JACKSON REFORMS

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REFERRAL FEES

LASPO 2012

Sections 56 to 60 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO).

The ban does not create an offence or a claim for breach of statutory duty when a referral fee is paid.

LASPO 2012

Also the payment of a referral fee does not affect the validity or enforceability of the retainer with the client.

But the referral fee contract is unenforceable.

LASPO 2012

The ban covers the payment (or receipt) of a fee for a case to be referred to “a regulated person” (which includes a lawyer).

It also covers the receipt of a payment for referring a client in the course of a case.

A referral occurs where we receive, other than from the potential client, information that we need to make an offer to the client.

LASPO 2012

This definition is widely drawn in an effort to limit our ability to get round the ban.

Payment includes any benefit received by anybody (whether or not the person providing the information) but it excludes reasonable hospitality.

LASPO 2012

Significantly the Lord Chancellor can specify a maximum amount that can be paid for a specified service.

If a service is obtained at higher than the fixed figure then that is prima facie evidence that it includes a referral fee.

LASPO 2012

Although LASPO creates the ban it leaves the enforcement to the relevant regulatory bodies (such as the SRA).

One issue is whether the different regulators will operate similar rules or will some organisations have an advantage because of the way that they are regulated.

SRA Enforcement

Where it seems that to the regulator that a referral fee has been paid they have to investigate.

The regulator can have a rule that it is for the regulated person to show that the payment is for a service rather than for a referral.

SRA Enforcement

Ultimately, in an outcomes-focused regulatory landscape, it will be for practitioners themselves to ensure their own compliance.

The SRA expect firms to make their own decisions on whether their arrangements are compliant. LASPO specifically puts the burden of proof on the individual firm.

SRA Enforcement

The SRA does not intend to provide regulated persons with ‘pre-approval of business models.

However, the SRA are intending to give some examples of what is clearly within the ban and what is not.

SRA Enforcement

The only changes to the SRA Handbook are:

Expected Outcomes that referral fees are not paid or accepted.

Indicative Behaviours of having effective systems to deal with these activities;
keeping proper records of relevant payments and receipts
and ensuring that payments for services are no more than market rates.

COSTS CHANGES

CFAs

The success fee will not be recoverable in respect of any CFA entered into after 1 April 2013 except for:

Mesothelioma; Insolvency; Defamation and Privacy claims.

The success fee will still be recoverable for any CFA entered into before that date.

CFAs

CFA ORDER 2013

The maximum success fee 100% of costs.

Personal Injury claims - maximum claim from the client 25% of past and general damages.

For other claims no maximum.

DBAs

A damages-based agreement is an agreement:

For legal services;
payment on success; and
payment linked to damages.

DBAs

A DBA is enforceable only if it:

is in writing

relates to proceedings which can use a conditional fee agreement;

limits the fee payable;

complies with requirements; and prescribed information is given.

DBAs

DAMAGES-BASED AGREEMENTS REGULATIONS 2013.

A damages-based agreement must specify:

(a) the claim or proceedings or parts of them to which it relates;

(b) the circumstances in which the representative's payment, expenses and costs, or part of them, are payable; and

DBAs

DAMAGES-BASED AGREEMENTS REGULATIONS 2013.

(c) the reason for setting the amount of the payment at the level agreed, including having regard to, where appropriate, whether the claim or proceedings is one of several similar claims.

DBAs

"expenses" means disbursements incurred by the representative, including the expense of obtaining an expert's report and, in an employment matter only, counsel's fees.

DBAs

"payment" means that part of the sum recovered in respect of the claim or damages awarded that the client agrees to pay the representative, and excludes expenses but includes, in respect of any claim or proceedings to which these regulations apply other than an employment matter, any disbursements incurred by the representative in respect of counsel's fees.

DBAs

In an employment matter, a damages-based agreement must not provide for a payment above an amount which, including VAT, is equal to 35% of the sums ultimately recovered by the client in the claim or proceedings.

DBAs

For personal injury claims the amount of the payment must be inclusive of VAT and must not exceed 25% respect of general damages for pain, suffering and loss of amenity; and damages for pecuniary loss other than future pecuniary loss, net of any sums recoverable by the CRU; and which are ultimately recovered by the client.

DBAs

In any claim other than employment or personal injury a damages-based agreement must not provide for a payment above an amount which, including VAT, is equal to 50% of the sums ultimately recovered by the client.

DBAs

However these limits apply only to first instance proceedings and not to any appeal.

DBAs

The indemnity principle applies.

e.g.	DBA fee	£5,000
	Assessed costs	£6,000
	Other side pay	£5,000

DBAs

Costs shifting continues to apply and the costs recovered from the other side have to be offset against the DBA fee.

e.g.	Claim value	£10,000
	DBA fee	£ 2,500
	Costs recovered	£ 2,000
	Client pays	£ 500

QOCS

Qualified One Way Costs Shifting applies to all Personal Injury cases started after 1 April 2013 where there is no recoverable Success Fee.

Does not apply to Pre Action Disclosure applications.

QOCS

QOCS protection lost if the case is struck out:

No reasonable cause of action;

Abuse of process;

Likely to obstruct just disposal.

QOCS

QOCS protection remains in place if:

Discontinued (but note fundamentally dishonest);

For an appeal.

QOCS

Brighton & Hove Bus & Coach Co Ltd v Brooks & Tadrous [2011] EWHC 2504 (Admin)

The test of fundamental dishonesty is:

(i) it must be pleaded by the Defendant

(ii) statements and representations must have been made

(iii) those statements and representations were false

QOCS

Brighton & Hove Bus & Coach Co Ltd v Brooks & Tadrous [2011] EWHC 2504 (Admin)

(iv) this was likely to interfere with the course of justice in some material respect

(v) at the time they were made the maker had no honest belief in their truth and knew they were likely to interfere with the course of justice

Shown on the balance of probabilities.

QOCS

Part 36 overrides QOCS but only to the level of damages awarded.

QOCS does not apply to claims not for the benefit of the claimant e.g. Credit hire.

ATE INSURANCE

The premium will not be recoverable in respect of any ATE policy entered into after 1 April 2013 except for:

Liability reports in Clinical Negligence claims.

The premium will still be recoverable for any policy entered into before that date.

BTE INSURANCE

No change to regulation or rules after 1 April 2013

SMALL CLAIMS LIMIT

General Small Claims Limit increased to £10,000.

Government considering increasing Personal Injury Small Claims Limit to £5,000.

COSTS BUDGETING

Costs budgeting pilots in existence for Defamation, TCC and Mercantile courts.

Budget to be produced at the beginning of case management and approved by the court.

COSTS BUDGETING

The Civil Procedure Rules are amended as from 1 April 2013 to make specific provision for costs budgeting via costs management orders.

This rule will apply to all Multi Track cases except those in the Admiralty/Commercial Courts or Mercantile/TCC/Chancery over £2M.

COSTS BUDGETING

Multi track cases commenced post 1 April 2013 but the Court may manage the costs to be incurred by any party in <u>any</u> proceedings

The Court may at any time make a costs management order

The section and Practice Direction may apply to any other proceedings where the Court so orders

COSTS BUDGETING

Applies to all parties except litigants in person unless the Court orders otherwise

Must be filed and exchanged when the notice of provisional allocation states or if no date given then no later than 7 days before the first CMC

If you do not then you will be treated as having filed a budget limited to court fees.

COSTS BUDGETING

Precedent H Mandatory

Jackson thought two hours to complete!

First page only if budgeted costs are less than £25,000

Note the statement of truth

COSTS BUDGETING

Costs allowed to complete Precedent H:
No more than 1% of the approved budget or £1,000.

Budgeting and costs management overall:
No more than 2% of the approved budget.

COSTS BUDGETING

Pre-action costs
Issue of proceedings and pleadings
CMC
Disclosure
Witness Statements
Experts Reports
Pre-Trial Review
Trial preparation
Trial
Settlement Discussions
Contingencies x 3

COSTS BUDGETING

The outcome of the budgeting process is an order recording:
The extent to which the parties agree the budgets; and

Where not agreed to record the Court's approval after making appropriate revisions

Then the Court controls the budgets in respect of recoverable costs

COSTS BUDGETING

In practice the first case management conference will be the first time the budgets are before the Court

It may be that the Court lists the budgeting separately in larger cases or where there is substantial dispute

Such hearings will be called Costs Management Conference and will be by telephone where practicable.

COSTS BUDGETING

On assessment of costs the Court will have regard to last approved or agreed budget for each phase of proceedings and
will not depart from the budget unless good reason to do so

Within proceedings any case management decision will take in to account budgets and the costs involved in each procedural step

COSTS BUDGETING

Experts:
Clear interaction with amendments to CPR 35
Should you ask experts to tender for work?

Factual Evidence:
A clear link with amendments to CPR 31 and 32

COSTS BUDGETING

Case law is unclear

Henry v News Group Newspapers saw costs allowed substantially outside budget but clear indication the new rules would not be so flexible

Ryder v Beever saw a case struck out for failure to file a costs estimate

COSTS BUDGETING

Safetynet Security Ltd v Coppage [2012] EWHC Birmingham Mercantile Court NLJ 19 October 2012

At the conclusion of a trial the judge ruled that a detailed assessment would be a futile exercise where the receiving party did not intend to claim more costs than it had claimed in its approved budget.

COSTS BUDGETING

Budget properly:
Do it centrally - Do not leave it to individual fee earners

Work out from existing files what certain steps cost

Consider contingencies on all cases

Keep budget under review and go back if you may exceed it

PROPORTIONALITY

CPR 44.5(3)

(a) the conduct of all the parties

b) the amount of money involved;

(c) the importance of the matter;

(d) the complexity of the matter;

(e) the skill, and specialised knowledge;

(f) the time spent; and

(g) the place where the work was done.

PROPORTIONALITY

Costs are proportionate if, and only if, the costs incurred bear a reasonable relationship to:

(a) the sums in issue in the proceedings;

(b) the value of any non-monetary relief in issue in the proceedings;

(c) the complexity of the litigation;

(d) any additional work generated by the conduct of the paying party; and

(e) any wider factors involved in the proceedings, such as reputation or public importance.

PROPORTIONALITY

Thus the new test removes:

the importance of the matter to the parties;
the skill, and specialised knowledge;
the time spent; and
the place where the work was done.

Adds any wider factors involved in the proceedings, such as reputation or public importance.

PROPORTIONALITY

Lownds v Home Office [2002] EWCA Civ 365
If ….. the costs as a whole appear disproportionate then the court will want to be satisfied that the work in relation to each item was necessary and, if necessary, that the cost of the item is reasonable.

PROPORTIONALITY

Jackson proposed that the CPR should explicitly provide that the fact that costs were necessarily incurred does not make them proportionate thus reversing *Lownds*.

PROPORTIONALITY

The proposed rule is intended to be a long stop. In the first instance, the court should assess costs by applying the test of reasonableness. That process will usually result in a total sum which is “proportionate”.

PROPORTIONALITY

Jackson LJ himself believes that there is no need for any guidance in a Practice Direction as the whole thing can be controlled by some “robust” Court of Appeal decisions.

PROVISIONAL COSTS ASSESSMENT

The pilot for provisional assessment of costs that has been running in Leeds, York and Scarborough courts is to be extended to all cases where the costs are £75,000 or less whether the case is heard in the High Court or the County Court.

PROVISIONAL COSTS ASSESSMENT

The court will undertake a provisional assessment of the receiving party's costs on receipt of Form N258 and the relevant supporting documents. The provisional assessment will be based on the information contained in the bill and supporting papers and the contentions set out in Precedent G (the points of dispute and any reply).

PROVISIONAL COSTS ASSESSMENT

The paying party must state in an open letter accompanying the points of dispute what sum, if any, that party offers to pay in settlement of the total costs claimed. The paying party may also make an offer under Part 36.

PROVISIONAL COSTS ASSESSMENT

The court will not award more than £1,500 to any party in respect of the costs of the provisional assessment.

PROVISIONAL COSTS ASSESSMENT

Any party which has requested an oral hearing, will pay the costs of and incidental to that hearing unless it achieves an adjustment in its own favour by 20% or more of the sum provisionally assessed; or the court otherwise orders. When considering whether to depart from the normal order indicated the court will take into account the conduct of the parties and any offers made.

FIXED COSTS - PORTALS

RTA

End of July 2013 extension to £25,000

Fee cut in existing portal at the end of April 2013

Currently draft protocol captures claims where CNF submitted on or after 1st April 2013

FIXED COSTS - PORTALS

Taken from the draft RTA protocol:
An accident resulting in bodily injury

Caused by or arising out of the use of a motor vehicle

On a road or other public place in England and Wales

Unless injury caused by a breach of EL regulations

FIXED COSTS - PORTALS

EL/PL

End of July 2013

Applies on accident date – after 1 April 2013 then it is caught

FIXED COSTS - PORTALS

Taken from the draft EL protocol:

A claim by an employee against an employer

Arising from bodily injury in the course of employment

Or a disease contracted as a result of a breach of duty within the course of employment

FIXED COSTS - PORTALS

Taken from the draft PL protocol:

A claim for personal injury

Arising out of a breach of duty

Against a person other than the employer of the claimant

Or against the employer <u>if</u> it is not in the course of employment

FIXED COSTS - PORTALS

Fixed recoverable costs for claims <u>within</u> the rta and el/pl protocols

	Claims of £1k-£10k			Claims of £10k-£25k		
	Stage 1	Stage 2	Total	Stage 1	Stage 2	Total
RTA claims	£200	£300	**£500**	£200	£600	**£800**
EL/PL claims	£300	£600	**£900**	£300	£1,300	**£1,600**

Massive drop

Referral fee of £700 taken out

FIXED COSTS - PORTALS

Will we see more admissions as commercially cheaper to settle in portal?

A perverse incentive to settle in portal even where claim perhaps not valid

Will the Defendant simply admit in some cases rather than drop out?

FIXED COSTS - FAST TRACK

	Pre issue £1,000-£5,000	Pre Issue £5,001-£10,000	Pre Issue £10,001-£25,000	Issued – Post Issue Pre Allocation	Issued – Post allocation pre listing	Issued – Post listing pre trial	Trial - Advocacy Fee
	Case Settles before Issue	Case Settles before Issue	Case Settles before Issue				
Road Traffic Accident							
Fixed Costs	Greater of £550 or £100 + 20% of Damages	£1,100 +15% of Damages over £5k	£1,930 + 10% of Damages over £10k	£1,160 + 20% of Damages	£1,880 + 20% of Damages	£2,655 + 20% of Damages	£485 (to £3,000) £690 (£3-10,000) £1,035 (£10-15,000) £1,650 (£15,000+)
Escape	+ 20%	+ 20%	+ 20%	+ 20%	+ 20%	+ 20%	na
Employers Liability							
Fixed Costs	£950 + 17.5% of Damages	£1,855 +12.5% of Damages over £5k	£2,500 + 10% of Damages over £10k	£2,630 + 20% of Damages	£3,350 + 25% of Damages	£4,280 + 30% of Damages	£485 (to £3,000) £690 (£3-10,000) £1,035 (£10-15,000) £1,650 (£15,000+)
Escape	+ 20%	+ 20%	+ 20%	+ 20%	+ 20%	+ 20%	na
Public Liability							
Fixed Costs	£950 + 17.5% of Damages	£1,855 +10% of Damages over £5k	£2,370 + 10% of Damages over £10k	£2,450 + 17.5% of Damages	£3,065 + 22.5% of Damages	£3,790 + 27.5% of Damages	£485 (to £3,000) £690 (£3-10,000) £1,035 (£10-15,000) £1,650 (£15,000+)
Escape	+ 20%	+ 20%	+ 20%	+ 20%	+ 20%	+ 20%	na

FIXED COSTS - FAST TRACK

RTA to trial
Max - £7,655 (£25,000 damages)
Min - £2,855 (£1,000 damages)

EL to trial
Max - £11,780 (£25,000 damages)
Min - £4,580 (£1,000 damages)

PL to trial
Max - £10,665 (£25,000 damages)
Min - £4,065 (£1,000 damages)

PART 36

New Sanction

The claimant makes a Part 36 offer and gets more at trial then the Defendant has to pay additional costs as a number of sanctions can be applied.

PART 36

Current sanctions:
Costs on indemnity basis;
Interest on costs up to 10% above Base Rate;
Interest on damages up to 10% above Base Rate.

In addition to the current sanctions the claimant will get a supplement of 10% on the damages awarded up to £500,000. 5% thereafter to a maximum of £75,000.

PREPARING YOUR FIRM

Claim in a Road Traffic Accident settling after allocation but before listing for £10,000 PSLA and past losses.

PREPARING YOUR FIRM

CFA costs

Fixed costs: (£1,880 + £2,000) =	£3,880
Success fee of 25%:	£2,500
TOTAL:	£6,380
Plus:	
VAT:	£1,276

PREPARING YOUR FIRM

DBA costs

DBA fee at 25%:	£2,500
Fixed costs limited to DBA fee	£2,500
Less VAT:	£ 416
TOTAL:	£2,084

PREPARING YOUR FIRM

LARGER CASE

Case done efficiently:

General damages	£50,000
Specials 1 year	£50,000
Total	£100,000
Solicitor's success fee	£25,000

PREPARING YOUR FIRM

Same case done inefficiently:

General damages		£40,000
Specials 4 years	(£40,000 x 4)	£160,000
Total		£200,000
Solicitor's success fee		£50,000

PREPARING YOUR FIRM

De-skill or Niche?

Charging clients more?

Doing less work?

Extensive research into your firm’s case costs.

PROCEDURAL CHANGES

Overriding Objective

The Overriding Objective has been modified to require that cases are dealt with “justly and at proportionate cost”.

Clearly this increases the importance of costs in any case management.

CPR 3

CPR 3 is now split into three elements:

Case management

Costs management

Costs capping.

CPR 3

The court may contact the parties from time to time in order to monitor compliance with directions.

The parties must respond promptly to any such enquiries from the court.

ALLOCATION

Court officer will issue a notice of intention to allocate to a track.

Allocation Questionnaires renamed as Directions Questionnaires.

RELIEF FROM SANCTIONS

New rule:

The court will consider all the circumstances of the case, so as to enable it to deal justly with the application, but in particular it will consider the need:

RELIEF FROM SANCTIONS

for litigation to be conducted efficiently and at proportionate cost; and

to enforce compliance with rules, practice directions and orders.

SMALL CLAIMS

General limit raised from £5,000 to £10,000.

MULTI TRACK

For a case that is to be allocated to the Multi Track the parties MUST attempt to agree directions in advance of the Case Management Conference and submit the agreed directions or their proposals at least 7 days before the CMC.

FACTUAL EVIDENCE

The court may give directions:

(a) identifying or limiting the issues to which factual evidence may be directed;

(b) identifying the witnesses who may be called or whose evidence may be read; or

(c) limiting the length or format of witness statements.

FACTUAL EVIDENCE

(c) limiting the length or format of witness statements.

FACTUAL EVIDENCE

Cummings v Ministry of Justice [2013] EWHC 48 (QB)

Many witness statement from claimant struck out or reduced.
Claimant refused costs of production and ordered to pay defendant's costs of dealing with those statements.

DISCLOSURE

For Multi Track cases including a personal injury claim and all Fast Track cases:

(a) an order to give disclosure is an order to give standard disclosure unless the court directs otherwise;

DISCLOSURE

(b) the court may dispense with or limit standard disclosure; and

(c) the parties may agree in writing to dispense with or to limit standard disclosure.

EXPERT EVIDENCE

When seeking permission for expert evidence the applicant must also specify the estimate of costs and

the issues to be considered by expert.

EXPERT EVIDENCE

Experts to be allowed to “hot tub” when they give evidence together.

PART 36

There will be an additional amount of 10% on an award of up to £500,000 and 5% on the amount of the award in excess of £500,000.

The maximum amount that can be added to the award is £75,000.

APPEALS

In any proceedings in which costs recovery is normally limited or excluded at first instance, an appeal court may make an order that the recoverable costs of an appeal will be limited to the extent which the court specifies.

APPEALS

Where a application is made for a second appeal it must state in the grounds of appeal what important point of principle or practice, or other compelling reason is which is said to justify the grant of permission to appeal a second time.

THE END