"History will judge this era with little kindness"

The Civil Justice Council asked for views on the impact of the Jackson reforms back in February. **Laura Nabozny**, a partner from Morrish Solicitors, says that the council needs to know that the current system for the administration of civil justice is broken

Laura Nabozny
is a partner with Morrish Solicitors

Everyone knows that rules have to be obeyed. But in the case of the administration of civil justice, they must have the flexibility to cope with real life situations. They should not be applied as if life is lived in an academic legal utopia.

Sadly, the notion of legal common sense, which would normally prevail with concomitant sanction applied by judicial discretion, (tempered by a realistic possibility of appeal where, in a rare case, that was justified), has been abandonded.

The move away from the justice-based approach is to be deprecated. It is contrary to what a reasonable lay person is entitled to expect and is an abrogation of the responsibility of the state to provide a fair system for resolving civil disputes.

An inconsistent approach

We have experienced a notable inconsistency between different District Judges, even in the same court, in relation to the application of decisions of the higher Courts, which sadly are in themselves inconsistent. In *Mitchell* it was suggested that the ruling was designed to achieve certainty and to avoid the need for satellite litigation. In practice, it has had exactly the opposite effect.

The inconsistency of approach has led to difficulties in cases when dealing with the other party, as well as in advising clients.

For example, if we are compliant with directions in a case and the other party is not, then due to the inconsistency of approach between District Judges, we feel unable to advise clients accurately on how the Court is likely to deal with the defaulting party in any particular case. If a client cannot be reliably advised, the certainty desired in Mitchell is a cruel, expensive myth. The inevitable effect is more hearings, not less.

> "We have experienced a notable inconsistency between different District Judges, even in the same court, in relation to the application of decisions of the higher Courts, which sadly are in themselves inconsistent

We are now in a position where we have had to decide as a matter of firm-wide policy that we are unable to give the other party an extension of time to the Court's directions. We have made that decision on the basis that the grant of an extension may be negligent in that it could have the effect of depriving our client of a procedural advantage.

The result is that procedure overrides substance. This attitude has been fuelled by some, shall we say, surprising decisions made by various courts.

An example of this inconsistency was found in a recent case we were involved in where the defendants served their witness evidence ten working days late. Their application for relief from sanctions was granted on paper. This is in stark contrast to the much publicised recent cases where evidence has been disallowed after a direction has been missed by a matter of hours. How in these circumstances can we advise our client on how the Court is likely to respond to such a breach – whether this be a breach on our part or the defendant's?

In another case a defendant asked for permission to obtain their own medical expert in a multi track personal injury case. We did not object but the Court refused their application because no cost information had provided for that experts report; even though it could have been given at the hearing itself.

On a separate occasion which dealt with the same point, the district judge decided that the likely cost of the medical evidence could be known from past experience and the exact opposite result was reached. Our reference to CPR requirements for costs information was literally shouted down by the judge, who allowed the defendant to obtain a report.

Since appeals of case management decisions are now effectively impossible, the perfect storm has been created.

Court delays and a lack of resources

There is excessive delay with the courts in not only typing and serving orders made on the courts' own initiative, but also in listing applications – presumably because they are swamped with what should be unnecessary applications to seek relief for sanctions.

We have, a number of times, received orders from the court

> There is excessive delay with the courts in not only typing and serving orders made on the courts' own initiative, but also in listing applications – presumably because they are swamped with what should be unnecessary applications to seek relief for sanctions

pecifying that the order be complied with by a particular date hich has in fact already passed by the time the court order has een received. Clearly we cannot comply with such orders, but ue to the consequently unpredictable approach of district judges, e cannot anticipate what the court's response to this will be and herefore do not know what we need to do to remedy the problem.

Is an application for relief from sanctions required in these ircumstances? Even though we could never comply as we knew othing about the order?

One example of this involves an order received on 26 February with a list of documents to be served by 23 January. The claimant was granted permission to obtain a medical report and for it to be disclosed by 28 February. Compliance was plainly impossible as we had not even instructed the expert, since permission was required.

The judge said that he was not prepared to change the order, leaving our client with no alternative but to appeal; leaving civil justice entirely discredited in his eyes, and ours.

Such orders also cause acute anxiety, as well as creating unnecessary work for both practitioners and courts.

This sort of thing did not happen pre-LASPO save on infrequent occasions and in such circumstances we would be confident that common sense would prevail. Sadly, this is no longer a factor that seems to be taken into account.

On a more practical basis, the courts vary hugely across the country as to how they will accept documents. Some courts will only accept orders sent by email, some will not accept email. Others will only accept emails if the attachments are less than five pages long, and a few no longer accept filing of documents by fax, but have not publicised this. This problem needs to be resolved as part of the creation of the National County Court.

If these draconian sanctions are to remain as a result of any breach, then the means to file documents at court has to be consistent.

Sanctions

At Morrish, we believe the sanctions imposed for breaches following Mitchell are far too draconian and have moved us away from a justice-based approach to civil claims.

There is a willingness to impose what used to be the ultimate, and rarely used, sanction of strike out with impunity. It is almost as if the judges were issued with strike out pills in their training pre-LASPO. In our opinion the sanctions do not assist or go towards the justice of a case and are in themselves applied inconsistently. A slavish regard to procedural dogma now overrides substance.

This creates huge injustices and impacts upon our ability to advise clients as to the likely progress and even the outcome of their case. Different and more proportionate sanctions are required.

Cost budgeting

We believe that Form H is entirely unfit for purpose. It is too complex and in our experience many District Judges at CCMC do not understand it or chose not to have meaningful regard to it. We have found that some Judges are taking a broad brush approach to costs budgeting, whereas some are scrutinising the Form H word by word and number by number.

In a recent clinical negligence case, we spent the best part of a week preparing Form H and trying to agree and disagree items with our opponents. It all turned out to be wasted time.

At the joint CMC and CCMC, the District judge had a quick look at the budgets and then said: "this is rather tricky isn't it? Costs management dispensed with."

Preparation of Form H is hugely time-consuming and does not follow any recognised analysis of how we would record time or consider projected work to be done in the future. It does not even accord with the layouts of Bills for Detailed Assessment. Given that the rules require parties to front load the work they do before issuing proceedings, it is doubly irrelevant as the court do not examine pre issue costs. The sanctions for failing to comply with cost budgeting rules are disproportionately draconian. To, in effect, deprive a party of the ability to obtain legal representation for want of a form that is rarely actually looked at is, in our opinion, contrary to the justice of a case and simultaneously otiose of and in itself.

Our experience is that it is probably looked at by a judge in perhaps 25% of cases in which the form is prepared; the corollary being that 75% get along fine without bothering with Form H. In our view it should be dispensed with – save in respect of cases with costs over circa £250,000 base solicitors costs.

We urge those responsible to put right this intolerable position. History will judge this era of Civil Justice with little kindness.