

The Jackson Review of Civil Litigation Costs

INTRODUCTION

Lord Justice Jackson yesterday published his final report into costs in civil litigation following the extensive process of consultation undertaken last summer after the publication of his preliminary report in May 2009. The report is a detailed and substantial one extending to over 550 pages and will no doubt be the subject of considerable debate in the legal profession in the coming weeks. In this note we briefly analyse the impact of the main recommendations.

PROFESSIONAL NEGLIGENCE DISPUTES

- **Enforcement of Protocol compliance** Jackson has overcome the initial scepticism in his preliminary report regarding most of the Pre-action Protocols (other than that for construction and engineering disputes) and recommends that they should remain. The Professional Negligence Pre-action Protocol in particular is found to be effective and no specific amendments are proposed to it. However in order to promote more effective enforcement of the Protocols Jackson recommends that the parties should be able to make pre-action applications if one party is failing to comply with the Protocol and the Court should have power to award summary costs against the defaulting party at that stage. Although the Courts will have to be wary of frivolous/excessive applications at the pre-action stage on balance this provision is likely to be of assistance to defendants as they will be able more easily to force claimants to properly particularise claims and to produce full supporting documentation before issuing proceedings.
- **Success fees/ATE premiums** Jackson has held to the view mooted in his preliminary report that success fees and ATE insurance premiums are one of the major contributors to disproportionate costs in civil litigation and should cease to be recoverable from unsuccessful opponents. Clients will still be able to enter into 'no win no fee' agreements but any success fee will have to be borne by clients out of their damages rather than recovered from the other side. This is clearly a welcome development for defendants. Claimant lawyers will now be more reluctant to encourage litigants to embark upon 'no win no fee' claims and the recommendation will also have an obvious impact upon the level of damages awarded to successful claimants in any event.
- **Costs shifting** Jackson recommends that to compensate for the loss of recoverability of ATE premiums qualified one way costs shifting for certain categories of litigation should be introduced – namely that the claimant will not be required to pay the defendant's costs if the claim is unsuccessful, but the defendant will be required to pay the claimant's costs if the claim is successful. This recommendation should be opposed although we note that its implementation is only recommended for personal injury litigation, with judicial review, clinical negligence and defamation considered potential future areas for its introduction.
- **Fixed costs** Jackson recommends extending the fixed costs regime beyond that currently existing in RTA/employer liability cases to all fast track cases. Jackson also recommends that the procedure rules should be amended to allow the Court to assign a case to the fast track at any time (CPR Pt 8). However his recommendations for the implementation of a fixed costs

regime in multi track cases extends only to the patents court with a subsequent review to consider extension to small medium/sized multi track disputes.

- **Part 36 offers** There is a perceived imbalance in the operation of Part 36 in that a claimant's failure to beat a Part 36 offer from a defendant can have dramatic consequences, whilst the potential sanction of indemnity costs has less effect on defendants, who know that if they lose they are likely to have to pay 80-90% of the costs anyway. In order to redress this imbalance Jackson proposes that unbeaten claimant offers under Part 36 should attract an additional reward of a 10% enhancement of damages. Although initially this recommendation would appear to disadvantage defendants, it will have the added benefit to all parties of encouraging early settlement as defendants will be less willing to press on to trial but claimants will also have to make reasonable offers.
- **Disclosure** Jackson proposes a new disclosure rule to apply to larger commercial cases with a value of more than £1 million requiring the parties and the Court to consider the most appropriate process for disclosure at a case management conference from a menu of options, rather than being bound by the requirements of standard disclosure. This development should be welcomed in the defence of larger cases as it will allow more cost effective investigation into disputes at an early stage and less scope for costs being incurred dealing with continual fishing expeditions. There should also be a greater emphasis on e-disclosure, Jackson argues, with further training in this area for practitioners.
- **Witness Statements** Although Jackson stops short of making any formal recommendations he does encourage judges in all courts to use adverse costs orders to penalise parties who serve witness statements that are too long and/or irrelevant. Obviously drafting and responding to witness statements is a large part of the defence of any claim, so such costs orders would assist defendants by reducing potential exposure to the costs incurred by another party at this stage.
- **Expert evidence** Again Jackson goes no further than suggesting a pilot study of the use of concurrent (as opposed to sequential) expert evidence under which the experts meet pre-trial to identify where they agree and disagree and give evidence concurrently at trial (otherwise known as "hot-tubbing"). The practice, which has become common in Australia, does have the potential to reduce the costs associated with expert evidence if the matter reaches trial.

TECHNOLOGY AND CONSTRUCTION COURT

- **View of the TCC** The report notes the "*high degree of satisfaction*" expressed with the service provided by the TCC and that most cases in the TCC are "*resolved at proportionate cost*". The benefits of certain TCC practices such as "docketing" (i.e. allocating a specific matter to an individual judge) are also commended and Jackson proposes that these practices be more widely adopted in other courts. In view of the general satisfaction with the operation of the TCC, Jackson considers that caution should be exercised in recommending significant changes to the TCC's existing procedures.
- **The Construction and Engineering Pre-action Protocol** The report notes the criticisms that have been made of the Protocol that it leads to an unnecessary increase in costs. Among the

suggestions made during the consultation was one from the TCC judges that if the Protocol was to be retained then the steps required by it should be taken after issue of proceedings, during a period when the action is stayed. This was in order that the assigned judge could oversee the process. The report recommends that for the time being, the Protocol should be retained as a pre-action process but that it should be reviewed and amended so that it is less prescriptive and the costs (or at least the recoverable costs) of complying with it are reduced.

- **Low value construction disputes** The report notes that although there is no fast track in the TCC, some small building disputes satisfy the fast track criteria (i.e. the value of the dispute is less than £25k; the trial can be concluded within one day and there is no more than one expert on each side). The report recommends the introduction of the fast track to the TCC. This may have implications for low value fee claims and provide an alternative to adjudication (where costs are largely not recoverable).

CONCLUSION

There is no certainty as to what, if any, suggestions in the report will be implemented in the current political climate or within what timescale. However Jackson's report confirms that he is firmly of the view that the courts should adopt greater costs management powers and should be less tolerant of unjustified delays or breaches of orders. The emphasis is upon the Court monitoring the progress of the parties to secure compliance with orders. The recommendations that help achieve this goal, such as for example pre-action applications to enforce the Protocol and greater allowing flexibility in relation to disclosure in large cases, will be welcomed by defendants as providing greater certainty in assessing future costs liabilities. The proposal to prevent the recovery of a success fee or ATE premium from unsuccessful defendants would, if implemented, be likely to significantly reduce the number of speculative professional negligence claims.

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