

EFFICIENT MANAGEMENT OF LITIGATION AND ARBITRATION

A talk by Sir Rupert Jackson at the Hong Kong International Arbitration Centre on 20th September 2018

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1. INTRODUCTION

1.1 This lecture. This lecture will invite you to consider the benefits of managing both litigation and arbitration with a close awareness of the costs consequences of the directions which the judge or arbitral tribunal is giving. The lecture will also invite you to consider whether the judge or arbitral tribunal should actually be controlling recoverable costs as the case proceeds.

1.2 Definitions. In this lecture I use the following abbreviations:

“CMC” means case management conference.

“CCMC” means case and costs management conference.

“CPR” means the English Civil Procedure Rules 1998, as amended from time to time.

“England” means England and Wales.

“FRC” means fixed recoverable costs.

“LCIA” means London International Arbitration Centre.

“LMAA” means London Maritime Arbitrators Association.

“QOCS” means qualified one-way costs shifting.¹

“Supplemental Report” means the Review of Civil Litigation Costs Supplemental Report on Fixed Recoverable Costs dated July 2017.

“TCC” means Technology and Construction Court.

“2009 Review” means the Review of Civil Litigation Costs in 2009.

“2009 Report” means the Review of Civil Litigation Costs Report Final Report, dated December 2009 but published in January 2010.

“2017 Review” means the Review of Fixed Recoverable Costs carried out between January and July 2017.

2. SHOULD JUDGES AND ARBITRATORS MANAGE THEIR CASES WITHOUT REGARD TO COSTS?

2.1 Why should judges bother about costs? Costs often emerge as the dominant issue in litigation. Not infrequently the costs burden which falls on the losing party exceeds the sum which is at stake in the litigation or the value of the property which is in issue. Costs matter. They shouldn't be left on one side, as something which no-one need worry about until the end of the case.

¹ This protects claimants in personal injury actions from costs liability, provided they act reasonably.

- 2.2 OK, if you insist. But why should arbitrators bother about costs? Arbitration is, of course, very different from litigation. Arbitrators are providing a service to the parties and are paid by them, unlike judges who are providing a public service and are paid out of public funds. The parties have a substantial degree of control over the process. For example, they choose the arbitral rules under which they will proceed. The sums of money at stake in a typical international arbitration are vast. They usually dwarf the legal costs.
- 2.3 All that is true. But, strange as it may seem, even in arbitration the parties are concerned about costs. In May of this year Queen Mary University published its latest biennial review of international arbitration.² This was based on questionnaires completed by 922 respondents and interviews with 142 of those respondents. 67% of those respondents said that the high level of costs was the worst feature of international arbitration. Many other surveys over the last twenty years have yielded similar results.
- 2.4 Conclusion in respect of arbitration. If the users are concerned about costs, surely the providers of arbitration services should be addressing that concern?
- 2.5 Progress in controlling arbitrators' fees. Already the arbitral institutions have taken steps to control the fees of arbitrators. For example, the LCIA (through which I do some of my work) limits the charging rates of arbitrators to a maximum of £450. The LCIA also requires arbitrators to commit themselves to a budget at an early stage of proceedings. Other institutions have similar rules.
- 2.6 But no progress in controlling the fees charged by lawyers on each side. The fees charged by the lawyers representing parties in arbitrations are not subject to any advance control.³ These fees far, far exceed the fees charged by arbitrators. The only assessment or taxation of lawyers' costs is carried out at the end of the case. By then, it is a bit late to say that this or that piece of work was unnecessary; or that full discovery was excessive.
- 2.7 Oh dear what is to be done? I respectfully invite you to consider the benefits of introducing costs management into both litigation and arbitration in the Asia Pacific region. Obviously, it would be inappropriate for me to start putting forward proposals for reform in your jurisdictions. But I hope you won't take it amiss if I tell you what is on offer.
- 2.8 Answer to the question posed. My answer to the question posed in section 2 of this paper is 'no'.

3. COSTS MANAGEMENT

- 3.1 What is costs management? Costs management, popularly known as costs budgeting, is a process whereby the parties prepare, discuss and attempt to agree budgets for their litigation; the court amends/approves the budgets (in so far as they are not agreed); thereafter the parties and the court manage the litigation in accordance with the approved/agreed budgets; the recoverable costs at the end are (absent good reason) assessed in accordance with the receiving party's last approved or agreed budget. The costs management rules in conjunction with the new rules on proportionality (CPR rule 44.3(2) and (5)) are designed to restrict recoverable costs to proportionate levels.

² 'The evolution of international arbitration' published by the School of International Arbitration at Queen Mary University of London

³ Subject to one very modest exception, of which I am aware. Para 11 of schedule 2 to the LMAA Terms requires parties after close of pleadings to complete questionnaires. Question 15 of the questionnaire asks for an estimate of costs through to the end of the reference. At the end of the case the arbitrators can take this estimate into account when assessing recoverable costs.

3.2 When was costs management introduced in England and what rules prescribe the procedure? Costs management was piloted in a small number of courts between 2009 and 2013. It was introduced generally in April 2013. The relevant rules are set out in section II of CPR Part 3 and Practice Direction 3E.

3.3 The new proportionality rules. The 2009 Report proposed that recoverable costs (when assessed on the standard basis) should be limited to that which is proportionate. The report also proposed a new definition of proportionality as follows:

“Costs incurred are proportionate if they bear a reasonable relationship to –

(a) the sums in issue in the proceedings;

(b) the value of any non-monetary relief in issue in the proceedings;

(c) the complexity of the litigation;

(d) any additional work generated by the conduct of the paying party; and

(e) any wider factors involved in the proceedings, such as reputation or public importance.”

CPR rules 44.3(2) and (5) implement these recommendations.

3.4 Has everyone loved costs management? No. The procedure meant more work for lawyers and more work for judges. Many lawyers and judges didn't like that. But over time the opposition has mellowed, as people have become more familiar with the process of costs budgeting and costs management. The submissions which came in during the 2017 Review confirmed this.

3.5 Why press on with reforms which were initially so unpopular? Because it was necessary. The only way to control costs effectively is to do so in advance. That means either fixed costs (i.e. set figures for each category of case) or costs management. Fixed costs are only acceptable for lower value cases. For the larger cases, the only way to control costs in advance is by means of cost management.

3.6 The views of court users. Many court users are delighted to see that at long last litigation (like all other business projects) is being conducted on budgets rather than on an open-ended basis. An interesting feature of the 2009 Review was that, when I took votes at meetings, lawyers tended to vote against the proposal for costs management, but clients (including in-house lawyers) tended to vote in favour.

4. THE BENEFITS OF COSTS MANAGEMENT

4.1 Conclusion from the first five years of costs management. The first and most important conclusion to be drawn after five years' experience of the process is the same as that which was drawn from the pilots. Costs management works. When an experienced judge or master costs manages litigation with competent practitioners on both sides, the costs of the litigation are controlled from an early stage. It brings substantial benefits to court users.

4.2 First benefit of costs management: Knowledge of the financial position. Both sides know where they stand financially. They have clarity as to:

(a) what they will still have to pay if they win (difference between own actual costs and own recoverable costs); and

(b) what they will pay if they lose (own actual costs + other parties' recoverable costs).

In many cases, the litigation costs form a substantial part of what the parties are arguing about.

This information is of obvious benefit for those making decisions about the future conduct of litigation. Practitioners say the information is extremely helpful in the context of mediation.

Insurers (who in practice end up footing many litigation bills) also find costs budgets valuable for the purpose of setting reserves.

- 4.3 Views of third party funders. Third-party funders, who play an increasing role in facilitating access to justice, attach particular importance to the first benefit. They require budgets for their own costs in every case and, wherever possible, seek costs management orders. Their contracts often link funding to the court-approved budgets. An experienced QC, who does much work in this field, states that he does not know of a single funder which dislikes costs management.
- 4.4 Second benefit of costs management: it encourages early settlement. One intractable problem of civil litigation has been that cases which are destined to settle often drag on for far too long before the parties come to terms. Chapter 4 of the 2009 Report identified this as one of the 14 causes of excessive litigation costs. The new costs management regime makes a contribution to tackling this problem, in that it encourages early settlement. Once all parties can see: (a) the total costs of the litigation; and (b) the extent of their own exposure, they are inclined to ‘see sense’ or bite the bullet early. Numerous practitioners have confirmed this.
- 4.5 Third benefit of costs management: controlling costs. When costs management is done properly, it controls costs from an early stage. This is for two reasons:
- (a) In some cases, the very act of preparing a budget, which will be subject to critical scrutiny, tempers behaviour. Any party who puts forward an over-elaborate case plan or an excessive budget;
 - (i) invites criticism; and
 - (ii) encourages similar extravagance by the other party/parties.
 - (b) Effective costs management by the court generally reduces the costs payable by the losing party. It also brings down the actual costs of the litigation for both parties, despite the additional costs involved in the costs management process.
- 4.6 Fourth benefit of costs management: it focuses attention on costs at the outset of the litigation. A number of solicitors and judges have drawn attention to this benefit. In the majority of cases, costs are a major factor. A failure by the victor to recover sufficient costs may render the whole litigation futile. The costs burden on the loser may be crushing, quite regardless of the damages which he may have to pay or the property rights which he may forfeit. It is therefore necessary that all concerned should be forced to focus on the costs involved at the outset.
- 4.7 Fifth benefit of costs management: elementary fairness. It is elementary fairness to give the opposition notice of what you are claiming. The rules require litigants to set out with precision the damages which they seek. Why treat costs differently? They are both sums of money which the loser must pay to the winner. From the point of view of the client, costs are often just as important as damages.
- 4.8 Sixth benefit of costs management: it prevents legal catastrophe. A regional costs judge in Bristol made the following point about costs management:
- “It protects losing parties (particularly the ‘real’ people, as opposed to insurance companies in PI claims) from being destroyed by costs when they lose.”*
- 4.9 But this procedure adds an extra layer of costs to litigation. Is it worth it? Yes. If costs management is done properly, the savings achieved significantly exceed the costs of the process.

5. FEEDBACK DURING THE 2017 REVIEW

5.1 Extensive feedback during the review. Many of those who contributed written submissions or who spoke at seminars discussed costs management. This was because many stakeholders maintained that the success of costs management had rendered any extension of the FRC regime unnecessary.

5.2 One firm of costs lawyers. One long established firm of costs lawyers with regional offices wrote:

“This proposal [costs budgeting] has undoubtedly had the largest impact to date owing to its effect on the everyday work of solicitors and the judiciary. At the outset there was of course a significant degree of resistance to the entire concept, however, solicitors are clearly now more comfortable with the idea of budgeting. At the inception of the regime, solicitors were deferring to our expertise although as time has progressed they are increasingly undertaking the drafting of budgets themselves. [This firm] regularly delivers seminars to its clients and it is apparent from the engagement at all levels, from junior to partner, that costs budgeting is being accepted as a more important part of the whole case management process than it was 3½ years ago.

Although we are being instructed on matters that have been costs managed, generally our opinion is that clients are settling matters using approved budgets as a basis for negotiations. It is usually only on those matters where the parties are significantly apart on any attempted negotiations where we are then instructed. Costs budgeting therefore appears to be having the intended effect of reducing the number of claims that have to proceed to detailed assessment. The procedural rules and the relevant forms have evolved to take account of various issues that have arisen in the application of the budgeting regime. Indeed, further rule changes are apparently imminent to address the SARPD Oil judgment and uncertainty concerning the application of the 1% and 2% allowance for the costs of the budgeting process. This evolution of the regime over a period of 3½ years was not unexpected given the drastic shift in practice required, however, it is clear that both practitioners and the judiciary are more au fait with the entire process and now is the appropriate time to assess its impact.”

That firm went on to argue that the combined effect of costs management and the new proportionality rule had “led to a reduction in recoverable legal costs thus negating the proposition of fixed costs.”

5.3 Chambers outside London. A large set of chambers in Bristol argues that FRC are misconceived, because costs management is the best way to control costs:

“Budgets are easy to explain to clients and provide them with reasonable certainty and predictability. The costs of budgeting are modest (capped at 3% of overall costs). Costs of budgeting and assessment are a reasonable price to pay for fairness.”

A large set of chambers in Manchester made similar points.

5.4 South Eastern circuit and Bar Council. The South Eastern Circuit (“SEC”) stated:

“In the multi-track budgeting, done effectively, should prevent disproportionate costs. It means that at an early stage parties have a clear idea as to their likely costs recovery and liability. It is done on a bespoke basis by experienced local judges after the parties have had a fair chance to make relevant points. The redrafted provisions on proportionality apply and can be applied to the specific case. The SEC is aware that budgeting is still bedding down and has mixed popularity but believes that with time it should be effective in achieving the goals identified above. It should lead to more appropriate and refined outcomes than the much broader brush of fixed recoverable costs.”

The Bar Council advanced a similar argument in para 38 of its written submissions.⁴

5.5 Law Society and Chartered Institute of Legal Executives. The Law Society pointed out that:

“Cost budgeting also allows parties to identify a number of non-standardised contingencies which may be unique

⁴ Available on the Bar Council’s website

(http://www.barcouncil.org.uk/media/547292/20170130_bar_council_submission_on_fixed_recoverable_costs.pdf).

features of their case such as seeking trial on preliminary issues, applications for specific disclosure, or costs for a mediation process.”

They continued:

“It is also worth remembering that parties do not have a “blank cheque” when it comes to their costs budgets. Proportionality is already written into the Civil Procedure Rules, reinforced by case law. Even if costs are necessarily and reasonably incurred, they will not be recoverable if they are disproportionate to the issues at stake.”

The Chartered Institute of Legal Executives (generally known as “CILEX”) states that costs budgeting “*has worked well*”, but it is only recently that judicial consistency has emerged.

5.6 Stephen Webber (claimant solicitor and chairman of the Society of Clinical Injury Lawyers). Mr Webber, an experienced clinical negligence solicitor, stated that costs management “*has been a huge success*” and is continuing to improve.⁵ He went on to argue that this was a more effective means of controlling costs than FRC.

5.7 Costs management in business litigation. The spokesman for the Commercial Bar Association at the Birmingham seminar said that budgeting works well in the Mercantile Courts. It provides a bespoke process for individual cases.⁶

5.8 The views of Queen’s Bench masters managing clinical negligence cases. Master Cook (supported by the Senior Master and assessor to the FRC review, Barbara Fontaine) reports that costs management is now working much better.⁷ There is more consistency between different courts as a result of judicial training. Parties are often agreeing proportionate costs, which shortens hearings. The one big problem is incurred costs, which are not currently subject to budgeting. Master Roberts in his lecture at the Association of Personal Injury Lawyers Annual Conference on 19th May 2017 stated that costs management now worked much better.⁸ Hearings are shorter and budgets or parts of budgets are often agreed. In summary, the Queen’s Bench masters specialising in clinical negligence regard costs management rather than FRC as the appropriate means of controlling costs.

5.9 Costs management in technology and construction litigation. The Technology and Construction Bar Association report that costs management works well in the Technology and Construction Court (“TCC”).⁹ The TCC has for long been in the forefront of costs management. In the Society of Construction Law’s paper D185, dated December 2015,¹⁰ three experienced TCC practitioners wrote:

“Costs Management

Where (i) a budget has been approved or agreed (particularly where, when approving that budget, the court has made clear comments about incurred costs); and where (ii) a standard basis costs award is made, it appears that courts are increasingly willing to summarily assess the costs of the claim as a whole at the end of the case, rather than send the matter to detailed assessment.

This appears to be particularly the case where, as is common in courts such as the TCC, the judge who decides the case is the same judge who has case managed it – and who therefore set the budget. An example of this approach

⁵ Mr Webber’s views were expressed at a seminar in Cardiff: see Supplemental Report chapter 4, para 12.3.

⁶ See chapter 4, para 10.2.

⁷ See chapter 4, para 6.4.

⁸ See chapter 4, para 18.2.

⁹ See chapter 4 para 10.2.

¹⁰ “The Pioneering TCC: Pushing the Boundaries on Litigation Costs”, available on the Society of Construction Law website (<https://www.scl.org.uk/papers/pioneering-tcc-pushing-boundaries-litigation-costs>).

can be seen in *Safetynet Security v Coppage*.¹¹ Such an outcome has the significant advantage for the receiving party that payment of the full costs will be due in 14 days, rather than having to incur the costs of preparing a detailed bill and then to wait many months for the outcome of an assessment or for the opponent to agree the costs.

Proportionality

The second factor is the more robust test of proportionality introduced into the CPR 44.3(2) in April 2013. This not merely allows, but in practice encourages, courts to take a robust, 'broad brush' approach to costs, without having to conduct a detailed, line by line, analysis of the costs. The combination of the ability to take such an approach, with the greater availability of costs information as a result of costs management and the presumption under CPR 3.18 that an approved budget will not normally be departed from provide a powerful temptation to a court, whether invited or not, to cut through costs issues at the end of a case and conduct a robust summary assessment."

5.10 Costs incurred before the first case management conference. The present costs management regime only controls future costs. Those represent the majority of the total costs. Nevertheless, many commentators make the point that it would be better if the regime controlled historic costs as well as future costs. That is a fair point. In the Supplemental Report I have put forward proposals to extend the present regime to encompass historic costs (usually referred to as "incurred costs"). See Supplemental Report, chapter 6 paragraph 4.3 and chapter 11 paragraph 2.2.

6. COSTS MANAGEMENT IN ENGLISH GROUP ACTIONS

6.1 Experience since 2013. Experience shows that costs management can be particularly effective in group actions. Group actions are the one category of litigation where parties (including claimants) often ask the court to make costs management orders, even though the claim falls outside the normal criteria for costs management. Examples are the *Kenya Litigation*, the *Iraqi Civilian Litigation* and the action by 5,800 shareholders against Lloyd's Bank and certain former directors.¹² Litigation funders, who often stand behind the claimants in large actions, favour costs management. They sometimes link their funding to court approved budgets. I understand from practitioners that there are three reasons¹³ why claimants usually seek costs budgets in group actions: (i) to prevent defendants over-spending on costs for which, if the action is lost, the claimants will be liable; (ii) to obtain information which the claimants need for ATE insurance; (iii) to have the comfort of knowing what work they will be paid for (if they win).

6.2 Kenya litigation. This massive claim brought by Kenyan nationals in respect of alleged mistreatment during the colonial era has been running for several years and is now at the trial stage. The principal solicitors for the claimants have a budget of some £62.5 million: £24 million before the first CMC and so subject to future detailed assessment + an approved budget of £38.5 million for work done since the first CMC.

6.3 Information from counsel. Counsel on both sides tell me that budgeting has worked well in the Kenya case. It has been carried out in stages for each tranche of the action. The parties exchange budgets. Then they have a round table meeting and usually reach agreement on many of the issues. There is then a costs management hearing in front of the judge to resolve outstanding issues. These hearings are always completed within a day. The savings achieved by this process substantially exceed the costs of the exercise.

¹¹ *Safetynet Security Ltd v Coppage* [2002] EWHC B11 (Mercantile).

¹² *Sharp v Blank* [2017] EWHC 3390 (Ch) deals with the costs management issues in that litigation.

¹³ Reasons (i) and (ii) do not apply in cases subject to QOCS.

- 6.4 Whereas in most litigation costs management and case management are done together in single CCMCs, in large group actions (such as Kenya) it makes sense to hold each costs management hearing a few weeks after the relevant case management hearing.
- 6.5 Lloyds Bank litigation. It was the claimants who pressed for costs management in this case. Nugee J made an order for costs management. I am told by counsel that the process has worked well.
- 6.6 Arch Crew litigation. This is a group action brought by investors in respect of financial services provided in Guernsey. The claimants applied for costs management. The defendants were neutral. The master made an order for costs management. That litigation has now settled.
- 6.7 Coke workers litigation. Both sides asked the court to undertake costs management. Turner J agreed to do so. This action is still running. Turner J sits with the Senior Costs Judge (Andrew Gordon-Saker) for costs management hearings. I understand from counsel that this works well. The parties are able to resolve most issues by agreement at round table meetings before the costs management hearings.

7. EFFICIENT CASE MANAGEMENT

- 7.1 Case management and costs management go together. In order to manage a case efficiently, the judge or arbitrator needs to understand the costs consequences of the directions which he or she is giving. If the parties have prepared proper budgets, the costs consequences will be clear and the tribunal can take those matters into account: for example, by limiting the scope of discovery or the number of expert witnesses. The objective must be to manage each case in a proportionate manner. So, case management and costs management run together. They promote the efficient conduct of litigation or arbitration.
- 7.2 Debate about sequence. In England, there has been some debate about sequencing. Should there be separate case management and costs management hearings or should the two be done together. For a time, different courts were adopting different practices. Fortunately, that has now stopped. The general practice is to do both together in CCMCs. The main exception is in large group litigation, as noted in para 6.4 above.
- 7.3 Summary. After a bumpy start in England, costs management has emerged as a successful discipline for controlling litigation costs. May I therefore invite you to consider the possibility of:
- (a) Piloting costs management in arbitration;
 - (b) Piloting costs management in litigation in your jurisdiction?

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20th September 2018