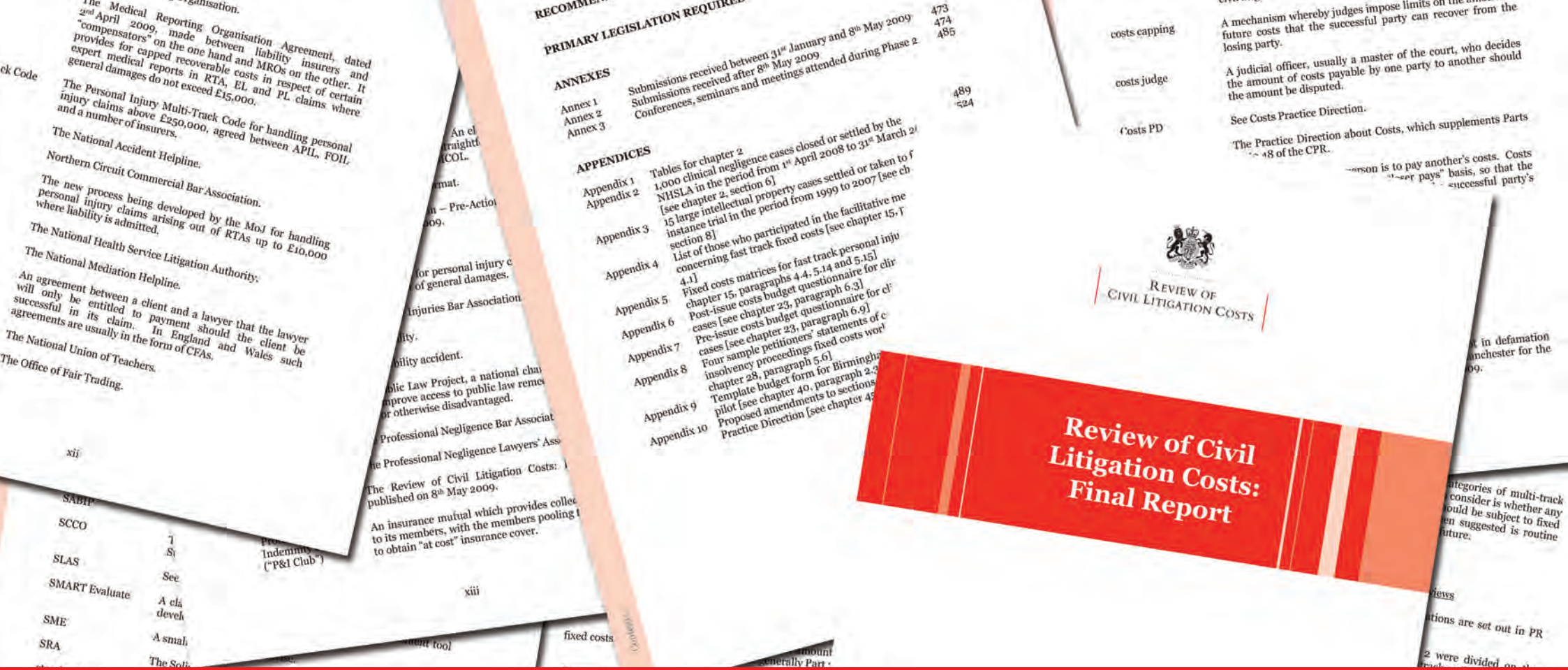

The Costs of Change –

The LexisNexis overview of the Jackson Reforms

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Executive Summary and Background

On 1 April 2013, the Jackson Reforms came in to force. They arose out of The Jackson Report ("Review of Civil Litigation Costs: Final Report") published in 2009 and modify the court system to deal with escalating costs. In doing so they will change the business of civil litigation forever.

The major focus of the reforms is to ensure that the costs incurred during proceedings are now proportional to the issues in the case. To achieve this, the reforms cover many aspects of funding civil litigation with the following being the main ones:

- Cases and costs management to be strictly regulated by the judiciary
- Proportionality of costs redefined
- Reform of funding so that success fees and ATE insurance premiums are no longer recoverable from the other side but lawyers can share in the success of litigation through Damage Based Agreements
- Use of referral fees now illegal
- Part 36 reforms imposing a harsher penalty on defendants for refusing to accept a reasonable offer

The Jackson Reforms were meant to be a packaged response. However, some aspects of the recommendations have not been fully implemented and this raises questions as to how the judiciary will seek to practically interpret the reforms. We hope this guide will help to walk you through the new provisions and highlight some of the potential pitfalls.

This guide states the law as in force in April 2013. For updates and further exclusive, complimentary materials please visit: www.lexisnexis.co.uk/jrg.

Index of Topics

This guide is divided into three parts that dovetail together. Part A deals with the rules on costs and funding. Part B looks at the case management and costs issues once a matter is begun, and Part C makes some suggestions for designing your costs budget with an eye to recoverability.

PART A: COSTS AND FUNDING

A wholesale review of the costs rules and practice directions has been undertaken. Costs are now dealt with in Parts 44 & 47 rather than Parts 43 & 48 as was previously the case. In addition, the costs practice direction has been restructured so that there is now one practice direction per Part rather than one costs practice direction running over all the parts dealing with costs. This wholesale review has resulted in changes to numbering within the Parts, new provisions being added eg Provisional Assessment within Part 47 and the removal of other rules such as those relating to funding agreements.

Proportionality in costs

The costs reforms have resulted in the overriding objective being amended to include 'and at proportionate costs'. In addition, a new rule has been added at rule 44.3(5) which is aimed at ensuring that the costs incurred in litigation are proportionate to the claims involved. The rule provides that:

> *"Costs incurred are proportionate if they 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"*

It is difficult to see how judges will apply this in practice and it has been the subject of much debate. This is because it is not yet clear how the concept of proportionality will be dealt with especially where it has been necessary to incur the costs. There has been disagreement amongst lawyers and judicial commentators as to whether the rule in *Lowndes* will continue to be applied. What is clear is that the proportionality of costs will be considered by the courts throughout the proceedings rather than simply during costs assessments. For many multi track cases the introduction of costs budgeting will ensure that this is an issue considered very early on in proceedings. For parties that fail to stay within budget, should they win the case, their costs will not be fully recoverable.

The introduction of the new rules may result in a period of uncertainty in case law but any teething problems with the rules should be addressed early on. To ensure consistency and efficiency of approach only two of the Lord Justices in the Court of Appeal will deal with any appeals arising out of the Jackson Reforms.

Detailed assessment

A new form of detailed assessment has been introduced known as provisional assessment. This applies when the costs associated with the proceedings are under £75,000. Many of the detailed assessment procedures need to be followed but the essential difference is that the assessment itself is dealt with on the papers. Whilst parties can appeal, tough costs consequences apply if the appellant fails to achieve a considerable change to the costs first ordered. Lexis®PSL Dispute Resolution subscribers are provided with assistance as to the procedure and also a table of the detailed assessment provisions which need to be complied with when undergoing provisional assessment.

General rules on costs

These are now set out in CPR 44. The rules provide the basis for understanding how the court will deal with the issue of costs eg the court's discretion, the basis for assessment (standard or indemnity, which includes new text for proportionality), commonly made costs orders as well as time for compliance with a costs order. Whilst many of the provisions are the same as prior to 1 April 2013 they have different paragraph numbers so you will need to work your way around the new format of the Part. New provisions in relation to Qualified One-way Costs Shifting (QOCS) and Damages Based Agreements (DBAs) are found in sections II and III respectively.

Qualified One-way Cost Shifting (QOCS)

QOCS applies to personal injury claims where there is no pre–1 April 2013 recoverable success fee or ATE or membership organisation premium in place. QOCS prevents defendants from recovering their costs from an unsuccessful claimant. It is retrospective in all other personal injury cases.

The additional costs burden on the defendant is intended to be balanced by the removal of the claimant's ability to recover ATE insurance premiums and success fees from the defendant post 1 April 2013.

The effect of QOCS is set out in CPR 44.14:

"44.14 Effect of qualified one-way costs shifting

(1) Subject to rules 44.15 and 44.16, orders for costs made against a claimant may be enforced without the permission of the court but only to the extent that the aggregate amount in money terms of such orders does not exceed the aggregate amount in money terms of any orders for damages and interest made in favour of the claimant.

(2) Orders for costs made against a claimant may only be enforced after the proceedings have been concluded and the costs have been assessed or agreed.

(3) An order for costs which is enforced only to the extent permitted by paragraph (1) shall not be treated as an unsatisfied or outstanding judgment for the purposes of any court record."

Thus where the claimant has a judgment for damages, a defendant is entitled to orders for costs where the claimant:

- fails to beat a Part 36 offer;
- is ordered to pay interim costs
- is ordered to pay the costs of specific issues under existing costs law and/or rules

The defendant may enforce his orders for costs against the claimant's damages and interest (but not costs), but only up to the limit of such damages and interest, as per CPR 44.14(1).

Exceptions

These are set out in CPR 44.15 and 44.16:

"44.15 Exceptions to qualified one-way costs shifting where permission not required

Orders for costs made against the claimant may be enforced to the full extent of such orders without the permission of the court where the proceedings have been struck out on the grounds that–

(a) the claimant has disclosed no reasonable grounds for bringing the proceedings;

(b) the proceedings are an abuse of the court's process; or

(c) the conduct of–

(i) the claimant; or

(ii) a person acting on the claimant's behalf and with the claimant's knowledge of such conduct,

is likely to obstruct the just disposal of the proceedings."

"44.16 Exceptions to qualified one-way costs shifting where permission required

(1) Orders for costs made against the claimant may be enforced to the full extent of such orders with the permission of the court where the claim is found on the balance of probabilities to be fundamentally dishonest.

(2) Orders for costs made against the claimant may be enforced up to the full extent of such orders with the permission of the court, and to the extent that it considers just, where–

(a) the proceedings include a claim which is made for the financial benefit of a person other than the claimant or a dependant within the meaning of section 1(3) of the Fatal Accidents Act 1976 (other than a claim in respect of the gratuitous provision of care, earnings paid by an employer or medical expenses); or

(b) a claim is made for the benefit of the claimant other than a claim to which this Section applies.

(3) Where paragraph (2)(a) applies, the court may, subject to rule 46.2, make an order for costs against a person, other than the claimant, for whose financial benefit the whole or part of the claim was made."

Damages-Based Agreements (DBAs)

This is a new form of funding arrangement whereby a legal representative agrees with their client that the legal fees will only be payable if a specified contingency occurs which results in a financial benefit. The contingency is generally the client 'winning' the claim and the financial benefit is generally the damages awarded. The fee payable to the solicitor will not be the actual legal fees but a percentage of the financial benefit obtained by the client.

There is very little assistance in place as to how DBAs will work in practice. The Damages-Based Agreement Regulations 2013, SI 2013/609 simply cover basic information as do the CPR provisions. What is clear is that the percentage of financial benefit payable to the legal representative is capped depending on the type of claim:

- 25% for personal injury—based on the combined total of the damages recovered for pain, suffering and loss of amenity and pecuniary loss (other than future pecuniary loss)
- 50% for all other civil claims—determined on the sums ultimately recovered by the client

The percentage financial benefit is only payable by a client that 'wins' whilst the expenses are payable 'win or lose'. Expenses are defined as costs incurred by the representative on behalf of the client but it is important to be aware that expenses are defined as excluding:

- counsel's fees
- any amount paid or payable by another party to the proceedings either under an agreement or court order

Many unanswered questions remain such as how the following will be dealt with:

- potential conflicts of interest
- differing terminology between the primary legislation and the DBA regulations
- assessment of costs when there is no agreed hourly rate under a DBA

We have sought to provide assistance in dealing with these issues and the many others that arise in relation to DBAs within LexisPSL Dispute Resolution and LexisPSL Personal Injury Practice Notes. We also provide worked examples of the impact a simple DBA, in different situations, can have for clients and their legal representatives depending on whether a case settles early or goes all the way to trial.

Reform of ATE Insurance

The ability of a successful claimant to recover after the event (ATE) premiums from the defendant has been abolished for any policies taken out from 1 April 2013 except in very limited circumstances. It is therefore still important to discuss with clients the use of ATE insurance and who should fund it.

Reform of Conditional Fee Agreements (CFAs)

CFAs ('no-win no-fee') have been reformed. Whilst they remain lawful, a successful claimant can no longer recover success fees for agreements entered into on or after 1 April 2013 (the exceptions being mesothelioma claims, insolvency disputes and publication and publicity disputes). The party entering into the CFA will now have to pay the success fee themselves which is capped as follows:

- personal injury and clinical negligence cases—25% of the costs recovered at first instance. In all other proceedings, eg appeals, the cap is 100%. Note: damages for future loss are excluded from the definition of damages to which the success fee applies.
- for all other cases the maximum success fee is 100% of the costs recovered

If a CFA was entered into prior to the new reforms coming into effect, the transitional arrangements, set out in Part 48, apply. These provide that the old provisions, although revoked, will continue to apply to allow recovery of a success fee from the defendant after 1 April 2013 if:

- the CFA was entered into specifically to provide advocacy or litigation services in connection with the matter in which the costs order is then made, or
- advocacy or litigation services were provided under the CFA in connection with that matter before 1 April 2013

However, if dealing with a Collective Conditional Fee Agreement (CCFA) the success fee is only recoverable if work was actually done on the case prior to 1 April 2013 under the agreement.

If dealing with a personal injury case, it is important to be aware of the Court of Appeal decision in *Simmons v Castle* in 2012. It decided that general damages for pain, suffering and loss of amenity, physical inconvenience and discomfort, social discredit and mental distress should be increased by 10% in all civil claims decided after 1 April 2013. However, that does not apply if the case is funded by way of a Conditional Fee Agreement (CFA) entered in to before 1 April 2013. The PSL Personal Injury Quantum Database allows practitioners to search for cases within their chosen injury category and within seconds access results. It narrows down those results by date or by value and will uplift the general damages element of the claim in line with Simmons v Castle. It shows the pre Simmons and post Simmons valuations.

Increased sanctions for claimant Part 36 offers

The changes to Part 36 introduce an additional sanction on claimant Part 36 offers. This change is intended to encourage earlier settlement and the 10% increase will apply to all non-pecuniary general damages whether the claim is brought in contract or tort. It will apply as follows:

- in a damages claim - 10% of the damages
- in a non-damages claim - 10% of the costs
- in a mixed claim for damages and non-damages - 10% of the damages element of the claim

Where there is a split trial these sanctions will only apply once.

Note: this change was part of the Jackson Reforms. In addition, a full review of Part 36 is due to take place in 2013 and it is anticipated that a number of controversial issues within Part 36 will be addressed. LexisPSL DR subscribers can find more details on this in the note "Progress on Part 36 reform".

Fixed costs

Generally an unsuccessful party can expect to pay a percentage of the costs incurred by the successful party. However, 'fixed costs' means that in certain circumstances the court will order that the unsuccessful party should only pay a fixed sum in respect of the successful party's solicitors' costs.

As a result of the Jackson reforms, whilst fixed costs continue to be dealt with in Part 45, rules have been renumbered and some have been substantially amended or deleted.

Specialist costs

Specialist costs regimes are set out in Part 46 including rules relating to costs incurred by solicitors and other legal representatives, costs on allocation and re-allocation and the new rules on costs only proceedings.

PART B: CASE MANAGEMENT IN ACTION

Active Case Management by the court

The intention is that the court will be much more pro-active and robust in their case management now the reforms have come into force. This approach was discussed in the Fifth Costs Implementation Lecture.

Contact by the court

Rule 3.1(8) provides that the court may contact the parties to monitor compliance with case management directions. The parties are to respond promptly to any such enquiry.

Relief from sanctions

The provision for relief from sanctions is contained in CPR 3.9(1) which has been replaced in its entirety by a much shorter and tougher provision:

> *"On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider the circumstances of the case, so as to enable it to deal justly with the application including the need –*
>
> *(a) for litigation to be conducted efficiently and at proportionate cost; and*
>
> *(b) to enforce compliance with rules, practice directions and court orders."*

This change is designed to enable the courts to take a more robust and pro-active approach to enforcing case management directions. Even before this provision came into force, the courts were taking a more robust approach in relation to procedural steps causing delay, stress and/or increased costs and the Court of Appeal was upholding these as long as they were fair. It is anticipated the momentum of this tougher stance by the courts will continue.

Payments on account

Payments on account are generally led by the court but they are now almost mandatory. Where the court has ordered a party to pay costs, the court may decide to order payment on account of an amount prior to the costs assessment. A successful party should ask the court to make an order for payment on account.

The management and conduct of proceedings

The reforms are intended to herald more robust and pro-active case management-both on the parties' and the court's part. As such, the courts are likely to require more co-operation and collaboration between the parties.

Small claims

The financial limit in the small claims court has increased from £5,000 to £10,000.

Allocation and directions questionnaires

Where a defence is received on or after 1 April 2013, parties will be subject to a new allocation process. Rather than complete an allocation questionnaire before allocation, parties will be sent a notice of proposed allocation. This notice notifies the party of the track to which their case has been provisionally allocated and requires them to, among other things, file and serve a directions questionnaire. Parties proceeding on the fast track and multi-track will also be obliged to seek to agree their proposed directions. These proposed directions are to be based on applicable model and standard form directions.

Case management directions on the multi-track

A new rule 29.1(2) has been added to ensure model and standard form directions are used by the court and parties, as a starting point, for cases proceeding on the multi-track. These directions are available online for practitioners and judges to download: www.justice.gov.uk/courts/procedure-rules/civil.

Disclosure on the multi-track

Previously, the default disclosure order was for standard disclosure. This often resulted in the costs of conducting the disclosure exercise being disproportionate to the value of the claim.

To remedy this, the CPR now provides for a disclosure 'menu' in multi-track cases (except for personal injury and clinical negligence claims). Under the new regime, parties are required to take various steps before the first Case Management Conference (CMC). The new provisions are set out in rule 31.5 and apply where the first CMC takes place on or after 16 April 2013. Where electronic documents are involved, parties must also comply with CPR PD 31B.

Witnesses of fact and Expert evidence

Witness of fact

A proliferation of over-extensive and irrelevant witness evidence has resulted in the new rule 32.2(3) on witness evidence. This enables the court to give directions:

- identifying or limiting the issues to which factual evidence may be directed,
- identifying the witnesses who may be called or whose evidence may be read, or
- limiting the length or format of witness statements

Expert evidence

The maximum amount recoverable for experts fees in the small claims court has increased to £750 per expert.

A revised rule 35.4 has also introduced the following new provisions:

- when seeking permission to adduce expert evidence, parties are now obliged to:
  - provide an estimate of the costs of the proposed expert evidence
  - identify the issues the expert evidence will address
- the court has an option, when granting permission, to specify the issues the expert evidence should address

In the spirit of the costs reforms it is also anticipated that the courts will be encouraged to make greater use of existing provisions to ensure efficient costs and case management in relation to expert evidence.

Practice Direction 35 also introduces an option for expert evidence to be given concurrently. Concurrent evidence, colloquially known as 'hot tubbing', is the process whereby the evidence of both parties' experts is provided during a discussion chaired by the judge. This could control costs by reducing the time needed to hear the expert evidence in a case. Explanations and insights from pilot schemes in the TCC and Mercantile courts in Manchester and from existing schemes, including in foreign arbitral proceedings, are provided in LexisPSL Dispute Resolution.

The portal and the Money Claims Centre Court

The portal

The Government has introduced changes to the Road Traffic Accident (RTA) portal and the pre-action personal injury protocol in relation to Employer Liability (EL) and Public Liability (PL) claims in its plan to reduce personal injury costs. The portal will be expanded to include higher value RTA claims and EL/PL claims up to £25,000 – see below.

The new fixed recoverable fees in low value RTA claims valued up to £10,000 are:

- RTA claims from £1000 - £10,000
- Stage 1 and 2 (£200 + £300) = £500

The fixed recoverable fees in the new pre-action protocol for EL/PL cases valued up to £25,000 and the extended RTA protocol up to £25,000 will be implemented on 31 July 2013. The fees proposed are:

Extended RTA protocol

- from £10,000 - £25,000
- Stage 1 and 2 (£200 + £600) = £800

Employment liability and public liability

- EL/PL from £1000 - £10,000
- Stage 1 and 2 (£300 + £600) = £900
- EL/PL from £10,000 - £25,000
- Stage 1 and 2 (£300 + £1300) = £1600

County court money claims centre (CCMCC)

HMCTS has identified that there are some unintended consequences of the automatic orders pilot coming to an end. Amendments will be required to the provisions on the transfer of cases.

PART C: COSTS BUDGETING AND COSTS MANAGEMENT ORDERS

Costs budget

A regime of costs budgeting has been introduced in multi-track cases through Part 3, section II and CPR Practice Direction 3E. It does not apply in the Commercial Courts and it is important to be aware that other exceptions apply such as claims valued at over £2 million in the Chancery Division and in the TCC and Mercantile courts.

The regime was introduced to ensure proportionality of costs to the issue in dispute and to enable a much more speedy assessment of costs once the dispute has been determined.

Costs budgets are required in the early stages of the case; they must be filed prior to the CMC. Costs budgets must be completed in the form of Precedent H; practitioners only need fill in the first page if the action is valued at £25,000 or less. A complete failure to complete a costs budget has draconian sanctions; only court fees will be recoverable by that party.

The emphasis is on co-operation. Parties are required to discuss their costs budgets and seek to agree them or at least part of them prior to filing and exchanging. It is important to be aware that agreement by the parties excludes the court's jurisdiction in relation to the costs budgets. The court can then only approve or refuse to approve the costs budgets; it cannot seek revisions of the budget. A court that refuses to approve a budget makes a comment in the form of a recital on the order which can then be taken into account at a costs assessment.

A failure to co-operate can result in costs sanctions whilst a failure to reach an agreement means the court can review the budgets and make revisions.

LexisPSL Dispute Resolution subscribers are provided with a fully interactive Precedent H together with in-depth checklists to help with completion of the budget. In addition, four videos provide an insight into the approach of the court to costs budgeting.

In the event that circumstances change there is a requirement to resubmit the budget to the court.

Costs Management Orders (CMOs)

Costs Management Orders (CMO) enable the court to control parties' budgets in respect of recoverable costs throughout the proceedings. The order records the extent of party agreement and/or records the court's approval of the budget following any revisions it considers to be appropriate. When a CMO has been made the court will then control the parties' budgets in respect of recoverable costs.

Whilst a CMO can be made at any time during the proceedings, it is not yet clear whether this is available only at the discretion of the court or whether a party can make an application for a CMO e.g. if the other side's conduct is such that it is causing or could cause your client to spend a disproportionate sum on costs.

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More information

- LexisNexis provides a wealth of resources related to dispute resolution and personal injury, covering both practical guidance and more detailed materials on contentious matters. You can apply for a trial of LexisPSL Dispute Resolution and LexisPSL Personal Injury as well as our other services by contacting your account manager or visiting http://www.trialpsl.com/.
- Our dedicated webpage on the Jackson reforms has a wealth of materials to get you started: www.lexisnexis.co.uk/jrg

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