Surveying the costs of Compulsory Purchase

31 January 2018
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Michelle is a Partner in the National Planning Consenting and Infrastructure Team with a particular expertise in advising on major planning, infrastructure and regeneration schemes, involving site assembly.

Michelle has also advised on some of the most significant reported cases in the field of CPO compensation and her recent reported compulsory purchase compensation cases include:

- **Thomas Newall v Lancaster City Council** - both in the Tribunal and in the Court of Appeal (key issues - development value, planning position, loss of rent, management time and other disturbance heads of claim).

- **JS Bloor (Wilmslow) Limited v Homes and Communities Agency** - in the Tribunal, the Court of Appeal and the Supreme Court (key issue – approach to planning assumptions and scope of valuation disregards).

- **Harringay Meat Traders v Greater London Authority** – in respect of a s18 Land Compensation Act 1961 appeal, a High Court challenge and a limitation determination in the Upper Tribunal (key issue - planning position, limitation).

- **Rooff Group v Greater London Authority** – in respect of a s18 Land Compensation Act 1961 appeal and a legal challenges in the High Court and the Court of Appeal (key issue – planning position, rule 2 value).

- **Overseas Plastics Group Limited v Greater London Authority** – in respect of a limitation determination in the Upper Tribunal.

- **William Hill v Transport for London** – in respect of a preliminary issue in the Upper Tribunal concerning the correct party to a reference and limitation.

Michelle’s current caseload on compulsory purchase compensation matters, includes advice for clients such as HS2, Network Rail, National Grid, RWE, London Borough of Barnet, Homes and Communities Agency, TfL and a number of claimants.

Michelle also has experience of advising on alternative dispute resolution (mediation and early neutral evaluation) in the context of compulsory purchase compensation claims, and has advised clients including Transport for London, Sefton Borough Council and the Homes and Communities Agency in this respect.
Glenn is a Costs Lawyer and head of Eversheds Sutherland’s Costs team. Qualifying as a costs draftsman in 1995, he has over 25 years’ experience in the field of costs, including time spent as head of costs at a magic circle firm.

Glenn specialises in major commercial litigation, arbitration and client fee dispute matters, and has considerable experience in Compulsory Purchase and Land disputes work having been retained by the London Development Agency in relation to a number of disputes in respect of professional fees incurred on behalf of various businesses relocated as a result of the London 2012 Olympics.

Glenn’s major cases include:

- **Ruttle v Defra** – costs claim arising out of the foot and mouth outbreak specifically in relation to the recovery of internal costs.
- **Balcombe v the LDA** - £1.25 million costs claims arising of the London 2012 Olympics.
- **Capita Alternative Fund Services v Drivas-Jonas [2012] EWCA Civ 1417** – A £5 million costs claim arising out of a negligent valuation of a shopping centre development.
- **Rubenstein v HSBC** – acting for the bank in a £1.8 million costs claim arising out of a financial mis-selling claim.
- **Holdstock v HSBC** – leading claim in relation to Payment Protection Insurance (PPI) claims.
- **The Construction Blacklist case** – the single largest budgeting case to go through the court system involving a 2 day hearing before a panel of judges including the senior costs judge, with leading counsel appearing on behalf of the claimants, and a number of defendants.
- **The Mid Staffordshire NHS Inquiry** – appointed Costs Lawyer to the inquiry responsible to the secretariat for the consideration of costs claims advanced by the solicitors representing the various interested parties.

Glenn is a past editor of “Costs Lawyer” magazine as well as being a regular speaker on costs issues, and was appointed Costs Judge to an Arbitration dispute involving the Football League and a major English football club.
Surveying the costs of compulsory purchase

31 January 2018
Michelle Moss, Partner
Glenn Newberry, Legal Director

Housekeeping
No fire alarm tests are scheduled for today so if you hear the alarm, please evacuate the building via the nearest fire exit.

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   - Principles of a Cost award – Michelle Moss, Partner
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2. Questions

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Introduction

- Pre-reference costs v Costs in the reference
- Types of Cost Order and Process
- Sealed offers
- Factors that may affect the Tribunal’s discretion

Tribunal’s jurisdiction to make costs orders

- Section 29 of the Tribunals, Courts and Enforcement Act 2007
- At discretion of the Tribunal, but subject to section 4 Land Compensation Act 1961
- Usually exercised in accordance with the principles applied in the High Court and County Courts
- Rule 10 – Tribunal Procedure (Upper Tribunal)(Lands Chamber) Rules 2010
**Types of costs order**

- Rule 10(3) – Wasted Costs – against party or its representative
- Rule 10(6) – Order for costs in proceedings for:
  - (a) compensation for compulsory purchase
  - (b) injurious affection of land...
- NB. *BPP (Farringdon Road) Limited v Crossrail Limited* [2015]
  Rule 10(6)(a) extends to temporary possession claims.

**Types of cost order cont....**

**Rule 10(7)**

“may direct that no order for costs may be made against one or more specified parties in respect of costs subsequently incurred”

- Can remove the future exposure of parties to an adverse cost award
- Can also limit the future liability in costs to a particular level
- Subject to retained ability to make a Rule 10(3) wasted costs application
- *Dickinson (and Another) v Network Rail* [2014]
  - C’s application for complete immunity was rejected as not justified by the size and nature of the matters in dispute
  - Tribunal did impose a costs cap on future liability for C of £15,000 inclusive of disbursements and VAT
  - “The crucial question, in my view, is whether the imbalance might prevent the less well-resourced party from participating effectively in the proceedings...and in the interests of fairness and justice.”

**Process for seeking a costs order**

- Rule 10(10) – may make an application **at any time** during the proceedings but no later than 14 days after the Tribunal sends the final decision that disposes of all issues
- Rule 10(12)(a) – Tribunal may summarily assess the quantum at the same time as issue the cost order
- Rule 10(12)(b) – Tribunal may similarly direct payment of a particular sum
- Most likely will direct that costs be subject to detailed assessment
- Written representations/simplified procedure:
  "costs will only be awarded if there has been an unreasonable failure on the part of the claimant to accept an offer to settle, or if either party has behaved otherwise unreasonably, or in the circumstances are in some other respect exceptional" [Practice Directions para 12.8]
The General Rule

"The general rule is that the successful party ought to receive their costs. on a claim for compensation for compulsory acquisition of land, the costs incurred by a claimant in establishing the amount of disputed compensation are properly to be seen as part of the expense that is imposed by the claimant by the acquisition. The Tribunal, therefore, normally make an order for costs in favour of a claimant who receives an award of compensation unless there are special reasons for not doing so". [Para 12.3 Practice Directions].

This is subject to the rules in section 4 Land Compensation Act 1961.

Section 4 Land Compensation Act 1961

- Where the AA has made an unconditional offer to settle in writing
- The Tribunal's award does not exceed the offer
- The Tribunal must order that the C bear its own costs and pay those of the AA from the date of the offer
- Unless there are special reasons not to do so

Section 4 Cont...
Section 4(1)(b)

- Where C has failed to deliver a particularised claim to the AA in time to enable it to make a proper offer
- The Tribunal shall order that C bears his own costs and pays the AA's
- After the time when the claim should have been delivered
- CLG Model Claim Guidance Notes and Model Claim Form
- S4A LCA 1961
Section 4 cont...

- Where C makes an offer to accept a particular sum
- The award is equal to or exceeds that sum
- The Tribunal must order the AA to bear their costs and pay C’s after the offer
- Unless special reasons apply
- Could give rise to indemnity principle costs award?

Section 4 cont...

- Multiple offers
- Withdrawn offers
  - Halpern and others v GLA [2014] (Clearun case)
  - £3m offer made over 2.5 years before hearing
  - Withdrawn by GLA after hearing C’s evidence
  - Award of circa £2.5m failed to beat withdrawn sealed offer
  - Tribunal ordered C pay AA’s costs from date of offer to date of withdrawal
  - Risky strategy?
- Practical Considerations

Tribunal’s Discretion to Make a Costs Award

- Must be special reasons to justify departure from s4 position
- Identifiable conduct leading to an obvious and substantial escalation of costs over and above those costs which it was reasonable to incur (Purfleet Farms Ltd v Secretary of State for Transport [2002])
- Tribunal will take into account matters such as:
  - The conduct of the parties before and during the proceedings
  - Whether a party acted reasonably in pursuing or contesting a particular issue
  - The manner in which the case has been conducted
  - Whether or not a party has succeeded on all or part of the case
  - Any admissible offers to settle
Tribunal’s Discretion to Make a Costs Award

– Did the successful party act unreasonably in refusing to agree to mediation/ADR?
– Halsey v Milton Keynes General NHS trust; Steel v Joy and another [2004] EWCA Civ 576

– Factors the court will consider include:
  • nature of the dispute
  • merits of the case
  • whether other methods of settlement have been attempted
  • whether the costs are disproportionately high
– Silence in reply to a request for mediation may be taken as an unreasonable refusal
– Costs consequences of sealed offer may be dis-applied
– Must not ignore requests!

Quantifying the Cost award
Glenn Newberry, Legal Director

Overview

• What is a Costs Lawyer?
• Tribunal assessment or Court assessment?
• How to quantify costs
  • Solicitor’s rates
  • Surveyors fees
  • Counsel
  • Indemnity costs
  • Conduct
A Costs Lawyer and a Costs Draftsman are one and the same – true or false?

Tribunal Assessment v Court Detailed Assessment

Proportionality is at the forefront of every costs assessment – True or False?
Expensive!!!!

Assessing surveyor’s fees

Barrister’s fees are set by a tariff and therefore are impossible to successfully challenge – true or false?
If I get my costs on an indemnity basis, I get paid in full – true or false?

Other Considerations – the “seven” pillars

• Conduct
• Value
• Efforts to settle
• Documents
• Complexity
• Skill and specialised knowledge
• Place
• Importance
• Time
Assessing the Quantum of costs Awards – General principles:

Assessing quantum - The Seven Pillars

CPR 44.4(3)

- Proportionality – Not strictly applicable in Arbitration matters
- Conduct
- Efforts to settle/offers
- Amount or value of claim/property
- Importance of the matter to the parties
- Complexity
- Skill and specialised knowledge of the legal team
- Time spent on the case
- Place and circumstances in which the work was done
- Budgets – not applicable in Arbitration matters
Standard Basis v Indemnity Basis

CPR 44.1:

“(1) The court will have regard to all the circumstances in deciding whether costs were –

(a) if it is assessing costs on the standard basis –

(i) proportionately and reasonably incurred; or

(ii) proportionate and reasonable in amount, or

(b) if it is assessing costs on the indemnity basis –

(i) unreasonably incurred; or

(ii) unreasonable in amount.”

In short, on the Indemnity basis, the onus shifts slightly, but not entirely, from the receiving party to prove costs are reasonable, and more to the paying party to prove costs are unreasonable. Indemnity basis is simply a reference to the resolution of doubt on the assessment of costs, it does not mean an absolute indemnity. If there is no doubt as to whether costs are reasonable, there is no difference between standard and indemnity basis costs awards.

The court can consider the quantum of costs under a contract and if doing so will assess costs on the indemnity basis (CPR 44.5).

Costs are assessed on either the standard basis or the indemnity basis, there is no in between. Any order or award which refers to anything other than the standard basis or indemnity basis will lead to an assessment on the standard basis.

Rates

Where were the solicitors located?

The starting point for assessing the reasonable rate of a solicitor is ‘the broad average direct cost of solicitors in the same geographical area doing the same type of work’ - Johnson & Others –v- Reed Corrugated Cases Limited [1992] 1 All ER169 (QBD). Consider the guideline rates. Although guidelines, it is rare that the Court will depart from these in personal injury cases.

Where was the client located?

See below, clients living in a cheaper band area need good reason to use a solicitor in a more expensive area.

Should solicitors in that area have been used?

There are a number of recent dealing with the instruction of Central or City London solicitors in matters which do not justify the use of London solicitors. Unless a case has an obvious London connection or is of such complexity that it requires the expertise that can only be found there, the receiving party should not be able to recover London rates. The 3 lead cases on this point are Wraith –v- Sheffield Forgemasters, Truscott –v- Truscott [1998] 1 All ER 82 (heard together) and Sullivan –v- CIS Insurance [1999] CA (Civ), 12.05.1999.

Was the appropriate grade of fee earner employed?

Self-explanatory. There are 4 separate grades of fee earner and the rates increase dependant on the experience of the solicitor. The SCCO guidelines are set out at the back of the notes albeit, they have not increased since 2010. Grades of fee earner are:

A – Partner or solicitor with over 8 years pqe
B – Solicitor with 4-8 years pqe

C – Solicitor with 0-4 years pqe

D – trainee/other

Legal Executives, Costs Lawyers and others slot in to the grades above.

Consider also:

Grade of Fee earner

Duplication

Delegation

Use of Counsel

The Seven Pillars

Indemnity Principle

The old A + B comparison

Personal experience

**Proportionality**

**The Old Test**

Under the Pre-Jackson test, the court must consider at the outset of an assessment the question as to whether the costs claim is, or appears to be, disproportionate. If the court does consider the claim to be disproportionate, the costs are to be assessed on an item by item basis applying the joint tests of necessity and reasonableness.

The 2 stage test was laid out by the Court of Appeal in the case of Lownds v Home Office [2002] EWCA Civ 365.

**The New test**

The test to be applied post 1 April 2013 is that proportionality is considered at the conclusion, not the commencement of the case. The court assess the costs as to whether they are reasonable costs reasonably incurred and reasonable in amount, and then take a step back and consider whether the resulting allowance is of itself proportionate. If not the court can reduce still further.

Adopting either test, ultimately, the court is seeking to strike a balance between the cost of the litigation and financial value. Whilst the rules point to any number of factors, the over-riding factor, especially in lower value cases, is the value of the claim.

**Conduct**

The court will consider the conduct of the parties both pre and post issue when considering the reasonableness, or otherwise, of the costs claimed.

Issues include exaggerated claims, vexatious behaviour, premature issue and failure to negotiate or mediate.

Conduct is generally a consideration at the point the order for costs in made rather than when quantifying the costs. Issue based or percentage based orders are often employed so as to the reflect degrees of success both in terms of issues and value.
However, the court can still consider issues of conduct when dealing with the quantum of costs even if such issues were not raised before the Judge or Arbitrator. You do need to be wary as on assessment, the tribunal or court’s job is simply to put into effect the terms of the order, not to consider such issues afresh. Often issues of “conduct” are defeated for that reason.

**Experts**

Were the expert’s reports disclosed? Not the acid test, but good rule of thumb. Were the reports disclosed? If not, it is arguable that they were not relied on and as such, are not recoverable inter partes. The counter argument for that view comes from a case called *Francis v Francis & Dickerson [1956]* in which the Court held that one had to take into account the reasonable actions of a solicitor ‘…sitting in his armchair with his then knowledge and acting in the best interests of his lay client..’

Did you employ experts, if so what did they charge? Historically of no concern to anyone other than yourselves, the question ‘How much did your expert charge?’ is one increasingly asked by Judges on assessment. Indeed, in some Arbitrations both parties will submit their costs claims ahead of the determination such that you will know what the other side’s experts have charged and can compare them with your own.

Has one party or other unreasonably refused to appoint a joint expert? Self explanatory. Not the panacea of costs savings that it was designed to be but parties should give consideration to the reasonable costs of appointing a joint expert where possible.

**Counsel’s Fees**

Was it reasonable to use Counsel at all? Did you use Counsel? Again, the latter question was historically of no concern but it is a question being increasingly asked by the Courts on assessment.

What did our Barrister Charge? Post CPR, District and Cost Judges have been encouraged to consider the fee notes of the paying party when considering the reasonableness of the fee notes of the receiving party although case law also dictates that this is not always a reliable guide.

You can also have regard to the rates charged by counsel and similar considerations apply as would be in play when considering the fees of the solicitor.

Counsel’s brief fee is designed to cover the costs of preparing for the hearing, any pre-trial conferences, skeletons, opening and closing submissions, additional unsociable out of hours preparation during the course of the trial, and the first day at court. Refreshers cover the second and subsequent days. *Loveday v Renton (No 2)* [1992] 3 All ER 184.

On larger cases expect to see the above split still further, conferences and skeletons carrying separate and discrete charges.

**Disbursements**

Are the disbursements reasonable/recoverable? Examples of non recoverable disbursements include photocopying, (except in exceptional circumstances) postage and faxes.

If travel is claimed, why? Generally, travel to attend on the client is not recoverable. There are a few exceptional circumstances where a claim may be justified. These include visiting the clients on site in order to inspect the property.

**Photocopying.** See above, the lead case is *Johnson v Reed Corrugated Cases*. Photocopying must be exceptional for the nature of the case else it is considered to be an overhead.

**Court fees.** Was the claim inflated? Court fees are more complicated than ever and the amount you pay to issue is dependent entirely on the amount you are seeking to recover. If a claim is made for, say £100,000 and
the court fee is calculated on that basis but the claim settles for £10,000, it is reasonable to argue that a fee based on a claim of £10,000 is all that is recoverable inter partes.

**Correspondence**

Check how many letters were sent to you. During a pre CPR study by Lord Woolfe and his team, the question of legal costs was examined closely and a sample of 500 cases were looked at to try and establish a pattern in relation to costs. There was none, save that for cases which ran to trial, the costs incurred were disproportionately higher than on those cases which did not run to trial. The reason being the parties’ solicitors, not the parties themselves had fallen out.

Generally, a 15% reduction is about right. Contrary to public belief and Claimant’s, not all work undertaken by a solicitor is absolutely recoverable from the other side. If that were there case, there would be no need for costs draftsmen, Costs Judges or Bills of Costs.

If Counsel or expert’s fees are objected to, the subsequent correspondence should also be disallowed.

**Documents**

Carry through previous objections. If expert’s fees and Counsel’s fees have been previously objected to, on the basis that their fees will be disallowed, the subsequent time spent dealing with those reports and/or instructions will also be disallowed.

Rule of thumb – If there is nothing specific to object to, as a general rule of thumb, make an offer based on a general reduction of approximately 20%.
Appendix 1

The Tribunal Procedure (Upper Tribunal) Rules 2008
Costs Provisions – section 10

(1) The Upper Tribunal may not make an order in respect of costs (or, in Scotland, expenses) in proceedings [transferred or referred by, or on appeal from,] another tribunal except—

[(aa) in a national security certificate appeal, to the extent permitted by paragraph (1A);]

(a) in proceedings [transferred by, or on appeal from,] the Tax Chamber of the First-tier Tribunal; or

(b) to the extent and in the circumstances that the other tribunal had the power to make an order in respect of costs (or, in Scotland, expenses).

[(1A) In a national security certificate appeal—

(a) the Upper Tribunal may make an order in respect of costs or expenses in the circumstances described at paragraph (3)(c) and (d);

(b) if the appeal is against a certificate, the Upper Tribunal may make an order in respect of costs or expenses against the relevant Minister and in favour of the appellant if the Upper Tribunal allows the appeal and quashes the certificate to any extent or the Minister withdraws the certificate;

(c) if the appeal is against the application of a certificate, the Upper Tribunal may make an order in respect of costs or expenses—

(i) against the appellant and in favour of any other party if the Upper Tribunal dismisses the appeal to any extent; or

(ii) in favour of the appellant and against any other party if the Upper Tribunal allows the appeal to any extent.]

(2) The Upper Tribunal may not make an order in respect of costs or expenses under section 4 of the Forfeiture Act 1982(b).

(3) In other proceedings, the Upper Tribunal may not make an order in respect of costs or expenses except—

(a) in judicial review proceedings;

(b) ...

(c) under section 29(4) of the 2007 Act (wasted costs) [and costs incurred in applying for such costs];

(d) if the Upper Tribunal considers that a party or its representative has acted unreasonably in bringing, defending or conducting the proceedings;
(e) [if, in a financial services case [or a wholesale energy case], the Upper Tribunal considers that the
decision in respect of which the reference was made was unreasonable.]

(4) The Upper Tribunal may make an order for costs (or, in Scotland, expenses) on an application or on its own
initiative.

(5) A person making an application for an order for costs or expenses must—

(a) send or deliver a written application to the Upper Tribunal and to the person against whom it is
proposed that the order be made; and

(b) send or deliver with the application a schedule of the costs or expenses claimed sufficient to allow
summary assessment of such costs or expenses by the Upper Tribunal.

(6) An application for an order for costs or expenses may be made at any time during the proceedings but may
not be made later than 1 month after the date on which the Upper Tribunal sends—

(a) a decision notice recording the decision which finally disposes of all issues in the proceedings; or

(b) [notice under rule 17(5) that a withdrawal which ends the proceedings has taken effect].

(7) The Upper Tribunal may not make an order for costs or expenses against a person (the “paying person”) without first—

(a) giving that person an opportunity to make representations; and

(b) if the paying person is an individual and the order is to be made under paragraph (3)(a), (b) or (d),
considering that person’s financial means.

(8) The amount of costs or expenses to be paid under an order under this rule may be ascertained by—

(a) summary assessment by the Upper Tribunal;

(b) agreement of a specified sum by the paying person and the person entitled to receive the costs or
expenses (“the receiving person”); or

(c) assessment of the whole or a specified part of the costs or expenses [including the costs or expenses
of the assessment,] incurred by the receiving person, if not agreed.

(9) Following an order for assessment under paragraph (8)(c), the paying person or the receiving person may apply—

(a) in England and Wales, to the High Court or the Costs Office of the Supreme Court (as specified in the
order) for a detailed assessment of the costs on the standard basis or, if specified in the order, on the
indemnity basis; and the Civil Procedure Rules 1998(a) shall apply, with necessary modifications, to that
application and assessment as if the proceedings in the tribunal had been proceedings in a court to which
the Civil Procedure Rules 1998 apply;

(b) in Scotland, to the Auditor of the Court of Session for the taxation of the expenses according to the fees
payable in that court; or

(c) in Northern Ireland, to the Taxing Office of the High Court of Northern Ireland for taxation on the
standard basis or, if specified in the order, on the indemnity basis.]
(10) [Upon making an order for the assessment of costs, the [Upper] Tribunal may order an amount to be paid on account before the costs or expenses are assessed.]
Appendix 2 - GUIDELINE RATES 2005 -

Band grade one guideline rates for summary assessment - 2005/06

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Aldershot, Farnham, Bournemouth (including Poole) Birmingham Inner Bristol Cambridge City, Harlow Canterbury, Maidstone, Medway & Tunbridge Wells Cardiff (Inner) Chelmsford South, Essex & East Suffolk Fareham, Winchester Hampshire, Dorset, Wiltshire, Isle of Wight Kingston, Guildford, Reigate, Epsom Leeds Inner (within 2 kilometres radius of the City Art Gallery) Lewes Liverpool, Birkenhead Manchester Central Newcastle - City Centre (within a 2 mile radius of St Nicholas Cathedral) Norwich City Nottingham City Oxford, Thames Valley Southampton, Portsmouth Swindon, Basingstoke Watford

Band two grade guideline rates for summary assessment - 2005/06

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Bath, Cheltenham and Gloucester, Taunton, Yeovil Bury Chelmsford North, Cambridge County, Peterborough, Bury St E, Norfolk, Lowestoft Chester & North Wales Coventry, Rugby, Nuneaton, Stratford and Warwick Exeter, Plymouth Hull (City) Leeds Outer, Wakefield & Pontefract Leigh Lincoln Luton, Bedford, St Albans, Hitchin, Hertford Manchester Outer, Oldham, Bolton, Tameside Newcastle (other than City Centre) Nottingham & Derbyshire Sheffield, Doncaster and South Yorkshire Southport St Helens Stockport, Altrincham, Salford Swansea, Newport, Cardiff (Outer) Wigan Wolverhampton, Walsall, Dudley & Stourbridge York, Harrogate

Band three grade guideline rates for summary assessment - 2005/06

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London band grades guideline rates for summary assessment - 2005/06

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<td>(All other London post codes: W, NW, N, E, SE, SW and Bromley, Croydon, Dartford, Gravesend and Uxbridge)</td>
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### Guideline Hourly Rates for 2007

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### Guideline Hourly Rates for 2010/11/12

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### Guideline Hourly Rates for 2008

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### Guideline Hourly Rates for 2009

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In tune with your needs
Introducing the Eversheds Sutherland Costs Unit
Introducing the Eversheds Sutherland Costs Unit

How can we help?
Our costs unit offers a complete litigation funding, retainer, case management and costs service, from traditional costs drafting services to bespoke costs budgeting and litigation management, drafting and reviewing retainers and arranging litigation funding through our network of third party funders. The unit has a proven track record in all manner of litigation, regularly dealing with multi million pound costs disputes and highly complex commercial matters.
By instructing us to deal with all your costs claims, you are assured of:
- a competitive pricing structure
- consistency of approach
- bespoke management information tailored for your business needs.

Why are we different?
Situated within one of the world’s largest litigation teams, and with litigators working alongside specialist costs lawyers and qualified project managers, we draw on our experience, not only of costs cases, but of being involved in and running large litigation projects. This provides the team with a valuable insight resulting in a bespoke costs offering that meets your needs and objectives.

We provide you with a service that has equal regard to the commercial realities of business as well as the ‘black letter’ law, allowing you to make the decisions that best suit your business needs. We also provide advice on funding options including Damaged Based Agreements, CFAs, preparation of retainers and the availability of third party funding.

Examples of Expertise

Budgeting and project management
Eversheds Sutherland have been at the forefront of budgeting and project management pre and post the recent Jackson reforms. The costs team have developed bespoke budgeting and reporting software to assist in this fast changing and evolving area.

Commercial and financial disputes
From straightforward contract disputes to multi-million costs claims arising out of arbitrations and financial disputes, including payment protection insurance (PPI) claims and financial mis-selling.

Solicitor/client disputes
The team has been involved in a number of disputes between clients and former solicitors in relation to fees and possess the expert knowledge required to navigate these often difficult and technical claims.

International disputes (including international arbitration)
The team have multi-jurisdictional experience having dealt with cost claims in jurisdictions such Dubai and Hong Kong, and recognised as fee attorney experts in the USA.

Public law and planning
Inquiries and investigation work, including acting as costs lawyer to the Mid Staffordshire Inquiry. Particular experience in claims arising out of large infrastructure developments including the London 2012 Olympics, Cross Rail and HS2.

Case studies

Mis-selling
Eversheds Sutherland’s costs team act for a number of financial institutions in relation to costs claims arising out of financial mis-selling claims having saved one bank alone £3 million in 3rd party legal fees.

At a recent 5 day hearing in the SCCO for 2 further banks, a costs claim of £650,000 was reduced to £180,000 and costs were awarded to the bank on the indemnity basis.

CPO
Represented the London Development Agency in relation to a number of high value costs claims arising out of the London 2012 Olympics including the case of Balcombe v LDA in which a claim for £1.25 million in claims adjustor fees, was reduced to £175,000, with the LDA also recovering the majority of its legal costs.
Services and expertise

Our services are split into three main areas:

1. Pre-litigation funding and retainers
   - bespoke retainer and alternate fee advice
   - advice on 3rd party funding options
   - advice on After the Event insurance and managing litigation risk

2. During litigation budgeting, project and costs management
   - preparation of Budgets and case plans
   - monitoring of spend versus budget on a “phase by phase” basis
   - project management of litigation and investigation matters
   - advice on and negotiating budgets and attendance at costs management conferences
   - advice on the costs implications of without prejudice and Part 36 offers
   - preparation of Statements of costs for interim hearings
   - advice on and preparation of statements to support schedules of costs for security for costs applications
   - provide expert witness services in relation to costs recovery and procedure in the UK
   - consideration of and advice in relation to draft judgments to include preparing or assisting with the preparation of costs submissions

3. Post Litigation, we offer a full service, cradle to grave costs service for both paying and receiving parties including
   - schedules of costs
   - bill drafting
   - points of dispute / replies
   - advice on settlement and points of law
   - negotiating with third parties and insurers
   - part 8 costs only proceedings
   - representing clients in disputes with their previous solicitor
   - representing Eversheds in fee disputes with clients
   - attendance at detailed assessment hearings

Our areas of expertise include:

- commercial disputes
- financial disputes
- budgeting and Project management
- compulsory Purchase Orders
- lands Tribunal disputes
- public law
- personal injury / clinical negligence
- industrial disease
- solicitor / client disputes
- arbitration disputes (national and international)
- insurance
- professional negligence
- litigation Funding
- retainers
- expert Witness services
- costs in other jurisdictions

What our clients say

"I have worked with the costs team for a number of years dealing with extortionate costs claims arising from mis-selling disputes. Their expertise and attention to detail has led to considerable savings and they are my first port of call for any costs related issue”

Philip Abel GE Capital
Get in touch

For more information, please contact:

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eversheds-sutherland.com

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Eversheds Sutherland (International) LLP is part of a global legal practice, operating through various separate and distinct legal entities, under Eversheds Sutherland. For a full description of the structure and a list of offices, please visit www.eversheds-sutherland.com.
Costs Guru
An eye on reform
The future of legal costs
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Costs cases update 20
Eversheds Sutherland has welcomed James Barrett as the new Senior Costs Lawyer to its Global Costs Litigation team. Based in the UK, James joins Eversheds Sutherland from Lampton 360 where he was a Business Manager. He was formerly Head of Costs at the UK Government’s Legal Department (GLD) where he advised on high profile cases such as the Iraq war and Guantanamo Bay. His expertise includes cases at County Court, High Court and Supreme Court level. James also has experience in public sector audit, compliance, litigation and business development, including business support systems, policies and procedures. The Global Costs Litigation team is uniquely placed to provide the wider litigation team with a competitive advantage. It is comprised of five fully qualified Costs Lawyers, and a Solicitor specialising in costs work.

Glenn Newberry, Legal Director and Head of Costs, Eversheds Sutherland, commented:

“James brings with him a wealth of knowledge and experience in the public and private sectors covering statute and common law and having advised on a variety of challenging and high profile cases.

“As we continue to undertake a great portfolio of complex and challenging work advising on commercial litigation and funding, costs recovery and case and costs management, I am confident James’s skills and experience will be a superb asset to the team.”

James Barrett, commented:

“I’m delighted to join the team and very much look forward to the challenges ahead. I’m pleased to have the opportunity to work with highly skilled professionals in costs litigation and to support the team in raising the profile of Eversheds Sutherland, as expert leaders in the sector and the profession as a whole.”
Welcome to the Autumn edition of Costs Guru and may I begin by thanking those who recently attended our Cardiff Costs Seminar, and put a note in your diaries for our up and coming London litigation funding seminar which will take place in Wood Street on 29 November. Speakers will include Costs Judge Master Rowley, Ben Williams QC and Stephen O’Dowd from Harbour Litigation Funding. You will find a flyer and details elsewhere in Guru.

Lord Justice Jackson’s Report on Fixed Recoverable Costs in Litigation matters

Bang on time, on 31 July 2017, Lord Justice Jackson published his long-awaited second report on the costs of litigation, with this report focussing on proposals for fixed costs in lower value litigation matters. As many of you will know, there is already a suite of fixed costs in many personal injury matters, and Jackson LJ, in his initial report, made no secret of his view that fixed costs should apply in all fast track matters.

Unexpectedly, in January 2016, Jackson LJ gave a paper in which he advocated the introduction of fixed costs in all litigation matters up to £250,000 damages. This paper received considerable comment. There was a sentiment that budgeting should be given a chance to bed in as we were still in relatively early days. In May 2016, the MOJ announced that Jackson LJ had been appointed to consider the issue of fixed costs. A working party was formed, and a series of roadshows arranged for interested parties to express their views.
I had the pleasure of attending the last of those roadshows in Cardiff which focused upon judicial review matters but also, touched upon general concerns and comments. What is clear from the findings is that the views of those attending the roadshows and the views of other lobbyists, including colleagues on the bench, had been taken into account.

Jackson has recommended the introduction of what he calls the “intermediate track” for cases up to £100,000 damages and which require a limited number of days in court, limited number of experts and witnesses. Whilst suggesting there may be a voluntary pilot scheme for business claims up to £250,000, his report stops short of insisting on one. The costs on the intermediate track would be fixed by reference to the stage of settlement and complexity. Cases would be graded from 1 through to 4 at the outset and this track would determine the level of fixed costs to be paid. The table is set out elsewhere. You can read more about the report in the article written by my colleague Louise Hoyle.

Implementation? Possibly legislation to be drafted in the next 12 months and at the earliest, on the statute books in April 2019.

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1. BNM v MGN [2016] EWHC B13 (Costs)
2. Harrison v University Hospitals Coventry & Warwickshire NHS Trust [2017] EWCA Civ 792
As always with costs litigation, change is the only constant.

Happy reading.

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Managing the costs of litigation

Alternative fee arrangements and third party funding options

Wednesday 29 November 2017 - London

We are delighted to extend an invitation to you to join us for what promises to be an exciting and informative seminar (followed by Q&A session) exploring the options which exist to fund litigation. The seminar will explore a number of aspects of litigation funding, including:

- alternatives to traditional hourly rates
- opportunities created by third party funding
- the courts approach to funded cases
- current case law and pitfalls
- a plenary Q&A session

Our speakers will include Senior Courts Costs Office costs judge, Master Jason Rowley, costs silk from 4 New Square Chambers, Benjamin Williams and senior director of litigation funding at Harbour Litigation Funding, Stephen O'Dowd.

If you would like to attend our costs seminar, please click below to reserve your free place.

Venue

Eversheds Sutherland, 1 Wood Street, London EC2V 7WS

Programme

<table>
<thead>
<tr>
<th>Time</th>
<th>Activity</th>
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<tbody>
<tr>
<td>17:00</td>
<td>Registration</td>
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<tr>
<td>17:15</td>
<td>Seminar begins</td>
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<tr>
<td>19:00</td>
<td>Refreshments</td>
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Please email hannahsmith-pickup@eversheds-sutherland.com to reserve a place.
Who are we?
Our costs unit services

Our costs unit provides a wide range of services, from traditional costs drafting services to bespoke costs budgeting and management, drafting and reviewing retainers and arranging litigation funding through our network of third party funders. The costs unit has a proven track record in all manner of costs disputes, regularly dealing with multi-million pound claims and highly complex commercial matters.

Why are we different?
Situated within a large litigation team, and with litigators working alongside specialist costs lawyers, we draw on our experience, not only of costs cases, but of being involved in and running large litigation and investigation projects. This provides the team with a valuable insight resulting in a bespoke costs offering. We provide a service that has regard to the commercial realities of business as well as the 'black letter' law, allowing clients to make decisions that best suit their business needs.

Services and expertise
Our services are split into three main areas:

1. Pre-project/litigation and retainers
2. During project/litigation budgeting and costs
3. Post-project/litigation traditional costs services
Pre-project/litigation:
- bespoke retainer and alternate fee advice
- advice on third party funding options
- advice on after the event (ATE) insurance and managing litigation risk

During project/litigation:
- preparation of budgets and case plans
- monitoring of spend versus budget on a “phase-by-phase” basis
- preparation of precedent H forms for case management conferences
- advice on and negotiating budgets
- attendance at costs management conferences
- advice on the costs implications of without prejudice and part 36 offers
- preparation of statements of costs for interim hearings
- advice on and preparation of statements to support schedules of costs for security for costs applications
- provide expert witness services in relation to costs recovery and procedure in the UK
- consideration of and advice in relation to draft judgments to include preparing or assisting with the preparation of costs submissions

Post-project/litigation, we offer a full cradle to grave costs service for both paying and receiving parties including:
- schedules of costs
- bill drafting
- points of dispute / replies
- advice on settlement and points of law
- negotiating with third parties and insurers
- part 8 costs only proceedings
- representing clients in disputes with their previous solicitor
- attendance at detailed assessment hearings
Jackson’s future proposals for costs certainty

One of the issues arising out of Lord Justice Jackson’s first substantive report on the costs of litigation was that in order to better control costs and provide more certainty as to the potential and recoverable costs of litigation, awaiting the detailed assessment of costs at the end and relying on the concept of proportionality was proving ineffective. The only way to effectively control the costs of litigation in advance is by way of fixed costs or budgeting.

Following Jackson’s initial January 2010 report and recommendations, fixed costs were implemented for the majority of fast track cases up to £25,000 and in an attempt to control costs in larger or more complex cases, costs budgeting was introduced for multi-track cases. Jackson envisaged back in January 2010 that fixed recoverable costs would eventually extend beyond £25,000 fast track claims, however this limb was not implemented in the 2013 legislation, now colloquially known as the ‘Jackson reforms’.

The reluctance to further extend fixed costs was a constant frustration to Jackson and he made no secret of his desire to introduce a wider raft of fixed costs. The extent of which has been a hot topic of discussion since January 2016 when Jackson gave a talk setting out a table of fixed costs for claims up to £250,000, and with Jackson’s subsequent comments being scrutinised for any hint as to the likely future for fixed costs. The latest being his January 2017 speech, given to the Insolvency Practitioners Association, where he hinted the impending report would recommend fixed costs be extended to claims up to £150,000, irrespective of complexity.
On the 31 July 2017, Lord Justice Jackson released his long awaited review of the costs regime. His recommendations, building on his 2010 review, proposed all fast track cases be covered by fixed costs and a new “intermediate” fixed costs track for certain claims up to £100,000 be introduced. Claims for mesothelioma and other asbestos related lung diseases are excluded from this proposed new track. To take into account the different types and complexities of cases, each track will accommodate a range of fixed costs by way of a banding system contained in a grid table for each track, with band 1 being the least complex and band 4 being the most complex. There will also be an opt out system so once again, we may see substantive arguments about costs at the start rather than the end of the case.

The intermediate track would include a streamlined resolution process, for example, no more than two experts per side, no more than a three day trial. If either of these conditions cannot be met, the case would not be suitable for the intermediate track.

Whilst Jackson’s proposals for the extension of the fixed costs scheme for both the fast track cases and the new intermediate track does provide certainty on costs from the outset, it will inevitably create much argument as to the correct banding of a case with both parties seeking to gain a tactical advantage and exploit any grey areas of the new rules. The proposed grid table for the new intermediate track is set out at the end of this article.
An eye on reform
The future of legal costs

The report also attempts to control costs in other areas. For judicial review claims, Jackson proposes the protective costs rules under the Aarhus Convention should apply. At present, such limits on costs recovery are reserved for environmental cases.

A pilot scheme is proposed for business and property cases up to £250,000, where parties choosing to opt in can expect cases to be heard within eight months of the first case management conference, with limited disclosure and evidence, and a trial lasting no more than two days.

Jackson accepts that clinical negligence cases are not suitable for fixed costs on the fast track or new “intermediate” track. Whilst the majority of cases were on the multi-track and therefore subject to costs management by way of budgeting, he believes there is scope to go further and fix costs for the smaller claims. In his report he encourages collaboration via a working group to create a workable fixed costs scheme for the claims under £25,000.

I think it is fair to say people’s worst fears have not been realised. Overall, the report, whilst advocating extending fixed costs, goes a step further. Recognising imposing a band of fixed costs on the current process will not work, Jackson has set out how he considers the process should be revised, and then the costs fixed.

The report provides the Rules Committee with a draft framework of rules to extend fixed costs with a recommendation that there be a further review after a four year period. Given Jackson’s retirement in March 2018, however, the mantra will be passed to someone else to carry on his legacy, although his report does leave some guidance for his replacement, concluding that if the proposed changes are working satisfactory, he recommends further consideration be given to expanding the scope of the intermediate track to include monetary claims above £100,000.

The next step is for the Government to consider the report and consult with the necessary bodies. Any changes are likely to be gradual rather than a sudden shift of the goal posts, but they will certainly provide more transparency on costs. The challenge will be for litigators to conduct such cases within the fixed fees, making costs management and planning from the outset even more important.
Proposed matrix of costs for Intermediate Track

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<tr>
<th>Complexity Band</th>
<th>Stage</th>
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<th>2</th>
<th>3</th>
<th>4</th>
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<tbody>
<tr>
<td></td>
<td>S1 Pre-issue or pre-defence investigations</td>
<td>£1,400 + 3% damages</td>
<td>£4,350 + 6% damages</td>
<td>£5,550 + 6% damages</td>
<td>£8,000 + 8% damages</td>
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<tr>
<td></td>
<td>If claim settles pre-issue, for PI claims, S1 figures are fixed; for non-PI claims, they are capped</td>
<td>£1,400 + 3% damages</td>
<td>£4,350 + 6% damages</td>
<td>£5,550 + 6% damages</td>
<td>£8,000 + 8% damages</td>
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<td>S2 Counsel/ specialist lawyer drafting statements of case and/or advising</td>
<td>£1,750</td>
<td>£1,750</td>
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<td>S3 Up to and including CMC</td>
<td>£3,500 + 10% damages</td>
<td>£6,650 + 12% damages</td>
<td>£7,850 + 12% damages</td>
<td>£11,000 + 14% damages</td>
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<tr>
<td></td>
<td>S4 Up to end of disclosure/inspection</td>
<td>£4,000 + 12% damages</td>
<td>£8,100 + 14% damages</td>
<td>£9,300 + 14% damages</td>
<td>£14,200 + 16% damages</td>
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<tr>
<td></td>
<td>S5 Up to service of witness statements and expert reports</td>
<td>£4,500 + 12% damages</td>
<td>£9,500 + 16% damages</td>
<td>£10,700 + 16% damages</td>
<td>£17,400 + 18% damages</td>
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<td></td>
<td>S6 Up to PTR, alternatively 14 days before trial</td>
<td>£5,100 + 15% damages</td>
<td>£12,750 + 16% damages</td>
<td>£13,950 + 16% damages</td>
<td>£21,050 + 18% damages</td>
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<td>S7 Counsel/ specialist lawyer advising in writing or in conference</td>
<td>£1,250</td>
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## An eye on reform
The future of legal costs

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<tr>
<th>Description</th>
<th>S8 Up to trial</th>
<th>S9 Attendance of solicitor at trial per day</th>
<th>S10 Advocacy fee: day 1</th>
<th>S11 Advocacy fee: subsequent days</th>
<th>S12 Hand down of judgment etc</th>
<th>S13 Counsel/specialist lawyer at mediation or JSM (if instructed)</th>
<th>S14 ADR: solicitor at JSM or mediation</th>
<th>S15 Settlement approval</th>
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<tr>
<td></td>
<td>£5,700 + 15% damages (deduction if party did not prepare trial bundle)</td>
<td>£5,700 + 15% damages</td>
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Total if damages eg:

- (a) £30,000: £19,150 (assuming 1 day trial)
- (b) £50,000: £22,150 (assuming 2 day trial)
- (c) £100,000: £29,650 (assuming 3 day trial)

- (a) £33,250: £39,450 (assuming 2 day trial)
- (b) £37,250: £43,450 (assuming 3 day trial)
- (c) £47,250: £53,450 (assuming 3 day trial)

- (a) £53,050: £53,450 (assuming 3 day trial)
- (b) £57,450: £57,450 (assuming 3 day trial)
- (c) £68,450: £68,450 (assuming 3 day trial)

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An eye on reform
The future of legal costs
Relief from sanctions: a return to stricter times?

The summer of 2017 has seen an interesting change of direction from the judiciary in its approach to relief from sanctions, much to the consternation of the legal industry. As the pendulum swings back in favour of a *Mitchell* approach, we ask whether this is a sign of things to come, or simply the balancing out of approach?

Many of you will remember the case *Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1526*, part of the “plebgate” saga. For those interested in costs and court procedure, the case was notable for the Court of Appeal’s decision to uphold the decision not to grant relief from sanctions for failure to service a budget in time. In its judgment, the court stated:

“In the result, we hope that our decision will send out a clear message. If it does, we are confident that, in time, legal representatives will become more efficient and will routinely comply with rules, practice directions and orders. If this happens, then we would expect that satellite litigation of this kind, which is so expensive and damaging to the civil justice system, will become a thing of the past.”

The decision in *Mitchell* received considerable criticism, not least due to the large number of cases reaching the High Court in relation to relief from sanctions. Further criticism was levied at the lack of consistent approach in the handling of these cases.

The Court of Appeal subsequently revisited *Mitchell* in *Denton v TH White Ltd [2014] EWCA Civ 906*, with the “trivial” test established in *Mitchell* being replaced by a three-limb approach:

- what was the breach and was it serious or significant?
- why had the default occurred?
- what were the circumstances of the case?
Still further, the inflexible strict adherence to the rules advocated in *Mitchell* was somewhat watered down with a proviso that if the non-defaulting party were to “unreasonably refuse” a request to consent to an application for relief from sanctions, not only could the non-defaulting party find themselves having to meet the costs of the application, but potentially facing additional costs sanctions.

Roll forward to June 2017 and the courts appear to be moving away from the decision in *Denton*. In *Gladwin v Bogescu* [2017] EWHC 1287 (QB) Turner J not only overturned the decision of the circuit judge to grant relief from sanctions for late service of witness statements, but went further to strike out the claim.

This was followed in July by *Lakhani v Mahmud* [2017] EWHC 1713 (Ch) where the decision taken by the district judge, not to grant relief from sanctions for serving a budget one day late was upheld. The consequences of which limited the recoverable future costs to court fees only, pursuant to CPR 3.14. The decision was made, in spite of the parties commenting on the budgets and agreeing the majority of the defendant’s schedule in advance of the CMC.

The position in both *Bogescu* and *Lakhani* are in contrast to the earlier 2017 decision of Warren J in *Intellimedia Systems Ltd v Richards & others* (2017), where relief from sanctions was granted for the late filing of a budget due to the illness of the conducting solicitor, with the sanction limited to the costs of the application being awarded on the indemnity basis. A fairer outcome perhaps?

Whether the approach taken by the courts in *Bogescu* and *Lakhani* are an indication of the future of relief from sanctions remains to be seen. It would however be prudent to keep them in mind, when dealing with costs and procedural matters. In this regard, we would very much encourage litigators to:

- refresh themselves of the court requirements for service of budgets
- ensure that their team is aware of the timetable for the case
- start the budgeting process early
- in larger matters, consider ‘light touch’ legal project management, to ensure the matter is reviewed and stays within budget.

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The new electronic bill of costs – are you ready for change?

After much anticipation, it looks likely that the new format electronic bill of costs for detailed assessment will, subject to ministerial approval, become compulsory from 6 April 2018, and will apply to all costs incurred from that date.

The requirement for time to be set out on the basis of the phase (e.g. witness), task (e.g. taking, preparing and finalising witness statement) and activity (e.g. communicate with witness) is a key feature of the new format. As such, consideration needs to be given to how time is recorded to enable bills to be produced with this level of detail. Every letter, telephone call, email, meeting and item of consideration or drafting, will need to be separately identified and claimed in the bill.

Of course, even with the most sophisticated of time recording systems, firms will still require expert input from a costs professional to check that the costs contained in the bill are reasonable, properly included, and in the right section of the bill.

**Background**

The origins of the new format bill of costs can be traced back to Lord Justice Jackson’s 2013 reforms when he charged the Hutton Committee, headed by Alexander Hutton QC (hence the name), with the task of developing a set of universal time recording codes for litigation (so-called J codes) and designing a new format bill of costs for detailed assessment.

Lord Justice Jackson’s motivation for change was that, in his view, bills were expensive and cumbersome to draw and did not always contain the necessary information to enable an assessment to
take place. This was particularly so in light of budgeting and the Precedent H. He considered reform and making better use of modern technology would both speed up drafting time and reduce the cost of the process.

**About the new format bill**

When it becomes mandatory, it is anticipated that the new format bill of costs will apply in all part 7 multi-track claims, with limited exceptions. The format will be compulsory for all costs incurred from the date the new bill becomes mandatory. As such, initially at least, claims for costs will likely be prepared in 2 parts with the first part mirroring the current, traditional bill of costs, and the second part being in the new format.

Receiving parties will be able to choose whether to adopt the bill template annexed to the Practice Direction, or to produce their own version of the bill using alternative software. The final amendments to the rules and Practice Direction to Part 47 are yet to be published, but they are likely to mirror the following in respect of requirements of the new bill, which must include:

- a capability to produce reports and aggregates based on phases, tasks, activities and expenses (as currently set out in schedule 1 to Practice Direction 51L)
- a capability to produce a summary of totals in a form comparable to the court’s Precedent AB
- a capability to automatically recalculate totals where input data is amended
- offering full functionality to the court and all parties by containing all calculations and reference formulae

Even if the new format bill does not become compulsory in April 2018, it is more a matter of ‘when’ rather than ‘if’ and we must all be prepared for change.

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3 Exceptions include proceedings that are subject to fixed costs, scale costs, cases where the receiving party is a litigant in person, or where the court has made another order. The new format bill will also not apply to legal aid claims or Solicitors Act assessments.
The effect of costs budgets on detailed assessment, continued…

In Guru’s Summer 2017 publication, we reported the decision in Harrison v University Hospitals Coventry & Warwickshire NHS Trust [2017] EWCA Civ 792, concerning the effect of budgets on detailed assessment hearings. In Harrison, the principle that an approved/agreed budget would not be departed from upwards or downwards without “good reason” was upheld. You will recall the court held there would still be a detailed assessment of the costs which had been incurred at the point the budget was set, but no assessment of the post-budget costs unless the good reason test could be satisfied.

Deputy Master Campbell, in the case of RNB v London Borough of Newham [2017] EWHC B15 (Costs), was asked to consider whether a reduction to the hourly rates in the incurred costs was good reason to depart from the budget and reduce the budgeted costs. The Deputy Master held that this was good reason not least because were the rates in the second part not reduced, the overall costs would be disproportionate. As we discovered at our recent seminar, this is a not a view that is universally supported by the judiciary with at least one Regional Costs Judge making it clear that he did not feel at all bound by this decision and would take some persuading to alter the budgeted costs at all.

Lakhani v Mahmud - Mitchell mark II?

In the recent case of Lakhani v Mahmud [2017] EWHC 1713 (Ch) the defendant failed to file an updated costs budget 21 days before the CMC by one day and the automatic provisions of CPR 3.14 applied and the budget was deemed to be limited to that of court fees only.

The defendant had initially sought to argue that the date of filing was correct, but later accepted it was late and made a last minute application for relief from sanctions, which was served on the claimant on the day of the CMC.

Relief was refused. Whilst the judge accepted that one day late might not be regarded as “terribly serious”, in the current case there were a number of matters which led him to take a different view, including:
The late acceptance resulted in wasted time arguing about the breach rather than the budgets.

The solicitors knew their offices were shut over Christmas and New Year, foreshortening still further the time to agree budgets.

The impact of late service had created an environment which was not conducive to agreement and was more conducive to the defendant presenting the costs as highly contentious.

Applying the three stage test in *Denton v TH White Ltd* [2014] EWCA Civ 906, it was held that the breach was not trivial, but was a serious breach. The budget was therefore allowed at court fees only even though the parties had in fact been able to speak and agree the budgets. The decision was upheld on appeal. It was accepted that the decision was “on the tougher end of the spectrum as to substance and on the leaner end as to analysis”, but the defendant had not been deprived of a trial and if the claimant succeeded at trial, the decision would have limited adverse impact.

The decision is a reminder of the importance of complying with court deadlines and to seek relief as soon as possible if required, as opposed to, in the Judge’s words, “making a mountain of procedural annoyance out of a molehill of missing a deadline”. 
An eye on reform
The future of legal costs

The decision in *Lakhani* is considered further James Barrett’s article on relief from sanctions in this edition of Costs Guru.

**Budget not limited to court fees after it is filed 10 days late**

In the case of *Mott & Anor v Long & Anor* [2017] EWHC 2130 (TCC), the defendants filed their costs budget 10 days late and sought relief from sanctions. The court considered the 3-stage test established in *Denton* in order to establish the seriousness of and reason for the breach.

The claimants submitted that late service of a budget “sufficiently distracts from the co-operative process of entering into discussions [about budgets]”, citing the *Lakhani* judgment (above). The defendants filed a witness statement citing IT issues as the reason for the delay, namely a firm wide issue which caused “difficulties including saving Word documents and printing those documents and there were issues around the system crashing during the course of working on documents”.

HHJ Grant found that the defendants’ breach was not “serious and significant” and given that the court made directions at the CCMC requiring the parties to file revised budgets, the parties were now in precisely the same situation they would have found themselves in if the breach had not occurred at all.

Notwithstanding the defendants’ seemingly lucky escape, they were ordered to pay the claimants’ costs of the application.

**£10k ATE premium challenge rejected based on ’hindsight’**

*Mitchell v Gilling-Smith* (2017) saw the defendant challenge the claimant’s ATE premium of £10,000, which was taken out to cover expert fees. The defendant’s submission was that the £10,000 premium was unreasonable in amount, given that the expert fees amounted to only £2,000.

Master Leonard, sitting in the Senior Courts Costs Office, expressed the view that waiting until risks are properly identifiable before purchasing ATE insurance rather missed the point of purchasing insurance at all. In his judgment there was nothing to support the contention that the claimant ought to have known the costs of expert evidence would have been in the region of £2,000 at the time the insurance was purchased. Furthermore, this was not the test to be applied when considering proportionality. The premium could not be characterised as disproportionate in a clinical negligence claim that settled for £200,000. The premium was allowed as claimed.