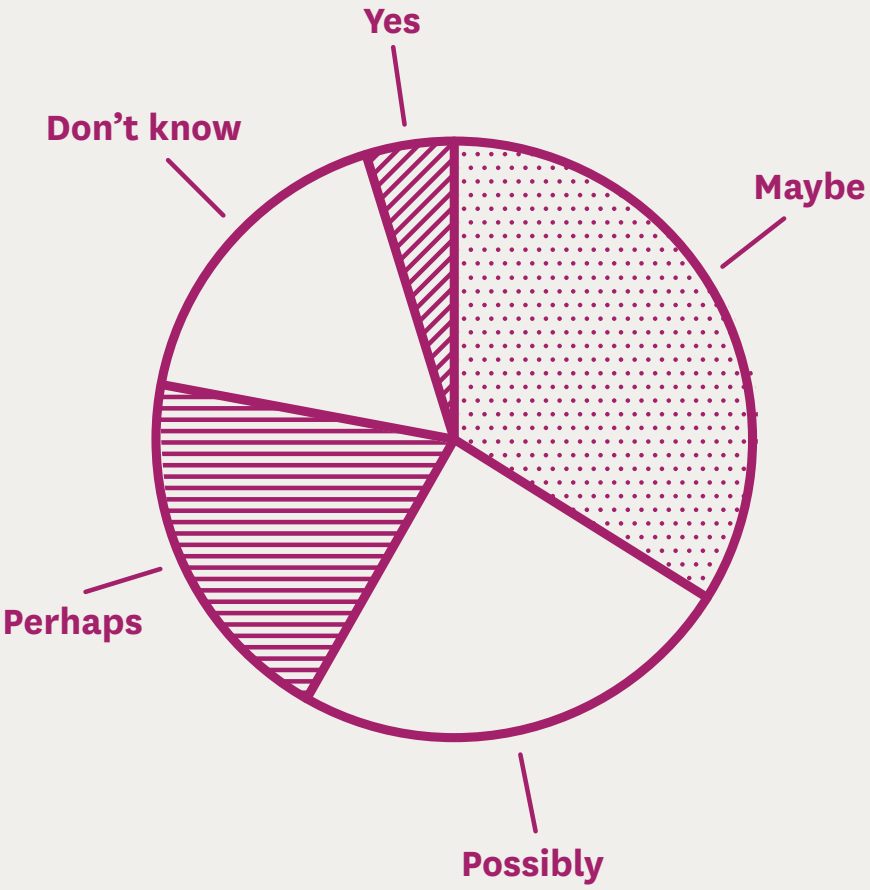
# The Costs Briefing

Edition 03 November 2016




→ **A Lack of Engagement.** Beware of overspend. → **Proportionality Trumps Reasonableness.** The latest on *BNM v MGN*. → **September Breakfast Meeting.** A round up from our recent event. → **Recoverability of Third Party Funding Costs in Arbitration.** Our update on this developing area of costs. → **Second Coming of Costs Bills.** A step in the right direction. → **News from Practico.** An update on what's been happening at Practico.

# November 2016

Welcome to the third edition of The Costs Briefing: "A Lack of Understanding". There has been a lot of activity here at Houndsditch since our last edition, with the launch of our new website including a video tracing the history of the costs world (if you haven't seen it yet, do check it out!).

September marked our second Breakfast Meeting at The Devonshire Club, chaired by Alexander Hutton QC, with a focus on the new format bill of costs and the continuing concerns around proportionality. If you have any feedback, comments, or would like to attend one of our events, please do get in touch, via costs@practico.co.uk

**Deborah Burke**
Managing Associate

# A Lack of Engagement

Andy Ellis

Recent research has revealed that 89% of cases governed by a costs management order have been subject to overspend. According to the report, there is 'a clear failure to comply with the CPR and keep within the ordered amount on a phase by phase basis'. The research goes on to highlight that litigators 'are now being punished for not taking their approved Precedent H into consideration by individual phase'.

That headline statistic, whilst stark, is not particularly surprising to those of us who operate at the sharp end of litigation costs. Costs lawyers have long been encouraging their clients to take a systematic approach to costs management, but a lack of deep engagement has been apparent.

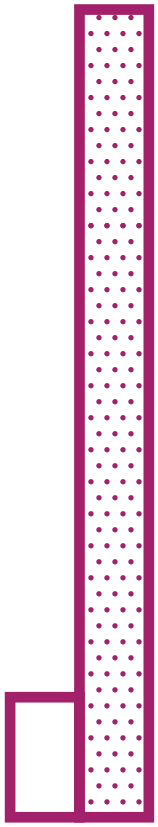
The rarity of applications to vary budgets supports the notion that many law firms are simply unaware of their current spend against the relevant components of an approved or agreed court budget (until it's too late).

Nor is it any longer wise to avoid budgeting and hope for a soft ride from the costs courts on assessment. In *BNM v MGN* the Senior Costs Judge, Andrew Gordon-Saker recently slashed a claimant bill in a non-budgeted case by two thirds under the operation of the post April 2013 rule on proportionality.

Large gaps have to be closed between incurred and recovered costs in otherwise successful cases or there will be a growing number of damaged client relationships.

Practico recently undertook its own research under the title 'Sophisticated Spending', based on a survey and follow up interviews with prominent general counsel and litigation heads. Our research revealed a growing but still low level of traction with tools that allow live (or at least short lag) feedback on outlay against budget. Firms have been slow to reconfigure their systems to accommodate the new 'J code' standard for cost categories that map to court budget categories. However, those early adopters such as Irwin Mitchell report that the benefits for efficiency and better management information are starting to show.

It is fair criticism that the budgeting rules have been here long enough for practitioners to understand and if not embrace them, at least adapt to them.



## Practico News

In October Practico welcomed Deborah Burke, who joins us as Managing Associate.

Deborah is well known in the costs world both as a senior costs lawyer and for founding and managing her own law costs drafting and consultancy business. She is now bringing that skill and experience to the management team at Practico and will concentrate on supporting and strengthening client relationships. Deborah will also focus on maximising the value to our clients of the innovative technical and presentational approach that Practico brings to its work.

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**James Barrett is saying goodbye**

After approaching two years at Practico, I am sad to announce that I am moving on to pastures new this November. It's been a fascinating two years at Practico, working on cases such as mis-selling of Interest Rate Hedging Product (SWAPS) cases, and the Construction Workers Blacklisting litigation.

More recently, I have been involved in project work around business development, which has seen me working on the website relaunch (including our new video). We have now held two breakfast meetings – both of which have seen some challenging costs topics come to the fore. Finally, taking up editorship of 'The Costs Briefing' has been rewarding; I very much hope you have found our offering useful.

It has been a great pleasure working with the Practico team and our clients, and I wish you all the very best for the future.

→ **Read more news at www.practico.co.uk**

# Roundtable at The Devonshire Club

The last week of September saw the second Costs Roundtable, a breakfast meeting held at the Devonshire Club. The meeting was chaired by Alexander Hutton QC, who was accompanied on the panel by Jamie Carpenter of Hailsham Chambers and Andy Ellis & Jeremy Morgan QC from Practico.

We were delighted to have a variety of representatives from key commercial law firms in the City, including Keith Mathieson and Oliver Murphy (RPC), Leah Alpren-Waterman (Watson Farley and Williams), Adam Fisher (Gowling WLG), Virginia Cooper (Bevan Brittan), Sonia Kenawy (White and Case), Razi Mireskandari (Simons Muirhead & Burton), Jennifer Richardson (Osborne Clarke), and Jason Shardlow-Wrest (Linklaters).

Many interesting issues were raised and thought-provoking questions posed, including those around the new bill format, proportionality, costs management, and the recovery in arbitration of the costs of arranging third party funding.

The new bill format occupied a sizeable part of the breakfast discussion. The readiness of lawyers and law firms generally to adopt J codes, along with the benefits and downsides were all discussed.

Alexander Hutton QC, Chair of the Hutton Committee, shared his views and experience on the new bill (which is likely to be mandatory from October 2017) and the path to conducting detailed assessments with electronic bills and analysis. He also highlighted key positive aspects including its time-saving potential and more cost-effective production.

Andy echoed these points, underlining the fact that it provides a more efficient way of keeping track of costs, particularly in cases that are subject to changing budgets.

Proportionality was another hot topic, with an extensive discussion around the recent decisions in *BNM v MGN* and *May & May v Wavell*

*Group PLC & Bizarri.*

Funding costs were also discussed; with a focus on the recent case of *Essar Oilfield Services Ltd v Norscot Rig Management Pvt Ltd* (see also our article below). Jamie Carpenter highlighted that this could make arbitration more appealing to claimants and that ATE premiums may be affected by such developments.

If you or any of your colleagues are interested in attending future events, please do drop us an email to **costs@practico.co.uk**

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Case Notes

**New Bill Format**

While there appears to be some delay having the precedent available on the CPR website, please see below the link to the precedent in PDF form. Please contact Andy or Deborah if you would like copies of the fully functioning Excel templates. → View pdf

**Recovery of costs of arranging third party funding**

*Essar Oilfield Services Ltd v Norscot Rig Management Pvt Ltd [2016] EWHC 2361 (Comm)*

High Court upholds the decision of an arbitrator to allow recovery of the costs of obtaining third party funding.

→ View case

**Proportionality**

1. *BNM v MGN Limited [2016] EWHC B13 (Costs)* → View case
   Senior Costs Judge halves a "reasonable" bill utilising the new proportionality rule.
2. *May & May v Wavell Group PLC & Bizarri [2016] EWHC B16 (Costs)* → View case
   Application of the two-stage proportionality test leading to a considerable reduction from a claim of £208,000 to £35,000 plus VAT.

**Costs Management**

*CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd and others [2015] EWHC 481 (TCC)* → View case

The court criticised the claimant's budget as being "unreliable, disproportionate and unreasonable" and went on to set new budgetary figures setting maximums that the claimant could recover in each phase of the litigation, giving consideration to both past and future costs.

*SARPD Oil International Ltd v Addax Energy SA & Anor [2016] EWCA Civ 120* → View case

Case highlights the danger of not raising objections to the opponent's incurred costs at the budget hearing.

# Proportionality Trumps Reasonableness

James Heawood

The recent decision of Master Gordon-Saker in *BNM v MGN* Limited has provoked and is likely to continue to spark much debate over the use of the so called "stand back" approach to proportionality in the post-Jackson era. The Claimant has obtained permission to appeal and the case will now receive the attention of the higher courts at the beginning of next term.

For those who do not know, the case concerned a primary school teacher who launched an action against MGN to prevent them from using confidential information obtained as a result of a tip-off from a source who had found her mobile phone. The claim settled shortly after proceedings had been issued and 16 months after first instructions were received. The Defendant agreed to pay £20,000 in damages and the Claimant's costs.

The bill totalled £241,817 (including additional liabilities). The total costs were assessed at £167,389. However, Master Gordon-Saker went on to consider the new proportionality test.

The Master stated that "it is clear that the new test of proportionality was intended to bring about a real change in the assessment of costs" and that was certainly the approach that he took. In his judgment the Master stated that;

- the new test should apply to additional liabilities
- the Court should not need to consider additional liabilities separately under the new test
- the test should not be based purely on financial proportionality to avoid the risk of disa bling litigants from presenting their case

Considering the above and the guidance set out under CPR 44.3(5) the Master reduced the bill to £84,855.

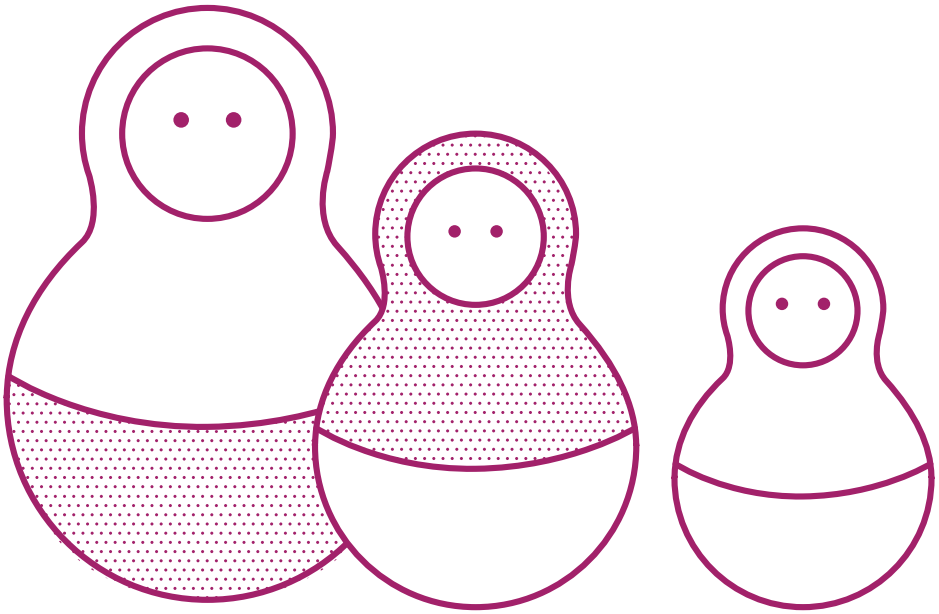
I have seen several comments on this judgment suggesting that Master Gordon-Saker has applied an arbitrary reduction to the bill and that his approach is not a fair one which I think, in a way, misses the point.

Whilst you can argue that the new test has its flaws – and it certainly creates a great deal of uncertainty for all parties as to what can be regarded as a strong settlement offer – it is hard to argue that the Master should not have applied it as he did.

**What does this judgment mean?**

First and foremost, it will hopefully set a precedent going forwards for applying the new proportionality test. In my experience, the old *Lownds* test did not appear to make any real difference to the costs ultimately recovered on assessment. Having clarity as to how the test should be applied (even if that produces what might seem to be harsh outcomes) can only be a good thing in my view.

Secondly it could potentially be seen to be a response to Lord Justice Jackson's proposals for fixed costs. I am not a fan of the proposed introduction of fixed costs without giving time to see whether budgeting and the new proportionality test succeed in controlling costs. Lord Justice Jackson has said that we have three years' experience of costs budgeting – in my view this is not nearly enough to create either a solid basis for a fixed costs model across all categories of claims or to see whether another regime change



is required.

I believe that the budgeting system (with assistance from the new proportionality test) will, in time, reduce costs and is a system worth persevering with. Furthermore, I believe that fixed costs are a move towards penalising Claimants (a view shared by Lord Dyson MR in his Harbour Lecture on 13 May 2015 – even if it is one he seems later to have resiled from) and reducing access to justice rather than promoting it.

Master Gordon-Saker has shown that the proportionality test can be effective at controlling costs – by considering all the circumstances of the claim and applying an appropriate figure to match those circumstances. The new test applied in this way is not dissimilar to a fixed costs regime save that rather than apply a single figure for all claims it looks at the individual claim and allows a fixed cost appropriate to that claim alone.

No system is going to deliver a perfect world but a case specific assessment seems to me to be far fairer than 'one size fits all'.

The appeal in *BNM v MGN* has been granted a leapfrog certificate to the Court of Appeal, to be heard by two Lord Justices and expedited with a time estimate of one day. A cross appeal has also been given permission to be heard.

Previously listed in the Chancery division in the first week of December, I suspect most observers will see the leapfrog as the shortest route to the inevitable final destination for this thorny issue.

The post LASPO proportionality test needs interpretation at the higher level – and if expedition really does mean expedition, then a pre-Christmas hearing is still on the cards.

# Recoverability of Third Party Funding Costs in Arbitration

Andy Ellis

A significant appeal decision has recently emerged dealing with the recoverability between the parties of third party funding ("TPF") costs in arbitral proceedings – *Essar Oilfield Services Limited v Norscot Rig Management Pvt Limited*.

*Essar* concerns a long-running ICC arbitration where the successful party, Norscot, further succeeded in an application to recover its costs of litigation funding.

The case is being hailed as a landmark judgment in some quarters and is expected to encourage more parties to engage in arbitration, especially if they have TPF. The equal and opposite is also true.

For the uninitiated, TPF arrangements usually allow the Funder, in return for taking on risk, to recover from the successful client either a percentage of damages or a multiple of advanced funds, whichever is greater. In this case the funding advanced to Norscot amounted to £647,086. A multiple of three times that outlay was the applicable product of the funding formula in this case which landed Norscot with a liability north of £1.9 million in return for the Funder having shouldered the lion's share of the litigation costs risk.

It is uncontroversial that none of that £1.9m would have been recoverable had the dispute been litigated rather than arbitrated.

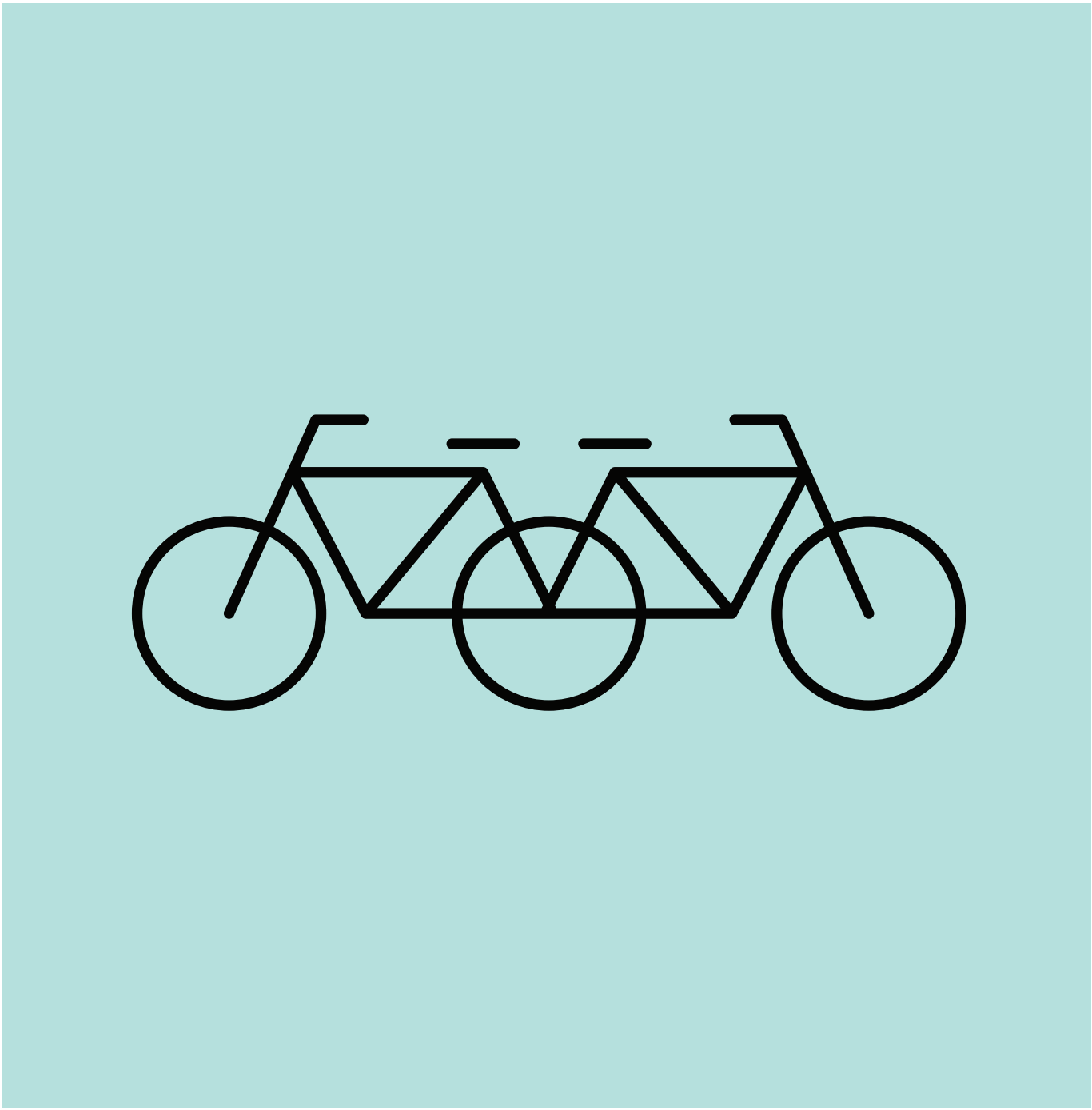
Under definitions found in s59(1)(c) of the Arbitration Act 1996 the Arbitrator may however use his discretion to award 'legal or other costs of the parties'. Sir Philip Otton, the former Lord justice of Appeal who acted as Arbitrator, found the third party costs to be recoverable as they properly fell within the ambit of 'other costs'. This decision was appealed to the Commercial Court and was upheld.

A key circumstance in the case, which may suggest an infrequent application of the principle, was the heavy criticism of the conduct of *Essar* in relation to both the Arbitration itself and the repudiatory breach of contract that gave rise to it. Sir Philip held that there had been a 'blatant attempt to drive Norscot from the judgment seat' forcing it to undertake a 'huge financial burden and gamble into entering into the funding arrangement'. Costs were awarded on the indemnity basis.

The position taken by Sir Philip was supported by HHJ Waksman on appeal who found the judgment to be 'detailed and robust', going on to say that it would be 'odd and certainly unfortunate' if the arbitrator was not entitled to include third party costs as part of 'other costs' as well as finding that 'the expression should not be confined by some legal straightjacket imposed by reason of what a court might or might not be permitted to order'.

Agreeing with Sir Philip that 'legal and other costs' is sufficiently wide to enable the recovery of the third-party funding. HHJ Waksman stressed that there was no basis for a narrow interpretation of 'legal and other costs' in the context of the Act. The Commercial Court held that the appropriate test was to consider what the incurred costs were for bringing or defending the claim. The High Court upheld the award for the third party costs incurred pursuant to section 59(1)(c) of the Act and Article 31(1) of the ICC Rules.

The fuller implications of this award are yet to be seen. There will no doubt be a slew of appli-



cations for the recovery of funding costs. However, whether a Tribunal is likely to award such costs will be fact-dependent and in all probability reactive to extreme conduct. It does not follow that such a costs windfall will become the norm.

Whether there is scope for further appeal on legal grounds is an interesting question. Many think not because the wording on the Act is wide and deliberately so. One cannot argue that the effect of the judgement is to put the successful party closer to the positon they were in before the dispute.

But where does it go next? I wonder if this will be followed by claims in arbitration for the costs of management time in addition to funding costs – another no-go area in litigation but now up for grabs in arbitration.

From a public policy perspective, it does seem incongrouous for the chasm to be quite so wide between the potential costs outfall in arbitration as opposed to civil litigation in situations when both are governed by English law. Just as the Jackson reforms have progressively removed the right to recover additional liabilities in litigation, it is odd timing to see the equivalent jurisdiction in arbitral proceedings travelling a considerable distance in the opposite direction.

# Second Coming – New Format Bill of Costs

Andy Ellis


Repetition as a device to denote a superlative is quite fashionable, if a bit irritating. Football pundit Jamie Redknapp likes to talk about 'top top players' while Micky Flanagan's catchphrase 'going out out' has entered common usage.

Not wanting to be left behind, the latest Hutton Committee bill of costs is accurately described as 'the new new bill' and it is receiving its official Rule Committee endorsement as Precedent AB in the 86th Update to the CPR.

The CPRC formed a sub-committee in May this year to reconcile disparate concerns about the new bill project (itself an original Jackson Review recommendation that has delegated to the Hutton Committee to develop). Interested bodies included the Judiciary, MOJ, Law Society, Bar Standards Board and ACL. Having pooled and considered feedback, the task remitted to the Hutton Committee was to revise and polish its first prototype bill. The fact that consensus has been achieved on the direction of travel and that the CPRC unanimously approved the revised bill for use in the next chapter of the SCCO pilot from October 2016 is important. The prospect of the latest version of the bill becoming compulsory in October 2017 has greatly increased.

The first version of the Hutton Committee bill had fallen on stony ground with most audiences, and gained little traction in the first year of the SCCO pilot. This was a shame given some of the noisiest objections came from people who did their best to avoid looking at it and might therefore not recognise a J code from a J cloth. But myth-busting takes time. Meanwhile, much of the detailed criticism over the clunkiness of the first new bill was often fair and had to be addressed.

Moreover, the profession needed a decent run up to adjust working practices without the added burden of retrofitting old time recording into new bill categories. The CPRC has accommodated that concern by directing that any mandatory form of bill will apply to work done after 1 October 2017.

The second iteration of the new bill is slicker, slightly simpler, and not locked exclusively to J codes. For example, the recommended number of available activities to record against has been pruned significantly.

Most importantly, law firms have become increasingly receptive to recording time in a way that can be tracked against budget and then converted into the foundation for a bill at the end of a case.

Not having an early warning on overspend can be disastrous in costs-managed cases. Once that is acknowledged (hopefully not as a reaction to burnt fingers), it is a shorter step to implement task-based time recording that can feed the new bill with less manual intervention.

The intention behind the bill has always been to enable the parties and the court to see the wood for the trees. The document is built as an Excel workbook which presents the costs claimed in progressively greater detail. The need remains to have reasonable skill levels in Excel in order to safely use the bill and exploit its potential. This will continue to be a barrier to

adoption for some, but the hope is that the legal tech market will produce applications that enhance and simplify the user experience.

The underlying costs data is tagged in such a way that the relevant variables may be used to configure the most informative summaries. Standard reports will show costs by phase which are then expanded to show the phase costs broken down to constituent tasks and activities.

For costs-managed cases there is a table comparing budget to actual and as a nod to old school assessment, a breakdown of routine and other communications. The detailed line items form an appendix rather than the main body of the bill. A printable version has been accommodated but the need for it should recede over time.

To appreciate where the largest lumps of costs fall and how they are composed, whoever is reviewing the bill reads the background information and then drills down through the summaries until they have seen enough to take an informed decision – as a paying party what to challenge and why – as a receiving party how best to respond to challenges and – for the assessing judge, what to probe and how much to allow.

Equally importantly in case-specific circumstances is the ability to filter the data, for example, to show work done by particular people or groups and/or between certain dates. Modelling outcomes based on alternative hourly rates and, in those cases that survive LASPO abolition, alternative success fee percentages can be effected very quickly.

If costs shifting were being introduced for the first time, it would be hard to imagine any prescribed format of costs report that did not require the functionality of the new bill. The issue is that we have moved from such a low base.

There is deep knowledge in the costs profession about how to cost files in order to populate and prepare the current rigid bill, but less desire to allow paying parties under the bonnet. The larger the bill under the existing regime outside the pilot, the less practicable it is to take a 'line by line' approach to challenges and to the assessment itself. Analysis of existing bills preparatory to framing points of dispute is time-consuming and expensive.

Hence parties, especially in commercial litigation, tend to avoid even embarking on the path to detailed assessment other than as a last resort. And who can blame them when the core document around which the assessment is based is expensive to produce and then requires a large amount of extra work to interpret and manipulate?

Even so, parties that win deserve to recover as much in costs as is reasonably justifiable and those that lose should not have to pay excessive costs just because it is too difficult and expensive to determine with any confidence which elements are unreasonable and which aren't. An unjust result can as easily arise from ill-informed negotiation as from an ill-informed court.

As a costs profession we can't control the imposition of arbitrary standing-back exercises to gauge proportionality or the extension of fixed costs. But, the minimum we should do is help to make the core document as effective a tool as possible in the resolution of costs disputes. I hope the 'new new' bill will come to represent a big step in the right direction.

This article was previously published in the *Law Society Gazette*.

→ View article

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