Jury still out on Jackson

One year after the implementation of the Jackson reforms, **David Greene** reviews their impact on the market

The Jackson reforms celebrated their first birthday in April. A year is not enough time to measure their success. Indeed, to some extent, the reforms have taken a back seat to the Court of Appeal decision in *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537.

That decision goes somewhat further than proposals made by Lord Justice Jackson, particularly on the concept of parties agreeing the extension of time for events in the litigation calendar.

The main body of the Jackson reforms came into effect on 1 April 2013. The manner in which this happened, however, and the transitional provisions, have built in a long period of transition from one regime to the other.

In particular, changes to the recovery of success fees and after-the-event insurance premiums drove many claimant firms, particularly in personal injury, to sign up thousands of clients with claims in prospect to beat the 1st April deadline. Those signings are still working their way through the system. The normal life of a personal injury case is nine-to-12 months, so the next year should really see a change there.

With all respect to the judiciary, two fundamentals are often forgotten in these types of reforms.

Steep learning curve

First, the greater the control the judiciary has over the course of litigation, the higher the costs. The judicial view suggests the contrary. The Bench seek control in order to reduce the costs of litigation but the opposite tends to happen. Any judicial intervention in the process naturally increases the cost. The conclusion many come to (and some predicted) in relation to previous reforms, including the Woolf reforms, are that they drive up costs.

We see this in the new post-Jackson budgeting process and indeed in the *Mitchell* decision itself. For the budgeting exercise to be completed, considerably more work needs to be undertaken.

Detailed consideration must be given to the whole run of the case. Correspondence needs to be exchanged to deal with issues that may arise and to agree the disclosure proposals and the budget itself. There is a steep learning curve for practitioners. Even when things settle down, the exercise will still drive up costs. The exercise does greatly assist in establishing predictable and, perhaps, proportionate costs but it will always cause further costs to be incurred.

The *Mitchell* decision requires much more time to be spent on an individual piece of litigation, thus increasing costs. Further, it has and will produce much satellite litigation. *Mitchell* may be seen as an aberration flowing from the judicial politics of the time. The courts must surely restore the principle that the primary purpose of the process is to do justice between the parties, who are actually paying the court for the privilege. The courts and the rule committee will hopefully step in to stop the tide of litigation and costs that flow from this decision.

The second fundamental is that market reaction to these types of reforms is all important. This can be difficult to predict and fraught with potential unintended consequences.

Because of the normal lifespan of personal injury litigation, we are starting to see the market reaction to the Jackson reforms. That market is being shaped by non-recoverability of success fees and of ATE premium. It is also subject to the change in fixed costs which were reduced substantially after referral fees were banned. We can see three market changes.

Since Woolf the personal injury market has worked on the basis that claimants would have no liability for costs and thus no risk. It was thought that might continue notwithstanding Jackson but it appears the market has concluded it must charge the client some costs out of the damages recovered. Any firm not doing that is unlikely to survive in the longer term.

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The second reaction is in the ATE market. It was predicted the ATE market in personal injury might collapse. It has not. It has, however, changed substantially because the ATE product being sold to claimants covers them in relation to Part 36 offers and the escape for the defendant from QOCS. ATE providers need volume to make this market work because premiums are small, which means conducting business with firms able to provide substantial numbers of clients.

This flows into the third effect of Jackson in personal injury - market consolidation. To make the new rates and recovery regime work, firms need to consolidate to cut the costs of undertaking the work.

The jury is out as to whether Jackson-related reforms will reduce the costs parties have to pay in personal injury or whether simply shift a proportion of costs from defendant to claimant.

In other civil work, the Jackson reforms make pursuing smaller debts uneconomic. It remains to be seen how the market will provide a home for such claims. It is possible there will simply be a substantial increase in the number of litigants in person.

Whilst highlighting increases in costs flowing from judicially-instigated reforms, there are some outstanding benefits of the latest round of reforms. In particular, the reforms produce a greater predictability for both parties in relation to costs. This makes the running of litigation somewhat easier and allows an accurate picture to be given to provide ATE cover for adverse costs. Proportionality also assists in pursuing claims in mid-range disputes. Unfortunately the picture is not so bright for lower range debts.

Some might say civil justice reform needs to be visited every 10 years or so. That's time enough for reforms to bed down and effects assessed. That means nine years before another review. Maybe then we could look fundamentally at judicial control of proceedings and to what extent that is truly necessary for an efficient and cost effective process - an interesting question for the next reviewer.

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