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What does the Preliminary Report on the Review of Civil Litigation Costs mean for TCC practitioners? Claire Packman reviews those proposals likely to impact upon TCC litigation.

On 8 May Sir Rupert Jackson published his Preliminary Report on the Review of Civil Litigation Costs ("the Report"). It amounts to 652 pages plus annexes and appendices surveying the existing state of civil litigation and considering fundamental changes on a scale potentially equal to those of the Woolf reforms.

Key matters under consideration likely to affect TCC practitioners are:

- **The proposal to defer the "pre-action" protocol in the TCC so it is carried out after issue of the claim form;**
- **The active encouragement of significant sanctions, including wasted costs orders, in respect of irrelevant and unfocused witness statements. Irrelevant matters in pleadings may also be sanctioned. The Report's comments on these matters may have an immediate impact in practice.**
- **Restrictions on the number, timing and scope of applications for specific disclosure;**
- **The use of "disclosure assessors" in heavy cases where much of the documentation is held electronically;**
- **A presumption that expert evidence on quantum be given by a single joint expert; in the case of other experts, exchange of reports to be sequential;**
- **Allowing the use of percentage contingency fees in the TCC, provided the cost of such arrangements is not borne by the defendant;**
- **Possible fixed costs or court imposed caps on the cost of particular stages of litigation.**

The remit of the Review is to make recommendations to promote access to justice at a proportionate cost and it does not shy away from including radical new departures among the options for consideration. The Report in most cases sets out potential future options without expressing a preference at this stage. Sir Rupert Jackson is keen to stress that he remains of an open mind: he says *"The reported assertion by some protagonists, that Jackson has already made up his mind and is simply going through the motions, is not correct."*[1] There are however certain themes and suggestions which appear to be given more prominence than others and which may therefore be more likely to make the final Review. Further, given Sir Rupert Jackson's experience of the TCC, his views are more likely to be fully-formed than those in other courts.

The Report seeks comments from practitioners by 31 July 2009, following which the Review will be written with its findings to be presented to Sir Anthony Clarke, Master of the Rolls, in December 2009.

[1] Part 1: Chapter 1 footnote 8

TCC litigation

Chapter 34 of the Report deals specifically with TCC litigation. However other sections of the Report are also of obvious relevance, such as chapters on disclosure, witness statements, expert evidence, case management, trials, fixed costs and cost-shifting.

The Review is not intended to re-open the debate which preceded the Second Edition of the TCC Guide, although the Report acknowledges that general reforms of civil litigation across the board may impact upon the TCC.

The Pre-Action Protocol for Construction and Engineering Disputes

The Report proposes a fundamental change to the way in which the pre-action protocol process is carried out.

It notes continuing concern among practitioners *"and judges"* about the front loading of costs which the protocol generates. Related concerns are the cost of compliance with the protocol and the concern that overseas litigant may be put off by the process.

It therefore puts forward a proposal to have the "pre-action" process after issue of the claim form in order to allow the process to be supervised by the court thereby avoiding duplication of costs, work and effort, limiting abuses and allowing for ready resolution of issues such as squabbles over the extent of disclosure. The costs of the protocol would become part of the costs of the action. It is suggested that such a change could be run as a pilot in the TCC.

The Report seeks the views of TCC practitioners and other TCC users as to this proposal. Few details are given of how the proposal would work in practice, for example whether the requirement for any sort of letter before action would remain, whether it would be open to the parties to agree to go through the protocol before issue rather than after, whether the process would be automatically triggered by the issue of the claim form or whether it would be dependent on directions at the first CMC, what criteria would govern whether it would be better to address issues by exchange of protocol letter and response or by exchange of pleadings etc. Practitioners may well want to provide their comments on these matters.

Witness Statements

Practitioners should note and beware the comments on witness statements in the Report because, not only does it scourge witness statements for being too long, too discursive, traversing documents unnecessarily and being more akin to submissions than the story of a lay person, but it actively encourages TCC judges to disallow the costs of such statements[2] and even to make wasted costs orders in respect of them: *"it may… be… that the judiciary must…stimulate the cultural shift to concise witness statements on the relevant facts by a more robust use of sanctions…This may mean imposing costs sanctions on any party that adduces evidence that is irrelevant or that does not go to the facts in issue. In particular, in appropriate circumstances, it may mean the use of wasted costs orders against the legal profession where the rules have not been adhered to."*[3]

Witness statements are particularly in the firing line of the Review as they are said not often to be the catalyst for settlement, yet engender extensive cost which is only of real value if the matter in fact proceeds to trial.[4]

The extent to which this will be done with retrospective effect is open to debate. The Report suggests a change in the rules may be the precursor to any such cultural change *"If judges are going to curb the excesses of witness statements and pleadings by means of retrospective costs orders, then perhaps a clear steer should be given in the rules"*.[5] However given that the complaints about witness statements are said in the main to be a failure to implement properly the Woolf reforms in respect of witness statements, it is clearly open to argument that witness statements in current litigation can already be subject to sanction and practitioners should be prepared for such arguments arising throughout 2009.

[2] Part 7: Chapter 34: para 5.6
[3] Part 8: Chapter 42: para 6.2
[4] Part 8: Chapter 42: para 3.3 and 3.4
[5] Part 7: Chapter 34: para 5.9

As to guidance as to what a witness statement should include, they should

- not be merely an extended submission (Chapter 42 para 4.6(ii)). Witness statements in interim applications appear in particular to have caught Sir Rupert Jackson's eye[6].
- only address issues in dispute (Chapter 42 para 6.3)
- be in the witness' own words (Chapter 42 para 6.3)
- not repeat what is already in the documents but should amplify facts that are not apparent from the documents in evidence (Chapter 42 para 4.4)
- be as short as possible.

Reply witness statements are discouraged and should not be allowed unless some genuinely new issue arises with which the witness needs to deal[7].

Pleadings

Pleadings with unnecessarily extended narrative are also attacked. Consideration is given to increased disallowal of the costs of such pleadings or requiring parties to re-plead.

Disclosure

Two chapters of the Report deal with disclosure: the first looks in great depth at the question of e-disclosure (the disclosure of electronic material), the second looks at disclosure generally.

The chapter on general disclosure (chapter 41) considers a broad spectrum of options which could take the place of standard disclosure, including adopting the IBA rules of disclosure, i.e. documents relied on coupled with specific requests from the opposite parties. However in the chapter on TCC business it is made clear that this approach is not favoured by TCC practitioners and judges, and it does not appear to be favoured by the Report. Practitioners can expect standard disclosure to be retained for TCC business as the default, although the Court will be encouraged to consider at the first CMC whether some more limited order might suffice. The TCC Court Guide list of circumstances in which standard disclosure may not be appropriate is quoted approvingly[8] and is likely to form the basis of reforms to disclosure in other courts.

Applications for specific disclosure appear to have caught Sir Rupert Jackson's eye[9] as vehicles of particular abuse, and it is likely that the final Review will contain some restrictions on the number and / or timing of such applications, along with further measures to prevent "fishing expeditions". Possible restrictions are to only allow one specific disclosure application per party, and to make applicants show that a document is material to the issues and necessary.

As to e-disclosure, in relation to TCC business it is said that *"E-disclosure should be used in those cases where it will save money, but not in cases where it will generate excessive costs (through the need to employ consultants, set up systems etc.)"* TCC practitioners should note however the general conclusion on e-disclosure which is that in every substantial case where documentation is held electronically, consideration must be given to the problems involved with and the costs of e-disclosure[10]. The need for planning and the involvement of senior lawyers at an early stage is stressed to ensure that the format of disclosure is cost effective, and that searches are undertaken using appropriate keywords.

In "heavy" cases, one suggestion raised by Sir Rupert Jackson is for the use of disclosure assessors where an experienced lawyer (or retired judge) is appointed to assist the court in relation to disclosure and to identify which categories of documents on both sides merit disclosure.[11] This is intended to keep a closer eye on the disclosure process without taking up inordinate judicial time.

Lists of Issues

There seems to be no enthusiasm in the Report to follow the Commercial Court in adopting lists of issues for TCC litigation, in particular because they are expensive to prepare given the need for hypothetical sub-issues and may be subject to change as the case develops[12]. The Report suggests revising paragraphs 14.4.1 and 14.4.2 of the TCC Guide to identify only the key issues at the pre-trial review.

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[6] Part 8: Chapter 42: paras 4.2 and 4.6(ii).
[7] Part 7: Chapter 34: para 5.7 and Part 8: Chapter 42: para 4.5.
[8] Part 8: Chapter 41: para 2.13
[9] See Part 7: Chapter 34: para 5.4; Part 8: Chapter 41: paras 2.10-2.11, 3.3, 4.2, 4.8, 6.3, 6.10, 6.12.
[10] Part 8: Chapter 40: para 8.1
[11] Part 8: Chapter 41: para 6.8-6.9
[12] See Part 8: Chapter 42: para 6.3

Document Management

Criticism of the duplication of documents is a theme which runs through the Report, in particular in relation to disclosure and exhibits to witness statements. It is clear that Sir Rupert Jackson would like to address this: he suggests that every new document could be given its trial bundle reference when it first appears[13].

Expert Evidence

Although the TCC chapter of the Report does not deal with expert evidence, under the discussion of general expert evidence in chapter 42 suggestions for saving costs are sought from practitioners. Key proposals under consideration[14] are

- whether sequential exchange of expert evidence on liability to be standard;
- whether there should be a presumption that all quantum experts should be instructed on a single joint basis unless there is good reason not to. Given the contentious nature of much quantum evidence in the TCC, it is doubtful whether this provision is intended to apply to TCC litigation. No exceptions have been made however;
- whether parties should not be able to recover the costs of expert reports which are not relied upon or not covered by leave given for experts to be called.

Funding Litigation

The Report asks specifically for further input from TCC users[15] on the following topics:

- Success Fees and ATE premiums: whether these should cease to be recoverable, and if so whether any exception should be made for "hard" cases or consumer type cases, such as a group of householders claiming against a housing development. The Report notes that there is no obvious justification for the defendant shouldering the burden of success fees and insurance premiums in the ordinary run of TCC litigation between commercial firms.
- Contingency Fees: whether contingency fees based on a percentage of damages should be allowed in the TCC, in particular if costs recovery is unaffected so the burden of the contingency agreement falls on the claimant and not the defendant. The Report notes that this is used to good effect in Canada[16].
- Fixed Fees: on the possible use of fixed fees in the TCC and in particular whether they might be welcomed by small and medium sized enterprises. It is not clear whether it is intended that such measures could apply depending on the nature of the litigant rather than the nature of the claim. The Report notes that in major high value litigation court users generally wish to retain the present regime of recoverable costs being at large[17]. The Report in chapter 48 considers both cost management and cost capping, whereby costs estimates are used by the court as part of the case management process to provide a budget or even a cap for each stage of litigation. The TCC is expressly referred to in chapter 48 which deals with costs management (*"[the more Draconian form of costs management]…may possibly be welcomed by litigants in business disputes of the kind that are managed and tried in…the TCC".)*[18] and TCC users may well therefore wish to comment on these proposals.

Conclusion

The Report rules little out of consideration at this stage, so predicting what will make the final Review is difficult at this stage. TCC practitioners with strong views should take advantage of the opportunity to comment by 31 July 2009.

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[13] Part 7: Chapter 34: para 5.3
[14] Part 8: Chapter 42: para 14.1
[15] Part 7: Chapter 34: paras 6.4 and 7.2
[16] Part 4: Chapter 20: para 2.5
[17] Part 5: Chapter 23: para 3.5
[18] Part 8: chapter 48: para 3.24