JIM DIAMOND

COSTS LAWYER & COMMISSIONER FOR OATHS

LEGAL BUDGETS & COSTS MANAGEMENT

21 ELLIS STREET

CHELSEA

LONDON SW1X 9AL

LEGAL COSTS UPDATE –November 2012

(1) Introduction

This article looks at the legal costs systems on the main land and in Jersey & Guernsey. With specific emphasis on client billing, client costs information, costs management and funding options in the future.

(2) Big Bang -April 2013

Lord Justice Jackson, produced a report in 2010, entitled 'Review of Civil Litigation Costs'. The report ran to some 600 pages. The reforms are due to come into force in Spring 2013. They have been described as the legal costs "BIG BANG"!

A cornerstone of the report is the introduction of cost management within the litigation process. Cost management will substantially change the landscape of legal costs. Clients will be far better informed at the first stage of instructing lawyers and all the way through a case to assesse the risks of taking the litigation route. The court by managing costs will directly and indirectly do away with the time consuming and expensive process of taxation of costs. Before the lawyers in the land and offshore rejoice then they should be aware of the pitfalls of costs budgeting. On Jackson LJ's first presentation of his draft rules at The Commercial Litigation Association's annual conference in June 2009, only a handful of the delegates, had ever drafted a budget. Jackson LJ understanding this issue started a training process for the judiciary the legal profession on the mainland has by and large ignored this.

The libel costs management pilot scheme (Practice Direction 51D) was introduced in October 2010. A year later a similar scheme was introduced in the Technology and Construction and Mercantile Courts.

The procedure provides that all parties in the action are required to produce a detailed budget of work completed, and work anticipated, up to and including the trial. The costs budget must comply with precedent form HB.

This is a comprehensive document that runs to nine pages in length. This is not an easy document to complete, especially to the untrained eye. The respective parties then exchange budgets prior to the CMC and submit comments on each others budgets. This information is submitted to the judge/master who will approve or deny the budgets.

At the invitation of Jackson LJ, the Centre of Construction Law at King's College London was asked to monitor the progress of the pilot scheme. The interim report was published on 3 February 2012. In brief, the judges found the process beneficial; the legal profession found it a negative step.

One lawyer questioned by the monitoring team stated that he "always under budgets, never over-budgets". Herein lies the crux of the problem.

All the parties' clients will be given access to all the budgets. They can assess their own lawyer's costs and global potential costs to assess the "risk in relation to the rewards".

The concept of "risk in relation to rewards" is not new. It was established in the Solicitors Costs Code in 1999.

Likewise costs management is not new as Lord Justice Woolf introduced costs capping provisions within the ***CPR (CPR 44.19***) again in the late 90's. Although in practice very few cases over the last decade followed this route. ***Alder Hey group action – APIL Vol 13 Issue 3 June 2003***

The defendant in the so called Alder Hey organ retention group action applied to cap the claimants' costs in the High Court last month. The Claimant firm Alexander Harris stated they would require a further £1million to take the case to trial. In his order dated 9 May 2003, His Honour Justice Cage ordered that there should be a costs cap on the claimants' costs from 10 February 2003 to the end of the trial in the sum of £506,500. The Judge indicated that he made this order on the basis of a four-week trial. The parties were given the option to apply to vary the order in the event of some future unforeseen and exceptional factor which affects costs. The Judge further stated that "*the Civil Procedure Rules makes no reference to a specific power to make a costs cap order. However it is clear from the Woolf report that the Court,*

particularly in multi-party actions, is encouraged to take control of costs just as it is to control the management of issues".

(3) Libel Costs Management Pilot Scheme

This Libel Costs Management pilot scheme has been running for all libel cases issued after 1st October 2010. Although little information has come out in this regard save the management of the phone hacking cases. The matter of ***Sylvia Henry and News Group Newspapers Ltd (16 May 2012) -[2012] EWHC 90218*** has certainly caused shock waves in the legal marketplace. The Claimant costs exceeded the budget set in the CMC by approximately £300,000. The analysis of the judgment shows for example the Claimant estimated work to be carried out under heading **"witness statements"** at £12,487. The actual costs claimed under this heading was in fact £228,891. A gigantic 1725% increase in the estimated to actual costs claimed. As this item purely relates to time spend with witnesses then something has gone significantly wrong in the budgeting process. If a case has the potential of 5 witnesses and this is included in the budget. At the CMC the budget is allowed. Then if the a lawyer believes 50 witness statements should be taken. Then, an application to the court to amend the budget figure should be made, prior to the work being undertaken.

This judgement has huge implications to Jackson LJ's proposals on costs management even before they have been introduced. The case is going to appeal with hearing due to take place some time in February 2013.

(4) The Legal Ombudsman

The Legal Ombudsman ("LO") was created in 2009, with substantial resources to its name (The Law Society Gazette 19.7.2011 stated the LO had operating costs of £8.3m in the first 6months of being set up).

The Legal Ombudsman, Adam Sampson, produced a report in early 2012 entitled **"Costs and customer service in a changing legal service market".**

Pre the publication of the report and in Mr Sampson's first interview published in the Law Society Gazette (2.9.10) he described as a "***scandal the profession's past inability to get its own house in order***."

Mr Sampson further stated in his report:

"Since we opened, costs have been the single most common reason for people contacting us with an issue about the lawyer. Cost issues represent 20 to 25% of the (ie 80,000-90,000 complaints per year) problems people come to us with".

These include whether a consumer felt they had somehow been over charged or at being confused or surprised by their lawyers costs. Our experience tells us that issues around the costs and pricing of legal services or a key driver for complaints in the legal services. But more importantly, the majority of cost complaints we see could, and should, have been avoided.

The provision of poor cost information and estimates is prevalent across our investigations. Lawyers say to us that it is the consumer who may not always be asking the right questions about costs, but it does not seem right for ethical to continue with behaviours that generate complaints……But cost complaints do tend to have one thing in common. Each could have easily been avoided if the lawyers had been more open and transparent about the cost of their services.

(5) <u>The Postion in Jersey</u>

The Jersey Law Society's Code of Conduct paragraph 5 sets out the requirements of advocates in Jersey regarding costs information to be given to clients:

5. Terms of Engagement

(1) Upon acceptance of instructions from a new client or a client who has not previously received terms of engagement or who has not instructed the firm for over five years, a member shall advise the client in writing of the terms of engagement, including reference to the following matters:

(a) the relationship of the lawyer to the client including the required basis of confidentiality, and utmost good faith between lawyer and client, and the duty of the lawyer to exercise reasonable skill and care;

(b) names and contact details of the member with overall responsibility for that client and of any other member and assistants dealing with that matter;

(c) if appropriate, the terms of reference for the work instructed;

(d) the basis on which fees and expenses are to be charged by reference either to scale or set fees, or to hourly rates and circumstances which may affect the level of fees such as:-

(i) the complexity and novelty of the matter;

(ii) the specialised legal knowledge required;

(iii) the monetary amount or other the value of the matter;

(iv) the number and length of documents;

(v) the urgency of the matter and the place and time of day when the work is to be carried out;

(vi) the importance of the matter to the client;

(vii) the time to be expended;

(e) the terms of any limitation of the member's or the member's firm's liability;

(f) the terms of payment and the time for payment, the rate of interest (if any) chargeable on late payment, the delivery of interim bills and the right of the client at any time to enquire and be informed of the fees incurred to date;

(g) liability for costs in contentious matters including a clear statement as to the principles of recovery of costs awarded against an opposite party and a clear statement as to any likely difference between the level of costs recoverable on an award of costs against such a party and the level of costs which the member will charge to the client;

(h) the terms upon which funds are held on behalf of the client, and their utilisation;

(i) the right of the client to receive progress reports on request;

(j) details of the internal complaints procedures established by the member's firm, including the name of the person to whom such complaints should be addressed, of the dispute provisions described in Rule 12 and of the existence of the professional disciplinary procedures;

(k) the circumstances in which the member's firm will have the right to vary the terms from time to time;

(l) the termination of the retainer, to include relevant details of the procedures utilised on file closure, and confirmation that notification of where documents will be held and of the date upon which the file will be destroyed will be given..

(3) A member should aim for complete understanding by the client from the outset as to the basis of the relationship.

(4) A member shall advise an existing client for whom a new matter is undertaken of any resultant change in the above information and shall provide the appropriate details. A member may agree with an existing client that it is not necessary to provide terms of engagement in respect of every new instruction, provided that such agreement is evidenced in writing.

Item 5 (d) which is copied verbatim from the **RSC Or 62** the concept of the "seven pillars" was introduced in April 1986. The concept was to get move into a discretionary costs system in which reasonable costs are recovered for a successful party. A factor "A" figure was introduced which covered the expense rate of actually doing the work with an additional figure added to it the Factor "B" ie the profit element. The A & B factor was abolished when the CPR was introduced in 1999. Replaced by guidline hourly rates for various levels of fee earners in geographical areas. The concept of a law firm arguing the hourly rate should be increased above the retainer rates because of the "seven pillars" is zero! Therefore this concept should be abolished in Jersey.

There is little evidence to show the legal market in Jersey provides clients with detailed budgets and even less information that clients are given any information on the "risk against reward".

This should become a compulsory exercise in the Jersey marketplace.

Compare the legalistic jargon in the Jersey costs code to the new user friendly **Solicitors Regulation Costs Code published 1st October 2012**.

Fee arrangements with your client

IB(1.13)

discussing whether the potential outcomes of the client's matter are likely to justify the expense or risk involved, including any risk of having to pay someone else's legal fees;

IB(1.14)

clearly explaining your fees and if and when they are likely to change;

IB(1.15)

warning about any other payments for which the client may be responsible;

IB(1.16)

discussing how the client will pay, including whether public funding may be available, whether the client has insurance that might cover the fees, and whether the fees may be paid by someone else such as a trade union;

IB(1.17)

where you are acting for a client under a fee arrangement governed by statute, such as a conditional fee agreement, giving the client all relevant information relating to that arrangement;

IB(1.18)

where you are acting for a publicly funded client, explaining how their publicly funded status affects the costs;

IB(1.19)

providing the information in a clear and accessible form which is appropriate to the needs and circumstances of the client;

However difficult budgeting is it produce it is essential in the Jersey market that budgets are given accurately.

The LVCR case is a classic example of an inaccurate budget. In December 2011 an estimate of £360,000 "on a worst-case scenario" was quoted in the local press by a Jersey minister. The figures given to him my the Law Officers Department. This case was of substantial importance to both the islands of Jersey and Guernsey. From a legal budget prospective the case was going to be a fully contested Judicial Review involving 3 governments. The £360,000 "worst case scenario" figure was always going to be substantially under the potential costs of the action. The overall costs by July 2012 were closer to £1million. If the matter had run its full course of appeals the "worst case scenario" figure could have been in the £3-£5million bracket.

The "Big Bang" reform sees ATE insurance premium's becoming a non-recoverable item.

In the case of **Riley v Pickersgill [2002] JLR 196** the mater's judgement stated a premium for ATE insurance was held to be irrecoverable in costs from the other side. Clearly the Master in Jersey was ahead of his time!

The bailiff in the case of *Alhamrani v Rusa Management* [2006] referred to the Jersey Financial Services Committee's Codes of Practice for Trust Company Business (2001, paragraph 2.1). He said:

"It is not generally in the best interests of the beneficiaries that a trustee should fall out with his legal advisers. Yet he does have a duty to be robust in contesting

any charge made by his lawyers that he considers to be excessive or relate to work that was unauthorised or unnecessary…. The court would not hesitate to use powers under article 53 of Trust (Jersey) Law 1984 to make an appropriate order against such legal adviser personally. I wish to underline the obligations upon trustees and the legal advisers to protect the interests of the beneficiaries".

Trustees are therefore under a professional obligation to request a detailed costs budget, as well as a risk against reward analysis. A more prudent Trustee should also consider obtaining budgets from more than one law firm. The Trustee may also find it best practice in specifically large cases to seek independent expert advice on the budget figures given.

In the case of case **of Viberts –v-Powel JRC 021** the, then Bailiff Sir Philip Bailhache stated:

It does seem to us to be good practice to report on the level of fees incurred to a client, whether legally aided or not, periodically, whether that period is measured in time or in fee increments. Few clients can now afford an open cheque book approach where the lawyers do whatever work they think to be necessary and then render an account for the time involved multiplied by an hourly rate which is not insubstantial. Indeed, the whole approach to the provision of legal services seems to be ripe for review. It must surely be time for the profession to reconsider its business model and to adopt what Professor Richard Susskind, in his illuminating book The end of lawyers? Re-thinking the nature of legal services (OUP, 2008) called the commoditisation or packaging of legal services for a fixed fee.

Professor Susskind book is a must read for those running legal practices in 2012. To give a flavour below are 3 quotes from his book which should have managing partners attention:

The traditional way of delivering legal service, crafting the solution from scratch starting with a blank sheet of paper, is a luxury that no one will be able to afford,"

"A lot of legal work is routine and repetitive; we can do it in different ways, it can be outsourced, off-shored, done by computers, standardized."

" Legal services will follow an evolutionary trajectory from "bespoke" services to commoditized services."

(6) <u>The Postion in Guernsey</u>

There is limited information in regard to client costs, except for the The Guernsey Bar code of conduct Rule 30-43. This seems to be a common sense approach to costs information to a client. Interesting Rule 35 states:

In all matters an Advocate should consider with clients whether the likely outcome will justify the expense or risk involved.

In 2010 a commercial law firm in Guernsey instructed an independent consultant to do a survey of various of their clients to ascertain their views on legal costs. The conclusion was every client was satisfied with the work and the personal ever one wanted far better costs budget information and budget updates.

Guernsey does not have a full time costs officer but Peter Haworth who is regarded as one of the one of the top Costs Judges at the SCCO has for a decade sat as the Lieutenant Bailiff in Guernsey on costs dispute when needed.

Master Haworth – who was one of three SCCO masters to oppose the Jackson reforms– *added that the costs parts of the CPR are to be shaken up, with parts 43 and 44 merged, as well as parts 45 and 46. The costs practice direction – the longest of any practice direction in the CPR – will be cut up, with a practice direction following each of the four parts relating to costs.*

On the Henry v Newsgroup Newspapers case, Master Haworth noted that costs management is the "buzzword" of the reforms: "I can't imagine that the Court of Appeal is going to row back from costs management and costs budgeting," he said.

(7) Third Party funding

The third-party funders believe funding beneficiaries involved in trust disputes will be a substantial marketplace in the future specifically offshore.

A survey compiled by city law firm Wedlake Bell and published in the *Law Society Gazette* (4 February 2011) stated: "Legal disputes over trusts had soared by 238 per cent during the recession. Beneficiaries who have seen the income generated by their trusts or the value of assets held in trusts slump during the recession have increasingly looked to recoup their losses by bringing claims against trustees alleging their assets have been mismanaged."

The issue over the legality and enforceability of ligation funders offshore was tested in October 2011, in the Royal Court of Jersey in the Valetta Trust case. The Court held, following a Beddoe application where the Court was required to consider the issue of champerty under the law of Jersey, that it was satisfied that the public policy considerations pointed strongly in favour of upholding the validity of the funding agreement between the plaintiffs and the Funder.

The Royal Court of Jersey further endorsed the legitimate role of litigation funding in the ***Barclays Wealth Trustees (Jersey) Limited v Equity Trust (Jersey) Limited and Equity Trust Services Limited***, Equity Trust was the former trustee and manager of real property unit trusts that ran into financial difficulty in 2007. The case, which is being brought by the successor trustee and manager, Barclays Wealth, involves serious allegations of breach of trust and breach of fiduciary duty. The Law Society Gazette 4th September 2012.

(8) Costs budgets

The message is clear. Costs budgeting has arrived both in terms of the client's needs and the court's management of costs in litigation. Apart from the two pilot schemes mentioned, the Queens Bench Division has of its own making in 2012 requested parties to produce budgets for Case Management Conferences . The QBD has stated they do not require the budget to be produced on the HB budget precedent form, a more simplistic budget will be acceptable. Even if the QBD does not have time to consider the budgets on the CMC, the indirect advantage is that respective clients have detailed analysis of their own and the opposition's costs.

The Litigation funders also require a budget of the potential costs of the third party lawyers. To assess "risk against reward" and if appropriate for obtaining an AEI insurance policy.

(9) Overriding objective:

The legal industry is undergoing the biggest change in a generation, Costs management, costs budgeting will be the wedge to bring in a variety or alternative billing systems/funding methods.

Law firms will need to adapt, become far more costs aware and lawyers trained in the art of costs management.

It is clear the costs codes used in Jersey & Guernsey's require updating. The costs codes are a "miss-mash" of various rules and costs codes used in England over the last 25 years. They are far to legalese. A simplistic version with the emphasis on the overall financial implications of using

law firms would benefit both the profession and the clients. The client because they have a certainty/risk assessment. The law firms as cash flow would improve and costs disputes would be substantially reduced.

The courts in both Jersey & Guernsey should also consider following the Jackson LJ's proposals to introduce costs management within the litigation process. This will streamline the process and almost certainly do away with the taxation of costs process. Jackson LJ has recognised in England that the judges will need specific training, but in long run this new procdure will lead to a far better streamlined and costs effective judicial process.

Perhaps the last word on the subject should be left with His Honour Judge Simon Brown QC who is running the pilot scheme in Birmingham in an article in ***New Law Journal 5th April 2012.***

"Costs management does require a cultural shift in attitudes to litigation and budgetary training by civil litigators, if firms are to survive and thrive as they have done in the mercantile courts. The days of putting in a bill at the end of a case based on a multiple of billable hours x £x per hour and expecting to be paid are over. Nobody in this country using the ordinary civil courts can afford it" .