

LITIGATION 2014

Costs budgeting, the Mitchell aftermath, and funding challenges

Francesca Kaye questions whether, with the storm clouds gathering over the civil justice system, there is any prospect of achieving fairness in the coming year

The civil justice system teeters on the brink of collapse, with 2014 promising more cuts with reductions in staff and court closures, fewer sitting days, delays in processing box work and more listing delays.

Court fees across the board will increase. Despite the outcry, government will move towards implementing hearing fees/increased fees for larger cases. The general public will be increasingly unrepresented, having to travel further, pay more and wait longer for any form of civil justice.

Costs budgeting

The number of cases brought within costs budgeting will increase. The proposed limit is likely to rise from £2m to £10m, with the default position that all multi-track claims under that limit must costs budget.

As larger cases travel through the courts with well-resourced litigants we will see an increasing number of Court of Appeal decisions clarifying costs budgeting rules and other aspects of the Jackson reforms.

The court will have to grapple with the tension between costs budgets and detailed assessment and the new meaning of proportionality.

Mitchell

The effect of the Mitchell ruling is already being felt. Lord Dyson opted for a short sharp shock. The sentiment behind Mitchell, that everyone should comply

with court orders, is right. The effect has not been what the Court of Appeal intended. It has resulted in:

- increased applications for extensions of time and/or relief from sanctions;
- increased (in some cases opportunistic) refusal to agree extensions and opposition to applications;
- more applications being issued and listed for hearing, clogging up the lists and delaying other court users.

In 2014 the Court of Appeal will battle to balance compliance and efficiency with justice and merits. It will provide early guidance on 'trivial' to try to stop these applications. Aggressive litigation will continue.

Insurers will step in to run relief from sanction applications for potential claims against solicitors. Such claims will rise with insurers increasingly looking at financial stability, risk management and resources on renewal.

Small general litigation practices will struggle to continue in the post-Jackson world - many will close.

ADR and front-loading

Fewer cases will be issued in 2014, suggesting the reforms are achieving their aim. More cases will settle pre-issue through some form of ADR. Mediations will increase but overall success rates will decrease as some cases are pushed into mediation too early.

Overall litigation costs will rise

with more front-loading of costs. By the time cases reach case/cost management hearings the bulk of the costs will have been incurred.

The Civil Justice Council costs committee will report on guideline hourly rates. All sides will be disappointed by the outcome!

Implementation of the Chancery modernisation review,



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ushering in a modern Chancery court with a triage system and docketing, will be welcomed. Masters will be able to conduct trials, improving the overall efficiency of the Chancery lists.

The solicitor client relationship will change. Both clients and their legal teams will need to be well resourced or funded for the entire case from the outset. Dabbling in litigation by either solicitors or clients will die out.

Litigation funding

Funding market developments will make it easier for SMEs to obtain competitively-priced funding products. However, CFA usage will decline as clients who

can afford to fund their dispute by another route choose not to give their solicitor a % uplift from their damages. The number of claims run without ATE insurance will rise whether or not QOCS apply.

Funders, like insurers, will be increasingly concerned about the financial stability and risk management profile of the firms they work with.

Client pressure will force a small minority of solicitors will risk working on DBAs. No revised regulations will be issued. The known issues are likely to arise at the end of cases so Judicial clarification is unlikely in 2014.

We felt the strong winds of change for much of 2013. Will life be calmer in 2014 or does too much uncertainty remain? There will be something for pessimists, realists and optimists in 2014.

As Winston Churchill said: "The pessimist sees difficulty in every opportunity. The optimist sees the opportunity in every difficulty." **SJ**



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