

The Costs Briefing

Issue 08 July 2018



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July 2018

Welcome!

As those of you who know me already will be aware, I spend a lot of my time meeting and listening to people – clients, fellow professionals, judges, committee members and of course the team here at Practico. I think I am pretty good at identifying interesting people with something to say. If I am right about myself, then the readers of this Costs Briefing will enjoy reading the articles contributed by PJ Kirby QC and Susan Dunn and will find their content both informative and useful.

As it so happens, I have seen both of them speaking as well - PJ at a training session with clients where he and Andy shared their collective experience and wisdom and Susan when she contributed with authority and clarity to our last Breakfast Costs Roundtable. A summary of the Roundtable also appears in this edition.

Being able to call on great writing from outside our team is brilliant, but the Practico team is pretty literate as well. Examples of that can be found in the articles from Andy and Aimee, both of which look forward to the future, while Ed chronicles his life in costs as he looks back at the last 18 years.

Deborah Burke
Managing Associate

A handwritten signature in black ink, reading 'DBurke', with a stylized, cursive script.

Shorter bills in larger cases – *Deutsche Bank AG v Sebastian Holding, Inc and Another*

Aimee Lawman
Senior Associate

A frequent challenge in costs proceedings involving substantial costs claims is how to approach its disposal in a way that allows for efficient and more cost-effective resolution - the conventional method for drawing bills is long-winded and can be vastly expensive. In addition to that, no-one (especially the Court) looks fondly on the prospect of a detailed assessment hearing which could potentially last as long as, or even longer than, the trial in the substantive proceedings.

In cases which cannot be settled before a bill of costs is prepared, we are advocates for producing hybrid-style bills that set out our client's costs at a higher level, enabling engagement before the need to drill down into the nitty gritty.

The courts are becoming more aware that this is a sensible approach on larger cases.

Recently in the Senior Courts Costs Office, a hearing took place before Master Gordon-Saker whereby directions were sought to agree an approach for the preparation of a hybrid-style bill to save the time and costs of drawing a conventional bill. The claim for costs was in excess of £65m and it was estimated that it would cost £2m and take two years to prepare the bill.

The Master was hesitant to make an order to prescribe the format of a bill which had not yet been prepared but acknowledged that the provisions of CPR 47 are not prescriptive, and that the model form of bill at Precedent A is just that – a model, not a prescribed form.

Without actually prescribing the exact format, he conceded that the alternative style bill - as proposed by the receiving party - was fair of

capable assessment, on the basis that the content was compliant with the guidance provided by CPR 47 (and in particular para 5.12 of the PD). It remains to be seen how that will eventually look and whether it actually reduces the time and costs associated with assessing the bill.

This is certainly a step in the right direction and more such engagement by parties and the courts in this regard is welcomed.

Over time the costs rules will need to be adjusted to cater explicitly for a more flexible approach. This is something that has to happen given that the current rules and approach often leads to a prohibitively expensive and drawn out process, putting most people off from entering into it in the first place.



Costs and professional negligence

As part of a series of articles on how to avoid professional negligence claims, PJ Kirby QC looks at where claims may arise around after-the-event insurance policies and litigation funding.

PJ Kirby QC

All cases involve costs. Lawyers have to earn a living. Costs may be the main reason why very expensive litigation ends up going to trial (see the recent example of *Sirketiv Kupeli* [2018] EWCA Civ 1264, where the Court of Appeal expressed its dismay over a series of modest claims taken to trial where the main issue was costs). At the end of the case, costs have to be paid and that may lead to the solicitor and client relationship breaking down. Sometimes it will result in allegations of professional negligence.

The challenged invoice at the end of the unsuccessful litigation may not be unusual, and may result in two further sets of costs covering allegations of negligence being tried in the High Court or county court, followed by a section 70, Solicitors Act 1974 detailed assessment.

That is, sadly, an all too familiar context for professional negligence claims. However, there is a danger that a new type of professional negligence claim involving legal costs may be emerging in light of the changes brought about by LASPO since 1 April 2013. The Jackson reforms saw the widespread introduction of costs budgeting and the abolition of the recovery between the parties of success fees and after-the-event insurance (ATE) premiums, save in a limited number of cases.

There may still be a few cases where clients have a claim against their solicitor for failing

to advise as to the availability of ATE insurance and the recoverability of the premium. Certainly, prior to 1 April 2013 it is difficult to see how a solicitor acting reasonably would not have discussed the availability of ATE. Paragraph 2.03(g) of the Solicitors' Code of Conduct provides:

'You must give your client the best information possible about the likely overall cost of a matter both at the outset and, when appropriate, as the matter progresses. In particular you must ...discuss with the client whether their liability for another party's costs may be covered by existing insurance or whether specially purchased insurance may be obtained.'

Prior to 1 April 2013, ATE was often available with deferred self-insured premiums. Whilst claims relating to the failure to advise as to the availability of ATE are more obvious in respect of the period prior to 1 April 2013, ATE policies are still available and a client looking to minimise the risk of an adverse costs liability may still prefer to pay a significant premium, a proportion of which may still be deferred, to obtain the necessary cover and certainty.

Solicitors still need to advise as to the availability of ATE. Whilst ATE was often associated with low-value personal injury claims, ATE is often now used in very substantial commercial litigation to reduce the risk to the bottom line of the balance sheet in the event of an unsuccessful

claim. All litigating clients need to be advised of the same.

If a client seeks to bring a claim in relation to the lack of ATE that client will have to show that ATE would have been available on terms that the client would have accepted.

Clients also need to be advised of the different ways in which litigation can be funded. In large commercial claims, a corporation may well prefer to share any fruits of the successful litigation with a third party funder to running the risk of the costs of an unsuccessful claim creating a significant dent in the balance sheet. Third party funding may have been originally seen as providing access to justice, but is now additionally providing protection for the profitability of corporations.

Of course, no claim will be made against the solicitor if the claim succeeds, but if the claim fails and there is a significant adverse costs liability the disappointed client may look to the costs advice that the solicitor gave at the beginning of the retainer. Did the solicitor actually explore the possibility of third party funding?

If a client seeks to bring a claim in relation to the failure to advise as to the availability of third party funding, that client will have to show that third party funding would have been available on terms that the client would have accepted.

Third party funding may lead to further

claims in respect of professional negligence. A funder will invest in a claim having received a proposal from the claimant's lawyers. That proposal will most likely contain an analysis of the prospects of success of the claim. Whilst funders will, or should, carry out their own due diligence a proposal that unreasonably over-eggs the prospects of success could lead to a negligent misstatement claim by the funder against the lawyers in cases where the claim fails.

Careful recorded advice at the outset is the way to avoid such claims.

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PJ Kirby QC is joint head of chambers at Hardwicke. He took silk in 2013. PJ sits as a deputy district judge and is a Bar Council-appointed High Court costs assessor. PJ is also an ADR group accredited mediator and is on the Costs ADR (CADR) panel of mediators.

This article appeared in the Law Society's Newsletter on 21 June 2018

<http://communities.lawsociety.org.uk/civil-litigation/news-and-features/civil-litigation-features-and-comment/costs-and-professional-negligence-ate-and-third-party-funding/5065299.article>

Litigation costs do not need to be a financial burden to your clients

Susan Dunn explains how legal costs remain at the forefront of the General Counsel's (GC) mind and how third party funding (TPF) removes the financial burden of litigation costs.

When asked which factors are driving change in the GC role, in the 2017 Winmark Looking Glass Report survey¹, 69% of respondents quoted cost pressures that *require improved efficiency*. It is unsurprising then that the question: "Which factors drive change in the role of external counsel from the GC's perspective", led to 82% respondents answering: "Cost pressures that require improved efficiency" - the number one answer.

And yet, costs remain disproportionately high for the administrative aspects of legal service provision.

In our dealings with corporate legal teams it becomes clear the challenges they face are:

- shrinking budgets – all departments need to deliver savings
- the need to question and control law firm budgets
- with the focus on transactional work, the need to obtain (costly) litigation expertise externally
- increased focus on achieving settlement

Law firms can offer GCs practical solutions when teaming up with a litigation funder. Firms have woken up to the fact that their clients demand that they understand the use of funding. Those

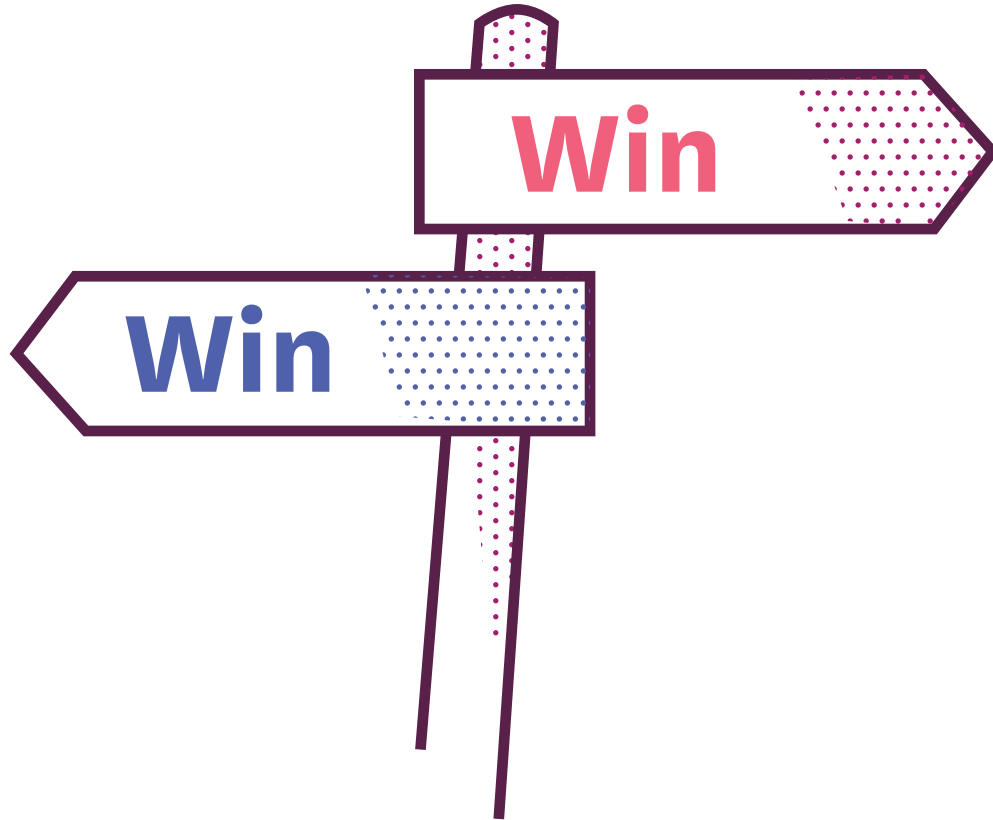
embracing this early on, have the advantage on slower moving peers.

We have seen an upsurge in direct enquiries from corporates, including from finance departments, approaching us for assistance with funding and also law firm selection. GCs recognise we work with an extensive range of firms on all types of disputes and like to tap in to our vast networks. They have embraced the fact that TPF relieves cost pressures while improving efficiency.

Divergent risk appetite

CFOs and in-house lawyers have different training and mindsets. Accountants are trained to see black and white whereas lawyers are accustomed to shades of grey, which lacks the certainty a numbers person craves.

The GC wants to prosecute valid claims and team up with the best legal team. The CFO is less enthused about dedicating part of his limited budget to pursuing litigation. Views of what constitutes 'acceptable risks' are divergent. And then there is the uncertainty about the outcome of litigation or arbitration. We have funded claims which everyone advised we would win, which either lost or failed to recover any money. Those losses never appeared in the company's



budget because the case was funded.

A CFO is interested in reducing financial risk. Likewise, the GC is trying to reduce legal risk and exposure to claims or criticism for the business. The trick is to stop treating litigation as a liability and transform it into an asset by removing the financial risk of the dispute. This is where TPF comes in.

Shift the burden of risk

When a funder backs a case all legal and case related costs are paid throughout the case by the funder - not the business. If the case is settled or won and monies received, the funder takes a pre-agreed share of the proceeds. If the case is lost, the loss is the funder's – there is no recourse. The business is only paying monies to the funder when it receives monies from a case. TPF allows CFOs to take the legal cost budget off their balance sheet and use that capital for other business objectives, while the GC can pursue good claims.

Improving efficiencies

Our evaluation of the claim for funding adds an informed second opinion to the prospects of the claim, from our experienced litigators, for no

charge.

We help develop and agree the budget for a case. As we ring fence that budget in our fund at the outset, we make sure all assumptions have been considered. This exercise helps focus the minds of all involved, clearly strategising the objectives for the claim.

TPF also helps strengthen the chances of the case succeeding by ensuring the case is properly resourced, i.e. that the best legal teams can be appointed.

Corporate clients, and their law firms, may worry they cede control to the funder when they agree to take on funding. That is not the case: we neither control the litigation team, nor the settlement discussions when they arise.

A win-win for all parties involved.

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¹ The Looking Glass Report 2017 by Winmark in partnership with Clyde & Co. The findings are based on a survey of 100 in-house legal leaders and 18 Board directors, desk research and 19 in-depth expert interviews.

Susan Dunn is Co-founder and Member of Investment Committee at Harbour Litigation Funding.
www.harbourlitigationfunding.com

This article first appeared in *The In House Lawyer* magazine

Don't fear the spreadsheet

Andy Ellis takes the pain out of electronic billing

Bills for detailed assessment in Part 7 claims must be submitted in electronic spreadsheet form for work carried out after 6 April 2018 - and if that amendment to the CPR doesn't get readers' pulses racing, nothing will!

For the wider costs community, as Mr Justice Birss has explained, surrendering to Excel equates to 'being dragged kicking and screaming into the 1980s'. The more pertinent question then is not 'Why is this needed?' but 'Why has it taken so long?'

The reassuring news for practitioners whose heads are already hitting the desk at this point is that they probably need to know little about the mechanics of the new electronic bill. Those who are sanguine about the merits of pivot tables and the benefits of xml schema can safely remain on home turf.

What I expect litigators, and their clients, will appreciate about the 'new' bills when they percolate through, are the smarter high and mid-level summaries that the spreadsheet data will feed. The current form of bill is too often opaque and unintuitive to navigate.

For those representing paying parties, especially in heavier cases, the burden of analysing costs claims should reduce. To understand where the big numbers fall in a conventional bill and to test its susceptibility to challenge, we usually need to re-enter the data into a vehicle

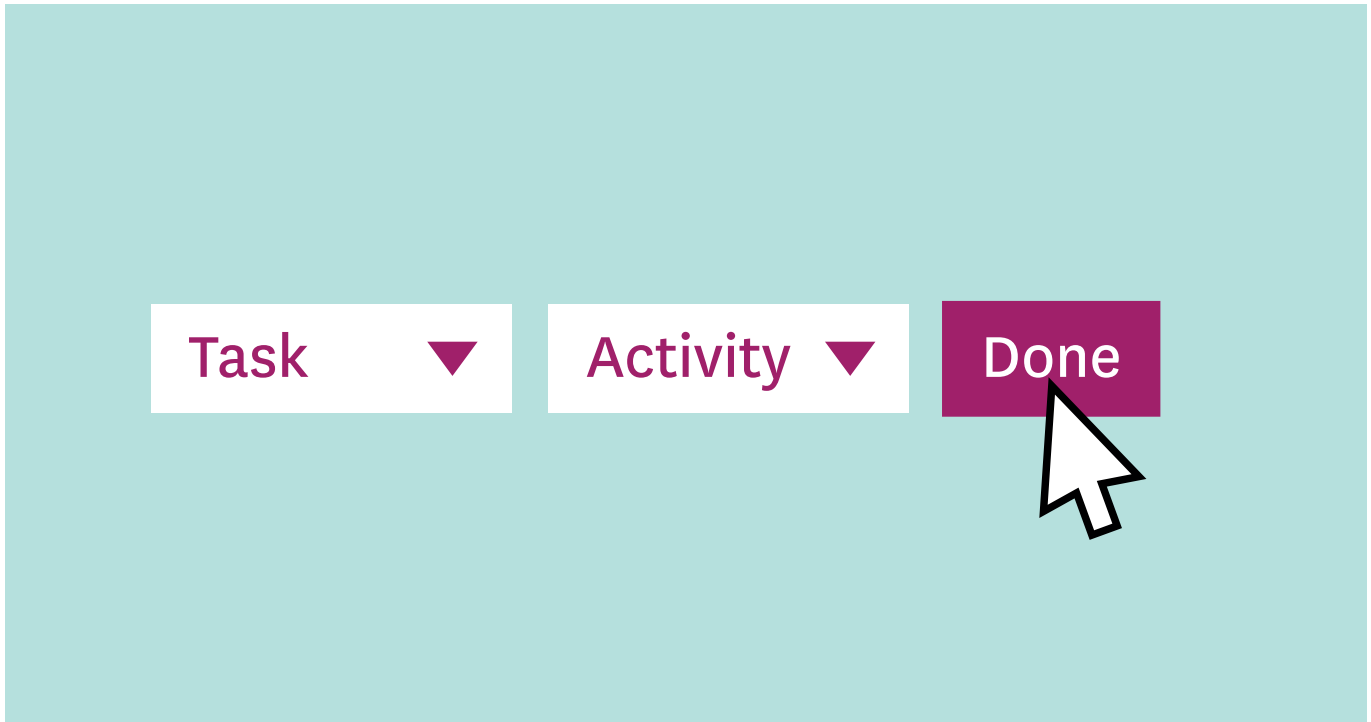
suitable for valuation and forecast. At least the first part of that exercise should be rendered unnecessary by the new bill and will save time and costs.

For receiving parties, the full benefits of the electronic bill are only realised if the law firm has adapted its time recording systems and daily disciplines to marry up with PD47's prescribed phase, task, activity and expense ('PTAE') categorisation.

Realistically, many dispute resolution lawyers will continue to avoid detailed assessment like the plague. Faced with the cost and time of reconfiguring systems and changing old habits some firms will prefer to take the pain of commissioning more labour-intensive and expensive 'reverse-engineered' bill preparation for their few cases when detailed assessment proves unavoidable.

Others have rightly pointed out that sophisticated clients often demand that their bills are categorised in a bespoke way (which may or may not be easily 'mappable' to the PD47 prescribed categories). Client preferences that promote a frictionless billing process are always going to trump a system that is optimised for recovery between the parties.

For firms and chambers who are now looking to bite the bullet I should summarise the key elements of PTAE. It's a dry subject but it works



fundamentally by categorising costs primarily by reference to what work is being done (the task and at a higher level, the phase) and only secondarily by how that work is carried out (the activity).

During the Jackson consultation, ‘J codes’ became a toxic label for the standard PTAE categories among the opponents of reform and there was an element of fake news about their alleged complexity.

Through some deft footwork in the CPRC, the ‘J’ task categories (on average three per phase) have been fully preserved in Schedule 2 to PD 47. Oddly they became uncontroversial once the ‘J’ prefix was removed. Perhaps people thought ‘J’ stood for Jackson.

It’s fair to say the number of activity options (modes of communication and attendance) initially drawn from the international UTBMS code set was impracticable to implement.

The Hutton Committee was able to slim down the activities from 30 to the 10 most used. A similar filleting exercise produced 15 expense categories from a compendious 66 in the international set, which should be some comfort to accounts staff posting disbursements to the ledger.

My own view is that even conscientious objectors (and one day even counsel) are likely to record to the Precedent H phases in cases

for which court budgets are required. And that being the case, they may as well go the extra yard and record instead by task. The task determines the Phase so it’s one decision not two. Most lawyers probably record to activities already, so no substantial change would arise there.

Early adopters report that this method of recording, once bedded in, tends to require fewer keystrokes and clicks. The most common example is that having selected a task of ‘preparing witness statements’ and an activity ‘drafting’ the only information needed in the narrative field is the witness’s name.

Over time (and our work on this initiative began in 2008 so I recognise that this is evolution not revolution) I expect to see improvement in the effectiveness of costs litigation. For larger bills, detailed assessment does not work well and yet if better visibility on the key components promotes more succinct challenges, I expect that assessment has a future and that the threats to it will arrive by the imposition of fixed costs and not by the emergence of electronic bills.

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This article originally appeared in the *New Law Journal* in May 2018

Costs Roundtable

Deborah Burke
Managing Associate



Our June 2018 event was chaired by Jeremy Morgan. The session was led by Alexander Hutton QC of Hailsham Chambers and supported by Andy Ellis, Deborah Burke and Kevin Wonnacott from Practico. We were pleased to welcome a variety of representatives from many different firms: Susana Cao Miranda from Linklaters, Melissa Oppenheim from Clifford Chance, Guy Harvey from Shepherd and Wedderburn, Clare Reffin from One Essex Court, Susan Dunn from Harbour Litigation Funding, Andrew Hutcheon from Watson Farley Williams, Louis Charalambous from Simons Muirhead & Burton, Virginia Cooper from Bevan Brittan, David Marshall from Anthony Gold, Gavin Chesney from Debevoise & Plimpton, Matthew Patching and Edward Parkes from Marcus Sinclair and Johnny Shearman from Signature Litigation.

Here is our summary of the discussion at the Costs Roundtable – Devonshire Club, 21 June 2018

Third Party Funding

1. Security for costs

- Security for costs has been an active area since CPR 25.14 enabled Defendants to obtain security from third party funders.
- An ATE policy can be an answer to an application for security for costs but if it doesn't have an anti-avoidance clause then it is much less likely to be regarded as sufficient security.
- Anti-avoidance effectively means that the ATE insurer cannot avoid the policy for material

non-disclosure and/or the client not telling the truth in relation to the claim.

- Funders are live to this issue and there are solutions including the funder being the insured party (so the potential fraudulent claim point falls away) and/or the policy proceeds being assigned to the Defendant.



- In some group cases the Claimants and the funders are named on the policy – the first £x in the name of the Claimants and a further amount in the name of the funder.
- Law firms seeking funding should always satisfy themselves that the funder has the funds available in any event – some do not. See *Bailey and others v Glaxosmithkline UK Ltd [2017] EWHC 3195 (QB)*.

2. The ‘Arkin’ cap

- In the Arkin case in 2005 (*Arkin v Borchard Lines Ltd and others [2005] EWCA Civ 655*), the CA decided that where losing Claimants had received funding from a third party funder but didn’t have the money to pay the Defendants’ costs, it would be appropriate to make an order against the third party funder who had funded the Claimant’s claim but only up to the amount of the funding that they’d put in.
- That’s the ‘Arkin cap’.
- In *Bailey*, Mr Justice Foskett didn’t limit the security to the Arkin cap and said he would not be bound by it. The security that was provided was put into an account which the other

party wouldn’t have access to. It would then be up to the judge at the end of the case to decide what to do about the cap and whether to apply it.

- Forskett J bore in mind Sir Rupert Jackson’s report which disparaged the Arkin cap and thought it was too generous to third party funders. Sir Rupert thought that third party funders should be liable for all of the costs of the Defendant in the event that a claim failed.
- The direction of travel appears to be that the Arkin cap will be removed.

3. Group Action Considerations

- In many group cases, without third party funding it is doubtful that large-scale group actions could be brought.
- The CAT Rules now allow for opt in and opt out for CRA claims. Opt out means that everyone who is included in the definition is opted in, even if they know nothing about the claim.



- In the *Merricks v Mastercard* litigation, everyone who had used a Mastercard in the UK between 1992 and 2008 was automatically enrolled as a Claimant and the estimate of aggregate damages was approximately £46 billion. One of the Defendants’ main points was that there were various faults in the way the Claimants were funding the litigation. The court found no reason in costs law why they shouldn’t make an order for such claims to go forward and it was the damages issue - the inability to quantify damages with sufficient pre-

cision - that caused the litigation to fail.

- This case is going to appeal and it is listed in the Court of Appeal for 31 October 2018.
- Without a workable opt-out regime it can be the case that for lower value cases, the cost of signing up Claimants becomes disproportionately expensive.
- Managing groups with diverse interests and different levels of preferred engagement in the litigation within a single group structure can be problematic.
- Much can be learned by taking the best aspects from Australia and the US of group litigation for both management and distribution; but lack of resources for studies and judicial involvement in the English jurisdiction slows the process of adoption of true opt-out schemes with contingency fees.

4. Portfolio funding

- This means different things to different people.
- In broad terms a client might have a group of cases. For example, a corporate client who wants to de-risk a batch of cases it might not otherwise pursue.
- Most law firms are not running great swathes of cases on risk, outside PI and other high-volume work. When the term is applied to law firms (it is more commonly a US term), an example would be a US firm running a number of cases on a contingent basis which are running for longer than anticipated and at higher cost. Some of that risk is laid off by selling a proportion of the WIP and with the funder providing a contribution to costs going forward in return for a share of proceeds. Adverse selection can predictably be a significant issue
- The risk assessment process by the funder can be enlightening to the law firm when data analysis replaces a more instinctive approach.
- Some funders will allow cross collateralisa-

tion which enables more creative solutions for the client, especially in commercial litigation.

5. Self-funding and DBAs

- It used to be a concern that if a law firm took on too much risk, then arguably such an arrangement would be champertous and invalid because the law firm would have so much at stake in the litigation and the firm's judgment would be impaired.



- Recent decisions suggest that it is acceptable for law firms to self-fund – in the case of *Sibthorpe & Morris v London Borough of Southwark* it was decided that a law firm can agree to pay the adverse costs in a claim. In *Germany v Flatman [2013] EWCA Civ 278 (10 April 2013)* it was found not to be wrong, invalid or champertous for the law firm to pay or fund all of the disbursements for the client.
- Strikingly, law firms are presently exempted from the adverse costs consequences of acting as funder.
- DBA insurance potentially changes the way firms can run cases which otherwise might be funded by a third party. If the firm is prepared to go on risk for the entire length of the case and can cover costs as the litigation progresses, and the case is ultimately lost, the insurer will pay a percentage of the firm's WIP on that case. It's a cheaper option than third party funding.
- There has been no recent clarity on the enforceability of DBAs and their termination provisions which, along with the non-avail-

ability of hybrid DBAs has discouraged widespread adoption.

6. Costs Budgeting

- Budgeting is second nature in funded cases.
- In the big cases budgeting is increasingly regarded as useful by defendants too.
- Since *Harrison*, the agreed or approved budget is a more reliable indicator of future costs liability.
- Sir Rupert Jackson is now proposing that costs budgeting should be extended to arbitrations. Cost caps were after all introduced in arbitral proceedings in 1996.
- The experience of costs measures in arbitration varies enormously. At one extreme in *Essar* the costs of the funder were included in the award; in other cases there had been a refusal to entertain security for costs despite it being written into the RCIA rules.

News from the team

Ed Marrow
Senior Associate



My career in the costs industry began in 2000 and I joined Practico in 2003. The initial years were spent attending detailed assessment hearings in the Senior Court Costs Office and in various County Courts up and down the country and individually preparing bills of costs, points of dispute and replies.

In more recent years, with the introduction of provisional assessment and a change in the

nature of our work, the detailed assessment hearings are less frequent and, when preparing bills of costs, points of dispute and replies, we have a more collaborative approach.

We have a great team at Practico who work well together, all bringing their own skill set to the table, under the watchful eye of Andy and Kevin.

I have been lucky enough to have worked on some particularly large and important costs cases including *Motto and others v Trafigura Limited* and *Various Claimants v News Group Newspapers Limited*.

Following three long years of study I qualified as a regulated Costs Lawyer last year to receive external validation for my many years of costs experience.

When I'm not at work I enjoy spending time with my family, playing tennis, watching sport – mainly football and pottering around my garden.

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