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COSTS ROUNDTABLE

Modern Claims hosted three Roundtable discussions as part of the Doctors Chambers Modern Claims Conference. The costs landscape has altered beyond recognition in recent years, but are the new regulations clear enough, and how is the industry coping with costs budgeting? Charlotte Lamb, Modern Claims, reports.

ATTENDEES

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'When the CPR was introduced, it was always more of a weapon for the defendant than it was for the claimant'
Alan Nesbit, Nesbit Law Group

CC: Existing guideline rates will remain in force at current rates for the foreseeable future Dyson MR has decided. Does this mean solicitors will be working at 2010 rates?
NB: I went to Rupert Jackson's Harbour lecture last week, and the Master of the Rolls apologised for hourly rates still being set at 2010 rates but confirmed that the data was insufficient to arrive at confident re-appraisals of rates. He emphasised that they are only guideline rates.
AN: The Costs draftsmen's job is to reduce the cost for the paying party. So the easiest target area is to go with the rate because you're immediately taking your percentage chunk out. We argue very strongly for the hourly rates we put in our CFAs. It always comes down to a discussion around the rates. They still feel set in stone to us because it's rare that we get a judge who is prepared to see the solicitor's side.
NB: In London, the Costs Judges don't pay much regard to guideline rates in the bigger cases, but in the provinces it's likely to be different.
AN: It's an obvious first point tactic. If I was on the other side I would certainly be arguing that, particularly if anybody at any stage puts something in that's above the hourly rate. We regularly have very complicated fraud arguments. Normally you lose a fraud case and the defendant solicitors ask for it to be reported to the DPP. That's in the background of the claimants mind before you get any more serious. It's based upon the complexities of the case and as soon as the idea of fast track comes into place, we're then into fixed costs.
LM: We've had some success on the argument, in Liverpool and Manchester - that there is nothing unusual in such cases and that these should be allocated to the fast track.
AN: We've appealed a couple of those. When that happens we've also looked at going with the 20% afterwards, which is a little used tactic.
GL: One of the things the UK benefits from is the multiple options. In Northern Ireland we have the standard hourly rate but the uplift prospects are extremely limited, mainly because the forums are so restrictive.
CC: It looks like hourly rates will be here for a bit longer until the pre-budgeting cases have worked through, and everything is budgeted by phase.
NC: Even if your budgeting is set, you've got incurred costs, which effectively haven't been looked at by the court.
IC: The incurred time facility isn't being used enough. If you have objections, they should be recorded. It is unsatisfactory

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Gerry Lee, P R Hanna Solicitors

when you're in a situation where a claimant has been successful and there hasn't been any previous challenge or comments on the incurred time of the cost budget, and then those attacks are coming after the event.

CC: Your case is costs budgeted and the trial overran by 2 days. If asked, can the trial Judge retrospectively increase the budget to cover the extra days? Would the position be different if you obtain an order for costs on the indemnity basis?
LM: It's not for a trial judge to adopt that approach, if anything it would be for the assessing judge.
WM: On the last day of trial could you not apply to revise the budget upwards?
NE: The application needs to be before the extra two days have been incurred.
LM: Usually if you're adding additional experts you tend to overrun as they may elongate the trial, but I think the contingency is the way to do it.
AN: The longer you expect the trial to last, the more likely it's going to go over. If it's a two-day trial, it's probably not going to vary hugely from that, if it's a three-week trial then the chances of it going over are far more likely.
LM: What tends to happen is that you underestimate it with only 5 hours in the day and the reality is it does take much longer.
IC: Your assumptions would usually set out to how long you expect things to be and if you're departing from those assumptions, there's good reason to move along from that.
AN: We prepare our budgets without counsel and when counsel get involved (normally towards the trial period), things suddenly change as the focus shifts from the budget to the trial. Whereas if you have anything about you you'll think that you need to amend your budget and make that application ahead of the trial.

CC: If you beat your own offer can you (as receiving party) recover anything extra under CPR36?
AN: Part 36 has to go both ways. There has to be something to make it worthwhile for the claimant and to put some pressure on the defendant to accept the Part 36 offer. When the CPR was introduced, it was always more of a weapon for the defendant than it was for the claimant.
MB: The interesting thing about Part 36 is the introduction of the rules to make offers on issues. On issues, certainly on detailed assessments, you can make individual Part 36 offers, with the costs of the issue on an indemnity basis.
AN: And work that out!
GL: One of the things that is frustrating for insurers in England and Wales who like to operate in Northern Ireland, is the lack of options that exist in regard to the equivalent of Part 36. We simply have the old fashioned payment into Court with little or no room to revise this once it's made and very often only serves to create additional uncertainty and unfairness. The Claimant invariably still sees it as the first step in negotiations rather than the defendants' final position.
AN: In a fraud case there is rarely much negotiation.

CC: Who does the money belong to if an extra 10% is ordered to be paid under CPR 36.17(4)?
MB: It must be the client's.
AN: As long as you're under 25%, there shouldn't be a problem.
CC: Under the new CFAs it would be a lot easier.
NB: You would have to write it in.
LM: Which nobody does! We do make Part 36 offers but they're general rather than issue based.

CC: Is it easier to obtain relief after Denton? If it was the solicitors' fault for not complying with an 'unless order', will that make a difference to the blameless client prospects of obtaining relief?
NB: In live cases, people don't seem to be taking the point about relief, they just seem to be agreeing that relief or extensions can be granted.
LM: It has diluted it.
AN: Denton provided a template for writing a witness statement. As long as the points in Denton are dealt with using a step-by-step approach, there is a fairly straightforward methodology for rectifying mistakes.
LM: A lot of judges weren't particularly comfortable striking solicitors out; it went against the grain.
NE: The last thing we wanted to see was technical point scoring and costs being driven up unnecessarily. Post-Mitchell, 3-month delays were building up to deal with the backlog. In Manchester the amount of appeals went up 40% as a result of Mitchell. The position has eased since Denton.

CC: When (if ever) is it worth applying for a hearing after the bill has been provisionally assessed?
WM: If you've got a point in principal, judges are quite reluctant to change their mind. They are only likely to do so when they have made a mistake, for example if they have read a case wrong or come to the wrong decision.
AN: I have a slightly different view as a business owner, it's a simple question of maths. If the amount of adverse costs against you is less than the amount that you could potentially recover if you were successful, then it's just a balancing exercise.

CC: If you are receiving, you are allowed 85%, aren't you always going to end up paying the costs as it is not possible to recover an additional 20%?
AN: If my costs of the oral hearing are £5,000 but I manage to get an extra 5%, which is £20,000, then why would I not want to risk it?
NC: Our clientele are a little resistant to it because of the modest sums that are at stake with provisional assessment itself, so there is a reluctance our end to pursue it any further. It does come down to financials, if you are the business owner you can make decisions more sharply.

CC: As practitioners, would you go for binding or not binding in terms of mediation?
AN: This is about experience. You have to be comfortable with the mediator.
GL: Who gets to choose the mediator?
AN: We've never really had an argument over mediators; they're all fairly neutral.
GL: If that issue of choice is largely irrelevant, I would've thought there should be a huge emphasis on mediation being binding.
NC: There has been an emphasis towards non-binding only because people are still dipping their toes in the water, but it does (if nothing else) provide an effective tool for settlement.

Modern Claims would like to thank all for attending.

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