Is cost-shifting stifling access to justice?

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In the first of a new series of updates written by members of the Commercial Litigators' Forum, chair Hilton Mervis puts the case for adopting a different approach to costs

The Commercial Litigators' Forum (CLF) has a track record of being at the forefront of discussing important changes to the judicial system—such as changing the mindset towards the introduction of conditional fee agreements (CFAs)/contingency fees. The pressing issue that now arises is whether the level of legal fees and the costs-shifting rule actually prevent access to justice for not only those without means, but also for the wealthy and small- and medium-sized enterprises. The time has come to change the costs regime.

The whole concept of being able to recover costs is inherently at odds with conducting litigation proportionately. The bandages used to help get access to justice (such as after-the-event (ATE) and funding) do no more than to (at a macro level) add to the costs of litigating. In order to get this debate going, I will be suggesting that we endorse some of the aspects suggested by Lord Justice Jackson in his 2017 Review of Civil Litigation Costs and develop a system which enables parties to resource their case proportionately in order to actually enjoy the benefit of getting the chance of a hearing before a judiciary held in such esteem by the world at large.

In essence, I favour adopting and modifying aspects from the US and German systems. Recoverable costs should be fixed in advance at a low maximum level. However, the court should retain the right to award costs on the basis of our existing costs-shifting rules where there has been 'unacceptable conduct'—vexatious litigation or blatant disregard of rules, and crucially, where there has been a finding that a party has promoted a dishonest case. This will enable greater access to the courts while at the same time actually discouraging bad conduct to a much greater degree than is presently the case.

As Lord Justice Jackson points out in his report, abolishing costs recovery is not so radical: we already adopt this approach in a number of tribunals. I want to bring to life some examples to help look at our system in a more critical way and highlight the need for urgent reform.

I recall when chairing a *Legal Week* Disputes Conference asking the then head of the Commercial Court if he personally, given the risk of cost-shifting, would engage in litigation where he had a say 55% prospect of success and had a few million or so at stake. The answer was 'no'. The answer was consistent with the harsh reality that most experienced litigators are rather like chefs who would not choose to eat in their own restaurant.

Two examples: are they fair?

If you were inventing a system to provide access to justice afresh, would you design it so that a litigant who wants to bring a valid good faith case on advice would, in the absence of securing some expensive ATE insurance, risk bankruptcy? Let's take two examples.

Let's imagine you got caught up in the case of *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98—a case known to all of us for the seminal judgment of Lord Hoffmann on how to interpret contracts. The case proceeded up from first instance to the then House of Lords. On the way, four judges said what was written made perfect sense, and five said it made no sense. The winner would get back all the costs for the whole process. The loser, for being marginally on the wrong side of an odd number of judges, would face a crippling costs bill (with no contribution from the four judges who got the law wrong).

Now let's imagine you prevailed against a party which engaged in all forms of tactical litigation and fabricated evidence. The winner will get their costs, but in reality, the 'indemnity' costs order in their favour will only be worth around 10% more than the standard basis (less than the service charge in a good restaurant).

Does this sound like an optimal system?

Litigation funding & ATE: not the solution

In order to make the system one a sane person would choose to participate in, it is said we need to pay money out to third-party funders and obtain ATE cover. Apparently, this is a growing and booming area where it just requires a 60% prospect of success and you can put your feet up and

enjoy the ride stress-free. Well, this is not quite how it works in practice.

Funding is all about the cost of litigation, and it stands to reason this is not going to be a cheap exercise. The money paid out to ATE and litigation funders is money that would otherwise go the participants in the litigation. It is not a no-cost option. From a macro-economic perspective, it is inefficient and leaks money from the actual protagonists who ought to be entitled to have their dispute resolved as efficiently as possible.

Leaving aside the macro problems with having an expensive add-on to an expensive system, the process of actually getting funding costs a lot of money. It is also the case that funders want the simplest cases with the greatest prospect of recovery. I was involved in a case where the client sought funding for many years, and ultimately it was rejected by every conventional funder. It did not fit the profile. Because it was for a sum in excess of £100m, there was no way to ensure that costs from numerous defendants would not exceed £10m. Ultimately in excess of £100m was recovered, but our system is such that even a case of this magnitude can leave a litigant without any recourse or access to justice. There are many accounts of litigants having perfectly respectable cases who cannot get adverse costs cover and are thus deprived of the opportunity of getting help on a CFA and/or bringing their case in a low-cost way.

The 'crazy' litigant in person

This example is brought up as the response to any suggestion of removing costs recovery. The simple answer is, as I have suggested, to retain costs-shifting to deter inappropriate conduct and cases. The litigant in person who is litigating now will still be litigating under the new landscape. But they will now be joined by other litigants seeking justice, either supported by law firms or conducting cases on their own.

It is doubtful the courts will be filled with such people because litigation, even without the suffocating costs-shifting rule, is stressful and time-consuming. If more cases did arise, that would be a good thing—perhaps a sign of access to justice for more people and not just the few who can fund the super-cases which can monopolise months of court time.

The arms race

Litigants and their lawyers get carried away in thinking that costs can be spent in the knowledge that if successful, a good proportion (maybe say 50% or more) will be recovered. When the first cost-shifting on interlocutory hearings was introduced, I was an associate at Herbert Smith and headed their inter-firm advocacy unit. As soon as those changes came in any early experience of arguing over a simple time summons ended. Instead, as every hearing now had the risk of an immediate costs order it needed to be won—at all costs. So trainees or junior associates were replaced with senior counsel or partners. The arms race had begun which can be illustrated by way of a recent example I was involved in where an application in the Commercial Court for an extension of time left the applicant with a bill of approx. £100,000—(almost a third of the guesstimated cost of the disclosure process). The chilling effect on access to the courts of this type of system cannot be underestimated.

Costs-shifting means it is no longer possible for a party to try and minimise costs in the hope of getting a decision from a judge. The immediate built-in counterclaim (being the costs of the successful defendant) makes it rational to spend more in the hope (illusory in most cases) of winning and recovering those costs. This is compounded by the fact that as most cases settle the parties often end up with 'each side bearing its own costs'.

Costs budgeting, guessing games & capping

The idea of costs budgeting may be a noble and well-intentioned one, but it is unworkable. It is a huge distraction and an added cost to an already expensive process. It is also inherently at odds with what ought to be revealed to the other side at the start of a case.

In a debate organised with Lord Justice Jackson and Roger Stewart QC against the motion, and myself and Nick Bacon QC for the motion 'Cost budgeting is inappropriate in complex cases', I invited Lord Justice Jackson to perform the same exercise as a solicitor at the start of a case, by guessing the number of sweets in a large jar (prominently displayed at the front of the room). Well not quite, I pointed out to him he should not look at the jar—as the exercise solicitors and judges face is in fact more analogous to having to guess the number of sweets in the jar based solely on an imperfect description of the jar and the sweets. One memorable example given was whether one should, if fully and properly setting out the estimated costs of witness statements, set out that they would be enormous as the clients were perhaps likely not being truthful and the documents did not match their account so would need to be explained away? Not many lawyers would comply with their obligation to predict the actual level of costs as opposed to what might be reasonable in these circumstances. The time expenditure for this process and the satellite litigation it spawns over the grounds for challenging and justifying the various cost assumptions are part of a ritual that does not benefit litigants overall.

Conclusion

It is said that when bringing up children, the only thing you can really control is yourself. The existence of costs recovery and the way it impacts litigation means that litigants in fact have no chance of controlling what they may end up paying for legal costs. Although my thoughts have primarily been directed at large to medium-sized commercial disputes, one can also see that pro bono centres would benefit from being able to help their customers who want access to justice but cannot afford the adverse costs or the resource needed to minimise that risk. They could, in theory, get limited help and assistance to bring well founded cases.

The fact more cases may now settle is equivocal evidence. Settling because the system is so risky and unfair does not give justice to those who have good cases. Settling because you know all parties can end up with their case in front of a judge is a much better barometer for a just settlement. If not already convinced, give a moment's thought to the compounding of this chilling impact on access to justice of the requirement to provide security for your opponent's costs (costs which ought never to be recoverable in the first place). While every self-respecting lawyer will be the first to say how much their skill and expertise changed the outcome of a case, there are many examples of where a judge's view cannot be shifted and broadly the same result would have occurred even with modest or no representation. It is the costs-shifting rule that removes that important right—to have one's day in court—from ordinary individuals and businesses. It is time for change. **NLJ**

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