"The Litigation Journey"

Wednesday 1st October 2014

Keynote Speaker: Master Gordon-Saker

Perhaps I can address **costs budgeting** first, as that is currently the greatest area of uncertainty. The reasons for costs budgeting are obvious. Nobody would start building a house without knowing what it will cost or will probably cost. Yet many lawyers have not been very good at giving their clients an accurate estimate at the outset. Often no estimate is given or an estimate is given which is so limited as to be of no assistance – the likely costs to the first conference or to the issue of proceedings.

Adopting the title of this conference, litigation is like a train journey. You cannot get off the train, without injury, unless everybody else agrees that the train can stop before its destination. Yet if you stay on the train to the end of the journey, you will only know the cost of the journey after you get off. So we need costs budgeting as a matter of fairness to litigants.

The other reason for costs budgeting is that detailed assessment is believed not to adequately control costs that have already been incurred. It is much more difficult to say to the winner – "You should not have incurred those costs so you cannot recover them" – than it is to say "*If* you take that step or incur those costs you will not recover them if you win".

So, the theory is good. The problem is the timing. The Court Service, as with other parts of the public sector, is under strain. A system already under strain has then to cope with an extra raft of work – costs management hearings – which take several times longer than directions hearings.

So an extra raft of work which is very time consuming – and at a time when there is no money for the training of the judges who will be carrying it out. The training we were given dealt with mechanics of costs budgeting – how to chart a course through Precedent H and how to deal with directions. There was no

training in costs as such. So a judge who had limited exposure to costs would not have any better idea at the end of the training about what a reasonable figure for that sort of case would be. He would just know his way around Precedent H.

What *was* stressed during the training was that judges should not micro-manage the budgets. It is not a prospective detailed assessment. You should not look at the hourly rates, you should not look at the hours - you should just look at the totals. Is that a reasonable and proportionate figure for that phase - or for that part of the phase.

But a common question from the judges during training was - "How can I look at the total, without looking at how the total is arrived at?" £50,000 for drafting witness statements might be reasonable at £400 ph - but not at £150 ph.

Costs budgeting is a huge change. It is going to take some time before we get it right. We do need better training for judges in relation to costs. If judges are going to fix the reasonable costs of a case, they need to know what sort of figure is going to be appropriate. They need the confidence to say that in this sort of case, with these sums at stake and these issues being litigated by these sorts of lawyers, the reasonable and proportionate sum for doing this task is this sort of figure. That is confidence which will come only with time and experience.

That said, I am told that – although different judges are taking different approaches to costs budgeting - people are generally happy with the overall results.

The effect of costs budgeting on detailed assessment is presently a known unknown - we know that there will be an effect but we don't really know what it will be. Obviously detailed assessment will be limited in most budgeted cases. The argument for the future will be what is left for detailed assessment in a case which has been budgeted. What amounts to a good reason for

departing from the budget when it comes to the detailed assessment. I anticipate that the Court of Appeal will want to keep the escape clause to fairly limited circumstances, otherwise a large part of the rationale for costs budgeting will disappear. There is no point in having a costs budget if everything will be up for grabs on the detailed assessment.

The present practical difficulty is that bills and budgets do not align. We will have a new bill that does align. But in the meantime there is no reason why the receiving party should not draw its bill in parts which coincide with the phases of the budget.

Guideline hourly rates

Do we need them? Yes we do. They came in with summary assessment - to assist judges who were less familiar with costs but who suddenly had to decide what a reasonable figure would be for the application or appeal or fast track trial that they had just heard.

They have some limited use on detailed assessment - either as a starting point or as a cross-check. But as the MR has pointed out, there needs to be greater flexibility on detailed assessment.

Well you know where we are. The information gathering process has to start again, solicitors will have to be encouraged to provide the information which can then be analysed to produce rates which are supported by sufficient evidence. In the meantime we carry on with the 2010 rates with the limited tweakings suggested by the Master of the Rolls at the end of last term. The MR will meet with the MOJ and Law Society soon to discuss a way forward.

Additional liabilities

The recoverability of additional liabilities simply had to go. There was no justice in a system which required losing parties to pay double, or with ATE premiums, more than double the reasonable costs of the winning party. And it is salutary to remember why we had that system. The government wished to reduce the civil legal aid bill. But it replaced a relatively modest burden on the state – the cost of civil legal aid in those relatively few cases where the assisted person was unsuccessful – with a much greater burden placed on paying parties.

The government's decision to replace civil legal aid with a system which required losing parties to subsidise the cost of unsuccessful claims conducted by their opponents' lawyers caused great damage to the civil justice system. Civil litigation became a commodity which could be bought and sold. Lawyers, who previously had no personal interest in the cases they undertook, now had a direct financial interest in the outcome. The focus turned from the justice of the case to the costs of the case.

And a flawed system introduced to plug the gap left by civil legal aid spread beyond that gap. Not limited to cases where legal aid was being withdrawn, CFAs and ATE insurance spread to areas of litigation where legal aid had never been available. For example, legal aid had never been available for defamation. So what justification could there be for requiring a defendant to a claim brought by a wealthy celebrity, one who could well afford to litigate, to pay double if they lost?

So now that the recovery of additional liabilities is going, we have had to find alternative means of access to justice not only for those areas where previously there was legal aid available, but also areas which were not affected by the abolition of civil legal aid.

At the end of last term the Supreme Court raised the question of whether the previous regime of recoverable additional liabilities breached the Human

Rights Act. The question has been adjourned to next term to enable the government to make submissions.

Inevitably in a considerable number of the detailed assessments that have taken place since the end of July, paying parties have been asking for an adjournment of the assessment of any additional liabilities claimed until the Supreme Court's decision in *Coventry v Lawrence* is known. Similarly parties ordered to pay costs at the end of a hearing have been asking for the question of their liability to pay additional liabilities to be adjourned. These applications have, I understand, been given short shrift. Additional liabilities are recoverable under primary legislation. If that primary legislation is incompatible with the Human Rights Act, that should not affect recoverability as between the parties. Although I know that there are arguments to the contrary.

The residual recoverable additional liabilities - those given a temporary reprieve by LASPO - are now going. There are winners and losers.

Claimants of modest means in defamation and privacy proceedings will have a modified form of qualified one way costs shifting. So they will be in a better position than they were before 2000.

The government has indicated that the exemption of the reforms to insolvency litigation will end next April with nothing to replace the recoverable additional liability regime.

I have some sympathy for insolvency lawyers who say that this will be a significant disincentive to proceedings against delinquent directors and that such cases will become too risky. But as against that, in reality we are just going back to the funding regime which was in place until 2000. The political will that is there for claimants in defamation and privacy cases - after phone hacking and Leveson - isn't there for insolvency proceedings.

Damages Based Agreements

It seems to have gone quiet but the DBA regs are still being reviewed by the MOJ in the face of criticism that they do not work and in particular that hybrid agreements (allowing for discounted rates payable along the way in any event) are not permitted. Another debate revolves around the indemnity principle. Presently costs claimed in DBA funded cases are expressly subject to the indemnity principle. The costs will be assessed on the conventional time and hourly rate basis but will be capped at the amount of the client's liability under the agreement. This can lead to the unintended consequence of a windfall for the paying party so the question is whether that cap should remain. Personally I am a fan of the indemnity principle but I can see that DBAs are not going to work in low value claims. That is one for the government.

Proportionality

We have a new test of proportionality and proportionality now trumps reasonableness. Even if the costs are reasonable, they will not be recoverable on the standard basis if they are disproportionate. Costs incurred are proportionate if they bear a *reasonable relationship* to – the sums in issue in the proceedings; the value of any non-monetary relief; the complexity of the litigation; any additional work generated by the conduct of the paying party; and any wider factors involved in the proceedings, such as reputation or public importance.

It is said that we will need guidance on how to apply the new test. I disagree. The guidance is already there. It is likely that somebody will in some case or another seek to appeal the approach that has been taken. But I would suggest that there is no reason to suppose that the court hearing the appeal will do other than restate the guidance that has already been given by Jackson LJ in his final report:

> … I propose that in an assessment of costs on the standard basis, proportionality should prevail over reasonableness and the proportionality test should be applied on a global basis. The court should first make an assessment of reasonable costs, having regard to the individual items in the bill, the time reasonably spent on those items and the other factors listed in CPR rule 44.5(3). The court should then stand back and consider whether the total figure is proportionate. If the total figure is not proportionate, the court should make an appropriate reduction. There is already a precedent for this approach in relation to the assessment of legal aid costs in criminal proceedings: see *R v Supreme Court Taxing Office ex p John Singh and Co* [1997] 1 Costs LR 49.

In the 15th implementation lecture on 29th May 2012 - the lecture entitled "Proportionate Costs" - Lord Neuberger, then MR, quoted that passage and said that it seems likely that the courts will develop the approach to proportionality "as Sir Rupert described it" in that paragraph.

Singh, a decision of the *Civil* Division of the Court of Appeal concerned the costs of criminal proceedings but the same process can easily be applied to a civil bill.

So applying the *Singh* principle to an inter partes civil bill in a case commenced after 1st April 2013 in respect of work done after that date, the court would assess it in the usual way, but then stand back and look at the total which has been allowed. If that total is disproportionate the court would then reduce it to a proportionate amount.

This approach has been criticised as arbitrary, but it is no more arbitrary than the *Lownds* approach. After all, to decide, at the outset of an assessment, whether a bill has the appearance of being disproportionate, one must have an idea of what would be proportionate - that is, one must have a figure for proportionate costs in mind.

Provisional assessment

Bills of up to £75,000 are now assessed provisionally on paper. The idea was that it would lead to speedy and cheap costs assessments in small cases. I think that broadly it works. I do not think that the £75,000 limit will be extended in the foreseeable future. What works for small bills does not work for big bills. Bigger bills will be in cases which have been costs budgeted. And, in the County Court, provisional assessment is done without the papers - so it is not suitable for cases where there are big or serious issues.

I think that we are seeing fewer settlements of cases in the provisional assessment bracket. More lawyers will take the risk of having the court decide than attempting settlement. As against that, provisionals take less time so we can get through more of them.

The Practice Direction indicates that the court should carry out a provisional assessment within 6 weeks. That is I'm afraid unrealistic. But you will get a bill provisionally assessed long before you would get a detailed assessment hearing. And our experience is that there are very few requests for an oral hearing. In the vast majority of cases the parties accept the provisional assessment.

I am hoping that the service presently provided by the courts will improve. The government has agreed an additional £75m per year for the next 5 years for improved IT and estate. The Rolls Building has just gone digital. So we hope that the paper logjams that we presently have will clear.

Master Gordon-Saker

Senior Costs Judge

This speech was delivered to Members of the Commercial Litigation Association (CLAN) at the Grange Hotel St Paul's, London on Wednesday 1st October 2014.