

**KEYNOTE ADDRESS TO THE LAW SOCIETY'S CIVIL LITIGATION
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THE NEW FORM BILL OF COSTS

CONTENTS

	<u>Paragraph nos</u>
1. Introduction	1.1 – 1.2
2. The need for reform	2.1 – 2.6
3. The current proposals	3.1 – 3.10
4. Criticisms of the current proposals	4.1 – 4.18
5. The way forward	5.1 – 5.13

1. INTRODUCTION

1.1 This lecture.¹ The purpose of this lecture is to address the current controversy about reforming bills of costs for detailed assessment and to suggest a constructive way forward.

1.2 Abbreviations. I shall use the following abbreviations:

‘ACL’ means the Association of Costs Lawyers.

‘Briggs Review’ means the Civil Courts Structure Review currently being undertaken by Lord Justice Briggs.

‘Costs Review’ means the Review of Civil Litigation Costs in 2009.

‘CPR’ means the Civil Procedure Rules 1998, as amended from time to time.

‘CPRC’ means the Civil Procedure Rules Committee.

‘Final Report’ or ‘FR’ means the Review of Civil Litigation Costs Final Report.

‘Fixed costs’ is used in this lecture as an abbreviation for a regime of scale or fixed recoverable costs, under which the amount recoverable is prescribed by the rules or can be calculated arithmetically in accordance with the rules.

‘Hutton Committee’ is shorthand for the “Jackson Review EW-UTBMS Development Steering Committee” chaired by Alex Hutton QC.

‘J-Codes’ refers to the standard coding format that has been developed by the Hutton Committee. Their full title is the “EW-UTBMS J-Code-set”.

‘LSSA’ means the Legal Software Suppliers Association.

‘LEDES’ means the “Legal Electronic Data Exchange Standard”, a body which creates open standard formats for legal information. They are responsible for the UTBMS.

‘PD’ means Practice Direction.

‘PR’ means Review of Civil Litigation Costs Preliminary Report.

‘UTBMS’ means the Uniform Task-Based Management System, a standardised form of time coding used in the United States

¹ I am grateful to my judicial assistant, Stephen Clark, for his considerable help in preparing this lecture.

2. THE NEED FOR REFORM

2.1 The problem. The current form bill of costs has a long and distinguished pedigree. It is based upon the style of a Victorian account book. Despite those historic virtues, the format is neither helpful nor appropriate in the twenty first century. The current form of bill makes it relatively easy for a receiving party to disguise or even hide what has gone on. What is required is a bill which (a) gives relevant information to the court and to the paying party and (b) is transparent. PR chapter 53 highlighted these issues and invited consultees to give their views.

2.2 Views during the Costs Review consultation. Most of those consulted endorsed the criticisms set out above. The current bill of costs is cumbersome, time consuming and expensive to produce. It is opaque, giving no clear information to the reader as to why costs were incurred or even the underlying work done. The information about time spent on documents is particularly difficult to decode. The current form of bill is an anachronism that makes no use of time-recording software.

2.3 Conclusions reached during the Costs Review. The need for reform was clear. FR Chapter 45 sets out the three requirements which any new bill would need to meet:

- (i) It must provide a transparent explanation about what work was done and why;
- (ii) It must provide a user-friendly synopsis of the work done, how long it took and why;
- (iii) It must be inexpensive to produce.

2.4 Recommendations. FR chapter 45 paras 5.4 – 5.8 argued that a new bill of costs should be developed which was capable of being automatically generated from time-recording software. It would contain all the necessary information required for the paying party – or a judge – to understand the receiving party’s costs in a clear, transparent and intelligible way while producing considerable savings in time.

2.5 I therefore made the following two recommendations:²

- “106 A new format of bills of costs should be devised, which will be more informative and capable of yielding information at different levels of generality.
- 107 Software should be developed which will (a) be used for time recording and capturing relevant information and (b) automatically generate schedules for summary assessment or bills for detailed assessment as and when required. The long term aim must be to harmonise the procedures and systems which will be used for costs budgeting, costs management, summary assessment and detailed assessment.”

2.6 Acceptance of the recommendations. Following publication of the Final Report the Judicial Executive Board announced that it accepted the recommendations. The

² See the list of recommendations at FR page 471.

Judicial Executive Board expressed no reservations about the recommendations for a new form bill of costs, although everyone accepted that this was a long term project and likely to be achieved after the main implementation date.

3. THE CURRENT PROPOSALS

3.1 Hutton Committee proposals. After the publication of the FR, the development of a new bill of costs passed to an ad-hoc working party set up under the auspices of Jeremy Morgan QC, one of my assessors during the Costs Review, to take the project forward. Alexander Hutton QC took over responsibilities as chair on Jeremy Morgan's retirement and the working party is now commonly known as "The Hutton Committee".

3.2 The Hutton Committee, after a considerable amount of effort and hard graft, have produced a new format bill of costs which is built on three integrated pieces of work.

3.3 The J-Codes. First, they have created J-Codes – a standardised way of capturing time-recorded information adapted from the UTBMS which is used for eBilling in the United States and US law firms operating in the United Kingdom. The J-Codes work by identifying the Precedent H phase in which work is undertaken (e.g. Pre-Action), what task is being worked on (e.g. Investigation of the facts or law) and the type of activity being undertaken (e.g. Planning, researching or drafting). The J-Codes were endorsed by the Master of the Rolls, Senior Costs Judge Peter Hurst and myself on 30th July 2014. They have now been ratified by the body with oversight of the UTBMS, the LEDES Oversight Committee.

3.4 The electronic spreadsheet. Secondly, there is a multi-purpose electronic Excel spreadsheet. This allows for a firm's time-recording data to be fed into it automatically and to create a bill of costs from it. It is possible to sort the data in a number of ways (by phase, by date or by the type of work being done). From this base you can generate a bill showing the full amount of the actual costs, which the client must pay. You can also generate a bill showing the costs recoverable from the other side. This requires adjustments, to strip out items payable by the client but not permissible as recoverable costs. The electronic spreadsheet can produce a bill for either detailed or summary assessment.

3.5 The finished bill. Thirdly, there is the finished version of the bill - this condenses all the information contained in the spreadsheet into a clear and legible format. It makes it possible for the judge or the paying party to examine the bill in varying levels of generality and with ease of comparison with the costs budget. Although the full bill will be in electronic form only (as it will have too many columns to print in A4) and designed primarily for use on screen, a shortened printed version can easily be made from it. Both will need to be served. A finished version of the print bill, including example data, is available as Precedent AA, attached to PD 51L (White Book pages 1627-1645) and available on the Ministry of Justice website.

3.6 Consultation and criticism. The Hutton Committee conducted a consultation on their proposals and received a number of critical responses. Four key strands of criticism have emerged from them, namely:

- a) The proposed bill is too expensive to implement;
- b) The proposed bill is too complex to work with;
- c) The proposed bill is too time-consuming to transfer work done before J-codes into the new format; and
- d) The proposed bill is too prescriptive in using J-Codes.

3.7 Decision of the CPRC. The CPRC established a voluntary pilot for the proposed new bill of costs, commencing in October 2015. Practice Direction 51L sets out the rules governing the voluntary pilot. The original plan was that the voluntary pilot would end this month and that a mandatory pilot would start. However, at their December 2015 meeting, the CPRC decided to extend the lifespan of the voluntary pilot until December 2016. It was agreed that the proposals warranted “careful further consideration” and “that it was too soon for any decision to be taken.”

3.8 Where next for the new bill? The CPRC were right to be cautious. This is an important reform, affecting the professions and the judiciary as a whole, which we need to get right. However, there is now a state of deadlock. We need practical proposals to break the deadlock and advance the discussion.

3.9 To that end, I put forward this paper as one such proposal. In Section 4, I will examine the criticisms made of the current proposals and whether they have any merit or not. Then, in Section 5, I will suggest what can be done to address those criticisms which have any force behind them as well as a number of other matters which could be implemented.

3.10 Interface with the Briggs reforms. More and more work is now being done electronically. The Briggs Review is carefully examining the structure of the civil courts and the scope for electronic working. That review is likely to lead to major reform. The traditional bill of costs, based on the style of a Victorian account book, is already inappropriate for the digital age. It can only become more so as the IT revolution finally reaches the civil courts.

4. CRITICISMS OF THE CURRENT PROPOSALS

4.1 Expense. Some are concerned that solicitors will be required to pay for expensive new time-recording software as a result of the changes. Not so.

4.2 For those who have already invested in software, it is possible to make these J-Code compatible with a relatively small amount of changes and costs. The LSSA have indicated to the Hutton Committee that some of their members have already updated their software to make it compatible with UTBMS generally and J-codes specifically.

4.3 For those who are looking to buy new software, the same applies. Furthermore, if a firm decision is taken to adopt the new format bill of costs, then software suppliers will be able actively to develop and sell compatible software. The LSSA has said that new products could be made available to the market within 6 months.

4.4 For those who do not work with time-recording software at all, there is more merit behind this criticism. Any new bill of costs needs to be flexible enough to fit with the sophisticated time recording systems of large City law firms, while also being capable of being drawn up by small high street practices. However, it is not a reason to resist electronic working altogether. Lawyers need to accept changes to their practices as technology makes it possible to work more efficiently.

4.5 At present, both the spreadsheet and the print version of the bill are heavily integrated with the J-Codes. It should be possible to re-design them so as to work either with J-Codes or without them. This would enable firms to choose the manner in which they present their billing data. All the new format bill should ask is for fee-earners to record their data in the phase, task and activity format and for those data to be served in an electronic format. How they choose to structure the presentation of those data should be up to them.

4.6 Complexity. Some argue that the J-codes and the new format for the bill of costs are too complex. They argue it is difficult to interpret and a simpler bill following the Precedent H stages would have been adequate. Not so.

4.7 There are a large number of individual J codes, but a practitioner need not use all of them. In the same way a typical solicitor does not use all the codes in the OPSIS case management software – just the codes that are relevant to his/her work.

4.8 While the Excel spreadsheet that creates the new format bill may *look* complex, the finished product is not. I invite those concerned to look at Precedent AA. It gives all of the required information in a clearly presented format. The reader can choose to look at various levels of generality – either the broad overview of the Precedent H stages or the specific detail of the individual litigation activities undertaken.

4.9 In relation to the spreadsheet itself, it should be kept in mind that this is only one way of generating the new bill and it has been designed to cope with a wide range of scenarios. Not all of its columns and cells will be used. Furthermore, if there is demand the members of the LSSA will produce new versions of it or create user-friendly interfaces based upon it. Solicitors should feel free to adapt it or create versions of their own. While a new bill of costs may mean that those who are responsible for preparing the bill will need to become familiar with Excel, they need not become experts.

4.10 The ACL has produced a simpler version of the Hutton Committee's spreadsheet which would just use Precedent H stages, arguing that this avoids much of the complexity issues. However, if a simpler bill were to be adopted, the bill would lose many of its advantages by sacrificing the level of information provided with the bill.

4.11 The triad of phases, tasks and activities provide for a high level of clarity and precision. A bill which merely states that £3,000 was incurred pre-action without explaining how and why it was incurred is unhelpful. The Precedent H stages have many things to commend them, but the basic spreadsheet does not provide enough information for a proper detailed assessment. The bill would have the virtue of simplicity, but suffer from the vice of being simplistic.

4.12 Time-consuming. Some argue that if all bills have to be put into J-codes and the new format, it will take a considerable amount of fee-earners' time retrospectively to apply them to work done before their implementation. It has been suggested that this will cause an increase in the cost of bill preparation time in excess of 200%.

4.13 There is force in this objection. The new bill of costs was intended to reduce the cost of drafting the bill, not to cause considerable extra expense and divert resources away from other, more productive tasks. It will therefore be necessary to implement this reform in a way that avoids the need for re-structuring past records of work done.

4.14 The prescription of J-Codes. In many respects, the concerns detailed above are less about the new format bill in its spreadsheet or printed form and more directly criticisms of the J-Codes themselves. Some practitioners argue that they go into excessive levels of detail. Others claim that the J-Codes are too prescriptive and there will be difficulties in making sure fee-earners code work correctly.

4.15 Any proposal is going to have strengths and weaknesses – it should not be surprising that J-Codes have both. Happily, I am told that it was never intended to make J-Codes mandatory for the new bill of costs. The Hutton Committee took the view, correctly, that it would be beyond its remit to do so.

4.16 Nevertheless, the professions would be wise to give serious consideration to J-Codes. There are considerable advantages to using them. They make the process of drafting a bill considerably quicker, easier and cheaper, if J-Coding is done contemporaneously with the work carried out. The J-Codes help with the clarity and transparency of the new bill.

4.17 If the professions wish to create alternative time-recording standards or to present their billable time in another way, then the J-Codes represent the standard which they will have to equal or exceed.

4.18 Conclusion. Most – if not all – of the criticisms about the new format bill of costs are aimed at the J-Codes. There are strong views on both sides of the debate. As a result of the new format bill's foundations being built on J-Codes, this has meant that the entire bill has been criticised rather than one discrete part of it.

5. THE WAY FORWARD

5.1 A modest proposal. There is a practical solution to the present quandary. I suggest that the way forward is to revise the current proposals, preserving the work of the Hutton Committee while allowing for greater flexibility in the new bill.

5.2 The Hutton Committee's proposed version of the bill should be adopted as the new bill format, albeit with the references to the J-Codes removed. The CPR should allow practitioners to prepare that bill in any manner of their choosing; whether with the assistance of J-Codes, automatically generated by an Excel spreadsheet or by hand.

5.3 A digital copy of the bill should be served on the court and the paying party along with an electronic spreadsheet, which clearly and accurately details the work done in the course of litigation, following the Precedent H stages. This should be in the same format of phase/task/activity and adopt the Precedent H guidance for what work falls in a given phase. Time entries can either be generated automatically by time-recording software or inputted manually by those who prefer to record their work done on paper. For those using J-Codes, the Hutton Committee spreadsheet provides an excellent tool for preparing the bill.

5.4 Court IT. It is important that any new IT for the civil courts should have the capacity to receive electronically both costs budgets and bills of costs in the new form. I would respectfully urge those designing new hardware and software for the civil courts to take this into account.

5.5 The above proposal has three key elements to commend it.

(i) First, we have a new format bill which meets the three criteria set out at paragraph 2.3 above and the Recommendations in the FR. The new format bill integrates with costs budgeting and Precedent H. It can be generated automatically by time-recording software. It provides a framework for software providers to create tools for the professions.

(ii) Secondly, it makes good use of the excellent work of the Hutton Committee. Indeed, it would not be possible without it. While revising the proposals will mean that the current version of the spreadsheet and the J-Codes are not an essential part of the scheme, their value will be preserved for those who adopt J-Codes. As suggested above at paragraph 4.16, the professions should give serious consideration to them.

(iii) Thirdly, it sidesteps much of the criticism which gave rise to the present delays. The print version of the bill and the accompanying spreadsheet are not radical innovations. Nor do they involve significant cost. They require only a basic level of computer literacy and an understanding of how to present information clearly.

5.6 Retrospective application? One of the more serious criticisms is the argument that retrospective application of the new format bill and of J-Codes would increase the cost of bill preparation dramatically.

5.7 The proposal above diminishes the seriousness of this criticism. There is, however, a complete solution to the problem. The CPRC should choose a future date for the implementation of the new bill. Work done before this date may be recorded in the old system and with the old format bill. Work done after this date should be done in the new format bill. There will be no retrospective imposition and no need to go through historic information, trying to apply the phase/task/activity format retrospectively. May I suggest that the new form bill of costs should be mandatory for all work done on or after 1st October 2017? The voluntary pilot under PD 51L could be extended until that date.

5.8 Fixed costs for bill preparation In addition, I invite consideration of a proposal to cap or fix the recoverable costs of preparing the bill. The receiving party should only

expect to recover up to a certain amount for the preparation of the bill – possibly expressed as a % figure of the total value of the assessed bill.

5.9 Does any of this matter if we have fixed costs for the multi-track? The only way to control costs effectively is to do so in advance, i.e. before the money is spent. That means either fixed costs or costs management. There is room for debate as to where the boundary between those two regimes should lie. It is a mistake to think that the recent proposals for fixed costs makes the new format bill an irrelevance. This is for three reasons:

(i) If there is a fixed costs regime (of the kind I have previously suggested) for the multi-track, it will only go up to a certain level and it will only apply to assessment on the standard basis. There will still be many bills of costs requiring detailed assessment.

(ii) In view of the vociferous opposition to fixed costs, it is uncertain when and up to what level fixed costs will be introduced.

(iii) Even in cases subject to fixed costs, contemporaneous electronic time-recording under phase, task and activity (such as with J-Codes) would provide invaluable internal management data to enable firms (a) to maximise their profits and (b) to run those cases as efficiently as possible. This will be particularly important if the new regime prescribes fixed costs for each phase, as previously recommended.

5.10 Conclusion. If this proposal finds favour with the CPRC – and with the professions more generally – then I suggest that the best way forward is to take three steps:

- (i) First, create a version of the print bill and spreadsheet which removes references to the J-Codes. The bulk of work has already been done by the Hutton Committee and it does not require major surgery.
- (ii) Secondly, set a date for when the CPRC will decide whether to implement the new bill of costs (subject to appropriate modifications). Invite interested parties to send in representations on the new bill to a CPRC sub-committee, which can report back at that meeting.
- (iii) Extend the voluntary pilot under PD 51L until such time as the new form bill of costs becomes mandatory.

5.11 Preliminary draft of the new bill. A possible preliminary draft of the new bill is attached to this paper for consideration.

5.12 Regardless of whether this particular proposal is accepted or not, one thing does need to be kept in mind: the status quo is of no benefit to anyone. Investment decisions on time-recording software are being deferred. The work of the Hutton Committee has been left to lie fallow. Most egregiously, we still have a bill of costs that was identified as being seriously deficient many years ago.

5.13 This is not intended as a criticism of the CPRC's decision last December. The consultation responses rightly gave them pause for thought. However, the obstacles are not insurmountable. The Hutton Committee has designed a new bill that is fit for purpose. With the appropriate rule changes and practical steps in the implementation process, the concerns can be addressed.