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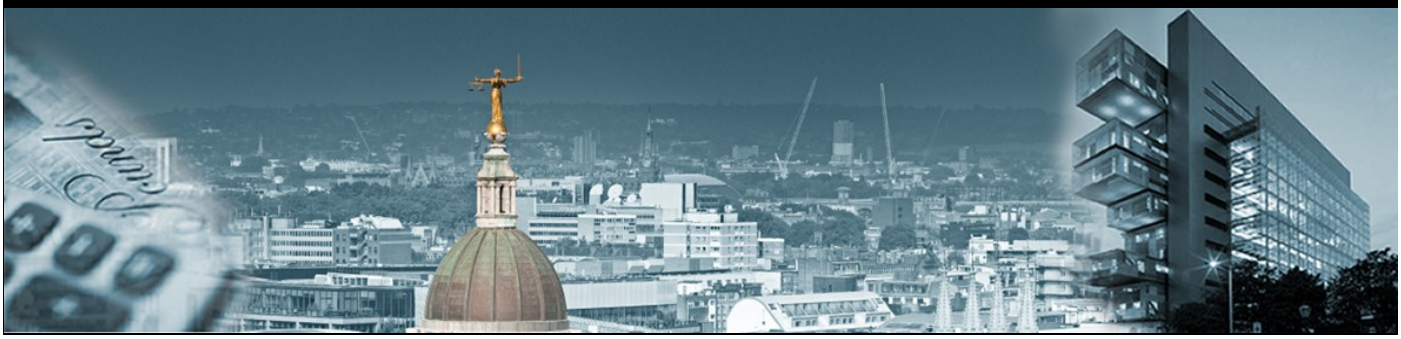
newsletter



Paul Shenton Assesses the Real Impact of Costs Budgeting on Litigation

To paraphrase the judicial comment in *HIT Finance v Lewis & Tucker* [1993] 2 EGLR 231, 'Budgeting is an art not a science, but it's not astrology either'. I have had the dubious pleasure of lecturing on the subject of estimates (the forerunner to budgets) in litigation for more than 15 years; but now the time for implementing the oft promised change has actually arrived.

Commercial clients and liability insurers have, for many years, sought out law firms that can provide managed litigation services. That has involved varying approaches to bringing greater certainty to the perceived abyss that the costs of commercial litigation disputes often seemed to fall into. But this was primarily a one-sided conversation, when the process itself involves at least two - and often many more – parties, who are outside the control of the client or insurer.

The Woolf reforms

Back in 1996, when Lord Woolf prepared his report which led to the introduction of the Civil Procedure Rules (CPR), the control of the costs of litigation were supposed to be tackled by the new regime. I am confident in stating that such lofty ambitions failed. Precedent H is not a new concept. It has been in the CPR for many years. Why, then, did it lead to no discernible change in the conduct of litigation?

The answer is relatively simple. The changes in the Rules were not accompanied with clear and effective sanctions for non-compliance. Without a stick, behaviour would not change. And it did not. In well over 10 years of post-CPR litigation, there were very few examples where the failure of a party to comply with their Estimate of Costs led to any substantive sanction. There is a degree of irony in the fact that one of the few examples where a successful party in litigation was substantially penalised where the costs claimed far exceeded the estimate provided in their allocation questionnaire, was actually a successful defendant (*Tribe v Southdown Gliding Club* [2007] EWHC 90080 (Costs)).

The tide of judicial thinking in the early part of this century was neatly encapsulated in the better known decision of the Court of Appeal in *Leigh v Michelin Tyre* [2003] EWCA Civ 1766, where Dyson LJ said: 'If costs estimates have proven to be a "damp squib", it may be that the reason for this is that judges simply do not know how to take them into account when assessing costs. Another factor may be that, as Judge Mitchell said in the present case, there is a concern that, if Para 6.6 (of the practice direction to Part 43 of the CPR) is taken seriously, it will merely encourage satellite litigation.' Hardly a welcoming embrace for change.

The Jackson approach

To effect meaningful change in the conduct and management of litigation, it was recognised in Lord Justice Jacksons Preliminary report (Vol 2 – May 2009) that controlling costs required ensuring that the management of costs was inextricably linked with the management of the case itself. Without establishing this binding umbilical cord between the conduct of the case and the costs spent on its delivery, there was unlikely to be any meaningful change.

This was delivered in practice by the introduction of costs management, to sit alongside case management.

More cynical readers might believe that the pilot schemes to test the new principles in operation were designed to succeed. By choosing Courts with specialist judges, already 'docketed' to cases from the outset (see PDs 51D and 51G), they were given the best opportunity to provide a favourable outcome. Alongside enthusiastic and informed judicial sup-

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porters (see the judgement of HHJ Simon Brown QC in *Slick Seating v Adams* [2013] EWHC B8), the new landscape has been carefully crafted.

The issue of sanctions
These changes need to be considered alongside the equally important new provisions dealing with the consequences of failing to comply with Court Directions post 1 April 2013, and attempts to seek relief from the sanctions of any such failures. The case of one of my colleagues, Darren Naisbitt, in Murray *Stokes v Dowlman Architecture* [2013] EWHC 872 TCC which was heard in March this year, shows clearly the stricter approach the Courts are going to consider adopting, even during these transitional times. As in the Court of Appeal decision in *Henry v MGN* [2013] EWCA Civ 19, do not be mistaken by the escapes achieved in both cases from draconian sanctions. In both cases, the Court made it clear that different decisions would have been reached if they had been left to determine the cases under the new Rules in force from 1 April this year.

The practical effect
So what does this all mean in practice? The Rules are clearly set out in the new Practice Direction 3E 'Costs Management' and the Amendment to the Costs Practice Direction – Section 6 'Costs Budgets'. These new provisions cannot sensibly be considered in isolation. They have to be given sensible effect alongside the new definition of proportionality, which makes clear that primacy is now to be given to ensuring that the proposed (or actual) costs expended in a case are proportionate to the money in dispute.

There is not time here to consider in detail the difficult issues and choices that parties will need to deal with in relation to proportionality. This is particularly the case when complex and important issues need to be litigated to ensure justice is achieved, and the cost of doing so, is, at first glance, difficult to justify compared to the actual money involved in the case. What I can say, having just dealt with a Supreme Court case against a leading bank where the damages involved were only approximately £30,000, is that parties and their legal advisors will need to engage with the Court from the outset to ensure that justice can still be achieved on superficially small value claims that can still have significant legal consequences.

There is some good news, however - for clients and their lawyers alike. The costs of the litigation will now be transparent, in a way that has never been seen before. This will enable commercial parties to more accurately assess their exposure, both to their own and the other side's costs. If parties deliver the litigation within the budgets approved by the Courts, it may eliminate the need for any subsequent detailed assessment process (see *Safety Net Security v Coppage* [2012] EWHC 1311). But unfortunately dreams that this land of utopia may just be around the corner had had a swift dose of reality thrown upon them in June, by the Court of Appeal's comments in *Troy Foods v Manton* [2013] EWCA Civ 615. Lord Justice Moore-Bick said: 'It follows that I do not accept that costs judges should or will treat the court's approval of a budget as demonstrating, without further consideration, that the costs incurred by the receiving party are reasonable or proportionate, simply because they fall within the scope of the approved budget.' It has been said by one supporter of the new regime that when he read those words, he simply 'rubbed his eyes in disbelief'.

There has been public judicial support for the extension of the costs management regime to all cases, and so it seems likely that even cases with estimated damages above £2 million will soon be caught by the new regime. As has been said by many commentators, these cases require more, not less, Court management.

There are, however, a number of matters which practitioners need to be both aware of, and have the resources and expertise available to deal with. I have listed a few of these below:

1. <u>The Precedent H form</u>

   The use of this form is mandatory. But be careful; please check the numerical calculations when the individual entries have been inserted. I will say no more than that we have created our own version.

2. <u>Work already undertaken</u>

   The Court has no power to retrospectively apply a budget to work already carried out (PD.3E.2.4). In many cases involving expert evidence and/or those cases involving large numbers of documents, there are often substantial costs which are incurred before the proceedings have even formally started. But the new concept of proportionality does apply. Also, the Court can and will take into account the work and its value already incurred when setting the first budget.

3. <u>The 11 phases</u>

   The Precedent H form is designed by reference to 11 fixed 'phases' involved in the litigation. Phase 1 is pre-action costs. However, I foresee difficulties ahead. I spent my first ten plus years in practice as a commercial litigator, dealing mainly with professional negligence and construction disputes. I never dealt with a case in the linear progression provided by precedent H; and nor, do I imagine, does anyone else. If cases are concluded after, say, disclosure, the costs expended by that date will rarely be as little as those identified for the actual stages completed. Work on many of the other stages will already have been undertaken by that stage as well. Therefore, without a timeline to sit alongside the prescribed stages of work (running horizontally across the top of the document), the form's usefulness will have limited benefit for the client, the court and opponents alike. It could cause chaos.

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4. Contingencies

   This last section is arguably the most important. Variations to budgets will not be allowed without good reason – and the fact that the original one was wrong is unlikely to be sufficient. Clarity in identifying what work is covered by the budget is an essential pre-requisite for the consequential contingencies to be identified. We have an extensive list that we recommend are considered before finalisation and service. You have been warned.

5. Variations

   Carefully preparing the original budget is only the start of the process. Cases change. An application to vary a budget is allowed – but only if significant developments in the litigation warrant such revisions. If a proposed amended budget cannot be agreed (it is not difficult to imagine there being disagreement) then the amended budget needs to be submitted to the Court for approval. Such an application needs to identify the changes made, the reasons for them, and the objections of the other party to the proposed changes. The Court may approve, vary or disapprove the revisions (PD 3E.2.6).

6. The first CMC

   Historically, the first CMC has often been uneventful. Beware: this is going to change dramatically. Be unprepared at your own peril. Imagine explaining to your client that your Grade A hourly rate of £450 has not been approved, and the Court has decided that £300 per hour was more reasonable and / or proportionate. Your carefully prepared budget will have been reduced by one third, on one issue alone. Most defendants to litigation lose, and it is often a case of damage limitation. Now, defendants can seek to limit the damage on the costs front from the first CMC. If you don't participate, the position is even worse; sanctions are built in. Any party that fails to file a prescribed budget will be treated as having filed a budget comprising only the appropriate Court fees.

   If the scope of the directions is varied at the CMC, do you have the software and / or people available to incorporate such changes to the applicable budget? If there is not enough time, this must be taken care of. There is a new type of hearing created for dealing with contentious cost management hearings (either as part of the first CMC, or to deal with subsequent applications to vary). When agreement cannot be reached, the Court will consider the figures for each phase of the proceedings – to assess how reasonable and proportionate they are. This will lead to a Costs Management Order. It is trite but necessary to say that preparation and experience are recommended for these hearings. But beware, deputy masters and district judges do not receive their training for this until November this year.

7. Sanctions

   I have identified a few examples of these, above. In addition, CPR 3.18 provides that, when assessing costs on the standard basis, the Court will 'have regard to the receiving party's last approved or agreed budget for each Phase of the proceedings, and not depart from such approved or agreed budget unless satisfied there is a good reason to do so.' How this provision is supposed to readily conform to the existing version of the Bill of Costs is anyone's guess?

Change is here

Finally, will these new rules really carry the meaningful bite that they would appear to indicate? The decision in *Elvanite Full Circle v AMEC* [2013] EWHC 1643 in May provides a powerful and salutary message to all doubters who think that real change is not already upon us.

The Court approved a budget of defendants' costs of £268,000 at the CMC on 31 May 2012. On 7 February 2013 (a month before the trial), the defendant sent a revised budget of £532,000 to the Court and the claimants. But the defendant made no application to vary the budget before the trial this case was covered by the TCC pilot provisions under PD 51G). The claim was dismissed entirely, and a modest element of the defendant's counterclaim was allowed. Could the defendant recover more costs than the approved budget compared with their actual costs? This was a difference of approximately £264,000. The answer was an emphatic no. A successful defendant deprived of over a quarter of a million pounds, for failing to comply with costs management provisions. Bite big enough?

Paul Shenton
Managing Director

Cheque Presentation to St Mary's Hospital Charity, Manchester

Last month, Paul Shenton, our Managing Director, presented a cheque to Jenny Clarke, Corporate and Individual Fundraising Manager at St Mary's Hospital Charity in the sum of £2,986. The money was raised from our Just Costs Annual Charity Golf Day which took place on 27 June this year.

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 Amber Holt on 0161 618 1784 or email amberholt@justcosts.com.

http://uk.linkedin.com/company/just-costs-solicitors https://twitter.com/JustCosts

Check out our Costs Budgeting Blog by Tom Blackburn: http://www.justcosts.com/blog

Costs Budgets and DBA's by Wayne Spring

April 2013 saw a shift in litigation process as a consequence of the effect of Sir Rupert Jackson's implementations. A whole raft of measures were amended which included legislation, regulations and rule changes. All of these will in some way have a direct application on the way commercial cases are presented and run.

Damages-Based Agreements

The SRA 2007 under Rule 2 states that you [as a solicitor] must ensure that you and your client has an understanding of each other's expectations and responsibilities in relation to the costs aspect. So what has happened?

From April 2013 solicitors have been able to enter into Contingency fees or Damages-based agreements (DBA's). Prior to this date it has been enforceable for a solicitor to enter into this type of agreement in employment matters. This 'extended' right is pursuant to The Damages-Based Agreements Regulations 2013. With a DBA solicitors will be able to pursue litigation in return for a percentage of the damages recovered. As a consequence of the regulation English commercial litigation will be similar to that found in the USA. Accordingly if a solicitor enters into a DBA and they lose they will not be paid. On the reverse in large commercial cases they can recover upto a maximum of 50% of the damages which could in some instances far exceed the level of costs a solicitor may have charged the client.

Successful claimants using DBA's will recover their costs (the solicitor's hourly rate fee and disbursements) from defendants in the usual way, but the claimant will be responsible for paying from their damages any shortfall between the solicitors' costs paid by the losing defendant and the agreed DBA fee and will also be required to pay any shortfall in respect of disbursements. Solicitors acting under a DBA will be required to comply with the indemnity principle, which means that their fee would still be restricted to what is due under the DBA fee: if the DBA fee is less than the solicitors' costs would be in the absence of a DBA, a losing defendant would only be liable to pay the DBA fee.

The DBA Regulations detail requirements which must be fulfilled so that the DBA is enforceable. The DBA must specify:

1. the claim or proceedings, or part thereof, which the agreement relates to;

2. the circumstances in which the legal representative's payment, expenses and costs are payable;

3. the reason for setting the payment amount at the level agreed.

Cost Budgeting

Long gone are the days when solicitors could charge their client by the hour and not face being put to proof on the reasonableness or necessity of the work provided. Today, a solicitor as mentioned above under SRA Rule 2 are required to give the client the best possible cost estimate at an early stage. With the post-April 2013 rule changes was an introduction of new cost management rules. Solicitors are now faced with providing a comprehensive account of the work they have done and what they intend to do. Not only did the rule makers produce what must be for many solicitors an over complex looking form but the sanctions that are applied for failing to file and serve one under CPR 3 (2) is possibly overbearing.

It may be of some slight relief that they only apply to those cases that commenced after the 1 April 2013 and assigned to the Multi-Track (CPR 3.12). That may not however be it. It is more likely that solicitors will now on Allocation Questionnaires advance submissions of complexity to shift them from the Fast Track to the Multi-Track which will require the preparation of the Precedent H cost budget form.

What sanctions?

The CPR details the very harsh consequences of failing to file a budget. Under CPR 3.14 it states that:

Failure to file a budget
3.14 *Unless the court otherwise orders, any party which* ***fails to file a budget despite being required to do so will be treated as having filed a budget comprising only the applicable court fees****.*

Draconian it may be but the Courts will and are encouraged to strike out any claim for costs save the Court fees if the budget is filed late. Be warned that the Courts are adopting this approach and will apply the rules as cost budgeting is an indication of how the Courts are embracing the changes introduced by Sir Rupert Jackson.

It is worth noting that costs are recovered (well a small fixed percentage) for preparing the Precedent H and where the costs total does not exceed £25,000 you need only complete page one. They are nevertheless going to be time consuming documents to complete and solicitors are required to be as accurate as possible. Failure to effectively monitor the costs can prove costly (see *Murray and another v Neil Dowlman Architecture* and *Elvanite Full Circle Ltd v AMEC Earth & Environmental (UK) Ltd* [2013] EWHC 1643]*). The most shocking decision to date on the issue of none compliance was handed down on the 1 August 2013 Andrew Mitchell MP v News Group Newspapers Ltd* [2013] EWHC 2355 (QB) – "Plebgate" – where the Court restricted the costs to the Court fees only. The Claimants solicitors applied for relief from sanctions but were refused. This decision is subject to an appeal.

It is therefore very important to ensure full compliance with the new rules as the Courts are adopting a very harsh line.

Here at Just Costs Solicitors we have a number of experienced cost lawyers who are able to produce cost budgets for you and ensure full compliance with the regulations.

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