

The New Format Bill: what are the prospects for (probably) the least favourite of Jackson's reforms?

1. There are quite a few features of the Jackson reforms that practitioners dislike. My own betes noires include the new definition of proportionality and most costs budgeting. But the current leader in the, highly competitive, unpopular Jackson innovation stakes is probably the new format bill. Whereas one interest group or another is usually a fan of most of the other reforms, it sometimes feels as if there is fairly widespread dread at the prospects of practitioners, judges and courts having to get to grips with an entirely new species of bill of costs.

So what's the new bill all about?

2. When Lord Justice Jackson was researching into costs back in 2009, he discovered that there was broad dissatisfaction with the current format of the bill of costs. The bill was felt to be expensive to draw, cumbersome and difficult to understand. Jackson LJ could not see why technology, and in particular the use of time recording software, did not provide a simple solution, and therefore decided that what was needed was a new kind of bill, based on spreadsheet technology, that would achieve three improvements on the existing bill, in the words of the Jackson final report:

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

3. So the intention was that the new format of bill would be fuller, easier to understand and cheaper – what's not to like if that improbable combination can be achieved?

And what has been happening for the last 6 years?

4. Jackson LJ appointed a committee led by Jeremy Morgan QC to take on the thankless task of grappling with J-Codes and the new format bill. Since Jeremy retired it has been chaired by Alex Hutton QC, and has become known as the Hutton committee. Now, this really is not Alex's fault, but I do have to point out that if you want something done in a hurry, don't put the word Hutton in the title.

5. I just give you three examples. The first is the Hutton enquiry; nowhere near as bad as the Chilcott enquiry, but it still took 6 months and cost millions. The second is the great cricketer Len Hutton, who held the record for the longest innings in first class cricket in his day, scoring 364 runs over 13 hours facing 847 balls; hugely impressive, but not exactly swift. And now we have the Hutton committee. It's not Alex's fault and not the fault of the other committee members, but the moral of the story seems to be that if you want something done quickly, don't put the word Hutton in the title.

6. Joking apart, the real reason for the time that has been taken has been the inherent difficulty of the task set by Jackson LJ. The specification for the new bill that he proposed was it should be better, fuller and cheaper than the traditional bill. The original idea appears to have been that existing time recording software would be able, with some modest tweaking, to produce a bill of costs at the push of a button. Unfortunately that was never realistic, and so the committee had first to develop the J-codes, which Deborah Burke will be speaking about later, and then to develop the new format bill.

7. The committee's aims remain ambitious: to develop a system under which contentious work is electronically recorded so that costs budgets, statements of costs and bills can be produced automatically and at proportionate cost from those time records.

8. The new bill is basically an adapted Excel spreadsheet package. As the Guidance Document puts it:

The BoC is a self-calculating, self-summarising spreadsheet document based on the J-Codes, which is capable of being generated automatically by use of the J-Codes and adopting the same structure

The new bill is presently in the form of an Excel workbook, but the plan is that in due course it will be reproduced in a universal and open source format as an XML schema. This will mean that Excel and other commercial providers will not be able to establish a lucrative monopoly/oligopoly.

Benefits of the new format bill

9. It is obvious that there will be real benefit at a detailed assessment hearing from the use of such a bill. Decisions as to, for example, hourly rate or level of fee earner will be able to be reflected instantly in the bill without the need for elaborate and sometimes protracted recasting of the bill at the end.

10. The new format bill will be equally useful in negotiation. Parties will be able to calculate the effects of likely decisions by the costs judge at the touch of a couple of buttons, rather than by way of preparing a separate document.

Problems with the new format bill

11. There is a particular difficulty with any bill which is based on spreadsheet technology. The Hutton Committee point this out at paragraph 13.2 of the Guidance:

The challenge in developing a spreadsheet (as opposed to using the traditional blank piece of paper on which to write a bill of costs) is that one has to try to think of every eventuality and factor them all into the construction of the spreadsheet template.

12. The problem is exacerbated by the need to divide bills into multiple parts both because of costs budgeting and to comply with the indemnity principle where solicitor client bills have been rendered in the course of the litigation, in accordance with General of Berne Insurance v Jardine Reinsurance Management [1998] 2 All ER 301.

13. All this can mean that bills becomes unwieldy with many boxes and many sections, and this means that a user unfamiliar with spread sheets may find themselves facing a very complicated document with lots of active worksheets.

14. Any spreadsheet based package is vulnerable to an unwary user making changes to the formula boxes which can have a far-reaching effect on the figure that emerges – users have to be sufficiently numerate to apply a common sense test to spot if this has happened.

15. And then there is the problem that if a costs claim goes to assessment, it will not just be the advocates will need to be able to be able to work a spreadsheet, but the judges as well. That means both that the judge will have to have access to reliable computer resources, as well as the skills to work with spreadsheets. Whilst there are many judges who are thoroughly computer literate, there are many more who are not. I confess to having felt a certain amount of dread when reading in the Guidance that in order to work with the new format bill it is “particularly important” to have a series of skills including that you:

Have a working knowledge of Excel Pivot Table functionality.

I am not sure I look forward to the first time I have to check with a High Court Judge on a costs appeal that he does....

16. And what about the situation on a provisional assessment when there's no advocate there to help?

17. Of course judicial unfamiliarity with this sort of computer programme does not pose an insuperable obstacle. Proper provision of IT and judicial training ought to be able to render judges capable of working effectively with the new format bills, but that depends on the MoJ getting the funding and managing to procure the right hardware, software and training. This is a tall order in a time of austerity.

Responses to the consultation

18. In summary, not very enthusiastic. Respondents have pointed to the complexity of the bill and the expense of drawing it, and above all to the formidable task involved in retrospectively J-coding work that has been undertaken but was not coded at the time.

19. The Association of Costs Lawyers' response contends that the new format bill appears more complex and less transparent than the old written bill, and that the Jackson aim of a more informative bill is not being achieved. A large majority of ACL members surveyed for the consultation expressed the opinion that the new format bill is not workable in its current form. The ACL suggested an interim form of bill to be used as a transitional document; that is a document that uses J-codes and Excel, but is simpler and closer in structure to the traditional bill.

The pilot

20. The pilot scheme allows the use of the new format bill instead of a traditional paper bill in the SCCO for a 6 month period from 1 October 2015 to 1 April 2016. The new bill, is used, is to be served both in pdf form and in electronic form.

21. Take up of the pilot has been very limited. At the end of January 2016 the SCCO reported that it had not yet seen a new format bill. Over the last few weeks a handful of new format bills have been received.

22. I understand that there have been a series of issues with those new format bills:

- The process of drawing them has proved prolonged and expensive;
- In one case there have been concerns raised by the paying party as to hidden rows and columns within the spreadsheet;

- The Paying Party has had difficulty in getting an overview of the work that has been done;
- Drafting Points of Dispute has proved expensive.

23. None of these bills have, so far as I have been able to find out, gone to assessment as yet. There have been a very recent interlocutory hearing in the SCCO before Master Leonard about the hidden rows and columns issue, but I have not yet heard the outcome.

Mandatory use of the new format?

24. The lack of enthusiasm for the voluntary pilot is unsurprising. The change from old style to new style bill means a major investment in software systems and, more intractably, a major change of working practice if fee earners are going reliably to input the information needed for J-coding. For so long as the new format is optional, firms will be loath to incur these costs, and fee earners will not be willing to allow the task of time recording to be more onerous than it would otherwise be

25. For these reasons the Hutton Committee proposed to the Civil Procedure Rule Committee that the use of the new format bill be made mandatory from October 2016 (the original plan had been for it to be mandatory from April 2016). The Rules Committee, however, decided in December 2015 that it was too soon to make a decision and that there needed to be a survey by the Law Society and further consideration by the Ministry of Justice and the Rules Committee before a decision was made.

So where is all this going to lead?

26. There can be no real doubt that in due course the standard bill of costs will be a self-calculating spreadsheet, not a printed out document. There can be no justification for the courts and the profession being stuck indefinitely with a system which requires manual recalculations.

27. But the transition to a fully spreadsheet based system will be difficult and demanding, and it may well be that the shift is too great to make in one leap.

28. There are several possible approaches that will make the transition easier, and may prove attractive to the Rules Committee:

- (a) hybrid bills using the new format only for new work after a particular date;
- (b) the ACL "new format light" approach, combining a more traditional approach with J-codes and a spreadsheet format;

(c) making bills more robust by reducing the number of live boxes within the spread sheet. This would mean that some manual calculation would be required, but that the bill would be partially self-calculating but harder for an inexperienced user to get badly wrong by overwriting formulae.

More questions than answers

29. And of course the uncertainty about the likely approach to the introduction of some form of new format bill sits alongside wider uncertainty. Whatever approach is taken to the new bill, there is real uncertainty as to the categories of litigation to which fixed costs will apply, and we still do not really know what the impact will be of costs budgeting on the assessment of costs at the end of proceedings that have been fully costs budgeted.

30. It may be that, in time, the detailed assessment approach to costs becomes limited to a cohort of high value litigation, and if so, the view may be taken that the expense involved in the new format bill is proportionate to the costs involved.

31. For the moment, though, what I can tell you is that some form of J-code based spreadsheet from of bill is on its way. But we will have to wait and see what particular form it will take, and when it will become compulsory.

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