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This article first appeared in a slightly different form in *New Law Journal*, July 2011

THE COST OF ENLIGHTENED JUSTICE

By Rani Mina and Tom Duncan

Professor Dominic Regan's article in the 27 May 2011 edition of this journal reports upon the implementation of the "Jackson Juggernaut" in legal costs management. Professor Regan was no doubt being facetious in comparing the reforms foreshadowed by Lord Justice Jackson in his Review of Civil Litigation to a "terrible force" but should litigants and litigators have concerns about the cost management techniques being piloted?

The next step in the reform process is the extension of the costs management pilot scheme, currently running in the Birmingham Mercantile Court, to all Technology and Construction Courts and Mercantile Courts, from 1 October 2011. It will take effect as a pilot in these courts and is likely to be rolled out to other courts in due course.

The associated Practice Direction (PD51F) provides that:

1. The parties are to exchange and submit their detailed budgets to the court prior to the first case management conference. This should follow a standard template, which is attached to the Practice Direction and requires a costs estimate for each of the specified activities to be undertaken: e.g. pleadings, disclosure, witness statements, expert reports, mediation and any other appropriate steps. The budget allows for "identifiable" contingencies.
2. The parties are encouraged to discuss their budgets while they are being prepared and before each case management conference and other hearings.
3. The court will review these budgets and, if it decides to make a "costs management order" may make "appropriate revisions" prior to approval of the budgets. The court may also order attendance at a subsequent cost management hearing in order to monitor expenditure.
4. If a costs management order is made, a party must notify and explain to the court any increase in the budget and the court may approve or disapprove of departures from the budget. When subsequently assessing costs the court will not depart from the approved budget without good reason.
5. Any party may apply to the court if it considers another party is "behaving oppressively in seeking to cause that party to spend money disproportionately on costs." It is not clear what order the court may make in these applications.

Despite popular perception, lawyers are acutely aware of the risk of costs becoming disproportionate and clients already expect a costs budget for the various stages in any litigation and require the case to be managed consistently with the budget. The new practice direction envisages the court taking a more active role and making "appropriate revisions" to the budgets. The practice direction gives a wide discretion and "appropriate revisions" might involve or lead to:

- limiting the length of pleadings and witness statements;
- questioning the use of larger law firms or senior Counsel in cases where the sums in dispute are modest;

Rani Mina

Partner
Commercial Dispute Resolution
rmina@mayerbrown.com

Tom Duncan

Senior Associate
Construction & Engineering
tduncan@mayerbrown.com

- requiring electronic disclosure to be iterative and issue based;
- increased insistence on joint experts or "hot tubbing"; or
- insisting on competitive tendering for expert services or third party vendors and outsourcers for disclosure exercises.

At the very least, it is clear that the parties will have to justify the steps to be taken as proportionate. Also, judges will need to hone their project management skills and some training is being provided to assist. Effective case management by judges should assist in obtaining the key evidential tools to determine the dispute and avoid reams of irrelevant paper. As His Honour Judge Simon Brown QC, who has already piloted the scheme in Birmingham, has said: "judges seek the Holy Grail that will given them just 10 key documents in any case and not require them to find the proverbial needle in a haystack."

There are potential drawbacks; the precise course of any dispute is difficult to predict at the outset, which means there is a danger that too much court time (and cost) will be taken up arguing about changes to the budget. However, the increased transparency, including in relation to an opponent's costs, should enable litigants to assess their financial risks with more certainty and at an earlier stage. This will allow more informed decisions to be made about the merits or otherwise of pursuing a case or settling. It may even be that effective cost management and budget approvals will mean detailed costs assessments become a relic of the past.

As long as the judges are consistent in how the process is implemented, litigants and litigators should adapt quickly to the procedure. Strategies and tactics will be developed to reflect the rule changes. Paragraph 4.5 of the Practice Direction (see point 5 above) is particularly ripe for use as a tactical weapon. It is most likely to be deployed where one party has virtually unlimited resources and the other side does not, in an attempt to level the playing field. It may also be used by parties with relatively equal resources to, for example, object to lengthy and repetitive pleadings, resist requests for further information or to resist wide-ranging or oppressive disclosure requests. How the courts respond to such applications will be crucial in determining how widespread such tactics become.

So do not fear the "Jackson Juggernaut". It represents an opportunity for lawyers and their clients to engage more effectively with each other and the court in our continuing efforts on the road to proportionality.

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August 2011