

JACKSON - THE NEW BILLS¹

by

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Introduction

The Final Report of the Jackson Review² made a number of recommendations which he wanted to be considered, and introduced, as a package. Today I shall be looking at some of the recommendations which have received the least publicity and which do not feature in the Legal Aid, Sentencing and Punishment of Offenders Act³ ("LASPO"), but will be of great interest to Costs Lawyers. These are some related recommendations on:

- Detailed assessment
- Summary assessment
- Costs budgeting.

Jackson Review implementation

Before discussing these recommendations, I should describe the process by which the Jackson Review recommendations generally are being implemented.

Those which the Government has accepted and require primary legislation are in LASPO – examples are the reforms of CFAs and Damages Based Agreements. The Act will be supplemented by secondary legislation in the form of regulations – eg as to the formality and/or information requirements for these two forms of retainer agreement.

Other recommendations have been, or are in the process of being, implemented by the Rule Committee, by judicial decision or by informal action. The Rule Committee will make a whole range of changes to the CPR to deal with such matters as Qualified One Way Costs Shifting and the new Part 36 provisions. Judicial decision, it seems⁴, will be required to implement the 10% increase in general damages. Informal action has already taken place to implement the recommendations on Third Party Funding, with a voluntary Code of Conduct approved by the industry for that purpose.

As is well known, the Big Bang date for the implementation of the reforms has been put back to April 2013, but the judiciary, and Jackson LJ in particular, have been keen to ensure that the reforms do not hit the profession out of the

blue on that date. They have therefore set up a programme of lectures, usually given at conferences called by interested parties, in which progress on implementation of different aspects of the reforms is reported upon. These lectures can be found on the Judiciary website at <http://www.judiciary.gov.uk/publications-and-reports/review-of-civil-litigation-costs/lectures>. I should stress that this lecture does not have that status.

Detailed Assessment

Two of Jackson's 109 recommendations relate to the form of the bill of costs for detailed assessment. They are as follows:

106 A new format of bills of costs should be devised, which will be more informative and capable of yielding information at different levels of generality.

107 Software should be developed which will (a) be used for time recording and capturing relevant information and (b) automatically generate schedules for summary assessment or bills for detailed assessment as and when required. The long term aim must be to harmonise the procedures and systems which will be used for costs budgeting, costs management, summary assessment and detailed assessment.

The Review found that there was widespread criticism of the existing form of bill for detailed assessment even on its own terms as a manually produced, paper presentation of a claim for costs. The best account of these appears in the Preliminary Report⁵:

The format of bills used today is based on the style of a Victorian account book. That format is not necessarily appropriate or helpful in the 21st century. What is required is a bill which gives relevant information to the court and to the paying party and which is transparent. The current form of bill makes it relatively easy for a receiving party to disguise or even hide what has gone on.

In the Final Report Jackson set out the three requirements which in his view had to be satisfied and which form the basis of recommendation 106. They are as follows⁶:

- (i) The bill must provide more transparent explanation than is currently provided, about what work was done in the various time periods and why.*
- (ii) The bill must provide a user-friendly synopsis of the work done, how long it took and why. This is in contrast to bills in the present format, which are turgid to read and present no clear overall picture.*
- (iii) The bill must be inexpensive to prepare. This is in contrast to the present bills, which typically cost many thousands of pounds to assemble.*

By the time of the Final Report, Jackson had come to see the advantages of the IT revolution for achieving these aims. He asked himself the question, “How to meet those requirements?” and answered, “*In my view, modern technology provides the solution.*” That is the origin of recommendation 107 and it shows how, although at first sight the two recommendations are distinct, in fact they are inextricably intertwined.

The Final Report goes on⁷:

Time recording systems must capture relevant information as work proceeds. The bill format must be compatible with existing time recording systems, so that at any given point in a piece of litigation a bill of costs can be generated automatically. Such a bill of costs must contain the necessary explanatory material, which is currently lacking from the bills prepared for detailed assessment. Crucially, the costs software must be capable of presenting the bill at different levels of generality. This will enable the solicitor to provide either (a) a user-friendly synopsis or (b) a detailed bill with all the information and explanation needed for a detailed assessment or (c) an intermediate document somewhere between (a) and (b). The software must provide for work which is not chargeable or work which is written off to be allocated to a separate file.

Summary Assessment

Recommendation 105 related to summary assessment. It was:

A revised and more informative version of Form N 260 should be prepared for use in connection with summary assessments at the end of trials or appeals.

A revised form has been prepared. It can be found, with a short explanation, in Jackson’s 8th lecture in the implementation programme – the link is <http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/lj-jackson-8th-lecture-implementation-programme-25012012.pdf>. The number of categories of costs has been slightly reduced compared with the existing form and there is a schedule to set out the claim under the documents item in much more detail. The new form will come into force in April 2013.

The purpose of mentioning the new form in this lecture is only to relate it to the recommendations for detailed assessment, and in particular to recommendation 107. If software is to be introduced which enables inter partes bills of costs to be prepared from solicitors’ time-recording systems at

different levels of generality, then clearly it has to be able to produce bills for summary, as well as detailed, assessment.

Costs management and costs budgeting

From an early stage in his Review, Jackson had begun to establish programmes to pilot costs management. The first was in the Birmingham TCC and Mercantile Courts. This was followed by the defamation pilot in London and Manchester – see Practice Direction 51D. There had not been enough experience of these pilots by the time of the Final Report for there to be much in the way of positive recommendations for costs management, but Jackson suggested a gradualist approach with rules being drafted in the summer of 2010 once feedback from the pilots had been analysed⁸. From 1st October 2011 the Mercantile and TCC Pilot was extended to all Mercantile Courts and TCCs – see Practice Direction 51G.

An essential part of the costs management pilots was the use of a template for the preparation of costs budgets to be submitted to the court for approval. The most recent versions of the templates in actual use are Precedent HA which is used in the defamation pilot and Precedent HB for the Mercantile/TCC pilot⁹. The two Precedents are very similar, the main difference being that some topics are only relevant to one or other of the types of case.

A detailed report on the Mercantile/TCC pilot was published in February 2012 - <http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/cost-management-pilot-int-report-feb2012.pdf>. In particular it considers criticisms of Form HB.

The future of costs management and budgets will be made public in a lecture to be delivered at a conference organised by the Law Society on May 29th. Although as a result of illness Jackson LJ will be unable to deliver that lecture himself, it will be the latest in the series of judicial lectures designed to keep the profession informed on the progress of implementation of the Review recommendations and on the form that any new rules will take.

As with summary assessment, if the benefits which Recommendation 107 envisages are to be realised, it is essential that any budget template which is used be capable of being generated from the data on solicitors' time-recording systems.

The ACL Working Group

In September 2010 the ACL established a working group of costs professionals¹⁰ to consider Jackson’s proposals for a new format of bill of costs for detailed assessment. Its First Report was published in October 2011 and can be found at

<http://www.costslawyer.co.uk/sites/default/files/11.10.11%20Report.pdf>.

The Report is a model of clarity and is well worth reading in full. What follows is only the briefest of summaries, which cannot hope to do justice to it.

In addition to their own literature research, the group interviewed judges with experience of costs budgeting, the head of operations at Barclays which has invested heavily in e-billing and similar systems, a manager for one of the major suppliers of e-billing, a freelance legal IT expert, representatives of the two companies that produce software for inter partes billing and some other costs professionals.

The working group’s report concluded:

- That what the Jackson Review described as “the current proposals”¹¹ on a new bill format were workable. These are that the information in a bill should be categorised into “phase, task and activity”¹², with ‘phase’ being the highest level of generality and ‘activity’ the highest level of detail. Examples are “phase” = ‘witness evidence’, “task” = ‘attendance on witnesses’ and “activity” = ‘seeing witness Bloggs for two hours on 13.6.12’. Using these categories it is possible to generate, from the same data entries, reports at different levels of generality:
 - a high level of generality ranging from total costs on the case to total costs (or respectively profit costs, counsel’s fees and other disbursements) and times on each phase. This would give the parties and the court a broad indication of costs incurred and could be used for comparison with budgets.
 - a medium level of generality, showing in respect of each phase completed the time and costs for each task. This is broadly the information required for most purposes for detailed assessment.
 - a high level of detail, showing in respect of each phase and task the breakdown of time and costs. This level of detail is

necessary to explain the more controversial items on detailed assessment, such as the documents item.

- That “phase”, “task” and “activity” should be defined by reference to codes developed in the USA for electronic time recording and e-billing, known as the “UTBMS¹³” codes. The reason for this is that, although the UTBMS codes would require some modification for civil litigation in England and Wales, they form the basis of most solicitor/client systems in use in this country as the pressure for e-billing etc came initially from US clients. The UTBMS codes also have the advantage of having stood the test of time, and there is no point in trying to reinvent the wheel.
- That full-scale transition to a system which enabled data for inter partes bills to be downloaded from solicitor/client systems would take some years as such systems are expensive to replace and have a life of 5-7 years.
- However, the use of a “phase, task, activity” format was possible both for bills prepared manually as at present¹⁴ and for bills generated more automatically from solicitor/client systems.
- There should be a pilot study of a new format.

One of the most important insights that the working party had was that the production of detailed bills, summary bills and budgets by electronic means is, in IT terms, no more than the production of a series of different reports from the same data.

The latest stage

In February 2012 I was asked by Jackson LJ to keep abreast of the ACL work and to ensure that it proceeded in harmony with the work being done on costs budgets. It was agreed that harmony with summary assessment was also necessary.

Having spoken to various key players, it became apparent to me that the key to implementing the Review’s recommendations on the format of bills for detailed assessment and summary assessment and of budgets lay in ensuring the workability of recommendation 107, the ability to generate these forms from data recorded in time-recording systems.

As the ACL working group had shown, the UTBMS codes formed the foundation stone of the majority of these. In order to avoid expensive and potentially disastrous attempts to reinvent the wheel, and to ensure compatibility with the major systems in the market, it was logical to ensure that the software developed in accordance with Jackson's recommendations was compatible with these codes.

The UTBMS codes were originally developed for use in US legal business. The guardian of these codes is the LEDES¹⁵ Oversight Committee ("LOC"), an international, if US-centric, organisation with members from a number of countries. The UK has representatives on the LOC.

As there are major differences between the way in which legal business is conducted in the US and in England and Wales, the UTBMS codes require adaptation if they are to be used in this jurisdiction. There is a precedent for such a process in the agreement in 2005 of an adaptation of the Codes for use in UK transactional work.

On April 24th there was a meeting of interested parties to discuss the feasibility of adapting the UTBMS codes to meet the requirements of civil litigation in this jurisdiction and a likely timescale for that process, as well as setting up a smaller working group to agree the necessary adaptations. I chaired the meeting which was also attended by:

- Three members of the ACL working group;
- Two UK representatives of the LEDES Oversight Committee;
- Representatives of CostsMaster and iDraft;
- A representative of LITIG, an organisation of IT professionals working within law firms;
- A representative of the LSSA, a Law Society-approved organisation of the suppliers of time-recording, practice management etc software to the legal profession;
- A representative of the Law Society;
- Master Leonard;
- An independent legal IT professional;
- The solicitor who has been most closely involved with Jackson LJ in the development of the costs budget templates;
- Professor Susskind, the well-known specialist in IT and the legal profession.

The meeting agreed that it should be possible to agree adaptations of the UTBMS codes to meet the needs of civil litigation in this jurisdiction, and a small working group was set up to make recommendations on specific adaptations to the codes. It was seen as essential that any adaptation should consider not only the needs of inter partes bills but also should be compatible with any development of the costs budgeting templates, Precedent HA and HB, that might be announced at the Law Society conference on May 29th. No specific time-scale was agreed, but one of the LEDES representatives is going to project manage the working group and come up with a likely timescale.

Once agreement has been reached on the codes, work on the precise format of the new bill for inter partes assessment can begin. This work cannot sensibly be taken any further at this stage, since the precise content of each phase, task and activity will underlie the new format. The ACL working group will, I hope, be heavily involved in the development of the new bill format.

Once a new format has been agreed then, like most of the other innovations arising from Jackson, it will be piloted. The pilot is likely to be in the Senior Courts Costs Office. This would be advantageous not only because it is the only specialist costs court in the country, but also because it will be the court carrying out the detailed assessment of many of the bills which have been through the budgeting process – the defamation pilot is in London and the SCCO assesses bills from the Central London Mercantile Court as well as the Central London and RCJ TCCs.

It is too early to even hazard a guess at the likely timescale for the introduction of the new billing format. It is though right to point out that Jackson LJ described the introduction of a single software system for the generation of both budgets and bills of costs as a “long term aim”. It can safely be said that the new billing format will not be rolled out nationally with the other Jackson reforms in April 2013, though the pilot may have got under way by then.

No decision has yet been taken on whether a pilot should take place on paper only. This might be necessary if the relevant software companies are going to take a very long time to produce an electronic version. However, I would very much prefer the pilot to include electronically produced bills, as well as paper ones, since many of the advantages of the new system lie in the potential of electronic systems.

In other areas of the operation of the Court Service, difficult issues have arisen over shared access by judges and court users to the same electronic systems. If judges are to be able to consider bills produced in an electronic format, agreement will have to be reached on how that is to happen.

How will the new bills be produced?

The aim of this part of the Jackson reforms is to facilitate a better way of doing bills. I cannot see the Ministry of Justice developing a bespoke computer program for this purpose, nor is there any intention to dictate the use of particular software. The intention is to prescribe the physical format in which inter partes bills must appear, because some format has to be prescribed, but to ensure that this format is not incompatible with solicitors' own time-recording systems so as to frustrate recommendation 107. It will then be up to the costs profession, and the legal IT industry, to come up with ways of producing bills in the desired format.

The new bill format has to be accessible to all types of solicitor, from the sole practitioner to the large City firm and the, even larger, ABS. It will not be dictated by the needs of the largest firms, though it is fair to recognise that those who can afford the most sophisticated software will be the ones who derive the most of the benefits which Jackson saw as coming from the use of such programs.

Accordingly it will be possible for the new bills to be produced:

- Manually
- By using a commonly available generic program such as Excel
- By using proprietary costs-drafting software such as CostsMaster or iDraft
- By means of software incorporated in, or as an add-on to, a time-recording/practice management/e-billing system.

My own view is that, although the production of bills, both detailed and summary, and budgets will be greatly assisted by software, the day when the process is fully automatic is well over the horizon. There are two reasons for this.

The first lies in legal professional privilege and client confidentiality. The raw data entered on a solicitor's time-recording system, which today effectively constitute attendance notes, is privileged and confidential. This is particularly

true during the course of the case and remains so even when the case has been won and costs are being assessed, save to the extent necessary to enable a bill to be judged fairly. No solicitor could properly allow that data simply to be made available to the court and the other side at varying levels of generality down to the contents of every individual entry. A process of vetting that data to protect privilege and confidence is essential, and that process has to be done by human beings.

The second reason was hinted at in the Jackson Final Report, where he said, *“The software must provide for work which is not chargeable or work which is written off to be allocated to a separate file¹⁶.”* He might have added that this process has also to be applied to work which is not recoverable under the particular terms of a costs order. Whilst the creation of a separate file for this purpose and the physical movement of relevant costs data to that file may well be done by the software, the judgment as to what work is not chargeable or cannot be claimed inter partes in the particular case has to remain a matter of professional judgment exercised, it is to be hoped, by humans.

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¹ A paper presented to the Conference of the Association of Costs Lawyers, Heathrow, May 11th 2012. Although Jeremy Morgan was an Assessor to the Jackson Review and, as will be apparent, is also playing a role in the implementation of the recommendations discussed in this paper, the views expressed are his own and should not be taken to be official. Implementation of the recommendations in question is a matter for the Rule Committee.

² Review of Civil Litigation Costs: Final Report, December 2009.

³ Yes, it is no longer a Bill. It received Royal Assent on May 1st.

⁴ The Government rejected amendments to LASPO to make this statutory.

⁵ Review of Civil Litigation Costs: Preliminary Report, May 2009, Chapter 53 para.3.2.

⁶ Final Report, Chapter 45, para. 5.3.

⁷ Chapter 45, para. 5.4.

⁸ Final Report, Chapter 40, paras.7.17-18.

⁹ A copy of a blank Precedent HB is annexed to this paper so that its general form may be understood.

¹⁰ The group comprised Debbie Burke (chair), David Abraham, Derek Boyd, Julian Caddick, Brian Collins, Andy Ellis, Mark Friston, Steven Green and Jon Lord.

¹¹ Final Report, Chapter 45, para. 5.6.

¹² As Prof. Susskind has pointed out to me, this categorisation has not been plucked out of the air by US lawyers/IT people. It is already well established in the field of project management.

¹³ UTBMS stands for Uniform Task Based Management System.

¹⁴ The existing software systems are best seen as manual, since they depend on the cost lawyer manually inputting all the data from solicitors' files and printouts of their time-recording systems.

¹⁵ LEDES stands for Legal Electronic Data Exchange Standard.

¹⁶ Chapter 45 para. 5.4.