www.costsbarrister.co.uk

Costs 2016

Andrew Hogan

A presentation for the Ropewalk Chambers Personal Injury Conference

Introduction

1. Another year, another Personal Injury Conference, and another paper on costs. This year, I am going to concentrate on what I regard as systemic themes or issues, whilst Shilpa Shah looks in a little more detail at some of the interesting cases of the last 12 months.

Fixed costs

2. At the time of writing, I am still waiting to see, along with the rest of the legal world, what shape the proposed fixed costs for NIHL and clinical negligence claims might take, as no consultation documents have been published. Plainly what might be on the cards is a revision of part 45 CPR to bring into place a set of provisions, which might not be dissimilar to the fixed costs regime which applies to cases which start on the Portal, drop out and continue as part 7 claims, largely on the Fast Track.

3. However, the speech by Jackson LJ on 28th January 2016, ominously entitled "The Time Has Come", has in a sense overtaken events. What that speech proposed as has been widely reported, is a scheme of fixed costs which would apply to all monetary claims of up to £250,000, or as has been observed, virtually all of civil litigation. That speech is worthy of careful consideration, as the proposals within it, despite wide resistance, may yet come to pass in some shape or fashion.

4. The "problem" as perceived by Jackson LJ was stated in these terms:

The present level of costs and complexity of civil litigation has evolved over time under the influence of costs shifting and the system of 'hourly rate' remuneration. Remuneration on a time basis rewards inefficiency. Unrestrained costs shifting drives parties to leave no stone unturned: the more costs mount up, the more determined each party becomes to ensure that the other party pays them. The result is inevitable - a civil justice system which is exorbitantly expensive. I readily accept that the complexity of law and procedure contribute to high costs. But complexity is inherent in every modern legal system, as so many well intentioned law reformers have ruefully discovered. There are other jurisdictions with complex laws and procedural rules where litigation costs are significantly lower than here.

5. The speech began with a plea to avoid "lop sided" reform:

One important omission is the fixing of costs for non-personal injury fast track claims. There are a large number of cases in the fast track not involving personal injury. Litigants in these cases need access to justice at proportionate cost, just as much as personal injury claimants and defendants. We must therefore establish a fixed costs regime for all non-personal injury cases in the fast track. I understand informally that the MoJ is supportive of the proposal. Whilst acknowledging the pressure on resources, surely this task should now be prioritised? The figures proposed in FR chapter 15, section 6, suitably adjusted for inflation, would be a good starting point.

It would be illogical to fix the costs of clinical negligence claims in the multi-track (as the Government is now proposing) without sorting out the fast track at the same time.

6. However it became apparent that something far more radical was being proposed:

The view that we should move towards fixed costs is steadily gaining ground. This is evidenced by recent speeches or reports by the Lord Chief Justice, the Master of the Rolls, Flaux J (then the Judge in Charge of the Commercial Court) and Lord Faulks (Minister for Civil Justice). When I consulted the Association of

HM District Judges on this issue in September 2014 the President's response was: "There is overwhelming support for fixed costs both in the fast track, and in the lower value multi-track cases. This would save time and costs. I have not heard a voice which dissents from this view." A recent report published by the Bingham Centre for the Rule of Law in conjunction with JUSTICE and the Public Law Project, entitled "Judicial Review and the Rule of Law"6 proposes a fixed costs regime for judicial review claims: see chapter 5. The authors see the introduction of fixed costs as promoting the rule of law and enabling individuals to hold the Government or public authorities to account.

Fixing costs is an effective way of ensuring that a party's recoverable costs and its adverse costs risk are proportionate to the subject matter of the litigation (depending, of course, upon the figures which are chosen). I accept that this makes an inroad into the traditional costs shifting regime. On the other hand the traditional costs shifting regime tends to drive up the incurred costs of both parties: see the academic research summarised in PR chapter 9. Also that regime leads to disproportionate costs recovery.

A fixed costs regime provides certainty and predictability. This is something which most litigants desire and some litigants desperately need. A fixed costs regime is easier for solicitors to explain to clients than the current costs rules. Also a fixed costs regime dispenses with the need for costs budgeting and costs assessment. This will achieve (a) a substantial saving of costs for the parties and (b) a substantial reduction in the demands made upon the resources of the court.

We now have enough experience (including that gained from costs budgeting and the existing fixed costs regimes) to devise a coherent scheme of fixed costs for the whole of the fast track and for the lower reaches of the multi-track. The time for doing that has now come.

7. It will be remembered that the **Mitchell** fiasco had its origins in a taste for justice, Singaporean style. Jackson LJ, accordingly drew on the experience of fixed costs in New Zealand and Germany to support his argument. He then moved on to sketch in broad terms what his proposals were:

The first question is whether we should be fixing costs for all civil cases (like Germany and New Zealand) or just for the fast track and the lower reaches of the multi-track. This is a policy decision for others. I would favour the latter course (as recommended in my Final Report), but I acknowledge that some favour the former course. There are two particular reasons why I favour adopting the latter course:

(i) Switching to a totally fixed costs regime for all claims, however large, would be too great a change for the profession to accept, certainly in the short term. The justice system only functions because of the high level of support which the profession provides.

(ii) Reform is best done incrementally, so that we can see how it is working out. That is why (in FR chapter 16) I recommended deferring consideration of fixed costs in the multi-track until after the implementation of the fast track and IP Enterprise Court reforms. Those reforms are now largely in place and they are successful. It is therefore appropriate to move on to fixing costs in the lower reaches of the multi-track. Once that regime is in place, people can see how it works and consider whether to introduce a universal fixed costs regime.

The costs for personal injury cases are now fixed. In relation to non-personal injury cases, we must now move to a fixed costs regime, as previously recommended: see paragraph 2.8 above. In future years many of the current fast track cases may proceed in the Online Court (proposed by Briggs LJ in his recent report) and be subject to a completely different regime.

We now have a guide for setting fixed costs, which was not available before April 2013. That is contained in the new rules 44.3 (2) and (5). Only "proportionate" costs can be recovered, regardless of how much more it was reasonable and necessary to spend on conducting the case. In determining what costs are proportionate, one looks first at the amount of money (or the value of the property or rights) at stake. One also takes into account the other factors identified in rule 44.3 (5). Bearing that guidance in mind, I invite consideration of a grid of fixed costs along the lines set out below. In preparing this grid I have drawn on the combined experience of the costs judges. I have also taken into account what I have learnt from discussing costs issues with practitioners over the years. It should be noted that the recoverable costs

suggested below are distinctly higher than those allowed in the fixed costs regime of the IP Enterprise Court: see CPR rule 45.31. As noted in paragraph 2.9 above, that regime has proved popular with both court users and practitioners.

8. This in turn leads us to examine his now notorious grid:

5.4 The grid. In this grid band 1 is for claims where the sum in issue or the value of the property or rights claimed is between £25,000 and £50,000. This encompasses a large number of multi-track claims. Bands 2, 3 and 4 are for larger claims up to a ceiling of £250,000. The suggested figures in the grid include counsel, but exclude other disbursements, the costs of enforcing any order and VAT. The costs of claims above £250,000 can be controlled by means of costs management.

9. The grid itself is as follows:

	BAND 1 £25,000 – £50,000	**BAND 2 £50,001- £100,000**	**BAND 3 £100,001 - £175,000**	**BAND 4 £175,001 - £250,000**
Pre action	3250	5250	8750	12000
Issue/statements of case (add 25% if counterclaim)	1400	2250	3750	5750
CMC	950	1500	1500	1750
Disclosure	1875	3000	3500	5000
Witness statements (add 10% per witness approved by the court over 3)	1875	3000	5000	7500
Expert reports (add 10% per expert approved by the court over 2)	1400	2250	3750	5500
PTR	950	1500	1500	1750
Trial Preparation (add 5% per day for the 6th and subsequent days if trial fixed for more than 5 days)	1900	3000	5000	7500
Trial (add 5% per day for the 6th and subsequent days if trial lasts for more than 5 days)	3750	6000	11000	18000
Negotiations/ADR	1400	2250	3750	5500
TOTAL	18750	30000	47500	70250

TOTAL	18750	30000	47500	70250

10. In addition to the grid, he proposed rules as to how the figures within the grid, should accrue or be awarded:

Rules

1. If the claimant wins, the band is determined by the sum or the value of the property recovered. If the defendant wins, the band is determined by the sum or the value of the property claimed.

2. The fixed cost is payable only if a work stage is completed. 50% of the fixed cost is payable if proceedings have been issued and the work stage has been substantially started.

3. Add 15% if the work needs to be done in London.

4. Fixed costs will not apply in respect of any stage in respect of which the court has awarded indemnity costs.

5. The court may add a percentage uplift to fixed costs for part or all of the case, if it considers (1) that the claim involved exceptional complexity or (2) substantial additional work was caused by the conduct of the other party.

The ten stages in the above grid follow the ten stages in precedent H. Practitioners are now familiar with this structure and reasonably comfortable with it. Although 'boundary disputes' are inevitable in any structure, they will be reduced if we stick to the now established division of tasks.

One advantage of this approach is that parties would no longer have to prepare, agree and/or argue about budgets in claims up to £250,000. This will save both time and costs.

Consideration must be given to the question whether any specific categories of work (for example defamation, clinical negligence or construction disputes) require a percentage uplift on the basic figures. Such an uplift will only be appropriate if most cases in a particular category are of such complexity as to warrant additional costs

If we are moving to a fixed costs regime for the lower reaches of the multi-track, it is essential that we create a coherent structure. What we do not want to have is a series of separate grids for different types of cases. There should be single fixed costs grid for all multi-track cases up to £250,000. In so far as particular areas of work merit additional costs, the rules can provide percentage uplifts for specified types of case. I am aware that the Department of Health is proposing to introduce a scheme of fixed costs for clinical negligence claims. That would start to take us down the Balkanisation route. I suggest that a better approach would be to include clinical negligence claims in an all embracing fixed costs regime, as proposed above.

What would be a sensible way forward if we are moving to a totally fixed costs regime for all cases, however large? This is not the course which I recommend. Nevertheless it would be possible to develop a scheme based on either the New Zealand model or the German model. If we follow Germany, it is essential to make allowance for the greater burden imposed upon English practitioners than upon German practitioners, by reason of our rules of civil procedure. My own preference would be to make the recoverable costs a percentage of the sum (or value of the property/rights) in issue, but subject to a number of variable factors or adjustments. That would not be illogical, now that we have DBAs. If we go down this route the recoverable percentage would have to be on a sliding scale. Otherwise the costs recoverable on, say, a £20 billion claim would be ludicrously high.

11. Reading through these proposals and thinking about how they might be applied in practice, without even considering the adequacy or otherwise of the figures which seem to have been scribbled on the back of the proverbial "fag packet", the actual scheme as proposed is nonsensical. If implemented as proposed it would lead to satellite litigation without end. The reasons for my conclusion can be stated as follows.

12. The starting point is to note the paucity of costs which are awarded for pre-action work, and the assumption that all subsequent categories of costs, will be incurred post action. This is not the way that litigation works. Expert

reports will often be obtained pre-issue. Witness statements will be obtained pre-issue. If a case settles, it will be because of ADR/Negotiation, even if that is only an exchange of half a dozen letters leading to offer and acceptance. So the actual categories of budgeting which are refined between incurred and future costs, do not make sense when transferred to and as contemplated by the grid.

13. Secondly if fixed costs are paid for each stage, based on it being completed, presumably the full entitlement to ADR/Negotiation costs will accrue for every settled case. What on earth, however is meant by "substantially started"? How do you define and then apply that concept with ease and clarity?

14. Thirdly, consider this anomaly. If you have a single expert's report, and an offer and acceptance are made consequent to its disclosure, then you receive the full fee for this work stage. If you have a single expert's report and announce imprudently in correspondence, you intend to update it, and then an offer and acceptance are made, you receive 50% of the fee for the work stage, though, objectively no further work (and no less work) has been done.

15. Fourthly, is trial preparation complete when a trial bundle has been prepared, or when a brief to counsel is delivered, or when the parties arrive at court, or at 10.29 on the day of the hearing? Although the most obvious example of the scope for creative argument, there are other "boundary disputes" which are not going to be easy to resolve in this grid.

16. Fifthly, what is the scope for a paying party, to argue that it was premature to undertake work falling within a work stage or that work such as proofs of evidence are not "witness statements" ? There was no need to undertake witness statements for example, prior to the issue of proceedings or for familiar premature issue arguments to arise?

17. Sixthly, and perhaps more fundamentally there is a real philosophical problem with this approach. When you fix fees across an entire category of litigation in order to achieve a proportionate relationship between the legal costs, and the value of the case, what does it actually matter, how much work has been done in an individual case?

18. Conceptually, it should not matter whether a case settles after half a dozen letters or on the cusp of trial, as the cases will average each other out. What matters in this context is the overall level of remuneration and whether this is fair and practical, on a "swings and roundabouts" basis.

19. Conversely, for those cases, where it would be unfair or impractical to impose a fixed level of costs, because the nature of the case, or the level of costs needed to be spent to achieve justice you do look at what work has been reasonably and proportionately done.

20. So what he is actually proposing, is not a system of fixed fees at all, but rather is more accurately to be described as a tariff: replacing guideline hourly rates, with guideline lump sums, but awarded in an arbitrary fashion, with ample scope for satellite litigation by way of detailed assessment.

21. As costs counsel, I would give such a system three loud cheers, for the endless work it will create: as an academic commentator, I would despair and suggest that such a system would mean the worst of all possible worlds, wreaking substantial injustice in many cases, and not achieving the important overall aim of reducing transactional costs, when determining the costs.

22. In truth, I suspect there will be a greater move to fixed costs in the next few years. Not on the basis of these proposals, but because **a** broad based scheme of fixed costs which applies to all claims up to £250,000 could be

devised, and applied and has a lot to commend it in terms of facilitating access to justice. It will provide certainty.

23. It reduces the risk that the losing side to litigation will go bust, due to a huge and unknown costs liability and at a stroke, it means that the pointless and expensive costs budgeting regime can be locked away with the cutlass and the broadsword, as a relic belonging to another time.

24. It also is likely to overtake the move to J codes and digital billing: if virtually all costs are fixed, who will care when inter partes costs come to be awarded about time management and logging each and every individual letter? J codes can then be relegated to solicitor own client charging, for those who choose to adopt them, which after all, is what they were designed for.

25. Such a regime might also kick start a properly funded and worthwhile BTE industry now able to more accurately gauge and quantify its exposure to adverse costs, with reasonable premiums and also provide stabilisation of the ATE industry.

26. It also, represents the reinvention of the way litigation used to be funded: devotees of the nineteenth century practice of costs, will be well aware that most costs were fixed by scales, and event those who practised at the end of the twentieth century will recall with fondness the scale costs that applied then.

27. The only reason, that I could discern why scale costs were not carried forward into fixed costs under the Woolf reforms in 1999, was because the rules were rushed into force whilst half written, leading to endless updates as the vestigial remnants of the County Court Rules and Rules of the Supreme Court were gradually cleared away.

28. The biggest concern that the introduction of fixed costs will have, is one that affects the workload and the remuneration of the lawyers. Fixed costs in Germany, undoubtedly affect the structure of the legal profession: most firms there are small, engaged with a very different court process than the one we have in England and Wales, and have the benefit of a very stable BTE insurance industry.

29. I cannot see how a significant proportion of the legal profession, which currently makes a living from disputes over costs and their quantification can continue in their current employment, or rather continue doing what they do now.

30. I also suspect that in absolute terms, it will lead to lower costs awards across the board, and a likely decrease in remuneration in traditional areas of work, although much will turn obviously, at what levels fixed costs will be set at.

31. However, equally, I think that areas of work which are currently in desuetude, due to LASPO 2012, might flare into life again: I have in mind particularly disability discrimination claims and environmental claims.

32. Moreover, fixed costs are more generally likely to cause cases to fight and go to trial, as defendants know that the downside to defending a case tooth and nail will be limited.

33. So the upshot of fixed costs could be more litigation rather than less: in which case, the solution for those lawyers who practise exclusively in costs, is perhaps to engage with what could be optimistically described as a process of "creative destruction" and start to think about the opportunities that this will create, and start planning for them now.

34. I would draw a parallel with industrial change. It is now more than 30 years since the miners strike of 1984-1985: the mining industry has effectively gone. Many of those miners, who lost their jobs in the decade after the strike, never worked again.

35. But the demand for energy and the need for an energy industry has never been greater: the key is to ensure early recognition and adaptation to the way the legal services industry is going to change over the next few years to avoid the miners' fate.

Digital billing

36. One of the proposals within the Jackson Report, which should have been relatively non-contentious, was the move to digital bills of costs as a seamless bolt on to time recording. We all live out lives in the shadow or dread of emails, and use computers as an essential tool of our practice.

37. Yet bills are still largely "drawn by hand" using a precedent Bill of Costs, that would not look out of place in the Victorian courts. Such a practice provides a useful source of income, for the increasingly endangered species of the costs draftsman.

38. Of course, once time recording and billing are conflated, so that in theory at least, a solicitor presses a key on his computer, and turns his time recording into a bill of costs, what role for the costs draftsman? Or rather what role can he find in such a brave new world? The ALCD has of course evolved into the ACL, and this body, not without qualms, recognises the need for innovation and for some years, has been embarked upon a quest to add value to the litigation process.

39. The Jackson Report noted as follows:

106 A new format of bills of costs should be devised, which will be more informative and capable of yielding information at different levels of generality.

107 Software should be developed which will (a) be used for time recording and capturing relevant information and (b) automatically generate schedules for summary assessment or bills for detailed assessment as and when required. The long term aim must be to harmonise the procedures and systems which will be used for costs budgeting, costs management, summary assessment and detailed assessment.

40. The ACL has accordingly done a great deal of work, to make digital billing a reality. Anyone who wishes to read a detailed account of that work and the significance of J codes (of which more, oh so much more) is invited to look here: http://www.associationofcostslawyers.co.uk/wordpress/wp-content/uploads/2015/03/Jackson-Review-UTBMS-LitCode-Revision-EW-UTBMS-J-Code-Documentation-...1.pdf

41. Excerpting that document which dates from 2014, the following can be noted:

Lord Justice Jackson saw increased use of technology as a vital means of achieving these aims. Accordingly it is essential that any new format is capable of being produced and analysed electronically. At the same time it is recognised that the production and assessment of bills on paper will continue for some years.

42. The report correctly notes the importance of time recording:

If the advantages of the electronic production of bills are to be maximised it is important that a fee-earner's time entries should form the basis not only of a solicitor's bill to the client but also of any bill to be presented for assessment by the courts (subject to any adjustment required to comply with approved budgets and/or costs orders). Otherwise, as at present, every entry in a bill for assessment is simply a manual repetition of something that has already been

input electronically in the firm's time recording system. If this duplication of effort is to be avoided, the same underlying codes have to be used by the firm's practice management or time recording system as are used in the preparation of bills for assessment. Since bills for assessment will all have to be presented in the same format, it is essential to develop a common set of codes which can be used to record entries in the time-recording system and from which both solicitor and client bills and bills for assessment can be generated.

43. Now the problem: instead of devising something new and beautiful, with elegant simplicity and suited to the system of litigation we have in England and Wales, the development of digital billing has been beguiled by the prospect of drawing on American concepts, to get an "off the shelf solution":

Similar sets of codes have already been developed in the United States, though with a rather different purpose there. They have been developed there to provide a common language for e-billing, under which both the law firm and the client have systems using a common code set for respectively the delivery and analysis of bills. There are several such code sets, for use in different areas of practice, but they all go under the name UTBMS. Their development and use is now supervised by the LEDES Oversight Committee (the "LOC"), a body with membership from a number of jurisdictions but particularly the US.

44. Note that this was a decision made as long ago as 2011:

In response to the requirement of the Jackson Review to develop a new format for bills of costs for detailed assessment capable of taking advantage of new technology, the Association of Law Costs Draftsmen (now known as the Association of Costs Lawyers), established a working group of costs professionals, whose first report entitled "Modernising Bills of Costs" was produced in October 2011. The ACL's report recommended that the possibility of adapting LOC UTBMS standard time recording codes for litigation in this jurisdiction should be investigated (paragraph 76). The ACL report can be seen by using the link given below:
http://www.costslawyer.co.uk/sites/default/files/11.10.11%20Report.pdf

45. Of course the chief architects have now moved on:

Following publication of the ACL's report, Senior Costs Judge Master Hurst, asked Jeremy Morgan QC to initiate and chair a working group to move forward with the recommendations from the ACL report. Accordingly, a working group was set-up titled the 'Jackson Review EW-UTBMS Development Steering Committee' that consisted of Costs professionals and industry experts.

It was decided by the Steering Committee that UTBMS style codes could be utilised, but only if substantial adaptations were made in order to reflect the actual stages of the judicial process in England and Wales, and also map to the new precedent-H budget codes. Therefore the objectives of the Steering Committee became thus:

• Development of a new set of UTBMS style time recording codes for litigation cases in England and Wales, so that these could be recorded by law-firms and analysed by the courts.

• Designing a new format for bills of costs for detailed assessment which would set out the work done by reference to phases, tasks and activities.

46. These are the J codes:

The new EW-UTBMS litigation code-set for use in England and Wales (EW) has been developed by the Jackson Steering Committee – this has been done using a UTBMS framework and with guidance from the LEDES Oversight Committee in the UK (LOC-UK). It is anticipated the codes will be used in the following costs related stages of a case:

- The preparation of bills for detailed assessment at the end of the case.

- The preparation of bills for summary assessment either in the course of or at the end of a case.

- The preparation of costs budgets, which are the cornerstone of the Jackson Costs Management proposals.

- The comparison of bills with budgets.

- Recording time for the purposes of solicitor/client billing.

All these proposals concern only costs claims against unsuccessful opponents/Other Parties rather than bills from solicitors to their own clients. However the need for these to be synchronised has been explained above.

47. The work is at an advanced stage:

If the working group's proposals are agreed costs summarised to EW-UTBMS J-code-set standards will form an integral part of the new bill of costs and will be used by the judge to assess the costs.

The J-codes have (with specified exceptions) been formulated by reference to Precedent H and their application is for present purposes limited to cases in which Precedent H is used. After piloting they can be extended to apply to all civil litigation and to include particular categories of work not identified in Precedent H, for example family cases.

The overarching benefit of the EW-UTBMS Civil litigation code-set will be to assist solicitors in providing the courts and other parties with information about the legal costs which they are claiming which will enable the courts and other parties to analyse those costs at different levels of detail, and compare actual costs to budgeted costs.

In the wider context, the purpose of the new EW-UTBMS code-set is listed below:

- To enable courts and other parties to easily perform analysis of costs and legal fees at different levels using the same set of data, including the comparison of actual costs to budgeted costs.

- To provide a conformity in costs breakdowns across the court system by providing a common set of 'Budgeting and Time Recording codes' and thus also enable consistency in costs breakdowns across the courts.

- To enable data in the form of Time Entries (including Task and Activity codes) to be entered just once into a solicitor's system, and from that it should be

possible to produce cost reports and bills at different levels of detail for different purposes.

- To be intuitive enough for all organisations to easily adopt.

- To be compatible with existing time recording systems in terms of length and format.

- To enable and assist in the analysis of costs during the process of inter-parties cost recovery.

48. So far so good. It all sounds very sensible. Of course, the problem with time recording is well known, it tends not to fit with how human beings actually work. Hence the crude "6 minute unit". The continued use of estimated time. The fact that many solicitors do their time sheets on a Friday afternoon, after a long lunch in the pub.

49. And more prosaically, the use of claims management software, where standardised letters, precedents and tasks are allocated a standard time, so that when cases are assessed together from one firm, a delicious synchronicity between the files becomes readily apparent. Moreover, the J codes are so numerous, and prolix, that the actual uniform application of them, across the profession as a whole, could lead to a wide diversity of labelling, to the constituent parts of a bill.

50. It was reported in January 2016 however, that the move to a digital bill of costs had been shelved, as noted in the minutes of a meeting of the Civil Procedure Rules Committee. The Committee considered both the results of the consultation on the proposals which took place in the summer of 2015 and a letter from the Law Society. The Committee acknowledged that the proposal went beyond a pilot and had major implications for the profession.

51. The Committee "agreed that the matter needed to be given careful further consideration by the Ministry of Justice and by the committee and that it was too soon for any decision to be taken".

52. The Hutton report had called for the new Bill of Costs to be introduced from a certain date namely October 2016, so as to force the legal profession to embrace the white heat of the technological revolution. But quite frankly few solicitors had yet invested in an expensive package of case management software which used J-Codes. "That is, judging by the feedback received, largely because of uncertainty about the new bill's implementation and any future changes."

53. There was particular concern that, if the compulsory pilot applied to budgeted cases in which final orders for costs were made from a certain date, many cases caught by this would have been running for a number of years without the use of J-Codes.

54. Applying them retrospectively would be a very sizeable task, the committee was told, with one consultee saying that a feasibility study suggested that doing this would increase bill preparation time by more than 200%.

"Similar doubts have been expressed about the ability of Costs Lawyers to reinterpret accurately, into J-Code format, time previously recorded by others."

55. The minutes said that while Sir Rupert Jackson accepted that the introduction of automated bill production would in the short term entail unavoidable cost to the profession, *"he is unlikely to have contemplated a temporary increase in the cost of bill preparation by as much as 200%".*

56. Finally: *"The move from paper to electronic assessment is obviously a huge change. It will require from practitioners substantial investment in new infrastructure (for some, although it is clear that many have the infrastructure already) and working methods. Many have not yet made that substantial investment because they have been uncertain about the implementation of the Bill of Costs. At the same time, many of the concerns now raised about implementation arise from the very fact that practitioners have not yet made that investment.*

57. The minutes concluded: *"If this vicious circle is to be broken, practitioners need to know that the new Bill of Costs will be introduced. For that reason, we have concluded that it is not in fact possible to 'pilot' the Bill of Costs in any real sense. Practitioners cannot be expected to make the necessary investment if there is any likelihood of the Bill of Costs being abandoned. The question then is how to time the introduction of the BoC so as to eliminate, or at least minimise, the very substantial transitional costs that will otherwise fall on practitioners and their clients."*

58. Of course, if fixed costs do come in on cases up to £250,000 in some shape or form, the impetus to force the legal profession to start digitally recording time will receive a heavy, possibly fatal blow.

Assignment

59. One of the issues that is currently under the spotlight, is whether a conditional fee agreement can effectively be assigned between solicitors firms. Both the case of **Jones v Spire Health Care** (District Judge Jenkinson) and the case of **Budana v Leeds Teaching Hospitals NHS Trust** (District Judge Besford) are currently grinding their way through the appeals process.

60. The issue of assignment might arise, in the context of a firm selling its work, becoming insolvent, and the work being sold off by a liquidator to

another firm, or more mundanely a solicitor simply moving firms and taking the client with them. In such circumstances, for a number of years, the practice has been to "assign" the CFA made between a personal injury client and the first firm, to the second firm. The issue now, is whether as a matter of law, such an assignment is possible.

61. The point matters, because to be able to transfer a pre-1st April conditional fee agreement, and retain the recoverable success fee within that agreement, could be far more profitable, than having to make a new conditional fee agreement, with the new firm of solicitors. Conversely, for a paying party, being able to limit the duration of the original conditional fee agreement, would generate an opposing financial benefit.

62. It is best to start from first principles. The starting point is to note that a contract between a solicitor's firm and its client, might fall within that category of contracts apt to be described as personal contracts. It is a contract for the solicitor's firm to provide a service personally to the claimant. It is fundamentally different from a contract for the purchase of pork bellies or orange juice.

63. **Chitty on Contracts 32nd** edition provides an overview of this area of law at paragraphs 19-054 to 19-055, and a number of decisions of high authority confirm that a personal contract is not capable of assignment: see in particular **Griffith.v.Tower Publishing Company [1897] 1 Ch 21**, **Nokes.v.Doncaster Amalgamated Collieries Ltd [1940] AC 1014** and more recently the restatement of principle noted in **Crane Co.v.Wittenborg AS (Court of Appeal 21st December 1999)**.

64. If however, such a contract is capable of being assigned, then matters do not end there. Every contract contains what might be called benefits and burdens. Assignment, can the transfer of the benefit of an existing contract.

but the general principle is that the burden of a contract is not capable of assignment, as burdens should not be imposed without consent. That is subject to a limited number of exceptions.

65. Where both parties to the existing contract and a new party agree that the new party should take over the benefits and burdens of a contract, that is not an assignment at all. Instead a novation has occurred. It is the rescission of the old contract and its replacement with a new one, on the same terms as the former contract, but with different parties.

66. The principles of novation are of long standing: see **Southway Group Ltd.v.Wolff and Wolff [1991] CLR 33** Bingham LJ at paragraphs 52-53 and **Chitty on Contracts (32nd edition**) at paragraphs 19-086 to 19-088.

67. In a true case of assignment, there is a limited exception where a burden can be transferred, the "conditional benefit" cases. This principle is often misunderstood: it provides that a burden can be transferred, where the requirements set out in the **Davies.v.Jones [2009] EWCA Civ 1164** case are satisfied: see the Vice Chancellor's summary of principle at paragraph 27.

68. This formulation of principle is in turn derived from a chain of authority which disapproved a related principle devised in **Tito.v.Waddell (No2) [1977] Ch 106** the "pure principle of benefit and burden" including **Rhone.v.Stephens [1994] 2 AC 310**, and **Thamesmead Town Limited.v.Allotey [1998] EG 161**.

69. The key to understanding the distinction, is that it is not enough that the benefit is provided in exchange for the burden being performed: that is true of every contract, whether it be for the fee paid for solicitors services, or price paid for the purchase of pork bellies.

70. Rather the receipt or enjoyment of the benefit must be relevant to the imposition of the burden, in the sense of being conditional or on reciprocal to the latter: in essence the narrow exception of "conditional benefit" is concerned with ensuring that qualifications on a benefit are transferred too.

71. Receiving parties however, start with the high ground in the arguments, namely the decision of Rafferty J in the case of **Jenkins.v.Young Bros Transport Limited [2006] 1 WLR 3189**. This is a decision of a High Court judge it is binding in the county court. The question then however, is what is its ratio decidendi that is binding?

72. The judgment does not purport to lay down a sweeping statement of principle that conditional fee agreements are assignable. It is limited to the peculiar facts of the case: see paragraph 31 of the judgment. The width of the ratio could be stated to be relatively narrow.

73. I also think that it is fair to say that the arguments for the receiving parties, do not begin and end with **Jenkins**; there are other points that could be made, when undertaking an analysis of these doctrines.

74. Analysing the consequences of a non-effective assignment were this to be found at a hearing, I think the court would go on to find that any new firm acting for the receiving party would have made a new contract of retainer: I think the law would readily imply a contract of retainer, but this would be a novation.

75. On the basis that a novation took place, and all other things being equal, the terms and conditions of the retainer would be apt, to be those in the original conditional fee agreement.

76. But such an agreement made post 1st April 2013, must comply with the formality requirements of section 58(4)(d) of the Courts and Legal Services Act 1990 and articles 4 and 5 of the Conditional Fee Agreements Order 2013: including containing the statutory cap on the success fee. If it does not, the conditional fee agreement is unenforceable and no costs will be recoverable under it.

77. In such circumstances, although it may be argued that a deed of variation or a deed of rectification or the doctrine of severability can be used to remove the success fee or otherwise cure any non compliance with the statutory requirements those arguments are unlikely to succeed for reasons of public policy, as the acceptance of the arguments would run counter to the statutory scheme regulating conditional fee agreements.

78. A further argument, that is unlikely to have any success, is the notion that a client can be taken to have "waived" the statutory rights to consumer protection by pursuing a claim for costs based on an unenforceable conditional fee agreement.

79. It is accordingly conceptually odd, that it can be contended as some commentators would, that it is consistent with public policy that a "back up" conditional fee agreement can be used to anticipate and circumvent in advance, an assignment failing and a conditional fee agreement being found to be unenforceable.

80. Such an agreement is really no more nor less, than a client agreeing to waive their rights if the original conditional fee agreement is found unenforceable and agreeing to be bound by a new one. Or analogous to an anticipatory severance clause, often found in commercial contracts.

81. It sits uneasily with the goal of consumer protection, that the client's contractual position vis a vis his solicitor, hinges upon whether a third party raises a challenge to the enforceability of the conditional fee agreement on detailed assessment.

82. Why would public policy permit such an outcome, when rectification, variation, severance and probably waiver would not be allowed? Indeed the argument that such a second, inchoate conditional fee agreement will have such an effect depends upon a further, single High Court authority, where the key arguments of public policy do not seem to have been squarely addressed by the High Court judge.

83. If this authority proves readily distinguishable, as it may, then the so called "back up" conditional fee agreement, may prove to be no comfort at all. This latter issue will undoubtedly be litigated, I suspect in the next few months. Another issue which no doubt will fall to be argued about in the context of claims for costs, are the cases where a firm of solicitors effectively passes on a client to a new firm of solicitors, who are said to act as agent to the first firm's principal.

84. In fact, the first firm then fade out of the litigation, as the relationship is simply meant to permit continuation of a conditional fee agreement without the need to make a new retainer: the so called "agent" is to all intents and purposes running the show. The questions that this relationship raises, are interesting ones but probably deserve their own paper.

85. This is an issue that will run, at least the length of 2016 and possibly into 2017 too.

Alternative Dispute Resolution and costs

86. Should parties to a costs dispute engage in formal attempts to settle a case such as mediation, arbitration, early neutral evaluation or a joint settlement meeting? A slew of recent cases, suggest that costs penalties will be imposed if they do not.

87. Alternative Dispute Resolution (ADR) is an alternative to litigation. Seen twenty years ago, as touchy-feely nonsense, "being nice" to the "being nasty" of litigation, the last twenty years have seen it increase dramatically in importance.

88. ADR is now very much in vogue, as an alternative to using the crumbling civil courts with their extortionate fees. But the impetus to use ADR is not solely generated by the desires of the potential parties to expensive litigation to reach a compromise, but is now increasingly pushed onto the parties by the courts themselves keen to reduce pressure on their scarce resources.

89. The principal mechanisms for doing so, are encouragement and the potential threat of a costs penalty, if that encouragement is ignored. It is therefore a matter of some interest, to consider the criteria the court will look at when considering whether it is appropriate for the court to impose a costs penalty on a party, who has otherwise won their case, due to their failure to negotiate or use in particular a form of alternative dispute resolution: this can be mediation, but commonly in the context of personal injury claims is a joint settlement meeting.

90. The starting point for consideration of the law on this topic is the case of **Dunnett.v.Railtrack (Practice Note) [2001] 1 WLR 2434** where the Court of Appeal gave some guidance as to the potential for costs consequences to be applied to parties who refuse to mediate.

"Skilled mediators are now able to achieve results satisfactory to both parties in many cases which are quite beyond the power of lawyers and courts to achieve. This court has knowledge of cases where intense feelings have arisen, for instance in relation to clinical negligence claims. But when the parties are brought together on neutral soil with a skilled mediator to help them resolve their differences, it may very well be that the mediator is able to achieve a result by which the parties shake hands at the end and feel that they have gone away having settled the dispute on terms with which they are happy to live. A mediator may be able to provide solutions which are beyond the powers of the court to provide."

91. Some years later the issue came before the Court of Appeal again in the case of **Halsey.v.Milton Keynes General NHS Trust [2004] 1 WLR 3002**, which is perhaps still the leading authority on this issue. In that case the Court of Appeal established the following principles in paragraph 16 of its judgment:

The question whether a party has acted unreasonably in refusing ADR must be determined having regard to all the circumstances of the particular case. We accept the submission of the Law Society that factors which may be relevant to the question whether a party has unreasonably refused ADR will include (but are not limited to) the following: (a) the nature of the dispute; (b) the merits of the case; (c) the extent to which other settlement methods have been attempted; (d) whether the costs of the ADR would be disproportionately high; (e) whether any delay in setting up and attending the ADR would have been prejudicial; and (f) whether the ADR had a reasonable prospect of success. We shall consider these in turn. We wish to emphasise that in many cases no single factor will be decisive, and that these factors should not be regarded as an exhaustive check-list.

92. Some of these factors are relatively straightforward in their application, others deserve a little deeper reading into the judgment, to see what the Court of Appeal had in mind and how these factors were to be applied in context. Dealing with the (b) merits of the case, the court noted at paragraph 18:

The fact that a party reasonably believes that he has a strong case is relevant to the question whether he has acted reasonably in refusing ADR . If the position were otherwise, there would be considerable scope for a claimant to use the threat of costs sanctions to extract a settlement from the defendant even where the claim is without merit. Courts should be particularly astute to this danger. Large organisations, especially public bodies, are vulnerable to pressure from claimants who, having weak cases, invite mediation as a tactical ploy. They calculate that such a defendant may at least make a nuisance-value offer to buy off the cost of a mediation and the risk of being penalised in costs for refusing a mediation even if ultimately successful.

93. Turning to factor (c) and the use of other methods of negotiation, the court noted at paragraph 20:

The fact that settlement offers have already been made, but rejected, is a relevant factor. It may show that one party is making efforts to settle, and that the other party has unrealistic views of the merits of the case. But it is also right to point out that mediation often succeeds where previous attempts to settle have failed. Although the fact that settlement offers have already been made is potentially relevant to the question whether a refusal to mediate is unreasonable, on analysis it is in truth no more than an aspect of factor (f).

94. Turning to consider (d), I note that the factor of delay is considered in this way:-

If mediation is suggested late in the day, acceptance of it may have the effect of delaying the trial of the action. This is a factor which it may be relevant to take into account in deciding whether a refusal to agree to ADR was unreasonable.

95. But perhaps the most important factor in the court's reasoning and certainly the one they devoted the most time to discussing in the judgment, was the prospect of the mediation succeeding.

23 In Hurst v Leeming [2003] 1 Lloyd's Rep 379 , Lightman J said that he considered that the "critical factor" in that case was whether "objectively viewed" a mediation had any real prospect of success. He continued, at p 381: "If mediation can have no real prospect of success, a party may, with impunity, refuse to proceed to mediation on this ground. But refusal is a high risk course to take, for if the court finds that there was a real prospect, the party refusing to proceed to mediation may, as I have said, be severely penalized. Further, the hurdle in the way of a party refusing to proceed to mediation on this ground is high, for in making this objective assessment of the prospects of mediation, the starting point must surely be the fact that the mediation process itself can and often does bring about a more sensible and more conciliatory attitude on the part of the parties than might otherwise be expected to prevail before the mediation, and may produce a recognition of the strengths and weaknesses by each party of his own case and of that of his opponent, and a willingness to accept the give and take essential to a successful mediation. What appears to be incapable of mediation before the mediation process begins often proves capable of satisfactory resolution later."

24 Consistently with the view expressed in this passage, Lightman J said that on the facts of that case he was persuaded that "quite exceptionally" the successful party was justified in taking the view that mediation was not appropriate because it had no realistic prospects of success.

25 In our view, the question whether the mediation had a reasonable prospect of success will often be relevant to the reasonableness of A's refusal to accept B's invitation to agree to it. But it is not necessarily determinative of the fundamental question, which is whether the successful party acted unreasonably in refusing to agree to mediation. This can be illustrated by a consideration of two cases. In a situation where B has adopted a position of intransigence, A may reasonably take the view that a mediation has no reasonable prospect of success because B is most unlikely to accept a reasonable compromise. That would be a proper basis for concluding that a

mediation would have no reasonable prospect of success, and that for this reason A's refusal to mediate was reasonable.

26 On the other hand, if A has been unreasonably obdurate, the court might well decide, on that account, that a mediation would have had no reasonable prospect of success. But obviously this would not be a proper reason for concluding that A's refusal to mediate was reasonable. A successful party cannot rely on his own unreasonableness in such circumstances. We do not, therefore, accept that, as suggested by Lightman J, it is appropriate for the court to confine itself to a consideration of whether, viewed objectively, a mediation would have had a reasonable prospect of success. That is an unduly narrow approach: it focuses on the nature of the dispute, and leaves out of account the parties' willingness to compromise and the reasonableness of their attitudes.

27 Nor should it be overlooked that the potential success of a mediation may not only depend on the willingness of the parties to compromise. Some disputes are inherently more intractable than others. Some mediators are more skilled than others. It may therefore sometimes be difficult for the court to decide whether the mediation would have had a reasonable prospect of success.

28 The burden should not be on the refusing party to satisfy the court that mediation had no reasonable prospect of success. As we have already stated, the fundamental question is whether it has been shown by the unsuccessful party that the successful party unreasonably refused to agree to mediation. The question whether there was a reasonable prospect that a mediation would have been successful is but one of a number of potentially relevant factors which may need to be considered in determining the answer to that fundamental question. Since the burden of proving an unreasonable refusal is on the unsuccessful party, we see no reason why the burden of proof should lie on the successful party to show that mediation did not have any reasonable prospect of success. In most cases it would not be possible for the successful

party to prove that a mediation had no reasonable prospect of success. In our judgment, it would not be right to stigmatise as unreasonable a refusal by the successful party to agree to a mediation unless he showed that a mediation had no reasonable prospect of success. That would be to tip the scales too heavily against the right of a successful party to refuse a mediation and insist on an adjudication of the dispute by the court. It seems to us that a fairer balance is struck if the burden is placed on the unsuccessful party to show that there was a reasonable prospect that mediation would have been successful. This is not an unduly onerous burden to discharge: he does not have to prove that a mediation would in fact have succeeded. It is significantly easier for the unsuccessful party to prove that there was a reasonable prospect that a mediation would have succeeded than for the successful party to prove the contrary.

96. Most recently, the issue was the subject of a very interesting decision in the Court of Appeal, that of **PGF II SA v OMFS Co 1 Ltd [2014] 1 WLR 1386** where the Court of Appeal stated the issue before it, was as follows:-

This appeal raises, for the first time as a matter of principle, the following question: what should be the response of the court to a party which, when invited by its opponent to take part in a process of alternative dispute resolution ("ADR"), simply declines to respond to the invitation in any way? An unreasonable refusal to participate in ADR has, since 2004, been identified by this court as a form of unreasonable conduct of litigation to which the court may properly respond by imposing costs sanctions: see Halsey v Milton Keynes General NHS Trust [2004] 1WLR 3002. After a general review of the progress of ADR, and mediation in particular, with the assistance of intervention by the Law Society and several bodies engaged in the development of ADR, this court laid down non-exclusive guidelines for deciding whether, in particular cases, a refusal to participate in ADR could be shown to be unreasonable. Those guidelines have stood the test of time, and the crucible of application in subsequent reported cases. A common feature of most of them, including the two cases reviewed in the Halsey case itself, was that the refusing party had communicated its refusal to the inviting party, with succinct reasons fordoing so.

97. It is worth noting that in that case a serious proposal for mediation had been made:

…By a separate letter the claimant invited the defendant to take part in an early mediation. The letter assumed that the defendant would wish to review the claimant's disclosure, and that a meeting and exchange of information might usefully take place between experts, before a mediation commenced. The claimant offered to send the defendant its Section 18 valuation. Numerous specific dates in May and June 2011 were proposed and additions were made to a previously notified list of suggested mediators. The letter concluded by seeking the defendant's agreement to mediate, and an explanation for any refusal. It sought confirmation as to documents and information which the defendant might wish to see before mediation, an exchange of dates and the defendant's list of proposed mediators. It was, overall, a thorough, carefully thought through and apparently sensible mediation proposal, taking full account of the likelihood that the defendant, which had not been in occupation of any part of the Building for several years, would wish to obtain further information before taking part.

98. In the event, the Court extended the Halsey guidelines as follows:

In my judgment, the time has now come for this court firmly to endorse the advice given in Chapter 11.56 of the ADR Handbook, that silence in the face of an invitation to participate in ADR is, as a general rule, of itself unreasonable, regardless whether an outright refusal, or a refusal to engage in the type of ADR requested, or to do so at the time requested, might have been justified by the identification of reasonable grounds. I put this forward as a general rather than invariable rule because it is possible that there may be rare cases where ADR is so obviously inappropriate that to characterise silence as unreasonable would be pure formalism. There may also be cases where the failure to respond at all was a result of some mistake in the office, leading to a failure to appreciate that the invitation had been made, but in such cases the onus would lie squarely on the recipient of the invitation to make that explanation good.

There are in my view sound practical and policy reasons for this modest extension to the principles and guidelines set out in the Halsey case, which concerned reasoned refusals, provided in prompt response to the request to participate in ADR. The first is that an investigation of alleged reasons for refusal advanced for the first time, possibly months or even years later, at the costs hearing, where none were given at the time of the invitation, poses forensic difficulties for the court and the inviting party including, in particular, the question whether the belatedly advanced reasons are genuine at all. The manner in which this issue was debated both before the judge and on this appeal is illustrative of those difficulties.

99. Since the **PGF** case was handed down by the Court of Appeal I have argued this point successfully once in the High Court, for a paying party, where at the start of a judicial review claim a roundtable meeting was offered by the claimant in correspondence to ventilate all issues and explore options for settlement: at the time of the hearing 12 months later, that offer had never been responded to, and so the successful party was only awarded 75% of its costs, despite winning on every issue in the substantive claim at a hearing.

100. So this point can and is making a difference to awards of costs, including as the recent cases indicate in the clinical negligence context, but the principles noted in the case law above, are not applied in a vacuum: each case will turn on its own facts.

101. What is crucial is to lay the groundwork early with a detailed and reasonable offer of ADR in whatever mode is thought appropriate, with proposals, an agenda, dates for the ADR to take place, the identity of potential mediators if appropriate and to force the recipient to explain why they think ADR is not appropriate, if that is indeed their position.

102. The **Halsey** guidelines should be clearly expressed and referred to, forcing any response to deal with the proposal in a structured way. If they do not do so, then an argument on costs will have a greater chance of success.

ANDREW HOGAN

24, The Ropewalk,

Nottingham,

NG1 5EF

4th March 2016