



A seminar on Fixed Costs: Threat or Opportunity?

The Leeds Law Society, in association with Clarion Solicitors and Kings Chambers, held a seminar at Clarion's offices in Leeds on 8 June 2016. The seminar focused on the recommendations made by Lord Justice Jackson (LJ Jackson) in relation to the extension of fixed costs, and included a question and answer session with a panel of experts.

Following a brief introduction by Sue Harris, President of the Leeds Law Society and Director at Walker Morris LLP, Andrew McAulay from Clarion Solicitors provided the audience with the background to fixed costs and an overview of the current position. The seminar then moved on to a question and answer session with Andrew McAulay, Nigel Poole QC (Kings Chambers), Ian McCombie (Gordons LLP) and Richard Coulthard (Michael Lewin).

Andrew commented it all started with the Jackson Report back in 2010, where fixed costs were introduced to claims on the fast track and lower level multi track claims. There were also the developments with regards to DBA's etc. The Jackson Report led to massive changes. The idea of an extension of fixed costs fell of the radar until 2013, when it was mentioned by LJ Jackson in a number of lectures. He mentioned that fixed costs were pushed by Lord Woolf but it never happened. Andrew went through the history of fixed costs culminating in the creation of the Civil Justice Council (where the figure of £25,000 was mentioned in meetings a few times) and latterly the 'Jackson Grid'. Andrew remarked that he thought any implementation would not happen for some time, probably not until October 2017.

Question and Answer

Sue Harris, Leeds Law Society and Walker Morris LLP

Q: *What are the advantages to a fixed costs regime?*

Nigel: We need to start by being realistic. The widespread perception is that some parts of civil litigation have become a bit of a racket and there is a determination to cut costs. If it is not this regime, there will be another regime to bring costs down. If we take it all in, fixed costs look more attractive; costs are going to come down; cost budgeting has been unsatisfactory and not put in place in the same way across the country. A fixed costs regime gives certainty. It means that parties and legal professionals can plan and work out the risk more accurately. It also allows for speedier payment. For cases with private paying parties, it is helpful and gives clarity, and may give rise to increased contested litigation because people know more of the risks. I also have in mind the uplift envisaged for London cases, but we could compete on costs favourably because all costs will be the same across the country outside London. I draw attention to the three points raised by LJ Jackson that the 'Jackson Grid' is just a prompt to start the debate, the actual threshold for fixed costs has not been decided, and we are only at stage 1 of the process. I am concerned about the future of the junior bar as do not see how the regime will fit in with this. My second concern is that the department of health have been running with it and do not think they

are the appropriate body. I am also concerned about inequality of arms; that parties can still spend what they like if they have the funds to do so. But there are advantages to the regime as outlined.

Richard: I refer to the judgment in *Broadhurst v Tan*. These similar principles could be applied more generally. Certain clients struggle with ATE insurance and it may be that the ability to obtain this becomes easier. As already noted, a fixed costs regime would allow parties to plan more. From a business perspective, in terms of budgeting, it would be a lot easier. Regarding the London point, there is a question mark over what needs to be done in London.

Ian: The idea is to reduce the amount of work and budget drawn from the government. It is simply to reduce litigation and the amount of government expenditure. It is now crucial that at the outset of a matter, as it is inevitable and applies to enough of a range of cases, that solicitors need to think if they can afford to run the case at all. The well funded litigator will not be affected by the regime. The low funded litigator is affected. However a positive is that parties' exposure is much more defined.

Andrew: The positives to the regime are certainty, freeing up court time, no costs budgeting or assessment, insurance premiums could go down, and proportionality. The negatives are that LASPO is still not embedded and so it is the wrong time to bring in fixed costs, we need to give time for cost budgeting to work, and the risk of a more one sided system (defendants will fight harder so might not actually free up court time as envisaged).

Ian: The judiciary have struggled with the costs argument. Costs budgeting tried to give clarity. The 'Jackson Grid' is a starting point. At the first meeting with the client, need to properly assess the opponent and what they can spend over and above recoverability. We can combat inequality of arms by exploiting the part 36 regime to its full extent, having a proper relationship with the client and educating them in relation to insurance – can even write yourself in as preferred lawyer in insurance policy. This inequality drives alternatives to litigation and poses the question whether it is a fight that should be taken on; if a client says they do not care about costs then get it in writing. We are required to be cleverer in our decision making.

John Mackle, Clarion Solicitors

Q: Do you see the rules changing for fixed costs and part 36 to address their stark differences?

Richard: The courts want people to use part 36; and they'll want the penalties of part 36 to penalise the parties.

Andrew: Essentially part 36 will trump fixed costs.

Nigel: Or could come up with an entirely new set of sanctions.

Richard Cramer, FrontRow Legal

Q: Do you think we are likely to see an increase in professional indemnity insurance?

Andrew: I do think it will result in a spike.

Ian: I think law firms can dictate their premiums based on the success of the firm.

Richard: It is important to assess every case at the outset and place a greater focus on the right level of fee earner doing the right level of work.

Ian: If clients had before the event insurance, wouldn't have to worry. Should be an industry standard. I see a development in before the event insurance.

Nigel: I refer to the case of *Procter v Raleys Solicitors*.

Ian: With regards to the unbundling of services, it comes down to how well the retainer is defined. It should not be a cause of professional negligence.

Matthew Rose, Clarion Solicitors

Q: *What are the proposals for non-monetary relief? It is necessary to attach a value to it with the fixed costs regime?*

Ian: This could be one of the exceptions. As an exception it will be determined by reasonableness, proportionality etc.

Richard: As historically seen, we will end up with a load of satellite litigation on this and related issues.

Catherine Woodward, Gordons Solicitors

Q: *Would a similar regime be introduced for barristers as well?*

Nigel: I don't know. The fees exclude expert reports. The legal fees in the grid include counsel fees. It is troubling for counsel. If free rein was given then this would defeat the object of fixed costs. If the bar came to a separate arrangement then this would be fixed. The figures are not final. This is one argument to be raised and need to show a willingness to consult but we need to positively lobby. Our principle arguments are to defend the profession; clients prefer fixed costs.

Dominic Clark, Shulmans

Q: *How do we combat litigants in person which require us to do twice the amount of work dealing with them as they don't know what they are doing?*

Ian: Need to push the burden onto the case management judge.

Richard: It remains to be seen. It could be regarded as "exceptional work" and outside of the regime.

Andrew: It is rough justice and can take it on the chin. Either charge for the shortfall or just do it for the fixed fee.

Ian: it is frightening because it raises the question as to the quality of work.

Sue Harris, Leeds Law Society and Walker Morris LLP

Q: *We have been promised a consultation. What is the best approach as Leeds legal community?*

Andrew: I would definitely recommend the surveys again. Leeds has a voice and it would be useful if a committee is formed and to get people's views together. We need people to respond. What about the national Law Society?

Sue: I am sure they will respond but want us to respond locally too.