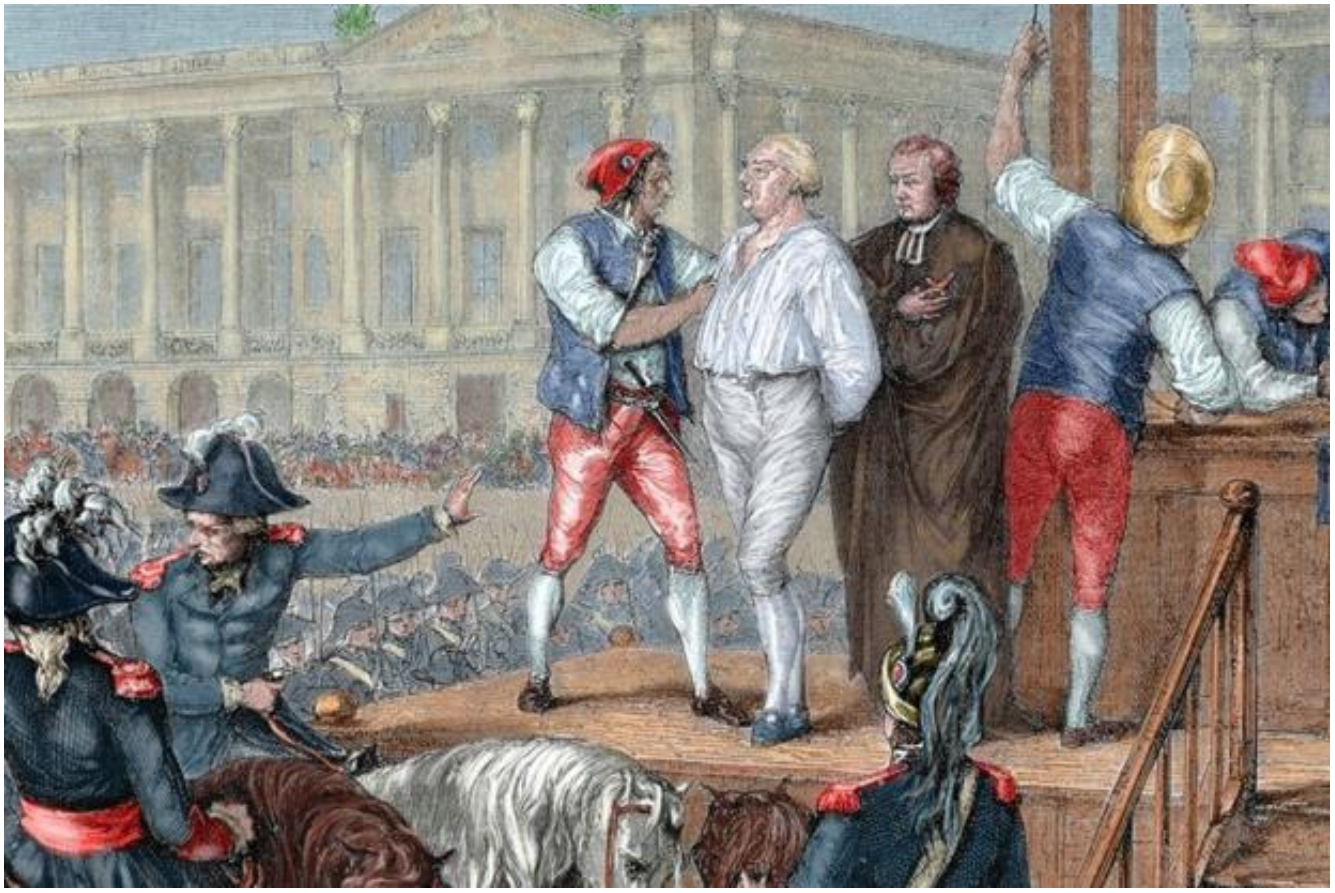
Law

Civil justice reforms: first verdict



Too soon to tell: like the French Revolution, reform effects are still to be judged GETTY

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London litigators say changes will deny access to justice, survey finds. Edward Fennell reports

Seven months into a revolution may be just too soon to assess its impact. After all, the early Chinese communists of the 20th century regarded it as still too early to evaluate the consequences of the French Revolution.

That aside, the London Solicitors Litigation Association (LSLA) is monitoring quarterly the consequences of Lord Justice Jackson ’s civil justice reforms, which came into effect in April. The first results are published tomorrow in the *New Law Journal* .

The focus of the reforms was to rein in legal costs to make civil litigation more affordable and more cost effective, especially in areas such as personal injury. In a series of key changes, the amounts payable to lawyers under conditional fee (no-win, no fee) agreements were capped.

Referral fees were also banned in personal injury cases and damages-based agreements (DBAs) were allowed for the first time. The package represented a formidable threat to the established business model for many law firms and is already prompting a mass exodus (especially by small firms) from areas such as personal injury work.

No surprise, then, that the survey has found discontent among litigators at the impact of Jackson.

Headline figures show that 93 per cent of lawyers surveyed thought that access to justice would decrease as a result of the new regime, while 69 per cent thought the new budgeting measures would increase costs. It concludes: “If making civil litigation fairer, less expensive and more accessible was the ultimate endgame for Jackson then there is clearly much work still to be done.

So did Lord Justice Jackson fail to think through the full ramifications of his recommendations in a commercial context — or are they just proving very tricky to implement? Francesca Kaye, LSLA president and partner at Russell-Cooke, put it bluntly: “The increased procedural steps and associated costs imposed by the Jackson reforms are perceived to add no value to the client and adversely affects the clients’ ability to pursue a claim or insist on its strict legal rights. This has further reduced access to justice for those of modest income including SMEs rather than increasing it.”

David Greene, a partner at Edwin Coe, agrees. “As a claimants’ lawyer we do not believe that the Jackson reforms will increase access to justice,” he said. “We have cases that we would have run prior to Jackson which we would now have doubt over.”

Perhaps the most damning view of successive attempts by senior judges to improve the justice system for the benefit of the citizen came from Seamus Smyth, a partner with Carter Lemon Camerons.

“Overall we don’t think the Jackson reforms will increase access to justice,” he said. “Both Woolf [reforms in the 1990s regarding case management and litigation costs] and Jackson have increased (and accelerated) the overall cost of litigation and that overall cost will have the effect of reducing, not increasing, access to justice.”

No wonder Georgina Squire, partner at Rosling King, says: “Most claimant clients are very unhappy with the outcome for them of the reforms.”

Undoubtedly the law of unintended consequences has made its unwelcome presence in several respects. The need, for instance, to forecast costs under Jackson appears to be having the effect of bloating them (as a precautionary measure).

Meanwhile the availability of conditional fee agreements (CFAs) is in decline. The reason is simple. Under Jackson “success fees”, CFAs are no longer payable by the losing side but are now normally deducted from the damages recovered by the winning

party.

In the case of personal injury they must not exceed 25 per cent of those damages. The upshot is that almost half of survey respondents (47 per cent) said they would now rule them out or restrict their use.

“Respondents are increasingly looking to third party funding to allow clients to offset the costs of a partial CFA against their costs of obtaining ‘After the Event’ insurance should they wish to avail themselves of it,” says the report.

“Those able to fund the dispute themselves, meanwhile, are more often choosing to do so rather than pay the success fee. Whichever way you look at it, clients clearly do not wish to pay the uplift from their damages.”

Some elements of the reforms are still being clarified by the Government. The Ministry of Justice is currently reviewing the Damages-Based Agreements Regulations, in which there appear to be some gaps and uncertainties. Under a DBA, lawyers are not paid if they lose a case but may take a percentage of damages recovered for their client as their fee if the case is successful.

Guy Harvey, partner at Shepherd and Wedderburn , says: “If hybrid DBAs became the norm, many more firms would embrace them. If a case has legs but the client cannot or does not wish to fund it going forward, third-party funding will be the growth market.”

Clearly the Jackson reforms — like Woolf — will evolve. What seems clunky today might refine over time. To date, though, the first findings are not positive; time will tell whether lawyers’ predictions prove correct.