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Review

Construction, Engineering and Projects

A look into the future of expert evidence: Lord Justice Jackson's Preliminary Report

BACKGROUND

In May 2009, Lord Justice Jackson published his preliminary report into the costs of litigation in England and Wales. The aim of the preliminary report is to provide some food for thought and a basis for discussion in the consultation period. The final report is due in December 2009 and the recommendations will be finalised and implemented in 2010.

Lord Justice Jackson acknowledges that his report cannot and will not be anything like on the scale of the reviews of the Civil Justice Council and the Civil Procedure Rules Committee, who are also undertaking similar review exercises, however, what Lord Justice Jackson has done is to focus on the cost of expert evidence and how that cost can be reduced without reducing the quality of the expert evidence.

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1 CURRENT PROBLEMS WITH EXPERT EVIDENCE

The preliminary report identifies several problems with the current system, including the inclusion of inappropriate and excessive expert evidence which adds to time and costs. The report acknowledges that there is no single solution which will solve all the problems but outlines proposals and ideas for how the problems could be tackled going forward.

2 WHEN SHOULD AN EXPERT BE INSTRUCTED?

Before going on to looking at specific recommendations, Lord Justice Jackson raises the issue of when an expert should be instructed.

Lord Justice Jackson looks at the current practice in courts across the country and one example he gives is of the Technology and Construction Court ("TCC"). Currently the TCC Guide suggests that prior to any Case Management Conference or any other pre-trial stage, the parties should give consideration to any tests, inspection or investigation which could be undertaken jointly or in collaboration with other experts. Any such collaboration should be preceded by a meeting of the relevant experts to discuss the issues and devise an appropriate protocol. Lord Justice Jackson is full of praise for these rules, which directly address the issues raised in Lord Woolf's Access to Justice Report including the suggestion that experts should be encouraged to communicate at the earliest possible stage. That's where the good news ends however. Lord Justice Jackson comments that in practice, this guidance is often ignored and courts rarely encourage such collaboration.

3 CUTTING COSTS AND SAVING TIME

Lord Justice Jackson's preliminary report identifies several specific issues for discussion which would potentially cut costs and save time including:

- sequential exchange;
- single joint quantum expert;
- non-recoverable expert costs;
- hot-tubbing.

3.1 Sequential Exchange

Lord Justice Jackson's proposal is that experts should exchange reports sequentially rather than simultaneously. This would mean that one party could raise an issue and the other party could respond to it – rather than both parties raising issues at the same time.

One immediate problem with this approach is deciding who would go first. It may be that the circumstances of the case may dictate who would go first. However it may be better for a judge to decide on the key issues of the case before experts are even appointed to stop the experts presenting reports on irrelevant or unimportant issues.

This idea is likely to gain more support in smaller cases. In large or complex cases there is much more reliance on the judge being able to filter through the arguments of the parties in advance of the court hearing. Sequential exchange would not be a benefit in this situation. It could even waste more time and costs and it could mean that some issues are not defined or dealt with properly.

3.2 Single Joint Quantum Expert

Lord Justice Jackson proposes that the parties should use a single joint expert on quantum. The expert would give evidence and be cross-examined by both parties.

Once again, this has been seen as a positive suggestion for litigation cases where there is only a small amount at stake and the issues are simple. For more complex or high value disputes, the parties may argue that a single joint expert would not be able to become as well acquainted with a party's particular circumstances as a party appointed expert. Another concern is that the appointment of a single joint expert would lead to a raft of objections to the single joint expert's evidence – with claims of unfair, unsafe or biased evidence. This would clearly escalate costs and time and chances are that the parties would appoint their own experts anyway.

3.3.1 Non-recoverable expert costs

The aim of this one of Lord Justice Jackson's proposals is to stop parties and their experts from submitting an excessive number of reports on irrelevant or sideline issues. Lord Justice Jackson proposes that to discourage this kind of behaviour, parties should not to be allowed to claim as a cost, a report which is not relied upon in court.

There is no definition of 'relied upon' in the preliminary report and Lord Justice Jackson does not indicate what this should include. Grey areas here could be, for example, a report which helps a party's case but is not examined in court, or a report which has meant that agreement can be reached between the parties on the issues contained within it, but that is not examined in court. Hopefully the final report in December will shed some light on these issues.

3.4 Hot-tubbing

Hot-tubbing, is unfortunately not as exciting as it sounds. The hot-tub method is something which Lord Justice Jackson has seen as a potential cost and time saving measure which is currently used in Australia, with apparent great effect. The practice actually developed in Australia in an attempt to stamp out expert witness bias and save time and costs, following the recommendations of the Woolf report.

Hot-tubbing is the commonly used slang for the practice more commonly referred to as concurrent legal testimony, which allows experts to discuss their opinions collaboratively. The way it works in practice is that the experts and legal representatives have a meeting with the judge pre-trial to identify where agreement and disagreement exists between them. The judge and counsel have a chance to ask questions to the experts and the experts can ask questions to each other and generally discuss the issues.

Assuming the judge has an active interest in ferreting out the truth and the experts are candid, the hot-tubbing option seems a preferable option. It can save time and money and also allows the experts to actually help the court get to the bottom of issues more easily, rather than fighting it out in an adversarial style battle of wit, wisdom and wills. It reportedly works particularly well in certain areas, for example in the Administrative Appeals Tribunal in Australia which already had a fairly informal atmosphere. Plus it is also popular with the experts themselves.

The potential problem with introducing this from both the lawyer and the expert's point of view is that expert witnesses are accustomed to the gladiatorial style of giving evidence and it would require a lot of training, not to mention a change in culture and strategy for the experts, lawyers and judges.

Another problem with hot-tubbing is that it normally takes place towards the end of a case rather than at the outset. This means that the expert will have already done a lot of preparation and reporting and therefore potentially a lot of cost would have already been incurred. With this in mind, the level of savings achievable may be minimal. However, any measure which could save time and cost, even to a limited extent in some cases, and has a proven track record in a country which follows fundamentally the same legal system as us, shouldn't be overlooked.

CONCLUSION

At this stage it is unclear how Lord Justice Jackson's preliminary recommendations will be taken forward and how many of these will ultimately make it into the final report but one thing is certain, the final report will stir up plenty of interest in the legal world. Lord Justice Jackson himself states in his preliminary report that his final report is sure to generate a lot of protest as he fully intends to shake up the civil litigation landscape.

FURTHER INFORMATION

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