

# Potholes and pitfalls

*When it comes to the radical world of costs, process is profit*

BY TONY GUISE

**M**ost lawyers, I would hope, aim to make a profit. Otherwise one may as well give up the law as a business and become a full-time pro bono specialist. Laudable though that is, pro bono does not pay the rent.

Assuming, therefore, that pro bono is not the exclusive pre-occupation of the readership of *Solutions*, I will try to set out in this article some indicators about how to ensure that you not only undertake work for clients, but also undertake it profitably. That is to say, actually get paid.

The most important fundamental to get right is the process of ensuring the retainer is effective. Process is profit! What follows are some examples of issues which can cause things to go badly wrong. If one is aware of them, one should be able to plan to avoid them.

## POTHOLES

1. It is of increasing importance to ensure that any estimates given to the client are as accurate as they can be and kept up-to-date as frequently as necessary. The really difficult part is remembering to keep the estimate up-to-date. A good way of doing this is to develop a culture of revising estimates every time a bill is delivered. Developing a culture is vital to ensure continuing profitability.

Nor is it any longer an issue between solicitor and client. Between the parties the court has a recent addition to its cost rules to deploy in terms of restricting costs which exceed estimates. See section 6, costs practice direction, paragraph 6.6.

2. Estimates are becoming important in the context of proportionality too. See *Pask v McNicholas Construction Services Limited* 31.05.06 SCCO. Costs Judge Simons held that cost estimates are relevant to the issue of proportionality and, in turn, the recoverability of costs. He referred to HHJ Alton's words in *Jefferson v National Freight Carriers*: "In modern litigation, with the emphasis on proportionality, there is a requirement for parties to make an assessment at the outset of the likely value of the claim and its importance and complexity, and then plan in advance the necessary work, the appropriate level of person to carry out the work, the overall time which would be necessary and appropriate to spend on the various stages in bringing the action to trial and the likely overall cost."

In *Adam Musa King v The Daily Telegraph* the senior costs judge

said: "One way of testing proportionality of the costs is to ask whether a litigant, paying costs out of his own pocket, would have been prepared to pay that level of costs in order to achieve success. For the purpose of the test the claimant must be deemed to be a person of adequate means. That is someone whose means are neither inadequate nor superabundant."

In the *Pask* case, costs Judge Simon said: "Taking all those factors into account at the end of the day my decision is based on the question, do costs of £269,000, which is the net amount of the costs excluding VAT, appear to be proportionate in a case where £678,500 damages have been recovered, where liability was not in issue and the case was settled before trial... Taking all those factors into account I have come to the conclusion that these costs appear to be disproportionate. I am not satisfied that there has been any planning... where... one of the factors is what the likely overall cost is."

"For costs to have risen from February 2004 from an estimated £40,000 to £269,000 in December 2004, a period of 10 months, notwithstanding the difficulties that were encountered with the other solicitors, seems to me that there has been a total lack of planning about the costs and a failure to carry out this litigation in an economic and proportionate manner."

## PITFALLS

In the context of solicitor and client, detailed assessment estimates remain of vital importance as these cases illustrate.

1. *Wong v Vizards* [1997] 2 Costs LR 46: The court only allowed an extra 15 per cent more than the estimate as an acceptable margin for error. Vizards' loss ran into tens of thousands of pounds.

2. *Slade v Boyes Turner* SCCO 17.10.03: Notification of an increase in rates by inference from a print out was insufficient. Boyes Turner missed an easy part of the process and lost thousands. The important step they missed was to ensure that when changing hourly rates the client receives a letter setting that out. Don't forget that one's terms of business must permit changes in hourly rate in the first place!

3. *MacDougall v Boote Edgar Esterkin* [2001] 1 Costs LR 118: "Absent informed approval, there is no presumption sufficient to displace the figure arrived at by detailed assessment."

You get what you are given on a solicitor and client detailed

assessment unless you can show that you have set out in writing the consequences of costs options for the client and that he or she has been able to form a good understanding of what is involved.

In *MacDougall* the case involved a construction dispute with which Mr and Mrs MacDougall began to experience difficulty funding. Boote Edgar Esterkin offered to defer payment of their costs so long as their hourly rate could be increased to reflect the cost of the loss of that cash flow and the risk they were taking.

This was discussed at a meeting with the clients when a projection of the actual costs brought about by the revised charging structure was sketched out by the partner in a rough note. The outcome was, however, a level of charge which was substantially more than the charges would otherwise have been and the court held this was entirely disproportionate in terms of compensating for the loss of the cash flow and additional interest charges the firm would have had to bear. Further, the clients could not possibly have agreed to this because there was no evidence that this had been sent to them in writing. Consequently the firm lost almost £200,000 in fees – all because of a process mistake.

4. *Garbutt v Edwards* [2005] EWCA Civ 1206: Under the Solicitors' Costs Information and Client Care Code 1999, the requirement that solicitors "shall" give estimates is only exhortatory. In other words it can be ignored almost with impunity. Watch out!

The new Code of Conduct is coming into force at some point this year. There is a subtle but very important change in the rules about giving the client information about costs. See rule 2.03, information about cost. The subtle change arises from the use of the word "must" instead of "should" throughout the new rule. "Must" is defined by case law as imposing an obligation. In other words, you can no longer ignore the duty to give regular, accurate estimates.

#### SECTION 51, SUPREME COURT ACT 1981

Practitioners should be aware of the fast developing jurisdiction in the third party funding arena. It is set to grow further during 2007. The early part of January saw a third party funder financing a £90 million professional negligence claim against a firm of accountants and this, I believe, is only the beginning.

It is growing because the courts have progressively restricted maintenance and champerty and encouraged the financing of actions by making the position of third party funders' costs clearer.

It is worth revisiting the relevant statutory basis for this jurisdiction. Providing assistance or support to a party to litigation was maintenance – illegal. Sharing in the proceeds in exchange for support was champerty – illegal too. However, through a series of cases from the mid 1980s these restraints have become less important.

1. *Aiden Shipping Co Limited v Interbulk* [1986] 1 AC 965 (HL): Section 51 is drafted so widely that it could be used to fix third parties with costs orders.

2. *Symphony Group v Hodgson* [1994] QB 179 (CA): No costs order against an employer supporting a defendant former employee acting in breach of a restrictive covenant in favour of his former employer.

3. *Hamilton v Al Fayed* [2002] EWCA Civ 665: No costs orders against people supporting cases with no financial interest in the outcome.

4. *Dymocks Franchise Systems (NSW) Pty v Todd* [2004] 1 WLR 2807 (PC): The Privy Council said the criterion was whether it was just, in all the circumstances, to make an order.

5. *Gemma Limited v Gimson* [2005] EWHC 69 (TCC): Costs order could go to a director and company secretary if the funding officers stood to gain from the litigation; or controlled and directed it; or pursued it unreasonably or for an ulterior purpose not connected with the best interests of the company.

6. *Goodwood Recoveries Ltd v Breen* [2005] EWCA Civ 414: Director fixed with the costs for he was the real beneficiary and he controlled it throughout.

7. *Petroleo Brasileiro SA v Petromec Inc* [2005] EWHC 2430 (Comm): Costs orders sought against three third parties. No order against two of them which were companies despite one providing limited funding but neither had controlled. Whereas the third third party was ordered to pay costs because he had been a director of the other two, had made funds available and was the only person to benefit from the litigation.

8. *CIBC Mellon Trust Co v Stolzenberg* [2005] CA: No reason in principle why a shareholder should not suffer a costs order if the shareholder had funded, controlled and directed litigation in order to protect or promote their own interests.

9. *Total Spares & Supplies Ltd v Antares SRL* [2006] EWHC 1537 (Ch): Non-party held liable for costs despite fact that they had not caused the costs to be incurred. Steps taken by the defendant company to divest itself of its assets to a sister company (AWF) so as to avoid consequences of costs orders led to a costs order against the entity which had received the assets and was controlled by the same persons who controlled Antares.

10. *Arkin v Borchard Lines Ltd* (Nos 2 and 3) [2005] EWCA Civ 655: The Court of Appeal opened the door for commercial funding organisations to enter the market in England and Wales by indicating that such bodies would be liable for costs but only to the extent of their support.

11. *Dranex Anstalt v Hayek* [2005] unreported: No substantive threshold test to be overcome before joining a third party for such purposes thus making it very easy to launch one of these applications.

Work is being undertaken by the Civil Justice Council on the issues in this area and a CJC forum on this and other costs related issues is being held in spring 2007 with a two-day international symposium on funding being held by the Commercial Litigation Association (CLAN) next autumn.

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