Beyond the electronic bill

A Practico White Paper

When, in view of his impending retirement to sunnier climes of Italy, Jeremy Morgan QC asked me in early 2013 whether I would be interested in taking over as chair of the "interesting little project" of introducing an electronic bill of costs, I had no concept of what would be involved over the next five long years before the rules finally made it a mandatory requirement. I won't say whether my answer to him might have been different with the benefit of hindsight, but I was always a firm believer in the goal of modernising and streamlining the unwieldy processes in assessing costs. With some admitted bias and self-justification (although the credit for the technical side of it lies entirely elsewhere), I do believe the new bill has made a significant contribution to bringing costs into the modern era. But there is clearly more to be done in this regard. Practico has been at the forefront not only of that particular project from the start but in developing and embracing ideas to make better use in this field of ever-changing technology and to providing a better costs service for clients. In bringing together the fascinating ideas on the way forward from an impressive range of experts in the field, this white paper itself makes a highly important and timely contribution to forging the assessment of costs in the "white heat of the technological revolution".

Alexander Hutton QC

THERE WAS A WIDE FEELING
THAT WORK SHOULDN'T STOP

At the end of July this year, a few current and former colleagues from the Hutton Committee met up to mull over events since we first made proposals to move civil costs assessment into an electronic format – starting with the bill itself. The mood among us was optimistic about the rate of adoption and the growing engagement. It is also timely that the Senior Courts Costs Office (SCCO) has published a Practice Note on electronic filing of documents, which will be mandatory from 20 January 2020.

There was a wide feeling that work shouldn't stop; that the costs assessment procedure should be developed and improved to help harness the advantages that electronic presentation provides – filling in the gaps between the bill and the assessment itself.

It's fair to say that there was rather less enthusiasm from those assembled about more committee work. One bright suggestion as an alternative was to gather views on what should happen next and present those views for wider discussion.

This paper is the result and is based on a series of interviews conducted on our behalf by independent journalist Joanne Harris. It is our aim to stimulate debate throughout the civil litigation world, but especially among costs experts so that the best solutions emerge as quickly as possible.

My thanks to all who contributed, both the interviewees and those who helped behind the scenes.

Any feedback or alternative ideas that emerge will be welcomed. You might like to use the LinkedIn page that we have set up for the purpose at: tiny.cc/practico

Andy Ellis

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How we got here

In the past 25 years the England and Wales court system has undergone a number of reforms – all aimed at overhauling and modernising the way the courts work. As is often the way with change, one set of developments breeds another, and the way the cost of litigation is handled has not been immune from this.

During the Review of Civil Litigation Costs led by Lord Justice Jackson in 2009 and 2010, a number of those submitting their thoughts to the consultation noted that the way in which bills of costs were handled by the court was no longer suitable for 21st-century litigation.

In his final report published in January 2010, Jackson LJ recommended that "a new format of bills of costs should be devised, which will be more informative and capable of yielding information at different levels of generality.

"Software should be developed which will (a) be used for time recording and capturing relevant information and (b) automatically generate schedules for summary assessment or bills for detailed assessment as and when required. The long-term aim must be to harmonise the procedures and systems which will be used for costs budgeting, costs management, summary assessment and detailed assessment."

Jackson continued the theme in a 2016 speech to the Law Society's Civil Litigation Conference in which he noted: "The current bill of costs is cumbersome, time consuming and expensive to produce. It is opaque, giving no clear information to the reader as to why costs were incurred or even the underlying work done. The information about time spent on documents is particularly difficult to decode. The current form of bill is an anachronism that makes no use of time-recording software."

As a direct result of the Jackson Review, a working party had been established – led first by Jeremy Morgan QC, and then by Alex Hutton QC – to drive forward the work of creating a new bill of costs. By 2015 the new electronic bill was ready to be piloted.

The pilot ended up lasting a lot longer than originally intended. It was extended until December 2016 and then again into the following year after very few bills were actually submitted. The Hutton Committee's proposal of using standardised time recording codes known as 'J-codes' in the bill was tweaked after criticism that there were too many activity categories, and IT infrastructure in the courts was not ready for the original proposed implementation date of 1 October 2017.

However, with Birss J leading the way, the Civil Procedure Rule Committee introduced an amendment to Practice Direction 47 which requires that bills of costs for detailed assessment for work undertaken

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>
> **Master Leonard**

after 6 April 2018 must be in electronic spreadsheet format.

Parties have access on the HMCTS website to a template spreadsheet created by the Hutton Committee – Precedent S – to assist them in preparing an electronic bill. J-codes are preserved but the 'J' label itself has been removed, and it is a fairly flexible document.

"That's quite deliberate," points out SCCO costs judge **Master Leonard**. "Parties can use any form of spreadsheet that complies with Practice Direction 47. It has to offer the same sort of information and functionality as does Precedent S, but it's open to people to create an alternative format that suits them and meets their needs.
"To date most parties have been sticking with Precedent S, but we have seen variations and we hope to see developments and improvements over time as people get used to using spreadsheet bills."

Of course the use of spreadsheets for bills of costs was not a new innovation devised by the Hutton Committee. Some firms have been using Excel to create bills for a number of years. What is new is that parties submitting bills for work done after 6 April 2018 *must* now submit them in spreadsheet format, and Precedent S gives those who are less familiar with it a template document to use.

So far, so good – and, so far, relatively untested. In the 18 months or so since the new Practice Direction 47 came into force, only a handful of bills produced in the new format have reached the detailed assessment stage.

Master Leonard estimates that he has actually assessed only around 15 electronic bills so far. Many have settled before the assessment hearing. Numbers are increasing, with the SCCO now receiving new electronic bills on a daily basis.

The slow start is partly due to the fact that few cases falling within the timeline dictated by Practice Direction 47 have reached the stage of detailed assessment – and some of those which have, have had the requirement to produce an electronic bill of costs removed.

In a recent judgment before the High Court in *Assetco Plc v Grant Thornton UK LLP* Mr Justice Bryan said that because work in the case had largely been done before 6 April 2018 it was "not likely to be of great assistance to the costs judge if the court were provided with two separate costs bills in different formats". The successful claimant was therefore told it did not have to submit an electronic bill.

And yet this is inevitably going to change over time. As more cases falling under the new Practice Direction 47 reach a conclusion, more electronic bills will have to be produced, and more will be argued over at detailed assessment.

Master Colum Leonard
Costs Judge
Senior Courts Costs Office

> Almost every bill that I have assessed over the last few months has been an e-bill and virtually all of the bills now being filed for detailed assessment are e-bills.
>
> **Master Gordon-Saker**

In fact, says Master Leonard, nobody has to submit bills in two different formats. If the bill covers work done after 6 April 2018, they can either do that or file one comprehensive bill in spreadsheet form.

"The two-format option exists for people who might find it difficult or costly to squeeze old records into the new format, but we receive electronic bills that go back well before April 2018, so it seems that that need not necessarily be a problem," he says.

"Obviously, as in *Assetco*, it may be fair and sensible to have the whole bill on paper where only a little work has been done after 6 April 2018, but as time goes on that will change. No-one should ask a court to order that their bills be prepared on paper only because they have not yet got to grips with the new spreadsheet format," Master Leonard adds.

Andy Ellis
Managing Director
Practico Ltd

Chief Master Andrew Gordon-Saker
Senior Costs Judge
Senior Courts Costs Office

The Senior Costs Judge **Andrew Gordon-Saker** says: "Almost every bill that I have assessed over the last few months has been an e-bill and virtually all of the bills now being filed for detailed assessment are e-bills.

"While there has been the odd hiccup, my experience has been very positive. I think it works. The detailed assessment hearing has not changed much. But there is much more detail in the e-bill which, if you know how to do it, can be manipulated in ways which can give a clearer overview of what was done. It is far preferable to phased paper bills, which are much more difficult to assess."

It is clear that innovation should not stop here. Making the electronic bill mandatory was intended to be a means to an end rather than the end itself. Key people within the world of litigation are now looking at how to develop the process further. There is much which can – and arguably should – be done to make detailed assessment more efficient and better informed by the more insightful presentational options now available.

Practico managing director **Andy Ellis** suggests "We may end up with a more fundamental change to how detailed assessments are conducted, especially in the larger cases.

"Once bills are over £1m and sometimes less, the benefits of resolving micro-points by attrition are quickly overtaken by the 'costs of the costs.' Something has to give, and it usually does. Hence it would be helpful to develop and record best practice and reflect that in procedure as experience grows," Ellis adds.

IT IS CLEAR THAT INNOVATION SHOULD NOT STOP HERE

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Technical issues

> With a full electronic bill before the court [...] it potentially saves hours at the detailed assessment and makes it quicker and more efficient. **Steven Green**

Alexander Hutton QC
Hailsham Chambers

Drew Winlaw
Partner and Chief Legal Engineer
Simmons Wavelength Ltd

Law firms these days are investing heavily in technology and there is a wide range of tools available to automate as much of the legal process as possible.

The electronic bill, however, is built around one of the most widely available pieces of software, an Excel spreadsheet. The Precedent S template comes pre-loaded with formulae to populate different sections of the sheet; parties building their own bills have the ability to create their own formulae and macros.

Drew Winlaw, partner and chief legal engineer at Simmons Wavelength, says the choice of Excel makes an electronic bill accessible across the profession – no matter what size the firm drawing up costs.

"It's good to use a tool that's available to everybody and suitable across platforms," Winlaw says. "The legal engineering approach is to use the simplest tool that does the job and the largest amount of benefit can be found by people knowing how to use these tools.

"It's not a magic artificial intelligence tool, where you just feed information in and out pops the answer," Winlaw adds. "It's just about getting data in the right structure and putting information checks and cross-checks in to separate judgments that are made in the creation of a bill."

Although the use of Excel lessens the need for investment in sophisticated legal technology, it does require investment in time to properly understand how to make the most of what the format can do.

"Having several Excel gurus in a costs lawyering type practice is an absolute imperative," Winlaw believes.

Everyone involved in a costs dispute will end up requiring a basic working knowledge of Excel, but Hutton Committee chair **Alex Hutton QC** says the ease of use of the format has surprised many.

"My experience generally has been that spreadsheets look scary but when you start doing them, you go 'bingo! This is pretty clever'," Hutton says. "People have found the spreadsheet much more manageable than they expected it to be."

He agrees with Winlaw that costs lawyers and costs draftsmen will need to understand how to use Excel, and says he has spoken to experienced draftsmen who acknowledge that to stay relevant in the future they will have to move with the times.

That need to adapt extends to the judiciary too.

"The spreadsheet format took a bit of getting used to – I did have to learn how to use a spreadsheet properly," admits Master Leonard. After training himself up, he designed a guide to help his fellow costs judges use spreadsheet bills.

Ellis says a willingness to engage with

the electronic bill format pays dividends.

"It helps when people really engage with Excel and build it into the way they routinely work; as with most learning, if you don't use it you tend to lose it," Ellis says. "In our experience the people that do best with it are people that really get themselves stuck into it and search for their own solutions to issues."

The introduction of the electronic bill has also led to the introduction of new court tools – dual screens for judges, with one screen visible to the parties while the costs judge works on the other. Master Leonard says he has liked working with the dual screens so far, and the technology also gets the seal of approval from Irwin Mitchell head of costs Steven Green.

"You can see the changes that are happening live, effectively," Green says, adding that this avoids having to break off in the middle of a detailed assessment to go and work out figures on paper.

"I quite like that. With a full electronic bill before the court and the parties being able to do this, it potentially saves hours at the detailed assessment and makes it quicker and more efficient," he adds.

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An old chestnut

> “When time is recorded properly the electronic bill is an awful lot easier to generate. **Steven Green**

The main challenge law firms currently face is one which is not going to be solved quickly – the way in which solicitors record their time.

“When time is recorded properly the electronic bill is an awful lot easier to generate,” Green says, simply.

The problem is that there is no one answer to what “properly” recorded time looks like. Differing requirements from different clients means there is often no consistency even within a firm, and solicitors are not usually thinking about the practicalities of a bill of costs when recording chargeable time on a given matter.

“The vast majority of solicitors in large commercial firms don’t record time in such a way that you can with the electronic bill in mind so that, generally, you can't simply copy and paste it into a bill,” says Herbert Smith Freehills costs lawyer **Kevan Neil**. “That’s a whole culture shift within the profession generally before something like the electronic bill becomes as effective as it should be. Where we are at the moment is a stage we’ve got to go through, to get to the point where people are recording time properly in the appropriate format.”

Kevan Neil
Costs Lawyer
Herbert Smith Freehills

Ellis says the culture shift Neil is calling for should involve solicitors thinking in a new order about how they record time.

“The mindset becomes a lot easier if one first categorises what you’re working on rather than how you’re doing it,” he says. “Conventionally lawyers have started with the type of activity and topped that up with notes in the narrative field that may or may not indicate the litigation task that the entry concerns.”

Green reports that Irwin Mitchell – a firm with the largest in-house costs team in the country – is one of those which did start using J-codes as a foundation for its time recording around five years ago in acknowledgement that the electronic bill was on its way. Their use, he says, has speeded up the production of bills in many cases, along with continuing to cultivate the mind set where case handlers must always think about how their work is recorded into phases and tasks.

Winlaw notes that rules, or guidelines produced by clients on how firms should bill, are helping the general situation when it comes to time recording. The increased use of technology as part of the process ought to help the link between firms’ time recording and the production of bills of costs, he predicts.

“I expect that as the general take up of IT systems for legal time recording in particular improves, the data should improve,” he says, while warning: “It still contains quite a high degree of human input as to what lawyers say they’re doing at any particular time in a time record.”

The debate over how to record time properly is far from new.

“The number of times that disputes about costs really get nasty are quite rare. It is unrealistic to demand that lawyers give

priority to the level of granularity in time recording when they almost never go to assessment" Ellis says. "We could have been having this same conversation 10 years ago or 20 years ago, and, in fairness, the way commercial clients require to be billed will always trump court-facing procedures. If the court-facing and client methods can be made compatible, so much the better."

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Pre-assessment protocol

> “There should now be scope for a formal protocol to ensure that a receiving party does not have free reign to run up significant assessment costs when prospects of an early compromise, [...], should be explored.
>
> **Derek Boyd**

Court rules require receiving parties to produce a bill of costs for detailed assessment within three months of a costs order, but there is currently no way to ensure that this timescale is kept to, and there is no current pre-action protocol for detailed assessment.

Simons Muirhead & Burton senior associate **Erica Henshilwood** points out that even though many costs disputes settle before reaching full detailed assessment, they can still incur additional costs if parties prepare formal bills routinely.

Erica Henshilwood
Senior Associate
Simons Muirhead & Burton

“Thousands of pounds are being incurred by receiving parties in the production of bills of costs, and there’s nothing the paying party can do about it,” Henshilwood says.

She proposes the introduction of a new step in the procedure. This would be a requirement to serve a costs summary which is essentially a simple breakdown of costs incurred in the form of a table – let’s call this a pre-assessment protocol for costs. That, Henshilwood suggests, would enable the paying party to decide whether or not to make an early offer and potentially give itself “some level of costs protection and allow it to avoid being liable to pay for an unnecessary bill of costs”.

Such a costs summary, she adds, would need to be served promptly after a costs order was made and certainly well within the current three-month time limit for bills.

Herbert Smith Freehills’ Neil agrees that a requirement to serve a costs summary or schedule would be beneficial, in a prescribed format that would break costs down by the phase of litigation, level of fee-earner, and number of hours spent on a case.

“Then you’ve got the information to know whether or not it’s possible to come up with a decent offer and potentially agreeing it,” Neil adds. “When you serve a bill in a budgeted case you’re required to serve a Precedent Q with it anyway which compares the bill with the previously approved or agreed budget. There should be nothing to prevent that being done at an earlier stage.”

Hutton also thinks a summary bill could be a useful addition to costs procedures.

“Hopefully, if you’ve recorded everything electronically as you go along, then the process of producing a summary should be a relatively easy one. It should be a short process and it should be possible to do that,” he says.

Nicholas Bacon QC agrees this is an area where further enhancements to costs procedures can be made.

Nicholas Bacon QC
4 New Square

“There is in my book always opportunity for improvement and despite the dramatic changes brought into the costs field over the

> I think that we should give further thought to a system of early neutral evaluation.
>
> **Master Gordon-Saker**

past eight years, this is an area which can still benefit from improvement," Bacon says.

"I very much like the idea in larger cases (perhaps £1m +) of exploring a CPR compulsory period of dispute resolution based on schedules and only after that has failed requiring the receiving party to prepare bills of costs."

Watson Farley & Williams litigation partner **Andrew Hutcheon** suggests that a preliminary stage could be built into the procedure, whereby a costs judge carries out a preliminary non-binding adjudication on a summary bill.

"That would come in quickly and already be an early indication of what the expectations are," he says.

Hutcheon suggests the courts could learn from the way in which large bills are dealt with in arbitration, where a statement of costs gives the arbitration tribunal the ability to allocate costs generally between the parties, with the courts then leaving decisions on quantum of particular issues to detailed assessment.

"I think that we should give further thought to a system of early neutral evaluation," agrees Master Gordon-Saker. "One can see an obvious analogy with financial dispute resolution hearings in the Family Court. However the practical difficulties would include: that the judge at the preliminary hearing would not be able to conduct the detailed assessment (there aren't that many costs judges); the preparation time needed in costs disputes (would the judge need to read all of the receiving party's papers in advance of the preliminary hearing?); and whether the issues could actually be identified without a detailed bill and points of dispute."

"We do need to look at a protocol that's specific to large cases," agrees Ellis, although he acknowledges that what a "very large bill" is defined as and comprises is also subject to debate. He stresses that any summary bill of costs would need to be filed on an open basis so parties can refer to it later.

"It means that the can doesn't get kicked down the road too far. The consequences are that you need to define what has to be in that summary," Ellis points out. "A costs schedule is not currently a term of art – which can lead to wrangles about the utility of the information provided in high level summary and what it might be hiding."

There is, however, clear support for the concept of requiring parties to serve an early summary and the electronic bill would lend itself to creating such a document with more ease than the traditional paper bill. With a high proportion of costs disputes

Andrew Hutcheon
Partner, Watson Farley & Williams

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> **Nicholas Bacon QC**

tending towards ADR, having a mechanism which would either speed up the settlement process, or help make a detailed assessment more tightly focused, is appealing to litigators and costs lawyers alike.

Derek Boyd, senior costs lawyer at Ince, mentioned another incentive for refreshing the process — "So far untouched by reform is the principle that a losing party should automatically pick up the costs of assessment, when surely there should now be scope for a formal protocol to ensure that a receiving party does not have free reign to run up significant assessment costs when prospects of an early compromise, particularly where budgeting has taken place, should be explored."

Nicholas Bacon QC also suggests that more sanctions would prevent abuse of one aspect of the current system.

"I think the 'open offer' system is not working. It is basically respected in form and not substance. I appreciate we have Part 36 but that imposes a penalty on a paying party where it does not beat a receiving party's offer.

"Is there a case for imposing a costs sanction, or placing risk on a paying party having its open offer beaten by a particular margin beyond the standard award of standard costs of assessment? If there was a costs sanction on a paying party in cases where an open offer was beaten by a certain percentage – perhaps an increase of over 150 per cent – then it would help remove the obviously tactical games that are being played. Just a thought," he says.

Derek Boyd
Senior Costs Lawyer, Ince

THE INTRODUCTION OF A NEW STEP IN THE PROCEDURE

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Early and active case management

Another change to costs procedures which practitioners think could be beneficial is encouraging ways to streamline the detailed assessment such that the court will drill down to the detail in selected areas rather than plough through every item.

Building on the idea of a pre-assessment protocol, Bacon adds. "Once there has been attempts to settle under a protocol, the parties are then in a good position to work with the court to identify the real issues. The days of objecting to line-by-line time spent on every task in a case (in large cases) must surely require scrutiny going forward — it is often disproportionate and wasteful in costs."

Bacon suggests: "I would like to see the costs rules reflecting what happens in larger cases. Specific provisions, probably in the practice directions, recognising that in £1m+ cases the court will list the matter for directions to identify the key issues and encourage the making of directions for the resolution of those key issues before requiring a line by line assessment, would be helpful."

Getting the procedures and protocols updated is a priority for many.

"Practices on assessment built up over the years to accommodate the inadequacies of earlier times, such as counting letters, should be reviewed in light of a more enlightened and sophisticated age," Derek Boyd says.

"The electronic bill is an acknowledgement of the need to embrace advancements, but this needn't be limited only to the conveniences of technological progress when other developments in, for example, fee structuring have also taken place.

"As for assessment procedures, I've often likened the electronic bill to a Rolls-Royce engine fitted into a Mini. Practice directions that should be re-written have instead only been tinkered with. It's surely time to look at the chassis required and build one that is fit for purpose. They did it when they developed the Civil Procedure Rules, so why not costs assessments?" Boyd asks. Sampling is the most common method of streamlining assessment and is not a new idea. Litigators and counsel say costs judges are always open to ways of cutting down the cost and length of a hearing. However, at present there is no set protocol or guidance on the issue, and now that the electronic bill potentially makes sampling much easier, there is a consensus that things should change.

"There needs to be more thought about how the detailed assessment process can be proportionate and how it can really affect the reality of the position. Detailed assess-

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> **Derek Boyd**

ment isn't like a conventional trial," points out **Benjamin Williams QC** of 4 New Square. "You know someone is getting costs and the only issue is how much they should be. You only need the costs judge to start ruling in a few areas to get a sense of what percentage is going to be knocked off the top."

The electronic bill allows for quicker segmenting of a bill, by picking specific time periods, phases, or types of work to scrutinise. This has been done in the past, but the functionality of a spreadsheet should make the process simpler and, potentially, cheaper. For example, it is possible to search for specific chronological periods, or pivot the data to extract specific tasks if the input is right.

As past cases have shown – such as *Motto v Trafigura Ltd*, where the parties agreed to proceed through nominating certain months for examination – parties can recognise that a costs judge does not need to scrutinise a bill line-by-line to come to a conclusion about the amount of costs which should be awarded.

Williams and other specialist counsel note that sampling would help keep detailed assessment proportionate to the scale of a case. There is no agreement yet about how big a bill should be before sampling is initiated.

Hutton says: "Any bill above about £500,000 would lend itself to some kind of sampling process, but I don't think you can be prescriptive about it."

Irwin Mitchell's Green says the complexity of detailed assessment can be exaggerated.

"It's possible to get through big cases in a day or two," he points out, agreeing that there may be some scope for sampling in the largest detailed assessments.

"You're not always going to get the right result in a small to medium sized bill to start picking samples, but maybe in a large bill it may be the right way of doing it," Green adds.

Ellis suggests that in a situation where the parties have agreed to sampling a bill, it would be safest for both the receiving and paying parties to nominate where they would like to sample from to prevent the process being "a game of Battleships for a paying party".

The court must also have a say in the matter, Ellis says.

"A costs judge has got to be able to say, 'it would help me if I saw this, that or the other'," he says. "Early case management would be needed. I hope that wouldn't put a huge stress on the court if it was confined to larger matters.

Benjamin Williams QC
4 New Square

> There needs to be more thought about how the detailed assessment process can be proportionate and how it can really affect the reality of the position. **Benjamin Williams QC**

"It's a more grown-up way of doing things. It sounds like you're front-loading the process, but the result should be shorter assessments that would be more cost-effective to undertake, making the costs of assessment more proportionate," Ellis adds.

According to Ben Williams QC, while there are no current disincentives to the use of sampling in a large detailed costs assessment, equally there are no stated incentives. He suggests that the costs office should make it clearer that parties requesting sampling would be encouraged to do so.

"In my experience costs judges are open to any suggestion which avoids them going through an entire bill line by line," agrees Hutton. "Sampling is often adopted by the costs judges themselves, and I'm not sure whether you can do anything more than leave it up to the costs judge."

"We already do sampling. It is done formally in the assessment of the costs of group actions and informally when the court adopts a broad brush to the assessment of a documents schedule," points out Master Gordon-Saker.

Yet not everyone is wedded to the concept. While supporting it in principle for larger bills, Green highlights that there is always the chance that the sample chosen ends up being the wrong choice for one party.

Herbert Smith Freehills' Neil has reservations for different reasons, although he concedes that sampling can be effective in circumventing particularly long and laborious detailed assessments.

"I've had experience of sampling in large assessments. It tends to leave me feeling unsatisfied, like there hasn't been sufficient scrutiny," he says. "There's no doubt that in some circumstances it can be effective, but the problem with it is that there's an expectation that detailed assessment will live up to its name and it will be a fairly fine-grained process. As a paying party it can be effective to trawl through the various items in a bill of costs knocking various bits off."

THE COSTS OFFICE SHOULD MAKE IT CLEARER THAT PARTIES REQUESTING SAMPLING SHOULD BE ENCOURAGED TO DO SO

6

Points of dispute and replies

> “What I would prefer to see would be points of dispute in a format more like a mediation position statement. **Kevan Neil**

The Hutton Committee is not the only group to have created a template electronic bill. The Association of Costs Lawyers (ACL) produced their own version, which shares a number of similarities with Precedent S but also several differences. The ACL template is currently on version 21 as the organisation continues to update and amend the bill with the aim of making it easier to use.

Chief among the differences between Precedent S and the ACL template is that the ACL bill incorporates tabs to collect parties’ points of dispute and replies to these points, within the same composite electronic file.

Changes to PD47 so far have only been about the electronic bill. As soon as that bill is served formally, we default at the moment to an entirely paper-based process.

The concept to extend electronic ‘pleadings’ in detailed assessment to include points of dispute and replies is one which is broadly welcomed and supported.

“That’s a good innovation. If I understand it, you can redraw the figures electronically in the points of dispute and replies to demonstrate which items should be allowed and which items shouldn’t be allowed. That’s a much neater way of doing things than by paper and getting a calculator out,” says Hutton.

Green says the points of dispute and replies issue is an area where the electronic bill could potentially make a significant, positive difference to the speed and cost of a costs dispute.

“If you’ve got a very big paper bill it’s a big exercise to work out who’s done what and what the points of dispute are,” he says. “What the electronic bill gives both parties is a different way to be able to resolve costs. If you’re a paying party you’ve got much more scope with the electronic bill to be able to work out what you’re offering and what you’re challenging.”

While the technicalities of bringing bills and points of dispute together are worked through, Master Gordon-Saker suggests a way to mitigate the work of relating the spreadsheet with the paper document.

“Where the paying party files points of dispute to an e-bill on paper, it is extremely helpful if the bill identifies the items to which each point applies in a separate column with the ability to filter it. The particular items challenged in each point can then be filtered and identified easily,” he suggests.

Green says he is a supporter of seeing points of dispute and replies as part of the electronic bill, to make the whole process of settlement discussions, as well as detailed assessments, more efficient and timely.

“They should be in the spreadsheet and part of that process, in my opinion,” he says. “It often doesn’t create efficiencies if you’ve got a part electronic and part paper bill although that is probably inevitable for some time.”

Simons Muirhead’s Henshilwood is also enthusiastic about bringing the process together into one document.

“I think it’s a great idea because you can then run formulas and data checks across the same base data,”

> We have not been prescriptive about points of dispute and replies in e-bill cases. Once we know what works best, we may be able to produce revised models. **Master Gordon-Saker**

she says. "Once you've got past the stage of the basic points of dispute and replies you're into pure maths formulas."

Neil has an alternative angle on the issue, saying he would like to see points of dispute brought closer to the bill, but in a slightly different way.

"Some of the time it's all fairly pointless," he says of the disputes and replies process. "You end up at a hearing anyway, still trawling through every item.

"What I would prefer to see would be points of dispute in a format more like a mediation position statement, or a schedule where you can set out the broad parameters of the points you're taking in relation to the costs. The other side can put in a reply in a similar format. They should then be accompanied by a very simple albeit potentially quite long schedule which uses the items in a bill to indicate what the paying party is prepared to offer in respect of each one.

"The benefit of that, attached to fairly high-level points of dispute and replies, would be that you'd focus people on what level of costs was agreeable to each side," Neil suggests.

Hutcheon agrees with Neil that whatever the format, parties could still end up running through the same issues in court anyway. He is however an advocate of better protocols governing objections which parties can put forward to a bill.

"You get a two or three-line objection to a minor piece of work and the amount of time you spend on that objection is just very annoying. You still have to go through everything and it's often very repetitive," he says.

Certainly, although integrating points of dispute and replies into the electronic bill potentially gets rid of cross-checking the electronic bill with reams of paper, nobody is suggesting that this would minimise the contentious nature of a detailed assessment hearing. As barrister George McDonald of 4 New Square points out, reviewing disputes and replies will still need costs lawyers' expertise.

Ellis adds: "The bigger the bill, the more you're tempted down a road of disputing only the key issues and the big arguments because it's unrealistic to do anything else."

Master Leonard queries "whether it will feasible and practicable to bring everything into one document".

However, from the technical side of things, Simmons Wavelength's Winlaw says bringing points of dispute and replies into the electronic bill – as the ACL template shows – is entirely possible.

"It can absolutely happen," he reassures. "It's just a way of checking a set of timelines that relate to a particular point of dispute and maintaining that continuity throughout the process of working through the points of dispute.

"As each particular timeline might relate to several different points of dispute, you need to manage that data very carefully. That can be done within Excel for the vast majority of bills."

Costs specialists say that moving in this direction

> As each particular timeline might relate to several different points of dispute, you need to manage that data very carefully. That can be done within Excel for the vast majority of bills. **Winlaw**

will require the parties to cooperate more closely to ensure this continuity – but in the grand scheme of things, if the technical issues are handled, integrating the whole process within the bill is likely to present a significant improvement to the way points of dispute and replies are currently managed.

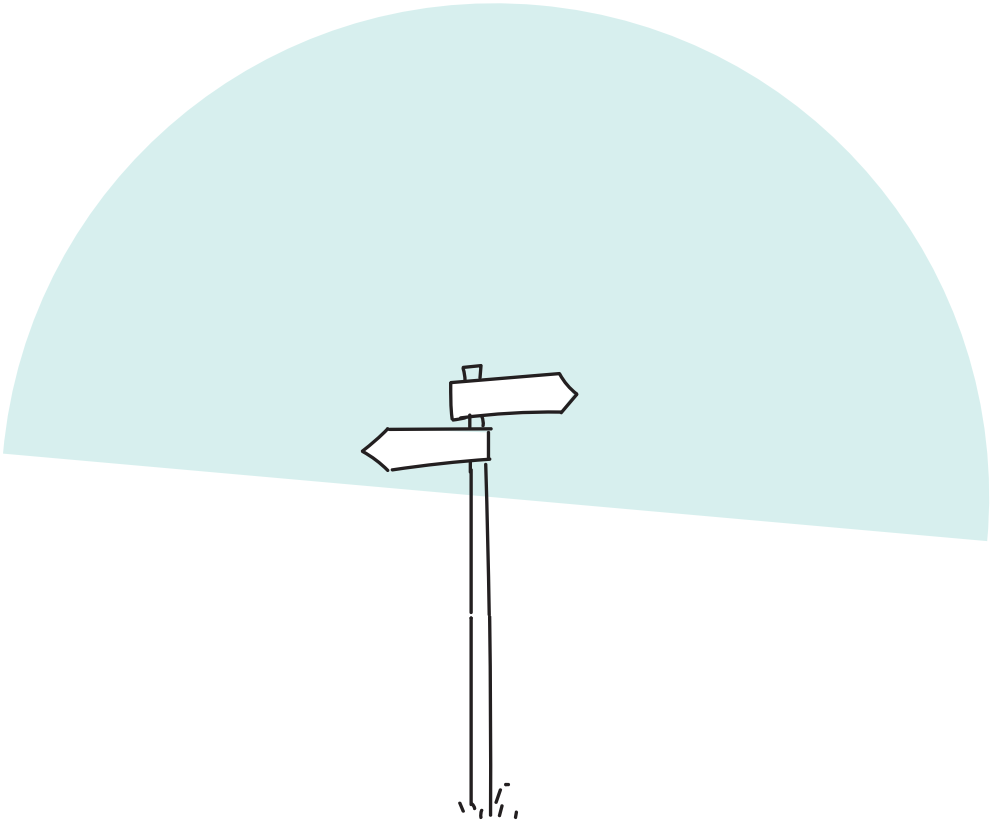
"The fundamental features of the detailed assessment procedure haven't changed significantly in generations," points out Ince's Derek Boyd.

"Two of the biggest developments to take place in my working lifetime have been the introduction of pleadings in the way of points of dispute and replies which, to my mind, firmly established detailed assessment as satellite litigation, and costs budgeting, which has brought costs as a feature of litigation to the forefront when once it was considered only at the end," Boyd says.

"With budgeting and electronic filing, advanced technologies have now come into play. The court has come into the twenty-first century, but the new detailed assessment procedures remain unclear and the practice directions, having evolved less swiftly, are still from an earlier age," he adds.

Master Gordon-Saker notes there is still work to do on this front.

"We have not been prescriptive about points of dispute and replies in e-bill cases. Once we know what works best, we may be able to produce revised models," he says.



MOVING IN THIS DIRECTION WILL REQUIRE PARTIES TO COLLABORATE MORE CLOSELY

7

Still early days

To date, the impact of the electronic bill on detailed assessments has been limited. Master Leonard and his SCCO colleagues are at the more experienced end of the scale when it comes to taking the new model through to a final hearing, with the majority of costs disputes continuing to settle before they reach this stage.

"With costs there's always a long tail. There are still quite a lot of bills that fall outside the period where you have to use it," he points out.

Steven Green notes many cases begun today will not see a bill of costs produced for several years.

"You've got to get all of these cases through the system with older style time recording where phases and tasks weren't as prominent, before you start seeing all of the benefits of the new system," he says.

"It's part of a big change for many, many costs draftsmen," adds Neil. "This fairly small slice of the legal profession is in a time of radical change and it's a case of working through it."

Green says Irwin Mitchell has had around half a dozen electronic bills (or part electronic) progress to detailed assessment, and where the costs judges and parties have been well-prepared to deal with them, the process has been smooth. However, he is not prepared to make a judgment call on whether the electronic bill will eventually make parties more inclined to fight through to detailed assessment.

"We're interested in efficiency and settlements," he adds. "Any process which is quicker and cheaper is more attractive to everybody. I don't think in any court process it's right to say 'make the trial attractive'. It is usually a last resort."

Due to the fact that some firms are still grappling with the mechanics and, given the time it takes for a case to get to the point where costs are presented, there continues to be a certain amount of unpredictability about the full impact of electronic bills on detailed assessment.

Winlaw thinks that in principle the bill will help make detailed assessment quicker and cheaper, and that if that point is reached, parties might be more willing to consider it.

"One of the fears about going down to detailed assessment right now is the cost of it," he says.

He suggests the sea-change which needs to happen is for parties to understand that the electronic bill allows assessments to be informed by data, rather than by a prolonged negotiation.

At the counsel level, the electronic bill gives barristers a lot more detail a lot more quickly than the old paper bill format.

"I can be slapped with a lot more granular analysis by the people instructing me. To an extent it acts as a shortcut," says Williams.

Practico's Ellis also appreciates that "for some, the new bills may be more expensive to produce at the moment in the transition period, but savings will follow later and will be more evident in the efficiency of modelling different outcomes and informing settlement parameters," he predicts.

Henshilwood says lawyers and their clients should be encouraged to resolve disputes as early and as amicably as possible, particularly with smaller claims, although she adds that electronic bills are likely to form a better basis for resolving costs disputes than paper.

> It's not perfect but nothing is, but it's really done the job that it's asked to do. I think it has been a real step forward. **Alexander Hutton QC**

"It may be said that because it's so easy for the other side to manipulate the data that's given to them in electronic form, that it promotes settlement. It ought to make things easier because you're giving all that data to the other side in a form that facilitates analysis," Hutton adds.

Neil, however, while supporting the transition from paper to electronic bills, does not see that they will have a significant impact on the detailed assessment process – or, as others have suggested, encourage parties to settle sooner because they have access to better data at an earlier stage in the process.

"Whilst I appreciate that the data is less easily manipulated or considered in an old-style bill, I don't find the old-style bill any less transparent than the new bill and I don't see why it would make settlement any easier," he says. "Having said that, I do think that, once time recording practice has caught up with the technology, bill preparation should become easier and quicker."

Neil also has some outstanding concerns, which he says still need to be addressed, such as making sure that the technology remains robust. The courts have already had their share of technology failures, such as the well-publicised collapse of the courts' networks in early 2019 – or the pagination mix-up with the electronic bundles provided to the Supreme Court during the high-profile prorogation hearing in September – and Neil points out that for electronic bills to work, so does the technology.

"I could see a three-week hearing going down the pan because the bill gets corrupted," he says. "I think it's the right direction to go in, definitely; I just think that at the moment I'm not sure that all the circumstances surrounding it are established to make it really work as it should work."

Hutton remains very positive that the system will be improved by the changes we have seen and those to come. He says the credit for creating the electronic bill should not go to him as committee chair but to all those who supported the work.

"I'm very pleased and I genuinely take almost no credit myself. We had an excellent team," he says.

Hutton reports that as time has passed since the initial culture shock he has received generally positive feedback on the bill.

"I've had a number of people come up to me and say 'I quite like your electronic bill, it's alright'," he says. "I'm not getting a raft of emails saying this doesn't work and that doesn't work. I think there's a general acceptance that this has to be the way forward and it's not that difficult.

"It's not perfect but nothing is, but it's really done the job that it's asked to do. I think it has been a real step forward."

8

Where next?

> “The way that things are set up it seems likely that electronic bills will become the standard format. **Master Leonard**

Deborah Burke
Managing Associate
Practico Ltd

Practico’s **Deborah Burke**, who chaired the first ACL committee on bill format and saw the project all the way through as a member of the Hutton Committee, says “the basic point is that with a data driven electronic bill, introduction of a pre-assessment protocol, and early judicial intervention in the way that issues are raised, I would hope that taking the right case to assessment could become a more attractive and proportionate option.”

Hutton thinks the scope of the bill can be extended to a “number of other avenues” without the need for another committee or working group.

He says a natural extension already is the link between the electronic bill and the current pilot for summary assessment of costs, set out in Practice Direction 51X. The pilot began in April 2019 and lasts until 31 March 2021, but Hutton suggests that – like the electronic bill itself – few are likely to get involved until they have to.

“My experience is that nobody does anything until it becomes mandatory,” Hutton notes, saying he has not yet seen an electronic summary assessment of costs. “Unless you put a gun to peoples’ heads, they won’t actually do it. When you do force them to do it, they go ‘it’s not that bad actually’.”

Hutton suggests that the electronic bill could well be used beyond Part 7 multi-track claims, to which it currently applies.

“I think it would be fantastic if the electronic bill was extended to other types of litigation which aren’t covered at the moment,” he says, adding that it could well be used for family cases, judicial review or Court of Protection cases.

Master Gordon-Saker agrees the Court of Protection could be a good place to start expanding the use of the electronic bill.

“I think that the next step may be electronic bills for deputies appointed by the Court of Protection. The Costs Office receives over 8,000 of these every year and some firms who do a lot of this work have asked for the facility to file e-bills,” he reveals.

The complication, Hutton points out, is that court procedures for such matters are different to civil litigation with different phases involved, and that would mean that someone would have to prepare another electronic bill template that could be used –

> If I had a crystal ball, I'd say the use of graphical and modern data visualisation to go alongside the numbers is where we're going to end up as best practice. **Andy Ellis**

although this is far from an unachievable aim.

Ellis argues that the teething issues of the electronic bill were inevitable but is now looking forward. "We've managed to get through the labour pains of the adoption of systems," he says. "Looking past that, how can the process of resolving costs disputes be better informed by the ways we can now slice and dice the information?"

At present, the electronic bill is heavy on data and numbers, but Ellis believes that parties could start expanding on this in the future.

"If I had a crystal ball, I'd say the use of graphical and modern data visualisation to go alongside the numbers is where we're going to end up as best practice. We're very interested in data visualisation as a discipline but that's a slow burner," he says, suggesting that this is likely to appear sparingly and only in the larger cases initially.

"We've got a wide-open mandate; we've got to be bold and experiment with different forms of presentation," he adds.

Practico, and the costs lawyers interviewed for this piece, are not concerned that the electronic bill is going to take their roles away; the need for continued human input will certainly remain.

"It's making the labour-intensive part of the process more efficient," Ellis says. "It's not making what we do redundant, it's just improving the quality of what we do."

Master Leonard agrees, and echoes Hutton in the hope that the electronic bill will become standard across a much wider range of cases.

"The thing about the bill is that it's really about managing the nitty gritty in an efficient way," he says. "The way that things are set up it seems likely that electronic bills will become the standard format."

It is a challenging time to be a costs lawyer, says Ellis, adding that those who exploit the potential of the bill should reap the dividends. Those who make the most of the new format are likely to achieve more positive outcomes than those who don't.

"We've got an opportunity to debate and establish best practice here. It's a really positive challenge: stay relevant, be better."

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