# Fixed costs in litigation: a new track post Brexit?

In his latest proposals, Lord Justice Jackson, the judge responsible for the overhaul of costs in civil litigation in 2013, has now suggested that fixed recoverable costs be extended in many cases, in all likelihood after Brexit. The aim is to improve access to justice by encouraging a reduction in the costs claimed by parties throughout the litigation process.

One key proposal is the introduction of a new "Intermediate Track", which would impose fixed costs for straightforward cases worth between £25,000 and £100,000. The effect of this is that parties may not be able to recover their full legal costs in the event of successful litigation, but the losing party has more predictability about what they will be asked to pay.

So, how will this work, and what can be done now to protect businesses further down the line?



Tel: 0344 967 0793 | Email: info@LA-Law.com | www.lesteraldridge.com

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## Current allocations

There are currently three tracks to which a civil claim may be allocated. These determine the procedural rules and directions which apply and the costs which can be recovered by the successful party from the opponent:

1. Small Claims track – captures claims with a value of less than £10,000 (except in housing and personal injury claims, where the limit is £1,000). Very limited fixed costs are recoverable in this track.

2. Fast track – captures claims valued between £10,000 and £25,000. Costs tend to be assessed based on costs actually incurred, subject to certain limitations, and for all trials the recoverable advocate's fees are fixed.

3. Multi-track – captures all claims with a value of £25,000 or more and/or which are too complex for the fast track. Costs are not fixed and tend to be assessed based on costs actually incurred. A costs budget is prepared during the early stages of litigation and is either agreed by the opposing party or fixed by the court.

## What is the new track and what does it mean?

The new "Intermediate Track" is likely to apply principally to debt recovery claims with values between £25,000 and £100,000, but theoretically it could catch any civil claims which fulfil the criteria set out below. The idea is to rein in the costs of multi-track litigation for cases which can often become disproportionate to the amount at stake. However, the effect of this may well be to increase the gap between legal costs spent and legal costs recovered.

In order for a claim to be captured by the intermediate track, it needs to satisfy the following key criteria:

1. It is not suitable for the small claims or fast track;

2. The claim is for debt, damages or other monetary relief (valued between £25,000 and £100,000);

3. A trial is not expected to exceed three days;

4. There should be no more than two expert witnesses per party giving oral evidence;

5. The case can be justly and proportionately managed under new procedure;



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6. There are no wider factors, such as reputation or public importance, which make the case inappropriate for this track.

Mesothelioma and other asbestos-related lung diseases are excluded from the track and would continue to be dealt with under their own specific procedure.

It is likely that the track will be split into four bands ranging from the least complex, low-value claims, up to the complex cases where there are more serious issues of fact or law. The track is ultimately intended to be a streamlined system for cases of no more than "modest complexity", and so more complex claims may not be captured on the basis that they are not suitable for fixed costs.

## What can you do now?

Many of the claims captured by the intermediate track will be debt recovery or contractual money claims between businesses and other businesses or individuals. However, the current proposals do not overrule contractual provisions relating to costs.

One area for businesses to consider now, therefore, is what their terms and conditions say about the costs of recovering a debt in the event of a customer's default. Although there are constraints on what might bind the customer, in particular where a claim is later made against an individual, businesses may review their terms and conditions in order to try and ensure that all legal costs are recovered in the event of any later successful claim for breach.

However, the warning which Lord Justice Jackson has given to accompany that suggestion is that, if businesses start writing contractual provisions to side-step the fixed costs regime on a large scale, there may be a "very strong case" for legislation to prevent parties from reaching an agreement about recoverable costs. That, presumably, would be some way down the line, however.

## Conclusion

At present, the proposals put forward by Lord Justice Jackson are simply that, and have not yet changed the law. The Ministry of Justice must approve them if they are to have any effect and so, for now, we await the outcome of further consultation. The Government does seem to be on board with the idea of extending fixed costs, but it is unlikely that an intermediate track will be introduced before Brexit in April 2019. Those considering litigation may want to keep a close eye on this issue, given the potential costs implications.

Lester Aldridge continues to consider flexible litigation funding options with clients, and methods of alternative dispute resolution, should any readers wish to discuss those.



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