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Implementing Lord Justice Jackson's proposals for the civil courts: the bear necessities

The Government has announced which of the proposals made by Lord Justice Jackson in his report on costs in English civil litigation it intends to implement. Success fees and ATE insurance premiums will no longer be recoverable, lawyers will be able to enter into contingency fee agreements, and there will be a hardline proportionality test for all costs claimed from the losing party. The package's real target is personal injury claims, but the proposals will have an effect on commercial litigation.

Whatever benefits may have flowed from Lord Woolf's major reform of civil litigation of the late 1990s, no one considers it made litigation cheaper - rather the reverse. As a result, Sir Rupert Jackson was despatched by the Master of the Rolls to spend 2009 consulting widely about how to remedy the situation, and to publish recommendations for reform. Those recommendations were published in January 2010.

The incoming Government then consulted as to the extent to which it should implement those recommendations. With the responses in its hands, the Government has now announced what it intends to do, namely:

- *Abolish the recoverability success fees.* The succesful party will no longer be able to recover as part of its costs any success fee it has agreed to pay to its lawyers under a conditional fee agreement (CFA). Similarly, the successful party will not be able to recover an after the event (ATE) insurance premium paid in order to cover the risk of being ordered to pay the other side's costs. As a result, litigants will always have to pay some of their own costs, and will therefore have an incentive to exercise control over the work their lawyers carry out and the rates they charge.
- *Increase by 10% non-pecuniary damages.* Non-pecuniary damages are an attempt to provide compensation for non-financial losses (eg pain and suffering). These will be increased in order to provide some redress for the requirement that successful claimants must pay any success fee due to their lawyers out of the sums recovered in the litigation.
- *Cap success fees at 25% of damages in personal injury cases.* Success fees can be up to 100% of the fees a lawyer would have charged on a normal, hourly, basis. This limit will remain but, in addition, success fees in personal injury claims will be capped at 25% of damages, excluding damages for future care and loss. This is to ensure that not all damages are swallowed by lawyers' fees, particularly those damages intended to provide for the costs of long-term care.
- *Qualified one way costs shifting in personal injury cases.* This means that a defendant will be ordered to pay the claimant's costs if the claimant succeeds, but the claimant will not be ordered to pay the defendant's costs if the defendant succeeds, save in exceptional circumstances. The logic of this arises from the fact that personal injury claimants take out ATE insurance to cover the risk of being ordered to pay the defendant's costs should they lose. However, most of these claimants win, which means that the cost of the ATE insurance is passed to the defendant or, in most cases, the defendant's insurers. If the claimant's risk of being ordered to pay the defendant's costs is largely removed, the claimant will not need to take out ATE insurance, and the cost will therefore be removed from the system. The Government will consult on whether an unsuccessful claimant should be required to make a minimum payment towards costs in order to discourage speculative claims.

Key Issues

- **The reforms are directed at personal injury claims but will affect commercial litigation**
- **A 10% bonus for beating a Part 36 offer will encourage all claimants to make token offers**
- **A new proportionality test will render some claims uneconomic to pursue**
- **Allowing lawyers to enter into contingency fee agreements is unlikely to import US-style litigation**

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- *Lawyers can enter into contingency fee agreements.* Lawyers can now enter into CFAs, under which they can receive up to double the fees they would have been paid if instructed on a traditional basis. Contingency fee agreements will allow lawyers instead to be paid a proportion of any sum won. If a claimant who has instructed lawyers on a contingency fee agreement is successful, the costs recoverable will be calculated on a normal, hourly, basis, and capped at 25% of damages, excluding damages for future care and loss.
- *Claimants beating their own Part 36 offer will receive an additional 10% in damages.* A Part 36 offer is a formal offer that either party can make to settle a case. If a defendant makes a Part 36 offer, which it beats at trial, the claimant must, even though successful, pay the defendant's costs from the time of the offer. If the claimant makes and beats a Part 36 offer, it receives costs assessed on a slightly enhanced basis. The Government considers that this does not give the claimant a sufficient reward for making an offer, or penalise the defendant sufficiently for rejecting an offer. To remedy this, the Government proposes to give the claimant a 10% bonus on its claim if it makes and beats at trial a Part 36 offer.
- *Costs recoverable from the losing party will be subject to a strict proportionality test.* Currently, if the successful party can show that the costs it incurred were necessary for the conduct of the action, those costs can be recovered from the unsuccessful party even if the costs are, in total, disproportionate. The Government intends to prevent any costs that are disproportionate being recovered from the unsuccessful party. As a result, a party that incurs only those costs that are strictly necessary to pursue the claim will be unable to recover those costs to the extent they are disproportionate to the sum claimed.

Some of these proposals will require primary legislation (eg those concerning CFAs) but some can be implemented by secondary legislation, including by court rules. The precise details are not yet clear, and further consultation may be necessary on some aspects. Similarly, the timing of implementation is not clear.

The proposals are directed in the main at personal injury litigation, as well as smaller claims, rather than commercial litigation (the Government is also consulting on proposals to reform County Courts (*Solving disputes in the county courts: creating a simply, quicker and more proportionate system*), which proposes raising County Court limits and forcing parties into mediation). But three proposals in particular have the potential to affect commercial litigation.

First, the 10% increase in damages that a claimant will recover if it beats its own Part 36 offer will encourage all claimants to make an offer. If a claimant alleges that a debt is due to it, there is little disadvantage to the claimant, and potentially a significant benefit, in offering at the outset to accept 99% of the sum claimed. If the defendant pays up, great; if the defendant fails to pay, the claimant will potentially recover 110% of the sum due if it wins. Whether it is appropriate to reward a claimant and penalise a defendant in this way is, however, a different question. For example, if someone tried to enforce in England a New York judgment calculated at 110% of the sum assessed as damages, that judgment would not be enforceable as a result of section 5 of the Protection of Trading Interests Act 1980.

Secondly, the imposition of a strict proportionality test for costs will render certain claims uneconomic to pursue. What will be considered proportionate for these purposes is not clear (25% of the sum claimed? 50%? 100%?), but if doing the bare minimum required by the court and the court's rules to win a case will cost twice as much as the sum claimed, and costs no higher than 75% of the sum claimed can be recovered, there is no financial benefit in bringing the claim.

Thirdly, allowing lawyers to enter into contingency fee agreements may affect claimants' ability to pursue claims. However, the risks involved, coupled with the inability to recover more than normal costs if successful, mean that the proposals are unlikely to result in a flood of new claims. Third party funders can already support claimants on a contingency fee basis, which has not had any major effect on the English litigation market - indeed, the main impact may be on third party funders. US-style litigation is unlikely to arrive in England as a result of this reform.

What is clear is that another significant shake-up of civil litigation in England is on the way. The details and the timing remain to be clarified by the Government. The target may be personal injury litigation, but commercial litigation will not be immune.