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Roundtable: civil litigation

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Civil litigation roundtable

Litigators are trained to think on their feet – which is just as well, given the recurrent bouts of legislative and procedural reform imposed on them. Eduardo Reyes reports from the latest roundtable.

The civil claims arena is seemingly convulsed by permanent revolution. Those attending the *Gazette*'s latest roundtable, on civil litigation, costs and funding, have worked with successive waves of reform since Woolf in 1999. And the Ministry of Justice could hardly be making itself busier, spurred on by the chancellor of the exchequer and even the prime minister.

Litigators are trained to think quickly on their feet. In the current climate, that is just as well.

At the heart of Jackson LJ's reforms, of course, are concerns to control the cost of cases and to change the risk matrix. And the good judge is not done yet, most recently proselytising for fixed costs to apply to claims up to £250,000.

This is where Anthony Gold's managing partner David Marshall begins the discussion, referring to Jackson's speech in January this year about what the judge called the lower reaches of the multi-track.

Marshall describes Jackson's approach as 'taking proportionality purely as a number, and ignoring the inputs'. As a result, he estimates, lawyers would likely see 'shortfalls in more cases'.

David Golton, head of litigation at Wedlake Bell, goes so far as to question the appropriateness of the judiciary being directed to focus on costs on prescriptive lines. The cases affected, he notes, are 'commercial disputes, or disputes between individuals – none of whom are relying on the state' other than insofar as the state provides the courts service.

The roundtable takes place a day after the introduction of controversial new court fees, which effected a steep increase in fees payable by claimants for money claims up to a capped figure of £10,000.

Rosling King partner Georgina Squire describes the fee hikes as 'yet another challenge' in terms of access to justice. Squire, who is also a committee member of the London Solicitors Litigation Association, adds: 'SMEs… are now being stretched in terms of whether they want to litigate anymore because of the cost of litigation, and the likely recoverability of any costs in the event that they win.'

She adds: 'Why are we constantly trying to squeeze costs? For what purpose? Protecting a defendant who loses?'

In common with others present, she is critical of the way the 'smaller end' of the claims spectrum is being defined: 'Actually, these are very sizeable claims for most people in this country. It's a travesty… that access to justice is being restricted in this way.'

Dean Nicholls, a partner at Gordon Dadds, alludes to his own experience of disputes in the region of £250,000 where, under the regime advocated by Jackson, the fixed cost would be about £80,000 (covering both solicitor and counsel). Although these are not high-value claims, he notes, 'the issues are nonetheless complex and of great importance to the parties. There is a real risk that those… without deep pockets will simply either be deterred, or unable to advance their cases in the way that they probably need to. I think that must run against the concept of access to justice.'

Simon Cullingworth, a partner at specialist disputes firm Kobre & King, questions whether judges are adequately equipped for their role in superintending costs and budgeting in civil litigation: 'My view is that the judiciary had this sprung on them with very little training and forethought. At the bar you are not trained in any of that.'

In higher-value cases, Cullingworth notes, fewer costs issues arise, for the simple reason that 'the judges know that the lawyers have either got in-house cost specialists, or there are costs lawyers who have been involved in budgeting'. So 'there is very little tinkering or attempting to try and analyse the budgeting of those cases'.

He adds: 'I was in the Commercial Court recently, and the look of relief on the judge's face at the CMC [case management conference] when he saw that both sides had agreed each other's cost schedules of many millions of pounds was palpable – to the extent that he made a joke about it.'

J-codes

The discussion then turns to the use of 'J-codes' – standardised codes categorising every activity within the civil litigation process for costs assessment purposes. At present, adoption of the codes is partly dependent on the judiciary and partly on litigators themselves.

Adoption of the codes has been partial, says Andy Ellis of costs consultancy Practico, and in consequence 'a bit of myth-busting is needed'.

He adds: 'There seem to be two camps: people that hate them and are resistant at every level and those people who have actually used [the codes]. The first camp is very large and vocal.'

Yet Ellis contends: 'The idea of actually describing the work that people do more logically than may be done at the moment, and having a standard… I would have thought that is generally a good thing.'

'We are [using the codes] because our American clients impose them on us,' reports Kobre & King's Cullingworth. As an English lawyer, Cullingworth's initial reaction was 'a big sigh'. However, he is now a convert, 'having witnessed the speeding up of the billing and payment processes – because the client is reading your bill against a coded system'.

'It's had a beneficial commercial effect,' he adds, even though 'trying to squeeze an associate's comment on what they have done that day into a J-code can sometimes be a challenge'.

Use of J-codes is not alien for many, Nicholls stresses: 'On a practical level, anybody who is working regularly with third-party funders will know that you have to agree your own budgets directly with the funder – and with the client, obviously. That will be broken down into strict categories that won't necessarily correlate directly with J-codes, but there is some sort of equivalence.'

At the table

Robert Dougans, Bryan Cave; Dean Nicholls, Gordon Dadds; John Bechelet, Bivonas; Joel Heap, DWF; Tom Matusiak, Stewarts Law; Kevin Bonavia, Peters & Peters; Andy Ellis, Practico; David Golton, Wedlake Bell; Eduardo Reyes, Law Society Gazette; David Marshall, Anthony Gold; Brie Stevens-Hoare, Hardwicke Chambers; Georgina Squire, Rosling King; Simon Cullingworth, Kobre & Kim; Stephen Rosen, Collyer Bristow; Robert Hanna, Augusta Ventures; Clare Eustace, Law Society; Greg Cox, Simpson Millar

Professional standards

Many present are preoccupied with the seeming conflict between an emphasis on costs control that points to delivering access to justice 'on a shoestring', and the consequent strain placed on lawyers' professional standards.

Simpson Millar partner Greg Cox observes: 'The word "proportionality" doesn't appear in the SRA Code of Conduct. We're still stuck with providing this "Rolls-Royce service" and we're not able to say: "Look, we want you to be able to bring your case [and have] access to justice, but we can only do it this way. We need a DBA [damages-based agreement] with this percentage, because on this case it's actually fair and right, and we need to have limited responsibilities for what we're going to be beholden to if something goes wrong".'

So how are solicitors responding practically to the demand for further economies in litigation?

Collyer Bristow partner Stephen Rosen says: 'One way to cope with some of these problems is technology and artificial intelligence.' Indeed, the decision of a court to accept the role of predictive coding in an electronic discovery exercise (see tinyurl.com/pgkqjor) is noted as significant.

The question of how cases are staffed and how teams are run is also referenced. Joel Heap, national head of DWF's commercial litigation practice, explains: 'Gone are the days of partners and assistants looking at 70,000 emails [based on what] some master has thought is a good keyword to search for in a business.'

Instead, he points to DWF's 'paralegal hub' in Manchester as an exemplar of evolving practice: 'There are skilled paralegals who can help on transactional corporate stuff, but they've all come from a background of having done e-disclosure. They understand most of the platforms. That starts to become the only way you can possibly deliver that sort of service on that sort of budget.'

Or, he adds, 'you talk to your client about how you're not going to meet the budget. If you can find clients who are prepared to pay, you're still OK, but it's only going in one direction, isn't it?'

Even as costs reduce, access to justice is going to remain a problem, Rosen notes. 'The answer, I think, is an inquisitorial system,' he suggests. 'All these things we're talking about today would work better.'

Such a system would sit with other civil law norms, such as a more paper-based process – and also dovetail with greater judicial specialisation. Brie Stevens-Hoare QC, a barrister at Hardwicke Chambers, observes: 'I sit in the Land Registry tribunal, and there it's all property tribunal judges. We deal with virtually all interlocutories on paper.'

Trials, she adds, are the same as at a county court 'but they take half as long. Costs, at the end of the day, are about a third of what they would be if it had gone through the county court. The reason is you're not having to explain to the judge the subject matter, and why expert evidence being argued on one side is or isn't appropriate for that particular subject matter. They understand it'.

Litigation funding

Third-party funding is now an established feature of a changing disputes landscape. Robert Hanna of litigation funder Augusta Ventures reflects on how attitudes have changed: 'When we started, we went round [the lawyers] and… begged you for cases. Now, we're seeing the claimants coming to us.' This puts the funder in the position of broker: 'One of the best elements of value we can provide is to direct [claimants] to a good lawyer, because if you think about it, claimants [aren't] used to this. They have had perhaps one litigation dispute in their lives.'

Third-party funding is an increasingly sophisticated business, Hanna notes, with expertise to match: 'We have an external costs lawyer who will assess the budget before we decide to fund the case. [And] we've got a retired High Court judge who will look at the higher-level merits. That gives comfort to the litigant.'

'I've been working for funders for many years,' says Gordon Dadds' Nicholls. 'I see it as my professional duty to raise the possibility of third-party funding to all clients, regardless of their size or their perceived financial strength. They can [then] make an informed decision as to how they wish to fund litigation. I am a supporter of third-party funding; it can work extremely well.'

Others are more cautious: 'I'm getting the sense that we're not quite there yet,' Bryan Cave partner Robert Dougans observes. 'It's like the ZX Spectrum. You know the change is on its way, but the change is [about] the next few years – the next product. We're not quite at the level [where] people are routinely saying: "What about a funder?".'

Another response, he says, is for a client to say 'if the funder is interested I'll pay for it myself'.

Nicholls acknowledges that problems can arise: 'I think there is an inherent potential risk in a funded arrangement where you have different stakeholders with potentially unaligned outcomes and expectations. I've had this experience myself, where funders have started to influence, or seek to influence, the direction of litigation – whether it be the selection of experts, or whether it be an approach to settlement discussions.'

He concludes: 'There is a risk that we as practitioners must always be alive to.'

Ultimately, it all comes back to value and merits of a claim. Heap conjures the scenario of a mediation where 'your £2m claim suddenly turns out to be worth £1m. You're [then] carving that £1m up between solicitors, the ATE premium, experts and a funder'.

This is a scenario Rosen recognises: 'You can start off with a damages claim of, say, £4m, and funding looks like it works for everybody. Then you settle at £1m and my [work in progress] is already £500,000.'

With higher-value claims, he says, 'the downsides to the funding… are, number one, the amount of effort we have to put in trying to get the funding, and going through all the hoops, and that may not be recoverable. The other thing, I suppose, is the devil in the detail when it comes to the funding agreement'.

One option provided for in the Jackson reforms was contingency fees, or damages-based agreements (DBAs), but the legal market has for the most part found their current iteration unworkable.

DBAs 'that work', says Marshall, 'would allow lawyers to be involved in funding.

'It's a very inflexible regime with "drop-dead" provisions,' he explains. 'If you [the lawyer] get it wrong you get absolutely nothing at all. Proposals [from the Civil Justice Council's working group on DBAs] are sitting at the Ministry of Justice and have been since [last] September.' The proposals, including the possibility of 'hybrid-DBAs' would make things 'an awful lot better', Marshall says, but 'nothing seems to be happening'.

Court infrastructure

Funding solutions, technology and improved project management can only go so far in meeting the full range of challenges faced in civil litigation. There are certain things that only the organisation of – and service provided by – the court system itself can facilitate.

On the positive side, the creation of a 'financial list', whereby cases on the list are heard by specialist judges, is welcomed. As Tom Matusiak, a professional support lawyer at Stewarts Law, says: 'Judges will get even more experienced by taking part in financial lists. They can take a grip on a case.' There is a further benefit, he adds: 'People would be looking to decisions made out of the financial list in areas of public interest. I think it may help pre-empt litigation… to get answers for our client without having to fight and pay the cost for it.'

Specialisation, Squire notes, is at the heart of the success of the Technology and Construction Court. Judges there 'know what they're dealing with. They can cut through the issues, which is why the interlocutories are so effective – which is why their case management is so effective'.

Similarly, with the financial list, 'one hopes that cases will be handled by judges who know the banking system back to front, and therefore they'll be expert at understanding the issues for trial'.

But Squire's other conclusions on the justice system are unsettling. While observing that 'we have an exceptional judiciary in this country, and I think we're all very proud of it, and that's what sets us apart', she adds: 'I question for how long that will remain the case.' Recounting instances of delay, file losses by the court and shifting timetables, she adds: 'We are let down by the administration.'

Heap sounds a similar warning: 'When you get to trial in London, and I would say Manchester as well, the service you get and the judges you get are as good as anywhere. But getting there is very, very painful, and it's putting a lot of international clients off.'

This makes proposals for changing the destination of appeals concerning, Stevens-Hoare says: 'The suggestion [in Lord Briggs' interim report]… is that certain classes of appeal from the county court will go on appeal to the High Court, to relieve the pressure on the Court of Appeal.' The result, she adds, would be that, 'the High Court's capacity is going to be compromised'.

What hope, in such an atmosphere, of reforms bedding down and the system working as directed? Past experience may be instructive; and it is not especially encouraging. Looking back to the upheaval set in train by the Woolf reforms, Dougans observes: 'It always struck me that Woolf gave judges the power to manage cases very actively. They did not take it up, in the main.'

http://www.lawgazette.co.uk/people/roundtable-civil-litigation/5054780.article