Commercial Litigation Association (CLAN) Conference 2013

Resource type: **Legal update: archive**

Status: **Published on 15-May-2013**

Jurisdictions: **England, Wales**

An update summarising key points from the Commercial Litigation Association (CLAN) Conference held on 14 May 2013.

Practical Law Dispute Resolution

Speedread

Practical Law Dispute Resolution was delighted to participate in the Commercial Litigation Association Network (CLAN) Conference on 14 May 2013. Ramsey J gave the keynote speech. He summarised key aspects of the civil litigation reforms which came into force on 1 April 2013, emphasising the need for more focused and efficient litigation, and outlined some future developments. These include a review of the exemptions from automatic costs management, the introduction of a new format for the bill of costs and standardised phase and task codes, and legislation to allow court control of pre-action costs. He also emphasised the importance of ADR in the future, revealing that every judge has been given a copy of the new Jackson ADR handbook. The conference discussed practical aspects of funding, case and costs management and disclosure, and delivery of the reforms.

(For links to more Practical Law Dispute Resolution guidance on the Jackson/civil litigation reforms, see our *Jackson page (www.practicallaw.com/9-524-0825)*.)

Contents

Two members of the Practical Law Dispute Resolution team, Beverley Barton and Susan Scott, participated in the Commercial Litigators Association Network (CLAN) conference on 14 May 2013, joining panel discussions on costs management and the effect of the reforms on disclosure

and ADR. Other speakers included Ramsey J, Tony Guise, Guise solicitors and Chair of CLAN, Nick Rowles-Davies, Vannin Capital, Andy Ellis, Costs Lawyer, Practico, Martin Heskins, Policy adviser on civil justice, Law Society of England and Wales, Neil Merchandani, Hogan Lovells, Paul Martin, Fasken Martineau, David Foster, Barlow Robbins, Sue Nash, Omnia Software and Tim Wallis, Expedite Resolution.

Ramsey J keynote speech

Giving the keynote speech, Ramsey J confirmed that the exemptions from automatic costs management given to the Commercial Court and for claims in the Chancery Division and Technology and Construction Court where the amount in dispute is over £2 million were being reviewed and may well not survive that review. He also talked of there being more "Jackson" reform to come, in particular:

- A working party has completed work on a new format for the bill of costs to work alongside Precedent H. In conjunction with this, standard phase and task codes are being considered and these have gone out for consultation to the Association of Costs Lawyers. Ramsey J hoped that they may be in force by the end of the year.
- There is going to be legislation to give courts jurisdiction over case and costs management, pre-action, as recommended by Jackson LJ. It is recognised that, particularly with more front-loading in litigation, pre-action costs can be substantial. (Such legislation depends on the parliamentary timetable but we understand that the aim is to bring it in quickly, perhaps alongside new law to clarify or amend the DBA regulations.)
- Fixed costs for more low value claims should be introduced in the longer term.

(Other sources have also reported Ramsey J confirming these – see for example, *Legal update, £2 million costs management exemption limit under review.) (www.practicallaw.com/3-528-7849)*

Other key points

Other key points raised in discussions at the conference are summarised below.

Costs management

Many practitioners are still nervous of costs management. They are concerned about interventionist judges and the effect on solicitor and client costs. If, as Ramsey J suggested, the current exemptions may not remain, it will not be possible to avoid costs management. The onus is on solicitors to prepare budgets carefully, ensuring that they have the right resources to do so. It is also important to marshal the best arguments to support the figures sought (and any applications to revise).Senior lawyers need to do case analysis early and constantly monitor developments. Case law has confirmed that applications to revise budgets because of error (rather than significant developments in the litigation) will be given short shrift. Having a costs lawyer on board throughout a case and linking to case management systems can be useful. The

conference also heard from providers of software packages and tools which might assist. If parties do not believe costs management is justified in a particular case, they should apply promptly for the court to order otherwise.

Proportionality

Proportionality is one of the most difficult aspects of the new reforms as the lack of guidance means uncertainty. If proportionality has been considered during costs management, it is thought that a costs judge on detailed assessment should be unlikely to reduce costs further for proportionality reasons. As consideration of proportionality does not arise if costs are assessed on the indemnity basis (because of the presumption of proportionality in favour of the receiving party), it is worth considering whether there are points to be made about the other side's conduct to justify orders for indemnity costs. However, a party can seek to curtail conduct leading to disproportionate costs during case and costs management, which are meant to be synchronous.

CMCs

There may be more CMCs in the future and some may be split so that parties can go away and consider suggestions. This may include revising budgets. It may be difficult to give accurate time estimates for CMCs.

ADR

Ramsey J and other speakers emphasised the importance of ADR as an "escape route from litigation". Every judge will now have a copy of the Jackson ADR Handbook (see *Legal update, Jackson ADR handbook published (www.practicallaw.com/2-526-7408)*) to remind them of its importance and some are apparently suggesting ADR be used at an early stage, for example, before disclosure. Practitioners and their clients should therefore embrace ADR to a greater extent than previously.

Disclosure

Disclosure is a key driver of litigation costs, so the new approach to disclosure for multi-track claims (save for those including a claim for personal injuries) is at the heart of the reforms. It is important to consider the changes in the context of the overlapping reforms. Other changes, including the revised overriding objective, the emphasis on the need for proportionality, the stricter approach to relief from sanctions, and costs and case management impact on the approach to disclosure. Practitioners need to become skilled at planning and budgeting for disclosure.

In multi-track claims, the parties must file and serve a disclosure report not less than 14 days before the first CMC. Form N263 provides a template disclosure report, but there are a number of potential pitfalls. For example, contrary to what is suggested by the format of question 1, parties are not required to prepare a list of documents at a stage when the disclosure order will not even have been made. As the form is not referred to at all in the CPR, it presumably cannot be a prescribed form, and parties are likely to want to adapt it for their own use. In cases involving a lot of electronic documents, there seem to be increased benefits in using the Electronic Documents

Questionnaire, as that will cover much of the information required for the disclosure report. Practical Law has prepared a note summarising some of the pitfalls to be aware of and providing some tips on preparing disclosure reports (see *Practice note, Preparing a disclosure report (www.practicallaw.com/4-525-4278)*). Early preparation is key including liaison with e-disclosure providers.

The rules also require the parties to discuss and seek to agree an approach to disclosure that meets the overriding objective, not less than seven days before the first CMC. In fact, discussions need to start at a much earlier stage. This will increase the prospects of reaching agreement. Different judges might adopt very different approaches to case management. Agreeing a proportionate approach might well be in the parties' interests. If they propose a sensible, proportionate approach, the court is unlikely to disagree. This will allow the parties to have more control over the approach to disclosure and avoid the risk of unexpected orders by the court.

Some have suggested that there will be a reluctance to embrace the menu options and select anything other than standard disclosure. However, practitioners need to make the reforms work. It has been suggested that, if the reforms fail to bring disclosure costs under control, then something much more radical, possibly, fixed costs for disclosure, or even a civil code approach, will be considered.

Part 36 and costs assessments

Part 36 offers can now be made in detailed assessments and the increased benefits now under Part 36 make it well worth considering. However, it may be difficult to judge such offers.

Funding

The many deficiencies in the DBA regulations for England and Wales were discussed, including their lack of flexibility (they do not appear to allow for partial or discounted DBAs or to fund defences) and the concern about the caps, indemnity principle and lack of provision for termination. It is hoped that these will be addressed in the proposed review of the regulations. The risk of unenforceability for breach is a real concern. Martin Heskins of the Law Society confirmed that, notwithstanding the present uncertainty, solicitors have a professional obligation to advise their clients about all methods of funding available (even those the solicitor does not propose to offer). The client needs to be advised in the client's best interests. This may not be the same as the solicitor's.

Experence has shown that different clients will want different things. Foreign clients in particular are keen for lawyers to have "skin in the game". However, there are other clients who do not want funding and prefer hourly rates. There is scope for creative retainers in the future but a lot of risk at the moment.

Paul Martin of Fasken Martineau, Toronto outlined the development of the use of contingency fees in Canada. He noted that, although there has been talk of the "Ontario model", in fact there is not just one model, but many variations. He made the point that contingency fees are still relatively new in Canada and some of the "kinks" are still being addressed. Professor Rachael Mulheron, Queen Mary, University of London who chaired the session, noted that it is rather ironic that the DBA model adopted here is being described as the "Ontario model". In fact, there are five key

differences:

- In Canada, DBAs were first introduced in the context of group actions. Here, BIS has indicated that, if its proposals for an "opt out" form of collective redress are brought forward, DBAs will not be permitted for such claims.
- Here, unlike Canada, it will never be possible to obtain the contingency fee plus costs. The government rejected the "success fee" model.
- Here, unlike Canada, there will be no quantum meruit if the DBA Regulations are infringed. Failure to comply with the Regulations will render the DBA unenforceable.
- Here, unlike Canada, there are caps on the permitted contingency fee (25% in personal injury claims and 50% in other claims).
- Here, the indemnity principle also means that there is a cap on the costs recoverable from the paying party.

The delivery of the reforms

The way the reforms have been implemented has not been helpful to practitioners. Much of the detail was not released until shortly before implementation, there are problems with the drafting and the Justice website still does not have all the new rules. The new Precedent H for costs budgets was also criticised as having errors and not being user-friendly. (Practical Law Dispute Resolution hopes to host a more user-friendly form developed by Sue Nash shortly.) It was agreed that practitioners need to raise difficulties with the MoJ.

For further information about the conference and CLAN's work, see the *CLAN website* .

Resource information

Resource ID: 0-529-2545

Published: 15-May-2013

Products: PLC UK Dispute Resolution

Related content

Topics

Case Management (http://editorial.practicallaw.com/2-203-6794)

Costs: Litigation (http://editorial.practicallaw.com/1-203-6799)

Disclosure: Litigation (http://editorial.practicallaw.com/4-103-1193)

Funding Litigation (http://editorial.practicallaw.com/5-381-9613)

Settlement and Part 36 (http://editorial.practicallaw.com/0-203-6808)