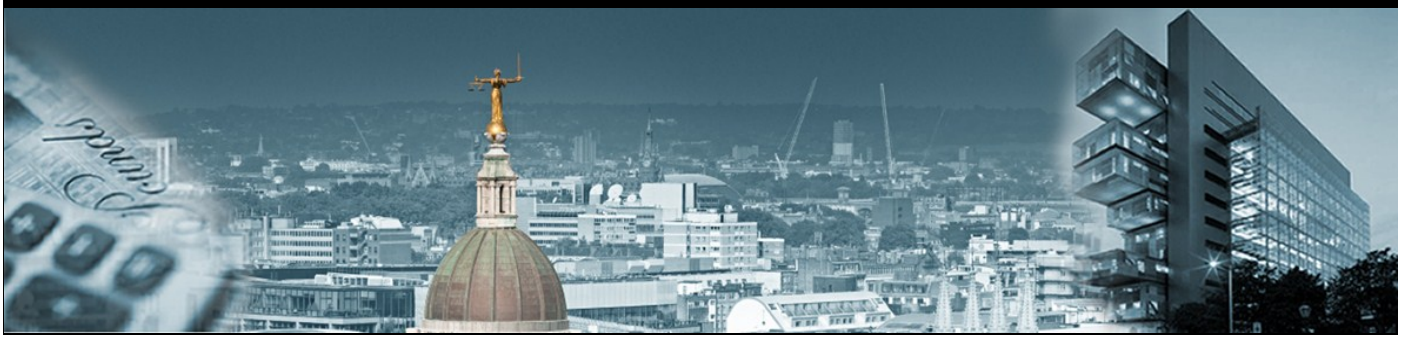
Issue 21

newsletter



Elvanite the kryptonite of costs budgeting

Before Elvanite, some common teething problems with costs budgeting to date:

1. The Directions Questionnaire. It states that the Precedent H (Costs Budget) is attached (meaning it should be filed and served with the questionnaire). **THE FORM IS WRONG**. Strangely (and almost as if too many changes were brought in too quickly, by an understaffed and overstretched dept.) completely contrary to the CPR and accompanying PD, the Precedent H form must be filed and served (unless the Court Orders otherwise) no less than 7 days before the first CMC. Do not panic!

2. Precedent H (the one on the CJC website and attached to the PD) – DOES NOT WORK. It a terrestrial tool in a digital age. Here at Just Costs, we have designed, developed and obtained approval from numerous Judges, our own Precedent H form. It's easier to use, actually works and is fit for purpose.

Now to Elvanite…

Elvanite Full Circle Limited v AMEC Earth & Environmental (UK) Limited is the perfect example of how not to approach costs budgeting. The Defendant had it's Costs Budget approved at £268,000, the case then went on to Trial where it won but the Defendant's costs actually came in at £530,000! Mr Justice Coulson presiding found that there was "no good reason" to depart away from the original Budget resulting in the Defendant losing a massive £260,000 of their client's money because they did not:

1. Stick to the original agreed Budget; or
2. Apply to amend their Budget.

I am sure you will agree, a very important lesson to be learnt here!

Due to the very scary, serious and important nature of costs budgeting, Tom Blackburn (National Advocacy Manager and Head of Budgeting at Just Costs) has decided to write a costs blog. You can find it by going to the Just Costs website at www.justcosts.com/blog.

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To find out more about how we can help with Costs Management and Budgeting, contact Amber Holt, National Client Relationship Manager on 0161 618 1784 or email: amberholt@justcosts.com

The New Part 36 Provisions and Applying Part 36 in Costs

The new rules permit the making of Part 36 offers in respect of costs but Part 36 will not apply to Detailed Assessment proceedings "commenced" before 1 April 2013.

I would not be surprised to learn that many solicitors have not managed to locate the new provisions, as they are not contained within the main body of the CPR or the Practice Direction to the new CPR 47. Nor would you find them within the Transitional Provisions section of the Practice Direction to the new CPR 48.

Referring to the illusive transitional provision concerning Part 47.19 offers, which you can find hidden within the Transitional Provisions to the Civil Procedure (Amendment) Rules 2013 at s 22(1):

"The provision made by rule 47.20(1) to (5) and (7) in the Schedule (liability for costs of detailed assessment proceedings) does not apply to detailed assessments commenced before 1 April 2013 and in relation to such detailed assessments, rules 47.18 and 47.19 as they were in force immediately before 1 April 2013 apply instead."

This will mean that all claims for costs where Notice of Commencement is served pre-April 1st 2013 CPR Part 47.19 still applies but Bills served post-April 1st 2013 have Part 36 incorporated into detailed assessment proceedings by CPR 47.20(4).

As many will already be aware, one significant benefit of the new Part 36 regime is that a successful party beating their own Part 36 offer will be awarded a 10% uplift on the sums recovered. See CPR 36.14 (3)(d)(ii). This will also apply in costs claims.

Great news for a successful client and it should be great news for their solicitors, but is it?

What does your retainer say?

Chances are that many are still utilising their old model retainers where they are not acting under a CFA and where they are under a CFA the vast majority will be using some form of the Law Society Model.

As such many solicitors will find that this 10% windfall must be handed over to their client, which is great for PR but not so great for profits.

Conclusion

The above may prove to be a stark realisation for many firms once they have missed out on a reward for their hard work. Take stock of your case list now and ask is it too late to vary your retainer?

Sam Hayman
Associate
London Office

The Last Thursday Club

Earlier this year, Just Costs launched The Last Thursday Club, a prestigious, yet informal, networking and social event for Legal Professionals from Law Firms across the City.

The event has already proved a success, providing a forum to connect with other like-minded individuals who face similar challenges to you on a day to day basis, and is testament to the commitment and support we are providing to lawyers and legal professionals in these uncertain times.

Whilst we are legal costs, budgeting and funding specialists, we can assure you that there will be absolutely no sales pitch from us. Of course, should you like to discuss any general or specific costs issues, our experts will be on hand to assist.

Held centrally in London at the same time and same venue on New Street Square, EC4 on the last Thursday of every month, drink and nibbles are complimentary.

To register your interest or to confirm your attendance, please contact Amanda Jordan on 0207 758 2164 or email amandajordan@justcosts.com

A simple tale—reasonableness & the human element

In our zeal to dissect, analyse and amaze the Court with our dazzling array of somersaults through case law and the CPR we often overlook the fundamental human element of the case we are dealing with.

In the case of **Mrs Patricia Williams and Sainsbury's Stores Ltd (15 March 2013)**, before Master Campbell, it was this "Human Element" which assisted the Claimant's Costs Lawyer in justifying the reasonable of the costs claimed.

The case involved a straight forward two-pronged argument over a single disbursement, a Preliminary Care and Rehabilitation Report. The Defendant argued that:

i) It was unreasonable to obtain the Report, and;

ii) In the alternative, the costs of doing so were excessive and should be reduced.

For the purposes of this article we will be concentrating only at the argument pertaining to the reasonableness of obtaining the Report.

Background

The Claimant, then aged 78, was badly injured when an employee of Sainsbury's collided with her in the supermarket. On 13 March 2009, a Letter of Claim was sent by her solicitors and on 14 April 2009, Sainsbury's admitted liability.

On 11 November 2009, the Claimant was examined by Mr M W McLain, (a Consultant in Traumatic and Orthopaedic Surgery). In his report dated 12 November 2009, at paragraph 5.3, Mr McLain stated:-

"Mrs Williams is an elderly lady. It is noted that "prior to her admission she was her husband's sole carer and had struggled to cope." As a consequence of these injuries she did require considerable help and still requires help in the house which she did not require pre-indexed event …"

On 24 November 2009 Mr McLain drafted a supplementary report following receipt of medical records from Northampton General Hospital. The penultimate paragraph read as follows:-

"With respect to the assessment of day to day care and assistance with personal needs and living tasks that the Claimant required, I feel unable to give detailed comment, it depends very much on the conditions in the house itself. I certainly recognise that she did require extra care and assistance when she went home from hospital and also probably in relation to the surgery she underwent later in August 2009, perhaps a specialist report in relation to this is necessary."

On 6 May 2010, Counsel provided an advice on quantum, in which the instructing solicitor was advised to obtain an expert report on the issue of care/ assistance. Only on receipt of such evidence would Counsel advise further on quantum.

In light of both the medical expert and Counsel's advice a rehabilitation expert was instructed to draft a report. Unfortunately, matters took a tragic turn at that time as the Claimant's husband became increasingly ill and died shortly thereafter. A Rehabilitation Report was eventually obtained and on 7 March 2011, the report was disclosed to the Defendant, who continued to reject the need for such a report.

The Defendant's Arguments

The Defendant's first point was in relation to the timing of the Report. It was the Defendant's argument that the accident had accelerated the help and care which the Claimant required by between only one and two years. The Defendant stressed the point that, the latest care which would have been required was 16 January 2011, but the Report was not dated until 21 February 2011, approximately two years and one month post the accident.

It was therefore the Defendant's argument (as summarised by the Court) that:

"…the Report was not a reasonable expense for Claimant to have incurred because by the time it was commissioned, she had incurred all the care costs which related to the accident for the care that she had received in the acceleration period. For that reason the entire fees should be disallowed."

The Claimant's Arguments

Acting for the Claimant, Monique Passalaris (of Just Costs Solicitors) asserted to the contrary and took the Court, at length, through the background and chronology of the case in order to show that, although the Defendant's argument might have been successful in a standard "run of the mill" case, due to the unique set of circumstances in this case, mainly the Claimant's advanced age and the fact that at the time when the Defendant insists the Claimant should have had cognisance of what her care expenses were, the Claimant was not only dealing with her own frailty and disabilities arising from the accident but also had to endure the increasing illness and eventual death of her husband of many years. It was therefore not reasonable to suppose (as suggested by the Defendant) that she could have/should have calculated her care losses for herself.

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A simple tale—reasonableness & the human element…(continued)

It was also emphasised that the Claimant was a lay-person with no expertise or experience in such matters and could not be expected to accurately assess the costs of her care, for example, how would she know what rehabilitation aids were necessary or/and available let alone what they would cost and/ or whether cheaper alternatives were available.

It was further pointed out that the Claimant's solicitors were simply unable to progress the case without the rehabilitation report as the medical expert could not/would not provide a detailed comment on the Claimant's day to day care needs without sight of such a report and Counsel could not/would not advise on quantum until he had received the same report.

Final Decision

The Court viewed that the correct approach was that costs should not be assessed using the benefit of hindsight and quoted the well established case of **Francis v Francis & Dickerson [1955] 3 WLR 973** in which Sachs J said this:

"The correct viewpoint to be adopted by a taxing officer is that of a sensible solicitor sitting in his chair and considering what in the light of his then knowledge is reasonable in the interests of his lay client …I should add that, as previously indicated, the lay client in question should be deemed a man of means adequate to bear the expense for this occasion out of his own pocket – and by "adequate" I mean neither "fairly adequate" nor "super abundant".

The Court found that in principle the instruction of the rehabilitation expert was a reasonable step to take and Master Campbell held: " In my judgment, in considering what was a reasonable step to take in her interests, the only reasonable conclusion Mrs Williams' solicitor could have reached was that the claim would be advanced by the commissioning of a report into her care and rehabilitation. Expressed differently, it is difficult to see how Mrs Williams' case could have been litigated effectively if [the Claimant's solicitors] had disregarded and ignored both the advice of Mr McLain and of counsel."

Monique Passalaris
London Regional Manager
Costs Lawyer