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Debbie Burke ~ Editor

I am writing this editorial with a feeling of great excitement not, as you may think, because of Lord Justice Jackson's interim report (although more of that later), but because I am delighted to announce not one, but two new additions to our team. Firstly, our trainee, Michelle Farlow, who joined us in July. Michelle is a law graduate with her LPC under her belt and will be joining our costs drafting team in Melton Mowbray. Secondly, we have strengthened our team further by bringing on board as a consultant Victoria Hopkins, a fellow costs lawyer and long term colleague of this business. Victoria joining us means that not only have we increased our geographical coverage (Victoria will be based on the south coast at our Lymington office) but even more importantly, Victoria is a huge asset as a technical draftsman and advocate. She is also an accomplished speaker on costs and some of you may have come across her already at CLT conferences.

Victoria and Michelle bring further breadth and depth to our established business. They in turn have been able to slot into their new roles quickly and easily because of the well established processes and procedures which form the backbone of our everyday operations at *Deborah Burke Costing Limited*. "Innovation" is one of our core business values and our newly strengthened team puts us in the position

to provide our clients with an even better service in the future.

As always, it is a pleasure to bring you specialist contributions - this time by Masood Ahmed and Andrew Hogan. Both articles are excellent and both show the continuing importance of a comprehensive knowledge of costs, whether you are acting for a receiving or paying party.

So, to Lord Justice Jackson's interim report. Reproduced on page 7 of this edition of **Costs Recovery News** is an article I recently penned for a number of local law society magazines. The extension of the fixed fee regime seems an obvious first step. More interesting is the possibility that a formal costs management regime will be introduced through the mechanism of cost

budgeting. The pilot study now running in Birmingham (please see page 8 of **Costs Recovery News**) may just represent the shape of things to come...

As always, the team at *Deborah Burke Costing Limited* is ready and waiting to deal with your costing requirements. Why not take the first step today by contacting us or sending your files for costing?

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**Cases in Brief...**

Section 11 of the Access to Justice Act 1999

This section of the Access to Justice Act continues to cause difficulties for solicitors whose clients are successful in obtaining costs against a legally aided opponent.

The judgment in this case reinforces the need for the party who is successful in litigation against a legally aided opponent to make an application under Section 11 for an order setting out the amount, if any, which it is reasonable for the legally

aided paying party to pay by virtue of the costs order made in the client's favour. This judgment reminds practitioners that the application under Section 11 must be made within three months of the date of the costs order, irrespective of any subsequent developments in the litigation between the parties.

Ref: (1) *Liverpool Freeport Electronics Ltd* (2) *Streed (UK) Ltd* (3) *Shirin Iqbal (Claimants) v Habib Bank Ltd (Defendant/Appellant) & Legal Services Commission (Respondent)* [2009] EWHC 861 (QB) QBD



Cases in Brief...

A criminal claim for costs?

MR Brewer was investigated by the Serious Fraud Office. The investigation extended to events in the USA and Mr Brewer retained an American attorney. He also instructed solicitors in the UK. He was later charged with the offence of money laundering and was granted a representation order which covered the work of his solicitors and counsel. When the trial was subsequently stopped and the Defendant and his co-Defendants were acquitted, a defendant's costs order was made.

Mr Brewer's claim for reimbursement included a substantial sum for the fees and expenses paid to the American attorney. The determining officer did not allow any of the payments made to the American attorney. After an application for a redetermination, an allowance was given for work done by the American attorney before the grant of the representation order but no allowance was given for fees and expenses paid to the American Attorney after the representation order was made. Mr Brewer then appealed and the judge certified two points of principle of general importance:-

1. The fact that the defendant was represented by counsel and solicitors did not necessarily prevent a further claim by an applicant for "expenses properly incurred".
2. The cost of paying fees in respect of professional services was, in principle, capable of being an out of pocket expense.

However, the judgment stresses the advisability of alerting the trial judge when an application for defendant's costs is going to be made and providing the trial judge with as much information as to the nature and anticipated quantum of costs which are likely to be claimed. The

judgment also stressed that an application for the cost of legal professional services performed during the currency of a representation order was likely to fail.

Interestingly, no-one involved with the case seems to have drawn the comparison with a litigant in person in civil proceedings. In the Agassi¹ judgment, Andre Agassi was not entitled (as a litigant in person) to recover the fees of a tax

expert who had carried out work which would normally have been done by a solicitor. In Mr Brewer's case, it must surely be arguable that his American attorney carried out work which could have been dealt with by his English legal team.

Ref: *Frederic Peter Brewer v Secretary of State for Justice* [2009] EWHC 987 (QB) QBD

1. Ref: *Andre Agassi v S Robinson (HM Inspector of Taxes)* [2005] EWCA Civ 1507

Does the statutory charge arise when a publicly funded claim fails but the claimant subsequently sues successfully for professional negligence?

IN this case, the Claimant's clinical negligence case had failed because of the negligent conduct of the claim by her solicitors. Those solicitors submitted their claim for costs to the Legal Services Commission and the Legal Services Commission duly paid out £22,000.00 in profit costs, disbursements and Counsel's fees. The solicitors advised the Claimant to obtain independent advice which she duly did and with the benefit of a further legal aid certificate, she successfully advanced a claim for professional negligence.

Quantum was agreed in the professional negligence case but an issue arose as to whether the statutory charge attached to the recovery in the negligence action in relation to the costs paid by the Legal Services Commission in respect of the original, clinical negligence, claim.

The full judgment deals in detail with the recovery provisions both under

the Access to Justice Act 1999 and its predecessor, the Legal Aid Act 1988.

His Honour Judge Holman decided that the statutory charge applied only where recovery was made in the original funded proceedings. It did not extend to recovery in other proceedings, even if those proceedings were related to the original funded proceedings.

On a practical level, practitioners dealing with professional negligence claims arising out of failed publicly funded litigation can use this judgment as authority for not making provision within the settlement of a professional negligence claim for any costs paid by the Legal Services Commission in funding the original claim (which had been handled negligently).

Ref: *Cassidy v Stephenson & Legal Services Commission*
Case No: 8WA01622



Recent Cases...

A 100% success fee allowed as claimed, now that's a turn up for the books!

THE Claimant had a clinical negligence claim arising out of the death of his father. The Claimant's mother consulted solicitors after his father had died and the case was accepted on a CFA basis on the premise that the Defendant hospital had caused or permitted the Claimant to become infected with MRSA. At that stage, the cause of the infection was not known and the success fee was set at 100%.

The judgment records that the action did not run smoothly. The Claimant's expert evidence did not support a finding that the hospital was at fault in relation to the infection or treatment but did conclude that inadequate attention had been paid to the deceased's diet and that his ensuing weakness had caused or contributed to his death. The case therefore continued on this basis but with reduced confidence. The action subsequently settled for £50,000.00 plus costs.

On detailed assessment before Master Campbell, the Master had agreed that when setting the success fee, the solicitor was right to look first at whether the client's case was "hopeless". If it was not, it was then right to conclude that insufficient information was available to give full advice as to the prospects of success. However, Master Campbell held that not being able to give full advice about the prospects of success did not justify a success fee of 100%. If, as the Claimant's solicitors submitted, there were reasonable grounds for investigating the case further, Master Campbell's view was that the solicitors must have thought that the claim had a better than 50% chance of success, otherwise they would not have accepted it on a CFA basis. Master Campbell translated his conclusion into a 60% prospect of success for which a

success fee of 67% was appropriate.

On appeal, the "crucial question" was whether Master Campbell was justified in concluding that the prospects of success should have been assessed at 60%, rather than 50% (as had actually happened).

Mr Justice Jack concluded that the solicitor's assessment had been that the claim might have had a better than or worse than even chance of success - it could easily have been assessed at having a lower than 50% chance of success because the claim faced difficulties and had uncertain prospects. The appeal was allowed and the 100% success fee was restored.

This is, indeed, a heartening judgment for claimant practitioners but it does not

give carte blanche to claimant lawyers to recover success fees routinely at 100% just because the CFA is entered into very soon after instructions are received and before a detailed investigation of the claim has taken place. In this case, the Claimant's solicitors were able to provide detailed witness evidence to support the way in which the case had been assessed at the outset. Having a rigorous assessment process which is properly recorded remains as important now as it ever was.

Perhaps this is the sort of case which Lord Justice Jackson has in mind when he makes reference in his interim report to ending the inter partes recoverability of additional liabilities who knows?

Ref: *David Ian Oliver v Whipps Cross University Hospital NHS Trust & Waltham Forest Primary Care Trust* [2009] EWHC 1104 (QB)



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Fixed percentage increases and Part 45 of the Civil Procedure Rules 1998

by **Andrew Hogan**

Costs Barrister

INTRODUCTION

1. Despite the ethos of the Civil Procedure Rules and the pre-action protocol for personal injury claims, it remains the case that a proportion of issued claims proceeding towards a contested trial on liability or quantum will settle very shortly prior to or at the door of the Court, or even possibly 10 minutes after the start of a trial opened by Counsel.
2. The issue as to whether in the context of road traffic claims solicitors are entitled to 12.5% or 100% by way of uplift on their fees is sometimes clouded by doubt as to how the relevant rules apply in differing factual scenarios. The purpose of this article is to consider how the Rules contained in Section 3 of Part 45 of the Civil Procedure Rules 1998 should be applied in practice.

AN OVERVIEW

3. The starting point is to consider Rule 45.15 which applies the Rules which are relevant to determining fixed percentage increase in road traffic accident claims. That section has no application to a claim which has been allocated to the small claims track or to a claim not allocated to a track but for which the small claims track is the normal track or, as an increasingly historical irrelevance, claims where the road traffic accident occurred before 6th October 2003.
4. Rule 45.15 provides that a reference to a trial is a reference to the final contested hearing or to the contested hearing of any issue ordered to be tried separately and a reference to a claim concluding at trial is a reference to a claim concluding by settlement after the trial has commenced or by judgment.
5. Rule 45.16 provides that in the general run of cases the percentage

increase which is to be allowed in relation to solicitors' fees is 100% where the claim concludes at trial or 12.5% where the claim concludes before a trial has commenced.

THE PROBLEM

6. The Rules appear to be clear. But problems have arisen in practice as illustrated by the case before His Honour Judge Stewart QC of *Sitapuria v Khan* (Liverpool County Court 10th December 2007) where in respect of a case being fixed for disposal, an Order was made by the Judge prior to the case being opened by Counsel for the Claimant which provided for damages to be assessed by consent in the sum of £25,000.00 and for the Defendant to pay the Claimant's costs to be the subject of summary assessment if not agreed before that Judge.
7. In that case, although in effect the case had settled on the morning of the hearing, the Judge ruled that because the trial had not commenced by which in any normal sense it meant that the case had been called on and had at least begun to be opened as a contested hearing then the trial had not commenced.
8. The Judge commented that if the trial had not commenced in the sense there is no contested hearing by reason of a settlement prior to the case being called on, then the appropriate percentage was 12.5%.
9. However a practice has grown up whereby issues of liability and quantum may well be resolved but a disposal hearing is left in the list in order to serve as an opportunity for a summary assessment of costs.
10. Before that hearing has commenced no order for costs has been made in the receiving party's favour who is normally the Claimant. Often a Defendant or paying party will wish to raise issues of principle as to whether there should be an order for costs in the Claimant's favour or if so whether

it should be a partial costs order by reason of for example issues of conduct or issues of premature issue or other matters which the Defendant wishes to be ventilated.

11. Such an approach may prove a costly option for Defendants who wish to take such arguments.
12. The case of *Thenga v Quinn* (2009) EWCA Civ 151 is a reported decision by a Lord Justice of Appeal, Lord Justice Wilson, on the construction to be given to the Rules. It is not binding being a decision given by a single Lord Justice at an ex parte hearing but is significant. In short the Court focused upon the issues of what the Rules could be taken to mean and said this at paragraph 18.

My view is that it is plain beyond serious argument that, in drafting rule 45.15(6)(b), the rule makers have not thrown the conventional notion of a "trial" to the wind; and that the "final contested hearing" relates to the substantive claim, albeit (probably and as the circuit judge appears to have concluded) including a hearing referable to a disputed claim for an award of costs in principle, ie, subject to quantification.

13. Thus by maintaining in the list a final hearing when an issue of principle as to costs remains live paying parties are opening themselves up to the argument that 100% should be recoverable at such a hearing.
14. Conversely if they agree to pay liability quantum and costs to be subject to detailed assessment if not agreed then all of the points of premature issue or conduct could be raised on assessment and any appropriate uplift would be 12.5% rather than 100% by arguing points of principle at the final disposal hearing.

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Useful Information...

New consultant joins forces to strengthen team going forward



Victoria Hopkins

IF you're reading this issue of **Costs Recovery News** from cover to cover, you will already have seen Debbie's editorial announcing my new role as a consultant at *Deborah Burke Costing Ltd*. If, on the other hand, you're skimming through in order to find expert guidance on the weighty costs issues of the day, I will detain you only for a few moments while I introduce myself.

By joining forces with *Deborah Burke Costing Ltd*, I will be entering a new phase of a career in costs that started fourteen years ago when I took a job as a trainee law costs draftsman at a national costs firm. At that time, pre-Woolf, I spent most of my time grappling with scales of costs and legal aid regulations. Documents were prepared on typewriters; I was considered quite the eccentric when I brought in a second-hand Mac and started producing bills myself (gasp) without a secretary.

Although I was enjoying my work as a costs draftsman, I soon became restless. I did not enjoy the politics and archaic procedures of a large company and I had a hankering to strike out on my own. In the autumn of 1997, I scrounged a corner of my husband's office and started my own business with nothing more than a desk, a chair and a computer. I was everything from CEO to mail clerk, and I loved it. I didn't get much in the way of holidays for the first couple of years, but I was doing interesting, challenging work that allowed me to move into my own premises and expand the business.

As the century turned, the world of costs went, for want of a better expression, a bit mad. The drastic changes brought about by the Civil Procedure Rules and, more particularly, the increasing use of conditional fee agreements meant that costs disputes became more bitterly fought than ever before.

Technical challenges to CFAs abounded, and I spent more and more of my time in court. The "costs war", as the technical challenges became known collectively, was undoubtedly detrimental in many respects, but it improved the quality of costs advocacy in general, and mine in particular.

Over the last few years, I have developed additional roles such as assessor for the Law Society's

Remuneration Certificate Department, tutor for the Association of Law Costs Draftsmen's training course and speaker at various conferences and seminars. I have also had the luxury of being able to specialise in areas of costs law that particularly interest me, for example solicitor/own client costs.

My status as a costs lawyer, with its associated right of audience and right to conduct litigation, has enabled me to take instructions directly from companies, rather than solely via solicitors, and also to carry out some pro bono work. I particularly enjoy my role as a costs advocate and appear regularly both in my local courts and the Supreme Court Costs Office.

Practising the law of legal remuneration is undoubtedly an odd sort of business. It can be at once esoteric, tedious and adversarial. Costs lawyers argue about money, but we must always remember that the money belongs to a real person. Even in a routine road traffic accident case, where the Defendant is backed by a huge insurance company, the money will come out of the pockets of real people through their premiums. I view my work as a small but important cog in the machine that administers justice in this country and I'm very much looking forward to putting my skills and experience to good use as a positive contribution to Debbie's excellent team.



Useful Information...

Indemnity costs can add woe to a losing party's bill

by Masood Ahmed

This article was first published in the Law Society Gazette on 7th May 2009 and is reproduced with kind permission.

THE recent High Court case of Noorani v Calver [2009] EWHC 592 (QB) has provided valuable guidance as to the factors a court will take into account when deciding whether to award costs to a party on an indemnity basis.

The court may assess costs on one of two bases: on the indemnity basis or on the standard basis. If costs are assessed on the indemnity basis, the court will give the benefit of any doubt as to whether the costs were reasonably incurred or whether the costs were reasonable in amount in favour of the receiving party. If costs are assessed on the standard basis, the court will give the benefit of any doubt as to whether the costs were reasonably incurred or were reasonable in amount in favour of the paying party. In practice, it is rare for costs to be assessed on the indemnity basis and they will only be awarded by the court if, as we shall see from Noorani v Calver, there are specific factors which justify them - in this case hinging around CPR 44.3 (see box).

The claimant commenced High Court libel and slander proceedings against the defendant. Both the claimant and the defendant were senior members of the West Wirral Conservation Association. The association was split into two opposing camps, with both the claimant and the defendant in each camp. The heart of the action revolved around a letter written by the defendant stating that, following a telephone conversation between the claimant and the defendant, the defendant

was subjected to a series of nuisance silent telephone calls and calls which included, amongst other issues, direct threats of violence. Although the letter did not mention the claimant by name, the claimant argued that the letter implied that he was responsible for the calls. From an early stage in the proceedings, the defendant was able to demonstrate that the calls had actually been made by an acquaintance of the claimant who had made a confession to the police that the claimant had told

him to make the calls to the defendant. As a result, the defendant's solicitors demanded that the claimant withdraw his claim and pay the defendant's costs to be assessed if not agreed. The claimant refused and persisted with his claim. Further offers were made to the claimant at various stages of the proceedings but these were not taken up and the matter continued to trial.

During the trial, the claimant was cross-examined in detail in respect of the calls. Following this cross-examination the trial judge, Justice Coulson, noted that the evidence the claimant gave was 'disastrous for his case'. Unsurprisingly, by the third day of the trial, the claimant requested that the proceedings be discontinued.

Although it was clear that the claimant would be responsible for the defendant's costs as a result of discontinuing his claim, the issue arose as to whether the costs should be assessed on the indemnity basis.

The court found in favour of the defendant and awarded costs on the indemnity basis. In reaching his decision, Coulson J made a number of important comments in respect of when indemnity costs should be allowed. Citing CPR 44.3, Coulson J held: 'If indemnity costs are sought, the court must decide whether there is something in the conduct of the action, or the circumstances of the case in question, which takes it out of the norm in a way which justifies an order for indemnity costs.'

Coulson J then considered two important elements of the dispute that he found to be relevant when awarding the defendant's costs on an indemnity basis.

The parties' pre-trial conduct: After considering the history of the proceedings and the defendant's various offers, Coulson J held that, despite being made aware of the strong evidence against his claim, the claimant's unreasonable behaviour in refusing to withdraw his claim and to pay the defendant's costs meant that the defendant had achieved the same result he would have achieved if the claimant had accepted his offer earlier on in the proceedings. Coulson J further observed that the only difference now was that the defendant had incurred considerable costs in having to defend the matter to trial and concluded: 'That is an important part of the story and the parties' conduct which, so it seems, to me, on its own, justify an order in the defendant's favour for indemnity costs.'

The nature of the claim: The nature of the claim was another factor which Coulson J took into account when awarding indemnity costs. He found that the claimant's claim was fundamentally flawed, especially in the light of the evidence which linked the claimant to the phone calls. Coulson J found that the libel action was being used by the claimant for ulterior purposes and that it was clear, following the evidence provided by the claimant during detailed cross-examination, that a jury would find that the claimant had indeed made the silent calls. It was this second reason that also justified costs being awarded on an indemnity basis.

Noorani demonstrates the strict approach the courts will take when deciding whether to award costs on an indemnity basis. The courts will, in particular, look closely at how the parties conducted themselves throughout the proceedings as well as the underlying arguments of each parties' case and, if the parties have behaved unreasonably and/or their claims or defences are fundamentally flawed, then the courts are likely to award costs on the indemnity basis. Clients who may simply want their day in court should be strongly advised as to the risks of not only losing the case and having to pay the other sides costs, but also of the risk that a court may award indemnity costs against them.

Masood Ahmed is a solicitor and a senior law lecturer at Birmingham City University

Costs and the Civil Procedure Rules

If parties to proceedings are unable to agree the amount of costs which are payable by one party to another then the parties may refer the matter to the court in order for the court to assess those costs. The court is provided with guidance under Civil Procedure Rule 44.3 (4) and (5) as to the issues which need to be taken into account when making an order for costs. CPR 44.3 (4) and (5) provides:

'In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including -

- (a) the conduct of all the parties;
- (b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and
- (c) any payment into court or admissible offer to settle made by a party

which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply.

(5) The conduct of the parties includes -

(a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed the Practice Direction (Pre-Action Conduct) or any relevant pre-action protocol;

(b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue;

(c) the manner in which a party has pursued or defended his case or a particular allegation or issue; and

(d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim.'



Useful Information...

QUITE understandably, there has been a flurry of commentary on Lord Justice Jackson's preliminary report which was released in May 2009:

www.judiciary.gov.uk/about_judiciary/cost-review/preliminary-report.htm

None of us can know, yet, what will appear in Lord Justice Jackson's final report and which, if any, of his recommendations will become part of the daily routine of work for civil litigators although the interim report has been described by at least one legal commentator as having something for everyone. Whilst it is pretty certain that there will be an extension to the fixed costs regime, how will life change in other areas for litigators in a post-Jackson world?

Below is an extract from the diary of my favourite (fictional) fee earner, Fiona Fee-Earner, for 1st July 2012.

JULY 2012		Friday 1st	
Time & Task	Fiona's Comments		
9am - 10am Post opening & considering new instructions received	The fact that one way costs shifting has been introduced in a number of areas has not made any real difference to the number of new instructions received in the last year or so.	2pm - 3pm Client meeting with Mr Jones	This will be a difficult meeting because he had a prior accident at work in 2008 and is struggling to understand just how different his position is now in relation to obtaining expert evidence from the position as it was when he had his first accident. The way in which the new rules have been phrased means that for all practical purposes, we will need to use a single joint expert. We cannot get that report pre-issue and that has an impact on assessing the risk of this CJA case going ahead successfully. More work is having to be done before we can obtain objective evidence to support the possible claim and because of this, our firm's policy is not to enter into a CJA at the earliest possible time. I need to tell Mr Jones that his private retainer will have to continue for a little while yet.
10am - 11am Mr Hughes - case management hearing	I remember reading Lord Justice Jackson's interim report during the summer of 2009 when the phrases "active case management" and "costs management" leapt out at me. Here I am almost three years later attending a court hearing where my client must be present and where the current state of play in relation to both sides' costs and the costs implications of anticipated future costs will be examined actively by the judge assigned to Mr Hughes' case. The "forensic" approach to costs is clearly here to stay for cases such as Mr Hughes', which escape the extended "predictable" regime.	3pm - 3.15pm Diary note - allocation and listing questionnaire costs estimates	With the ongoing consultation on a formal costs budgeting process well underway and draft amendments to the CPR/Practice Directions due imminently, none of us can afford to make any mistakes whatsoever in terms of calculating costs to date. Forecasting future costs is becoming an increasingly complex task where liaising with our costs draftsman is vital as is setting out clearly the assumptions we make when calculating those likely future costs.
11am - 1pm Training - valuing damages	The head of department has asked me to provide an in-house talk on the current state of play in relation to the use of standardised reporting formats and software developed in partnership with defendant organisations to value damages. This is an ongoing area of concern for all Claimant litigators, particularly as there is a strong move by the insurance companies to extend this system to higher value claims. Whilst cutting out medical reporting organisations seems to have been of benefit to claimants, defendants and their clients, the way in which damages are assessed has wide implications for claimant lawyers both in relation to their own clients and the civil litigation system as a whole.	3.15pm - 5pm County Court hearing - appeal against wasted costs order made in the case of White	I was on holiday, expert evidence was exchanged late and under the new provisions designed to deal with non-compliance with deadlines, a wasted costs order was made against the firm. Needless to say, my department head is less than impressed, but we now have a system in place to stop the situation arising again.

Lord Justice Jackson's final report is expected in December 2009. Whatever the recommendations, the future will remain uncertain, particularly in the light of a possible change of government and bearing in mind the fact that significant changes to the current system will need to be approved by Parliament.



Watch this Space

The Birmingham Costs Budgeting pilot....

...or to give it its official title, the "Pilot from 1st June 2009 of "costs management" of cases in the Birmingham Technology & Construction Court and Mercantile Court where parties voluntarily provide detailed estimates of future costs".

Pilot studies come and go but all civil litigators will do well to keep the progress of this newly started pilot in their sights. The information gathered during the pilot study is to be used by Lord Justice Jackson to assess the feasibility of direct costs management allied to case management in civil litigation as a way of ensuring that the costs of each party are proportionate to the amount at stake and ensuring that the parties are on an equal footing.

Of course, the Civil Procedure Rules already permit judges to control costs during the course of the litigation. However, it is probably accepted by most practitioners that this has not happened and that most arguments over costs take place after the case has concluded. In Lord Justice Jackson's interim report, he refers to the fact that "any normal project costing thousands (or indeed millions) of pounds would be run on a budget. Litigation should be no different." (paragraph 3.28 of Chapter 48 of Lord Justice Jackson's interim report (www.judiciary.gov.uk/about_judiciary_cost-review/preliminary-report.htm)). In his commentary on the Birmingham pilot study, Lord Justice Jackson highlights the potential deterrent to litigation which is presented to small/medium size enterprises which "crave certainty about the costs of litigation" and are deterred from pursuing valid claims or defences by the fear of an "indeterminate costs liability".

The guidelines issued by the Court in Birmingham indicate that detailed budgets submitted by both parties will be central to the costs budgeting process. Where the parties agree to take part in the pilot, the budgets will set out the anticipated cost of each anticipated step in the litigation. Disbursements and Counsel's fees will be included in the budget as will reasonable allowances for specified contingencies.

As part of the case management process, the presiding judge will be able to record approval or disapproval of a party's budget. The budgets will be updated as the litigation progresses and the progress of indicating approval or disapproval will continue.

There is a reporting requirement for a party which exceeds a previous estimate to inform both the other party/parties and the court of this fact. A party's reliance on an estimate provided by the other party will be recorded by the judge for the purposes of any future argument pursuant to Section 6.5A of the Costs Practice Direction.

The guidance for the pilot study suggests that in any subsequent detailed assessment, costs which fall within the previously approved total will generally be approved.

When practitioners attended a preliminary meeting prior to the introduction of the pilot study, no-one voted against its introduction. Court users are being encouraged to provide regular, confidential, feedback to Lord Justice Jackson as the pilot study progresses.

As costs draftsmen, the team at *Deborah Burke Costing Limited* has long been a

supporter of the introduction of a costs budgeting process. On first reading, the Birmingham pilot study seems to be a well constructed attempt to gather more information about the feasibility of costs budgeting as a litigation tool. The devil is always in the detail, however, and even at this early stage, so many points have been thrown up:-

- The guidance indicates that there should be no costs on either side in the preparation of detailed budgets because the budgets will be no more detailed than the solicitors are required to provide in order to comply with the Solicitors' Code of Conduct 2007. Our experience is that very few solicitors, at the present time, include a detailed budget when advising clients about likely cost.
- It seems slightly strange that the courts will be required to record when a party is relying on a costs estimate. Surely, the presumption should be that a party does rely on a costs estimate.
- Likewise, the statement that at any subsequent detailed assessment previously approved costs will "generally" be allowed does not seem to give the certainty which it is said that parties to litigation crave.
- Will there be circumstances when a party is unwilling to provide costs information about future steps, because a future step is intended but the party intending to take that step does not want to provide any advance notice to the opposition of a proposed application? What happens then?
- Will the pilot study be, to some extent, self selecting because participation is voluntary? Will that diminish the validity of information obtained?

As soon as we hear more about the pilot, we will include further information in future editions of **Costs Recovery News**. Until then, watch this space

www.dbcosting.co.uk

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