



With Lord Justice Jackson looking closely at estimates, Neil Rose finds there is more to them than a finger in the air, while on page 10 Jamie Carpenter reviews the current state of the law

Whether you call it an estimate, a budget or even a quote, there are some lawyers who will tell you that it simply cannot be done. How can they predict the course of the random game that is litigation?

In April, shortly before he released his preliminary report on the reform of civil litigation costs, Lord Justice Jackson addressed the Association of Personal Lawyers annual conference, held at Celtic Manor in Wales. Quoting paragraph 2.03 of the Solicitors Code of Conduct on providing clients with an

estimate, he asked delegates how effectively they are able to do this.

'The answer is "extremely difficult",' replied one delegate in an answer that won possibly the loudest applause of the whole conference. He said he understood why the rule is there – and his firm tries to comply by saying the costs could fall within a range – 'but it's an almost impossible rule to comply with.' He cited the problem of not knowing how the defence will respond, and warned that estimates just confuse clients.

'We get criticised by the

judiciary and our regulators when we don't happen to get it right all the time. We do sometimes feel that our clients are frightened off pursuing claims because they think they're going to face a large bill at the end of the case out of their damages or even if they're unsuccessful [while on a CFA].'

Pilot takes off

In his preliminary report, Lord Justice Jackson looked closely at the rules surrounding costs management – not a term expressly recognised by the CPR – and said: 'It appears

that first instance courts make relatively little use of the powers conferred by these rules.'

He made several suggestions for bolstering courts' management of costs, including elevating part 6 of the Costs Practice Direction on estimates into a rule. Existing powers allow judges to make parties file detailed estimates or budgets at regular stages, and make a costs management order alongside any case management decision. It would be possible to take this further, he said, and for it to become the norm for the court to cap the costs of each stage of the litigation.

Such is his interest in this topic that he set up a brief costs management pilot in the Birmingham Mercantile, and Technology and Construction Courts. It aimed to test out whether judges can actively control costs throughout a case – if successful, it should also have eliminated most detailed assessments. It basically involved the court's specific approval or sanction of costs at stated or approved levels at regular stages in the case. It emphasised the need for firms to provide proper detailed estimates, but no more onerous than they should already be giving under the Solicitors Code of Conduct.

According to the pilot's guidelines: 'The objective of costs management is to control the litigation in such manner that the costs of each party are proportionate to the amount at stake and to ensure that the parties are on an equal footing.'

Though welcomed, practitioners' main concern was whether the level of costs involved in managing the costs rendered the exercise pointless.

A similar year-long pilot is due to begin on 1 October at the Royal Courts of Justice and High Court in Manchester for defamation claims.

Cement mixer

The judge was present to hear estimates and budgets debated at the Commercial Litigation Association's annual conference in London earlier this summer. The association's chairman, Tony Guise, is a solicitor who has banged the drum for estimates for some years, and began the debate by arguing that rule 2 contains too many escape clauses from providing estimates.

One of Lord Justice Jackson's assessors, leading defendant lawyer Andrew Parker of Beachcroft, set the scene. He reminded delegates that Lord Woolf, in his *Access to Justice* reforms, saw clients as an important control on costs, but conditional fee agreements 'have rather divorced them'. The code of conduct is not often enforced in this area and though there are some rules in the CPR, the courts do not really use them, he observed.

He described form H as 'not fit for purpose' because it does not provide sufficient information to make a 'sensible assessment' of what the costs will be.

For Paul Shenton, managing director of the law firm Just Costs, poor estimating is 'down to ignorance and fear'. He argued that the Birmingham pilot actually shows why estimates go wrong. 'Most lawyers are pretty good at valuing the "bricks" of litigation,' he explained, that is the key stages of a case. But they will often be 30-60% out because they make no allowance for the 'cement' that holds the litigation together. By this he meant the e-mails – 'the amount of internal and external e-mail correspondence is phenomenal' – the internal strategy meetings, client meetings and so on.

It is estimating the value of this cement that is 'the art', Mr Shenton said, whereas the bricks are 'the science'. He urged lawyers not to be 'paranoid' about being scientifically accurate from the start when calculating an estimate. 'Things change but the most important thing is communicating with the other side.'

The Birmingham pilot foreshadows this, he noted. If you are transparent and ensure the judge approves your estimates as you go along, 'then it will be hard to challenge your costs at the end'.

However, the wider concern is whether the judiciary, especially in the higher courts, 'has any idea of the costs of litigation', Mr Shenton said. It is not enough

reckoned.

Master Haworth told Sir Rupert that the rules around estimates needed clarifying either by an appeal court ruling or through the CPR 'so solicitors know where they stand – it's gone on long enough'.

He considered the pilot a 'sensible way forward' provided that it only applies to the multi-track. In fact, it might only be worthwhile for cases worth more than £250,000 because budgeting itself is an expensive process. 'It will only work if it smacks of firm case management by the same judge,' Master Haworth continued. 'If this system is to work, it should allow the judge to carry out a summary assessment at the end of the case.'

Well-known costs lawyer

expended,' he said. This means that serving a budget with a claim form is too late – 20-30% of costs are run up before the protocol period finishes.

From the floor, a barrister argued the case for costs capping, having seen it work in arbitrations when applied after pleadings are closed so that both sides know what the arguments are.

However, Master Haworth said the SCCO's experience of costs capping 'is not good because the costs of costs capping outweigh the benefits'. Paul Shenton said he had not seen a great demand for costs capping. He described it as 'stage two' – only useful when there is an inequality of bargaining power between the parties.

'It appears that first instance courts make relatively little use of the costs management powers conferred by the Civil Procedure Rules'

for the judiciary to want to deal with costs – it was also a matter of training and experience.

Early riser

Master Peter Haworth, a former solicitor and now a judge in the Supreme Court Costs Office (SCCO), told delegates that in his view the system is simply not working – solicitors pay lip-service to estimates, providing 'thumb in the air' figures on the allocation questionnaire which 'simply go through on the nod from the judge'. He conceded that there are 'one or two' exceptions to this, adding: 'If they can [do it], what can't all district judges?' It came down to their willingness, he

Michael Bacon told delegates that he was 'absolutely certain' that budgeting is the way to control costs. 'Budgets are there to plan properly at the outset, backed up with assumptions,' he said. He advised preparing a budget on a stage-by-stage basis; the lawyer would then be able to demonstrate to the court why the budget was too high or low, because he could point to the underlying assumptions which either did or did not occur.

Mr Bacon suggested that, rather than having the SCCO, costs judges could be employed as assessors to help judges consider budgets. 'If you want to control costs, you have to do so before they are

To the future

So where does this all leave us? Waiting for Lord Justice Jackson's final report, of course, and wondering if the Birmingham pilot had enough time to produce any meaningful results. There is ample survey evidence that certainty about costs is now critical to many businesses' decision on whether to enter litigation – more so even than their prospects of success.

It should not be forgotten that Lord Justice Jackson's central mission is to provide access to justice at proportionate cost, and it is likely therefore that we will hear a lot more from him about estimates come his final report in December.