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Making matters worse?

Woolf & Jackson have diluted claimants' costs recovery, says Seamus Smyth

The Woolf and Jackson Reports have made life tougher for claimants in business litigation by (i) introducing new litigation stages whose costs are not recoverable, (ii) increasing costs overall, and (iii) substantially reducing the proportion of costs which are recoverable by successful claimants. The two reports brought significant improvements but those improvements should not blind us to their—no doubt accidental—adverse consequences. Will it get worse?

In the 1990s (before Woolf) one could, with reasonable confidence, advise a client with a commercial claim that if a letter before action were written and he instituted successful proceedings shortly thereafter, he would probably be awarded, say, 80% of his actual costs. 20% was bad enough.

Woolf woes

Woolf introduced protocols. These are expensive; the costs are likely to be irrecoverable. He promoted mediation—also expensive—the cost of which is almost certainly irrecoverable. Summary assessment of costs in interlocutory proceedings was also a consequence of Woolf. The preparation of a summary assessment schedule alone has a further cost (which is totally wasted if the court declines to assess summarily) and, when a court does assess costs summarily, it will, in the profession's experience, very seldom award anything like the full costs (even if they are quite properly claimed) and generally go for a rather cowardly two-thirds. The disallowed one-third is also irrecoverable. Woolf also imposed front-loading by advancing the stage within the litigation process when certain tasks must be carried out (ie much of the work on disclosure now has to be done at the protocol or commencement stage—not after the "pleadings" stage). The effect of front-loading is that if a case is concluded with an award or agreement as to costs at a certain stage, the cost of work already done in anticipation of *future* stages in the litigation is likely also to be irrecoverable.

Case management preparation is now significantly more time-consuming but the end result does not look very different. Consider all the elegantly-prepared hearing bundles which are discarded because: (a) they are never used; or (b) they have to be updated for subsequent developments.

Jackson jinxes

The Jackson Report contributed to this process by introducing budgets. Preparation of budgets in itself is expensive, and is based on a (widening) range of assumptions which must be made very early in proceedings, thus generating the near-certainty that budgets will have to be amended later. The vice of early budgeting is that, in each section of Precedent H, the claimant's budget must be pitched at the upper end of the reasonable bracket because the claimant does not know to what extent work done in other categories might increase or reduce the estimate and the present perception is that each of the sections of Precedent H is a maximum incapable of being increased even if there have been savings in other sections. Claimants' budgets will therefore inevitably be generous not because any particular section in the budget is excessive but because the combined effect of *all* the sections being pitched at their reasonable maximum produces cumulatively a distorted result. That notwithstanding, claimants will almost certainly find that excesses over the budget for particular sections are irrecoverable. A further consequence of cautious/generous budgeting is that after the event (ATE) insurance premia payable by commercial claimants are increased.

As distinct from the relatively straightforward advice a commercial claimant's solicitor might have given in the 1990s, the comparable advice today must be that a successful claimant will recover his costs only in principle, because that principle is now heavily qualified. No protocol costs or mediation costs are likely to be recovered. 33% of all summary assessments will not be recovered, nor will the differential in any particular section of Precedent H between the budget and the actual costs. The total of these items alone (ignoring here any further irrecoverable elements) would easily be 30% of the total costs claimed. Finally, from the 70% rump remaining after these deductions, there are likely to be yet further reductions. The losing party may still apply for detailed assessment (and is now more likely to do so because the chances of a substantial reduction in the claimed costs have increased with the new Jackson emphasis on proportionality). Allowing for an assumed reduction by 20% in the detailed assessment, this might leave the "successful" claimant with a recovery of little more than 50%. Oh yes—and an increased ATE insurance premium too.

> *"Costs recovery for successful claimants has been seriously diluted & access to justice for claimants correspondingly reduced"*

Overall impact

Reducing costs recovery from 80% to 50% constitutes a substantial further disincentive for claimants contemplating litigation. For defendants (who will generally make maximum use of the acknowledgement and response periods allowed in the protocols, thereby achieving up to four months delay gratis despite Lord Woolf's objective of curbing delay), the incentive to delay and frustrate the litigation process further is much greater than it was in the 1990s. The Woolf Report wholeheartedly supported costs recovery. The Jackson Report upheld the principle of costs recovery. The irony is that the overall effect of Woolf and Jackson, seen through the prism of a few decades' experience of commercial litigation, is that costs recovery for successful claimants has been seriously diluted and access to justice for claimants correspondingly reduced. Recent reforms have caused this; will future reforms make matters worse? It seems so. NLJ

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