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Welcome to the May 2016 edition of *Insight*, Fenwick Elliott's newsletter which provides practical information on topical issues affecting the building, engineering and energy sectors.

This issue looks at the impact of the Jackson Reforms, three years on from their introduction.

Insight

The Jackson Reforms to the litigation process: 3 years on

When the Jackson Reforms first came into force in April 2013, it was proclaimed they would lead to significant changes in the way in which civil litigation was conducted and would improve the culture of litigation for the good of all. Three years on, this 59th issue of *Insight* (i) provides a reminder of the key aspects of the Jackson Reforms; (ii) reviews how they are working in practice; and (iii) takes a look at some of the latest developments.

Cost budgets

One of the key elements of the Jackson Reforms was the effective management of litigation costs through the introduction of costs budgeting. The basic idea behind costs budgeting is that costs budgets detailing a party's costs for the entire litigation must be filed and exchanged prior to the first Case Management Conference. Parties are encouraged to seek to agree costs budgets, in whole or in part, after they have been exchanged and the court will record any such agreed budget. Where the budgets are not agreed, the court has to review, make any appropriate revisions, approve the budget and make a costs management order. As will be clear from the *Mitchell* case, a party who fails to file a budget when required to do so will be treated as having filed a budget comprising only the applicable court fees, unless the court orders otherwise.

On 13 May 2015, Lord Justice Jackson gave the third annual Harbour Litigation Funding Lecture titled "*Confronting Costs Management*".[1] During that talk he highlighted what he saw as the key benefits of costs management:

(i) Both sides know where they stand financially. They have clarity as to what they will recover if they win and what they will pay if they lose.

(ii) It encourages early settlement.

(iii) It controls costs from an early stage.

(iv) It focuses attention on costs at the beginning of litigation.

(v) Case management conferences are now more effective in that there is serious debate about what work is really necessary, what disclosure is required, what experts are needed.

(vi) "*Elementary fairness*": it gives the other side notice of what you are claiming.

(vii) "*It protects losing parties … from being destroyed by costs.*"

A party cannot recover costs simply because they are reasonably and were necessarily incurred. The costs incurred must be proportionate to the matters in issue. Mr Justice Coulson gave guidance as to the court's approach in the case of *Willis v MJR Rundell & Associates Ltd*,[2] where he declined to make a costs management order or approve either party's cost budget on the grounds that they were disproportionate and unreasonable.[3] The key points to emerge from that judgment were:

(i) Where the aggregate of the cost budgets exceeds the maximum amount claimed, the court is likely to take the view that the cost budgets are disproportionate and unreasonable.[4]

(ii) It is essential that any cost budgets submitted are sufficiently detailed to enable the court to undertake a proper review and assessment.

(iii) If the court only gets to see the budgets by the time a substantial proportion of costs have already been incurred, this will undermine the effectiveness of the cost management regime and the court's ability to contain costs.[5]

(iv) The parties should aim to obtain approval for their cost budgets at an early stage and be prepared to make proactive and prompt applications to the court if budgets are exceeded.

(v) If one party wishes to attack the other's cost budget, it should present the court with alternative figures for any items that are contested. In this case neither

Insight

side offered substitute figures in respect of each other's cost budget. As a result, the judge concluded that he did not have sufficient information to propose alternative figures and stated that it would be inappropriate for the court to do so without notice and without any necessary supporting detail.

In view of the Judge's criticisms in this case, the following should be avoided:

(i) large, rounded-up figures for which no breakdown is provided;

(ii) lump sum items which are not properly substantiated and explained. For example, it is not appropriate to include a single sum for "*contingent costs*" without further detail;

(iii) describing components of the cost budget as "*incurred/estimated*".

In short, it is now essential for parties to prepare accurate budgets and keep them up to date. Costs budgeting is here to stay and now applies to all cases with a value of under £10 million. The court will not allow a party to revise its approved budget if there was a simple error in the budget. However, the court may allow the costs budget to be revised if there has been a significant change to the course of the litigation since the budget was prepared. Significant reasons may include the addition of a party, substantial amendments and the increased complexity of the case.[6]

In the case of *Group Seven Ltd v Nasir,*[7] Mr Justice Nasir commented that:

> *"However, what is principally required in assessing a costs budget is to consider the proportionality of the amount of the budget so that the court feels that it would be appropriate to award the budgeted sum to the receiving party and require it to be paid by the paying party."*

The position in 2016

In April 2016, as the 83rd CPR update comes into force, changes were introduced to the cost budgeting regime set out in CPR 3.12-18 to encourage parties to agree the budgets in advance of the Case Management Conference. Costs budgets must now be filed 21 days and not 7 days in advance of the CMC and parties must then file, 7 days before the CMC, an "*agreed budget discussion report*" setting out what is agreed and the reasons for any disagreement. The idea behind this change is to increase the opportunity for agreement, and parties are now required to cooperate and compromise regarding their budgets and have more time to reach an agreement.

Changes to the court process and procedures

One of the headline features of the initial Jackson Reforms was the change in approach of the courts to breaches of the rules and court orders.

The Mitchell and Denton cases: a reminder

The key case which generated a fair amount of headlines for a variety of reasons was *Mitchell v News Group Newspapers Ltd,*[8] which we discussed in Issue No. 30 [http://www.fenwickelliott.com/files/insight_issue_30.pdf]. Here the claimant was penalised for the late filing of his costs budget which caused the original hearing to be delayed, and limited his costs recovery to court fees only, as opposed to the costs budget he had filed at court which was in excess of £500,000. In reaching this conclusion, the Court of Appeal laid stress on the need to adopt a practical application of the new CPR 3.9 which emphasised both the need for litigation to be conducted efficiently and at proportionate cost, and the need to ensure compliance with court rules, practice directions and orders.
In *Mitchell*, the Court of Appeal confirmed that, going forward, the relevant sanction for any breach of a court rule would be applied unless the court order or rule that had been breached was trivial, or there was a "*good reason*" for the breach. As we explained in *Insight* No. 37 [http://www.fenwickelliott.com/files/insight_issue_37.pdf], the apparent harsh result of the application of the court guidelines in the Mitchell case was reconsidered in the case of *Denton v TH White Ltd,*[9] where the Court of Appeal outlined a new three-stage test:

(i) First, the court must consider whether the breach was "*serious or significant*". In *Mitchell*, the test had been to say if the breach was minor or trivial. This would appear to give the courts a degree of flexibility. If the breach is neither serious nor significant, relief from sanctions will usually be granted.

(ii) Secondly, the court must consider whether there was a good reason for the breach or why the breach occurred.

Insight

(iii) The court must consider all the circumstances of the case so as to enable it to deal justly with the application. These circumstances include two of the factors set out in CPR r.3.9: (a) the need for litigation to be conducted efficiently and at proportionate cost; and (b) the need to enforce compliance with rules, practice directions and orders.

In *Denton*, Vos LJ referred to CPR r.1.3, which provides that "*the parties are required to help the court to further the overriding objective*", noting that:

> *"We think we should make it plain that it is wholly inappropriate for litigants or their lawyers to take advantage of mistakes made by opposing parties in the hope that relief from sanctions will be denied and that they will obtain a windfall strike out or other litigation advantage. In a case where (a) the failure can be seen to be neither serious nor significant, (b) where a good reason is demonstrated, or (c) where it is otherwise obvious that relief from sanctions is appropriate, parties should agree that relief from sanctions be granted without the need for further costs to be expended in satellite litigation. The parties should in any event be ready to agree limited but reasonable extensions of time up to 28 days as envisaged by the new rule 3.8(4)."*

The approach of the courts in 2016

The approach of the courts is that the "*rules exist to enable the court to resolve the matters in issue, not to throw up unnecessary technical obstacles*".[10] It is fair to say that the *Denton* decision led to a slight relaxation of the approach by the courts, but only a slight one. There continue to be cases where the courts reinforce the importance of procedural discipline and compliance with court rules and orders.

In the case of *British Gas Trading Ltd v Oak Cash & Carry Ltd*,[11] a defence was struck out as a consequence of a two-day delay in filing a listing questionnaire in compliance with an unless order. However, although the apparent delay was only two days, looking back, the Court of Appeal noted that in total the defendant's solicitors had had three months to comply with the relevant order, but failed to do so. On top of this they were two days late in complying with the unless order. This breach was serious and significant. Further, on top of this, the defendant delayed for over a month before seeking relief from sanction. Had it acted more promptly, then the late filing of the listing questionnaire might not have had any adverse impact on the overall conduct of the action.

Lord Justice Jackson noted that if:

> *" the defendant had made an immediate application for relief at the same time as filing its PTC, or very soon after, I would have been strongly inclined to grant relief from the sanction of striking out. To debar a party from defending a £200,000 claim because it was somewhat late in filing a PTC is not in my view required by rule 3.9, even as interpreted by the majority in Denton."*

A similar approach was taken in the case of *Gentry v Miller*.[12] This was a road traffic accident where, following judgment being entered in default of the service of an acknowledgement of service, insurers applied to set aside that judgment, alleging amongst other things that the claim was fraudulent. Vos LJ took a similar view to LJ Jackson:

> *"In my judgment, Mitchell and Denton represented a turning point in the need for litigation to be undertaken efficiently and at proportionate cost, and for the rules and orders of the court to be obeyed. Professional litigants are particularly qualified to respect this change and must do so. Allegations of fraud may in some cases excuse an insurer from taking steps to protect itself, but here this insurer missed every opportunity to do so. … The insurer must in these circumstances face the consequences of its own actions."*

Disclosure

With the emphasis on proportionality and the need to try and keep costs under control, it was no surprise that disclosure was one of the areas identified as needing reform. As part of the Jackson Reforms, substantial revisions were made to Part 31 of the Civil Procedure Rules. We say nothing further here, however, as we discussed the recent developments, particularly about predictive coding or computer assisted review (CAR), in the March 2016 *Insight* Issue 57 [http://www.fenwickelliott.com/files/insight_issue_57.pdf]. Further comprehensive guidance on eDisclosure can be found on the TeCSA website.[13]

Continued drive towards electronic working

Given that the aim of the Jackson Reforms was to lead to a decrease in costs, it is no surprise that the courts and parties are being encouraged to make use of a new electronic system to file documents. Since 10 November

Insight

2014, an extended trial for a new online filing system has been operating. Found at www.ce-file.uk, the Courts Electronic Filing (or CE-File) system enables parties in the Technology and Construction Court, Chancery Division, Commercial and Admiralty Courts and Bankruptcy and Companies Courts to file claims and documents and pay fees electronically. This increasing use of technology is bound to be a continuing feature of litigation as time goes by.

The Pre-Action Protocol

TeCSA has carried out a review[14] of the Construction and Engineering Pre-Action Protocol ("PAP"), which was published in January 2016. One reason the review was carried out was in response to suggestions that the PAP might be abandoned or heavily modified by the Court Rules Committee to make it voluntary. The review canvassed opinions from across the construction industry, including solicitors but also main contractors, specialist subcontractors, consultants and insurers.

Overall, 95% of respondents thought that the PAP was a valuable pre-action mechanism and 87% believed that it was creating access to justice. Based on the Report's findings, TeCSA said:

> *"there should be no doubt that the PAP ought to remain and that it should continue to be a compulsory step for those wishing to pursue a claim through the courts."*

It is interesting to note that when considering how the PAP could be amended, approximately 75% of respondents felt that access to and guidance from TCC Judges pre-action would be beneficial.

A new approach to trials and hearings

Since October 2015, the TCC, along with other courts that operate out of the Rolls Building in London, has been operating, under Practice Direction 51N, two new pilot schemes: the Shorter Trial Scheme ("STS") and the Flexible Trial Scheme ("FTS"). These pilot schemes are scheduled to last for two years. Neither scheme is mandatory and a claimant must "*opt in*"; if a defendant wants to opt out it must apply to do so promptly. Both schemes potentially should allow for more streamlined court procedures and savings in terms of time and costs.

Under the STS, there is still a pre-action protocol process, albeit a much shorter one being based upon a 14-day notice of intention to issue proceedings under which the defendant has 14 days to reply. The aim is to have trials listed within 10 months from the issue of proceedings, with trials of no more than four days and a judgment delivered no later than six weeks after the hearing.

With the FTS, the aim is to enable parties by agreement to adapt the trial procedure to suit their particular case. The FTS is designed to encourage parties to limit disclosure and to confine oral evidence at trial to the minimum necessary for the fair resolution of their disputes. This is all consistent with its stated aim, namely to reduce costs, reduce the time required for trial and to enable earlier trial dates to be obtained.

As with all new processes, initial take-up tends to be slow. However, in the recent case of *Family Mosaic Home Ownership Ltd v Peer Real Estate Ltd*,[15] Mr Justice Birss noted that the STS is intended to involve tight control of the litigation process by the court, in order to resolve the dispute on a shorter more commercial timescale. The idea is that a case will be managed by the same judge throughout. The Judge noted that:

> *"The initiative as a whole also seeks to foster a change in litigation culture: a recognition that comprehensive disclosure and a full, oral trial is often unnecessary for justice to be achieved. That in turn should improve access to justice by producing significant savings in the time and cost of litigation."*

Cases that will not normally be suitable for this trial process include:

- cases including an allegation of fraud or dishonesty;
- cases which are likely to require extensive disclosure and/or reliance upon extensive witness or expert evidence;
- cases in the Intellectual Property Enterprise Court;
- cases involving multiple issues and multiple parties;[16] and
- public procurement cases.

Looking forward

The courts are continuing to review potential reforms to the court process. In January 2016 Lord Justice Briggs published an Interim Report entitled *Civil Courts Structure Review*.[17] As well as looking into ways to reduce the delays in the Court of Appeal, one of the headline points arising from the interim report was the idea of creating an Online Court for the resolution of money claims up to £25,000 for use by litigants without lawyers.

Insight

This may ease the administrative pressures on the county courts. Despite its name, it would not be entirely automated or online. Lord Justice Briggs outlined three potential stages:

(i) Stage 1: a mainly automated process by which litigants are assisted in identifying their case (or defence) online so that it can be understood by their opponents and resolved by the court, and required to upload the documents/ evidence which the court will need to decide the claim.

(ii) Stage 2 will involve a mix of conciliation and case management, by a Case Officer. This will be conducted partly online, partly by telephone, but "*probably not face-to-face*".

(iii) Stage 3 will consist of determination by judges. This may not be through a traditional trial but could be carried out on the documents, on the telephone, or by video or at face-to-face hearings.

Lord Justice Briggs is expected to complete his review by the end of July 2016.

Conclusions

The Jackson Reforms are, of course, not the only changes the court system is currently facing. Indeed there is a certain irony when the cornerstone of the Reforms, namely the reduction of costs, is contrasted with the ever-increasing costs of court fees themselves (something which is not within the control of the judges or courts themselves). However, Mr Justice Edwards-Stuart succinctly summarised the approach that the courts are expecting to see in the case of *Gotch v Enelco Ltd*:[18]

> *"If access to justice is to have any real meaning, then the aim of keeping costs to the reasonable minimum must become paramount. Procedural squabbles must be banished and a culture of co-operative conduct introduced in their place. This will not prevent contentious issues from being tried fairly: on the contrary it should promote it."*

Footnotes

1. https://www.judiciary.gov.uk/announcements/harbour-lecture-by-lord-justice-jackson-confronting-costs-management/
2. [2013] EWHC 2923 (TCC)
3. One particular point to note is that the recoverable costs of budgeting itself are capped at 1 per cent of the approved budget for completing Precedent H and 2 per cent of that budget for all other costs, save in exceptional circumstances: PD3E 7.2.
4. Something the TCC has done in the cases of *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd* [2015] EWHC 481 (TCC) and *GSK Project Management Ltd (in liquidation) v QPR Holdings Ltd* [2015] EWHC 2274.
5. However, the CIP and GSK cases make it clear that a court will take into account the amount of costs that has already been incurred.
6. *The Board of Trustees of National Museums and Galleries on Merseyside v AEW Architects and Designers Ltd* [2013] EWHC 3025 (TCC).
7. [2016] EWHC 629 (Ch)
8. [2013] EWCA Civ 1537
9. [2014] EWCA Civ 906
10. *Williams v Devon County Council* [2016] EWCA Civ 419.
11. [2016] EWCA Civ 153
12. [2016] EWCA Civ 141
13. http://www.tecsa.org.uk/e-disclosure
14. *Report Evaluating the Perceived Value of the Construction and Engineering Pre-action Protocol,* available on the TeCSA website – www.tecsa.org.uk. The research included the examination of data records from 216 disputes.
15. [2016] EWHC 257 (Ch)
16. Aside from Part 20 counterclaims for the revocation of an intellectual property right.
17. https://www.judiciary.gov.uk/civil-courts-structure-review/
18. [2015] EWHC 1802 (TCC)

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