Excessive litigation: how can it be discouraged and stopped?

Huw Jenkin assesses the options for curbing excessive or aggressive litigation

In the Solicitors Regulation Authority (SRA)'s November 2018 report 'Balancing duties in litigation', the SRA criticises 'excessive or aggressive litigation' involving 'disproportionate valuations of the claim, wide-ranging allegations of impropriety and inappropriate volumes and tone of correspondence'. The SRA indicates that these cases 'create disproportionate costs' and 'occupy court time to the detriment of other cases', and that the courts have made clear their disapproval of such cases (citing, by way of example, *Excalibur Ventures v Texas Keystone & Ors* [2013] EWHC 4278 (Comm)).

In October 2018, the case of *Robert Tchenguiz & Ors v Grant Thornton & Ors* came to an end. Commenced in August 2015, following a similar case brought by Vincent Tchenguiz, the case alleged criminal conspiracy and claimed £750m. It took up significant amounts of court time on an array of interlocutory issues, and was due for a 12-week trial before being withdrawn by Mr Tchenguiz after three days. As well as taking up substantial Commercial Court time, the case significantly affected the lives of three professional men for over three years. Unusually, Knowles J made a series of formal remarks following the withdrawal of the case, in which he made clear that the individual defendants left the Court with their reputations intact, and were owed an apology by Mr Tchenguiz. In addition, indemnity costs were awarded.

I express no view as to whether Mr Tchenguiz's case falls into the category of 'excessive litigation', but on any view it provides a useful perspective from which to ask the following questions, in respect of cases which would qualify as 'excessive' from the perspective of the SRA, and which the SRA plainly views as problematic:

1. First, how should excessive litigation be prevented from being commenced in the first place?
2. Second, how should such litigation be dealt with swiftly, if commenced?

First, as to how to prevent excessive litigation being commenced in the first place:

1. Proper costs sanctions: particularly for the largest and potentially most time-consuming cases, the threat of indemnity costs may be an insufficient deterrent. Claimants hope to settle in any event, and the numbers may be such that the risk/reward equation makes economic sense even if, in the event, they do not achieve settlement. Two possible solutions are: (i) to consider imposing an additional penal costs sanction where a case is adjudged to have been brought *in terrorem*; and (ii) to consider whether costs sanctions of this nature might be imposed by the court even if the case is, in the event, settled.
2. Professional sanctions: I have referred above to the courts' views on 'excessive litigation'. It is, I suggest, for the courts to identify, criticise, and where appropriate report, cases which breach the SRA rules, and they should do so actively, in addition to making wasted costs orders where appropriate. The courts must appreciate that parties will often not want to make these allegations themselves, or make reports themselves, for fear of an allegation, in the midst of hostile litigation, that they are defensively 'playing the man, rather than the ball'.
3. Consequences for claimants: the SRA report above refers to a case involving 'one side accusing the other of criminal conduct without any cause', in what the judge likened to 'an act of war'. In such circumstances, expressions of disapproval in judgments may have limited effect, at least on claimants themselves (as opposed to their lawyers). Where a claimant lies in an effort to gain an economic advantage, the relevant court should find it to be in contempt of court, and/or refer it to the Director of Public Prosecutions. It is not clear to what extent this in fact happens in practice, despite the huge sums often at stake.

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Second, as to how to enable excessive litigation to be dealt with swiftly, if commenced:

1. Summary judgment/strike-out process: the summary judgment/strike-out process is inapt to deal with complex factual allegations – it requires the factual position effectively to be incontrovertible on the basis of the documentary record. The result of this is that cases alleging fraud, for instance, are likely both (i) to have the most commercial impact, and the most detrimental effect on defendants, particularly individuals; but also (ii) to be least susceptible to summary judgment. Unscrupulous claimants will know this. This therefore needs to be rethought. What 'safety valve' can the courts devise for these sorts of cases? The summary judgment regime is clearest about one thing: it is not a 'mini trial'. Why not? What about an initial mini trial, for certain cases, assisted by witness evidence but with no cross-examination, to assess whether a case is properly arguable and should therefore proceed to a full trial?
2. Appeal speed: a key adjunct to the above is the need for a swift appeal process. Parties weighing up applying for summary judgment may be put off by the fact that any such judgment is likely to be appealed, that the appeal may take some time, and that if the party loses, significant time has then been wasted. In the prior case brought by Vincent Tchenguiz, a summary judgment application was brought in August 2015, heard in January 2016, determined in the defendants' favour in April 2016, but not due to be heard on appeal until November 2017. One possible solution, in addition to the Civil Procedure Rule Committee's current efforts to prevent delays at the Court of Appeal, might be to have an expedited appeals process in respect of summary judgment decisions.
3. Continuous assessment by solicitors: the SRA report above states that '[i]f a solicitor knows that a client's case is not honestly brought, they must not act', and that this requires 'proper checks of the instructions and evidence'. This is not a single *ab initio* assessment. As evidence comes in, solicitors must re-evaluate their initial views and, if necessary, then cease to act. This needs, in my view, to be emphasised in the SRA rules if it is to be followed, as there are obvious barriers to it happening in practice.
4. Court strike-out following decision on one part: in the Robert Tchenguiz case, and having weighed the above considerations, the defendants applied for summary judgment in respect of one element of loss, said by the claimants to amount to over £150m. Summary judgment was granted, with Knowles J indicating that the relevant part of the claim 'demonstrably ha[d] no foundation and should never have been brought'. Particularly given the difficulties referred to above, the courts might consider, for future cases, that where an element of a case has been emphatically dismissed in this way, the entire case (or, alternatively, the claimant) is effectively tainted, and should not be permitted to proceed.

Some of the above proposals would require significant change. However, in my view, the aims of (i) freeing up the courts; (ii) preventing undue detriment to defendants; and (iii) preventing gain to undeserving claimants, justify focus and further action.

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