



**Consumer
Focus**
Campaigning for a fair deal

Consumer Focus response to MOJ's review on civil costs

February 2011

About us

Consumer Focus is the statutory consumer champion for England, Wales, Scotland and (for postal consumers) Northern Ireland.

We operate across the whole of the economy, persuading businesses, public services and policy makers to put consumers at the heart of what they do.

Consumer Focus tackles the issues that matter to consumers, and aims to give people a stronger voice. We don't just draw attention to problems – we work with consumers and with a range of organisations to champion creative solutions that make a difference to consumers' lives.

Executive summary

Being able to afford civil litigation is crucial to consumers' ability to achieve justice; yet this is one area of the Woolf reforms¹ that has not been successful. As a consumer organisation that campaigns for a fair deal for consumers across the whole economy, including the legal sector, we are concerned that the cost of obtaining civil justice, particularly in lower value claims, is disproportionately high. This is denying people access to justice and when justice is not served consumers do not receive compensation for an injury suffered; a loved one lost; substantial financial losses and so on.

In addition, exposure to civil liability acts as an incentive for businesses and other proprietors to act within the law; the effect of restricted access to the court means that a large number of offenders are not held accountable to victims and indeed society for wrongs committed.

Consumer Focus accepts that, in order to facilitate access to justice, alternative means of funding litigation are inevitable; particularly following the retraction of legal aid. We know that without these alternative means, many claimants will be unable to afford to pursue valid claims. We welcome an open and frank debate on the application of contingency fees, conditional fees, third party funding and the expansion of legal expenses insurance to the England and Wales legal framework. Our concerns about alternative funding relate to the finer details of how these proposals would be applied, and whether there would be adequate regulation and consumer protection. To this end, we are keen to ensure that consumers are given adequate information, protection and safeguards. However, as a matter of principle, we do not wish to see contingency fees apply to personal injury claims.

While it is natural to focus on aspects of the civil justice system that appear to be ineffective, it is important to recognise and celebrate aspects of the system that are effective and responsive to the needs of consumers. The small claims track limit and Alternative Dispute Resolution (ADR) are, in overall terms, cases in point². We continue to support the small claims track as a system that puts consumers at the heart of the process, and welcome changes which may make it even more responsive³. It is important that the civil justice system learns from aspects of the system that is working and uses these in other areas. For this reason, we strongly support Lord Justice Jackson's proposal to introduce a modified small and fast track procedure specifically for Patent County Court (PCCs). The Civil Procedure Rule CPR 63.1(3) currently requires that any intellectual property claim is classified as multi-track and is therefore ineligible to be determined under a small claims basis. This means that the PCC cannot currently provide a small claims track or fast track for copyright infringement disputes. Disputes must be pursued through multi-track regardless of their complexity or the wish of the claimant or defendant.

¹ <http://bit.ly/gytz9N>

² In October 2010, Consumer Focus published a report into users' experience of the small claims procedure *Small claims, big claims*. <http://consumerfocus.org.uk/g/4mv>.

³ We made a number of recommendations in that report for improvement to the procedure.

Lord Justice Jackson's review was presented as a package of reform; it would however appear that the Government has opted to pick and mix from the original reforms. We are concerned that this has resulted in an imbalance; so that the proposals aimed at making cost proportionate is not balanced and tempered by alternative means of funding legal disputes.

Finally, we are not satisfied that these proposals have been sufficiently impact assessed either by Lord Justice Jackson or by the Ministry of Justice (MoJ). We are concerned that the Equalities Impact Assessment has not been carried out in full. We are particularly concerned on the impact these proposals will have on those on low income and other vulnerable consumers. We do not consider it appropriate that policy decisions of such significance should be made on the basis of 'preliminary and incomplete' impact assessment; so described by the MoJ.

Main issues

Cost is an important determining factor in whether access to justice exists for consumers. After all, a key characteristic of access to justice is the ability of consumers to pursue justice without running the risk of financial ruin. We therefore agree that the cost of justice should as far as possible be proportionate to the claim in question. However, proportionality cannot be an absolute or overriding principle. There will always be cases where the complexities or the nature of the legal disputes justly result in legal costs exceeding the value of a claim.

We have known for a long time that civil justice comes at a cost that is unaffordable for most ordinary consumers. We also know that cuts in public spending means that the dwindling civil legal aid budget will be cut further. We are therefore interested not just in solutions that keep the cost of justice proportionate, but alternative means of funding legal actions that will widen access to justice for middle and low income consumers.

Lord Justice Jackson's report makes a number of mixed recommendations that address the twin issues of proportionality and alternative funding mechanisms. The Government hasn't consulted on Lord Justice Jackson's full set of recommendations, but has focused on the primary recommendations around conditional fee arrangements (CFAs), specifically the abolition the recoverability of 'success fee' and 'After the event' (ATE) premium.

One of Lord Justice Jackson's key reforms relates to CFAs. He proposes that 'success fees' and 'ATE' insurance premiums should no longer be recoverable from the losing party. We appreciate that success fees and ATE premiums may have contributed to the disproportionate cost of civil justice. However, we are concerned that if these become irrecoverable, and the claimant has to pay the success fee itself, then CFA will become less appealing to consumers and this may in turn have a negative impact on access to justice. Although Lord Justice Jackson attempts to balance the potential effect of these proposals by proposing a 10 per cent increase in damages payout, we are unconvinced that this is sufficient. This is particularly the case when one considers that damages' payouts in England and Wales have not been up rated for a long time. More importantly, we simply have not seen figures to suggest that a 10 per cent increase in damages will mitigate the detriment consumers are likely to face.

Lord Justice Jackson also proposes that lawyers should be permitted to enter into agreements where legal fees are contingent on success, and the lawyer is paid a percentage of the claimant's damages (damages-based-agreement or contingency fee agreement). We support the expansion of contingency fee agreements. However, as a matter of principle we do not agree that contingency fee arrangement should apply to personal injury cases. And we advocate regulation of contingency fee as a necessity.

Likewise, we are broadly in support of third party funding as an alternative means of funding legal disputes. However, the existing business model for third party funding does not accommodate consumers. Generally speaking, funders look for higher value claims, cases worth £100,000 or more. This puts most ordinary consumer claims outside its remit and so it cannot, in its current guise widen access to justice.

We are broadly in support of expansion and promotion of Legal Expenses Insurance. Indeed we recently completed research into the operation of this market. Our research suggests that this market is fragmented, confusing for consumers, and it prohibits consumers from choosing their own solicitors. Improvements will have to be made before this product can be actively promoted to consumers⁴.

Consumer Focus is concerned that there are no concrete plans to implement the most significant recommendation Lord Justice Jackson has made in relation to intellectual property litigation. The Government's consultation document states that 'consideration of [Lord Justice Jackson's] recommendations to introduce a modified small and fast track specifically for patents county courts is pending an assessment of the success of the new streamlined process.'⁵ The new streamlined process, along with other changes to the rules and procedures, has been introduced to the PCC very recently, on 1 October 2010. We are therefore concerned that postponing consideration for the introduction of a modified small claims track until the success of the new streamlined process is fully assessed could lead to significant delays. In the past four months, 27 consumers have been sued in the PCC for alleged copyright infringement through peer-to-peer filesharing. And with the implementation of the Digital Economy Act 2010 initial obligations code at the end of 2011 we expect a significant increase of such cases being brought before the PCC. Therefore we ask the MoJ to immediately consider the introduction of a modified small claims track to the PCC specifically designed to accommodate consumers acting as defendants in lower value copyright litigation.

Consumer Focus has followed the 27 cases closely and while we welcome the active case management in these cases, the cases highlight fundamental problems in relation to consumers who are defendants in a process designed for commercial entities. The most significant problems relate to the lack of access defendants have to information about the process and the problem of accommodating defendants who are not represented by a lawyer in a process that assumes that all parties have legal representation.

⁴ Our report will be published in March 2011

⁵ Consultation document <http://bit.ly/aVB1YR>, pg.90

Our policy position on the Government's proposals

Consumer Focus's position on the proposals to overhaul conditional fee arrangements.

The proposal: That CFA 'success fee' and ATE premiums should no longer be recoverable from the losing party.

1. These proposals mean that 'no win, no fee' arrangements will lose some of their attraction to claimants, this may in turn have a negative effect on accessing justice; since it means that claimants will have to pay success fee and ATE premiums from their damages. We are concerned that the potential impacts of these proposals have not been assessed thoroughly from the perspective of consumers.
2. We are also concerned that lawyers may be more reluctant to take on 'no win, no fee cases' as they will be relying on the claimant's damages to get their success fee. We are concerned that these cases will become uneconomic to run and that claimants will either retort to self representation or not bring cases at all.
3. It is important to draw attention to the Government's consultation on legal aid which is running in tandem with this consultation. That consultation seems to restrict eligibility for civil legal aid even further. We are concerned that consumers who may have been eligible for legal aid will no longer be eligible, and worryingly these same consumers are likely to be affected by an unattractive CFA. It is important to draw attention to one of the key reasons success fees and ATE insurance premiums were introduced; to ensure access to justice when the option of legal aid was removed from personal injury cases. We now find ourselves in a similar situation and simply haven't seen the evidence that this will not impact disproportionately on one set of consumers.
4. However, we appreciate the concerns that success fees may contribute to the disproportionate costs of civil justice, especially when 100 per cent success fees are currently possible and indeed charged. Therefore, it may be worthwhile exploring the feasibility of capping success fee for all civil litigation.
5. We support qualified one way cost shifting in personal injuries cases, which does have the potential to redress the burden that is likely to be caused by the irrecoverability of ATE insurance. However, we remain concerned that qualified one way cost shifting will not deal with claimant's liability for their own disbursement, particularly in complex cases like employment liability claims. It is crucially important that these proposals are impact assessed thoroughly, and as yet we are not convinced that they have been.

Our position on uplifting damages by 10 per cent for successful claimants

6. In 1999, the Law Commission published a report into general damages⁶. It acknowledged that damages in England and Wales are very low and proposed an appropriate increase. While we emphatically support an increase in damages, it should not be contingent on whether or not 'success fees' continue to be recoverable. Perhaps more importantly, we are unclear as to how the 10 per cent figure was arrived at. We would like to see transparency and evidence which show that the proposed 10 per cent will indeed plug the gap that will exist if success fee and ATE premiums become irrecoverable.

Contingency fees

7. Consumer Focus understands, and accepts as valid, the motivations for considering the expansion of contingency fees in civil cases. We appreciate that some of the motivations are born out of the need for greater access to justice, particularly for plaintiffs who are outside legal aid, but who would find it difficult to fund a claim, and indeed for defendants opposing a weak claim by a wealthy and oppressive claimants. Although we are not opposed to contingency fees in principle, we are keen to ensure that any proposal has inbuilt safeguards which protects the interest of consumers.
8. Consumer Focus has listened extensively to the arguments for and against contingency fees. We will not restate them here, except to say that a lot of the arguments against contingency fees centre around issues of solicitors losing their professional judgement, independence or being overly compensated. However, we are unaware of evidence of conflict being more frequent in countries that allow contingency fees. Nevertheless, some regulation of contingency fees is necessary to protect consumers. This should be designed with input from consumer organisations and should include:
 - rigorous conduct rules pertaining to the details of the contingency fee agreement
 - provision of standardised, well designed, clear and transparent information. This information should make clear what the client should and should not be charged for. There should also be an obligation to inform clients of other forms of funding such as insurance and legal aid
 - a cap on the maximum percentage that can be recovered in fees from the award
 - independent advice regarding the terms of the agreement
9. However, as a matter of principle, personal injury cases should be exempt from contingency fee agreements. Our concerns with the application of contingency fee in personal injury cases are broadly twofold: firstly, we are concerned that injured claimants should receive 100 per cent of their compensation. This money is often based on what would be needed for their recovery, rehabilitation or adjustments to their diminished quality of life. We do not think it proper that fees should be subtracted from damages awarded. Secondly, and linked to our first concern is the fact that damages for personal injury have not been significantly up rated for approximately 10 years, despite calls by the Law Commission to do so. Some continue to argue that awards for damages are considerably lower in England and Wales when compared to other countries. Therefore, it would be iniquitous for claimants, who may currently receive smaller amounts of compensation than might be merited, to part with a percentage of compensation to cover fees. This is irreconcilable with the need for an accessible but fair system.

⁶ Law Commission report 257, Damages for Personal Injury cases non-pecuniary loss, 1999

Our position on key aspects of the Jackson recommendations not covered in the consultation document

Intellectual property – introduction of a modified small claims track to the Patents County Court

1. Consumer Focus would like to encourage the MoJ to push ahead with the implementation of Lord Justice Jackson's recommendation to introduce a modified small and fast track the PCC, soon to be renamed the Intellectual Property County Court. As the primary forum for lower value intellectual property disputes the PCC is playing an increasingly important role in ensuring that consumers have access to justice. Over the past eight years consumers have become the target of lower value copyright infringement litigation in relation to alleged copyright infringement through peer-to-peer filesharing. With the implementation of the initial obligations code of the Digital Economy Act 2010 the PCC is likely to see an increase in such cases. Cases in which consumers are alleged to have infringed copyright through peer-to-peer filesharing will usually have a value of up to £5,000 and we believe that a modified small claims track for the PCC is vital in ensuring that these consumers have access to justice and are in a position to defend themselves.
2. According to the Intellectual Property Court Users Committee (IPCUC) the recent changes to the PCC rules and procedures were mainly designed to address 'the long-standing concerns about the high cost of intellectual property litigation in the United Kingdom, particularly for small and medium sized-enterprises'.⁷ As the IPCUC points out, the PCC was created by Parliament to serve the interests of SMEs by providing an affordable forum for lower value intellectual property disputes.⁸ Imposing a limit of £500,000 on the financial remedies available in the PCC⁹ will reinforce the desire to make the PCC a cost-effective forum to resolve lower-value intellectual property disputes.¹⁰ Lower-value copyright infringement disputes now involve consumers, and therefore their needs should receive greater consideration in the ongoing PCC reform.
3. We recommend that the MoJ undertakes a review into whether, in respect to copyright disputes involving consumers, the PCC performs against its objective of providing an affordable forum for litigation and providing access to justice. This includes the few cases which have been processed under the old rules and procedures, and the 27 cases which have been brought under the new rules and procedures since 1 October 2010.

⁷ Intellectual Property Court Users Committee, Working Group's final report on proposals for reform of the Patents County Court, July 2009 pg.5

⁸ Ibid, pg.6

⁹ Setting the Limit: Consultation on setting the limit on the value of claims heard in the Patents County Court, Intellectual Property Office, October 2010, pg.12

¹⁰ Intellectual Property Court Users Committee, Working Group's final report on proposals for reform of the Patents County Court, July 2009 pg.7

This review should commence immediately and inform the introduction of a modified small claims track to the PCC, as recommended by Lord Justice Jackson. As part of the review the MoJ should also engage with the Independent Review of Intellectual Property and Growth, launched by the Prime Minister in November 2010. The call for evidence specifically asks whether ‘to what extent is cost of litigation a factor in the effectiveness of civil remedies?’ including the ‘effect of different civil fora: High Court / County Court / Intellectual Property Office (IPO) Tribunal.’¹¹ It is important that the review builds on the work done by the IPCUC and Lord Justice Jackson and that the MoJ works closely with the IPO to introduce a modified small claims track to the PCC as soon as possible. We therefore recommend that:

- the MoJ should undertake a review into whether, in respect to copyright disputes involving consumers, the PCC performs against its objective of providing an affordable forum for litigation and providing access to justice
- the MoJ should work closely with the IPO to introduce a modified small claims track to the PCC as soon as possible

Fixed cost

Consumer Focus was convinced by the arguments advanced for fixing cost in Fast-Track claims. We know that in some respects fixing costs may control the disproportionate cost associated with civil justice and contribute towards providing some certainty and predictability around recoverable costs. Although we had some concerns about the unintended consequences of fixing costs, we were of the opinion that these were not insurmountable, so long as adequate safeguards, exceptions, flexibility and judicial oversight were built into an effective and fair fixed cost regime. We would like to reiterate that we expect to see a careful and consultative consideration of the suggestions listed below when this work is taken forward:

4. It is important to give consideration to the exemption of complicated cases from the fixed cost regime eg employment liability and industrial disease cases. Consumer Focus believes that considered consultative work should be undertaken to determine the level at which fixed cost should be set. This work should involve a thorough analysis and understanding of solicitors’ costs, including the various constituent parts involved.
5. It is important to be clear about when and how the fixed cost would be up rated and indeed when it would be reviewed, to assess whether the costs are capped at the right level.
6. We are keen for there to be some judicial oversight over the process, including the possibility of removing either the fixed cost limit or moving a case into the multi track where a judge considers it appropriate.
7. We are concerned that fixing costs may lead to poor quality in standards from service providers, who know that their efforts would be remunerated at a set rate regardless of effort. We believe that standardised consumer information about the details and nature of work to be carried out would mitigate this.

¹¹ Review of Intellectual Property and Growth: Call for Evidence – Enforcement of rights, Independent review of IP and Growth



Consumer Focus's response to MOJ's review on civil costs

If you have any questions or would like further information about our response, please contact Lola Bello, by telephone on 020 7799 7984 or via email lola.bello@consumerfocus.org.uk

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Published: February 2011

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