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Jackson one year on: a brave new world of fear and uncertainty

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'There seems to be a big stick approach to the way litigation is conducted and an air of unreality over what can be described as trivial'

Perhaps it was too good to be true. The Jackson report implemented with properly resourced courts and without the civil legal aid cuts. Cheaper, more efficient litigation, which encouraged more people to enforce their rights, instead of massive court fee increases.

Lawyers held their breath last year to see how the Jackson reforms would really be implemented, and then there was Mitchell. The roof fell in and, as the dust settled, so did what John Bramhall, new president of London Solicitors Litigation Association, described as a new "climate of fear".

Bramhall said the "message from the top" from the senior judiciary, at last month's Civil Justice Council conference, was "unrelenting and unapologetic".

He went on: "I find it a little depressing. There seems to be a big stick approach to the way litigation is conducted and an air of unreality over what can be described as trivial.

"The developing case law is inconsistent and there is no guidance as to what is the correct approach. There is going to be uncertainty and increased nervousness across the profession, along with more negligence claims over missed time limits."

Bramhall said the profession was under "incessant pressure" from Jackson, Mitchell, pressures on court fees and guideline hourly rates.

"There's not a lot of good news, though London remains a world centre of legal disputes, whether through litigation or arbitration. Grayling makes this point, and this is the message everyone wants to get out."

However, Bramhall said the Mitchell ruling had created a "climate of fear" and solicitors could now be criticised by clients for not taking what would have been seen as 'silly points'.

"There needs to be a level of understanding between solicitors before cases can be resolved. The Commercial Court is showing a greater level of sympathy as to what it deems to be trivial and what is a good reason."

Bramhall said the '28-day buffer', which would allow parties to agree time extensions of up to 28 days without applying to the court, could offer some help, but he had failed to identify any other crumbs of comfort.

David Marshall, managing partner of Anthony Gold, said there was some evidence that fewer low-value public liability cases, like trips and slips, were being brought in the post-Jackson era. This was because cases were often risky and success fees needed to be higher than the limit of 25 per cent.

Another concern was the failure of DBAs to get off the ground in the way Jackson wanted.

"He made it clear that DBAs were part of the package, and the Civil Justice Council feels the regulations have not allowed them to be used," Marshall said.

He said Lord Faulks, the justice minister, who attended the CJC conference, said the MoJ would be taking another look at the regulations.

"I am sure he understands what the problem is, and may be able to bring a fresh perspective, but I am not particularly hopeful," Marshall said.

He added that the CJC conference was dominated by Mitchell. "The Master of the Rolls was hardly going to stand up and say: 'I've got it completely wrong.' In the summing up session, he said that the way we do things in this country is by case law, there will be other cases and things will settle down."

John Spencer, vice president of APIL, said that there was evidence that low-value claims were falling across the board.

"I don't adhere to the ABI belief that this is great news for access to justice," Spencer said.

He said the number of notified RTA portal claims from May 2013 to February 2014 was 10 per cent down on the previous year.

Spencer said there was also evidence of "significantly lower than expected" numbers of claims on the employer's liability and public liability portals.

Rather than reducing after the abolition of referral fees, Spencer said the costs of acquiring personal injury cases had gone up.

"It is not realistic to presume that solicitors working in the personal injury sector spend nothing to generate work," Spencer said.

There was a further problem with high-risk and complicated cases, in that the 25 per cap was not high enough to make some of them commercially viable.

"In order for these problems to be overcome, some action is required. It is not an option for the MoJ to say that life should continue as it ever did. There are real impacts on genuine victims who have suffered injury and need to be protected."

Living in fear

"There is a huge jurisprudence building up around Mitchell. It reminds me of automatic striking out in the period before Woolf. The whole system virtually went into meltdown, and at the end they got rid of it all and Woolf came in. I can see the same thing happening now.

"Everyone is taking ridiculous points, frightened of being struck out for technical reasons and it's dangerous to trust anyone any more. The whole point of Woolf was to foster a 'cards on the table' approach. We've lost sight of that and we're in great danger of losing the benefits of Woolf.

"Jackson's approach is that of course lawyers will moan about changes, but you have to give them time. The problem is the lack of court resources. Why do they produce reports based on more resources when, in fact, there are fewer? Instead of giving control to practitioners, there is more court control, but is that achievable?

The courts are short of resources and yet we are spending a huge amount on highly technical points.

"They have introduced a system where you have to keep going back to the courts to do anything. Budgeting hearings take a lot longer than ordinary hearings. There are a huge number of applications for extensions. I'm not sure they have thought through the impact of all this.

"The Court of Appeal may take the opportunity to set clearer guidelines on what is trivial, and what isn't, but I'm not that hopeful. The pace of case law doesn't move that quickly. In the costs wars, judges tended to stick to the facts of the cases before them. I fear we are into that sort of mode."

David Marshall is managing partner of Anthony Gold