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Insurance surgery: Patience is a virtue

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Taking time with costs budgeting pays off, says Iain Stark

Costs' reserving and budgeting is never far from the mind of the conscientious fee earner conducting litigation.

In the Cat PI forum we are attuned to the fact that costs budgeting applies to cases issued after 1 April 2013. Unfortunately, there is a distinct lack of consistency by different courts in particular after directions questionnaires have been filed in terms of the orders received. It is apparent that the inconsistencies place fee earners in a predicament about what to actually prepare, some courts appear to require very little to be filed in advance of the costs & case management hearing, while others require Precedent H forms, observations of agreement/disagreement and combined summaries.

Costs management is here to stay and this enables the parties to assist the courts in managing the litigation and controlling the costs spend. A statement of truth cannot be viewed as an empty formality and the significance of the costs budgeting when assessing costs at the conclusion of a claim cannot be ignored. Pursuant to CPR 3.18 the court is required to consider each approved phase and not the costs budget total as a whole when considering the costs subject to assessment. The message appears to be that failure to engage in the process accurately may have a detrimental impact on likely recovery at the conclusion of the claim.

Case law

2015 has seen a glut of decisions that impact on the manner in which costs budgeting is approached by the judiciary and provides a useful insight as to how one should approach preparing a costs budget generally.

Mr Justice Warby ruling in *Tim Yeo MP v Times Newspapers Limited* [2015] EWHC 209 (QB), [2015] All ER (D) 47 (Feb) reminded all that costs budgeting should not be a lengthy exercise, expressing the view that it may be appropriate for the court to consider rates and projected hours when considering a costs budget. In considering contingencies, they should only be included if they are likely to occur and do, in fact, fall outside any of the other areas in the costs budget; counsel's brief fees fall within the trial phase and not trial preparation phase; and, a costs budget need not be for the entire litigation, as it is permissible to costs budget up to a particular stage of the litigation.

Likewise in ruling in *GSK Project Management Ltd v QPR Holdings Ltd* [2015] EWHC 2274 (TCC), [2015] All ER (D) 63 (Aug), Mr Justice Stuart-Smith was highly critical of the costs budget process generally stating that: "It is hard to imagine anything more sterile than arguing about a grossly excessive costs estimate. It does not go to the issues, it is wasteful of court and the parties' time, and it offends against the obligation to keep costs to the reasonable minimum."

The judgment also highlighted that costs budgeting was expected to be undertaken on a broad brush process; however as proved by this case, in specific circumstances a more detailed examination of the costs budget is required. The claimant's costs budget was deemed wholly disproportionate and reduced by 100%, which in turn led to the claimant being ordered to pay the additional costs caused by the costs budget dispute.

Factors to consider

The costs budgeting process continues to develop. When faced with a costs budget for approval or deliberation by the court, factors which come into play include:

1. Be prepared to place a value on the claim where appropriate to assist the court in deciding whether the anticipated spend is reasonable and proportionate.
2. Engage with the opponent if budgeting for a specific stage in proceedings or preliminary issue so that the judge can budget like-for-like.
3. Hourly rates do influence the overall approved budget and should reflect current market trends.
4. Hours anticipated should be challenged on what is anticipated set against what has already been incurred.
5. Expert and counsel's fees should be scrutinised and if necessary a call for estimates in support of the sums claimed.
6. Contingency provisions should only be included if: (a) they are likely to arise during the course of the proceedings; and (b) they are not in effect as a consequence of a standalone application that would otherwise carry its own costs consequences
7. Widely exaggerated costs budgets may give rise to adverse costs order.
8. By the same token tactical costs budgets are viewed dimly by the judiciary and do nothing to assist an advocate's credibility at the costs and case management conference.

A costs budget is not a target to hit, simply a ceiling should the eventualities anticipated arise during the conduct of the claim, subject to increase following a material change if warranted, ergo a costs budget is not a guaranteed cap on costs.

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