MASTER OF THE ROLLS

Confronting Costs Management

Harbour Lecture by Lord Dyson MR

May 2015

It gives me great pleasure to add a short contribution to this important topic. At the very outset, I want to make it clear that I strongly support costs management. As Sir Rupert says, the new regime is in the public interest and is here to stay. That is not to say that the current system is perfect. It is unsurprising that the experience of the first two years of the Jackson reforms has revealed some problems. It would have been remarkable had the position been otherwise. That is why the sub-committee of the Civil Procedure Rule Committee chaired by Coulson J has been established to examine the extent of the problems and to make recommendations for improvement. It is also why a seminar organised by the senior QB Master was held in March 2015 on costs budgeting in clinical negligence cases.

The Jackson Report was a brilliant piece of work. It was the product of a huge amount of research. But there is no substitute for testing civil justice reforms in the crucible of the real world of civil litigation. This was a luxury that was denied to Sir Rupert apart from a few pilots. We do now have the benefit of seeing how the reforms have been working in practice. In many respects, the cost management aspects of the reforms have been successful. I greatly welcome the fact that the percentage of cases (other than personal injury and clinical negligence cases) in which costs budgets are agreed is steadily rising; and that, for the most part, solicitors are not collaborating to agree inflated budgets.

Judges and practitioners are becoming more familiar with the process of cost budgeting and are getting better at it. That is only to be expected, but is nevertheless encouraging and welcome too.

We are indeed fortunate that Sir Rupert has found the time to produce a detailed report on the working of the costs management regime two years after its introduction. His lecture this evening is a carefully researched and clear review of the current situation as he sees it. It is a valuable piece of work. But it is not appropriate for me to comment on each of the points that he makes, not least because, as Head of Civil Justice, I would not wish to commit myself without taking account of the views of other interested parties. I am also conscious of the central role of the Rule Committee in all of this. There are, however, some aspects of what Sir Rupert has said on which I would like to comment.

The benefits of cost management are obvious and, I believe, not controversial. They tend to be overlooked. The focus of the attention of judges and practitioners alike tends to be on the problems. That is inevitable. Sir Rupert has identified a number of the main objections that are levelled against costs management. I agree with his answers to them.

He has also identified eight particular problems which have emerged and proposed solutions to them. I agree with him that the solution to the problem of inconsistency of judicial approach lies in judicial training. Inconsistency of judicial approach undermines public confidence in the justice system and encourages forum shopping. His proposals for a standard form of costs management order; for an amendment to the rules in relation to the time for lodging costs budgets; and for changes to precedent H should be given careful consideration by the Rule Committee.

Nobody disputes that there is a problem of delay in clinical negligence cases in London and some (but not all) of the regional centres. There has been a massive increase in the number of clinical negligence cases in London in the last few years, but no increase in judicial resources to deal with the case and cost management of them. As Sir Rupert says, the waiting time for a first case management conference in London is now about nine months. This is unacceptable. He proposes that the way to resolve the impasse is by granting a one-off release and coupling this with the repeal of parts of rule 3.15 and PD 3E. These are proposals that are worthy of the most careful consideration. But I have real concern about them. The key proposal seems to be that the Rule Committee should issue new criteria to guide courts in deciding whether or not to make a costs management order; and these

should be formulated bearing in mind principles which include that "the court should not manage costs in any case if it lacks the resources to do so without causing significant delay and disruption to that or other cases." I do not doubt that, if the rule/practice direction were amended to reflect this principle, judges would do their best conscientiously to apply it. But I fear that the lack of resources card would be played in many cases and that there is a real danger that costs management would become the exception, and not the rule, in clinical negligence cases. As Sir Rupert points out, there are now two fewer QB masters than there were in 2009 when he recommended that an additional QB master be appointed to deal with clinical negligence cases. The massive increase in clinical negligence cases in London since 2009 has made the case for an additional QB master even more powerful than it was when Sir Rupert first made his recommendation. It may be that, without more judicial resources, the costs management of clinical negligence cases may have to be abandoned in a significant number of cases. I await the recommendations of the Coulson report with great interest.

I agree with what Sir Rupert says about the desirability of having a single case and costs management hearing and the advantages of what he refers to as "an iterative process".

Sir Rupert makes a number of useful points on the subject of GHRs. I agree that it is unsatisfactory that the rates have not been revised since 2010. But new rates must be firmly evidence-based. I think everyone accepts that. Thus far, obtaining reliable evidence on which to base new rates has proved to be elusive. Neither the Ministry of Justice nor the Law Society has been willing to fund the necessary survey. I agree that other possible avenues should be explored. Sir Rupert suggests that foundations which support socio-legal research or universities might be willing to undertake the work. But the difficulties should not be underestimated. First, the success of the exercise would depend on the willingness of solicitors to provide the necessary information. Secondly, I was advised that the cost of conducting an effective survey and analysing the results would be very considerable.

Sir Rupert has repeated his plea for an extension of the fixed recoverable costs regime to all fast-track cases as well as to the smaller multi-track cases. I take this opportunity to support him on this. I have been urging it publicly for a considerable period of time. There has been no public response from the Department. I do not know whether there are any objections in principle to it. So far as I am aware, there are none. I can see that, if the proposal were

accepted in principle, there would be battles over the levels at which the fees were set and as to the cut-off point for fixed fees in multi-track cases. I can also see that there would have to be a provision for disapplying the regime in exceptional circumstances. But in my view, the time has come for the Department to say that it accepts in principle that the fixed costs regime should be extended. At a stroke, this reform would surely reduce disputes about costs and also reduce the cost of a large swathe of civil litigation more generally.

Finally, I wish to express my admiration of Sir Rupert for his Harbour lecture. We are fortunate that the author of the reforms which have done so much to improve civil justice in this country has been willing to undertake this review. He has made a number of valuable suggestions which will be taken into account in deciding on the way forward.
