

Creating a monster

Jeff Lewis examines the unintended costs impact of reforms to civil justice

Have you ever read a government manifesto which pledges to increase crime? Or seen a restaurant advertise that it aims to make its food less healthy? Thought not. And have you ever come across a proposal to reform the civil justice process with the aim of increasing costs? Again, thought not.

Phrases like ‘cutting crime’, ‘reducing obesity’ and ‘reducing legal costs’ are all standard fare, looking great on paper but much harder to actually deliver. But whereas some governments might at least claim to have cut crime, and whereas some restaurants might have developed some healthier food options, it is questionable whether, in commercial litigation, despite all that has been said about cutting legal costs, any of the major reforms to civil procedure have actually achieved that.

Cutting legal costs has understandably been a major objective of governments for many years. And few can argue that this is indeed a laudable aim. We all have experience of businesses – especially SMEs and owner-managed businesses – being unable to access justice because of the prohibitive cost of litigation. But, in the world of commercial litigation, how far has that objective been achieved?

There have been two big, judge-led reviews leading to civil justice reforms in the last 25 years. First, Lord Woolf carried out a review of civil procedure (which led to the introduction of the Civil Procedure Rules (CPR) in 1999), one of the aims of which was ‘to improve access to justice and reduce the cost of litigation’. Then, in 2009, Lord Justice Jackson (as he then was) was tasked with making proposals to rein in legal costs (or, as his Final Report puts it, ‘to make recommendations in order to promote access to justice at proportionate cost’).

Many of Woolf’s and Jackson’s recommendations impacted far more on personal injuries litigation than on commercial litigation, and it might fairly be said that many of their recommendations have been hugely effective in reducing the costs of personal injuries litigation. But, to the extent that their (and other) reforms had the objective of reducing costs in commercial disputes, how successful were they?

IMPACT OF PAPs

A key innovation in the CPR was the introduction of Pre-Action Protocols (PAPs). Over the years, there have been a growing number of areas of litigation to which a specific PAP applies, including areas of commercial litigation (for example, debt claims, construction and engineering disputes, and professional negligence claims). Those claims not covered by a specific PAP are captured by the general Practice Direction on Pre-Action Conduct and Protocols. All of the PAPs require a full exchange of information and documentation in an initial letter before proceedings are commenced. All of these PAPs effectively replaced the old ‘Letter Before Action’, which sometimes consisted of little more than a short, one-page letter outlining the briefest of facts and threatening legal proceedings after seven days. Frequently, such letters were little more than a sham effort to avoid litigation, which sometimes followed swiftly afterwards (often before even the claimant knew much about their case). By contrast, the PAPs make clear that litigation should be a last resort.

There is no doubt that compliance with the rigours of the PAPs in commercial cases can save costs and, perhaps even more importantly, allows both parties to know, before proceedings are commenced, what

case they are facing. There is no doubt that some cases settle pre-proceedings as a result of the exchange of information in the pre-action correspondence encouraged by the PAPs.

There is also no doubt that some unmeritorious cases do not see the light of day because a robust Letter of Response from a proposed defendant dissuades the proposed claimant from proceeding further. In those cases, there can be no doubt that the introduction of the PAPs has saved costs.

However, in cases that do proceed to litigation, the reality is that the pre-action correspondence often unnecessarily increases costs, since all of the effort involved in it is then duplicated once proceedings have been issued. Further, compliance with PAPs leads inevitably to ‘front loading’ of costs: while this can enable parties take a more realistic view of their case at the outset, the investment of such a high level of costs at the pre-proceedings stage can itself act as an obstacle to settlement.

COST OF CMCs

The Woolf reforms introduced the concept of a Case Management Conference (CMC). This was part of Woolf’s concept of case management, allowing the courts to manage cases and to control litigation. Until that point, it was the parties (and not the court) that

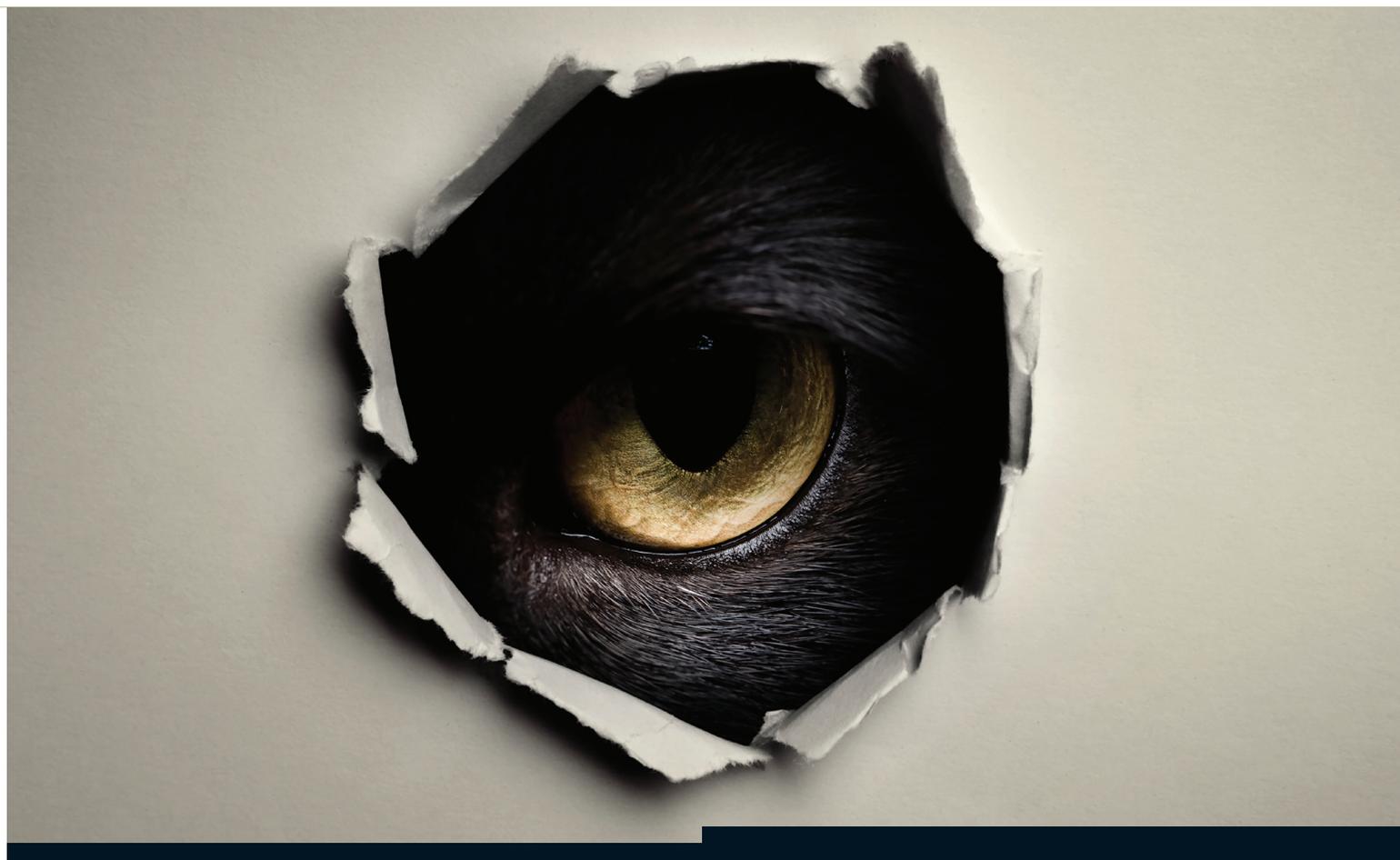
Businesses are still puzzled by why it is that their legal bills are getting bigger, when they were supposed to be getting smaller

controlled litigation, often leading to severe delays. Whereas previously, all cases had been managed in pretty much the same, summary way, now the most important cases would be allocated to the multi-track and case-managed by a judge at a CMC.

Woolf envisaged that the case management judge would ‘grab hold of’ the case at the CMC, and manage it according to its own peculiarities and needs. To do this, the parties would need to supply the court with various documents, including a case summary (agreed if possible), draft directions (agreed if possible), and a copy of ‘all documents that the court is likely to ask to see’ (which, realistically, means a bundle of all significant documents – and, sometimes, a list of issues and / or a chronology). In addition, parties wanting to use expert evidence must be able to justify the need for it; parties must be in a position to prosecute any other applications they wish to bring; and often parties are required to attend the CMC with details of availability for trial.

Sensible as all of this may sound, I question whether the cost of this level of preparation for a CMC has reaped a proportionate benefit. We all know that in practice it can take a long time to agree a case summary and / or draft directions and / or a chronology; there may be a variety of reasons for this, not least caused by the fact that the parties are, ultimately, ‘pulling in different directions’; inevitably, what one party wants is what the other party does not. So the cost of preparing

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for a CMC can be extremely high. Is the extra expense justified? Given that the court is often faced with having to hear CMCs in a compressed period of time (thanks to listing pressures), and given that, in most cases, what might loosely be referred to as ‘standard’ directions are given (disclosure, witness statements, expert evidence where appropriate, preparation for trial), I suspect that it is not.

But if the CMC, when it was first introduced in the CPR, caused a spike in costs, more recent changes have turned that spike from being molehill-sized to mountain-sized.

COSTS BUDGETING

Probably the most significant change introduced by Jackson to commercial cases in the multi-track was the introduction of costs budgeting. The purpose behind it was to ensure that a party knows the maximum amount that it is going to have to pay its opponent if it loses its case. However, it is difficult to see how it actually reduces costs, given that costs budgeting does not operate to cap the costs that a party has to pay to its own legal team; in fact, it invariably increases the legal bill (as opposed to decreasing it) for the successful party, which has to pay the (inevitable) shortfall between its own legal team’s actual fees, and the figure that has been set by the court by way of costs budget.

The costs budgeting process itself comes at significant expense, as the costs of preparing the budgets and preparing for the case management

hearing at which they will be considered is normally significant. Now that we have been doing this for a few years, we are a little more familiar with the process of preparing a costs budget. But even now, my guess is that few solicitors can prepare a proper costs budget in less than two-to-three hours. Where a claim is particularly complex or high-value, the time needed to prepare a costs budget will increase significantly. So that is an extra few hours for which a client has to pay.

But it does not end there, since a further significant tranche of costs is then incurred in discussing the costs budgets and preparing budget discussion reports. Effectively, this involves a mini-detailed assessment on both sides, but with the process complicated by the tactical considerations engendered by the fact that neither party knows which of them ultimately will be the paying party, and by the reluctance of either party to challenge its opponent’s costs in such a way as to damage the credibility of its own costs budget.

By the end of the budgeting and negotiating process, the likelihood is that the client has racked up several hours of extra solicitors’ time. The hearing itself is inevitably likely to be extended by around at least an hour in order to deal with costs budgeting, and not infrequently costs budgeting has to be deferred to a later date; for example, because the court does not have time to carry out the budgeting exercise, or because it has made a direction that scuppers at least one of the costs budgets

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– if an order for a split trial or a significant amendment is unexpectedly made, for instance. In such cases, the parties incur the costs of a whole separate hearing. For these reasons, budgeting often adds significantly to a party's costs rather than reducing them. All in all, it is a lot of extra costs for little (if any) ultimate benefit.

DISCLOSURE

Another reform introduced post-Jackson was the requirement for parties in commercial litigation to produce disclosure reports. This was intended to address the perceived mischief caused by the courts' tendency (with the blessing of the parties) always to order standard disclosure. The completion of a disclosure report requires an interrogation by solicitors of the parties as to where their documents are located and how they are stored. The intention was that this, together with the Electronic Disclosure Questionnaire, would lead to a narrower, more focused approach to disclosure. In fact, it makes virtually no difference at all, yet it adds another layer of costs to the litigation process.

From this, we moved last year to perhaps the most disproportionately expensive change of them all (albeit under a pilot scheme): the Disclosure Pilot Scheme (DPS), which came into being in the Business and Property Courts (BPC).

The ultimate purpose behind the DPS is to reduce the costs associated with the disclosure process, bearing in mind the vast swathes of electronic documents generated by modern businesses. The result is that the days of defaulting to 'standard disclosure' are over, the new regime providing for five different models for disclosure on an issue-by-issue basis.

Everything from the preparation of the list of issues for disclosure, which generally involves input from counsel (when did counsel ever get involved in disclosure previously?), through to the completion of the detailed and unnecessarily complicated Disclosure Review Document (DRD), and the discussion with opponents – which can become protracted and / or hostile – all adds significant extra costs. Even after all this process has been completed, the time spent by the court in laboriously going through the list of issues for disclosure, and listening to competing submissions as to which model for disclosure should be applied, is considerable.

While accepting that, in very high-value cases between huge companies, the DPS may potentially produce a costs saving, my own experience – and that of most practitioners – over the first 12 months of the DPS is that the cost of complying with it is significant, and entirely disproportionate to any benefit gained. One of the biggest flaws of the DPS is that it rather assumes that the case is going to go to trial; because in reality, most cases do not reach trial, and so the very significant frontloading of costs that is required by the DPS produces no (or very little) return for that investment. Indeed, the two critical points at which significant costs are incurred in complying with the DPS are right at the start of the case (pre-issue), and at the time when the Disclosure Review Document needs to be completed, before the CMC. Yet these are precisely the points in the process when costs really need to be kept to a minimum, not least because the point at which parties generally begin to talk seriously about settlement is just after the costs and case management hearing. All of this, of course, entirely defeats the objective of the DPS, and causes a problem in terms of costs and access to justice to those 'ordinary businesses' engaged in anything other than very high-value litigation. Those businesses can only hope that the feedback from the pilot scheme is sufficient to consign the DPS to history.

**LOOKING AHEAD**

So much for history. What of the future? The reform work purporting to save costs is not over yet. A working group of the Business and Property Court has been reviewing the rules on witness statements, and it published its report at the end of last year. It arises from concerns, set out by Jackson and underscored by cases such as *Cathay Pacific Airlines Ltd v Lufthansa Technik AG* [2019] EWHC 715, around the fact that (among other things) witness statements are often more a product of lawyers than the actual evidence of the witnesses. The working group, in its report, fought shy of recommending any radical reforms to the witness statements process, but even some of the recommendations that it has made could lead to a disproportionate increase in costs for parties.

For example, one of the recommendations is that the individual courts within the BPC should give further consideration to the introduction of a requirement for parties to produce a pre-trial statement of facts setting out their factual case. This would be in addition to witness statements and exchanged at the same time, with a view to confining the witness statements themselves to evidence which can properly be given by that witness at trial. While this is only a recommendation, and the detail will need to be fully considered, anything that involves extra work should be regarded with some circumspection, otherwise this potential reform could too be one that achieves the opposite of what is intended.

There is no doubt that some of the changes introduced by the rule-makers (including those prompted by the reviews conducted by Woolf and Jackson) have been of overall benefit to the litigation process. But when it comes to commercial litigation, as illustrated above, most of the changes that were designed to save costs have in fact served only to increase costs – and disproportionately so.

And so while communities can dream of lower crime rates, and healthy-eaters can dream of better choice in restaurants, businesses are still puzzled by why it is that their legal bills are getting bigger, when they were supposed to be getting smaller.

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