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Modern Litigation Trends: some thoughts from the recent CLAN event in Bristol

by Practical Law Dispute Resolution

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RESOURCE INFORMATION

RESOURCE ID

W-014-4060

LAW STATED DATE

25 April 2018

RESOURCE TYPE

Legal update

JURISDICTION

England and Wales

Speedread

On Thursday 12 April 2018, the Commercial Litigation Association (CLAN) held a "Modern Litigation Trends" event in Bristol, chaired by Stephen Dilley of Womble Bond Dickinson, who hosted the event.

The speakers were:

- Lucy Baldwin of Paragon Cost Solutions.
- Nicholas Pointon of St John's Chambers.
- Fred Brown of Grant Thornton UK LLP.
- Mark Beaumont of Annecto Legal Ltd.
- Professor Dominic Regan (who gave the keynote address).
- Nicholas Shapland of Affiniti Finance.
- Steve Din of Doorway Capital.

Beverley Barton, Senior Editor, Practical Law Dispute Resolution, was delighted to have the opportunity to attend and to participate in the panel discussion.

Sitting back and taking stock of the event, what is really striking is how, five years on from implementation of the Jackson reforms (how time flies!), costs and funding issues are still very much to the fore.

Costs concerns are a key driver for the ongoing procedural reforms (which show no sign of slowing down any time soon), although Lord Justice Jackson has now retired and it looks as if more than one judge will be taking on his mantle. Costs and funding solutions also continue to develop apace, as the third party funding market "matures" and the approach to ATE insurance and conditional fee agreements is re-positioned following the abolition of recoverability.

Costs are not the only current talking point for litigators, however.

To capture a flavour of the day, Beverley has highlighted just a few of the key messages from each of the presentations.

Costs budgeting and the new bill of costs

Lucy Baldwin kicked things off with consideration of some interesting recent developments on the costs budgeting front. Items of interest include:

- **The courts' approach to incurred costs:** Since 6 April 2017, the CPR has explicitly stated that the court can only manage costs to be incurred (that is, future costs) (although comments on already incurred costs can be taken into account in any subsequent assessment proceedings). Lucy identified a few cases of interest on this topic, including the decisions in *Harrison v University Hospitals Coventry and Warwickshire NHS Trust [2017] EWCA Civ 792* and *Richard v The BBC and another [2017] EWHC 1666 (Ch)*. Lucy highlighted the benefits of agreeing costs with the other side, and suggested that, where possible, practitioners should avoid concerns about the level of already incurred costs from preventing such agreement. The level of certainty that provides is very valuable.
- **The need to closely monitor costs against budget:** Costs budgeting isn't something to be done and then forgotten. It is an ongoing discipline. Clients will want to know about any differences between the budget and what costs have actually been incurred.

Careful monitoring of each phase of costs is required (including profit costs and net disbursements).

- **Amending budgets:** If there are "significant developments" after a costs management order has been made, which will increase costs, ensure that the costs budget is revised as soon as possible. Ideally, this should be done before the additional costs have been incurred but, in any event, as soon as possible. Disbursements and counsel's fees should be included. There must have been a significant development in the litigation that was reasonably not considered in the first budget. There is currently no authoritative list of what "qualifies" (and probably never will be!) but possible examples include new experts or witnesses, amended pleadings, or an extended trial. Lucy emphasised the need for care, referring to one case where there had been a very brief mention of a possible need for psychiatric evidence, which was not budgeted for. When that evidence proved to be necessary, because the possibility had previously been flagged up (albeit briefly) it was held that there were not good grounds for increasing the budget (as this was not a new development). *Sharp v Blank and others [2017] EWHC 3390 (Ch)* also provides guidance on what constitutes a "significant development".
- **Hourly rates:** Lucy highlighted a couple of decisions where hourly rates were criticised on detailed assessment, giving rise to the interesting dichotomy of whether this could impact on the approved budget: *RNB v London Borough of Newham [2017] EWHC B15 (Costs)* and *Nash v Ministry of Defence [2018] EWHC B4 (Costs)*.

Lucy then provided some very timely guidance regarding the new bill of costs, which is mandatory in Part 7 multi-track claims in respect of costs recoverable between the parties for work undertaken after 6 April 2018, except where (i) fixed or scale costs apply (ii) the receiving party is unrepresented or (iii) where the court otherwise orders (*PD 47.5.1(a) and (b)*). She was pretty positive about the changes and, as a word of encouragement, added that the final list of J-Codes is much simpler than it was originally.

She was only aware of one client who had actually "pressed the button" already, so this is definitely a space to watch, and no doubt further useful practice tips will emerge.

Straight from the horse's mouth: counsel's top tips on instructing counsel effectively

Nicholas Pointon of St John's Chambers then outlined some "dos" and "don'ts" when instructing counsel. He said that he felt mindful of the risk of sounding "whining" or of trying to elicit more, and earlier, instructions, so it was brave of him to come and enlighten the other side of the profession!

A few top tips included:

- Do try to develop a good working relationship with counsel. For example, feel free to pick up the phone to them. Don't do everything by email.
- Introduce the client to counsel. Work as a team.
- Keep counsel updated of developments: it can be frustrating to be left on the periphery not knowing what is happening. Keeping counsel informed can be more efficient as it reduces the reading in that might be necessary at short notice otherwise.
- Clients often run "beauty parades" when selecting law firms. There is no reason why the same can't be done with counsel. Feel free to ask clerks for recommendations, to chat with prospective counsel, and to discuss funding issues at an early stage.
- Involving counsel early can pay dividends. A collaborative approach (with counsel and solicitors talking through different scenarios) can be effective, even when it comes to drafting pleadings: two heads can be better than one. Solicitors need to be closely involved in finalising the pleadings, and can play a significant role in teasing out the issues. Working in this way can be cost-effective (as it minimises the need for amendment later).
- Nicholas noted that instructions to counsel can seem very old-fashioned and arcane, with everything written in the third person. He made a plea for solicitors to:
  - say what they think about the case/specify any particular concerns;
  - make it very clear if something is urgent (and tell the clerk too); and
  - mention any holiday plans: counsel will not be best pleased to burn the midnight oil on an advice only to find that you are away from the office!
- Nicholas observed that, perhaps oddly, counsel sometimes don't have much involvement with witness evidence. He suggested that they are well-placed to "mitigate cross-examination fodder". He also emphasised the need to share the other side's witness evidence as soon as possible, in case it gives rise to a need for interim applications. He gave the example of one case where it had been agreed that there would be a split trial (liability then quantum), but the other side served evidence on quantum and said that they had changed their minds about having a split trial! Counsel needed to know.
- Remember that counsel can have a role to play post-trial (and not just at the celebratory drinks!): for example, if it is necessary to consider an appeal, or in the context of enforcement and costs recovery.

Ensuring that your expert's evidence will withstand (increasing) court scrutiny

Fred Brown of Grant Thornton spoke about the role of the expert witness and, by reference to relevant case law, provided some cautionary examples of pitfalls that can arise in the context of expert evidence, including:

- *Van Oord Ltd and another v Allseas UK Ltd [2015] EWHC 3074 (TCC)* is a paradigm example of how not to comply with CPR 35. Coulson J identified 12 separate points of criticism regarding the claimants' quantum expert which, he concluded, rendered the whole of the valuation exercise "worthless".
- A hearing on 24 November 2017, in which Gross LJ warned SFO prosecutors that the appeal court judges viewed the SFO's use of an expert witness who appeared in the LIBOR trials as "a debacle", noting:

  > "It's not a matter to be downplayed when the Crown in a major prosecution calls a witness who is wholly out of his depth. We take a very serious view of what in the judgment we will describe as a debacle, whatever the outcome. We want to know how did it come about that he was instructed when he lacked expertise? We are very concerned as to how he can have been instructed, the due diligence, and how it came to light".

- In proceedings brought on behalf of Christine Perry (a former post office worker who alleged that she developed multiple sclerosis as a result of falling over a mailbag at work), Judge John Griffith Williams, recorder of Cardiff, sitting as a High Court judge, said that Peter Behan, emeritus professor of neurology at Glasgow University, "demonstrated a capacity to use his interpretation of the evidence to suit his purposes which conflicts with his duty to the court as an expert witness."
- *Jones v Kaney [2011] UKSC 13*, in which the expert allegedly signed the joint statement without having read the opponent's expert report (and knowing that she did not agree with it). Following this decision, expert witnesses no longer enjoy immunity from suit for breach of duty (whether in contract or negligence) in their participation in legal proceedings.

Fred then suggested some ways of avoiding getting into similar difficulties. Perhaps not surprisingly, several of the points echo those made by Nicholas Pointon on behalf of counsel being instructed in cases. Things he highlighted included:

- Ensure that the expert you instruct has the right credentials (including, for example, sector experience).
- Consult the expert early (or, at least, not late).
- Avoid instructions that are too narrow: the expert needs to consider all relevant information.
- Keep in mind the original instructions as the matter progresses. Ensure that you check the original instructions when the final report is prepared (which might be years later).
- Provide the expert with all necessary information.
- Ensure sufficient scrutiny of the information by the expert.
- Be aware that incorrect calculations might lead to flawed opinions.
- Manage the interaction between witness and expert evidence.
- Be mindful of any late changes to the pleaded case.
- Manage costs.

A future for civil litigation

In his inimitable style, Professor Dominic Regan provided an invaluable whistle-stop tour around some current hot topics for dispute resolution lawyers, plus the "inside" story on events including Jackson LJ's valedictory speech (at which, apparently, Jackson LJ commented on how one unexpected thing he learned during his time as a Court of Appeal judge was the number of different ways in which to commit murder).

Some items of particular interest included:

- **Proportionality:** Proportionality now trumps reasonableness and necessity. There is no practice direction to provide guidance on what exactly is meant by the term "proportionate", and the Court of Appeal declined to give guidance in *BNM v MGN [2017] EWCA Civ 1767*, so the court's approach in *May and another v Wavell Group Ltd and another (unreported)*, 22 December 2017, *(County Court at Central London)* generated keen interest (and not only because it involves a famous rock star). The story might not be over: apparently the decision may be appealed, so this is a space to watch.
- **Conduct:** Dominic noted that, in 2017, there were more cases than ever highlighting the need for parties to be reasonable. He earmarked *OMV Petrom SA v Glencore International AG [2017] EWCA Civ 195* as one of the most important cases of 2017.
- **Part 36:** In a brief preview of his recently updated talk on Part 36, Dominic noted that there are still cases of invalid Part 36 offers, and highlighted the need to comply with the formal requirements. Part 36 offers can be extremely effective and help to maximise costs recovery (not least as, where there is a successful Part 36 offer and indemnity costs, any issues over proportionality or costs budgets can be completely avoided).

- **Compulsory pre-action ADR?** The Master of the Rolls has promised that a paper on whether there should be compulsory pre-action alternative dispute resolution will be published this summer. This follows on from the CJC's recent ADR consultation. Dominic said that ADR is immensely important and, strategically, solicitors should be advocating it. He referred to the decisions in *PGF II SA v OMFS Company 1 Ltd [2013] EWCA Civ 1288* and *Laporte and another v Commissioner of Police of the Metropolis [2015] EWHC 371 (QB)*.
- **Disclosure pilot scheme:** Dominic noted that practitioners, generally, have not been using the menu of options in CPR 31.5(7). This has led to the proposals for reform. He added that practitioners should expect to see massive efforts to reduce the scope of disclosure, which is extremely expensive and often pointless. It is possible that the proposed pilot scheme will come into operation at the end of this year.
- **Fixed costs:** A consultation paper regarding proposals for an extension of the fixed costs regime is awaited. There is no doubt that the fixed costs regime will be extended. Jackson LJ has proposed that fixed costs should apply for claims from £25,000 to £100,000 and that there should be a new "intermediate track", as an extension of the fast track. Dominic emphasised that the fixed costs matrix in Jackson LJ's final report bore no resemblance to those in his initial "The Time Has Come" speech back in 2016. Currently, under the proposals, there is no cap on experts' fees, but that is likely to come. Separately, the government is also looking at fixed costs for clinical negligence cases up to £25,000. A report is expected in November. There is huge judicial support for the extension of the fixed costs regime: Vos J (now Editor in Chief of *The White Book*) and the Master of the Rolls, for example, are completely on side.
- **Costs budgeting:** Dominic referred to recent decisions which have developed the approach to incurred (as opposed to prospective) costs.
- **Court modernisation:** Dominic referred to the ongoing work to develop the Online Court, and the new electronic bill of costs, noting that, in time, paper will disappear. The Crown Courts are now all electronic so this is "tried and tested". Coulson LJ is taking on the mantle of reform from Jackson LJ (although Ryder LJ (who is in the ascendancy and is very clever) has indicated that reform should be by committee and is too much for one judge to manage).
- **Litigants in person:** In *Barton v Wright Hassall LLP [2018] UKSC 12*, the Supreme Court decided, by a majority of 3:2, that a litigant in person should be treated like anyone else and not afforded special treatment.

Funding options

Mark Beaumont illustrated how creative thinking about funding arrangements can possibly "unlock" claims that, otherwise, would never be litigated.

He highlighted the flexibility that is now available, with the ability to make bespoke arrangements on a case-by-case basis, combining elements of third party funding, after the event insurance, conditional fee agreements and (perhaps for the brave?) damages-based agreements.

He outlined the process for securing funding, what funding costs, and provided some useful worked examples illustrating how different funding arrangements can impact on the client's cash flow and recovery of damages. It is all about transfer of risk. For example, one choice might be between having a big success fee or a higher (discounted) hourly rate: a success fee will come out of the client's damages, whilst the higher hourly rate will be payable by the losing party.

Up for discussion

The final session was a panel discussion with Professor Regan, Mark Beaumont, Lucy Baldwin, Nicholas Shapland of Affiniti Finance, Steve Din of Doorway Capital and Beverley Barton. There was active audience participation, and a wide range of topics were considered. Just a few examples of the developments generating active debate included:

- **Proposals for reform of the disclosure process in civil litigation.**

  Discussion points regarding the proposed mandatory disclosure pilot scheme, to run for two years in the Business and Property Courts, included:

  - Based on the lack of take up of the current menu options, will anything really change under the pilot? Are judges going to actively case manage the approach to disclosure?
  - Will there be a move towards more of a US approach, with increased front-loading of costs, and a requirement to give considerable disclosure pre-action?
- **Compulsory mediation.**
  - Would compulsory ADR just generate an unnecessary layer of additional cost/would it actually achieve anything?
- **Damages-based agreements.**
  - Is anyone actually using DBAs/is there any news of when the regulations might be revisited?