LSLA
Prepared by Kysen PR

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'Everyone is covering their back': litigation post - Mitchell

"Rigid, aggressive behaviour and an unhealthy obsession with point-scoring" had superseded "pre-Mitchell pragmatism, flexibility and co-operation", according to a survey by the London Solicitors Litigation Association (LSLA) together with the New Law Journal.

The master of the rolls Lord Dyson last year refused relief from sanctions to lawyers representing Andrew Mitchell, the MP embroiled in the Plebgate scandal, for a late costs budget in a test case of the Jackson reforms. In response to a question in the LSLA survey as to whether case management behaviour on specified time limits had changed post-Mitchell, almost three-quarters of respondents (72%) replied in the affirmative.

"There is a lack of co-operation amongst solicitors to sensibly extending deadlines, as it is seen as a chance to get your opponent possibly struck out. Hence, there is more game playing than sensible co-operation," said one respondent.

"We used to have a level of co-operation between parties and the court, well-run cases progressed by agreement and a case only went to court if there was something you really couldn't agree on," commented Francesca Kaye, immediate past president of LSLA. "The system was flexible, worked to everyone's advantage – it paid to talk." The "very robust" Mitchell judgment has introduced a "demoralising rigidity". "Now everyone is covering their own back and what's best for the client is being sidelined by a slavish obsession with deadlines," Ms Kaye said. "It's depressing."

Almost two-thirds of respondents (64%) said the requirement to file and serve a costs budget had changed their approach to litigation. Another respondent complained of "difficult tactical considerations around the costs budgeting process and different applications by different judges" which was "increasing antagonism".

It was "a shame for Jackson" that the way in which the MoJ introduced his reforms had "unleashed a backlash of negative sentiment", said Ms Kaye. Almost three-quarters (74%) of respondents said costs budgeting had increased costs to firms and over half (51%) claimed to have stopped offering CFAs. Firms were apparently avoiding damages based agreements because of a lack of clarity around the current rules – almost three-quarters of respondents (74%) said they did not offer them.