Editor's Note

Lord Justice Jackson's *Review of Civil Litigation Costs—Preliminary Report* (2009)

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Early this year the Master of the Rolls asked Lord Justice Jackson to review the rules and principles governing the costs of civil litigation and to make recommendations in order to promote access to justice at proportionate cost. In May Jackson L.J. published his *Preliminary Report of the Review of Civil Litigation Costs*. The report consists of two volumes running to over a thousand pages.

The reasons why the Master of the Rolls charged Jackson L.J. with this task have been only too obvious to anyone who has used the civil court. The costs of litigation are high, disproportionate and above all unpredictable. This has had a number of lamentable consequences, the most serious and damaging of which has been the undermining of access to justice. Prosecuting or defending an action exposes the parties to unlimited financial risk because litigants have to undertake to pay their lawyers by the hour, regardless of outcome and without an upper limit, except where they are represented on a conditional fee agreement (CFA) basis. A litigant who is successful would normally recover his reasonable litigation costs under the indemnity principle, but if he is unsuccessful he may have to pay his opponents' litigation costs as well as his own lawyers' bill. Even relatively affluent persons cannot litigate without risking financial ruin. Litigants represented on a CFA basis risk nothing and have therefore easy access to justice, but as a result of the success fee and the after-the-event (ATE) insurance premiums the overall cost of CFA litigation has very considerably increased. This cost has been passed on to consumers through defendant insurance companies that have to meet the costs. Consumers of insurance and other services have been paying a premium to allow some to litigate without any risk to themselves but with often rich financial benefits to their lawyers.

A further corollary of the high, disproportionate and unpredictable levels of litigation costs has been an explosive growth in litigation over costs. Since litigation costs are very high and can easily outstrip the value of the subject matter in dispute, litigants have powerful incentives to try every possible avenue to shift the burden to someone else. Indeed, the legal profession itself has now become a major player in this form of litigation due to the direct interest that lawyers have in recovering their success fee from defendants. The complexity of the costs rules in England, without parallel in any other country in the world, has generated unparalleled satellite litigation over costs.

Litigation over costs takes a great variety of forms, of which only a few need to be mentioned here. The court has a wide discretion in making costs orders. Where there is discretion it is likely to be invoked in order to gain an advantage in shifting the costs to another party or challenging the amount payable. For example, the controversy may be over what effect the conduct of a party should have on the incidence of costs or their amount, or whether, and to what extent, the requirement of proportionality should be taken into account in calculating recoverable costs. Disputes over the court's exercise of discretion are bound to be hard fought, not infrequently at more than one instance.

Costs estimates have recently generated disputes. Lawyers are now required to give their own clients and the opponent costs estimates. Disputes have arisen about whether such estimates are binding; clients have tried to hold their own lawyers to the estimate that they were given; unsuccessful parties argued that recoverable costs should be limited by the estimate that the successful party had initially filed. Before commencing proceedings a person may apply for a protective costs order so as to obtain a shield from adverse costs consequences should he bring unsuccessful proceedings, or in order to obtain a limit on the amount of an eventual adverse costs order. Such applications are normally made in public interest litigation. A more common form of protection beyond public interest litigation is the costs capping order, which may place a limit on any eventual recoverable costs. Applications for both forms of orders have increased steadily over the years.

England must be alone in the world to provide a costs-only procedure. This procedure is designed to enable parties who have settled their dispute without bringing any legal proceedings, and who have even agreed who should pay the costs of the settlement, to start proceedings so that the court may determine the amount of the payable costs.

Litigation over costs is by no means limited to parties. A party may apply for a costs order against a person who was not a party to the litigation. In the past applications for such orders were few because such orders were made only in situations where the non-party had either funded the litigation costs of an unsuccessful party or where the non-party stood to benefit from the fruits of the litigation. However, as litigation has become more expensive various forms of third-party litigation funding have been developed with the result that costs orders against non-party funders have come to the fore. Mention should also be made here of wasted costs orders which can be made, amongst

others, against legal representatives. Wasted costs applications are normally hard fought and intensive.

Finally, the last decade has witnessed what has come to be known as the costs trench war or the costs wars. These wars were fought over the recoverability of CFA success fees and ATE premiums. The combatants were not the parties to the underlying dispute but claimants' lawyers, on the one side, and defendants' insurance companies on the other. Lawyers representing clients on a CFA basis have a personal interest in the outcome in that they are entitled to recover their success fee from unsuccessful defendants and have therefore a strong financial interest in maximising it size. On their part, defendants' insurers have every reason to resist exaggerated claims. The tension between lawyers' financial interests and insurers' resistance generated a vast volume of litigation over costs. To begin with, CFA's were used mainly in personal injury claims arising from motor accidents or accidents at work. But their use has since spread to other areas, most notably to defamation litigation where titanic battles over costs have taken place.

The multitude of rules governing costs, court discretion in relation to costs, the CFA legislation and the vastness of amounts at stake made costs litigation one of the more thriving and profitable growth industries, seemingly impervious to recession (see Jackson, *Preliminary Report* (''the Report'') (2009), Vol.1, Ch.3, para.5.1). It has generated considerable income for the legal profession even if it has brought no benefit to the general public; if anything it has made access to justice more expensive and more hazardous. This explains why someone, whether the Government or the judiciary, had to make a move to find some way out of this uniquely English mire of litigation over costs. As it happens, it was the Master of the Rolls who took the initiative of launching the Jackson inquiry.

The Jackson Report stands witness to the depth of the malaise and to its intractable nature. It plots with admirable clarity and authority the rules governing costs, the principles that have evolved, the court's practices, and the nature of the interests at stake. It also describes the various ways of funding litigation. Besides self-funding, there is still some limited legal aid, there is before-the-event insurance, after-the-event insurance, third-party funding, and conditional fee agreements. Jackson L.J. analyses these various systems and also considers the possible benefits of contingency fees, of CLAF (Contingency Legal Aid Fund), and of SLAS (Supplementary Legal Aid Scheme).

The canvas of the Jackson Report is too large to permit close commentary in the space of a few pages. All that can be achieved here is to draw attention to some central points that would need to be borne in mind when considering Jackson L.J.'s final report and his recommendation at the end of the year.

It is essential to appreciate from the start that at the root of our troubles is the combined effect of the hourly pay system and the indemnity rule. Outside CFA arrangements, which will be discussed later, lawyers are paid by the hour, regardless of outcome and without an upper limit. Clearly, this system provides a powerful economic incentive to increase input by complicating and protracting the litigation process. Similar incentives are present in other services where providers are paid by the hour, such as accountants or car mechanics. However, there is one big difference in that in any other service consumers are able to resist costs demands by shopping around. This is well nigh impossible

in the context of litigation legal services because of the inherent opaqueness of the operation of the market. Laymen must rely on lawyers to judge how necessary costs are in order to defend their rights and, further, it is largely in the hands of lawyers to render costs necessary. Whether an accountant or a mechanic has done a reasonable job is normally judged by results, in the case of legal services this test is largely absent; the loss of one's case will not necessarily, or even normally, be due to poor representation. As a result, clients are poorly placed to either shop around or resist fee demands.

A still more serious impediment to client control over costs is the English costs-shifting rule. The indemnity rule, whereby the loser in litigation has to pay the winner's costs, adds to the client's difficulties. Given that success secures not only the subject matter in dispute but also the litigation expenses, a litigant who believes that an increase in the amount spent on litigation will increase his chances of success has a very good reason for progressively raising his stakes. Once one party has increased the stakes, the opponent would feel compelled to follow suit for fear that by using inferior procedural devices, be it a less celebrated lawyer or a less qualified expert, he would compromise his chances of success and run a greater risk of having to pay the other party's costs as well as losing the subject matter in dispute. Indeed, a point may come where the parties would have reason to persist with investment in litigation not so much for the sake of a favourable judgment on the merits, as for the sake of recovering the money already expended in the dispute, which may well outstrip the value of the disputed subject.

Once litigation is under way, the indemnity rule acts as a ratcheting-up mechanism which effectively forces the litigant to go on investing in litigation to the bitter end for if he stops he is regarded as the loser and has to pay his opponent's costs. At the same time the parties' legal representatives have no economic incentives to stint on the hours they invest in serving their client's cause because the indemnity rule rewards the inefficient. Even where they are minded to keep down costs, they may be unable to do so since they have to react to the opponent's moves.

Jackson L.J. recognised the seriousness of the situation when he observed (the Report, Vol.2, Ch.46, para.5.2):

> ''We have arguably reached the position in this jurisdiction where the level of costs is so high that facing a full adverse costs order is likely to be a disaster for most ordinary citizens. This is so much so that litigation on behalf of individuals does not tend to happen these days unless a mechanism can be found to protect the claimant (either legal aid cost protection or after-the-event insurance). Even small corporate bodies like NGOs will not litigate on important issues if there is a risk of full costs exposure.''

There are only two tried systems that can protect litigants from open ended costs liability: (i) the US system where, by and large, a no costs-shifting rule is in operation and litigants have to bear their own costs whether they win or lose; and (ii) the German fixed recoverable costs system. Jackson L.J. has drawn attention to the widespread support for the retention of the costs-shifting

principle and has indicated that he is unlikely to advocate a radical departure from it. Though it should be noted that few systems are wholly consistent in operating one or the other principles. For instance, costs-shifting is applied in some types of cases in the United States. By the same token, there are areas of English litigation where no costs-shifting rule is in operation, as in the small claims track and in employment tribunals. The Report does not advocate introducing costs-shifting where it does not exist at present, but nor does it advocate abandoning it where it does operate, though it does canvass some modifications which will be mentioned later.

Considerable consideration is given in the Report to various systems of fixed costs recovery. It draws attention to two different types of fixed costs: (i) fixed costs which are the product of a genuine attempt to estimate the actual (reasonable) costs of the winning party; and (ii) fixed costs which are deliberately set at less than the actual (reasonable) costs of the winning party. This categorisation is helpful in explaining the range of options, though it is somewhat misleading. If we look at the German system, which is the most successful fixed costs system, it is clear that cannot be easily fitted into either category. It provides for recoverable tariffs. The tariffs may offer adequate compensation for the lawyer in some cases but in others it may over or under compensate them. And it certainly does not set out to ensure that recoverable fees are lower than the actual expenses.

The aim of the German system and others like it is to establish tariffs for calculating the amount of recoverable litigation expenses. Clients may spend more than the recoverable fees, but they would know that such extra investment would not be recovered in the event of success. Such systems have the advantage of predictability. This predictability has allowed a thriving litigation-costs insurance market to flourish in Germany. So much so that many household insurance policies include litigation expense cover. This means that a substantial proportion of the German population is able to prosecute or defend claims without digging deep into their pockets, let alone risking financial ruin. Since the tariffs for recoverable fees are not insubstantial, most litigants can obtain legal representation at the standard tariff. In effect, the standard tariff operates as an informal but effective check on litigation expenditure.

Given that a system of fixed recoverable costs is the only way of achieving access to justice at predictable and proportionate cost (other than the abolition of the costs-shifting principle), much attention is devoted to this subject. The Report draws attention to the fact that fixed costs are already in place in a number of contexts. For instance, CPR Pt 45 s.I sets out the amounts of recoverable costs in respect of solicitors' charges in specified categories of case. Generally speaking, these rules apply to: (a) money claims where judgment in default is obtained or summary judgment is given; (b) claims where the court gave a fixed date for the hearing when it issued the claim and judgment is given for the delivery of goods; and (c) uncontested claims for possession of property and similar matters. CPR Pt 45 s.II sets out the costs that are recoverable where: (a) the dispute arises from a road traffic accident; (b) the agreed damages include damages in respect of personal injury, property damage, or both; and (c) the total agreed damages do not exceed £10,000. CPR Pt 45 s.III sets out

the success fee under a CFA or CCFA that will be allowed to a successful claimant in RTA claims which are not covered by the predictable costs regime of s.II and are not within the small claims band.

Of particular interest are fixed fast track trial costs under CPR Pt 46 which may be awarded in respect of the costs of an advocate for preparing for and appearing at the trial of a claim in the fast track (excluding other disbursements or VAT). For claims up to £3,000 recoverable costs are £485, for claims between £3,000 and £10,000 recoverable costs are £1,035, and for claims up to £15,000 the recoverable costs are £1,650. However, the court has discretion under CPR r.46.3 to award higher costs. And, more importantly, there is no limit on the recoverability of pre-trial costs which may of course exceed the above amounts many times over.

Jackson L.J. has indicated that he would support the extension of the fixed costs system to cover the entire costs of litigation in the fast track, the limit of which now stands at £25,000 (see the Report, Vol.1, Ch.22). He and his committee have produced a matrix according to which recoverable fast track costs will depend on the stage of the proceedings at which the case was concluded and the value of the case. Although, as we shall see presently, issue may be taken with the system adopted for arriving at the amounts to be allowed under this system, the proposal to extend the fixed costs system to include the entire costs of fast-track litigation is welcome. It recognises that at least in claims up to the fast track limit litigants should be able to litigate without fear of being liable to unlimited and therefore unpredictable amounts of costs in the event that they are unsuccessful in litigation. It heralds a more enlightened and just approach to access to justice.

There are a number of concerns, however, about the approach adopted to the proposed introduction of a fast track fixed costs system. First, Jackson L.J. and his committee seem interested in setting the amounts recoverable at a level that reflects the present actual costs in fast-track litigation. This is unfortunate since the present costs are a product of a system which offers powerful economic incentives to exaggerate hourly input. The second reservation concerns the idea that the fixed costs should not apply to disbursements because of the fear that it might not be possible to find an expert who would work within the fee structure. The Report even shows some sympathy to claimant practitioners who argued that access to justice would be compromised because the fixed fees may in some cases be insufficient. Lastly, the Report states (Vol.1, Ch.22, para.2.19):

> ''*Exceptional cases*. Whatever system is introduced, there will need to be provision for exceptional cases in order to ensure that litigants are not deterred by the limits on recoverable costs from bringing meritorious claims. Although the fast track trial costs do not have such a provision (fast track trials are by definition limited to one day), there is an 'escape clause' in the fixed recoverable costs rules, to be found at CPR rule 45.12.''

The trouble with any escape clause is that that it encourages practitioners to take advantage of it. Jackson L.J. expresses confidence that this will not happen, observing that in this respect, ''CPR rule 45.12 has been successful: there is no record of any application for 'escape' being pursued to a hearing''

(the Report, Vol.1, Ch.22, para.2.20). This confidence may be misplaced. Practitioners have not had to have resort to the CPR r.45.12 escape from fixed costs because pre-trial costs are open ended so that profits can be generated at that stage, thus bypassing the cap on trial costs.

The real problem lies in the position that Jackson L.J. seems to have adopted, that fixed costs must be the product of a genuine attempt to estimate the actual (reasonable) costs of the winning party. As already observed, any such estimation will inevitably be made by reference to current practice and current levels of costs, which have been the product of a system that allows unpredictable and disproportionate costs to be incurred. Consequently, a fixed costs system which is founded on the present costs level and which, in addition, permits the level to be exceeded in "exceptional" circumstances, will be in the end self-defeating. For a system of fixed costs to succeed, it must be robust, free standing and cap the expenses at a level which is proportionate to the amount in dispute and possibly to its importance, leaving litigants free to spend disproportionate costs at their own expense, if they so wish.

This brings us to the Report's discussion of costs in the multi-track. Jackson L.J. says that the multi-track is not amenable to type-1 fixed costs, i.e. to costs that represent the actual (reasonable) costs to the winning party. At the same time he makes it clear that there is no intention to introduce a type-2 fixed-costs system in the multi-track. What are therefore the proposals for making costs predictable and proportionate in multi-track cases, which are after all the cases that generate the highest, often spectacular, costs?

Two proposals canvassed here deserve attention. A most interesting proposal is to introduce a one-way costs shifting rule in personal injuries claims. The system would work as follows: if the claimant wins, he would recover his costs as at present, but if he loses he would not have to pay the defendant's costs. The advantage of the system is that it leaves successful claimants with full compensation without the need to take out ATE insurance. Jackson L.J. reports that the overall cost to defendant insurance companies will be lower than at present because what they would lose in foregoing costs would be more than made up for by not having to pay the ATE premiums to successful claimants.

This may be true, but the disadvantage is that claimants' lawyers will continue to benefit from the present economic incentives that reward input, reward inefficiency and are anti-competitive. True, this will not affect claimants' access to justice. But it will keep the litigation costs of insurance companies high and these costs will be passed on to policy holders. Policy holders, whether rich or poor, will therefore continue to subsidise an inefficient system which rewards lawyers for the hours that they spend and therefore generate profits for those who find way of increasing input rather for those that increase efficiency. Having said that, Jackson L.J. has expressed strong interest in proposals to be worked out by the Ministry of Justice, whereby personal injury claims of up to £25,000 would be subject to a new claims process which will be more cost effective. It remains to be seen however what scheme emerges and whether it succeeds in counteracting the incentives of hourly pay.

For other types of multi-track litigation the Report proposes a scheme of costs management (the Report, Vol.2, Ch.48). The Report explains (Vol.2, Ch.48, para.1.6):

> ''Costs management is concerned with ensuring that the incidence of costs is actively controlled by the court as the case moves from inception to its conclusion. Successful costs management might however, also have a part to play in avoiding detailed assessment hearings in all but the most exceptional cases. Specific approval or sanction of the incidence of costs at stated or approved levels throughout the life of the case ought to have the effect of removing or reducing the need for an ex post facto examination of whether the costs incurred should have been incurred or were reasonably incurred.''

The Report draws attention to the court's power of costs management already present in the CPR. CPR PD 6 confers a power to manage costs by reference to the exchange of estimates of costs. CPR PD 6.3 anticipates the court receiving costs estimates at different stages and assumes that the court will have regard to the estimate when making case management decisions. However, the PD does not expressly empower the court to limit the recoverable costs to the estimates provided or to set boundaries within which levels of costs may be incurred. Under CPR PD 6.5A the court is entitled, ex post facto, to require an explanation for a departure of 20 per cent or more from an earlier estimate. Where no such explanation is given or the paying party demonstrates that he reasonably relied on the estimate, then the court may regard the difference between the costs claimed and the costs shown in the estimate as evidence that the costs are unreasonable or disproportionate.

Jackson L.J. refers to the advice given by the senior costs judge to the Woolf enquiry that,

> ''the most effective and simple method of keeping costs under control is to keep the client informed at all times as to what is proposed in his name''.

This view has since been shown to be unfounded. For, after all, what can a litigant do about such estimates? As has been explained above, once litigation is under way litigants are caught in a vice that ratchets up costs relentlessly. They can escape from the jaws of the vice only by discontinuance which involves paying the opponent's costs to date. Moreover, a series of Court of Appeal decisions have stripped costs estimates of much practical significance. Clearly, the present costs management jurisdiction has done little to render costs predictable or proportionate.

Seeing that the present system of costs management has failed the Report canvasses a new approach: *costs budgeting* (the Report, Vol.2, Ch.48, para.3.5):

> ''What is costs budgeting? Costs budgeting is not a term found in the CPR. It is a term that has been derived from consultation papers and reviews that have taken place over the past decade. The essence of costs budgeting is that the costs of litigation are planned in advance; the litigation is then

> managed and conducted in such a way as to keep the costs within the budget. Professor Zuckerman has written extensively about the benefits of controlling costs before they are incurred, rather than simply assessing them afterwards.''

To be worthwhile a system of budgeting would have to remedy the two basic ills of our system: unpredictable and disproportionate costs. It would therefore have to accomplish two objectives: to render recoverable costs predictable in advance of, or early in, the proceedings, and remove, or counter act, the incentives that the hourly-pay system presents. A straightforward way of doing it would be for the judge who gives the case management directions to determine there and then the amount of recoverable costs by making a rough estimation of what would be a reasonable and proportionate investment in view of the importance, value and complexity of the case.

The Report does not go down this route but instead puts forward two budgeting systems for consideration (Vol.2, Ch.48, paras 3.15 et seq). The first is an *estimate-based budgeting system*. It would require the parties to file detailed costs estimates or budgets at regular intervals during the proceedings. It is suggested that estimates would be provided at the following intervals: (i) at the outset with the claim form; (ii) at the first and all subsequent case management conference hearings; (iii) at all interim hearings; (iv) at trial. In some cases it may be appropriate for costs estimates/budgets to be filed and served at fixed intervals (e.g. every six months) throughout the life of a case from inception to the final hearing.

It is proposed that on the basis of these estimates the court would make a costs management order. This order could include the following: (i) approving the parties' budgets (budgets would be rolling budgets added to as the case progressed but for which approval was obtained prospectively); (ii) requiring the budget to be certified by a statement of truth or belief by the legal representative in order to reinforce a message of the significance attached to the budget and it will avoid opportunities for the abuse of costs management orders; (iii) a direction that if costs incurred exceed the budget by 20 per cent or more, notice to that effect shall be given to the other party; (iv) directions limiting future recoverable costs when the (restrictive) criteria for cost capping are satisfied. The report adds that when issues arise as to the extent of disclosure, amendments of pleadings and the like, it may be helpful if detailed costs breakdowns are available. The rules might provide for example, that in determining such issues, the court should have specific regard to the costs consequences and proportionality.

This estimate-based budgeting system does not meet the objective of rendering costs predictable for several reasons. Under the proposal predictability would be achieved only for a stage at a time so that at the beginning of litigation parties would still be in the dark about their full eventual exposure. Furthermore, budgets would not be binding, with the result that the successful party would be entitled to claim more than the budgeted costs if he can persuade the court that they were necessary.

More serious still is the failure of this system to address the root problem of the perverse economic incentives created by an hourly fee system. This is because budgets would be based on the lawyers' own estimates of the number of hours that they deem to be necessary for each stage of the process. The more one party's legal team estimate their hourly input, the more reason would the opponent's team have to match that estimate or even exceed it. Clearly, lawyers would have no financial incentives to challenge each other's estimates.

Furthermore, this system of budgeting is labour intensive. It effectively involves an ex ante detailed assessment exercise. Each party's lawyer would have to produce in effect a bill of costs with detailed items justifying the billable hours anticipated at different levels of legal expertise or seniority. Indeed, without fairly detailed estimates it would be difficult to justify claims substantially exceeding the estimates at the end of the proceedings, or even at the end of the stage of the proceeding in which the estimates have been given. Much has been said about the front-loading necessitated by pre-action protocols. A costs management system that effectively required ex ante detailed assessment at every stage would involve far greater front-loading.

Worse still, requiring the court to manage costs is as likely as not to increase forensic activity about costs and litigation over costs. Unlike pre-action protocols, ex ante provisional costs assessments may give rise to disputes and satellite litigation. Expenditure of time on semi-binding costs estimates, on justifying costs levels at every juncture and on trying to justify exceeding the estimate or cap, could become a source of practitioner income just as pre-action protocols have become; one more excuse for front-loading. And it should not be forgotten that these matters, like case management directions, will not be left entirely to district judges, masters and trial judges, the appeal courts will want to have their say too. No matter how well intentioned and trained the judiciary may be, it will not be able to withstand the force of the combined economic incentives created by the hourly fee and the indemnity principle. The pressure will always be there to push up costs through forever trying to justify the highest possible input and thereby the largest possible number of billable hours. Under such a scheme costs front-loading would soon eclipse pre-action protocol front loading.

Conscious of these potential pitfalls, Jackson L.J. has canvassed a different costs management model, to which we may refer as a *capped budgeting system* (the Report, Vol.2, Ch.48):

> "3.21 *Taking costs management one stage further.* It would be possible to develop the proposals discussed above by making it the norm for the court to cap the costs of each stage of the litigation process. So when giving directions for disclosure, service of witness statements, service of expert reports etc., the court would attach a price tag to each activity. These price tags could either be agreed by the parties or fixed by the court after argument. The maximum recoverable cost of each stage of the litigation would be that specified by the court in advance. If this course were adopted, there would need to be radical revision of the present cost

capping rules. This course would have one obvious disadvantage and two obvious advantages.''

The disadvantage of this model, Jackson L.J. points out, would be that the winning party may not obtain a full recovery of its costs. The ''full cost shifting'' rule which is currently part of our legal culture, he explains, would be modified by successive judicial interventions during the course of the litigation. But he also draws attention to two important advantages: (i) each party would have certainty about the extent of its costs liability in the event of losing the action; (ii) the parties and their lawyers would have an incentive to keep costs down at each stage of the action.

Jackson L.J. accepts that the second of these two points is critical. For only by means of some form of costs capping would we free parties from the ratcheting mechanism, produced by the hourly fee system and the full indemnity rule. Once costs have been capped, the client would know exactly his exposure in the event that he is unsuccessful and would be better placed to tell his own lawyer that he is only prepared to pay what the court has determined to be an appropriate cost for a particular step or stage in the proceedings.

Although the capped budgeting system is the only system which would be effective to render costs predictable and proportionate, Jackson L.J. is unsure whether, ''the more Draconian form of costs management would be welcomed by court users'' (the Report, Vol.2, Ch.48, para.3.24). If by court users one means lawyers, it is quite clear that the legal profession would vigorously resist such a system. Indeed, as Jackson L.J. points out, the idea of a capped budgeting system was canvassed during the Woolf Inquiry but was dropped because of the hostility to it by the legal profession. At paras 16 and 17 of his *Final Report on Access to Justice* (July 1996), Lord Woolf explained said:

> ''16. In order to explore the issue of costs further, the Inquiry published an issues paper by Adrian Zuckerman, which discussed a number of mechanisms for controlling costs in advance, such as budget-setting, fixed fees related to value, fixed fees related to procedural activity or a mixture of the two.
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> 17. The paper occasioned a general outcry from the legal profession. Prospective budget-setting was seen as unworkable, unfair and likely to be abused by the creation of inflated budgets. The ability of judges to be involved in the hard detail of matters such as cost was generally doubted. The imposition of fixed fees, even relating only to inter partes costs, was seen as unrealistic and as interference with parties' rights to decide how to instruct their own lawyers. There was widespread concern that these suggestions heralded an attempt to control solicitor and own client costs. The restrictions were generally seen as 'artificial and unworkable'.''

It is plain that these objections had little to do with the interests of clients or with access to justice. They were a reaction to a perceived threat to vested interests that the profession has in an uncapped costs system which allow

considerable scope for maximising billable hours. We can only hope that the experience with uncapped costs since Lord Woolf wrote his report will make Jackson L.J. less amenable to the legal profession's special plea.

Finally, a comment needs to be made about CFAs. Jackson L.J. considered the possibility of abolishing CFAs but rejected the idea (the Report, Vol.1, Ch.16, para.5.4):

> "My own provisional view is that, following the retraction of legal aid, either CFAs or some other system of payment by results (contingent fee agreements, CLAF, SLAS, third party funding agreements etc.) must exist in order to facilitate access to justice. The underlying principle of payment by results has been absorbed into our litigation culture over the 14 year period since 1995. . . . The real issue, therefore, is how CFAs or alternative 'no win—no fee' arrangements should be structured, not whether they should exist. We should be aiming so far as possible for structures which provide incentives:(i) for lawyers to get the best possible results for their clients, whilst discharging their duties to the court and to other parties; (ii) for clients to propose or accept reasonable settlements; and (iii) for all parties to keep costs down to proportionate levels."

It is certainly right to maintain a system of payment by result. This feature of CFAs in quite unobjectionable. What is objectionable is that the CFA success fee and the ATE premium should be recoverable from unsuccessful defendants. We need not go here into a great deal of detail about the effects of the CFA system (see the Report, Vol.2, Ch.47, paras 3.9, 4.1), save to say that this system allows the claimant to agree with his lawyer an hourly fee, a success fee and an ATE premium which the claimant will never pay but which they will expect to recover from the defendant. Jackson L.J. noted that,

> "in other jurisdictions where conditional fee agreements or contingency fee agreements are allowed, [but] the additional costs of such arrangements are not transferred to other parties. . . . the approach adopted in England and Wales is the source of some surprise overseas". (Report, Vol.2, Ch.47, para.4.3.)

He therefore addresses the question of what arrangements should be put in place if success fees and ATE premiums cease to be recoverable.

In relation to personal injury litigation, he canvasses the following measures:

- introducing one-way cost shifting;
- capping the proportion of damages which the claimant's lawyers might take in respect of success fees;
- providing that no element of damages referable to future care costs could be subject to any deduction;
- raising the level of damages;
- introducing a CLAF or a SLAS for personal injury claims.

Jackson L.J. is of the view that outside personal injury litigation similar measures might need to be considered to promote access to justice, if ATE premiums and success fees become irrecoverable. He noted that CFAs are seldom used

in commercial or mercantile litigation and that therefore no special measures would be necessary in the event that success fees and ATE premiums become irrecoverable.

The adoption of any of these proposals, or a combination of them, would be preferable to the present system since the recoverability of hourly fees plus a success fee of up to 100 per cent of the hourly fees, plus ATE premiums, creates perverse economic incentives and unacceptable distortions which no other country in the world has ever been foolish enough to introduce, let alone tolerate.

The Jackson *Interim Report* represents a huge achievement in terms of explaining the immensely complicated and convoluted English costs system, in terms of assembling all the relevant data, in terms of informing the reader of the variety of methods of funding litigation in other jurisdictions worldwide and, above all, in its rigour and depth of analysis. This Report has no precedent when it comes to a bold and imaginative discussion of possible solutions and of their advantages and disadvantages. As such it is already a monumental achievement.

However, what we presently have is an interim report only. Jackson L.J. is due to publish his final report at the end of the year. Whether litigation costs can be made predictable and proportionate will depend on what is ultimately proposed. It seems, however, clear that to succeed any new arrangements would have to break the vicious ratcheting mechanism now blighting civil litigation. Such arrangements would need to separate the two limbs of this mechanism; to drive a wedge between uncapped hourly fees and the indemnity rule. There is nothing wrong with hourly fees, provided that they are not recoverable. There is nothing wrong with the rule that the successful party recovers his litigation costs from the unsuccessful party, provided that these costs are not calculated on an uncapped hourly fee basis. There is much wrong, however, with these two principles when they run in tandem. Only when these two features of the English costs system are put asunder will litigants have a decent access to justice in the English court.