Will costs reforms end access to justice for those without means?

An Act to cut expense and delays in the civil courts may have the opposite effect, reports Alex Wade

On the eve of what just about every litigator in Britain agrees will amount to a "seismic change" in the legal landscape, there is disquiet.

In three months, Lord Justice Jackson’s proposals for cutting costs and delays in the civil courts will be law. But far from promoting access to justice, as was the original intention, many solicitors now fear that the reforms — in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) — will have the opposite effect.

The impact, warns Andrew Stephen- son, a partner with Carter-Ruck, "will be to make it more difficult for those of limited means to obtain legal representation". He adds: "There is widespread agreement that the cost of litigation in this country is too high, but far from curing or ameliorating it, LASPO will only make things worse."

Lord Justice Jackson was commissioned to review civil litigation in 2009, after concern among senior judges about how Conditional Fee Arrangements (CFAs) had developed. Introduced in 2001 for personal injury claims as a result of Lord Woolf’s access to justice reforms, CFAs, or "no win, no fee" deals, mean that if a claimant solicitor loses a case he is not paid, but if he wins he can charge a bonus, or "success fee". With CFAs came After the Event (ATE) insurance, enabling claimants to protect themselves against paying a defendant’s costs if they lost. Until now, a winning claimant could recover the premium.

Jackson’s brief was to overhaul the excessive cost of litigation and "to promote access to justice at proportionate costs". The net effect, enshrined in LASPO, is the abolition of the recovery of success fees — which can run into double figures — and ATE premiums from the losing side. As the Ministry of Justice put it: "People will still be able to use CFAs but will have to pay their lawyer’s success fee and any ATE insurance (if taken out) themselves."

"The cost of litigation is too high, but this will only make things worse’

The bill also caps success fees at 25 per cent; a formal ban on referral fees and increases general damages by 10 per cent. There are other more technical changes but it is the reforms to "no win, no fee" deals and insurance cover that are causing most unrest.

Stephenson, a libel lawyer, cites the case of Sarah Hermitage, a restaurant owner who was sued for breach of contract by her landlord. "Under the lease, he had no defence to subsidence caused to the property by building work," says Mireskandari. "He used to remortgage his house to recap- tify the problem, but at least he was then able to use a CFA with ATE to sue the negligent builder." He could not have done this under the new Act, Mireskandari says: his only option would be to lose everything and go bankrupt. "The introduction will result in plenty of manifest injustices like this."

There is one benefit: if a claim fails lawyers will not be liable for the defendant's costs, as long as they conducted the claim properly. Yet they remain anxious. "Overall, LASPO will set up a regime in which more complex cases are fast-tracked, combined with a proposal to slash by more than half fixed costs recoverable by lawyers," says John Spencer, a leading personal injury solicitor. "But the result of over-simplified procedure and potentially inadequate representation could well be that clients are denied justice."

Of course this is not the intention of either ministers or Jackson. There is widespread concern about what is seen as a bonanza of lawyers’ fees and the growth industry spawned by "no win, no fee deals", including the impact on motorists’ insurance premiums. The costs of going to law, he says, have spiralled beyond what is proportionate. But when a libel lawyer, a commercial lawyer and a personal injury lawyer all agree, it might just be that the Jackson proposals are imperfectly translated by LASPO. There is some comfort after Government indications last month of a rethink of aspects of the Act. But unless that results in redrafting, access to justice — so prized in Britain — may be yet more elusive.

The second argument is that a change in the law would cause uncertainty and practical problems. That is very unconvincing. All that would be required is for the polling station to be sure of being allowed to vote.