Debate: The Costs War

Before 1995 insurance lawyers were complaining the problem with costs was that claimant lawyers would be paid win or lose; certainly with cases run under legal aid, and the inability of a successful defendant to recover costs. Conditional fee agreements, though a radical funding option at the time, were seen as a solution.

Claimant lawyers, though on a steep learning curve, have learnt to make the new funding regime work. It seems ironic that defendant lawyers, still in the comfort zone of risk free retainers rewarding good and bad advice alike, are still complaining.

The introduction of CFAs closely followed procedural reforms which introduced the concept of proportionality, which is, according to Mr Parker, the root of the problem. Costs, at least when assessed on the standard basis, must be reasonably incurred and proportionate.

However, the concept of proportionality, even in the narrow context of the ratio between costs and damages, does not include additional liabilities. The funding reforms introduced in 2000, making additional liabilities recoverable, have inevitably increased costs. In return, however, access to justice has been opened up to those who had enough means to be ineligible for legal aid, but would certainly not have sufficient means to litigate against well-resourced opponents.

Mr Parker considers the courts have been unable to use proportionality as an effective control mechanism. This is at odds with my own experience of assessment where proportionality is often cited as the reason for reducing cost, even when these have been reasonably incurred.

That leaves the question of base costs, how these are calculated and whether the different markets, in which claimants and defendant lawyers operate, give rise to the risk of abuse.

Claimant lawyers are generally acting for individuals often of relatively limited resources, often unsophisticated legal consumers, whilst Defendant lawyers are acting for well-resourced financial institutions who are very sophisticated legal consumers.

The general context would, therefore, suggest that it is the claimant who faces the greater risk of abuse. However, quoting Lord Bingham in Callery, it is suggested it is the defendant who risks abuse generated by the use of CFAs, on the basis the claimant does not have to pay any charges incurred. The same point could be made about claims run with the support of BTE insurance or any other method of funding designed to give access to justice to the more modestly resourced.

This view pre-supposes the defendant is able to insist on fixed fees and “competitive rates”. Is that always so? Costs estimates and schedules of costs from defendants often make interesting reading when considering this question.

Sometimes the rates claimed by defendants will be lower than the relevant guideline rate, but often the rates are in the same region as the guideline rate, and it is not unusual to see rates, apparently agreed with the insurers, well above the guideline rates.

As for fixed fees, I have never seen an estimate, statement or schedule from a defendant, which I have understood as reflecting a fixed fee retainer.

Specific instances may not, of course, always reflect the general picture but Mr Parker gives some examples, let me respond with one of my own.

There was a case in which the defendant did indeed have a rate below the guideline rate, and a very modest overall estimate of costs. The court was not impressed, however, when on the hearing of an (unsuccessful) application the defendant put in a statement, for that application alone, which was 3 times the costs estimated for the case as a whole!

So, despite very different markets there may not be such a difference as might be expected in the terms of business between claimant and defendant lawyers, except of course claimant lawyers are usually operating under the mind-focusing risk of conditional fees.

The reality is that the kind of risk described by Lord Bingham in Callery would only materialise not just if solicitors acting for claimants agreed an excessive hourly rate with their clients, but if the court were to allow such rates at the stage of assessment.

This is exactly where hourly rates come into play by capping, in the majority of cases, the rate that can be recovered by the successful party, whatever the terms of the retainer.

That, of course, protects a claimant, facing a high hourly rate agreed between the defendant's lawyers, in an unsuccessful case just as much as it does the defendant where the claimant succeeds.

Furthermore, if it is considered the nature or value of the claim is such that it should have been handled at a lower level the hourly rate allowed will be only that for a fee earner of the appropriate grade, whatever the seniority and experience of the lawyer who did handle the claim.

Use of such rates is important, when considering the risk of abuse, because the defendant, as a sophisticated legal consumer, is not only able to offer bulk work in return, perhaps, for the 'competitive rates' referred to but also well able to properly balance price and value. The claimant, conversely, is unlikely to be an experienced consumer of legal services able to make that judgement.

Transparency is the watchword, but funding arrangements made by defendants with their lawyers remain largely opaque. It is not just a question of transparency between solicitor and client but transparency about funding arrangements generally if the suggestions made by Mr Parker are to be considered in a proper and open way.

That suggestion, as the proposed solution to the perceived problems, is fixed costs. But surely that would seriously increase the risk of abuse by the defendant.

Defendants are plainly prepared to spend money, above and beyond that which is recoverable, in the event of success, in appropriate cases including, of course, cases involving technical challenges.

Unilaterally fixing the costs of the claimant gives the defendant free reign to deploy greater resources which could make pursing the claim simply uneconomic. As matters stand, the claimant, even if costs are significant, can seek to justify these if they are proportionate to the issues.

Perhaps many of the problems perceived by Mr Parker arise from defendants not using the opportunities which are already there to deal with claims quickly and efficiently.

The pre-action protocol has been around for a decade, encouraging early admissions of liability, disclosure of information on quantum and settlement.

Part 36 of the Civil Procedure Rules encourages claimants, as well as defendants, to make offers and perhaps defendants need to engage with ADR more readily in many cases so that indemnity costs are not incurred.

It is circularity for defendants to take every point, technical challenges being just one aspect of an over-adversarial approach, have to meet the costs of so doing and then complain that it is somehow the fault of the system rather than those using it.

The current system, although no system is ever perfect, helps apply a level playing field to parties who, in terms of resources and legal sophistication, are usually in very different positions. Unilateral imposition of fixed costs on claimants would be a very blunt instrument indeed likely to cause problems and injustice.

To finish where all this stated, technical challenges should cease. These incur costs about costs. The polarise the representatives when it is well recognised that good working relationships lead to less behavioural issues and better outcomes for all concerned.