

Challenging Costs Management Decisions

This seminar aims to provide practical advice in relation to issues relating to Costs Management Decisions to help Practitioners to continue to maximise their profits.

Key features of Costs Management: -

1. Costs budgeting will apply to all multi-track cases commenced on or after 1 April 2013, unless the Court Orders otherwise.
2. If the budget is less than £25k, then only page 1 of the budget needs to be completed.
3. Parties must file and exchange Costs Budgets within 28 days of service of the Defence, unless the Court orders otherwise.
4. The parties are encouraged to seek to agree costs budgets, in whole or in part, after they have been exchanged.
5. Litigants in Person do not need to complete a budget (although must still receive budgets from other parties).
6. Beware - where a party fails to file a costs budget, that party may be treated as having filed a budget comprising only the applicable Court fees.
7. There is a precedent form to be completed – allowances must be made for: -
 - Work done to date – e.g. pre action costs; issue of proceedings ; expert evidence
 - intended work – e.g. disclosure, witness evidence
 - likely contingencies – e.g. making/defending any proposed applications
 - disbursements
 - Counsel fees
 - Experts fees
8. The new test of proportionality will be applied to the budget.
9. The Court will decide whether to make a Costs Management Order. If so, the approved budget will be recorded and if necessary, a further hearing listed to monitor expenditure.

10. Approval of budgets is not retrospective – costs already incurred are not reduced!

However, costs already incurred may nevertheless influence decisions in relation to costs budgets and the Court may record its comments on costs already incurred, which are likely to be influential at any future Detailed Assessment.

11. There is a presumption in favour of making a Costs Management Order.

12. There should be regular reviews of costs budgets, particularly if there are any significant developments in the litigation.

13. Any revised costs budget must be provided to the other party for agreement. If agreed, the Court must be notified of the revised costs budget. If not agreed, the revised budget must be filed at Court, with reasons for the revisions and objections raised by the other party. The Court may then hold a Costs Management Conference.

14. After the budget has been approved, the parties must re-file the budget in the form approved with re-cast figures, annexed to the Order approving it.

15. If any interim applications are made which, reasonably, were not included in the budget, then the costs of those applications shall be treated as additional to the approved budget.

16. Where no Costs Management Order is made, the current provisions about estimates set out in CPR CPD Section 6 will be amended to apply to budgets.

17. The 20% rule relating to discrepancies between any costs estimate and the final Bill of Costs, will therefore apply in respect of any unapproved costs budgets. A statement of reasons for the difference must therefore be included with the final Bill of Costs if the most recent budget has been exceeded by more than 20% (excluding additional liabilities).

18. Unless there are exceptional circumstances, then the recoverable cost of completing the initial budget will be the higher of £1000 or 1% of the approved budget.

19. All other recoverable costs of the costs management process must not be more than 2% of the approved budget.

Tips: - Getting the budget right!

It is important to make sure that correct hourly rates are utilised in the costs budget as it will be difficult to later depart from these in assessment proceedings.

Budgets should be as accurate as possible – good time recording is essential to make sure time ledgers provide an accurate reflection of the amount of work done.

It is advisable to provide a good level of detail in relation to the assumptions on which the budget is based – there is better scope to later justify costs incurred as the paying party cannot say they were not aware of the position!

Although approved budgets do not relate directly to costs already incurred, it is likely to benefit the Court to have details of those costs to enable it to consider whether proposed future costs are proportionate.

Where costs budgets are high, it may be beneficial to prepare a Skeleton Argument or Witness Statement to expand on the assumptions/explanations that accompany the budget, to assist in justifying the level of costs.

Situations may arise where the parties include significantly different assumptions within their costs budgets – this will mean both sides' total budgets are not directly comparable. Any assumptions leading to a significantly higher proposed budget may need further justification.

As set out in *Jefferson v National Freight Carriers*, it is likely to be beneficial for Solicitors to have a clear case plan from the outset, involving an assessment of likely value and complexity of the claim and a plan of the '*necessary work, the appropriate level of person to carry out the work, the overall time that would be necessary and the appropriate spend on various stages in bringing the action to trial and the likely overall costs*'. Advocates at the costs management hearing should have a good knowledge of the case plan to assist in explaining or justifying the proposed costs budget.

IMPORTANT POINTS: -

If a previously approved budget becomes inaccurate, then a revised budget must be filed, providing reasons for any increase (the revised budget must be filed at least 7 days before any CMC, costs management hearing, pre-trial review, or trial). The Court can then approve or disapprove the changes. **There are likely to be difficulties receiving payment for any costs that have been specifically disapproved by the Court.**

Practitioners **must** inform their Client within 7 days of any Costs Management Order – there are likely to be difficulties recovering costs on a Solicitor/Own Client basis, if there is any failure to inform the Client.

There is scope for parties to apply to the Court if they believe another party is behaving oppressively in terms of seeking that party to spend money disproportionately.

At detailed assessment, the Court will have regard to the most recent approved Costs Budget and is unlikely to depart from it unless there is good reason to do so. If the costs budget is likely to be exceeded and a revised budget has not been filed, it is a good idea to keep a file note detailing the reasons why the budget has been exceeded. It is also advisable, where practicable, to notify the Defendant in advance that the budget is likely to be exceeded and the reasons why. The client should also be notified.

Uncertainties.....

Costs Management is still very much in its infancy and there remain a number of key uncertainties: -

- Circumstances in which a Costs Management Order will be made.
- How much regard the Court will pay to *unapproved* costs budgets during detailed assessment proceedings.
- The costs involved in complying with 'costs management' and the extent to which these will be recoverable between the parties.
- Is there scope to challenge a Costs Management Order? If so, on what grounds?
- Are Courts likely to routinely approve costs budgets which are prima facie proportionate?
- Will both parties' costs be budgeted? To what extent will one party's budget influence the amount approved in respect of the other party?

Guidance

Henry v News Group Newspapers Ltd, SCCO, 16 May 2012, Senior Costs Judge Hurst

This claim was one of the first to be dealt with under the Defamation Proceedings Costs Management Scheme. Both parties exceeded the budgets that were approved on 20 September 2010. The SCCO decision deals with whether there was good reason to depart from the approved costs budget and, if so, by how much the budget should reasonably be exceeded.

In this matter the budget in respect of Disclosure and Witness Statements had been exceeded by significant amounts (£76,306 and £216,404 respectively).

The Defendant had maintained a robust defence up to trial and had heightened its allegations against the Claimant at a late stage in the proceedings. The Defendant had also re-amended its defence on numerous occasions and served ten additional lists of documents. The matter was of utmost importance to the Client – her ATE only covered a small proportion of adverse costs and she would have lost her house had she lost her case at trial. The case settled very close to trial.

The Defendant sought to argue that there was not good reason to depart from the costs budget on the basis that the Claimant had allegedly failed to comply with the terms of the Practice Direction and neither the Court nor Defendant were aware of the significant increase in costs. The Defendant did not seek to argue that it had relied on the Claimant's budget in settling the proceedings, but that it was entitled to rely upon it. The Defendant had also exceeded its own costs budget. Although the Defendant had produced a revised costs budget on 19 May 2011, the case settled before the further costs management hearing took place. The Defendant had also sought to discuss budgets with the Claimant and had notified the Claimant of their increased costs. The Claimant did not respond in any meaningful way in respect of the budgets.

Within the assessment proceedings, the Claimant provided the Court with breakdowns of additional work/costs not budgeted for. In particular, as a result of the Defendant's amended Defence and continual service of supplemental Lists of Documents, the Claimants' witness statement needed constant updating, which had not been budgeted for.

Conclusion

Whilst the Claimant was likely to have good arguments at Detailed Assessment as to why costs were reasonable and proportionate, the Court had to consider whether there was good reason to depart from the costs budget. The Claimant had largely ignored the provisions of the Practice Direction and therefore it was concluded that there was not good reason to depart from the budget. However, permission to Appeal granted.

Comments

This case provides good guidance as to the approach Courts are likely to adopt in relation to costs budgets. In this matter there was ample justification to cover the costs claimed themselves had it been a normal Detailed Assessment, however, the hurdle of whether or not there is good reason to depart from the budget could not be surmounted due to the failure to comply with the Practice Direction.

This case clearly highlights the importance of making reasonable efforts to notify the Court and other side when a costs budget has been exceeded, particularly if it is likely to be by a significant amount. If the matter is likely to be ongoing for some time, then efforts should be made to seek a further CMC and prepare a revised budget.