan; Utilise TDS Ltd v Davies* [2014] EWCA Civ 906 was widely welcomed yet the original budgeting teething problems remain.

Litigators are not convinced by suggestions that, by gathering data from completed cases, a "going rate" can be identified for certain phases or even entire cases. Even those advocating that approach accept that there is still an element of experience and knowledge that has to be added to the mix to provide a more accurate costs budget.

Respondents felt strongly that cost budgeting should be part of the process of case planning and, if done properly, will be case specific even if guidance can be provided by other cases.

According to Francesca Kaye, "simplifying the process so that the key number is the total amount of the costs overall and not the phase by phase amount would assist, as would judicial consistency of approach and training to ensure consistency as much as possible".

But until such time as more clarity is introduced litigators have no choice but to produce clear budgets and try to stick to them. Budgeting has put costs firmly centre stage and lawyers can no longer give out estimates that they feel they have little chance of abiding by.

It is expected that there will be a drive to greater transparency with solicitors being required to disclose copies of their bills to the other side so that all parties—and the court—can see the costs that are being incurred compared with budgets.

And if clients find that lawyers cannot keep to the budget, there is a feeling among litigators that the likelihood of clients changing lawyers more frequently to try to manage their costs will rise.

Neil Dooley comments: "Traditionally, once embroiled in litigation, there is a reluctance to change legal teams, but I suspect this will become more common as pressure over costs increases."

Cost control

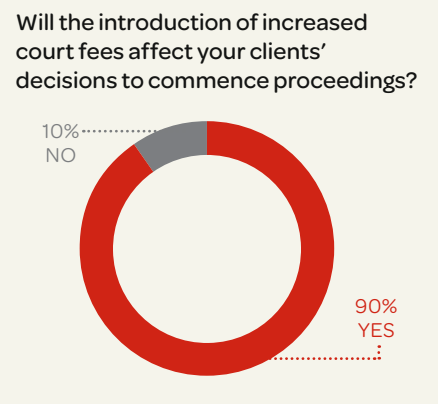
Lord Justice Jackson has already identified that costs budgeting is a problem in clinical negligence cases pointing out the delays that the new regime is causing. He indicated that costs budgeting might need to be disapplied to

Court fee hikes: the backlash

"The new fees hit SMEs hardest: the oligarchs suing for billions will not notice and the massive bulk of small claims are unaffected. The SMEs will effectively subsidise the others."
Seamus Smyth, partner, Carter Lemon Camerons

"These sorts of levels of fee present a barrier to the court for individuals and SME's. The government is exploiting its monopoly to the detriment of individuals and small business. The combination of the Jackson reforms and this huge hike in fees has a real effect on the ability to enforce rights through the courts."
David Greene, NLJ consultant editor & senior partner, Edwin Coe

"While the increase in court fees may assist in reducing the number of unmeritorious claims which are pursued through the courts it will also have the effect of reducing the overall number of claims.This must be counter-productive overall."
Francesca Kaye, partner, Russell Cooke.



some disputes. The "Shorter and Earlier Trial Procedures Initiative" which is expected to be piloted later in the year is likely to disapply cost budgeting or at least provide a truncated version. But with cost budgeting here to stay for the majority of cases litigators are keen for even modest changes to be looked at as a matter of urgency.

According to Francesca Kaye: "The most useful change based on the current approach would be to remove the restriction on moving shortfalls between phases. The emphasis should be on the overall figure for the cost budget and parties should be able to readjust the amounts for each phase within the costs budget provided they do not exceed the overall cost budget figure."

Other litigators advocate a more radical approach with decisions on costs budgeting being taken away from judges and given to specialists who better understand the day to day mechanics of complex commercial litigation.

"The judges themselves freely admit that they do not have enough experience or knowledge to form a view as to what costs are reasonable in such cases and a one day judicial course is not enough," comments Ted Greeno.

Greeno believes that a cheaper solution to limiting costs would be to have a rule that the recoverable costs are capped at the amount incurred by the party who has spent the least.

He says: "There would have to be some checks and balances around that but this would enable a party to get certainty, if that is what it wants, by ensuring that its own costs are controlled."

The new normal

But for all the lobbying for a more sensible interpretation of the reforms, lawyers remain angry that the process of change appears to have been hijacked by the MoJ. Take damages based agreements (DBAs) for example, which have been dogged with uncertainty due to the regulations appearing to preclude partial or "hybrid" DBAs. These allow a client to pay an element of an agreed hourly rate and then pay a contingency payment on success for example, thus sharing the risk with the law firm. Despite the profession standing solidly behind the regulations being reformed to allow this, the MoJ has refused to act, making it clear that it is not a priority when reviewing DBAs earlier this year. Unsurprisingly, only 57% of our respondents say they are agreeing to work on a contingency basis with just one per cent of them doing it via a DBA. At the same time, a universally loathed reform such as the court fee hikes is quickly pushed through with little dialogue with the profession.

Of the few bright spots to emerge recently, litigators highlight the new Part 36 amendment as an intelligent piece of drafting. The new rules, which came into effect in April, exempt Part 36 offers from the normal contractual rules of "offer" and "acceptance". Therefore, even if a party has refused a Part 36 offer from the other side it can be accepted at a future date so long as it has not been withdrawn by the other party. The new rules, which attempt to clarify some conflicting case law interpretations, also amend Part 36 offers made in the course of appeals and clarify counter-claims and time-limited offers. The amendments are considered overall to be very much in the spirit of Jackson with an emphasis on reducing the time and cost of litigation.

After-the-event insurance (ATE) is also highlighted as a potential game-changer for the profession with around half of respondents (48.5%) saying they were able to secure it despite a lack of clarity within the case-law. The ATE underwriting market was given a major boost in May after the Court of Appeal (considering ATE insurance for the first time) in *Greenclean Waste Management v Leahy* overturned a High Court ruling that an insolvent claimant's ATE could substitute security for costs. While the Court of Appeal accepted that an ATE policy can provide security for costs in principle, it added that such cases would be rare and that an ATE policy must not contain terms that entitle an insurer to avoid liability to pay the other side's costs.

While the judgment paves the way for ATE to be rolled out as a genuine method of third party funding, the extent to which it will be deemed a legitimate form of security for costs is less obvious and will hinge on the individual policy wording. The gauntlet has nonetheless been laid down for ATE underwriters to draft some genuinely innovative policies in the area of costs and security. Yet despite these few glimmers of hope on the horizon, a massive 83% of respondents to our survey think the cost of litigation will increase over the next five years. This is a pretty damning indictment on the establishment's unwillingness to recognise that the spirit of Jackson was about achieving the polar opposite.

Political moves

The recent General Election win by the Conservative Party has led to a change of personnel in the MoJ with Michael Gove replacing the heavily criticised Chris Grayling as Justice Minister. Many litigators are hopeful, but not optimistic, that this will lead to a change of direction in terms of the profession's relationship with government.

Graham Huntley, partner at Signature Litigation, says: "There is no doubt that Michael Gove is a talented and able politician. I find it hard to believe that he will not look at some things afresh."

The fact that Gove, like Grayling, is a non-lawyer does not bode well in the eyes of many litigators with many also

Costly budgeting

"The two things that need to change are the format of the process which needs to be simplified and secondly the experience and training of the judges. The former is already underway and the latter will take time, but thankfully in my view much less than a generation."
Graham Huntley, partner, Signature Litigation

"Cost budgeting has increased costs rather than reduced them. It is delaying cases. It is not clear that it is providing the benefits that it was expected to provide for anyone."
Francesca Kaye, partner, Russell Cooke

"As a concept budgeting is a good thing. We should ditch Form H and have a more simplified justified global budget. Form H and the arguments over it are simply racking up costs."
David Greene, NLJ consultant editor & senior partner, Edwin Coe

feeling that even if he is own man, he will doubtless have little power to change anything in the light of the government's relentless austerity drive. Further legal aid cuts are predicted and civil justice, in particular, is not expected to be seen as a priority.

At the beginning of June the government announced £4.5bn of cuts to public finances with the Justice department hit for £249m. To put this into context it is more than the budgetary reductions imposed upon the Home Office; Foreign and Commonwealth office; Energy and Climate Change; Environment, Food and Rural Affairs, and Culture Media and Sport combined.

According to Neil Dooley: "I am sure Michael Gove will continue to look at ways to cut the legal aid budget further, but we seem to be close to a tipping point. Gove does have a reputation for innovation and raising standards and I hope that he understands that the English legal system is admired around the world. Further cuts to legal aid will inevitably cause some parties prejudice with the risk that justice is not always possible, which in turn undermines the integrity of the whole system."

For most respondents, however, the very least Gove must do is to take a leaf out of Sir Rupert Jackson's book and take the time to consult those with a real understanding of the issues.

As Ted Greeno concludes: "Lord Justice Jackson (in contrast to Lord Woolf) consulted widely and reached sensible conclusions which in some respects have been overruled. There is a worrying lack of understanding at the top of the MoJ, of which the court fees hikes are a good example. We all want the same thing, but the law of unintended consequences resulting from poorly thought through policies will prevail unless the Mr Gove listens to the profession. Dismissing all objections as the special pleading of vested interests would be a mistake."

As the findings of our survey and subsequent analysis make clear, the need to establish a clear and focused dialogue between the MoJ and the profession has never been more pressing. **NLJ**

Survey details: 148 LSLA members completed our online survey, which was distributed by e-mail to current LSLA members in Spring 2015.

James Baxter has written about the legal sector and international business markets for over a decade, spending four years as editor of leading monthly magazine Legal Business. In addition to writing for the legal press, James has contributed to a number of national, business and consumer titles including Esquire, The Guardian and Associated Newspapers. He also undertakes corporate writing projects and media consultancy.