

Developments in civil litigation: second Jackson report published

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Authors: [Julian Bailey](#), [Charles Balmain](#), [Kieran Anderson*](#)

Lord Justice Jackson's hotly anticipated report on fixed recoverable costs has just been published and makes a forceful case for fixed costs recovery in lower-value claims in England and Wales.

Fixed Recoverable Costs Review

The proposals

On 31 July 2017, Lord Justice Jackson published his review of fixed recoverable costs ("FRC") in English civil litigation for consideration by the Government. His key recommendations, among others, are:

- A grid of FRC for all fast track cases (claims up to £25,000 that can be tried in one day).
- A new 'intermediate' track, above the fast track, for certain claims up to £100,000 that can be tried in three days or less and with no more than two expert witnesses giving oral evidence on each side. The new intermediate track will have streamlined procedures and a separate grid of FRC.
- A voluntary pilot of a 'capped costs' regime for business and property cases up to £250,000 in the London Mercantile Court, with streamlined procedures and capped recoverable costs up to £80,000 run along similar principles to the Intellectual Property Enterprise Court ("IPEC").

The fast and intermediate tracks

The first two recommendations aim to control costs in advance of being incurred – the "only effective way to control costs", according to Jackson LJ. For both the fast track and the proposed intermediate track, the regime of FRC would restrict parties to recovering only set sums for certain specific aspects of the litigation (the "fixed recoverable cost" or "FRC"). Under the respective grids of FRC put forward by Jackson LJ, FRCs are liable to be increased or decreased according to (i) the stage at which the case finished (either through settlement or full trial); and (ii) the complexity of the case.

Whilst the grids provide certainty as to a party's costs exposure in lower-value claims, the risk presented by the fast and intermediate track FRC regimes is that the costs recoverable do not in fact match the costs actually incurred by the winning party, leaving either the legal representative or litigants themselves to absorb the shortfall. For this reason Jackson LJ's review has faced much criticism, notably from claimant law firms, on the grounds that any regime of FRC could stifle access to justice should lawyers fail to be properly remunerated for their work. This is recognised by Jackson LJ by noting in his report that he has made his recommendations based on reasonable costs and proposals, and that the converse theory has equally negative consequences for access to justice: the risk of costs spiralling out of control is often enough to deter parties from bringing lower-value claims.

The capped costs regime in the Mercantile Court

Perhaps of most interest to corporate entities is the proposed pilot in the Mercantile Court for certain business and property claims up to £250,000. But because the pilot is proposed in the High Court, claims will range in value from £100,000 to £250,000 in practice (£100,000 being the lower limit for High Court claims).

The aim of the pilot is to provide costs certainty for litigants in lower-value business and property disputes. The overarching rationale sought is the same as that applied in the IPEC: commercial entities are prepared to sacrifice a certain amount of their recoverable costs in exchange for a swift outcome with a clear delimitation of their costs exposure should they lose the case.

The pilot is voluntary and so a party to a relevant case would not be obliged to subject itself to the capped costs regime. But, assuming the necessary ministerial approval is given to the pilot, the rate of uptake will inform the future permanency of a “Capped Costs List” in the Business and Property Courts and, according to Jackson LJ, may result in extending the regime to cases valued at up to £500,000.

What about claims over £250,000?

For higher-value claims, civil procedure has been left unchanged. All claims under £10 million must continue to be budgeted in accordance with Part 3 of the Civil Procedure Rules.

In his report, Jackson LJ notes that costs budgeting is recognised by the legal community in general to be operating well save for the problem of uncontrolled incurred costs at the date of the first Costs Case Management Conference when the budget is first judicially reviewed. Jackson LJ advises that consideration should be given to a regime of FRC to govern these initial costs with a pre-action procedure for seeking leave to exceed the FRC grid. The potential for FRC to affect high-value claims therefore remains.

Going virtual: Online Solutions Court and e-filing

Jackson LJ’s latest reforms are likely to dovetail neatly with Briggs LJ’s own recommendations¹ for overhauling the civil justice system in England and Wales. Briggs LJ’s “Online Solutions Court”, once set up, would likely play host to Jackson LJ’s new fast track FRC regime given both are designed to hear cases valued at up to £25,000. This would result in cases being managed and decided online from beginning to end, with FRC for the winner.

In a separate bid to streamline case management in the English courts, the Rolls Building – home to the Commercial Court and the Technology and Construction Court – is now only accepting electronically filed documents. Anything other than communications with judges and documents relating to hearings (i.e. skeleton arguments) must now be filed through “CE File” – the new electronic filing and case management system.

What future for the reformed civil justice system?

While innovations in information technology will do much to improve the efficient management of many types of litigation, Jackson LJ’s FRC reforms stand to have profound effects on the majority of cases in England and Wales, if endorsed by the government. The aim of creating a workable scheme in which recoverable costs are both necessary and proportionate to the work done in incurring them is a laudable, if controversial, one. Whether the proposals will succeed in promoting access to justice will be determined in the coming years.

* Kieran Anderson was one of the Judicial Assistants to Lord Justice Jackson for the preparation of his FRC report.

¹ <https://www.judiciary.gov.uk/publications/civil-courts-structure-review-final-report/>

White & Case LLP
5 Old Broad Street
London EC2N 1DW
United Kingdom

T +44 20 7532 1000

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