Practico

Partners to progressive law firms who want to take control of their costs

Practico Costs Briefing

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Welcome to the Practico quarterly Costs Briefing. Things are never still in the costs industry; the past three months are no exception.

As you will see from our articles, with further fixed costs proposals, amendments to the budgeting rules and the impact of case law there is plenty to keep practitioners on their toes.

In light of all the recent developments in the industry, we concluded it was time to undertake some research around maintaining control over litigation costs. We look forward to sharing our report produced with *Legal Business* very shortly.

We hope that you find this edition interesting and if you would like us to expand on any areas please do get in touch.

Burford Capital, BT and the transformation of litigation finance

Burford Capital Limited, the leading global finance and professional services firm, announced last month that they had agreed to provide $45m in litigation financing to a FTSE 20 company. It has subsequently been reported that the deal is with British Telecom. Christopher Bogart, CEO of Burford, has commented that 'this transaction is another example of the continuing transformation of litigation finance.' The deal certainly represents a change in utilisation of third party funding in the commercial litigation arena.

Third party funding can have real advantages for those that choose to deploy it in a commercial litigation situation. Benefits include the fact that this type of funding can enable businesses to run litigation that they could not otherwise afford. For organisations that have sufficient funds but low risk thresholds, third party funding provides an option to mitigate that risk. In addition, third party funding facilitates organisations in keeping the costs of litigation 'off the balance sheet' and enables an organisation to, in effect, recover monies from its assets.

On the other hand, third party funding is not without its downsides. Substantial payments are required by the funder for financing the litigation (these can be in the arena of 20 to 40 per cent) or even an element of equity of the property in certain cases. When establishing the funding arrangement, a period of 'exclusivity' is required for the funder to consider the case, which may include cancellation terms and delay the progress of the litigation.

The announcement from Burford represents a substantial change in the market. Third party funding is perceived as being less suitable for commercial litigation than for its traditional markets of consumer group action claims and individual claims. This development represents a shift away from this narrow perception. Earlier in the month, the third party funding market had a further boost with the announcement from Augusta that they would be funding pre-proceedings costs to enable claimants to assess the merits of an action. Both are clearly good omens for this funding sector.

For British Telecom, this deal indicates a significant transformation from their traditional litigation funding model. Burford is reported to be in negotiations with other corporates to establish similar deals and it can only be assumed that other in-house counsel and financial executives will see the real benefit of funding commercial litigation through such arrangements.

This change has been slow to arrive. One wonders whether this move to a third party funding model is as a direct consequence of the changes within the litigation landscape. The impact of costs budgeting, and the spectre of fixed and therefore more predictable inter partes costs are providing encouragement to take on cases.

In the longer term, it will be interesting to see how things play out in the market. The use of third party funding requires a change of approach by both in-house counsel and business leaders. In conducting litigation there will be a need to adjust to the concept of division of the spoils. The impact of this change should not be underestimated. Businesses will need to accept that a substantial proportion of their damages will be shared with the funders; this may not be so

popular after the deal is signed and the payments are due. Finally, third party funding is suitable for a limited number of cases. As more commercial organisations consider third party funding as an option, it is possible that funders will become choosier about the cases they fund.

British Telecom is one of the biggest litigators within the FTSE 100, with a reported 23 actions between January 2012 and July 2015. According to data from The Lawyer Market Intelligence, this $45 million of funding is understood to be in support of up to ten disputes. The cost for British Telecom in running litigation on this scale is substantial and must have a considerable impact on its operational overheads.

Moreover, this is an interesting development in commercial litigation and funding generally. There is no doubt reputational benefit to British Telecom and Burford in being in the vanguard of third party funding in a commercial arena. Now the model has been established it will be interesting to see how cautious other in-house counsel and CEOs are compared to those that are prepared to take the plunge.

James Barrett

http://www.globallegalpost.com/blogs/commentary/burford-capital-bt-and-the-transformation-of-litigation-finance-61888609

What does agreeing a budget mean? The Court of Appeal suggests it extends to incurred costs

Although *Sarpd v Addax* concerned the application of approved or agreed budgets to the appropriate amount of security for costs, the strong warning is to beware the implications of agreeing budgets in all situations without suitable caveats as to future challenges to the incurred costs elements.

Whilst the court cannot 'approve' incurred costs, failure to register specific objection to that element at the right time (i.e. the CCMC) can put the eventual paying party in difficulties when challenging later. Agreement of budgets can bring 'good reason to depart [downwards]' into play for incurred costs too.

This looks to me like much stronger authority than Lord Justice Moore-Bick's obiter remarks in *Troy Foods*. The implications are quite serious for those who might have thought agreeing budgets just kicked the can along the road to detailed assessment.

Andy Ellis

Further changes to costs budgeting: A post 6 April guide to the changes

All change again in costs budgeting, with a new round of rules coming in to play on 6 April.

There have been key changes to the filing deadlines for solicitors –

- For claims valued at less than £50,000: Precedent H will now need to be filed with the Directions Questionnaire.
- For cases valued over £50,000: a Precedent H must be filed 21 days prior to the CMC.

The new rules also introduce a budget discussion report, which is required to be served seven days prior to the first CMC. The report must be "agreed". We feel it is important to emphasize this requirement and encourage parties to engage in this collaboratively and to not treat this as a procedural task undertaken late in the day.

In our view, the introduction of this report will change CCMCs significantly going forwards. The report must set out agreed figures, disputed areas and reasoning. The introduction of this report can be seen as a clear indication from the courts that parties should be making every effort to agree as much of a budget as possible. This, we assume, is an attempt to reduce the costs management burden on the already overstretched courts.

The requirement to complete a full Form H has been reduced. Cases where the Precedent H value is under £25,000, or the claim is valued at less than £50,000, now only require a front sheet to be completed. That said, we would encourage practitioners to ensure that they have a full understanding of the figures presented on the front sheet when they attend the CCMC. A further change is the disapplication of the costs management rules for cases involving children, and for most cases involving parties with severely impaired life expectancy. A sensible change in our view.

To tackle the concerns of courts dealing with hourly rates, the Practice Direction has been strengthened to further discourage hourly rates being considered at the CCMC. Prior to this change courts have been somewhat inconsistent in their approach to hourly rates, so this clear guidance is welcomed.

Finally, the new rules introduce a requirement that bills of costs are prepared to reflect the phases set out in the Precedent H. The intention behind this change is to enable the court and parties to be able to clearly identify the link between the Precedent H (whether approved or agreed) and the costs claimed in the bill of costs.

These recent changes to the budgeting rules are, in our view, a sensible streamlining of the processes and should be welcomed by lawyers as positive change and reduction in the requirements in the preparation of Precedent H.

James Barrett

Jackson's fixed costs proposals - An unseemly rush

Declaration of interest. Any extension of fixed costs is a very bad thing commercially for costs specialists. No discretion = no work.

My firm Practico is, by design, concerned almost exclusively with complex high-cost cases including group actions. The barbarians are now at our gates because Sir Rupert Jackson wants to apply fixed costs to multi-track cases up to £250,000. Anyone will therefore be forgiven for translating anything I say about threats to access to justice as 'threats to future income'. So I will leave that part of the case to more neutral observers.

Views on Fixed Costs

Even though my heart will always produce a negative reaction, my head nevertheless says that the rush to implementation appears ill-founded. We are witnessing an attempted fast-forward of the Jackson reforms skimming across budgeting, skipping past the stiffer proportionality test and landing at fixed costs without pause for sober reflection or proper review. It is being promoted at a pace that seems out of kilter with the un-measured scale of the perceived problem.

Sir Rupert justifies some of this because 'not everyone enjoys'[1] costs budgeting – which is a deliberate understatement employed for comedic effect. The reality is that most non-costs-specialist judges and barristers intensely dislike dealing with costs and always have. This default negativity is now aggravated by the courts being severely under-resourced with no sign of respite. Judges and masters make no secret of this, as anyone who has attended costs management hearings will confirm.

It is true that the courts now budget costs for many cases (both sides' of course) but continue to assess the costs of very few (and then only those of the successful party). The resource complaint of budgeting relative to assessment is a fair one.

The most radical downward force on legal costs is generated by the April 2013 abolition of recoverable success fees and after-the-event-insurance ('ATEI') premiums[2]. Percolation of the full effects of these key Jackson reforms has been slow. The advance warning of abolition created a surge of conditional fee agreements and ATEI policies in the immediate lead-up to 1 April 2013. I suspect that final large wave is only now clearing. The exceptions to abolition for media cases (defamation and privacy incl. phone-hacking) and for insolvency work granted a stay of execution in some high-cost classes of proceedings where the add-ons still apply[3].

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[1] 'Fixed Costs - The Time Has Come' Lord Justice Jackson 28 January 2016. Para 2.10

[2] For the last 15 years the loser had been required to pay these additional liabilities on top of 'base' costs

[3] The insolvency exception is to be removed in April 2016

It takes time for substantial cases to resolve and, if costs are then to be disputed, the delays in hearing those ancillary disputes further hold up the delivery of what would be useful quantitative evidence.

There is a lack of hard data available to help project the reduction in the overall costs burden attributable to the abolition of recoverable success fees and ATEI. The fact of such cost reductions is obvious given success fees were claimed at up to 100% of base costs and ATEI premiums in extreme cases were set at over 80% of the cover.

The new proportionality test, also a Jackson reform, is designed to allow the courts to use a very broad brush when setting budgets during a case or assessing costs at the end. This may yet produce something radical as an instrument to contain costs. Its application is now slowly being felt. The pace of penetration has again been slow, for much the same reason as with success fees and ATEI. The period of transition from the old softer test to the new stiffer test is extended and inevitably messy – but lower costs will emerge from it - not always fair but fairer than fixed costs on the Jackson 'one size fits all' matrix.

Lord Justice Jackson can be forgiven for being frustrated that so many have briefed, quietly or loudly, against him and have fought concertedly against all his reforms. He says he would prefer another judge to draw up the scheme if the Government commissions it. If that happens I hope whoever does that listens more attentively than Sir Rupert has to those who hold views outside his pre-formed agenda.

Commentators, including Dominic Regan, suggest the Ministry of Justice has already decided that widespread fixed costs along Jackson lines is a good thing. I hope he's either wrong or that consultation and implementation takes so long that either the next big initiative will take its place, the wider legal profession will mount successful resistance and/or the deflationary effects of those Jackson reforms that did make it through into law can at least be measured and factored in.

Andy Ellis

Is hourly billing all that bad?

This week's case of interest is *Bolt Burdon Solicitors v Tariq & Ors [2016] EWHS 811 (QB)* - especially for the denouncers of hourly billing. The case upheld a contingency fee agreement, where the London law firm received 50% of the compensation recovered in the matter.

This should make us reconsider whether hourly billing really is all that bad. It is easy to grab a headline with a survey highlighting the 'rare as hen's teeth' £1,100 per hour partners. This case highlights the extremes of potential recoverable 'value-based' fees, where commercial factors and risk are taken into account.

The recovered hourly rate based on this contingency fee agreement would be an interesting calculation for the hourly rate naysayers, being approximately eight times the recoverable amount had the case been charged on the hourly rate basis.

Another point that comes to the fore is how arcane the law differentiating contentious from non-contentious work is. This work falls within the ambit of dispute resolution to most eyes but the loophole (definition of non-contentious work) that allows contingency fees in compensation scheme and tribunal work is surely ripe for review.

Finally, it does make you ask why we now have the DBA regulations for one type of dispute resolution and non-contentious business agreement for another, an unnecessary duplication.

James Barrett

News from Practico

In January we welcomed James Coleman to the Practico team. James is an experienced costs draftsman, having initially trained in Ireland before transferring his experience to England five years ago. James previously managed the Clinical Negligence Department of a national costs firm before joining the Government Legal Department as a Contractor, where he specialised in dealing with high value and complex bills of costs and costs budgets. James also frequently acted in an advisory capacity to Government Departments in respect of departmental costs strategies.

In April 2016, we attended and co-sponsored the Corporate Counsel & Compliance Exchange, where Andy Ellis presented.

Do you keep everything crossed or are you in full control of costs in high stakes litigation?

We are very excited that our research on litigation costs management and billing will be launched in the May issue of Legal Business. Mitigating risk on the costs aspects of big cases requires the right strategy and clear communication. As we do more showing and less telling, we find fingers, legs and toes start to relax.

If you would like a copy of our research, don't hesitate to contact us at mail@practico.co.uk

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