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ANALYSIS

Counting the cost of Jackson's final proposals

A curb on recoverable costs is pitched as helping litigants drive better deals with their lawyers. But Andy Ellis fears injustices in restricting what David can recover with no limit on what Goliath may spend

PREMIUM

The Brief team
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The last eight years of Lord Justice Jackson's judicial career have been dominated by his work on costs reforms. He is determined that the final instalment, published this week, will impose straitjackets on the amount of costs that can be recovered in most civil actions.

My practice depends on pushing and pulling at the margins of judicial discretion, so naturally this whole thing makes me queasy. But there are hard facts and principles to consider.

At the lower end, Lord Justice Jackson wants the costs of all fast-track cases – those worth up to £25,000 that can be tried in one day – to be fixed within four bands of complexity. At the moment fixed costs apply only to personal injury accident cases. This extension had largely been expected and opponents have concentrated on persuading Jackson to soften the edges.

The greatest trepidation has been in anticipating how Jackson would define "the lower reaches" of the multi-track into which he wants fixed costs to encroach. Having initially threatened the headline threshold of £250,000, he has settled on devising an intermediate track of cases worth up to £100,000 that can be tried in up to three days.

Since the spectre of fixed costs was first raised, the legal profession has performed a deft reverse ferret on costs budgeting. A year ago lawyers did not have a good word about it, but costs budgeting has gradually been recast as a success story. This has persuaded Jackson to lower the ceiling.

It is of no surprise that the one-scale-fits-all-cases notion that Jackson started with has given way to a more segregated approach. There are escape hatches from the intermediate track for cases with reputational issues, public importance and claims for substantial non-monetary relief. Clinical negligence is also reserved for further research and special treatment.

But what about the figures? The range of recoverable costs, to include trials, in the proposed intermediate track is £19,150 to £77,000. That upper limit includes 12.5 per cent London weighting. The scope takes in solicitors' and counsel's fees,

which are ring-fenced for advice and advocacy. Lawyers are going to struggle to retrofit necessary work to Jackson's scale.

The judge hopes that the curb on recoverable costs will help litigants to drive a better deal with their lawyers. To me there remains injustice in restricting what the Davids can recover with no limit on what the Goliaths may spend. Suggested restrictions on the length of pleadings and statements inadequately paper over that crack.

As we move on to the formal consultation phase around the Jackson proposals there needs to be greater emphasis on wider procedural reforms. If predictability is going to trump necessity, the amount of work needed to fight a case must also be reduced, which is far easier said than done.

Andy Ellis is the managing director of Practico, a London firm of costs lawyers