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Prepared by Kysen PR

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No pain, no gain!

Adam Burrell eases the pain of costs management



Costs management, particularly the requirement to produce detailed costs budgets, has attracted both criticism and resistance. However, costs management can work provided it is appreciated that it's not just about the detail buried in the budgets.

First stage

Directions set the framework

A key principle of costs management is visibility of the steps that are considered reasonable and proportionate to prosecute or defend a case to conclusion. At the outset the battleground is not concerned with detail or amounts but whether assumptions are reasonable. The first stage should be consideration of what directions are required, for example, whether it really is going to take three different expert disciplines with each party having their own experts, as opposed to joint experts. This is a natural progression of the "cards on the table" approach introduced by Woolf. Gone are the days of being able to build a case or defence without any transparency of what steps your opponent is taking.

- ▶ Be realistic. Do not be tempted to over-play or under-state what steps might be required. This will undermine any challenge you might want to make against the opposition's proposed assumptions.
- ▶ If directions are unlikely to be agreed,

consider isolating the disputed area within the budget so that the additional cost of a measure you want or your opponent wants can easily be identified by the court.

- ▶ Check that assumptions in the budget match directions which are proposed or even agreed. This might undermine an opponent's requested directions if for example they have assumed in their budget less expert disciplines than their directions seek.
- ▶ Avoid speculation. The budget should be based upon steps that can be anticipated. If steps occur which are not anticipated, the budget should and can be revised. If your opponent has been speculative, challenge any costs associated with it.

Second stage

The detail within the budget

Once you have determined the framework within which you want to prosecute or defend the claim, consider the detail of your opponent's budget. The following four areas can have a significant impact on reductions the court might make:

- ▶ Hourly rates. Whether these should be addressed at all at the costs management stage continues to be unpredictable. At the very least, if you don't agree them then you need to say so.
- ▶ Incurred costs. There is an incentive

to front-load as much as possible and argue that these costs are 'untouchable' and should not be considered at all. Such an approach only serves to undermine the process and ignores the clear power that the court possesses to take into account excessive incurred costs. If you consider the incurred costs to be unreasonable then you should highlight it and attempt to obtain at least a comment that might prove useful later.

- ▶ Costs relating to the process. The 1% cap for drafting the budget and 2% cap for other costs relating to costs management are often presented as an amount without any sort of breakdown. This is wrong and the cap is exactly that and a breakdown in line with the rest of the budget should be sought.
- ▶ Expert fees and counsel's fees. These can be compared and if your own expert/counsel is significantly cheaper try and find out why. Obtain as much detail as possible about your own fees and be wary of bulk discounts that might apply to panel arrangements. Try and find out what a non-panel rate would be to counter such arguments.

Third stage

Working out what is reasonable

When a budget has been disclosed, whether or not they have been agreed or a costs management order made, it will form a reference tool for the negotiation or assessment of the costs at conclusion. It is clear in practice that it is going to be very difficult to stray from both the steps and amounts that are set out in the budgets.

One practical difficulty is that the format of a detailed bill for assessment is different to the format of a costs budget for costs management. When acting for a paying party and you suspect a claim for costs differs significantly from a budget a breakdown of the work presented in the bill must be demanded in budget format.

Summary

Costs management provides an opportunity to challenge at a fairly early stage extravagant expenditure before it is incurred. It also enables the court to set the timetable from which costs will flow, giving the parties input into what that timetable should be. There are practical difficulties with implementation but it can make a real difference to the outcome of the litigation as a whole. **NLJ**

Adam Burrell is a partner with BLM and a member of the Forum of Insurance Lawyers (FOIL) Costs sector focus team