

SPEECH BY THE NEW SENIOR COSTS JUDGE AT CLAN EVENT ON 1 OCTOBER 2014

This document is published by Practical Law and can be found at: uk.practicallaw.com/8-583-5925
Request a free trial and demonstration at: uk.practicallaw.com/about/freetrial

On 1 October 2014, Senior Costs Judge Gordon-Saker gave the keynote address at a Commercial Litigation Association (CLAN) event, "The Litigation Journey".

Practical Law Dispute Resolution

SPEEDREAD

On 1 October 2014, an editor from the Practical Law Dispute Resolution team attended a Commercial Litigation Association (CLAN) event, "The Litigation Journey".

Speakers included representatives from a litigation funder that has recently entered the market here, an ATE provider, a project management company and an e-disclosure provider, as well as a PR consultant and an economist.

The *keynote address* (www.practicallaw.com/2-583-6051) was provided by Senior Costs Judge Gordon-Saker, on what was his first official day in this role.

Implementation of the *Jackson/civil litigation reforms* (www.practicallaw.com/6-525-3094) is still the big story for litigators, so there were plenty of areas for the Senior Costs Judge to address, including:

- Costs budgeting.
- Guideline hourly rates.
- The new proportionality test.
- Provisional assessment.

We are grateful to Annecto Legal Limited, litigation funding advisers, who organised the event, for providing us with a copy of Senior Costs Judge Gordon-Saker's full notes for his presentation.

We have identified ten key points of interest.

TEN KEY POINTS FROM SENIOR COSTS JUDGE GORDON-SAKER'S KEYNOTE SPEECH

We have identified ten key points of interest from the Senior Costs Judge's keynote address:

Costs budgeting

- The benefits of the Jackson reforms and the costs budgeting regime are clear. A lot of lawyers were not good at giving estimates. Detailed assessment does not adequately control incurred costs. It is

fairer to let parties know upfront what costs will not be recoverable.

- Costs budgeting has been a huge change and will take time to get right. Better training for judges is required. They need to have a clearer idea of what figures are reasonable and more confidence in carrying out the task. Confidence should increase, with time.
- Detailed assessments are likely to be more limited in future.

RESOURCE INFORMATION

RESOURCE ID

8-583-5925

RESOURCE TYPE

Legal update

PUBLISHING DATE

6 October 2014

JURISDICTION

England, Wales



- The question arises of what is a good reason to depart from an approved budget when assessing costs on a detailed assessment. No doubt, the Court of Appeal will eventually have to give guidance on this. It seems probable that the circumstances will be very limited. Otherwise, the entire rationale for introducing the regime is undermined.
- The current format for bills of costs is not aligned with the Precedent H format, but there will be a new bill of costs soon (see *Legal update, J-Codes: an update from the Jackson Steering Committee* (www.practicallaw.com/3-582-2685)). There is no reason why a receiving party should not draw up a bill of costs in line with the phases of his budget, now.

For more information on the new costs management regime, see Practice notes:

- *Costs management: overview* (www.practicallaw.com/2-504-5224).
- *Costs management: preparing budgets and completing Precedent H* (www.practicallaw.com/5-529-4325).
- *Technology and Construction Court: costs management* (www.practicallaw.com/3-556-6765).
- *Costs management: how best to prepare* (www.practicallaw.com/2-580-3786).

Guideline hourly rates

- Guideline hourly rates are important. The 2010 guideline hourly rates remain in force currently, due to the poor response to the recent survey (see *Legal update, Master of the Rolls rejects recommendations for new guideline hourly rates* (www.practicallaw.com/6-576-0445)). Any changes to the rates need to be supported by evidence. Getting the relevant information is key. The MR will be meeting with the Ministry of Justice and the Law Society shortly, to discuss the best way forward.

Coventry and others v Lawrence and another (No 2) [2014] UKSC 46

- In many detailed assessment cases, parties are seeking the adjournment of decisions about additional liabilities, pending the Supreme Court's decision in Coventry. The Senior Costs Judge indicated that such applications are being given short shrift. For details of the background to this, see *Legal update, Supreme Court adjourns appeal so government can address them on whether old costs regime infringed ECHR* (www.practicallaw.com/6-575-6429).

Damages-Based Agreements

- Things seem to have gone quiet on this front, but it is understood that the Ministry of Justice is still reviewing

the position. A key point to be clarified is whether hybrid agreements are permitted. There is also some debate about whether the indemnity principle should apply. Senior Costs Judge Gordon-Saker indicated that he is a fan of the indemnity principle, but can see that DBAs will not work in low value claims if it applies. For more information about Damages-Based Agreements, see *Practice note, Damages-based agreements in civil litigation (other than employment tribunal matters): overview* (www.practicallaw.com/1-524-3093).

The new proportionality test

- Senior Costs Judge Gordon-Saker does not consider that there is a need for further guidance on how the new proportionality test applies. No doubt, the Court of Appeal will eventually be asked for a view, but there seems no reason why anyone would do more than re-state Jackson LJ's guidance in his final report. The Senior Costs Judge also referred to the fifteenth implementation lecture by Lord Neuberger (*Proportionate Costs, 29 May 2012* (<http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/proportionate-costs-fifteenth-lecture-30052012.pdf>)). The courts are likely to develop the approach, as Jackson LJ described. A bill of costs will first be assessed in the normal way, then it will be necessary to step back, consider if it is disproportionate and reduce accordingly. This is no more arbitrary than the approach under *Home Office v Lownds* [2002] EWCA Civ 365. For more information on this topic, see *Practice notes, Costs management: overview* (www.practicallaw.com/2-504-5224) and *Detailed assessment: what it is and the basis of assessment* (www.practicallaw.com/3-203-1338).

Provisional assessment

- Provisional assessment broadly seems to be working. However, the Senior Costs Judge does not think the current limit (costs of up to £75,000) will be extended. In the County Court, the provisional assessment is being done without the papers. It is not suited to cases with big or serious issues. Currently, more cases within the bracket for provisional assessment seem to be going for provisional assessment, with fewer settled. The target is for them to be completed within six weeks. That is unrealistic currently, and the SCCO is not meeting that target. However, provisional assessments are still much quicker than detailed assessments, and it is hoped that the service will improve. For more information on provisional assessment, see *Practice note, Detailed assessment: provisional assessment* (www.practicallaw.com/3-550-3886).

SOURCE

Keynote address by Senior Costs Judge Gordon-Saker at a Commercial Litigation Association (CLAN) event on 1 October 2014 (www.practicallaw.com/2-583-6051).