

# Review

## Construction, Engineering and Projects



### A fundamental look at the costs of litigation

With mounting concerns about the costs of civil justice over the last decade, the Master of the Rolls has appointed Lord Justice Jackson to lead a fundamental review into the costs of civil litigation. Lord Justice Jackson has published his preliminary report and the review is now in its consultation phase.

The costs of civil litigation are being closely examined and with recent high profile cases such as the *Multiplex v Cleveland Bridge* case, Technology and Construction Court (TCC) cases are not exempt from scrutiny. It is not all doom and gloom, however, and the preliminary report indicates that in recently completed TCC cases, the percentage of costs recovered by the winning party is generally quite high, often in the region of 75% or more and secondly, in the majority of cases concluded, the costs incurred appear to be proportionate to the sums at stake.

In this note, we focus on the fundamental issue of funding litigation, though the review also addresses in detail matters arising from the conduct of litigation.

Here is a round up of the key issues:

- **Pre-action Protocol**

Concern has been expressed about the front-loading of costs which the Protocol generates that may amount, in the extreme, to hundreds of thousands of pounds or more. One proposal is that the Pre-Action process should start after the issue of the Claim Form. In other words, the Claim Form would be issued and then the action would be stayed for as long as necessary for carrying out the Protocol process.

In principle, this seems a sensible idea but whilst it may assist with cost recovery it may also result in the dilution of the key purposes of the Protocol, with increased tactical use of the Protocol and therefore increased overall costs. The Protocol is an important Pre-Action mechanism that, used properly, can result in the avoidance of formal proceedings, particularly for small and medium value claims. For high value and complex disputes, the Protocol can result in duplication and unnecessary costs.

- **Conditional Fee Agreements (CFAs), Success fees and After the Event Insurance (ATE) premiums**

Lord Justice Jackson questions whether Success fees and ATE premiums should be recoverable in TCC litigation with commercial organisations on both sides.

One view is that CFAs may be appropriate in a minority of cases, for example, where a group of householders are claiming against a housing development. However, in these difficult times, we are seeing more and more clients that wish to progress claims through CFAs. We are generally of the view that risk sharing with our clients is a positive step. Risk sharing has increased substantially in the industry in the last fifteen years and there is no reason why the legal profession should not also share risk. Would the disproportionate costs incurred in *Multiplex v Cleveland Bridge* have been incurred if the legal team were sharing in the risk? Probably not. Accordingly, we undertake risk assessments at an early stage to inform clients of all the options and issues involved in a case. Unless some viable alternative is proposed, we consider that clients want and require funding options such as CFAs.

- **Contingency fees**

Lord Justice Jackson questions whether the ban on contingency fees should be lifted.

This is an opportunity to contribute to the consultation and bring about changes in the process to achieve more proportionate costs and increased access to justice.

With the acceptance of CFAs in the TCC, the ethical argument against contingency fees has, to a large degree, fallen away. For medium sized cases (c £1million) even well resourced clients may not regard it as worthwhile to proceed to litigation on any basis other than contingency fees. Similar to CFA arrangements, we consider that the risk sharing approach to litigation is beneficial for all involved and that the legal profession should react to the demands of the industry it serves. We consider that contingency fees should be one of a range of funding options available to clients.

- **Fixed costs**

Is there a case for expanding the existing range of fixed costs currently provided for?

The cost certainty provided by a fixed fee approach to litigation is something most of our clients would favour but this approach currently clashes with the hourly billing approach required by the Courts in cost recovery. We consider that provided there is an agreement between the client and the solicitor as to the value of a stage of formal proceedings, there is no reason why the Courts should not enforce that agreement, if it is reasonable. In providing a service, it is important to recognize the true value of that service and not just the value of an hourly rate multiplied by a number of hours. We consider that commercial clients want certainty and there is a place for fixed fees in certain cases.

We intend to respond to Lord Justice Jackson during the consultation stage on the above issues and the broader costs issues raised by Lord Justice Jackson on the conduct of litigation. If you have any views on the issues raised, please let us know.

To see the preliminary report for yourself visit [http://www.judiciary.gov.uk/about\\_judiciary/cost-review/preliminary-report.htm](http://www.judiciary.gov.uk/about_judiciary/cost-review/preliminary-report.htm)

## FURTHER INFORMATION

For more information relating to this article, please contact:

### MANCHESTER:

#### David Moss

Partner  
T: +44 (0)161 830 5052  
M: +44 (0)7850 703324  
E: david.moss@hammonds.com

#### Paul Giles

Partner  
T: +44 (0)161 830 5007  
M: +44 (0)7876 208560  
E: paul.giles@hammonds.com

### LEEDS:

#### Zakir Mulla

Partner  
T: +44 (0)113 284 7142  
M: +44 (0)7718 601198  
E: zakir.mulla@hammonds.com

#### Richard Anderson

Partner  
T: +44 (0)113 284 7636  
M: +44 (0)7880 505222  
E: richard.anderson@hammonds.com

### LONDON:

#### Mark Fraser

Partner  
T: +44 (0)870 839 1599  
M: +44 (0)7825 171869  
E: mark.fraser@hammonds.com

### BIRMINGHAM:

#### Jonathan Leech

Partner  
T: +44 (0)121 222 3453  
M: +44 (0)7825 171093  
E: jonathan.leech@hammonds.com

## WWW.HAMMONDS.COM

If you do not wish to receive further legal updates or information about our products and services, please write to: Richard Green, Hammonds LLP, Freepost, 2 Park Lane, Leeds, LS3 2YY or email [richard.green@hammonds.com](mailto:richard.green@hammonds.com).

These brief articles and summaries should not be applied to any particular set of facts without seeking legal advice. © Hammonds LLP 2009.

Hammonds LLP is a limited liability partnership registered in England and Wales with registered number OC 335584 and is regulated by the Solicitors Regulation Authority of England and Wales. A list of the members of Hammonds LLP and their professional qualifications is open to inspection at the registered office of Hammonds LLP, 7 Devonshire Square, London EC2M 4YH. Use of the word "Partner" by Hammonds LLP refers to a member of Hammonds LLP or an employee or consultant with equivalent standing and qualification.