Judged by results

Jackson LJ reflects on his reforms in an interview with **Litigation Funding** editor Rachel Rothwell

On the day of *Litigation Funding*'s interview with Sir Rupert Jackson, large snowflakes are falling outside the window of his grand but functional office in the heart of the Royal Courts of Justice. The window is slightly open as the office, he remarks, is always either too hot or too cold.

Jackson will be leaving the stately environs of this 1870s building in a week, when his 70th birthday means he must retire from his judicial post. This is a time for reflection.

In classic style, the judge – known for his appreciation of the skeleton argument – has prepared a nine-page summary of his reforms, which will form the basis of a farewell lecture he is to give at his old Cambridge law faculty. In it, he has assessed the success or otherwise of every part of his reform package. Most initiatives receive a metaphorical tick from the judge, but there are a few crosses in there too.

CASE CONTROL

Jackson begins with his reforms to case management, which – with one notable exception – have been largely uncontroversial. Standard directions online and streamlined rules for case management conferences are working well, he says; and while increased docketing has not gone as far as he would have liked, it is 'effective as far as it goes'.

But he concedes that his new version of rule 3.9, with its firmer approach to the enforcement of rules and court orders, had a 'particularly bumpy start'. Indeed, the Court of Appeal's overzealous interpretation of the new rule in the now infamous *Mitchell v News Group Newspapers Ltd* [2013] EWCA Civ 1537 threw the legal world into chaos, with opponents 'mitchelling' one another over the slightest breach. Jackson himself firmly copped the blame for this, even though he was not even on the bench in *Mitchell* – and it seems he was quietly tearing his hair out over the judgment.

What was it like to be blamed for the *Mitchell* saga? 'Most unpleasant,' he grimaces. 'I didn't like it at all, but I had to put up with it. I did what I could. In lectures I called for a more reasonable approach towards stricter enforcement. Then *Denton* came along, and I set out in my judgment how I thought the rule which I was responsible for should be interpreted. I'm glad I was a member of the court in that case. The two judges I was sitting with came most of the way with me, but not quite all the way. But *Denton* marked a considerable retreat from *Mitchell*.

'My view is the courts should apply *Denton*, and the courts should not pay regard to *Mitchell*. *Denton* is the case that interprets rule 3.9…

'I think since *Denton* the courts have been applying the rule properly, and I think it's been very beneficial. Rule 3.9 as correctly interpreted makes people much more attentive to complying with rules and court orders than they used to be. Huge costs were being wasted by adjournments and so forth. The new rule has made litigation more efficient and therefore less expensive.'

How did Jackson come to be on the bench in *Denton*? 'I do sit on some cases about my reforms; I'm one of the judges [appointed] to do so. It's up to the listing office who sits. This has to be done with discretion, because whenever I sit on an appeal concerning the interpretation of my reforms, someone will write a letter to the [Law Society] *Gazette* saying Jackson is interpreting his own reforms, he shouldn't. So there's criticism, but on the other hand I have a real contribution to make, both in informal discussions with other members of the court, and in my own judgment.'

He adds, tellingly: 'I think it was probably fairly clear that when the interpretation of rule 3.9 was going wrong, I was concerned to be involved in any future appeal, and it so turned out – although it wasn't my decision – that I was involved. I'm really glad that I was involved, because I really want to see these reforms working properly.'

Jackson admits that the final piece of his case management puzzle, his menu of disclosure options, is one of the areas that warrants a cross rather than a tick. 'The rule is perfectly satisfactory, but the problem is that no one has taken any notice of it,' he remarks.

Jackson adds: 'Most of the case management reforms are working well, and people have quite reasonably forgotten they are part of the Jackson reforms. The fate of any civil justice reformer is that when their reforms work well, the fact that they were responsible for the reforms is forgotten instantly. Where people are displeased with the reforms, they are held personally to account.'

RECOVERY POSITION

From the claimant perspective, one of Jackson's most unpopular reforms was the abolition of recoverable success fees and after-the-event insurance. But the judge is adamant that this has achieved its aim.

He says: 'I didn't make myself the most loved judge in the world by ending recoverable success fees, but this reform has been a success. Recoverable success fees distorted incentives and drove up costs massively - you've only got to look at the figures in my original report to see that. The abolition has substantially reduced litigation costs.

'It's combined with several counterweight measures, increased damages, enhanced rewards for claimant Part 36 offers… and overall this reform has controlled costs without inhibiting access to justice. You can see that if you look at the figures for claims before and afterwards. A lot of people predicted that ending recoverable success fees would be the end of the world. I got a huge amount of flack for it.'

Would he accept that in areas such as small business disputes, the abolition of recoverability has made many cases uneconomical to bring?

'In small business disputes, recoverable success fees did as much harm as good,' he asserts. 'You would have Case A, where a small business is litigating against a large corporation, it has a good case, recoverable success

fees and ATE premiums, fortified by these rules, and it's able to go ahead knowing that it won't pay any costs if it loses, and it will recover everything back if it wins. But as often as not the boot is on the other foot. You might get the large corporation suing the small business… I remember a case where a modest sized business was suing a consumer, and the business had a recoverable success fee and after-the-event insurance. The judge dealing with the case threw up his hands with horror and said this cannot be what the rules were intended to achieve – and he only hoped Jackson puts it right.'

He continues: 'There were some absurd situations; international corporations suing the Civil Aviation Authority with CFAs and ATE insurance, and household insurers suing local authorities with recoverable success fees and ATE insurance, for example over tree root damage causing subsidence. The local authority was paying four times the costs of the action, and the insurance company was litigating at no risk. The local authorities put in a very powerful submission to me saying that these rules were never intended to put the burden on council tax payers.'

He adds: 'The problem with recoverable success fees is that, unlike legal aid, the regime is blind – it applies whether it's a big corporation against a small business, an insurer against a local authority; or a big global corporation against the Civil Aviation Authority. It was chaotic. I had to stop it. And I think most people, even those who vigorously spoke against it, knew in their heart of hearts that I couldn't let it go on.'

QUALIFIED SUCCESS

Turning to other issues, Jackson says qualified one-way costs shifting has succeeded, with insurers better off as they no longer have to pay substantial ATE premiums when they lose, while claimants remain protected. He is happy with the way the fundamental dishonesty provisions are operating, adding that 'where someone is fundamentally dishonest then they shouldn't be protected by QOCS'.

Moving to damages-based agreements, however, he concedes that this has failed. 'It's been one of my big disappointments,' he confesses.

Jackson cites three reasons for the failure of DBAs. First, the indemnity rule has not been abolished as he recommended, making solicitors 'fearful' of entering into them. Second, the DBA rules themselves are 'unsatisfactory and in urgent need of reform'. On this point, it is worth noting that while Jackson rolled up his sleeves and took an active role in the creation of many of the rules and practice directions relating to his reforms, the poorly drafted DBA regulations were produced during a period of illness in which the judge retreated from the fray entirely for 18 months. Had he been involved, the regulations would surely have been more workable; though Jackson may have been powerless to prevent the third obstacle to DBA success: the government's refusal to allow the 'hybrid' DBA option.

Returning to the theme of small business disputes, he says: 'Say you have a small business which wants to pursue a claim for a million pounds, and it's got a perfectly respectable case. In order to pursue the claim, it

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would be quite prepared to pay out, say, 25-30% of its winnings. It's a complex piece of litigation and the solicitors can't afford to do it at no cost, but they can say, "well, we'll do it at a greatly reduced fee of £X per hour, and in return we'll have a share of the winnings". The regulations don't permit that, and they should permit it.'

Why does he think the government refused to allow this hybrid option? 'I cannot understand why,' he frowns. 'There is no rational argument against it. I'm aware that big business lobbied against allowing contingency fees at all, and who knows what has been said by large corporations that do not like damages-based agreements.

'But in my view there is an urgent need to reform the DBA regulations and to permit hybrid DBAs. I would like to see the abolition of the common law indemnity rule, but that hasn't happened yet – and I could live without that if the regulations were amended and hybrid DBAs were permitted. If the Ministry of Justice does that, that will substantially promote access to justice.'

THUMBS UP FOR FUNDING

Jackson is still very much supportive of the concept of third-party funding. He says he likes it because while it increases access to justice, it does not add to the costs that the opposing party faces; unlike recoverable success fees.

He says: 'Third-party funding helps litigants with large claims, and groups of litigants with small claims. I would be the first to accept that it seldom assists individual litigants with small claims. But none of my funding proposals will serve everyone. What I've recommended is that we should have a range of funding options, to maximise the choices… Third party funding won't suit everybody, but you just need to maximise the options. I think this has been a success.'

Has the funding industry now grown big enough to warrant government regulation? He responds: 'The market did not need government regulation when I wrote my 2009 report. I said self-regulation was what we needed… I also said that the time would come when regulation would be needed. I'm not going to comment on whether that time has or has not been reached; I see from articles in the press that that's a matter of controversy, and I haven't studied the evidence sufficiently closely. What I do say is that the promotion of third-party funding which I recommended has been a success. The code for funders has been a success.'

He adds: 'Third-party funding controls costs, because the funder is an experienced litigator. And you may note that third-party funders love costs budgeting. They'll usually say they want to work on a court-approved budget. The fact that a professional litigant loves costs management tells us quite a lot about the system.'

BUDGET ASSESSMENT

Funders may be supportive of budgeting, but for litigators, it has been one of the most controversial aspects of the reforms; and many lawyers argue that it has frontloaded and increased costs. Jackson gives the initiative a firm tick, however.

'Costs management is working well,' he asserts. 'It's a success, people have got used to it. The one thing it doesn't deal with is incurred costs. That's a shortcoming, but it doesn't mean that the whole system is wrong. It's worth controlling future costs even if you can't control past costs. But we can actually control incurred costs, and I've set out how in my supplemental report, but it does require amendment to section 33 of the Senior Courts Act 1981 and section 52 of the County Courts Act 1984, to permit pre-action costs control. Once that is done, then the last problem with costs management is sorted.'

What did he think of the shambolic start to budgeting in 2013 – which again fell during his illness – and the lack of training received by the judiciary?

'In my [May 2015] lecture "Confronting costs management" I acknowledged the problems that existed and I called for more judicial training,' he says.

'The Jackson reforms covered a large number of issues. They were all introduced on the same day. People had to be trained for everything and costs management didn't receive separate and extensive attention. I can understand that the MoJ is strained and has limited resources, with a lot of reforms to train people up for.

'It was important to introduce all the reforms on the same day, because they were interlinked and they needed to have an effect; people needed to take notice of them and that was more likely to happen if they were all introduced on the same day. But the downside of the big bang is that there was less training on costs management for judges before the implementation date than would have been ideal.'

He adds: 'The introduction of costs management has not instantly made me a popular figure among judges and practitioners. [But] I think it's working much better now.'

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PROPORTIONATE APPROACH

Closely linked to costs budgeting has been Jackson's new proportionality rule, which the judge insists has worked 'in a fair way' over the past five years, despite a lack of guidance on its operation emanating from the Court of Appeal.

But would he accept that lawyers struggle to know how the rule will be applied in any given case? 'Well if they don't know what it means in an individual case, they've not yet brought a case in the Court of Appeal to deal with the point, have they?' he retorts.

Could guidance have been given in *BNM v MGN Ltd* [2017] EWCA Civ 1767 last year, as the profession had been anticipating? 'But in the end the case didn't turn on that point', he says, adding that he was not a member of the court in that case. Would he have liked to have given judgment in *BNM*? 'I couldn't possibly comment,' he says. 'The candid answer is that I suspect I ought not to be a member of the court that is interpreting rule 44.3 (5). I think that's too close to the bone.'

Jackson adds: 'What needs to happen is a group of appeals where one or other party is dissatisfied with the assessment of costs to come up collectively to the Court of Appeal presided over by the MR or a senior judge, where the court can give guidance on the rule.

'I don't think that we want a great long practice direction supplementing rule 44.3 (5). There would be endless arguments about the interrelationship between the rule and the practice direction… The fact that there haven't been cases coming up requiring direct guidance on the rule shows that by and large it's working satisfactorily…. If there were huge inconsistencies [in the way judges are applying the rule] I'd expect that to come to the Court of Appeal.'

The judge continues: 'The wording of rule 44.3 (5) occupied me for hours and hours and days and days, and I had been through a lot of different drafts, I'd run lots of different drafts through my assessors, and that rule captures the essential factors for determining what costs are proportionate. Among all the criticisms of the reforms, no one has suggested any improvement to that wording. You've got to have regard to the value of the case, or the sums in issue or the value of the property or rights in issue, you've got to have regard to complexity, you've got to have regard to people messing the other side around and so on. The rule identifies all the relevant factors. [But] I regret that there has not yet been a cluster of test cases… I would dearly like to see all going well on this front.'

FIXED IDEAS

One last piece of the Jackson jigsaw is yet to be slotted into place: the extension of fixed costs, as proposed in his 'supplemental report' published last July. Back in January 2015, Jackson stunned the legal profession by suggesting that, given the general dissatisfaction with costs budgeting, fixed costs were needed in civil cases worth up to £250,000. The speech had lawyers scrambling to explain how budgeting was actually working much better now, and by last July the judge had considerably scaled back his fixed costs proposals, to a far more palatable £100,000 case value threshold.

Did Jackson really believe in January 2015 that fixed costs should be brought in at the £250,000 threshold, or was this a tactical masterstroke designed to get the legal profession to leap on board with budgeting? A mischievous grin spreads across his face. 'Well in the words of that television programme, "you may think that – but I couldn't possibly comment".'

He adds: 'I was pleased to note that costs management was working rather better, and I took that into account in deciding to rein in my original proposals for fixed costs.'

Those plans now languish in an in-tray at the Ministry of Justice, and while Jackson is confident that they will at some point be implemented, he says he 'would have liked to see a swifter response' from the MoJ. He is also 'disappointed' with the delay to his planned pilot of capped staged costs for business and property cases worth up to £250,000, which he had hoped to have up and running while he was still conducting his supplementary review.

ANY OTHER BUSINESS

Aside from the reforms already mentioned, the Jackson package also included – among other initiatives – the introduction of provisional assessment, a ban on personal injury referral fees, the promotion of alternative dispute resolution, a 10% increase in general damages, and the 'hot tubbing' of expert evidence – all of which could fairly be regarded as quietly successful. 'The fate of a civil justice reformer is you get it in the neck when people are cross, but nobody notices when things go well,' the judge notes wryly.

Jackson greatly regrets that his recommendations on legal aid were not heeded, however. Indeed, it seems to be a source of considerable pain to the judge that despite having strongly warned against further cutbacks, the legislation enacting his reforms also brought in deep cuts to legal aid provision; and inevitably he finds himself blamed.

'On the very day my reforms were [introduced] there were swinging cutbacks in legal aid. Well they hold me responsible for it… If you're going to reform civil justice you need a thick skin.'

PASTURES NEW

Having spent the past decade reshaping civil justice costs, the fact that he must now leave the job unfinished is frustrating for Jackson. But he is compelled to do so as he reaches the mandatory retirement age of 70.

'At the age of 70 I do not feel either the need nor the wish to retire,' he remarks. 'It takes me out of the picture just when the last phase of my reforms [on fixed costs] is under consideration.'

Jackson will return to his former chambers, now at 4 New Square, as arbitrator and adjudicator, and is also joining the new commercial court in Kazakhstan headed by Lord Woolf. Is that disloyal to the British system? 'No,' he replies, 'It's a very good thing. It's excellent that the British brand is respected around the world… I think it will promote the rule of law, and promote the British brand.'

Ten years ago, Jackson was taken aside by the then Master of Rolls Antony Clarke to be told that he was being invited to join the Court of Appeal, and also being handed the task of tackling civil justice costs. That brief, which at the time was pitched as a one-year job, has dominated his time at the Court of Appeal. Has he ever wished the MR had simply picked someone else? 'I have had those moments, yes,' he laughs. 'But having been asked to do it, I felt I had to see it through… Whoever received that poisoned chalice was bound to make themselves extremely unpopular; unless they ducked the issue and just issued platitudes about the desirability of motherhood and apple pie or whatever.

'And despite all the criticism, the inescapable fact as I see it is that the Jackson reforms have achieved significant reductions in the costs of litigation.' He adds: 'Someone had to do something ten years ago. I was just unlucky to be the new boy in the Court of Appeal.'

Rachel Rothwell is editor of Litigation Funding