JULY/AUGUST 2014 | ISSUE 4

CostsLawyer

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Opportunity knocks

A new profession takes shape

Practice rights
ACL faces down 'malevolent' threats

Transferring CFAs
Assignments versus novations explained

Changing times
New CPR 3.8 analysed

ACL conference Manchester

Friday 24 October

Hilton Manchester Deansgate

SAVE THE DATE

Confirmed speakers include:

- **Costs Judge Master Leonard**
- **Alexander Hutton QC**
  Hailsham Chambers
- **Regional Costs Judge Besford**
  North Eastern Circuit
- **Jonathan Dingle**
  London School of Mediation

Confirmed topics include:

- New model form bill of costs – latest developments
- The new guideline hourly rates – implications for costs lawyers
- ADR and mediation
- The latest legal developments
- The future of the costs lawyer profession
- Panel discussion

For more information, please email Diane Pattenden at **enquiries@costslawyer.co.uk** or call the ACL office on **0203 174 0967**

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Visit the ACL website at www.costslawyer.co.uk

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ACL Association of Costs Lawyers

Editor's comment

My first two months as editor of *Costs Lawyer* have been a whirlwind of activity. In my first week, I was privileged to meet a large cross section of the profession at the ACL Annual Conference. Then, just as our printing presses were about to roll, the Court of Appeal heard three combined cases on the proper application of the *Mitchell* principles regarding trivial breaches of timetables – but, frustratingly, reserved its judgment. We'll therefore update our readers on the outcome of this important ruling via our e-bulletin service.

This sense of dynamism is carried across into several articles contained in this edition of *Costs Lawyer*. Our cover story examines the ACL's recently refreshed qualification, and highlights its new focus on issues such as advanced civil procedure and business management. Useful insights are also provided in our final Annual Conference report beginning on page 30, which explores the possible future career options open to costs lawyers.

To help our readers make sense of this brave new world, we've decided to extend the focus of *Costs Lawyer* magazine beyond the black letter law aspects of professional life, and also include market developments within the profession – effectively, the practicalities of running a modern cost law practice. And, as part of this evolution, I'd encourage firms to let me know about their innovations, appointments and expansions. Why not drop me a line at *editor@costslawyer.co.uk*?

Richard Parnham, *Editor*

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National costs law practice makes an innovative push for pricing work

It was a key theme at the recent ACL conference – how costs lawyers can diversify their revenue streams, in the face of challenges such as automation. Now one of the largest employers of costs lawyers in the country has firmly grasped this nettle in a determined effort to position itself as a law firm pricing, as well as costs drafting, consultancy service.

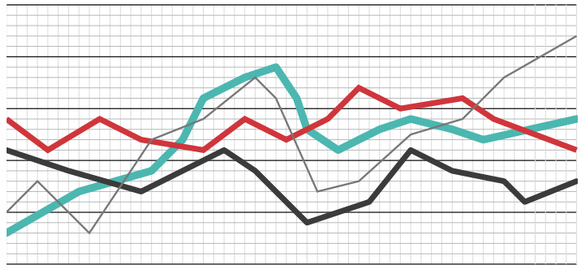
The practice in question, Burcher Jennings, only came into existence in April this year, following the union of law firm pricing consultancy Validatum and Jennings Costs. In May, the firm announced that it was undertaking detailed research into law firms' charge-out rates, with the intention of using the market intelligence gathered to advise firms on their pricing strategies.

Conducted via a short online questionnaire, the Burcher Jennings survey investigates law firms' pricing arrangements in relation to several key variables, including areas of law, location and levels of qualification and experience. Having collated and anonymised its survey data, Burcher Jennings then aims to produce half-yearly reports, where its findings are analysed.

The scale of the research is ambitious – the costs law practice has offered the first 500 law firms who respond to its survey a year's free access to its findings.

Explaining the Burcher Jennings' research initiative, firm CEO Martyn Jennings said that the whole issue of legal pricing had become increasingly important to law firms in recent years, as clients become more cost-conscious and demand a wide range of price and payment options. Yet, despite these demands, many firms are struggling to make informed decisions about how much they should charge for their services.

In contrast with contentious work, where law firms' charge-out rates are largely determined by the courts, there is currently a lack of accessible market data regarding appropriate fees for non-contentious work. "Such information is desperately needed," he said, pointing out



that a similar scheme has now operated successfully in New Zealand for five years.

Perhaps not surprisingly, given the current lack of available market data, Mr Jennings suggested that research conducted by Burcher Jennings to date suggests large disparities between law firms regarding how much they charge for their non-contentious work. Yet, if firms are able to get their pricing strategies right, Mr Jennings points out that they can often achieve substantial increases in their profitability – in some cases by 25 per cent.

In a separate announcement, Burcher Jennings has also confirmed the appointment of former Co-operative Legal Services director Christina Blacklaws to its five-member advisory board, which also includes Professors Stephen Mayson and Dominic Regan.

Explaining the rationale for hiring Blacklaws, Martyn Jennings said: "Christina has spent her career at the cutting edge of developments in the legal services market, with experience from community law firm, to hybrid, to virtual, to ABS. Couple that with the considerable insights her representative role at the Law Society has given her and, for me, it's a no-brainer."

NEWS IN BRIEF

Masters promotes partners

Masters Legal Costs Services has promoted six members of its team to full equity partnership status, taking the firm's equity partner headcount from two to eight. The newly promoted partners are: Carina Patterson, David Platnauer, Tony Hale, Francis Kendall, Thomas Spanyol and Ian Walton.

PI Costing relocates

PI Costing has relocated its Manchester office from Hardman Street to larger premises in Bexley Square in Salford. The development comes just three months after the practice opened a London office.

John M Hayes trio in Midlands spin-off

Three former costs practitioners have broken away from John M Hayes to form a new Chesterfield- and Derby-based practice, Bidwell Henderson, following a decision to return to their home region.

Costs lawyer Mark Bidwell was previously the manager of the Amersham branch of John M Hayes, while Rebecca Bidwell managed the firm's London operations. The third partner at Bidwell Henderson, Ann Henderson, also previously worked at John M Hayes's central London office.

Bidwell Henderson is currently recruiting for experienced costs lawyer personnel.

Just Costs expands again

One of the largest costs law practices in the country, Just Costs, has launched its fourth office in Leeds, to add to its portfolio of offices in Manchester, London and Chesterfield.

The new Leeds office will be headed by Chesterfield eastern regional manager Adam Oldale, supported by costs lawyer Nicola Brett, who has relocated to the city from Chesterfield.

The development is part of Just Costs' ambitious expansion programme, which has seen the firm hire 29 new staff in the past six months. A further 30 new recruits are planned for the coming months.

NEWS IN BRIEF

First fundamental dishonestly QoCs case claimed

9 Gough Square barristers John Foy QC and Simon Bridle have acted on what is believed to be the first finding of fundamental dishonesty under the newly qualified one-way costs shifting (QoCs) provision of CPR 44. In *Gosling v Screwfix and Anr*, an unreported Cambridge County Court case, the pair persuaded His Honour Judge Moloney QC that the claimant, Mr Gosling, had behaved in a fundamentally dishonest manner for the purpose of QoCs. Consequently, the claimant was required to pay Screwfix's costs on an indemnity basis. On a matter of fact, the dishonesty did not arise in relation to Mr Gosling's injury itself – rather that he exaggerated the extent of his on-going symptoms. Yet, while the dishonesty only accounted for half of Mr Gosling's claim, HHJ Moloney QC decided that the claimant's dishonestly was sufficiently serious to render his entire QoCs "shield" useless.

Costs lawyers welcome buffer direction

Costs lawyers from across the country have welcomed the 5 June update to CPR 3.8, which now allows parties to agree time extensions of up to 28 days without the need to apply to the court – as long as certain conditions are met. Runcorn-based Sterling Costs described the development as "a good day for common sense", while national firm Kain Knight was among those celebrating a "happy bufferday".

Correction

On page 28 of the May/June edition of *Costs Lawyer*, proper attribution should have been given to Melanie Vickery and not Michelle Vickery, as stated in the article. We apologise to Ms Vickery for the error.

Mitchell: CoA reserves judgment

Costs lawyers looking for definitive guidance on how to deal with minor case management breaches post-*Mitchell* will have to wait a little longer, after the Court of Appeal opted to reserve its judgment on three joined cases. The three disputes, *Decadent Vapours Ltd v Bevan*, *Denton & Ors v TH White Ltd & Anr* and *Utilise TDS Limited v Davies*, were heard by Master of the Rolls Lord Dyson, Lord Justice Jackson and Lord Justice Voss on 16 and 17 June 2014.

In the absence of any immediate Court of Appeal guidance, Kings Chambers' costs counsel Dr Mark Friston, who appeared on behalf of the Bar Council as one of the interveners in the case, urged practitioners seeking relief from sanctions to obtain an adjournment. "The way *Mitchell* is being applied will change," he predicted via Twitter, within minutes of the reserved judgment announcement being made. Earlier, Friston had tweeted a comment from Lord Dyson MR, stating: "If *Mitchell* is being interpreted as deriving the court of discretion, then the Court of Appeal needs to do something about it."

Practitioners wishing to gain insights into the nature of the claimants' submissions, and their Lordship's responses to the arguments put to them, may wish to review Gordon Exall's Civil Litigation Brief blog, where key aspects of the Court of Appeal hearings are summarised.

Guideline hourly rates: close, but not yet finalised

The Civil Justice Council's costs committee came perilously close to missing yet another self-imposed deadline regarding its guideline hourly rates (GHR) report – but finally, an important landmark has been reached.

In a statement issued on 2 June, costs committee chairman Mr Justice Foskett confirmed that GHR recommendations had now been finalised and submitted to the Master of the Rolls, Lord Dyson, for his consideration.

Deadlines to produce the report have repeatedly slipped in recent months: first from January 2014, and then from mid-April. The deadline was then extended once again until the end of May, which was met by the narrowest of margins. Foskett J attributed the delay in submitting the report to the "scale and complexity of the task" and "the need to reach agreement as far as possible on some very difficult issues".

At present, no date has been set for publishing the costs committee's recommendations. It is anticipated that the committee's report will be published at the same time as Lord Dyson's final decisions on what the GHR should be, and the dates from which the new rates will take effect.

"Refusal to mediate" costs case reported

The costs consequences of failing to take part in mediation have been highlighted in the recent High Court case of *Phillip Garritt-Critchley & Others v Andrew Ronnan and Solarpower PV Limited* [2014] EWHC 1774 (Ch).

Although the costs hearing took place on 4 February 2014, a summary of the case has only recently been published by Panonne, the firm that acted for four claimants in the case. The dispute centered on the defendant's failure to allocate shares in the company in accordance with an alleged agreement.

In delivering his ruling, His Honour Judge Waksman QC, sitting in the Chancery Division, Manchester District, awarded indemnity costs to the claimant, after concluding that the defendant's persistent refusal to mediate was unreasonable. Judicial antipathy towards parties who fail to engage in mediation has long been made clear, following the 2004 Court of Appeal ruling in *Halsey v Milton Keynes General NHS Trust*.

Finding in the claimant's favour, HHJ Waksman dismissed the validity of various claims made by the defendant, justifying its refusal to take part in ADR. These claims included the suggestion that there was no middle ground between the parties; that the parties disliked and distrusted each other; and that both sides were too far apart for a settlement to be reached. The parties could not know whether they were too far apart unless they sat down and explored the possibility of a settlement, HHJ Waksman said.

Consumer contract regulation warning

New consumer protection regulations may affect the recoverability of solicitors' fees unless strict conditions are met, experts have warned.

The warning follows last week's enactment of the Consumer Contracts (Information, Cancellation and Additional Changes) Regulations 2013 (CCR 2013). CCR 2013 applies to agreements entered into between traders – thought to include law firms – and consumers from 13 June 2014 onwards. The new regime replaces the Consumer Protection (Distance Selling) Regulations 2000 and the Cancellation of Contracts made in a Consumer's Home or Place of Work etc Regulations 2008.

Detailed guidance regarding CCR 2013 has now been produced by a variety of experts, including the Law Society, Kerry Underwood and Nicholas Bacon QC from 4 New Square.

Under CCR 2013, solicitors must make a large amount of information, such as fixed cost estimates or charge-out rates, available to consumers before any contract for services is agreed. That information will then be treated as part of the firm's retainer. In addition, if the firm wishes to change the nature of its retainer – for example, to increase its total project budget or vary its hourly rates – it must seek express permission from the client to do so.

In his guidance note on CCR 2013, 4 New Square's Nicholas Bacon suggests any solicitor who fails to provide such information may be exposed on the grounds of breach of contract and/or misrepresentation. Bacon also speculates that third parties may also be able to invoke rights granted under CCR 2013 if challenging an inter-partes costs bill.

The new CCR 2013 regime also updates consumers' obligations to pay for solicitors' early-stage incurred costs, where a contract for services is originally agreed 'off premises' or 'at a distance', and the consumer then changes his or her mind about instructing the firm.

Previously, unless agreed otherwise, there was a presumption against consumers having to pay any charges incurred by the firm during the first seven days of being instructed, so long as the consumer withdrew from the contract in writing. Now, the presumption against recoverable expenses has been extended to 14 days and, in addition, consumers' permitted method of cancellation has now been widened to include any 'clear statement' – including by email.

Failure to provide off-premises consumers with information explaining their right to cancel is now a summary offence, with fines of up to £5,000 for non-compliance now possible.

To help mitigate against both of these risks, the Law Society has produced two model documents that firms may wish to use. The first template focuses on firms' initial instructions to clients, and sets out the clients' right to cancel their agreement. The second template focuses on the cancellation process, and provides a model cancellation form.

No plans to scrap CPD, says costs regulator

The Costs Lawyer Standards Board (CLSB) has confirmed it has no plans to follow the lead of the Solicitors Regulation Authority (SRA) and abolish fixed hours continued professional development (CPD) training.

CLSB chief executive Lynn Plumbley told *Costs Lawyer* that the CLSB regarded costs lawyers' CPD obligations as playing an "integral part" in the profession's practising certification process.

The CLSB's reaction follows an announcement made by the SRA on 21 May, in which it said that it planned to abolish the requirement that solicitors undertake 16 hours' compulsory training per year. Under the SRA's new plan, which will first require approval from the Legal Services Board (LSB), the existing regime would start to wind down from February 2015, with abolition following in November 2016. Assuming the new plan is accepted, solicitors will be expected to declare they have "considered their CPD needs" when renewing their practising certificate.

Plumbley, whose organisation most recently updated its CPD regime in January 2013, said she intends to watch the LSB's response to the SRA's proposals "with interest".

The CLSB's decision to not revisit its costs lawyer CPD regime has been welcomed by the ACL. Claire Green, ACL Council member for education, said: "I think scrapping CPD is a retrograde step, especially for a profession in turmoil following swingeing changes to the rules and judicial precedent. ACL Training will continue to expect students to acquire the requisite number of CPD hours and will continue to offer opportunities to do so."

With the CLSB and SRA now adopting contrasting approaches on how best to ensure their professions remain competent, all eyes at England and Wales's various legal profession regulators will be on the LSB's response to the SRA's plan.

The LSB is expected to begin the process of reviewing the SRA's proposals in November this year, with a full response expected by early 2015.

NEWS IN BRIEF

Cook and Lord win ACL poll

Robert Cook and Jon Lord have been elected to the ACL's governing council. Cook works at Southport-based Ultimate Costs, while Lord works at London-based Cost Advocates. The election followed the retirement of former ACL president Murray Heining and the ACL's decision to expand its council to nine members. Cook admitted his win had come as a "big surprise", but he thanked all those who had voted for him – especially given the high calibre of the seven other candidates. Lord also expressed his thanks to the other candidates and to all those who voted. "I look forward to working with the Council and the wider membership to take the ACL forward in an exciting era for the profession," Lord added.

Entity regulation for costs practices

The Costs Lawyer Standards Board (CLSB) is now reviewing the responses to its recent consultation on how it should regulate costs-lawyer-led entities. The costs lawyer regulator is due to submit its recommendations to the Legal Services Board during July.

Under the draft proposals, many costs law practices will be subject to entity-level, as well as individual practitioner, regulation. Sole practitioners, in-house costs lawyers and mixed practices already governed by other legal regulators would be unaffected by the CLSB's plans.

The draft outlines CLSB's plans to make entities accountable for the actions of all of its employees (not just those who are CLSB regulated) and for a penalty system, including fines of up to £4,000 and a permanent removal of a firm's authorised entity status.

ACL seeks to head off "malevolent" rights challenges

The ACL has responded to several "malevolent" challenges to costs lawyers' right to appear in court by obtaining counsel's opinion confirming that its members have rights to conduct costs litigation and to act as advocates in costs proceedings – including when working in conjunction with unregulated costs specialists.

The advice given by 4 New Square's specialist cost counsel Roger Mallalieu is unambiguous. Costs Lawyers have an absolute right as conferred upon them by statute to conduct all costs proceedings within the limits of their statutory powers – regardless of the circumstances in which they are retained or employed.

The challenges have arisen where costs lawyers are working in organisations that are not themselves regulated and so not authorised to conduct litigation or provide advocacy – mainly because the Costs Lawyer Standards Board (CLSB) does not yet have a scheme of entity regulation in place.

However, Mr Mallalieu said the Legal Services Act 2007 specifically exempts costs lawyers from having to work in authorised bodies until entity regulation is introduced. The CLSB is currently consulting on introducing a scheme of entity regulation next year.

In order to ensure their position is as robust as possible, Mr Mallalieu's advice stated that costs lawyers should have systems in place to ensure that any non-authorised persons they work with are not engaging in reserved activities.

In relation to the right to conduct litigation specifically, the advice said that costs lawyers are entitled to use unregulated persons to assist them with tasks such as drafting, correspondence, secretarial services, general advice and assistance, without fearing that their litigation rights could be successfully challenged. What amounts to the conduct of litigation is likely to be narrowly construed, he advised.

Mr Mallalieu acknowledged, however, that until entity regulation is introduced, challenges could continue and judges may have concerns until the position is properly explained to them.

ACL chairman Sue Nash says: "We decided to take advice after several malevolent challenges to costs lawyers' right to appear in court. These challenges go to the very route of our *raison d'etre*.

"We are keen to hear from any costs lawyers who have, or are currently experiencing, any challenges to their audience rights. If appropriate, the Association would consider being joined as an interested party to the relevant proceedings. It is important that a clear legal precedent is established to prevent further unwanted satellite litigation of this kind."

For regular news updates... visit the Association of Costs Lawyers' website or subscribe to the weekly email update at ***editor@costslawyer.co.uk***

Obituary: Joe Locke of Williams Associates

Costs lawyer Joe Locke passed away peacefully on 12 May 2014 following a relatively short battle with cancer.

Born in Scotland in 1949, Joe began his career at law in 1964, dealing with general litigation and opposing claims for costs for a small firm of solicitors in Dunstable. After a few positions dealing with various types of litigation and costs, Joe began his career in costs in earnest in 1975. By 1980, he had established his own costs firm, which he ran successfully for almost 20 years before returning to an office environment in 1999. Latterly, in 2004, Joe became a partner at Williams Associates where, he always said, he spent the best years of his working life before retiring in March 2014.

Joe served for many years on the then ACLD Council, both as ordinary council member and as honorary secretary, and was the recipient of the Chairman's Cup for his services to our Association.

Joe loved to teach the law on costs, be that as part of the Association's training course, in-house or for external clients, and always had a friendly word for anyone in need of assistance. Joe's inimitable humour, generosity and passion for all things costs will forever be sorely missed.

Joe is survived by his doting wife, Margaret, and son, Russell, and is deeply missed by all of his family, friends and colleagues.

Jon Williams, Williams Associates

News

Legal Aid Agency in limited reprieve on local travel claims

The Legal Aid Agency (LAA) has suspended its blanket ban on reimbursing legal representatives for local travel; however, the reprieve, announced on 22 May, is only temporary. The strict new regime will restart for all legal aid certificates issued on or after 1 September 2014.

Historically, it has not been possible to recover expenses for local journeys – typically within 10 miles of the court visited. Here, the guiding principle, which the LAA has followed within its own regime, is contained in paragraph 5.22 (3) of the Practice Direction to Rule 47.6 CPR. This advice states that the exact definition of what amounts to 'local' is a matter for the court to decide, depending on local circumstances.

Yet, although the judicial position on this point has not changed in recent months, costs lawyers have begun to report that the LAA has started taking a tougher line when carrying out its own assessments – treating the 10-mile guideline as an absolute minimum distance permitted for claiming travel expenses, rather than a rebuttable presumption against a successful expenses claim.

Concerns have also been raised about whether the LAA is taking an unduly harsh approach by disallowing claims for travel time, inferring that travel time amounts to a travel expense.

Until it restores its 10-mile expenses ban on 1 September, the LAA will now revert to assessing time and expenses by reference to the reasonableness of costs, so long as the expenses claimed are supported by evidence. However, in itself, the fact that travel took place within 10 miles of the court will not automatically result in claims for travel expenses being rejected.

During this interim period, the LAA has urged practitioners to refer to the costs assessment guidance to help them judge whether travel time and expenses are reasonable.

The LAA has now agreed that anyone who has an assessment reduction in relation to local travel expenses can now submit an appeal in the normal manner. However, the LAA has also stated that it has no intention of reimbursing for claims where an appeal would now be out of time.

NEWS IN BRIEF

Cyber future for low-value civil disputes?

The long-term use of the courts system to resolve civil disputes worth less than £25,000 has been thrown into question, following the decision by the Civil Justice Council (CJC) to explore the concept of online dispute resolution (ODR). ODR involves the resolution of disputes across the internet, using techniques such as e-negotiation and e-mediation. The new advisory group will be chaired by Professor Richard Susskind OBE, a long-term and influential advocate of the use of computer-aided-justice. Professor Susskind has been IT advisor to the Lord Chief Justice of England and Wales since 1998.

Fixed cost medical reports considered

The Civil Procedure Rule Committee is now considering a plan to update the RTA Protocol and various reforms to Part 36 and 45 of the CPR, following its recent consultation on fixed-cost medical reports for soft tissue injuries – typically whiplash claims. The consultation closed on 28 May, and the CPR Committee is due to finalise its proposals at its July meeting. It is anticipated that any CPR or RTA Protocol changes will be implemented by October.

New publication

Class Legal, publisher of *Costs Law Reports*, has published the 2014-2015 edition of its *Costs & Fees Encyclopedia*. The 433-page book, which costs £60, will be reviewed in the September/October edition of *Costs Lawyer* magazine.

Roll-out of troubled CCMS electronic bill of costs continues

The Legal Aid Agency's (LAA) controversial client and cost management system (CCMS) – effectively an electronic bill of costs for legal aid matters – continues to be rolled out across the country, despite its tendency to crash on a regular basis.

The system most recently failed on 6 June, after previously failing for several days during its pilot phase in the north east of England.

In addition to the north east, CCMS has now been rolled out to firms across Manchester, Leeds and the Midlands, taking its total user base to more than 155 practices. Participating firms are typically given 10 days' notice of the system's launch in their area – after which date use of CCMS remains voluntary for three months only.

At the recent ACL Annual Conference in London, Ian Black from Ian Black & Associates offered a downbeat assessment of his experience of using CCMS during its pilot phase, suggesting he had effectively been forced to act as an unofficial software tester for the LAA.

A key point made by Black at this meeting was that, once firms agree to switch to CCMS, they are unable to withdraw from it. This is something costs law practices should bear in mind as the CCMS roll-out continues across the country.

Difficult times ahead

The Mitchell fall-out is challenging for costs lawyers, but legal aid reforms pose a threat to society as a whole, says ACL chair *Sue Nash*

As we all move into the summer months with the prospect of well-deserved holidays, I find myself reflecting on what a busy and important year 2014 is turning out to be.

The fallout from *Mitchell* has seen a raft of cases on the issue of compliance with rules and court orders, and, as I write, three cases are shortly to be heard in the Court of Appeal which, it is to be hoped, should give some guidance and clarity. Still to come are the eagerly awaited announcements about guideline hourly rates and the new format bill of costs, both of which are likely to have a profound effect on our future as costs lawyers.

All news will be reported via our weekly e-bulletin before being analysed in more detail in the next issue of *Costs Lawyer*. Our new editor, Richard Parnham, is going to have a busy time!

The last few months have also seen a huge amount of work undertaken by various council committees, and of course we have had our annual conference. You should all have received the email with the special conference report attached, and the conference is further discussed in this issue.

By the time you read this there will be two further additions to the ranks of the ACL Council, including one member who will have qualified within the last three years. The future of our profession lies with our trainees and young costs lawyers and they will now be guaranteed representation and a voice in the decisions that the Council take on behalf of the Association.

Access to justice

Most articles and commentary on the first year of 'Jackson' have focused on the changes to civil litigation, and of course these changes affect a considerable proportion of our membership. However, the legal aid aspects of the reforms have, arguably, affected the general population (as well as our legal aid group members) more. Indeed, I believe that the legal aid aspects of the reforms have had a profound and damaging effect on access to justice.

I have recently had cause to re-read the Civil Justice Council's report on access to justice for litigants in person, which was published in November 2011 – well ahead of the reforms that were brought into being in April last year. In the overview and executive summary, the report states:

"It is a reality that those who cannot afford legal services and those for whom the State will not provide legal aid comprise the larger part of the population of England and Wales."

> *"I believe that the legal aid... reforms have had a damaging effect on access to justice"*

The National Pro Bono Unit, which brings together the Bar Pro Bono Unit, Law Works and others, undertakes sterling work in helping people who might otherwise have no access to justice. This work is backed up by court support services that exist in many courts. Maurice and I have been in discussion with the National Pro Bono Centre to see how cost lawyers can assist their work and the people they represent. We have also spoken to the Citizens Advice Bureau in the Royal Courts of Justice and I will report further on both of these initiatives in due course.

Concerns about access to justice were expressed by CILEx president Stephen Gowland in his speech at the CILEx Annual Presidential Dinner, which I recently attended. Addressing principal guest Chris Grayling, he said: "We are not convinced with how on-board you are with the principles described in Magna Carta. Legal aid, judicial review and many other instruments are an expression of a principle that has defined our country – that of access to justice." I echo and support Stephen's concerns. The Lord Chancellor's wide-ranging response/speech has been widely reported in the legal press.

Staying on the same theme, can I urge you all to watch and listen to the campaign video produced by the Justice Alliance, which can be found at *www.justicealliance uk.wordpress.com*? This was shown at the start of the Legal Aid Lawyer of the Year Awards, which was attended by the chairman of the ACL Legal Aid Group, Paul Seddon. The evening marked the achievements of publicly funded lawyers such as Elkan Abrahamson, who has worked for Hillsborough families and campaigners for two decades, and was instrumental in obtaining the second inquest into the Hillsborough Disaster. We all owe a debt of gratitude to lawyers like him.

And finally...

As I mentioned at the conference, we want to encourage the setting-up of regional groups, and one, in Leeds, is already being put together by Nicola Brett and Andrew Macauley. If anyone else is interested in setting up a group in their area/region please contact me or Council member James Barrett. ■

A new profession takes shape

After a year-long hiatus, the ACL's costs lawyer qualification reopened for business on 1 May 2014. *Richard Parnham* explains the new regime, and gauges the profession's reaction to its key components

Richard Parnham is the new editor of *Costs Lawyer*. He has previously written for numerous legal magazines, including *The European Lawyer*, the *Solicitors Journal* and the International Bar Association's *Global Insight*

In retrospect, it was probably inevitable that the costs lawyer qualification would require reform to ensure the profession was equipped to cope with recent market developments. "The whole role of the costs lawyer profession has altered beyond recognition post-Jackson," says Claire Green, ACL Council member for education. "Previously, the courts had a *laissez-faire* approach to costs budgeting and timetabling. Now, and especially post-*Mitchell*, that attitude has had to fall by the wayside. The new costs lawyer qualification teaches students that the court timetable is now sacrosanct."

Indeed, the impact of the Jackson reforms – and also *Mitchell* – is reflected in several syllabus changes to the updated costs lawyer qualification. As before, students will continue to receive basic training in civil procedure during their first year of study. However, this introductory course will then be supplemented with more advanced training on explicitly costs-specific issues during students' final year of academic study. In future, a detailed understanding of the case law surrounding these issues will be expected.

Separately, and in recognition of costs lawyers' rights of audience following the Legal Services Act 2007, basic advocacy and negotiation has now become a first-year module. Going forward, it is anticipated that advocacy and negotiating skills will form the cornerstone of the costs law profession's key competencies.

Of course, for costs law practitioners, the year-long hiatus that occurred while the costs law qualification was re-written to encompass these updates was less than ideal. In some cases, firms now find themselves facing a hefty one-off cost to pay for the backlog of candidates they wish to put through the revised course – in the case of Kain Knight this amounts to around 25 candidates.

However, to some extent, the alternative approach of modifying the course 'on the fly' was equally unattractive. Following the Legal Education and Training Review (LETR), all branches of the legal profession are now under pressure to reform their legal education regimes – while simultaneously requiring students to undertake legacy courses that may soon be discontinued once the reform process is complete. By contrast, the new costs lawyer qualification has been designed to be LETR- and Jackson-compliant from the outset.

> *"The new course includes mediation, legal project management and other aspects of professional life that we believe will come to the fore in the future"*

Indeed, for the ACL's Claire Green, one of the key benefits of the new costs lawyer qualification is that it is forward looking, with a view to equipping students with skills that are likely to become increasingly desirable in the years ahead. "The new course includes mediation, legal project management and other aspects of professional life that we believe will come to the fore in the future," she says. And practitioners certainly seem to support this new focus. "Costs management and cost budgeting are a real opportunity for costs lawyers – as is major project work," says Philip Bowden, senior partner of Masters Legal Costs Services.

Another innovation in the new qualification is the introduction of a specific module covering business management – effectively, how to run a law practice. This module will feature a strong element of regulatory compliance, but also covers issues such as firm marketing and business development.

The logic for this approach is self-evident: with many costs lawyers opting to work on a self-employed basis, often from home, teaching practice management skills is now seen as a core competence. Additionally, it is hoped that these skills will widen costs lawyers' talents still further, enabling them to advise law firms on both profitability and regulatory compliance issues.

"I think the new qualification's focus on business management is a fantastic development," says Nick McDonnell, head of education and training *Continued overleaf...*

Did you know?
It took nine researchers almost two years to produce the LETR report.

ILLUSTRATIONS: ©IKON IMAGES/ALAMY

at Just Costs. "Gone are the days when practitioners only had to concern themselves with providing the client with a legal service. That's obviously still very important, but these days running a practice is just as much about making money and being profitable. These two issues go hand in hand."

Indeed, even costs lawyers who work in-house at large law firms can see the benefit of giving their trainee costs lawyers exposure to this issue. "If learning about business development means our trainee costs lawyers can come up with useful new ideas, that would be beneficial to our business," says Ian Gilbert, costs law team leader at Irwin Mitchell.

While several components of the revised costs lawyer qualification are new, other aspects of the previous course have been retained – albeit with some modifications. As before, the new course is studied via a series of standalone modules, however there is now a greater emphasis on the continued monitoring of students' progression throughout their period of study. Previously, students were given all course materials at the start of each academic year, and effectively given several months to complete their assignments. Now, students will be required to submit coursework every three-to-seven weeks, depending on the length of individual course components. There will also be one compulsory practical seminar per year, and one exam, which features elements of each module previously studied.

"The new regime will help to ensure that students are engaged with the course materials throughout their studies," says Kirsty Allison from Coventry University College, who helped devise various aspects of the revised qualification. "This approach is more regimented than before, but the key objective is that students should complete their assignments when the content of each module is still fresh in their minds."

> *"Gone are the days when practitioners only had to concern themselves with providing the client with a legal service... these days running a practice is just as much about making money and being profitable"*

After studying for the course's foundation modules in years one and two, students will, for the first time, be offered the chance to choose between three out of several possible modules to study, in addition to the three compulsory ones. Each of these modules has a strong practice area focus, albeit with a costs law twist (see 'Costs law qualification – key components' box, right). Legal aid is not included as a distinctive practice topic in the students' third year – instead, this subject is now subsumed within a wider compulsory 'funding' module, which is studied by all students in year two.

Of all the aspects of the new training regime, the issue of optional modules has arguably sparked the greatest debate among costs lawyers. Some query the benefits of early specialisation: "If you're not exposed to something, then you don't know whether you'll like it," observes Just Costs' Nick McDonnell. Others, such as Annette Livingstone from Annette Livingstone & Associates, welcome this development, because the new regime allows students to "pick their courses according to the work they do and the career they intend to follow".

In truth, it is likely that the optional modules that students select will, at least to some extent, simply reflect their employers' specific focus, either at a firm-wide or office-specific level. "We've always tried to give everyone a bit of a variety, and the chance to experience everything," observes Kain Knight's Matthew Kain, "but, in reality, our firm's specialisms are dictated by the work that clients send us. Our Canterbury office is more family oriented, while Bishop's Stortford tends to focus on both claimant and defendant personal injury work. London, meanwhile, is more commercially based." Irwin Michell's Ian Gilbert makes a similar point: "As a firm, we focus on personal injury, Court of Protection and commercial work – but don't have a criminal practice," he says.

Although the reworked costs lawyer qualification involves regular assessments, those responsible for devising the new syllabus have been at pains to ensure the course continues to allow students to juggle work and study. To aid this objective, many aspects of the revised qualification will now be delivered online, via a bespoke portal.

Effectively, the portal will act as a single point of delivery for much of the training programme, hosting webinars, podcasts and those weekly tutorials that take place online. The portal will also act as a repository for recordings of various ACL-sponsored events. For example, the ACL's Manchester Conference, due to take place in October, will include a session delivered by the London School of Mediation. It is anticipated that this presentation will be recorded and uploaded for students to review at a later date.

As before, the new qualification has maintained its reputation as being a course that

Costs law qualification – key components

Unit one modules *(all compulsory)*	Unit two modules *(all compulsory)*	Unit three modules *(compulsory)*	Unit three modules *(optional)*
• English legal system, legal method and legal skills • Professional ethics • Professional development planning (foundation) • Civil procedure (foundation) • Costs pleadings and other process documentation • Advocacy and negotiation skills	• Law of contract • Law of torts • Solicitor and client costs • Costs in special courts • Legal accounts • Funding (legal aid and other)	• Civil procedure (advanced) • Business management • Professional development planning	• Personal injury/ clinical negligence and costs • Criminal law and costs • Land law and costs • Company and commercial law and costs • Family law and costs

is open to people from a diverse range of backgrounds, both graduate and non-graduate. In this respect, the revised qualification is firmly ahead of the LETR-inspired curve, which aims to encourage greater social mobility within the legal profession. The flexibility of the new course is maintained by replicating many elements of a law degree or post-graduate legal qualification for non-graduate students, while allowing exceptions from various modules for

> *"We are quite vociferous about putting our employees through the costs lawyer qualification. It's a professional standard that we should be seen to meet"*

those who already possess legal qualifications – typically a law degree, the bar professional training course, the legal practice course or a CILEx level six higher diploma in law and practice. At present, around 50 per cent of costs lawyer students are graduates.

Given the choice of recruiting candidates without any formal legal qualifications, one might have been forgiven for wondering if the profession was beginning to follow the LETR's advice, and embrace the non-graduate career track – effectively 'growing its own' costs lawyer apprentices straight out of school. But, anecdotally, there appear to be few signs that the profession is moving in that direction. Of those firms interviewed for this feature, several said they planned to continue with their preferred option of supporting degree-educated employees through the costs lawyer qualification process – mainly because they had such a large pool of suitably qualified candidates to choose from.

Nevertheless, a handful of firms have begun experimenting with the non-graduate alternative, with the option of supporting their most promising recruits through the costs lawyer qualification process in due course. For example, Compass Law has already gone down this route, with one non-graduate due to complete a final costs law exam later this year. "If one of our non-graduate employees can demonstrate an aptitude over a period of time, I don't think the absence of a degree should be a bar on them progressing a future for themselves," adds Tony Armstrong, Compass Law's head of costs drafting. "As a firm, we are quite vociferous about putting our employees through the costs lawyer qualification. It's a professional standard that we should be seen to meet."

Elsewhere in the costs lawyer market, John M Hayes announced a plan to recruit 10 A-level students across its 11 offices as part of its in-house training programme in April this year. "In the light of the government's concern regarding youth unemployment, and our firm's own concern regarding student debt, we have decided as a responsible employer that it is our responsibility to take a different tack," says Birmingham regional manager, Philip Morris. "We are offering our recruits the opportunity to get on the job ladder straight away."

With the new costs lawyer qualification now firmly Jackson- and LETR-assured, there is a widespread recognition within the sector that students graduating from the revised course will be better trained than ever before. Indeed, the qualification is arguably so useful that the ACL is now considering whether to specifically target other legal professionals who wish to learn more about costs budgeting or legal project management.

"With the new budgeting and sanctions regime, it's now incumbent on solicitors to be on top of this issue from day one – and who is better placed to teach them about this issue than the ACL?" Claire Green enthuses. ■

The new costs lawyer qualification – overview

- The course is provided by ACL Training, a subsidiary of the ACL.
- The course comprises two key components: three years' academic distance learning, supplemented by three years' work-based learning.
- The first year of the course costs £1,400 plus VAT, with a similar commitment required for years two and three.
- The course is broken down into three annual units, with each unit comprising six modules. During year three, half of the modules studied are optional. Candidates can choose between three of five practice-area-specific options.
- Each module has its own tutor-marked assessment, which must be completed at the end of each module. In addition, students will be required to sit one exam and take part in one practical seminar each year.
- Students must successfully complete each year's study before they will be allowed to proceed to the next phase of their studies – although one resit per year is permitted. The pass mark for all assessments is 50 per cent.
- The first student intake for the new qualification will commence their studies in September 2014.

The next generation

As a new cadre of ACL members celebrate qualification, *Costs Lawyer* asks some of them to reflect on their student years

Readers of *Costs Lawyer* will each have their own memories of how they felt on qualification. Neil Sexton of Blake Lapthorn admits feeling "very pleased", while Irwin Mitchell's David White says he was "delighted that the hard work over the last few years [had] paid off".

That same sense of relief is shared by Robert Cook of Ultimate Costs, who, while conceding the course "took a lot of hard work to complete", says that both his employer and family were "very supportive of all the study time needed and it has been well worth the hard work".

Faye Barston, who works at Victory Legal Costs, was "extremely happy and proud to have passed", commenting that the exams "were harder to pass than the Chartered Legal Executive exams".

Barston can already see her professional horizons expanding; when she started, she dealt with defendant costs work, but on completion, she has moved to claimant work. "The course has helped with that move," and qualification will assist with promotions at work, she explains. The same is true of White, who says: "The course material helped me settle into my new job."

The unique blend of learning and work-based experience is something that ACL students appreciate. Hayley Walton of DAC Beachcroft Claims says her employer was extremely supportive in allowing her to earn and learn. Not only did her employer provide funding for her studies, it also granted study leave for examinations, revision days and compulsory seminars for each module.

Of course, such arrangements do not just benefit the students – employers also benefit from fee earners with a more detailed understanding of costs law in general. Lucy Baldwin at Paragon Costs Solutions found the course provided a base of knowledge in areas that she does not generally encounter, while Christopher Stephenson of QM Legal Costs says his studies "developed [his] understanding of costs issues, [in] complementing the practical and technical costs issues dealt with in daily work".

Some have worked in costs for many years. White, who works at Irwin Mitchell (as does fellow qualifier, Karen Brown), had many years of costs experience, having developed a career starting in legal aid, before now predominantly specialising in high-value serious personal injury, disease and clinical negligence cases. Following qualification, he has also begun to prepare costs budgets for such cases.

David Clivery of Clivery Barr & Co, who also had many years' experience as a costs draftsman, undertook the course so as to qualify and manage his father's firm upon his retirement.

Others have entered via the graduate route; like many, Fiona Beadle from Lyons Davidson had taken a law degree and LPC, but was unsuccessful in gaining a training contract. "The ACL qualification has afforded me the rights of audience I have been training a number of years to achieve," she explains.

The new qualifiers are aware how much impact civil justice reform has had; Cook says that while recent reforms initially "appeared to be catastrophic to the costs industry as a whole", his clinical negligence and serious injury department has allowed his firm to "grow and thrive" thereafter.

Clivery, too, has seen an increase in clinical and professional negligence cases; like others, he has seen a downturn in RTA claimant work and an increase in defendant work, having won two major public sector clients recently.

Jonathan Bingham, an associate at DAC Beachcroft Claims who manages Hayley Walton, says one recent major change has been the introduction of costs budgeting. "Costs are now being looked at prospectively and we are spending much more time using our internal costs expertise to prepare budgets and advise on the process," he explains.

"This presents great opportunities... but also challenges while the process is still bedding in, particularly as the courts are very inconsistent in their approach," he adds.

Sexton agrees, saying costs lawyers should "get as much experience and knowledge of costs budgeting as they can, as this will prove to be the main source of work for [them] in the future.

"Qualification will provide me and my firm with further work opportunities," as well as providing clients with the "peace of mind that they are instructing a qualified professional, who has the experience and capability to deal with their work effectively and efficiently", he adds.

The flexibility the qualification offers also extends to family law. Charlie Heale of Barford Fraser Solicitors, a specialist family law practice, worked within a firm of costs lawyers and also at her current employer, and says that qualification allows her to provide her employer and its clients with a very high standard of work.

Glen Fraser, name partner at Heale's firm, adds: "Charlie has quickly become an invaluable part of our team. Employing a costs lawyer is extremely important not only to improve the overall service to our clients, but also to improve the efficiency of our firm.

"Workplace learning and development is an area that Barford Fraser places great importance upon and it is an area we will only look to progress in the future."

The same is true of costs practices, as Lucy Baldwin highlights: "My employer is a keen advocate of the costs lawyer qualification; I was supported throughout, both financially and in terms of study leave."

Robert Cook agrees, saying he strongly believes that "to successfully complete the course it is vital that your employer is highly supportive of the same".

All of the graduates praised the ACL's work in providing materials and lectures, with David White noting that "the *Costs Lawyer* bulletins are extremely helpful", and David Clivery adding: "The study material and updates provided by Murray Heining were invaluable."

Claire Green of Compass Costs, chairman of the ACL Education Committee, has since thanked students for their feedback on the course, which she deemed "of particular assistance going forward with the new qualification, with early indications suggesting that it is going to attract many more students to follow in this year's alumni's footsteps.

"It gives me great pleasure to welcome all of our newly qualified costs lawyers," she added. "We appreciate the hard work you have faced to achieve your goal and are sure you are going to prove an asset to the profession." ■


David Clivery, Clivery Barr & Co

> *"The study material and updates provided by Murray Heining were invaluable"*
>
> *David Clivery, Clivery Barr & Co*


Charlie Heale, Barford Fraser Solicitors


Faye Barston, Victory Legal Costs


Robert Cook, Ultimate Costs

> *"...to successfully complete the course it is vital that your employer is highly supportive of the same"*
>
> *Robert Cook, Ultimate Costs*

> *"My employer is a keen advocate of the costs lawyer qualification; I was supported throughout, both financially and in terms of study leave"*
>
> *Lucy Baldwin, Paragon Costs Solutions*


Lucy Baldwin, Paragon Costs Solutions


Hayley Walton, DAC Beachcroft Claims

Regulatory update

Lynn Plumbley, chief executive of the Costs Lawyer Standards Board (CLSB), provides a round-up of regulatory developments

Costs lawyer authorised rights

Following consultation by the CLSB, on 26 March 2014 the Legal Services Board approved Costs Lawyer Authorised Rights (previously the Statement Rights) as forming part of the Costs Lawyer Code of Conduct. These were immediately implemented.

As a costs lawyer you are a regulated person under the LSA and are authorised to carry on the following reserved legal activities:

- *The exercise of a right of audience*
- *The conduct of litigation*
- *The administration of oaths.*

Provided that you are instructed to deal only with matters that relate to costs, you may conduct proceedings and represent clients in any court or tribunal, including any criminal court or courts martial, the Supreme Court or the Privy Council where:

- *the proceedings are at first instance;*
  or
- *the proceedings include an appeal below the level of the Court of Appeal or Upper Tribunal, are on a first appeal (other than in the Court of Appeal) and the appeal itself relates to costs;*
  or
- *the proceedings do not fall within either of the categories above, but your instructions are limited to dealing with the costs of the proceedings;*
  or
- *the court or tribunal grants permission for you to conduct proceedings or to represent a client (or both).*

Where proceedings relate to other matters, in addition to costs, the rights referred to above apply only to those parts of the proceedings (if any) that:

- *relate solely to costs;*
  or
- *relate to other issues, solely those issues that are not in dispute.*

A matter 'relates to costs' if it relates to payments for legal representation, including payments in respect of pro bono representation under s194 of the LSA and/or to payments made for bringing or defending any proceedings, but only if and to the extent that those monies are not damages. For the avoidance of doubt, this includes:

- *Costs between opposing parties including costs management and budgeting.*
- *Solicitor and client costs but not if and to the extent that issues of negligence arise when a lawyer competent to deal with allegations of negligence ought to be instructed instead.*
- *Legal aid, criminal costs, wasted costs or costs against third parties.*

Further, you may administer any oath.

Revised professional indemnity insurance rule

Following consultation by the CLSB, on 9 April 2014 the Legal Services Board approved for immediate implementation revised Practising Rule 10 on professional indemnity insurance:

RULE 10: Indemnity insurance
10.1 Costs lawyers shall ensure that they:

(a) practice with the benefit of professional indemnity insurance of a minimum £100,000 (any one claim) to include loss of documents; and
(b) on an ongoing basis, assess all financial risk associated with work being undertaken by them and ensure that professional indemnity insurance and loss of documents insurance is in place in excess of the minimum set out in rule 10.1(a) at a level commensurate with that work.

The CLSB thanks Murray Heining

Everyone at the CLSB would like to extend their thanks to Murray Heining for his excellent year as ACL chair. Under his chairmanship, so much was achieved for the benefit of the profession.

Entity regulation by the CLSB

The CLSB is considering all submissions made under its consultation process, which closed on 4 July 2014, before an application is made to the Legal Services Board. The CLSB will keep the profession updated on progress by way of its newsletter and its website. ■

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Legal update

Summaries are from Lexis®Library, All England Reporter service unless otherwise stated. For the full judgments, members should try Bailii (*www.bailii.org*), a free resource, Lexis®Library (*www.lexisnexis.com/uk/legal*) or other law reporting services. Members are reminded that decisions of lower courts are only included where an issue is determined that is novel or of particular interest. Such cases should be cited with care. The judgments in such cases can be persuasive but are not binding on higher courts

Public funding of expert witnesses

***JG v Lord Chancellor* and others**

[2014] EWCA Civ. 656

Court of Appeal, Civil Division
Richard, Black and Fulford LJJ

In 2006, the claimant child's father made an application for a residence and/or contact order, under s 8 of the Children Act 1989. The claimant was joined as a party with a children's guardian and granted a public funding certificate. The children's guardian suggested that it might be appropriate for there to be a psychological assessment that analysed family relations and functioning, and the impact of the ongoing dispute upon the claimant. The court was invited to permit the instruction of an expert psychotherapist to prepare a report on the family.

In October 2008, the district judge agreed that such an assessment would be beneficial. In April 2009, further directions about the psychotherapist's assessment were given, including for joint instruction and that the cost of the report would be funded by the claimant (the April order). In April 2010, the psychotherapist produced a report and sent an invoice to the claimant's solicitors. The solicitors submitted a claim in relation to costs and disbursements, including the psychotherapist's fee, to the Legal Services Commission (the LSC). In June 2011, the LSC sent a letter, suggesting that the costs of the psychotherapist should be shared between the parties and that it was unwilling to provide funds to discharge the whole invoice. In December, the LSC sent another letter, stating that it considered that the April order was in breach of s 22(4) of the Access to Justice Act 1999 and, therefore, unlawful. The claimant issued judicial review proceedings against the LSC. The judge dismissed the application on the basis that the April order had contravened s 22(4) of the Act because the district judge's decision had been affected by the fact that the claimant was in receipt of community legal service funding. The claimant appealed.

It fell to be determined whether the LSC had acted unlawfully in refusing to pay for the report in full.

HELD: The appeal would be allowed. It was tolerably clear that the idea of an expert had been the children's guardian's, and that what had been before the district judge had been her proposal that an expert should be instructed. Had matters stopped there, there was no possible objection to *Continued overleaf...*

the costs of that expert evidence being attributable to the claimant because it had been the claimant who had been going to put that evidence before the court.

There was nothing to suggest that either of the parents had contributed anything on the subject of the psychotherapist's instruction and certainly nothing to lead to the belief that they had been seeking to have an expert involved. Notwithstanding that the district judge had decided to order a joint instruction, the proper interpretation of what had happened in April 2009 had been that he had been completing the process instigated by the children's guardian in October 2008 and authorised by him then, and that the report had been, in substance, ordered at her request in order to address issues that had needed to be addressed in the interests of the claimant.

The fact that other parties might have had an input into the report had not converted it into their report or necessarily rendered them liable for the costs of it. It was vital to try to go back to the time of the instruction of the expert and to strip off the overlay of all the orders that had followed. Accordingly, the April order for the instruction of the expert had, in fact, been made at the instigation of the children's guardian on the claimant's behalf and it had not fallen foul of s 22(4) of the Act (see [125]-[129], [133], [134] of the judgment).

A declaration would be made that the LSC's decision not to meet the cost of the expert's report had been unlawful (see [130], [133], [134] of the judgment).

Permitted time extensions

Hallam Estates Ltd and another v Baker

[2014] EWCA Civ. 661

Court of Appeal, Civil Division
Jackson, Lewison and Christopher Clarke LJJ

The claimants' proceedings for defamation were dismissed. They were ordered to pay the defendant's costs subject to detailed assessment if not agreed. They were also ordered to pay £15,000 on account of costs, but did not make full payment of that sum by the date ordered.

The defendant's bill of costs totalled £86,500. She had previously indicated that it would be £72,600. The claimants asked for a 21-day extension of time to the period in which they were required to serve their points of dispute. The claimants' points of dispute were to be served by 14 May 2013. The defendant did not agree to an extension. On 14 May, the claimants applied to the Senior Courts Costs Office (SCCO) for an extension of time for service of the points of dispute. On the same day, the fee was paid and a copy of the application notice was sent by email to the defendant. On 15 May, the application notice was stamped and formally issued. On the same day, the defendant sent a letter to the SCCO requesting a default costs certificate. The request was ineffective as the accompanying cheques were unsigned.

The costs judge addressed the claimants' application notice *ex parte* on the papers. On 16 May, he made an order granting the extension sought and gave both parties liberty to apply to set aside or vary that order. The defendant applied to the costs judge to set aside his order and issue a default costs certificate, contending that the order of 16 May had impermissibly granted the claimants relief from sanction. On 31 May, that application was dismissed. The defendant's appeal against that refusal was allowed. The claimants' points of dispute, which had been served, were held to be of no effect. The judge held that there had been non-disclosure of the facts by the claimants. Further, their application for an extension of time had been issued out of time, therefore they had been seeking relief from sanctions. The costs judge had erred in granting relief from sanctions. The defendant was entitled, pursuant to CPR 47.9(4), to a default costs certificate. The SCCO was directed to, and later did, issue a default costs certificate in the sum of £86,400. The claimants appealed.

They submitted, *inter alia*, that in reversing the costs judge's decision, the judge had been wrong to characterise the claimants' application for an extension of time as an application for relief from sanctions, further, the costs judge had made case management decisions on 16 and 31 May with which the judge had not been entitled to interfere. Consideration was given to CPR 1.1 and 3.1.

HELD: The appeal would be allowed. The recent civil justice reforms had not changed the established principle that an application for an extension of the time allowed to take any particular step in litigation was not an application for relief from sanctions, provided that the applicant filed his application notice before expiry of the permitted time period. The new sub-paragraph inserted into the overriding objective (sub-para 1.1(2)(f)) did not require courts to refuse reasonable extensions of time that neither imperilled hearing dates nor otherwise disrupted the proceedings (see [26], [31], [41], [42] of the judgment).

The costs judge's decision to grant an extension of time had been a proper exercise of his case management discretion, as had his refusal of the defendant's application to set it aside. The application for an extension of time had been made before the expiry of the time allowed for filing the points of dispute. It was immaterial that the SCCO staff had not stamped the application until the following day. Therefore, the costs judge had been dealing with an in-time application to extend time under CPR 3.1(2)(a) and the principles concerning relief from sanctions had not been applicable. The costs judge had dealt with the application in accordance with the overriding objective, as amended. The claimants' application for an extension of time had been a reasonable one, which had not imperilled any future hearing dates or otherwise disrupted the proceedings. The defendant's application to set aside the extension of time order had been based upon the misapprehension that the costs judge had granted relief from sanction. His dismissal of her application to set it aside had also been a proper exercise of his case management powers. Therefore, the judge had erred in reversing the cost judge's decision of 31 May (see [25], [27], [28], [32], [41], [42] of the judgment).

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Personal injury proportionality

Finglands Coachways Ltd v O'Hare (a protected party by his sister and litigation friend Ms Portia Crees)

[2014] EWHC 1513 (QB)

Queen's Bench Division
Mr Justice Cranston

The applicant coach company had been a defendant in a personal injury action brought by the respondent, a 23-year-old man who had suffered injuries following a serious road traffic accident when his Honda Civic motor car collided with the applicant's double decker bus. The respondent suffered significant and extensive brain injuries with associated past and future losses and quantum valued in the *Continued overleaf...*

Case notes

region of £3-4 million. The respondent brought his claim on the grounds that the applicant's driver had driven through a red or amber light. The applicant denied liability and contended that it was the respondent who had driven through a red light. Accident reconstruction evidence led to the respondent's expert altering his opinion and the respondent withdrew his claim. The applicant served its bill of costs in the sum of £60,000. Following a detailed assessment hearing, the applicant's costs were assessed in the sum of £37,803.89 plus interest. The applicant applied for permission to appeal with an appeal to follow if granted.

The applicant contended that on the basis of CPR 44, the judge had erred in principle by assessing the costs by reference to the stricter test of necessity, as opposed to reasonableness, and there had been no finding or any argument about the costs being disproportionate, which was the legal prerequisite to considering necessity. Costs of just over £60,000 could not sensibly be said to be *prima facie* disproportionate in a heavily fought claim valued at a minimum of £3 million. Nor was there any argument that any particular item or group of items were disproportionate. Further, the failure to apply the correct test was a serious procedural irregularity and the judge's error pervaded the entirety of the assessment such that the final assessment had been reached in a manner that was fundamentally wrong and unjust (ground 1). With grounds 2-4 the applicant submitted that the judge had stepped significantly outside the ambit of his discretion upon which reasonable agreement was possible. The case raised the issue of whether, under CPR 44, a costs judge was entitled to consider if individual items of costs claimed were proportionate and necessary for the conduct of litigation, even if the costs of the litigation overall appeared proportionate. The applicant's contention was that in those circumstances a costs judge was confined to applying the less onerous test of whether individual items of costs had been reasonably incurred.

HELD: Prior to 2013, the starting point for assessing costs on a standard basis was CPR 44.4(2): (i) the court would only allow costs proportionate to the matters in issue and (ii) would resolve doubts as to whether costs were reasonably incurred or reasonable and proportionate in amount in favour of the paying party. The court was to have regard to all of the circumstances of the case and the specific factors, such as the value of a claim, specified in CPR 44.5. CPR 44.4(2) of the old rules meant that the court would, of its own initiative, disallow disproportionate costs even if the paying party had not raised the point. Whether costs, in a general sense, were necessary was integral to whether they were proportionate. In assessing costs under the old version of the rules, a court could consider on an item-by-item basis whether a particular item of costs was proportionate and necessary even if costs were proportionate on a global basis. There was nothing difficult in deciding whether particular items of a bill of costs were proportionate or necessary to the conduct of litigation (see [19], [27], [28] of the judgment).

Although the judge used the terms 'necessary' and 'need' indiscriminately, that conclusion was not fatal. In using the term the judge had been inquiring whether the costs were justified in the sense of being proportionate. Secondly, in assessing particular items of costs the judge almost always used the term 'reasonable', sometimes coupled with 'necessary'. The use of the word 'necessary' had to be judged in this context and in circumstances. Even if the judge had applied the test of necessity he had not been wrong to do so. There was nothing that confined the proportionality template to costs as a whole and excluded its application to individual items. The judge had not misdirected himself in law, nor had his approach been procedurally irregular or unjust. In relation to grounds 2-4 in relation to specific items, the applicant had not surmounted the high threshold for the court to interfere with the judge's exercise of discretion. Nothing before the court suggested that the judge had exceeded the generous discretion conferred on him or had been wrong in his approach to the assessment of the individual items. The application for permission to appeal, and the appeal itself, would be dismissed. The applicant had to pay the claimant's costs of the appeal (see [26]-[29], [32] of the judgment).

Costs for a partially successful claim

Cutting v Islam

[2014] EWHC 1515 (QB)

Queen's Bench Division
Mrs Justice Patterson

The claimant brought a claim in negligence against the defendant doctor in respect of the treatment that the claimant's deceased husband had received. While the claimant was not successful in establishing causation in respect of the long-term survival of her deceased husband, she was successful in establishing and recovering substantial damages of £50,000 for four months' loss of life. She succeeded also in establishing that the defendant's care was sub-standard and cut short the deceased's life. As per CPR 44.2, the issue of costs arose.

The fundamental issue was who was the successful party in the litigation. The claimant submitted that she had succeeded in her claim. That she had only succeeded in part did not detract from her primary entitlement to costs recovery. Further, no part 36 offer was ever made by the defendant. The defendant had chosen to ignore the evidence of his surgical expert and rely entirely on the oncological opinion that delays in referral made no difference and death was inevitable on the same day. The defendant submitted, *inter alia*, that the fact that the claimant was seeking 100 per cent of her costs was very surprising and indicative of the way that the claimant had conducted litigation. Particularly as the claimant had made a late re-amendment of her claim in regard to the prolongation of the life of the deceased.

HELD: The recovery by the claimant of just over three per cent of her original claim clearly entitled the court to ask itself who essentially was the winning party. Applying established law, the starting point was that the claimant was the successful party. Nevertheless, a discount should be made in respect of the late amendment made by the claimant. Such a course of action had been clearly undesirable so late in the proceedings. The scale of resources to be put towards a case of the re-amended value could be very

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Case notes

different than those out to one that was based on a complete cure. In the instant case, however, while it was accepted that there would have been some difference, there was still a considerable amount of evidence in common in the two formulations of the claim. Nevertheless, for the claimant to receive 100 per cent of her costs for recovering three per cent of her claim did not, in the circumstances of the case, seem justified. Taking all matters into account, the court would apply a discount of 25 per cent to the claimant's costs to make allowance for those factors (see [82], [83], [84] of the judgment).

The claimant was the successful party who should have 75 per cent of her costs paid by the defendant (see [87] of the judgment).

Ian Gascoigne is a partner in the litigation and dispute management practice group at Eversheds LLP. He was assisted in the preparation of this article by colleagues Hannah Nichols and Hena Ninan, but the views expressed are his own

Changing times

Ian Gascoigne of Eversheds considers time extensions following the recent amendment to CPR 3.8, inspired by *Mitchell* and *Lloyd*

Problems about agreeing time extensions arose after the rigorous approach taken in *Mitchell* where a severe sanction for a claimant being four working days late filing a budget was upheld. *Lloyd*, a later High Court case, correctly said lawyers could not themselves agree time extensions for exchanging witness statements. It provoked a slew of applications to ask a court to extend time in situations where this could have been done by the parties. A new rule, backed by comments from Jackson LJ in *Hallam Estates*, a recent costs decision, has helped to re-balance the system.

In the infamous *Mitchell* decision the Court of Appeal emphasised that courts would no longer tolerate lax litigants who failed to meet timetabled dates by limiting the use of CPR 3.9 in giving relief from sanctions. The amended 3.9, which took effect in April 2013, cited the need for courts considering its application to ensure compliance with rules and orders and to place at centre stage the efficiency of the court system. Mr Mitchell's cause was undoubtedly not helped by the fact that the master hearing his application for relief from the sanction for missing the filing date for his budget had had to move another case to accommodate the *Mitchell* hearing.

Lloyd concerned a missed date for the exchange of witness statements, which is a crucial stage on the way to trial. At a pivotal point, both sides can take stock of the likely outcome of the claim. Decisions to make offers to settle or to try to negotiate/mediate a resolution are often provoked by seeing the other side's intended oral evidence. It is no surprise, therefore, to find that CPR 32.10 provides a tough sanction for failing to meet the date for the exchange of witness statements. A defaulting party cannot call those witnesses at trial without the court's permission.

But *Lloyd* was never intended to apply to all time limits – only to those that would be affected by CPR 3.8 ("*Lloyd* situations"). This rule was not well known before *Lloyd*. It prevents parties agreeing to vary any time limit; a failure to meet that would trigger pre-determined consequences (either under the CPR or court order). Only the court may vary such a time limit, not the parties.

PHOTO: ©PHOTONIC17/ALAMY

Confusion reigns

In *Lloyd*, the parties could not simply agree to let the time for exchanging witness statements slip because it was one of those cases where the sanction for non-compliance was already provided in rule 32.10. But the case was wrongly understood as a bar on parties agreeing ANY time extensions at all.

> *"No party in a non-Lloyd situation should feel able to agree time extensions that would significantly affect a court-planned timetable without the court's approval"*

As an example, take a request to clarify a part 36 offer. CPR 36.8(1) allows a recipient of an offer seven days to ask the offeror for clarification. As no sanction exists for the offeror missing this date, the parties could agree to extend it without troubling a court. In many similar situations lawyers were not reaching agreements, fearful they would either lose an advantage, or that agreement would be ineffective and not protect their clients.

Confusion removed – *Lloyd* situations

To prevent the increasing number of unnecessary applications, the rules committee amended CPR 3.8 from 5 June 2014. The addition of sub-paragraph (4) means that parties in a *Lloyd* situation are able to agree one extension to a time limit of up to 28 days, providing:

- they do so in writing prior to the time limit expiring;
- it is a case where a failure to meet the time limit would lead to automatic consequences – a *Lloyd* situation;
- the trial date is not jeopardised as a result of the agreed extension.

This change is a sensible balance: promoting the integrity of the court process, while recognising that some time limits inevitably become unrealistic during a claim.

As a prediction, issues will arise over the following aspects:

- What constitutes an agreement in writing? An exchange of solicitors' letters will be fine, but would an unacknowledged email from one lawyer to another, which referred to a discussion and apparent agreement, count?
- Would an agreement reached on the day on which the time limit expired be sufficient, or should it be done by the day before that date?
- What would be the costs consequences where a lawyer, concerned by the overall impact on the timetable, causes a court application to be needed? Would a court hold that lawyer's client liable in costs if the court decided the impact of an extension was arguable but did not accept it?

Non-*Lloyd* situations

In *Hallam Estates v Baker*, Jackson LJ said: "It was no part of my recommendations that parties should refrain from agreeing reasonable extensions of time, which neither imperil hearing dates, nor otherwise disrupt the proceedings." He was not here referring to *Lloyd* situations where parties could not previously have agreed extensions without an application to the court. Although CPR 3.8(4) applies specifically to *Lloyd* situations, its safeguards are basic ones in sound case management. No party in a non-*Lloyd* situation should feel able to agree time extensions that would significantly affect a court-planned timetable without the court's approval, even if rules did not provide otherwise and the counterparty was not bothered about the impact.

Overall

The change to CPR 3.8(4) is useful, with recognition that it applies only to cases where a sanction would be automatically applied if a time limit is not met. The ability to extend other time limits continues alongside this change, but within the umbrella of the court's overriding power to control cases. ■

Case references

Mitchell v News Group Newspapers Limited **(2013) EWCA Civ 1537**
MA Lloyd & Sons Limited v PPC International Limited **(2014) EWHC 41(QB)**
Hallam Estates Limited v Baker **(2014) EWCA Civ 661**

Double trouble

Vikram Sachdeva explores the costs implications for solicitors who file budgets late – and then lose their case

Vikram Sachdeva is a leading junior at Thirty Nine Essex Street. He specialises in administrative and public law; professional discipline and regulation; Court of Protection and costs

The effects of filing a costs budgeting late are well known. After the Court of Appeal's judgment in *Mitchell v News Group Newspapers Ltd* (2014) 1WLR 795, a 'good reason' is generally required to justify any 'non-trivial' breach of a court order to file a costs budget. Under CPR 3.14, any failure to provide a cost budget without such good reason will result in the relevant party being limited to recovery of court fees only.

Unfortunately, what constitutes a good reason is very narrow, and does not include overwork or the mere overlooking of a deadline. It *may* (but will not necessarily) include a situation where the party or his/her solicitor suffered a debilitating illness or was involved in an accident, depending on the circumstances.

What is less well known are the costs implications for solicitors' firms who fund either an application for relief from sanctions, or the substantive litigation which accompanies it (or both) – but are then unsuccessful in either (or both) claims. There are good reasons to adopt such an approach, most obviously to avoid an action for damages for professional negligence from their client – for nobody can doubt that failure to adhere to court deadlines after *Mitchell* gives rise to a significant risk of a finding of breach of duty.

However, if the unsuccessful client is impecunious, the successful client may wish to pursue the unsuccessful client's lawyers. Two potential areas of liability are non-party costs orders and wasted costs orders.

The jurisdiction to make a non-party costs order resides in s51(1) and 51(3) Senior Courts Act 1981, which respectively provide that "the costs of and incidental to all proceedings in [various courts] shall be in the discretion of the court" and "[t]he court shall have full power to determine by whom and to what extent the costs are to be paid". There is no implied limitation to those who were parties to the litigation: *Aiden Shipping Co. Ltd v Interbulk Ltd* (1986) AC 965.

Non-party costs orders (NPCOs) are only to be made exceptionally (*Symphony Group Plc v Hodgson* (1994) 1 QB 179); but in this context, 'exceptional' merely means outside of the ordinary run of cases where parties pursue or defend claims for their own benefit and for their own expense – as per Lord Brown in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* (2004) UKPC 39 (2004) 1 WLR 2807 at [25]. In order for solicitors to be liable for an NPCO they must be acting outside of the role of solicitor, for example in a private capacity or as a true third-party funder for someone else, as per Rose LJ in *Tolstoy – Miloslavsky v Aldington* (1996) 1 WLR 736 at 745H – 746A.

Solicitors may fund disbursements without becoming a real party to litigation: *Flatman v Germany* (2013) EWCA Civ. 278 (2013) 1 WLR 2676. Further, mere negligence (in that case in the form of failure to obtain ATE insurance) is insufficient to attract liability for an NPCO: *Heron v TNT and Mackrell Turner Garrett* (2013) EWCA Civ. 469 (2014) 1 WLR 1277.

On the other hand, if a firm funded an application for relief against sanction for failing to file a costs budget on time, the application itself would clearly carry significant benefits for the firm, greater than the benefit to the lay client.

In *Myatt v National Coal Board (No. 2)* (2007) EWCA Civ. 307 (2007) 1 WLR 1559 the Court of Appeal had dismissed the claimant's appeals against the finding that the conditional fee agreements were unenforceable. Having decided that there was jurisdiction to make an NPCO against the solicitors, an NPCO was made because the main reason the appeal was launched was to protect the solicitors' claim to their profit costs of £200,000 in all 60 cases.

There is a clear analogy with an application for relief against sanction for failing to file a costs budget, which puts the solicitors at clear risk of an NPCO should the application fail.

If the application did fail, the solicitors would be facing a potential claim in professional negligence for failing to timeously file a costs budget. One way of mitigating that claim would be to conduct the case *pro bono*.

Although acting *pro bono* does not ordinarily give rise to liability to an NPCO (see *R (Golding) v First-tier Tribunal* (2012) EWHC 222 (Admin) at [34]), the motivation for acting *pro bono* clearly provides a pecuniary advantage to the solicitors (in reducing their liability in any professional negligence action) and may lead a court to treat the situation as justifying an NPCO.

Thus the solicitors may find themselves liable for the entire costs of the proceedings, having not been paid for their work by their client, owing to the failure to file a costs budget on time. To add insult to injury, there is also the possibility of a wasted costs order being made.

Section 51(6) of the Senior Courts Act 1981 gives the court power to "order the legal or other representative concerned to meet the whole of any wasted costs or such part of them as may be determined in accordance with rules of court", and 'wasted costs' are defined in s51(7) as including any costs incurred by a party as a result of any improper, unreasonable or negligent act or omission on the part of any legal representative or any employee.

In practice, the negligence limb (ie breach of a duty to the court) will be the easiest to establish; all that must be established is a failure to act with the competence reasonably to be expected of ordinary members of the profession – see *Ridehalgh v Horsefield* (1994) 3 WLR 462 per Sir Thomas Bingham MR at 233B – C.

If a lawyer fails to comply with a procedural step that results in the other side incurring costs, there may be a respectable argument that a wasted costs order is appropriate.

A further incentive (if one were needed) to file that costs budget early... ■

Did you know?
Vikram Sachdeva acted for the appellant in *Utilise TDS Limited v Davies*, one of the three recent Court of Appeal *Mitchell* test cases heard on the 16 and 17 June.

"If a lawyer fails to comply with a procedural step that results in the other side incurring costs, there may be a respectable argument that a wasted costs order is appropriate"

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Roger Mallalieu is a specialist costs law barrister. He is ranked as a leading junior in the field by both the Legal 500 and Chambers & Partners

Delicate manoeuvres

When transferring files with a CFA attached, it is important to appreciate the difference between an assignment and a novation, says 4 New Square's *Roger Mallalieu*

There are many reasons why a firm may wish to transfer live files to another practice – a dissatisfied client may wish to instruct an alternative advisor, for example – but alternatively, a practice may wish to transfer files in bulk, following a merger, an LLP conversion or a strategic decision to retreat from one or more practice areas.

Whatever the reason for the transfer, it is important to recognise there are two different legal mechanisms by which such transfers can take place. For the reasons explained below, one mechanism, a novation, is arguably favourable to the party selling the files. The other mechanism, an assignment, is more favourable to the acquiring party where a conditional fee agreement (CFA) is involved.

Assignment and novation – key differences

Novation

Novation requires a tripartite agreement. Both of the original parties to the contract *and* the new party must agree that the original agreement comes to an end and a new contract, in relation to the same subject matter and on the same terms, comes into being between one of the original parties and the new party.

The practical effect of this is to release one of the original parties from the contract and to replace him/her with the other party.

The legal effect is that there are two contracts. The first has ended and any issue as to any rights or liabilities under it, or as to any breaches thereof, is between the original parties (unless expressly addressed in the new agreement). The second is between the new parties, and any issues arising out of that are between the new parties.

Assignment

An assignment is an agreement between one of the contracting parties – the assignor – and a new, third party – the assignee – only. It does not (normally) require the agreement of the other contracting party.

An assignment creates no new rights. It is merely the transfer of existing rights under a contract from one party (the assignor) to another (the assignee). The assignee can then enforce those rights without the consent of the other party.

However, an assignment can generally only transfer the benefit of the contract and not the burden. It is trite law (with some limited exceptions) that the burden of a contract cannot normally be assigned.

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Assignment, novation and the particular problems of CFAs

Given that a transfer of right and obligations under a contract is possible by way of novation, why is novation, or simply the entering into of a fresh contract, not used? In many cases it is – for example, in the previously mentioned situation where a dissatisfied client moves from firm A to firm B. In such a circumstance, a firm's former client will often be happy to release his/her legacy advisor from any future liabilities. Assignments, by contrast, are often seen as a pragmatic way of dealing with bulk transfers, where it would not be straightforward to obtain permission for the transfer from all contracting parties.

There are also CFA-specific reasons why an assignment may be preferable to a novation. For example:

(i) To avoid any need to reassess the success fee on creation of a new agreement (primarily pre-April 2013 CFAs);
(ii) To maintain *inter partes* recoverability of success fees with 1 April 2013 or later transfer of pre-April 2013 CFAs;
(iii) To avoid regulatory and enforceability issues arising out of the capping of success fees in personal injury CFAs arising from the Legal Aid, Sentencing & Punishment of Offenders Act 2012.

Can CFAs be assigned?

The critical question, therefore, is can CFAs – as opposed to merely one party's rights under a CFA – be assigned? The leading authority is *Jenkins v Young Brothers Transport Ltd* (2006) EWHC 151 (QB). In *Jenkins*, the then Mrs Justice Rafferty held that a CFA could be assigned. In doing so, she relied heavily on the principle of 'conditional benefit'.

The 'conditional benefit' principle applies where the burden is a condition of and is in some intrinsic way tied to the benefit. One cannot, or should not be allowed to, pass without the other. If you want the benefit, you must also take the burden. The transaction is all or nothing, as previous cases have held.

Rafferty J held that in the context of the particular case before her, the entitlement to the benefits under the CFA (the assignment to the new firm of the right to payment for future work) was conditional on and relevant to the obligation to perform the burden (the performance of that future work by that firm).

She expressly left undecided the question of whether a CFA could be validly assigned where there was not that same presence of trust and confidence in a particular solicitor motivating the assignment as there was in that particular case.

The *Jenkins* decision is open to argument on a number of bases. Firstly, it very much stands on its own facts, as the judge made clear, and secondly, it is open to argument whether the judge correctly applied the principle of conditional benefit and burden (see the Court of Appeal's comments in *Davies v Jones* (2010) 1 P & CR 22, (2009) EWCA Civ. 1164).

Thirdly, the judge does not appear to have heard argument as to whether an assignment is possible at all in the context of a contract of personal service (see, for example, *Griffiths v Tower Publishing* (1897) 1 CH 21), and fourthly, there is arguably an increased emphasis on consumer protection issues in the years post-*Jenkins* – and, on the facts of *Jenkins*, such consumer protection concerns did not, in any event, arise.

> *"Any firms involved in the transfer of cases, and especially in the transfer of pre-April 2013 CFAs, would be well advised to seek advice on how best to achieve this"*

However, balanced against this must be the recognition that the courts are unlikely to be keen to foster further satellite litigation, and that, for obvious reasons, the situation in which the issue is likely to arise will normally leave the court inclined to find facts to support the existence of a conditional benefit in a situation where, had the dispute been between the actual parties to the agreement, the court may have been less inclined to do so.

Will *Jenkins* be followed? It is difficult to predict with certainty and, in any event, *Jenkins* is a long way from answering all of the necessary questions. However, there are good reasons to anticipate that, despite the uncertainties surrounding *Jenkins*, the courts will be keen to achieve a similar outcome in the majority of such cases.

That said, any firms involved in the transfer of cases, and especially in the transfer of pre-April 2013 CFAs, would be well advised to seek advice on how best to achieve this and, in particular, on how best to protect both the firm and the client in the event that the assignments are held to be ineffective. ■

Collaborations and CCMS

Paul Seddon is an independent costs lawyer based in Hockley, Essex. He first became a member of the ACL Legal Aid Group committee in November 2012, taking over as chair in December 2013

The first half of 2014 has been a busy time for the ACL's Legal Aid Group, reports chair *Paul Seddon*

With CCMS anticipated to become mandatory in September 2014, the ACL's Legal Aid Group (LAG) helped to organise an LAA training webinar, in which approximately 70 people participated. However, it was felt that the LAA's presentation was very basic and only dealt with small straightforward claims. Discussions are ongoing about the possibility of the LAA providing further webinars, covering substantive billing matters, and the LAG is currently lobbying for more effective training on using CCMS.

At the recent ACL Annual Conference in London, the legal aid seminar was well attended. An illuminating talk given by Ian Black from Ian Black and Associates about his experience using CCMS left us in no doubt as to his views and the problems CCMS pilot providers have faced. We also learned just how unsophisticated CCMS is, compared with the software that many of us currently use.

Earlier this year, both the Costs Assessment Guidance (CAG) and the Civil Finance Electronic Handbook were updated. Unfortunately, while the LAG responded to the March 2014 CAG consultation, much of what we suggested was not incorporated directly into these documents. The LAG continues to lobby for our submission points to be addressed at a future date.

Collaborations

In recent months, the LAG has developed close links with other bodies involved in legal aid work. In March, LAG secretary Linda Kann and I met legal aid representatives from both the Law Society and the Bar Council, to see how we could work closer together. Common areas of concern included our dealings with the Legal Aid Agency, the implementation of CCMS, changes to barristers' fees and the challenges for both legal aid solicitors and barristers. We have agreed to share our responses to consultation documents with each other prior to our respective submissions.

As a result of a further meeting with the Bar Council in May, the LAG has agreed to investigate the possibility of developing joint guidance for counsel to claim enhancements on prescribed rates under the new civil (non-family) remuneration regime introduced on 2 December 2013. We have also worked together to suggest improvements to the LAA's CF1A form, on which the new rates are claimed.

The LAG has now been invited to attend the bi-monthly meetings of the LAA Civil Contract Consultative Group. I was present at the meeting on 9 May, where issues discussed included counsel's fees and claiming for travel and waiting time.

> *"The LAG has developed close links with other bodies involved in legal aid work… We have agreed to share our responses to consultation documents"*

New benefits

At the recent ACL Conference, the presentation given by Carol Storer, director of the Legal Aid Practitioners Group (LAPG), proved helpful to many delegates. Immediately prior to the ACL event, the LAG secured a reciprocal agreement with the LAPG. From now on, all LAG members can receive discounts on LAPG seminars (and vice versa). LAG members will also receive fortnightly LAPG email updates.

We are now busy organising a legal aid seminar, which is due to take place in either September or October. We are looking for ideas for relevant subjects to cover, so please contact me at *paulseddon@costslawyer.co.uk* with your thoughts. We hope to announce further details within the next couple of months.

The LAG regularly issues email updates to those ACL members who have signed up to our group. To sign up, please contact Diane Pattenden at the ACL office. ■

Family matters

Ben Rigby is the former editor of Costs Lawyer

The Legal Aid Agency must pay the full cost of expert reports ordered by the new family court, the Court of Appeal has decided. *Ben Rigby* reports

One bugbear familiar to costs lawyers practising in legal aid costs has been the reluctance of the Legal Aid Agency (LAA) to pay the full costs of expert reports ordered by the new Family Court, leaving it to be split between the parties and the LAA.

However, in a recent case the Court of Appeal has decided that the Agency's approach was wrong, ruling against the LAA's predecessor, the Legal Services Commission (LSC).

The case followed the LSC's refusal to pay more than one-third of an expert's fees because it believed that the parents should have been required to pay the other two-thirds – leading to a Law Society intervention.

The Law Society intervened in the case of *JG v The Lord Chancellor* because of the need for solicitors to be clear from the start as to who is paying for the expert they instruct. The case also raised a 'question of general importance' about the lawfulness of the LSC's actions.

The court accepted the Law Society's argument that where an expert's report is sought by the child alone, it will be legitimate for the legal aid budget to bear the full cost. Moreover, the court went on to say that "it may not be all that infrequent" that this is the case.

The judgment means that, in future, the LAA must look at the facts of a specific case to decide whether it should pay the fees in full.

It also means that where unrepresented parents cannot afford to commission expert evidence but the court and the child's guardian consider such evidence necessary, it may still be appropriate for the full costs to be borne by the child through his/her legal aid certificate.

Law Society president Nicholas Fluck said the LAA's position had "left many family cases at an impasse where expert evidence that the court has deemed necessary is not available".

Experts were quick to comment. From the Bar, Mike Horton of Coram Chambers said the case was "a small silver lining to the very dark cloud created by LASPO's removal of legal aid in private law children disputes".

Horton noted that in difficult private law disputes, "the court may resort to appointing a guardian for the children, who may wish to instruct an expert", adding that "the Court of Appeal opens the door a little, but every case will depend on its own facts".

Tony Roe of Tony Roe Solicitors in Thame noted that the long and detailed judgment merited careful consideration, given changes to law and procedure since the facts of the case arose five years ago, highlighting Black LJ's comment that the procedural rules applicable were not the same as they are now and neither was the climate in which the parties and the judges were operating.

Jim Lines, partner at Harmans Costs, agreed with Fluck, saying: "It should mark the end of the Agency's approach of insisting that all of the parties should pay equal shares and that the LSC/LAA must look at the specific facts of the case under consideration."

The decision, Roe added, was based on very fact-specific grounds – something echoed by the ACL's Paul Seddon, who said: "In my opinion it by no means provides a *carte blanche* to fund experts when parents, who have the financial means to pay for them, simply refuse [to do so]."

Seddon added that the LAA's response to subsequent court decisions "remains to be seen", noting that the judgment recommended a prior authority should still be obtained. Lines agreed with Seddon, adding: "The Agency's response to the judgment and indeed to requests for prior authority will be interesting."

One practice management point highlighted by Roe is that costs lawyers should be sure to ask district judges to explain their reasons for each decision they take in a short judgment and for their orders to be precisely spelled out. ■

Judges debate costs proportionality

As the first day of the recent ACL Annual Conference drew to a close, one issue dominated the debate on Jackson – past present and future

PHOTO: @SPENCEFREDERICKPHOTOGRAPHY

It was the perfect way to ensure the first day of the recent ACL conference ended on a high: a panel discussion on Jackson involving Underwoods' senior partner Kerry Underwood and Professor Dominic Regan. Yet, while both Kerry Underwood and Professor Dominic Regan gave the delegates rousing summations and much to think about, it was another issue that prompted multiple questions from the audience: the issue of costs proportionality, raised by His Honour Judge Simon Brown QC and Regional Costs Judge Simon Middleton, co-author of *Cook on Costs*. Indeed, the debate on this issue spilled over into the following day's panel discussion, a summary of which appeared in the Conference Special e-edition of *Costs Lawyer*, published at the end of May.

Of the two judges speaking at the event, HHJ Brown was notably more anxious about the uncertainties raised by proportionality. He offered the example of a case that came before him involving a contested will, where both parties had spent £125,000 in legal fees fighting over a £250,000 estate. "Spending £125,000 on a £250,000 dispute is probably proportionate, but when you aggregate both sides' costs, spending £250,000 is probably disproportionate," he said. HHJ Brown then expressed a hope of future decisions on the proportionality point, in order to generate certainty. "I'd quite like to see what Lord Justice Jackson says in the Court of Appeal," he said.

By contrast, DJ Middleton further reinforced his credentials as a Jackson evangelist by telling delegates: "I'm probably the only person who thinks that proportionality is a great concept. I understand it. It's flexible. You don't want uncertainty – but there is uncertainty inherent. I'm sorry, that's the way we run the courts in this country. We have judicial discretion."

As far as DJ Middleton was concerned, CPR 44.3 (5) already offered enough guidance about what factors should be considered when deciding on proportionality. "Everything fits in somewhere," he said. "Is it just money? No, it's also the other four factors." For example, in a simple dispute over a £100,000 oral contact, he suggested a proportionate legal spend might be in the region of £15,000-£20,000 for each side. This prompted a parting joke from Underwoods' Kerry Underwood that he intended to "keep well out of Bodmin", where DJ Middleton sits.

DJ Middleton also indicated he may easily allow costs to exceed the damages recovered. For example, a libel claim that resulted in minimal damages may raise issues of public importance. Equally, relatively low-value holiday-related claims may raise complex issues that are expensive for the parties to address. Budgets may also be increased on proportionality grounds if it was felt that the proposed trial time had been underestimated, or if ADR funding was not initially allocated.

But DJ Middleton also made it clear that one factor had no bearing whatsoever on his considerations regarding the proportionality principle: solicitors' hourly rates. "Solicitor-client costs is a matter for you and your client management," he said, bluntly. "If I've only allowed £10,000 for disclosure and you think you need £20,000, you can either do the job for £10,000 with a low-grade fee earner or spend £20,000 knowing that you'll only get £10,000 back." ■

Brave new world

With the new model form bill of costs now looming on the horizon, costs lawyers opened the final day of their annual conference with a debate about their future

It was a stark message, but one the profession needed to hear. Opening the final day of the ACL's recent annual conference in London, ACL chairman Sue Nash warned the audience that the forthcoming introduction of the new form bill of costs would lead to a reduction in many costs lawyers' traditional workload, as the process becomes increasingly automated. More positively, she said, the need for costs lawyers' skills and experience would remain – albeit in a different capacity. "We're going to have to think a little more outside the box," she said. "What else can we develop into?"

Helpfully, several panel members came prepared with suggestions of possible growth markets for costs lawyers, all of which would allow them to draw on their core competencies. Consultancy work in relation to retainers, QoCs and costs budgeting were just some of the possible growth areas suggested by Nash.

Matthew Smith from Kings Chambers, meanwhile, offered nine possible career directions that costs lawyers may wish to move into, including advising law firms' clients on their litigation funding options. "Solicitors receive just half-a-day's training on costs, and many won't have the necessary knowledge to advise on this issue," he reminded the audience.

Another growth area suggested by both Nash and Smith was valuing solicitors' businesses, either in whole or in part. "When books of work are being sold, costs counsel are used to value files and analyse the vulnerability of recoverable money," said Smith. Nash, meanwhile, suggested that costs lawyers could advise lenders who offered external funding to law firms. "We are brilliantly equipped to do that work," she said.

> *"With costs budgets now being prepared earlier during the disputes process, advising clients on the likely cost of their dispute [could] bring many to their senses"*

What's more, with the recently re-launched costs lawyer qualification now including training in both legal project and practice management, Nash suggested these additional specialisms would offer yet more reasons for law firms to seek out costs lawyers' expertise. "If your firm employs a professional support lawyer, take on a costs lawyer too – you'd be absolutely nuts not to," she said, indicating a key message she intended to deliver to the legal profession as a whole.

Another possible growth area for costs lawyers that several speakers spoke in favour of was mediation. At first sight, this may seem like a somewhat odd career track for the profession to consider. But, in fact, there is a clear logic to this suggestion. With costs budgets now being prepared earlier during the disputes process, it was argued that advising clients on the likely cost of their dispute would bring many to their senses – thereby avoiding the litigation process altogether. "When you tell a client how much their dispute will cost, they tend to come back with a proposal to resolve the matter pretty quickly," said the ACL's education council member, Claire Green, who has received mediation training.

With most panellists offering an upbeat message about the future, Alison Lamb, chief executive officer of the Royal Courts of Justice Advice Bureau, reminded audience members of their obligations to wider society. In the past year, she said, the RCJ Advice Bureau had advised around 5,000 litigations in person (LiP), which had only been possible thanks to *pro bono* support offered by around 200 solicitors and barristers. Yet, while demand for the RCJ Advice Bureau's services had never been higher, the number of firms offering *pro bono* costs advice had fallen from five to just two, she said. What made this state of affairs even more regrettable, she added, was that much of the advice materials aimed at LiPs barely mentioned costs – which meant that LiPs often embarked on litigation without being aware of the financial consequences of losing their case. Costs advice is therefore an issue there needs to be much more awareness of, she said. ■

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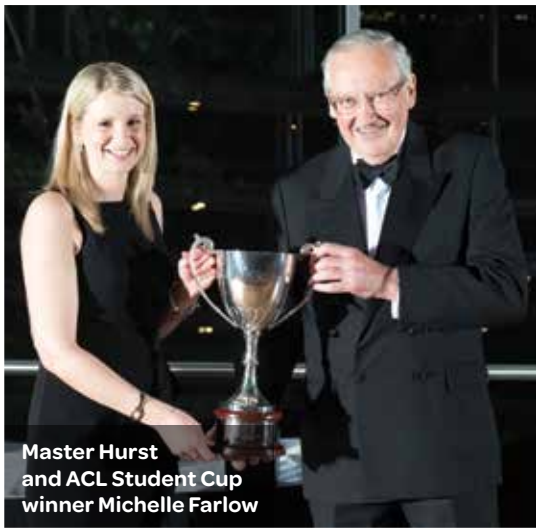
ACL conference: in pictures



Master Hurst and ACL Student Cup winner Michelle Farlow

Claire Green and Neil Rose raffle t-shirt for charity

The CLSB's Steve Winfield and Lynn Plumbley

ACL CEO Maurice Cheng and Master Campbell

ACL Chairman's Cup winner Ian Cosgrove (far right) with former ACL chairman Murray Heining (second left)

Your story

Ben Rigby interviews the winner of this year's ACL student cup, *Michelle Farlow* of Deborah Burke Consulting

How long have you been a costs lawyer? What do you most enjoy about your work?
Having passed the November 2013 exams, I have held a practising certificate since the start of 2014. I completed the three-year ACL modular course with my employer where I continue to work. I love the fact my work is varied and fast paced. I get great satisfaction from preparing bills and seeing files through to the conclusion of the costs recovery process.

What are your main areas of practice? How have they been affected by recent reforms? What kinds of client do you act for, and how busy are you?
My main area of practice is claimant recovery in clinical negligence matters. We act for a variety of clients, from high street to specialised national firms. The predominant change to my main area of work is the requirement of case management and budgeting. Greater emphasis is now placed on the need to plan litigation at the outset and measure performance as the case goes on.

Since the reforms, our workload has extended to the preparation and exchange of budgets, which involves communicating with our clients and other parties at a much earlier stage than we are typically used to. Our job continues throughout the lifetime of the case and the days of not being instructed until the litigation has concluded are fast disappearing.

We are extremely busy at the moment and are going through a demanding time. While receiving instructions in relation to costs management we are still receiving a healthy supply of traditional bill drafting and costs recovery work.

> *"Our workload has extended to the preparation and exchange of budgets, which involves communicating with our clients and other parties at a much earlier stage"*

What advice would you offer trainee costs lawyers in passing the examinations, and how should they prepare for them?
My advice would be to complete all of the set reading during the course and not just focus on the assignment questions. This way, trainees will be more prepared for the end exam. In terms of preparing for the exams, I would recommend attendance at the ACL revision days. I found these extremely helpful, along with the materials that were provided. I also think it is imperative to revise all of the topics on the examination syllabus and work through past exam papers in preparation for the real thing.

How do you feel about the ACL's plan to allot a dedicated seat to trainee and NQ costs lawyers as part of adding additional representation of the profession?
I think this is a fantastic idea and will bring diversity to the profession. I would definitely encourage trainee and newly qualified costs lawyers to get involved.

In your opinion, what are the most pressing issues for costs lawyers in 2014?
I think costs lawyers will continue to be faced with the challenges arising from the *Mitchell* decision during 2014. Being aware of recent case decisions on the issue is vital and the ACL's e-bulletin is helpful at getting information to all members. I also think costs lawyers will need to continue to review their working processes to ensure we are working efficiently and, ultimately, proportionately.

Outside of the law, what are your main interests?
I enjoy running and taking my dog to agility classes. I have entered the 2015 London Marathon ballot but I will not find out until October if I have been lucky enough to secure a place. I find running is a great way to unwind after a busy day at work! ■