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## What does the Final Report on the Review of Civil Litigation Costs mean for TCC practitioners?

Claire Packman reviews those proposals likely to impact upon TCC litigation.

On Thursday 14 January Sir Rupert Jackson published his Final Report on the Review of Civil Litigation Costs ("the Report"). It gives a series of recommendations intended to control costs and promote access to justice. It follows a Preliminary Report, published on 4 May 2009, which has been the subject of much discussion and consultation.

TCC litigation is dealt with at Chapter 29 of the Report. As befits a former Judge in charge of the TCC, he sets out with pleasure the reports of satisfaction from TCC users. In general TCC practices are given a pat on the back (*"I should be extremely cautious before recommending any significant changes to the existing procedures of the TCC"*) but there are a number of significant recommendations of which TCC practitioners should be aware.

**Key recommendations likely to affect TCC practitioners are:**

- **The Pre-Action Protocol for Construction and Engineering Disputes should be amended, so that**
  - **(a) it makes clear the limited level of detail required;**
  - **(b) costs should be disallowed at the first CMC if a party has gone beyond what is required.**
  - **The need for that protocol should be reviewed by TCC judges, practitioners and court users after 2011.**

- **Low value TCC cases should be able to be allocated to the Fast Track and managed and tried by district judges of appropriate construction experiences.**

- **Contingency fee agreements should be allowed.**

- **TCC Judges are encouraged to disallow costs in respect of pleadings or witness statements which contain extensive irrelevant or peripheral material.**

- **Courts should be more flexible about allowing supplementary evidence-in-chief.**

- **Lists of issues should be focused upon key issues rather than upon all the issues in the case.**

**The Pre-Action Protocol for Construction and Engineering Disputes**

The Protocol is dealt with in Chapter 35 paragraph 4.1 et seq. The Report notes complaints about the excessive and disproportionate cost of complying with the pre-action protocol. The Protocol is to remain pre-action (contrary to submissions from TCC judges and TECBAR), but:

(a) The protocol should be clarified: "*It should be made clear in the protocol that the claim letter should not annex or reproduce a draft pleading and that expert reports should not normally be served at the protocol stage. Documents should not be annexed to the claim letter or the response letter, unless there is good reason to do so. Documents in the possession of both sides should not be supplied*."

(b) There is to be greater judicial control and sanction if a party goes beyond the requirements of the protocol. The costs estimates before the first CMC should expressly state what costs have been incurred in complying with the protocol. "*If it is found that either party has gone substantially beyond the requirements of the protocol, the judge should so certify at the first CMC and should decide the amount of costs to be disallowed*." "…*it is to be hoped that a few robust judicial decisions will rapidly have the desired effect upon pre-action behaviour, thus reducing the need for cost disallowance applications."*

The court should also have the power by way of amendment to CPR rule 25.1.to give directions pre-action where there is a serious problem in relation to the protocol process.

When the TCC moves into the Rolls Building in 2011, the need for the protocol should be reviewed particularly in comparison with the lack of pre-action protocols for proceedings in the Chancery and Commercial Courts.

**Low Value TCC cases**

Fast Track
Currently all TCC cases are multi-track pursuant to CPR 60.6(1). The Report recommends changing this rule so as to allow TCC cases to be allocated to the fast track if of appropriate value (under £25,000), if there is only one expert on each side and if they can be tried in a day. Such cases will therefore be subject to the fast track fixed costs regime.

In order to deal with such cases, it is recommended that a small number of district judges with suitable construction experience be appointed.

Low value TCC cases not in Fast Track
Greater publicity is to be given to the fact that there is County Court jurisdiction for TCC work. Judges in the County Court should generally be more alert to the possibility of transferring cases to the TCC.

Mediation
The Report recommends that mediation should be promoted with particular vigour for those low value construction cases in which conventional negotiation is unsuccessful.

**Pleadings**

Criticisms are levied at *"overlong and discursive statements of case"*. The guidance given is that
a) where "shortcomings" are obvious from the outset, the offending party should be required to re-plead.
b) where the deficiencies or irrelevancies only become apparent later, costs should be disallowed.

The Report points out that the court already has the power to give such directions, and practitioners can expect this guidance to be influential immediately. The Report also recommends amending section 5 of the TCC Guide to make this guidance explicit.

One assumes that the "shortcomings" would have to be patent and serious in order for the Court to require a party to re-plead. Presumably it is hoped that, in practice, the threat of potential re-pleading with the associated costs implications will curb the long-winded.

**Witness Statements**

Witness statements are particularly in the firing line of the Report 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.

Witness statements in construction litigation are singled out for particular criticism, and parties are discouraged from going through the bundle commenting on each recorded event. Sir Rupert Jackson accepts that, in return, the court should be more flexible about allowing supplemental evidence-in-chief.

Practitioners should note and beware the comments on witness statements because costs sanctions are encouraged if witness statements contain much irrelevant or unnecessary material.

**Disclosure**

The majority of those who expressed an opinion favoured retaining standard disclosure for TCC cases. However the recommendations in the Disclosure section of the Report will apply to TCC cases.

For substantial cases the Report recommends a "menu option" which provides for a range of disclosure options to be agreed between the parties or imposed by the court. The options proposed are as follows:

1. Dispense with disclosure
2. Disclose the documents on which you rely and request specific disclosure from any other party
3. Disclosure by issue
4. Standard disclosure
5. Disclose any documents which it is reasonable to suppose may contain information which may:
    (a) Enable the party applying for disclosure to advance his case or damage the case of the party giving disclosure, or
    (b) Lead to a train of enquiry which has either of those consequences
6. Any other order in relation to disclosure that, having regard to the overriding objective, the court considers appropriate.

There may now be a move to change the CPR to implement the menu option but this is unlikely to happen in the immediate future. In the meantime this part of the report may be used to encourage a culture change to adopt a more flexible approach to disclosure where the parties agree and to costs orders where they don't.

As for e-disclosure, no further recommendations were made as part of the report on the basis that the necessary reforms were already being put forward for implementation by the draft "Practice Direction Governing the Disclosure of Electronically Stored Information'. That Practice Direction will require parties and their legal representatives to consider, at an early stage, the use of technology to identify potentially relevant material, to collect, analyse and review it. This is currently before the Civil Procedure Rule Committee and it is reported that the intention is that it should be finalised soon and brought into effect in April 2010.

**Lists of Issues**

Lists of issues should be focused upon key issues rather than upon all the issues in the case, and paragraphs 14.4.1 and 14.4.2 of the TCC Guide should be simplified to reflect this. There was no enthusiasm in the TCC to follow the Commercial Court approach to list of issues.

**Part 36 Offers**

With regard to Part 36 offers, the Report considered the effect of the Court of Appeal decision in *Carver v BAA plc* [2009] 1 WLR 113 ("*Carver*") which permitted "*a more wide-ranging review of all the facts and circumstances of the case in deciding whether the judgment, which is the fruit of the litigation, was worth the fight.*"

Sir Rupert Jackson criticizes the uncertainty which has been brought into the Part 36 costs regime by the decision in *Carver* and concludes that it should be reversed judicially or by rule change: "*It should be made clear that in any purely monetary case "more advantageous" in rule 36.14(1)(a) means better in financial terms by any amount, however small.*"

The Report also suggests including an uplift of 10% of damages (unless the Court considers it unjust to do so) for Claimants whose offer is not accepted but who beats their offer at trial.

**Funding Litigation**

Major changes are recommended to the current funding regime. Primary legislation will be required to effect many of the recommendations. In particular:

a) Preventing the recovery of success fees and ATE insurance premiums from defendants. Tree root claims by insurers against councils being funded by conditional fee agreements came in for particular criticism.

b) Lawyers be allowed to enter into contingency agreements. It is recommended that both solicitors and counsel should be permitted to enter into contingency fee agreements with their clients. However the cost of the contingency fee will come out of damages rather than being payable by the opposing party. Contingency fee agreements will have to be properly regulated and will not be valid unless the client has received independent advice.

In conjunction with the funding changes is a recommendation to increase general damages, including payments for nuisance, by 10%.

**Abandoned**

Proposals such as disclosure assessors and the progressive creation of the trial bundle through the case management process remain aspirations or matters which the parties can agree, but have not been put forward as recommendations.

**Conclusion**

It remains to be seen precisely which of the recommendations become law and when. Those entailing change to primary legislation (such as those relating to the funding of litigation) are likely to take some time to come into effect if at all. However those relating specifically to procedures in TCC litigation are more likely to be accepted quickly given Sir Rupert Jackson's particularly deep knowledge of the TCC and the relatively modest scope of the changes recommended.

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