LSLA

New Law Journal

PRESS RELEASE

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CO-OPERATION BEING SIDELINED AS LITIGATION REFORMS BITE

The extent of the body blow delivered to commercial litigation practice by the Mitchell relief from sanctions appeal judgment has been laid bare in a joint survey by London Solicitors Litigation Association (LSLA) and New Law Journal (NLJ).

Rigid, aggressive behaviour and an unhealthy obsession with point-scoring is elbowing out pre-Mitchell pragmatism, flexibility and co-operation between parties which used to get the job done sensibly for clients.

Civil litigators responding to the survey of LSLA's 1,500 members, whose practices range from major City litigation teams to specialist smaller firms and sole practitioners, bemoan a return of pre-Woolf adversarial days. Asked if case management behaviour on specified time limits had altered as a result of Mitchell, 72% of respondents said Yes.

"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. Compliance was being seen as more important than justice, with another respondent saying Mitchell "will lead to more aggressive litigation". Another said of Mitchell, "it is not a clever judgment".

Francesca Kaye, Immediate Past President of LSLA, whose two-year term of office spanned the finalising and introduction of the Reforms, said: "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. 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. It's depressing."

A litmus test on the impact of the Jackson Reforms one year on, the LSLA-NLJ's 2nd survey also took a long, hard look at the costs budgeting regime introduced after April 2013. Some 64% of respondents said the requirement to file and serve a costs budget had changed their approach to litigation – not necessarily for the better. To quote one: "There are now difficult tactical considerations around the costs budgeting process and different applications by different judges. It is increasing antagonism between parties over perceived attempts to take tactical advantage and appears to be being inconsistently applied."

In Francesca Kaye's opinion it's still too early to tell what the full impact of the new cost budgeting regime will be. "Consideration of costs was always part of the case planning process for most litigators. What's changed, as in Mitchell, is that we are now faced with a rigid process, with forms that don't work and uncertainty around court decisions. However, it will take another year while cases progress through the system before we can judge the true impact of the new regime.

"It's a shame for Jackson LJ that the way in which the MoJ introduced his reforms has unleashed a backlash of negative sentiment. This is probably being exaggerated by a sense that the MoJ isn't finished yet and that litigators face further changes meaning the litigation practice environment will continue getting tougher."

Jan Miller, Editor of New Law Journal, said: "We've gone into more detail this time on costs budgeting and case management now that litigators can draw on 12 months' experience. We have been impressed to see how litigation practices have been coping with such significant change, albeit there's considerable criticism and concern. "

Other Survey highlights

On costs budgets - 74% of respondents said costs budgeting had increased costs to their firms overall and 64% identified the post-reform new rules on disclosure as also driving up their costs.

On CFAs: 51% of respondents, compared with 34% six months ago, said they had stopped offering CFAs.

Firms continue to steer clear of Damages Based Agreements (DBAs) because of the lack of clarity around the current rules – 74% of respondents said they did not offer them, up from 71% last time.

On ATE Insurance: 60% of respondents said they were still able to secure economic cover for clients, although the non-recoverability of ATE premiums and CFA success fees was having an impact.

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