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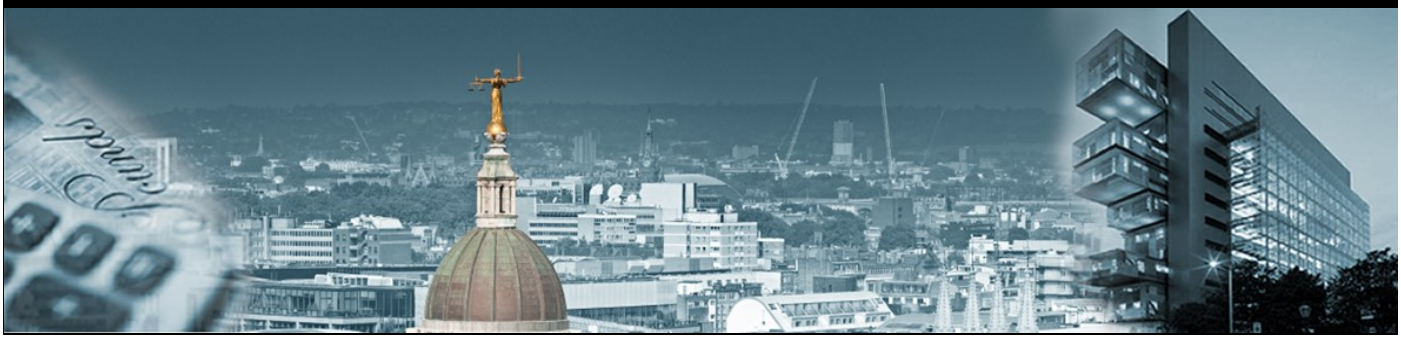
Issue 24

newsletter



When Should You File & Serve a Costs Budget?

By Nick McDonnell

This may sound a straightforward question. But, the recent appeal in the case of Porbanderwalla v Daybridge Ltd (30 January 2014) heard by HHJ Worster in the Birmingham County Court, demonstrates the issues generated by the relevant Civil Procedure Rules and Court forms together with their application and interpretation.

The Claimant commenced proceedings on 18 April 2013 for a claim for damages in the region of £42,000 being mostly credit hire charges. Upon receipt of a defence, the Court issued a Notice of Proposed Allocation to the Multi Track (Form N149C) which provided that:

"2. It appears that this case is suitable for allocation to the multi track. If you believe that this track is not the appropriate track for the claim, you must complete box D2 on the Directions Questionnaire (Form 181) and explain why.

3. You must by 28 June 2013

a) complete the Directions Questionnaire (Form 181) and file it with the court office [the address is then given] and serve copies on all other parties; and
b) attempt to agree directions with the other parties; and
c) file proposed directions in accordance with CPR 29.1(2) (whether or not agreed) with the Directions Questionnaire

4. By the same date, the allocation fee of £220 is due ..."

In the absence of a reference to costs budgets, both parties filed and served their Directions Questionnaires without them.

Upon the Court considering the parties' Directions Questionnaires, an order was made with comprehensive directions for management of the case. That order included the following:

1. Both parties having failed to submit budgets in Form H, the recoverable costs for each party shall be limited to the Court fees incurred by each pursuant to CPR 3.14.

2. This Claim is allocated to the Multi Track.

CPR.r.3.13 states:

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"Filing and exchanging budgets

3.13 Unless the court otherwise orders, all parties except litigants in person must file and exchange budgets as required by the rules or as the court otherwise directs. Each party must do so by the date specified in the notice served under rule 26.3(1) or, if no such date is specified, seven days before the first case management conference."

The rule suggests there are three triggers when a costs budget is to be filed and served; by the date specified in the Notice of Proposed Allocation to the Multi Track (pursuant to CPR.r.26.3(1)), or in the absence of such a date, no later than 7 days before the date of the CMC, or where the Court otherwise orders.

In this case there was no CMC listed and the Court had not otherwise ordered. Accordingly, the appeal considered the rule with reference to filing and serving a costs budget '…by the date specified…' in the Notice. Should the rule be given a wide interpretation and, therefore, was this by the date requiring the Directions Questionnaires to be filed and served (i.e.

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28 June 2013) or should the interpretation given be a much narrower one and refer to a date in the Notice specifically requiring costs budgets to be filed? Of course there was a date for the former but not the latter.

The parties' legal representatives had applied the narrow interpretation but the Court at first instance had applied the wider interpretation resulting in the Court imposing the sanction available at CPR.r.3.14; i.e. the parties were to be '…*treated as having filed a budget comprising only the applicable court fees*.'

The importance of this, of course, is that pursuant to CPR.r.3.18, a party cannot, without good reason, expect to recover costs above an approved budget.

On appeal, the Claimant ran a number of arguments.

The first argument was that the reference to '…*the date specified…'* must be a reference to a requirement to specifically serve a costs budget. If it was a reference to serve a costs budget by a date in the Notice to do something else (e.g. serve Directions Questionnaires or agree directions) then that would make little sense. The notice had gone as far as to specify other matters the parties had to comply with by such date, why then expect the parties to file and serve costs budgets but not go as far as saying as much? Indeed, CPR.r.26.3.1(b)(i) expects a Notice under that rule to '*specify any matter to be complied with by the date specified in the notice*' (our emphasis). To not make reference to the filing and serving of costs budgets in the Notice is to fail to 'specify' a matter concerning costs budgets. Indeed to not mention budgets is the opposite of specifying such a matter.

The second argument was that, unless the Court orders otherwise, CPR.r.3.12 expects the costs management and budgeting process to apply to all Multi Track case. In this case, the Court had not otherwise specified and the Court had not allocated the case to the Multi Track. The Court had merely 'proposed' to allocate the case to the Multi Track. Accordingly, the costs management process could not be expected to apply automatically.

The third and final argument was concerning the standard Form N149C available on the Court service website. This form appears to have been the intended form in place since April 2013 and specifically includes a paragraph which states:

> *"You must by XXXXXX file and exchange costs budgets as required by CPR3.13."*

The argument advanced was that if that was how the Notice had started out and the actual form served on the parties did not contain that paragraph, that was a positive move by the Court to remove that paragraph and to specifically not require the parties to file and serve costs budgets.

Whilst HHJ Worster was not persuaded by arguments two and three, he was persuaded by the first and allowed the appeal.

Interestingly, the Judge set out that, even if the appeal had failed, he would have allowed relief from sanctions with the case passing the 'good reasons' test in Mitchell MP v News Group Newspapers Ltd [2013] EWCA Civ 153.

This case clearly acknowledges the difficulties faced by both practitioners and the judiciary with the drafting of the rules and the Court forms together with their application and interpretation.

Whilst this decision is not binding, it is a step towards some guidance where previously there was none on this issue.

Cost of Adjudication by Wayne Spring

Until recently, it was the common thought that in the absence of an express contractual right or a right set out in any applicable institutional adjudication rules, no party in a matter in which adjudication arose could be ordered to pay the costs of the other party, irrespective of the outcome of the adjudication. That is contrary to the 'common' position in court or arbitration proceedings where costs usually follow the event, or in other words, the unsuccessful party is usually ordered to pay the successful party's costs.

In the relatively recent decision of *The Board of Trustees of National Museums and Galleries on Merseyside v AEW Architects and Designers Ltd [2013]*, adjudication took place between the Board of Trustees and its Contractor. The Contractor was successful in obtaining a decision from the Adjudicator that the Contractor was not responsible for certain defective designs that had been carried out by AEW. The Claimant's brought court proceedings against AEW seeking to recover damages arising from the defective designs and rather interestingly seeking to recover its legal and expert costs incurred in defending the adjudication against the Contractor.

Surprisingly and contrary to 'common' belief that costs of an adjudication are not recoverable, the High Court has held that AEW was liable to the Board of Trustees for its adjudication costs. Mr Justice Akenhead stated there would not have been a dispute

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Cost of Adjudication — cont'd

between the contractor and the Museum if the AEW had properly carried out its design responsibility. It was reasonably foreseeable that the contractor could refer the question of design responsibility to adjudication. There would not have been adjudication between the Museum and the contactor and the Museum would not have failed in the non-existent adjudication.

Mr Justice Akenhead held that the Museum's adjudication costs were recoverable from AEW. The Museum had passed the threshold of reasonable foreseeability and causation. If AEW had fulfilled its obligations, there would have been no dispute / adjudication with the contractor. Further, there was a sufficient causative link between AEW's breaches and the adjudication with the contractor. The link would only have been broken if the Museum's solicitors had negligently advised the Museum to defend the adjudication or acted unreasonably in the adjudication. Neither of these points had been argued by AEW.Until recently, it was the common thought that in the absence of an express contractual right or a right set out in any applicable institutional adjudication rules, no party in a matter in which adjudication arose could be ordered to pay the costs of the other party, irrespective of the outcome of the adjudication. That is contrary to the 'common' position in court or arbitration proceedings where costs usually follow the event, or in other words, the unsuccessful party is usually ordered to pay the successful party's costs.

This is the first time in over a decade since the Court has considered the question of whether it is possible to recover adjudication costs. It would appear that this case allows a party who has acted reasonably and incurs costs of adjudication to recover them from a third party. As to whether this will increase the number of claims being brought through the Courts – only time will tell.

Employment Tribunal Costs

Lord [Alan] Sugar won his high-profile Employment Tribunal case against former 'Apprentice' winner Ms [Stella] English but the question as to the recoverability of the legal fees continued. Lord Sugar sought to recover a reported £50,000 in legal fees, resulting from his successful defence of unsuccessful constructive dismissal claim against him.

The victory for the award-winning businessman was soured by the Employment Tribunal on the question costs. For anyone who is to embark on a claim though the tribunal it is worth remembering the starting point is that both parties will bear their own costs and the losing party is not automatically required to contribute to the overall winner's legal fees. The Employment Tribunal does have the power to award costs but clearly and as can be seen from this high profile case it is quite reluctant to exercise that discretion. Lord Sugar must have been confident that his legal team would have been able to obtain a costs Order especially after the damming words from the tribunal who stated that this case "should never have been brought".

Employment Tribunal Judge Foxwell rejected Lord Sugar's application to recover part of his legal costs in defending the original Claim. Judge Foxwell stated that, Ms English truly believed in her case, that she had been advised she had a claim. She had pursued it like any other litigant. Ms English had told the Tribunal that she had brought the case in "good faith" thinking it was legally sound.

So why is it so hard to get these costs and what can be done to try and get a costs Order? Firstly, consider the statistics on the number of costs Orders made in 2011/12 which are the current figures available. It confirms that there were 612 cost Orders made by the Employment Tribunal (officially 1,411 but one case had 800 Claimant's so this would have distorted the figures). You are now probably thinking, well, we might get them then? Again, it is highly probable that you will not. When you consider that just over 230,000 cases were handled, this equates to less than 1% of matters which get the costs orders. The average award made was circa £1,700. So the advice to any client must be you may not recover any costs.

The Employment Tribunal has in place a very high bar in which a party needs to clear before a tribunal will award costs. As up to 29 July 2013 it was limited to when a party forced a hearing to be adjourned. Also at this time the Employment Tribunal had in its discretion the power to award costs when a party had acted disruptively, abusively, vexatiously, unreasonably or where the case was misconceived. These, as detailed above, were not often applied.

Post 29 July 2013, the rules have changed in relation to both sets of circumstances on which costs may be awarded. The rules could be deemed to have increased the scope in which a tribunal may award costs. Now, the tribunal can award costs where proceedings have been commenced by a party which the tribunal deem 'had no reasonable prospect of success'. Case Management also plays an increased part in an attempt to recover costs as the Tribunal may now award a costs Order against any party that has been in breach of 'any practice direction or order, or where a hearing had been postponed or adjourned by an application from any of the parties at short notice'.

We turn back to the question, what can be done to try and get a costs Order? It would seem that if there is a breach or delay in the proceedings then make an application as post 29 July 2013 there are more opportunities. There is no cap on costs as the Employment Tribunal can have the power to award them in excess of £20,000.

With the new scope contained within the powers of the Employment Tribunal, will there be an increase number of cost Orders made? Time will tell for these are early days. Yet with the focus on cost management in the Civil Courts and the Employment Tribunal rules it will be paramount that all parties involved in employment tribunal litigation must ensure that they act in compliance with and adhere to the directions and orders given. Should your opponent fail to do so, you now have that right to seek an order for Costs.

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