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Q&A: Costs in litigation forecast for 2017

Practico managing director Andy Ellis and managing associate Deborah Burke shed light on the factors that will shape the legal costs industry in the coming year.



Q: For the benefit of our worldwide readership, what exactly is it that costs lawyers do?

Costs lawyers exist in jurisdictions where there is a costs shifting or 'loser pays' regime within civil litigation and arbitration. Elsewhere in the world, costs specialism focuses on costs control and audit of costs between law firm and client. For the purposes of today's discussion, we are talking just about costs between the parties under English law and what the next year is likely to bring in that field.

Specialist costs lawyers are used both to help clients who have won the case to recover as much as possible in the form of costs, and to mitigate the outlay of losing clients who have to pay the winner's costs. Increasingly lawyers require help to set budgets for legal spend – either with their clients or when it is ordered by the Court.

In high value, complex cases, including group actions, where the costs issues can be front and centre, often forming the greatest barrier to settlement, law firms require support. After the main case ends, the costs of satellite litigation about costs can be high and the client's desire to close the case as quickly as possible after judgment or settlement is understandable.

Q: We have seen much made of the current proposals that fixed recoverable costs, which already exist for some lower value cases, should be extended quite significantly. Do you see this as the greatest threat for UK litigators?

UK litigators must be acutely aware of the effect fixed recoverable costs will have on wider litigation life (both the winners and the losers) even if such a regime were introduced at lower thresholds of £75,000 or £100,000.

It is too simplistic to assume that just because some companies and insurers are often on the wrong end of costs orders, that they back the current proposals or that all claimants oppose them. The threat for litigators is surely in bringing in any new regime too quickly and after too little consideration of its overall impact.

Q: So what do you see as the greatest threat?

Perhaps the biggest single chilling effect on litigation has been the exponentially steep rise in the level of court fees required to commence litigation. Again, that won't stop big companies suing each other but it is a major disincentive to Joe Public and the SME sector.

At all levels, however, from magic circle to the high street, there is heightened commercial pressure for law firms to produce more for less. Litigators need to ensure that the commercial arrangements with their clients are clear and mutually understood, that time and billing practices are fit for purpose and that they are in a position to present timely and effective information on costs to their clients who are about to embark on what may be very expensive litigation. Clients of all stripes need to make informed decisions so that they don't risk winning the battle

and losing the war, and law firms must have systems in place to monitor legal spend against budget which can equip them to identify areas of potential overspend at the earliest possible opportunity.

Q: Is technology the answer?

Partly, but the old adage of garbage in, garbage out applies as much now as ever. We still spend a fair amount of time reviewing time recording which needs to be 'cleaned up' and categorised before it can be used effectively to support a winner's claim for costs.

Likewise, the exercise of scrutinising the amount which a losing party has to pay is made more costly because of the old-fashioned way claims for costs are presented.

Q: Any predictions for 2017?

Like the rest of the world, a lot of people who made predictions in 2016 ended up traumatised so it is perhaps more beneficial to set out a wish list.

1. If the MasterCard 'opt out' class action (which with tens of millions of potential claimants will break all sorts of records) is allowed to proceed, that it is accompanied by some sensible but sophisticated costs management.
2. That we see a robust decision on the ability to recover third party funders' costs from a losing party in arbitration. The Essar Oilfields v Norscot case has too many issues around conduct and should not represent the norm.
3. There is hope that the Supreme Court, which is sitting at the end of January in connected media organisation cases including Flood v Times Newspapers, does what Parliament has been unwilling to do so far, and ends recoverable success fees and ATE premiums in publication cases.
4. The process of sharing costs information between paying and receiving parties becomes fully electronic and compulsory and we see an end to impenetrable costs information being delivered in costs claims and high impact analysis and transparent reports become the norm.
5. Clearer lines are established between prospective costs control in the form of budgeting and retrospective assessment of costs at the end of a case. The process needs de-cluttering.

Andy Ellis, Managing Director, Practico - Andy has more than 25 years' experience in the costs industry. Andy is the go-to costs lawyer for many leading law firms and general counsel who value his incisive input and direction on what are often complex technical and strategic issues arising within high value costs litigation.

Deborah Burke, Managing Associate, Practico - Deborah is a dual-qualified solicitor and costs lawyer and is a prominent figure in the industry. She is chair of the Law Society's Civil Litigation Section Committee and is a member of the Society's Civil Justice Section Committee.

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