New Bill of Costs Format Consultation Response from Thompsons Solicitors

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Jackson's recommendations

Lord Justice Jackson recommended that a bill of costs should be:

(i) a transparent explanation about what work was done in the various time periods and why.
(ii) a user-friendly synopsis of the work done, how long it took and why.
(iii) inexpensive to prepare.

To achieve these aims the proposed solution was technology - a compatibility between time recording systems and a revised bill format. The idea that, at any given point in a case, a bill of costs could be generated automatically and transmitted electronically is attractive. The practical reality however is that for it to work with any level of success:

- A reliable electronic bill produced using J-codes directly from a case management system will be dependent on faultless data and high levels of quality control;
- New systems and procedures must be in place to ensure accurate time recording and the correct application of codes;
- New systems and new software takes time to bring in and get right;
- A bill which can easily be transmitted in electronic form will require all parties involved, including the courts, to have compatible IT software and know how; and
- There will be (potentially significant) costs for solicitors, draftsmen and the courts.

If the ideal is not to become a missed opportunity that disintegrates under a welter of missed deadlines and half implemented and/or poorly tested systems, there needs to be a lengthy pilot.

Where we are now

The Hutton Committee was formed back in 2012, sometime before anyone could have predicted how costs budgeting would work in practice. In practice the anticipated problems and requirements of 2012 are no longer relevant.

Since the implementation of the Costs Case Management procedure in 2013, Thompsons has produced over 2,000 costs budgets for costs management hearings in courts across the UK and we are better informed and versed in the Judiciary's approach and the costs implications between the parties.

Judicial practice varies. A number of courts direct as standard practice that a bundle of supporting documentation be filed which includes a full breakdown of incurred costs in phases, replicating the detail provided in the format of the 'current formal bill', seemingly because the costs budget form lacks detail and can be difficult to follow. Others have not.

We welcome the clarity provided by Senior Costs Judge Master Gordon Saker in BP v Cardiff & Vale University Local Health Board [2015] EWHC B13 (Costs) 17th August 2015, on what is required to reconcile the costs budget with the formal bill for the assessment proceedings.

The recommendations in the BP case are being carried out at no real extra cost. From 1st October 2015 parties in budgeted cases will be required to include a breakdown of work by phase with the bills. It is evident that the courts consider the current working formal bill to be very much a relevant document.

J-codes

The advantages of using coding to monitor costs budgets and forecast costs has become clear to us since the introduction of costs budgets from April 2013, however any formal system would require accurately, fully recorded and coded time.

J-codes allow for a subjective assessment in their application and we anticipate, without trialling and appropriate adjustment, that there will be arguments on correct application and the meaning of codes. There is also a risk of arguments around tactical coding.

There may also be issues over the correct categorisation of work. We appreciate that the fee earner selects from the list the appropriate codes which best categorises the work they are doing but we have found, with the preparation of costs budgets, that many items can span various phases let alone categories of work. For example, a conference with counsel or meeting with a client to discuss the expert evidence, the schedule of loss, witness statements and forthcoming trial requires judgement at both time recording stage and costing stage.

The expense of implementing time records into a time recording system (including IT infrastructure and development as well as on training for fee earners) will be significant for small to medium sized firms. Most firms are not the large commercial city firms that too often (and again here) are used as models and dominate the committees that suggest new procedures. It will be an expensive exercise given they are not intended to be mandatory.

Between the parties costs

Between the parties costs in personal injury litigation is notoriously aggressive, adversarial and hostile. In some instances the importance of the point being run far outweighs the costs at stake. However the LEDES system and incorporated UTBMS codes were designed with e-billing in mind.

Ours is not the world of the large corporate and commercial firms who, to the best of our knowledge, work exclusively on a solicitor own client basis with lawyers e-billing their clients direct for often significant sums where the costs are negotiated in global terms with percentage calculated reductions.

In personal injury many Detailed Assessments are resolved over proportionality and conduct issues. The items in the bill are often secondary and yet despite its introduction in 2013, we are still without guidance or a test case on proportionality. It is an incorrect application of CPR 44.4(3) to assess proportionality by comparing costs claimed with damages recovered. A transparent explanation is required, particularly on issues regarding proportionality and conduct and there should be provision for a receiving party to include conduct issues or matters relevant to the issue of proportionality within the bill.

The electronic bill

Having an efficient environmentally friendly costs assessment process is a laudable aim and one we support. But again, there are practical realities that the proposals gloss over and there are assumptions made which, if allowed to go unchallenged, will lead to problems later:

The new format bill can't be printed easily and whilst we assume this is because it is prepared with a view to being dealt with 'on screen' the format is complicated to follow on screen, with 18 tabs and little detail save for lists of coded phases, tasks and activities. It appears automated, generic and inflexible to the varying requirements of most costs actions.

By contrast, the current working bill format is a detailed document which presents the costs incurred in a chronological order, which we favour, providing a transparent explanation about what work was done in the various time periods and why. It works well, is user friendly and rarely requires further supporting documentation in order to fully consider a costs claim at assessment. It helpfully shows why and when work was done, say in response to the defendant's objections to an expert's opinion or preparing to reply to Part 18 questions.

- We suspect most firms nationally are a long way from the ideal of a paperless office.
- The electronic and automated service of a bill would presumably be without disbursement vouchers. The alternative is for the inclusion of large amounts of scanned disbursements which would be cumbersome and would no doubt require printing off in any event for reconciliation and full consideration.
- How would bills be signed to confirm the Indemnity Principle?
- The fact that the narrative in the new bill format would be the only place where the receiving party can emphasise points in relation to conduct and proportionality would lead to them becoming longer and more detailed.

Given that the new bill format will apply mainly to more complex Multi-Track cases and it is unlikely that Fast Track guideline hourly rates will automatically apply, Thompsons would recommend that there is a new section summarising the hourly rates, details of qualifications and reasons for claiming the hourly rates. This would allow for there to be an indication of complexity, specialised knowledge, skill and effort required.

The spreadsheet

Thompsons has encountered just one District Judge who uses a detailed spreadsheet to make adjustments to costs budgets.

Spreadsheets require knowhow to operate. In our experience it is a little more than the 'intermediate level of knowledge of spreadsheets' suggested in the paper if, especially when there is large amounts of data involved, we are to avoid the risk of errors and complications with formatting and formulas.

Would there be spreadsheet training for the Judiciary? Bearing in mind that the majority of county court bills are now assessed provisionally, the Judiciary will need to be fully equipped.

There is currently the availability from costs drafting software companies of comprehensive systems where data is inputted and is exported into the required formats at the touch of a button with the added benefit of an IT support team (a benefit we doubt would be provided for the world of legal costs by Microsoft). We believe that the new format should remain optional where there is good reason given. The alternative, for those who cannot afford or have not yet been able to invest in the necessary software to produce new format bills, is that the bills will take an enormous amount of time to produce.

We are not clear what ALT Task and ALT Phases Sort Sequences are.

The automated bill format seems to cater for the straightforward but not the cases where the bill drafting fees reflect on the complexities of the costs issues.

An automated and coded system won't be able to differentiate and exclude costs incurred in, say, pursuing a third defendant in a disease case or clinical negligence matter against whom proceedings were discontinued (which is not unusual and leads to costs orders which impact on recovery). Nor would it be able to exclude all costs relating to quantum should an order for costs be awarded for liability costs only.

The proposed system could not deal appropriately with an issue based costs order. This is worrying and the proposed bill format needs further thought in this regard. How would it deal with work that needed to be apportioned or where moiety should apply? It would not be able to deal at all with multi part bills with multiple defendants all with differing costs liabilities.

And yet, in our extensive experience, these circumstances occur regularly and would involve the adoption of the standard costs drafting practice to resolve. It would be costly and time consuming to work backwards to carry out detailed analysis of all work claimed to remove appropriate items.

Master Gordon-Saker in the recent BP case appears to anticipate exactly this conundrum when he says: "The approach to proportionality in respect of work done on or after 1 April 2013 is different to that in respect of work done before that date. In any case in which both approaches need to be taken, it will be necessary to identify the work which falls before and after that date and to identify the sums claimed for the work done before and after that date."

"In my judgment, where the case commenced on or after 1 April 2013, the bill covers costs for work done both before and after that date and the costs are to be assessed on the standard basis. It must be both convenient and necessary for the bill to be divided into parts so as to distinguish between costs claimed for work done before 1 April 2013 and costs claimed for work done on or after 1 April 2013."

Master Gordon-Saker's suggestion requires the involvement of a Costs Lawyer to carry out the division in the work. The new bill format could not comply with his requirement without that involvement.

Master Gordon-Saker goes on to say (in a case in which a budget has been approved or agreed and the costs are to be assessed on the standard basis): "Within each part, it will also be necessary to distinguish between the costs incurred before and after the budget was agreed or approved. This could be done without further sub-division by use of italics, bold, superscript or some other formatting device". The new format bill could not comply with this automatically and would require some form of detailed bill preparation time.

The bills should additionally incorporate (without needing any changes to CPR):

- One form for Notice of Commencement, Request for Default Costs Certificate, Request for Hearing and Request for Final Costs Certificate;
- Details of funding;
- Statement of Reasons for the Success Fee (where not fixed);
- Whether a written or oral assessment is required and reason;
- Details of any costs orders made within the proceedings.

Defendant orientated?

Reflecting, we would suggest the makeup of the group that has put forward these proposals on the new bill format, rather than ensuring (as it should) that both parties in litigation are on an equal footing, opens up the prospect of significant benefits for the paying party who raises more arguments. For paying parties, the format enables targeted challenges to be raised at the task level, challenging 'blocks of time' which the court, if it does not consider the detail and reasoning for all steps taken and costs claimed, may find persuasive.

A number of J-code descriptions are for work that paying parties routinely object to, as 'non-recoverable' and the use of such descriptions will inevitably only fuel further arguments. Examples include: Case Plans, JA 00 Funding, A103 Draft/Revise, A104 Review/Analyse, A110 Manage Data/Files/Documentation. Without being able to show the value or reasoning for costs being incurred, receiving parties may stand to lose recoverable time simply because of how it has been coded.

We are concerned as to the thinking behind "undated and untraceable items, already difficult to recover and the source of potential duplication of chargeable time, will disappear from bills of costs."

Increase in costs and court time?

The new format bill does not provide specific detail as to why each piece of work was done and why. Nor does it show the course of events chronologically. This is often information requested between the parties and at Budget Hearings by the Judiciary. The end result could be more cases coming before the court for provisional and detailed assessment.

Thompsons would certainly expect that paying parties will file more detailed and lengthy points of dispute requesting information as to why the level of costs claimed were incurred. Not uncommonly, we receive objections on a bill stretching to 50 pages or more and where more information would be required, these documents would become even longer. In turn our replies would need to be more detailed and would potentially require a chronological breakdown of costs incurred and why in any event. Receiving parties will be faced with having to do more to justify entirely necessary and proportionate steps taken in order to achieve a successful outcome in the litigation.

We are interested in how the Committee consider a detailed assessment would be carried out in light of the new bill format. How would a Judge go through and assess the reasonableness of a bill without the necessary detail as to why steps were taken? A detailed assessment is likely to take far longer and ultimately cost more given the extra layer of detail and information that would be needed in order to decide on the issues.

Bill preparation and the role of the Costs Lawyer

Reducing the costs of typing out entries of work done into a schedule of documents omits to recognise the skill that the Costs Lawyer brings to bill presentation - the ability to have the work in a format that the court finds useful, to exclude, divide, apportion and to clarify.

Thompsons' experience of preparing costs budgets to date has been that they take longer to prepare than bills because of the requirement to break down work into phases retrospectively. Whilst the Committee 'encourages' solicitors to implement J-codes as soon as possible and recognises the task of applying the codes in retrospect will be an arduous one, hence they will not be mandatory, work will still need to be coded into phase, task and activity and this will be a largely manual task.

It is unlikely that any case management or time recording software will be capable of applying the J-codes to historic work that has not been coded. This will be left to Costs Lawyers. Bills will take longer to prepare as all time will not only have to be coded by phase but also by task and activity.

We disagree with paragraph 6.4: "This compatible recording, budgeting and billing structure enables the automatic production of "reports" suitable for budgeting, billing, negotiation, assessment or any other purpose." Whilst we see the potential of J-codes to reduce the time and expense involved in preparing a bill of costs, any suggestion that by using J-codes solicitors will now be able to produce a bill of costs for assessment at the touch of a button is short sighted and unrealistic.

We anticipate even the Partner time for checking and signing off a bill would increase. Any bill will still need to be checked for accuracy. A Costs Lawyer's role in this regard will remain. The need to consider the file of papers and cross reference with the work done will remain. The checking of the automated system to ensure there are no errors will be important to uphold the Indemnity Principle.

A fee earner is rightly preoccupied by the main action litigation. Reliance couldn't be placed on them correctly coding and phasing activities in an urgent multi party application and this will be further complicated if different fee earners are recording differently. A Costs Lawyer would usually reconcile this.

There will be a point when some cases will be part J-coded and that will require the time consuming task of 'back costing' in J-codes, phase, task and activity something which aside from being clumsy and taking far too long will increase the cost of the process.

Thompsons fears that the Committee may well be right when it says: "paying parties are likely to object to paying the additional cost of an inefficient retrospective process and courts are unlikely to allow such costs on assessment" but their failure to then offer a solution or to give an alternative or even to explain what is 'inefficient' but rather simply to blithely propose early adoption of J-Codes is at best unrealistic and at worst arrogant.

The Committee's assertion that Costs Lawyers, for both paying and receiving parties, will specialise in ways of manipulating data that is imported from electronic time records in order to best present their case is something with which we would agree. But the failure again – having identified a problem – to suggest a solution, even one to be piloted is unhelpful. Thompsons anticipates a process that is, to nobody's benefit, likely to become an entirely novel and artful exercise.

Bland assertion follows bland assertion when the Committee comments: "Plotting costs information into relevant categories is a core skill for Costs Lawyers who already have the expertise to construct a bill in whatever format is required. However, where fee earners and counsel have used J-Codes to time record, the process of constructing a BoC will be substantially quicker and cheaper." This assumes that plotting costs information into categories is a core skill easily acquired when in fact it takes Costs Lawyers a number of years to do so and we would go so far as to suggest that from our experience most fee earners and barristers who are not familiar with preparing bills of costs will struggle to perfect the art of recording time in bill format.

Conclusion

- The Committee has assumed a level of knowledge and IT sophistication that is in reality lacking outside large commercial law firms.
- The Committee has sought to apply a model that may be suitable for commercial law firms but is inappropriate for those involved in personal injury (and indeed to our knowledge other work areas too).
- The Committee, having raised potential problems with the proposed system, has then failed to properly address them or provide practical solutions.
- A pilot of appropriate duration is essential.
- Any pilot should be based on cases where instructions had been received from the client post 1st April 2016 or to bills with a value in excess of £100,000.
- Some firms will understandably want to wait for the outcome of the pilot before investing heavily in new technology and training and recognising that, there should be adequate lead in times for implementation at the end of the pilot.
- The new bill format must be a fully flexible and workable document which is better than the current method.
- Extensive training for all parties and the Judiciary would be required in good time before any implementation.
- To avoid costly and time consuming rectifications and modifications and potentially endless guerrilla litigation there should be a proper process to ensure that all issues and concerns with the new bill format have been given detailed consideration with a view to resolution and reconciliation.

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