The Costs Briefing

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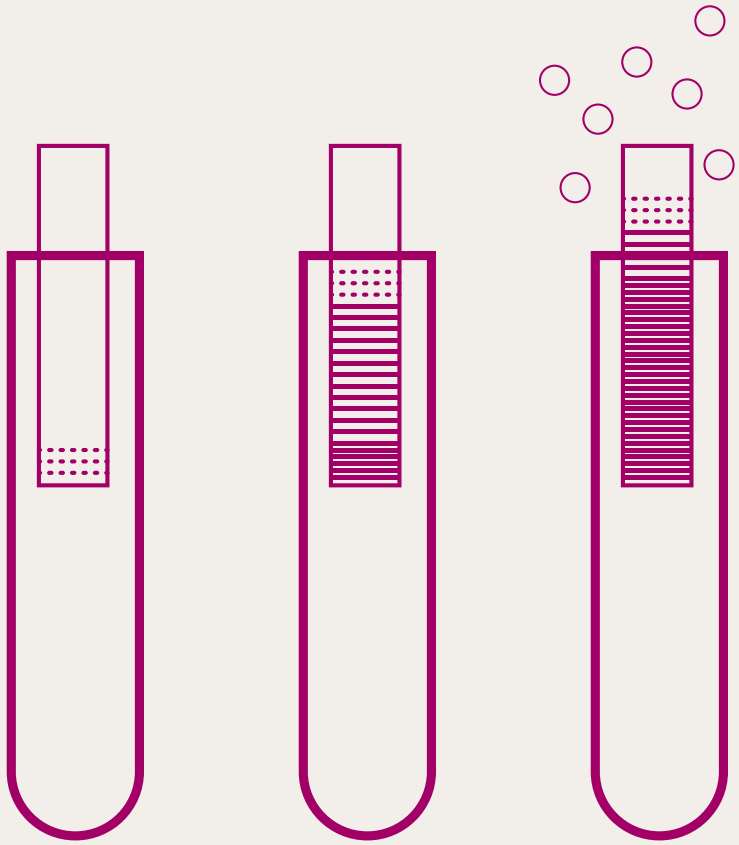

→ **The new test of proportionality.** Jeremy Morgan QC sums up recent developments to the new test of proportionality. → **Sophisticated Spending.** A litmus test of how the industry sees hourly billing, J Codes and tech. → **Part 36 developments.** Our update on the ever changing Part 36 rules. → **Budgets.** A new trap for the unwary. → **Practico Costs Roundtable.** A photo update from our inaugural event. → **News from Practico.** An update on what's been happening at Practico.

August 2016

Welcome to Edition 2 of the The Costs Briefing. It's been an important three months for Practico, with our inaugural costs roundtable taking place and the launch of our industry research "Sophisticated Spending".

Within costs litigation there have been significant developments, most notably with changes to proportionality – more of which later.

If you have any feedback, comments or would to like to attend one of our events, please do get in touch.

James Barrett
Managing Associate

The new test of proportionality

Jeremy Morgan QC

Strange as it may be that the first real decisions on Jackson proportionality should be coming out some three years after the new rules came into effect, that is indeed what is happening. The effect of the delay, which was inevitable given the transitional provisions, has perhaps been to lull the profession into a false sense of security that nothing much had changed. However, two Costs Judge decisions issued within a fortnight of each other show just how wrong that view would be.

To remind readers, the nub of the new test lies in CPR 44.3(2)(a) which includes, "Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred." Proportionality trumps reasonableness. In contrast to the earlier practice, proportionality is now to be decided by standing back after the line by line assessment and considering the overall sum to be allowed.

In *BNM v MGN Ltd [2016] EWHC B13 (Costs)* the Senior Costs Judge applied the new proportionality test to halve the sum which had been allowed at detailed assessment on a line by line basis – allowing about £85k in place of the £167k found to have been reasonable for a £20k privacy action for damages and an injunction which had settled at a relatively early stage.

In *May v Wavell [2016] EWHC B16 (Costs)* Master Rowley followed suit allowing £35k plus VAT in place of a line by line result of just below £100k. That was a private nuisance claim which had settled by the acceptance of a Part 36 offer of £25k made before defences were served.

At the time of writing the BNM decision is subject to an application for permission to appeal, but any appeal is likely to be an uphill struggle, given that a decision on proportionality is an exercise of judicial discretion par excellence: appeals against decisions on proportionality under the old test were always strongly

discouraged, and there is a barrage of extra-judicial comment from senior judges supporting the new approach.

Implicit in the new proportionality test is that there are some cases in which what is to be gained does not justify even the minimum expense necessary to achieve it so that either they should not be pursued at all, or the litigant who decides to do so will have to carry a substantial part of the costs whatever the outcome. In a sense there is nothing new in this – the small claims track and the old county court scales had the same effect. What is different though now, with proportionality applying to cases in all courts, is the open-ended nature of the risk faced by litigants and by solicitors who "eat what they kill". Even if they win they cannot be sure how much of their costs they will recover. A doubt that will certainly be exploited by defendants at all stages of a claim.

Ironically, the effect could well be to reverse conventional attitudes to budgeting. Claimants may well now press for costs management so as to get their budgeted costs approved at an early stage, thereby ensuring that they recover at least that amount if they win. If for some reason the budgeting hearing goes against them, they would have the option of pulling out and avoiding the shock of a Pyrrhic victory.

However, the most urgent need is for solicitors to rewrite those standard client care letters that advise the client that if they win they can expect to recover 60–75% of their costs. From now on such advice will have to be carefully tuned to the facts of the case in question.

Practico News

Practico was joined by Katy Neighbour in June as an administrative assistant, having recently graduated from Canterbury with a degree in History.

In May Practico attended Legalex, the Costs Lawyers conference, and in June attended the CDR Arbitration Summit.

We hosted our inaugural Breakfast Meeting in June and will be hosting further breakfast meetings in both London and in the regions in Autumn.

→ You can read more news on www.practico.co.uk

Sophisticated Spending – a litmus test of how the industry sees hourly billing, J Codes and tech

James Barrett

Towards the end of last year the litigation industry was in a state of considerable change and indeed remains in this state.

Government-driven reform continues at a remarkable pace, designed to tackle the clogged up "creaking, outdated" court service and to address the increasing costs of litigation within the English court system, as announced by justice secretary Michael Gove last summer.

In addition, technology is also acting as a significant driver to change within the legal industry, pushing for legal practices to change their working methods and to increase efficiency.

With this continued state of flux, we felt that it was time to consult those impacted the most by these reforms, in order to establish the industry position.

Practico approached the industry leaders, senior general counsel and litigation partners, commissioning a detailed independent survey of 50 corporate counsel around costs management in litigation, to ask what was most useful to them when it comes to controlling costs.

We learned through our survey and follow-up interviews that hourly billing remains the industry standard and something that corporate clients are used to. What also become clear was that there was an increasing importance in budgeting. More of which to follow.

Hourly billing

The outcome of our survey was perhaps not unsurprising. What is very clear from the results is that time-based billing is far from dead, with 78% of respondents still using it for disputes.

A further reason for the prevalence of time-based billing is reflected in the fact that 50% of respondents saw it as necessary to provide clients with the required transparency and visibility around litigation spend that they require.

Damien Byrne-Hill, Head of Banking Litigation at City giant Herbert Smith Freehills, explained the continued reliance on the hourly rate: clients are "very keen to explore different, alternative, innovative ways of addressing legal costs. They want the costs to go down but they're also interested in different ways to present them. For litigation, there's lots of scope to be innovative and come to arrangements but they tend to be tied to hourly rates, simply because in the latest pieces of litigation there will always be an element you can ultimately measure by the time the task took."

Technology

What is also clear is that the industry at large is struggling to keep apace with the technological

advancements around e-billing, time recording and litigation technology in general.

There is, in our view, the need for litigators to grasp the tech nettle through increased use and awareness of the benefits available from e-disclosure, through to electronic billing and the nascent artificial intelligence scene. As John Collins, Director of Legal at Santander UK, explained: "As institutions learn to use technology more effectively, it will be easier to produce relevant documents and prepare for litigation."

J-Codes

If hourly rates are still the industry standard and look to remain so, we believe there is a real need for litigators and their clients to be able to fully drill down into those hours to establish efficiencies and highlight where value can be enhanced. This was a view supported by Jeremy Barton, General Counsel of KPMG, who considers that the provision of data will enable clients to agree costs with their instructing solicitors; "the move towards transparency and analysis will help forge agreements".

As most in the industry will be aware, we at Practico are advocates of the J-Code model, to enable litigation spend to be recorded, presented and categorised. Our survey shows that the awareness of J-Codes within the legal industry is growing but remains low; 58% of respondents were not aware of them. However, those that were could see benefits of clarity, reducing internal administration and easier reporting.

Jeremy Barton expanded on this: "There isn't a huge amount of awareness in-house or in private practice… [However] the value of services you're paying for is critical. The content of e-billing between clients and law firms is gathering momentum. Having that platform with the codes established, the concept of getting that standardisation in place with J-Codes seems to have been a useful step because the court are looking to leverage technology".

We couldn't agree more. J-Codes will enable there to be a significant increase in correlation between the e-bills utilised for clients and those prepared for detailed assessment. J-Codes, at least at the task level and with a trimmed-down set of activities, provide a path to ensuring that legal spend can be properly analysed, whether it be for the purposes of client e-bills, the preparation of a budget or the recovery of costs from the paying party.

As Mark Garnish, Development Director at legal technology solution provider Tikit, explained: "You can monitor costs without them. But honestly, they just make life easier. A law firm is expected to budget for litigation and say, for argument's sake, they have budgeted 100 hours to spend on witness statements. They have to check to see how they're faring against that budget. If you use J-Codes, it's easy for you to monitor how you're doing against your original budget. Why not use a system which has been largely designed to achieve that?"

Mr Garnish saw transparency as the key benefit: "Why wouldn't a lawyer want to be able to check their budget?"

This is particularly on point given that most corporate clients are very familiar with working in a budgeted environment for litigation costs. Emma Slatter, then Global head of Strategy, Legal at Deutsche Bank, told us that "budgeting in litigation is of critical importance to managing client expectations".

We see the combination of J-Codes and costs budgets as being at the centre of litigation costs control. As Sa'ad Hossain QC of One Essex Court concluded: "It seems that the use of J-Codes will be widely adopted. It goes to the very heart of costs management and now it seems there is a joined-up approach.

"A costs budget is not simply something that is looked at during a procedural stage to work out costs. It should run through to the end where the detail of costs is look at. We're in a new world now."

The full version of the report, Sophisticated Spending, is available for download from our website. The article kindly reproduced with permission from the Costs Lawyer Magazine.

Part 36 developments

James Coleman

Year on year Part 36 throws up some exciting and controversial judgments, and with post April 2015 Part 36 offers now coming before the courts on a regular basis the indicators so far point towards yet another vintage year.

Amongst the changes from April 2015 was the insertion of 'whether the offer was a genuine attempt to settle the proceedings' at CPR.36.17(5)(e). This is now one of the circumstances to consider when determining whether it would be unjust to make the standard costs order arising from a failure to obtain a judgment more advantageous than the other party's Part 36 offer.

What constitutes a genuine Part 36 offer was recently considered by the High Court in the matter of *Jockey Club Racecourse Limited v Willmott Dixon Construction Limited [2016] EWHC 167 (TCC)*. Here the Claimant made an offer to settle liability on a 95% basis, despite such an outcome being an impossibility, the only realistic outcomes on liability were 100% or 0%. The Defendant resisted the usual costs order on the basis that the offer did not constitute a genuine attempt to settle the proceedings. The judge accepted that although the only available outcome was success or failure, that did not render the Part 36 offer invalid, referring to the approach in *Huck v Robson [2003] 1 WLR 1340* "I do not think that the court is required to measure the offer against the likely outcome in a case such as this".

A further issue which has emerged, dividing opinions along the way, is the costs consequence of late acceptance of a Part 36 offer. This issue was examined recently in *ABC v Barts Health NHS Trust [2016] EWHC 500 (QB)*. Here the Claimant accepted the Defendant's offer out of time, so the usual costs order would see the Claimant awarded costs up to the expiry of the Part 36 offer and thereafter to award the Defendant its costs. However, the Defendant submitted that, having regard to all the circumstances of the case, such an order would be unjust. The circumstance relied upon was that the Claimant failed in relation to the vast majority of its pleaded case. Therefore it was submitted that costs up to the expiry of the Part 36 offer should only be awarded in respect of a particular issue, with the balance of the pre-expiry Part 36 costs to be awarded to the Defendant, in addition to the post-expiry Part 36 costs.

Declining to make the costs order requested by the Defendant, McKenna J highlighted that the Defendant had the means and opportunity to protect itself in respect of the costs that it was going to have to incur to defend the issues the Claimant failed on, but chose to frame its Part 36 offer as a settlement of the whole claim and when not accepted by the Claimant, did not make any revised offer excluding the issues which failed.

This decision highlights the importance of careful drafting and monitoring of Part 36 offers, rather than relying on the rocky route of persuading a Court to exercise its discretionary under CPR 36.17 (5).

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Budgets – a new trap for the unwary

Jeremy Morgan QC

SARPD Oil International Ltd v Addax Energy SA [2016] EWCA Civ 120 was a commercial case argued by commercial, rather than costs, counsel. The result is a Court of Appeal decision that comes as a surprise to the costs specialist because it goes against the grain of practice to date.

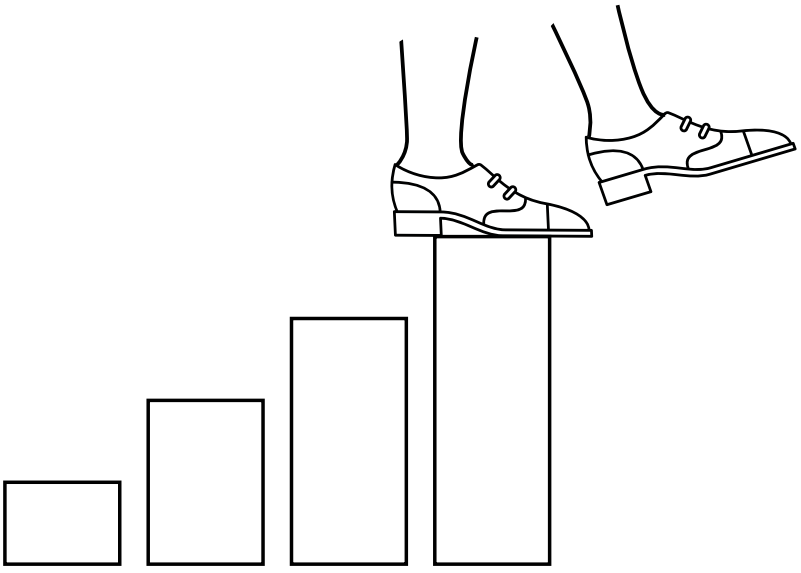
The issue for the Court was whether the judge below, in ordering security for costs, was correct to determine the amount by reference to an agreed budget which included, as Precedent H requires, figures for both incurred and projected costs. Of course, the costs management judge is not allowed to rule on pre-budget costs

(see para. 7.4 of PD 3E), but can comment on them and take them into account in determining the reasonableness and proportionality of subsequent costs.

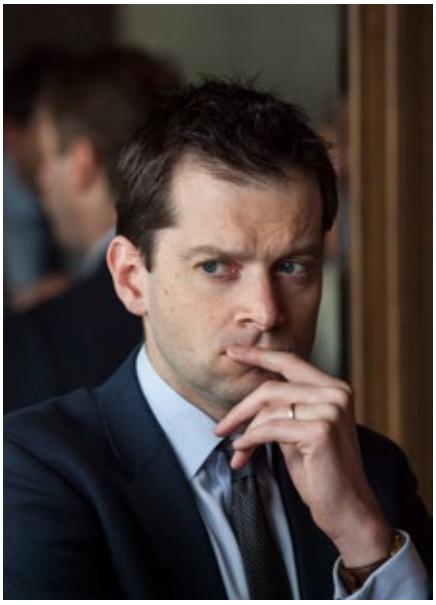
In *SARPD* the parties had agreed each other's Precedent H budgets, including both incurred and projected costs, and these had then been approved by the CMC judge. The Court of Appeal held that the case management hearing had been the occasion on which any issue over incurred costs should have been raised and that at the security for costs hearing it was too late for the party against whom security was sought to object. Whilst it might be objected that security for costs (where a broad discretion over quantum is being exercised) and detailed assessment are not the same thing, the reasoning is powerfully expressed and it would be a brave Costs Judge who declined to follow it when asked to do so on detailed assessment.

The Court justified its conclusion by reference to the overriding objective. The first CMC, it said, is the occasion to bring forward disputes over costs, including those already incurred, and if that opportunity is not taken then it would be wrong to allow the disputing party a further opportunity at a later stage. With respect, the overriding objective could also be used to justify exactly the opposite approach. The rules make clear that there is to be no detailed assessment of past costs at the budget stage and the proper forum for such an assessment is the costs judge (with detailed argument by costs lawyers rather than expensive counsel). Both parties and case management judges may well regard it as disproportionate and a waste of valuable judge time to have to run such arguments at the case/costs management stage.

The lesson then? The Court did not consider means by which a party or parties, or even a judge, anxious to avoid consideration of past costs at a CMC, could avoid the strictures of its judgment. It is suggested, however, that it would be safe for both parties to agree, expressly and in writing, that the incurred costs in any budget being approved by the court were expressly excluded from any such approval, or agreement giving rise to court approval, and the reasonableness and proportionality of such costs was to be a matter for detailed assessment or agreement at a later stage. If the CMC judge were to disagree, relying on *SARPD*, some quick thinking would be required, but there are still not that many judges desperate to carry out retrospective assessments where nobody else wants them to do so.



Practico Costs Roundtable – A photo round-up



On the 22 June, Practico hosted its inaugural Costs Roundtable at the Duck and Waffle in Central London. Over breakfast 18 commercial litigators, barristers and costs lawyers tackled the thorny issues of the day.

The event was chaired by Nicholas Bacon QC, with Practico being represented by Andy Ellis, Jeremy Morgan QC and James Barrett.

We were joined by Ioannis Alexopoulos (Bryan Cave), Jane Hobbs (Gateley), Katrina Emmanuel (King & Wood Mallesons), Louise Bell and Anna Caddick (Olswang), Rob Allen and Felix Zimmermann (Simmons & Simmons), Louis Charalambous (Simons Muirhead & Burton) and Andrew Hutcheon and Sam Prentki (Watson Farley & Williams).

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