

Review

Construction Engineering & Projects



Lord Justice Jackson's final report on costs in civil litigation

WHAT DOES IT MEAN FOR CONSTRUCTION LITIGATORS?

Lord Justice Jackson's final report on costs in civil litigation was published on 14 January 2010 with recommendations aimed at reducing excessive and disproportionate costs. The 584 page report covers a wide range of issues from defamation and personal injury litigation to electronic disclosure and ADR, but for construction lawyers, there are four main areas of interest:

- (a) Costs and Funding;
- (b) Procedure;
- (c) The TCC;
- (d) Training.

1 COSTS AND FUNDING

Lord Justice Jackson's report states, to the dismay of all ATE insurers that ATE insurance premiums add considerably to the cost of civil litigation and his recommendations in this area are designed to take away the need for such insurance. Only time will tell how these changes to funding arrangements will affect TCC users, a significant minority of which currently use conditional fee agreements and ATE insurance:

- (a) Success Fees and ATE insurance premiums should cease to be recoverable i.e. be paid for by the client rather than be recoverable from unsuccessful opponents.
- (b) Qualified one way costs shifting for certain categories of litigation where ATE insurance is often taken out. This means that an unsuccessful claimant will not normally have to pay a defendant's costs, therefore ATE insurance is not required.
- (c) Contingency fee agreements allowed for litigation provided that the terms are regulated, and any unsuccessful party would only have to pay a 'conventional amount' for costs rather than the contingent fee i.e. any difference would need to be borne by the successful party.

2 PROCEDURE

- (a) Part 36 Offers. The most startling recommendation is that defendants are to be incentivised to accept Part 36 offers by enhancing a claimant's recovery in damages by 10% if the defendant fails to beat a claimant's offer. The report states that this measure is required to strengthen the claimant's Part 36 offer which is currently less powerful than a defendant's Part 36 offer.
- (b) Cost Management. Parties to present budgets of their costs to the court for approval and rules to be drawn up which set out a standard costs management procedure. This recommendation has brought a significant amount of criticism with the most elegant and forceful attack upon the whole concept of costs management being delivered by Her Majesty's Council of Circuit Judges. Circuit judges do not think the judiciary should take on this responsibility and, even if it had the expertise to do so, believes that cost management by judges is a significant and difficult exercise which would be taken on at the expense of trying cases.

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- (c) Disclosure. A sensible recommendation is to remove the default position of standard disclosure for large commercial and similar claims where the cost of standard disclosure is disproportionate. Allow the parties and the court to decide on the form of disclosure at the first CMC.
- (d) Witness Statements and Expert Evidence. Another sensible recommendation is to place controls on the content or length of witness statements and expert reports, or limit the number of witnesses (in appropriate cases) with cost sanctions for non-compliance.
- (e) Practice Direction on Pre-action Conduct. Repeal substantial parts of the Practice Direction on Pre-Action Conduct which currently lead to unnecessary pre-action costs, and instead apply cost sanctions to discourage unreasonable behaviour.
- (f) Pre-action Applications. Amend the CPR to permit judges to deal with applications made before proceedings have commenced where a party has failed to comply with a pre-action protocol thereby causing serious prejudice to the applicant. Such applications to have potential cost sanctions for the defaulting party. The report recognises that this new provision has potential to generate costs and satellite litigation unless closely controlled and it recommends firm management by the judge, paper hearings and early guidance and a robust approach from the Court of Appeal to stamp out any abuse.
- (g) Summary and detailed assessments. Streamline the procedure for detailed assessments with a new format bill of costs and greater use of IT.

3 THE TCC

The good news is that the TCC was praised by Lord Justice Jackson with most cases being resolved “at proportionate cost” and court users reporting a high degree of satisfaction with the service. In light of this, the final report sets out only four minor recommendations for the TCC:

- (a) Mediation. Putting a greater emphasis on promoting mediation for low value cases.
- (b) Fast Track. Amending the CPR so that TCC cases can be allocated to the Fast Track where appropriate.
- (c) Key Issues. Amending Paragraph 14.4.1 and 14.4.2 of the TCC Guide to place focus only on the ‘key issues’ of the case rather than all issues.
- (d) Pleadings and Witness Statements. Amending section 5 of the TCC Guide to draw attention to the power of the TCC to disallow costs where pleadings and witness statements contain extensive, irrelevant or peripheral material.

4 TRAINING

Finally, the report recommends training for lawyers and judges in a number of areas including:

- (a) ADR;
- (b) E-disclosure;
- (c) Costs budgeting and costs management.



5 NEXT STEPS

Although some of the recommendations can be implemented by the courts for example dealing with pleadings and witness statements which contain extensive, irrelevant or peripheral material, some will require fundamental legislative changes, for example, pre-action applications for breaching pre-action protocols and pre-action costs management by the court.

The government and the Justice Secretary Jack Straw are now looking at the recommendations but with no established timetable for implementation, and a general election looming on the horizon, it is unlikely anything will be done for at least the first half 2010. However, Lord Justice Jackson remains confident that the political will to implement his recommendations does exist and that even with a change of government we should expect to see big changes coming our way in the not too distant future.

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