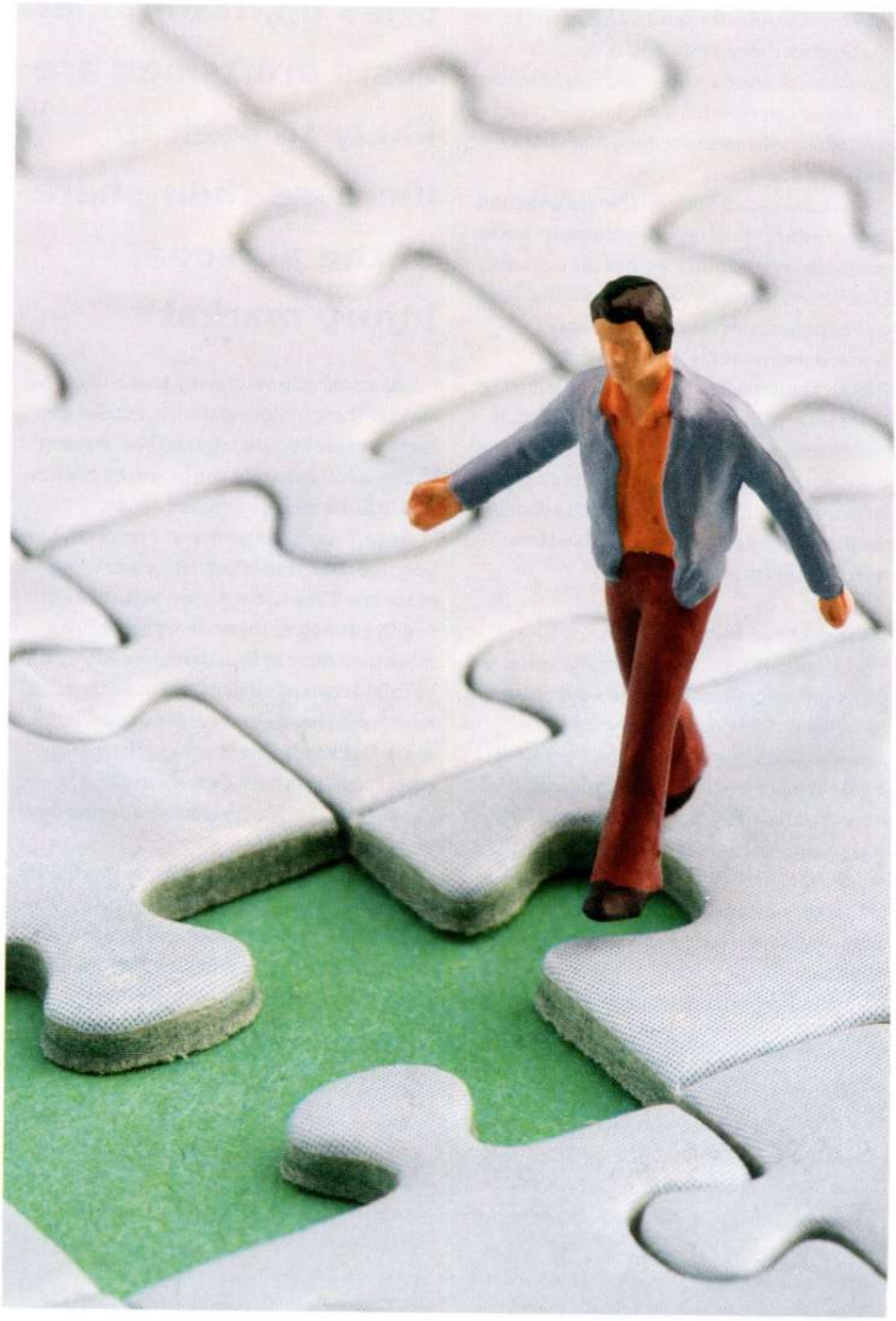
Changing tack

The future of the costs industry is uncertain, and practitioners should reconsider their current procedures in order to survive, says **Simon Gibbs**

THE MODERN LEGAL costs industry that was initially created to serve insurers and defendants has, in the space of little more than a decade, undergone a rise and fall that would have taken other industries decades to pass through.

During the late nineties the defendant legal costs negotiating industry sprang up from nowhere. Firms offered their services to insurance companies offering to negotiate reductions in claimant solicitors' costs claims. The initial success of these firms was, in part, based on the potential third party costs savings which could be achieved, but also coincided with the increasing legal complexity of this area caused by the introduction of the Access to Justice Act with the recoverability of success fees and after the event insurance premiums.

Many insurers recognised that it was becoming unrealistic to expect claims handlers to stay 100 per cent up to date with the law in this area and that negotiating costs settlements with third parties was becoming overly time consuming. The costs negotiating industry evolved to deal with large volumes of claims from insurers. In turn, this encouraged the creation of claimant costs negotiating firms to act on behalf of claimant solicitors. The increasing role played by costs negotiators squeezed many traditional costs draftsmen out of the picture.



Key developments

Recent events however have had a dramatic effect on the landscape. The introduction in 2003 of fixed predictable costs in non-litigated RTAs which settle for £10,000 or less has caused the biggest impact to date. Although still requiring some scrutiny, many insurers and claimant solicitors naturally felt comfortable bringing this work back in house. Even where these claims were still sent to costs negotiators, often on low fixed fees, the value of this work obviously reduced significantly.

At a stroke the volume of costs work shrank remarkably with an obvious impact on costs firms, both claimant and defendant. The closure of large costs negotiating firms has already been seen within the industry.

Following on from this development is the forthcoming introduction of the new claims process. This process will cover RTAs with a value of no more than £10,000. Importantly, it incorporates a new streamlined quantum hearing procedure for resolving cases where liability is agreed. Cases falling within the new process will attract a new fixed fee regime. In theory, therefore, more cases will be subject to fixed fees than is currently the case.

At the time of writing, details of the new fee structure have not been released and issues surrounding the appropriate level of these fees have been a major hurdle in finalising the scheme. Indeed, at one stage it appeared the whole process would be abandoned. It is now planned to launch in April 2010. Although we need to wait to see the final rules, it appears that a further chunk of

low-value work is going to be lost to the costs industry.

If that were not enough, Lord Justice Jackson then appeared with his 'Review of Civil Litigation Costs'. His 'Preliminary Report' seriously considers the possibility of replacing two-way costs shifting with one-way costs shifting in favour of claimants, at least in personal injury litigation. If this finds its way into the rules it would mean an end to the need for defendants' bills of costs. It would mean an end to the need for claimants to oppose defendants' costs. It would mean a reduction in the work for costs negotiators and costs draftsmen.

More radical, and almost inevitable to find its way into his final report, is the proposal to extend fixed fees to all stages of the fast track (This is very similar to what the original new claims process envisaged until it was watered down to only cover lower value RTAs). The impact of this proposal, if it becomes a reality, cannot be understated. It would remove 95 per cent of personal injury costs work. Although certain claimant representatives continue to oppose such a change, the pressure for an extension of fixed fees now seems unstoppable.

More people for less work

The changes to date, and those now being proposed, have also coincided with upheaval in the legal aid field. The move towards increased fixed fees in family and criminal legal aid matters will have a significant impact on traditional costs draftsmen. The Association of Law Costs Draftsmen, in their response to the 'Carter Report', predicted serious implications for some of its members with the loss of livelihoods as an inevitable outcome.

As legal aid work dries up, traditional costs draftsmen are likely to seek to increase their share of the personal injury market. However, this will occur at the exact same time that this market significantly shrinks. In short, there will be more people chasing less work.

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The small volume of work that is likely to survive these upheavals will comprise the higher-value litigated claims. The ongoing changes to the market are, however, not limited to those issues identified above.

An unusual change, in some respects, has been the incursion of barristers into this field of the law. Prior to the Access to Justice Act coming into force there were probably no more than three or four barristers who could be called costs specialists and most detailed assessment hearings were conducted by costs draftsmen. The number of barrister costs specialists now, conservatively, is a good 20 to 30, with many more offering their services in this area.

The interest of the junior Bar in this field is natural given the pressure being felt in relation to the volume of work and fees in other areas, not least as a result of the incursion of solicitors into areas of work previously considered to be the domain of the junior Bar.

The Bar's interest in costs has no doubt been fuelled by the number of traditional costs draftsmen who have abandoned all attempts to undertake their own advocacy given the increasingly complex arguments that are run on detailed assessment. Future reductions in work volumes may tempt some draftsman back to advocacy, but this is not an easy skill to master and the future will see straightforward detailed assessment hearings become a thing of the past.

Adopting a new approach

The future of the costs negotiating industry is precarious. Most of these businesses were designed to deal with large volumes of low-value, non-litigated claims. The future will consist of a low volume of high-value litigated claims. The next few years are likely to see the merger or closure of many of these costs negotiating firms.

A similar pattern is likely to develop within those costs drafting firms with a heavy reliance on personal injury work. As these changes begin to occur, insurers and solicitors are likely to review their current arrangements. As fixed fees are expanded, this will, in part, concern arrangements for bringing such work back in house and training claims handlers and solicitors to properly apply the new rules (whatever those are).

The wider review will concern consideration of costs partners for the future. Insurers and solicitors will want to consider whether previous volume suppliers are ideally suited to deal with the remaining work. The emphasis is likely to be on technical expertise and advocacy experience.

There will be a considerably greater focus on how higher-value claims are being handled, as opposed to these cases becoming 'lost' within the volume work. It will be interesting to see how many costs firms suddenly start claiming to have always been experts in higher-value work.

Insurers and solicitors are also likely to focus on how their costs partners add value to the services they offer. Until recently, this has been an industry dominated by a handful of large firms able to deal with volume work provided by major insurers and large personal injury solicitors.

The future may see an increasing willingness to use smaller niche firms who are able to offer a more specialised and sophisticated service. In any event, the next five years are likely to be as dramatic for the costs industry as were the last ten.

Preparing for the future

- Any expansion of fixed fees will see both insurers and claimant solicitors take more of this costs work back in house. This may require careful in-house training of staff and careful auditing. Experience suggests there was initially a large amount of costs slippage on the part of defendants when fixed predictable costs were introduced, with some insurers thinking the rules were more straightforward than they actually were, and unnecessary costs therefore being paid out. If insurers have learnt from past experience they are likely to take a more cautious approach next time. Equally, claimants will want to ensure that they are recovering the maximum available.
- Those who currently employ in-house costs draftsmen may find they will no longer have sufficient work to justify keeping the remaining work in house and will need to start looking for external providers.
- Costs negotiating firms and costs drafting firms will need to start considering future partners for merger or takeover in order to survive.
- Genuine technical expertise and advocacy experience will acquire a true premium. Clients will become more discerning about the service they are receiving. In turn, costs firms will either need to train staff to a much higher level then is currently the norm or look to recruit the best staff from those firms that do not survive any future changes.
- The Bar is likely to look to strengthen its role in the field of costs.

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