

Sue Nash ACL



CPR 1.1 amendment

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(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly **and at proportionate cost**

(2) Dealing with a case justly **and at proportionate cost** includes, so far as is practicable -

- (a) ensuring that the parties are on an equal footing;
- (b) saving expense;
- (c) dealing with the case in ways which are proportionate
 - (i) to the amount of money involved;
 - (ii) to the importance of the case;
 - (iii) to the complexity of the issues; and
 - (iv) to the financial position of each party;
- (d) ensuring that it is dealt with expeditiously and fairly; **and**
- (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases, **and:**”
- (f) **enforcing compliance with rules, practice directions and orders.**

Proportionality – 1

When still Master of the Rolls, Lord Justice Neuberger stated,




“Proportionality underpins both costs management and the Court’s approach to litigation costs generally”.

He went on to say that,

“Disproportionate costs, whether necessarily or reasonably incurred, should not be recoverable from the paying party”

(15th lecture in the Jackson implementation series)

Proportionality - 2

-  The new Rule states that costs incurred are proportionate if they bear a reasonable relationship to:
 - (a) The sums in issue in the proceedings
 - (b) The value of any non-monetary relief in issue in the proceedings
 - (c) The complexity of the litigation
 - (d) Any additional work generated by the conduct of the paying party
 - (e) Any wider factors involved in the proceedings, such as reputation or public importance
-  The concern is that (a) will 'trump' the others
-  Whether at the budget stage or at assessment, the Court will go through the costs/proposed costs and rule on an item by item basis whether they are reasonable and necessary. They will then stand back and look at the result and if they feel the costs remain disproportionate they will reduce them further. The Court of Appeal will be busy!

Costs Budgeting – 1

- Costs budgeting is covered by CPR Rule 3.12 - 3.18 and Practise Direction 3E
- Applies to all multi-track cases issued after 1st April 2013 except commercial cases with a value of over £2M (or any case of whatever value in the Commercial Court or Admiralty Division)
- Costs budgeting must be in the form of Precedent H. Notes for Guidance have been issued. Everything can be found in the 60th Update to the CPR published 1st March 2013.
- Timescale – as directed by the Court or, at the latest, 7 days before the first CMC
- Whole case must be budgeted unless the Court otherwise orders

Costs Budgeting – 2



Ten phases:

Pre-action costs

Issues / pleadings (or Statement of Case)

CMC

Disclosure

Witness statements

Expert reports

PTR

Trial preparation

Trial

ADR / Settlement discussions





... and Contingent costs

Costs Budgeting – 3







- Pre-Action costs do not include work done relating to any other budget phase
- Contingency ‘phases’ are for anticipated costs not falling into any other phase
- Approval is for total figures for each phase. Court may have regard to the constituent elements of each total figure
- Can be revised up or down if “significant developments” warrant revisions
- Interim Applications not reasonably included will be treated as additional to budgeted costs

Costs Budgeting – 4



Some interesting points arise

-  Budgets **must** be prepared in every case but a Costs Management Order (CMO) is **not** compulsory. The allowance for preparing the initial budget (£1,000 or 1% of budgeted costs whichever is the higher) and for dealing with the rest of the budgeting process (2% of budgeted costs) only appears to apply if a CMO is made.
-  The allowances for preparing budgets go into Phase 3 or 7 so end up being taken into account when the Court is deciding what are “reasonable and proportionate” costs.
-  The Court will not undertake an assessment of costs incurred before the first budget but will take them into account when considering the overall budget so what happens if the Court feels that the costs as at that point are already disproportionate?
-  The new proportionality rule only applies to work done after 1st April 2013 so it will be necessary to show which costs fall before and after this date.


Cost Budgeting – 5 – What you need to be able to do


-  Tag work recorded in PMS/CMS by phases
-  Analyse current cases by phase
-  Prepare costs budgets in the correct format
-  Monitor those budgets – by each phase – to ensure they are not exceeded
-  Identify and show already incurred work done pre and post 1st April 2013
-  Exclude from the budget any costs not recoverable from a paying party


Cost Budgeting – 6 – What you should think about

-  Where possible, analyse historic cases across those areas of work where you do most work, subdividing those areas as much as possible. Clinical negligence for example might be broken down into cerebral palsy/birth issues, failure to diagnose matters and surgical error cases. The more extensive the cross-section the more accurate the information (data) you will get out of it.
-  Produce a matrix (a spreadsheet will do) of average costs for each phase of each type/sub-type of matter to establish median times. You will then have a 'template' for future such budgets which can be backed up/justified by real data. Don't forget to then tailor the template budget(s) to your specific matter(s).

Cost Budgeting - 7

 Start recording all work done by phase to get into the habit of doing this – not forgetting that you are already working on cases that will be subject to budgeting! Your IT department should be able to help you ‘code’ your case management system in some way to enable you to record and filter the work done by phase.

 Set up a system to monitor actual work done against the budgeted costs for each phase because if you look like you are going to exceed your budget you need to try to agree a variation with the other side and if not make an application to the Court.

 Use your costs specialists to help you to prepare your own costs budgets and to analyse your opponent’s (they could also assist with (1) above). Get used to using them as part of your litigation team throughout the life of a case.

Useful Links

-  CPR 60th Update www.justice.gov.uk/courts/procedure-rules/civil
-  Judicial website – Jackson lectures
www.judiciary.gov.uk/publications-and-reports/review-of-civil-litigation-costs/lectures
-  Litigation Futures www.litigationfutures.com/jackson-reforms
-  Kerry Underwood www.kerryunderwood.wordpress.com/
-  LAPG www.lapg.co.uk/
-  Simon Gibbs blog www.gwslaw.co.uk/blog/
-  LCS www.litigation-costs.co.uk/

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