CLAN – 14 November 2016
Quick Round Up of Litigation Hot Topics

We might have thought that, after implementation of the Jackson reforms, we'd be in for some quieter times, but it is now clear that that was really only the beginning. There is so much going on that it can be hard to keep track of it all. Certainly, doing that has been keeping our team of about 13 editors busy!

A hot story this year has been Lord Justice Briggs' Final Report following his Civil Courts Structure Review (which feeds in to the HMCTS modernisation programme) but that is by no means the end of the story. We are currently facing revolutionary changes impacting on our justice system. And the overriding theme, still, is the need to get costs under control.

These are exciting but challenging times. I'll focus on some of the more immediate changes for you to be aware of: many of which impact on your day to day practice:

- **Hearing fees** –The Government outlined plans to remove refunds for hearing fees in civil courts, as well as moving the date at which the hearing fee is payable to four weeks before the date of the hearing. HMCTS is proposing to implement these changes soon.

- **Judicial working party on disclosure issues** – In our panel session, Chris, Mark and I touched on this, but it is such an important topic that it bears repeating. Back in 2013, when we published our new disclosure materials referring to the menu of options in CPR 31.5(7), we included a cautionary warning from the then Senior Master, Stephen Whitaker, that practitioners must embrace and engage with the reforms or they might face something far more extreme. Time has shown that to be prescient. Disclosure is still one of the key drivers of costs, and needs to be made proportionate. On this topic, Jackson LJ does not seem to think there is a need for further changes to the rules – the tools are there in CPR 31.5. However, he has identified the need for culture change. It is time for practitioners to get a bit more creative.

  I recently attended a conference in which Blair J referred to a case in the Financial List being done with no disclosure. If practitioners continue to stick with standard disclosure, who knows – might we eventually end up with a civil code approach?

- **E-filing** – Please do engage in the pilot scheme currently operating in the Rolls Building courts. E-filing is expected to become compulsory next year for professional users of these courts. There is much to be gained from trying out the system now for a few cases at least, to build experience and develop internal processes in your firms. Don't wait for it to become compulsory. There will be internal processes to sort out – for example over payment and risk. The clear message is "Prepare now!". There is a series of WebEx demonstrations scheduled (including one tomorrow), that allow you to have a guided introduction to using the system. If you let me have your email address, I can send you details.

- **Proportionality** – There has been disquiet about the difficulty of assessing what amounts to proportionate costs, and a lack of consistency of approach. When the new rules came in, some argued that there should be guidance in a Practice Note, but Lord Dyson said, at the time, that guidance would come in case law.

  We have had a few important decisions recently. Some of the most notable include:

  - *May v Wavell* (Brian May's rather costly claim regarding neighbouring basement excavations). His costs for this private nuisance claim, which settled for £25,000, were initially reduced, on detailed assessment, from £208,000 to £99,655.74. Then, applying the proportionality test in CPR 44.3(5), they were further reduced to £35,000 plus VAT).
  - *BNM v MGN Ltd [2016] EWHC B13 (Costs)*
  - *Merrix v Heart of England NHS Foundation Trust* (considering the relationship between costs budgets and the detailed assessment procedure).

  All of these decisions are going to appeal. *BNM v MGN* (in which the Senior Costs Judge set out his reasons for halving the sums which he had allowed as reasonable on the line by line assessment, on the basis that they were disproportionate) has a hear by date of 6 March 2017.

- **Fixed costs are coming!** – Jackson LJ's Final Report recommended an extension of the fixed costs regime for all fast track claims. Subsequently, in a speech at the IPA Annual Lecture on 28 January 2016, Jackson LJ recommended the introduction of fixed costs for all claims worth up to £250,000. Over the last months, there has also been discussion about fixed fees for clinical negligence claims. Papers from the July CPRC meeting (which were recently made publicly available) revealed that there is to be a consultation on fixed costs for clinical negligence claims up to £25,000 (a bit of a U-turn, as there had been some talk of foxed costs possibly extending to claims of up to £250,000). The timing is not yet known.

  On 11 November 2016, the Lord Chief Justice and the Master of the Rolls announced that they had commissioned Jackson LJ to undertake a review of fixed recoverable costs by 31 July 2017. The review's terms of reference are:

  - To develop proposals for extending the present civil fixed recoverable costs regime in England and Wales so as to make the costs of going to court more certain, transparent and proportionate for litigants.
  - To consider the types and areas of litigation in which such costs should be extended, and the value of claims to which such a regime should apply.

  Jackson LJ will formally commence his review in January 2017, but he invites views from practitioners, civil court users and any other interested parties, immediately, on matters such as: the amount of fixed costs; the level of claim at which fixed recoverable costs should stop and costs budgeting should apply instead; how to accommodate counsel's fees, experts' fees and other disbursements; and differences between claimant and defendant costs. Any evidence of actual recoverable costs should identify the type of case and the source of the evidence.

  Seminars will be held in London and elsewhere. Practitioners are urged to engage, and make constructive points known to him.

As I said just now, the key driver of the reforms, is concern about the cost of litigating, and a sense that it needs to be reined in, particularly given the wider context of austerity measures, and shrinking government resources.

One way of reducing the pressures imposed by government might be for practitioners to seize the initiatives already in place – such as the menu option for disclosure and initiatives such as the Shorter Trials and Flexible Trials Pilot Schemes.