

Electronic Bills and other updates from the costs world

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Electronic Bills

Lord Justice Jackson recommended:

“A new format bill of costs should be devised, which will be more informative and capable of yielding information at different levels of generality...

Software should be developed which will (a) be used for time recording and capturing relevant information and (b) automatically generate schedules for summary assessment or bills for detailed assessment as and when required.

The long term aim must be to harmonise the procedures and systems which will be used for costs budgeting, costs management, summary assessment and detailed assessment.”

Electronic Bills (cont.)

- In a document (Transforming Our Justice System) produced by the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals in September 2016 it was stated “it is time for **innovation** in our system..... We need to embrace new methods and approaches, and avoid and contain disputes as well as solving them.”
- Cue the government’s £1bn investment in the justice system started in 2016. This consists of HMCTS’s extensive use of technology such as online services and video hearings, the introduction of a common platform for the criminal justice system and a shrinking of the court estate. 6 year programme.
- Short term expense for long terms saving:
- HMCTS is expected to employ 5,000 fewer full-time equivalent staff (from the current 16,500), reduce the number of cases held in physical courtrooms by 2.4 million cases per year and reduce annual spending by £265m.
- Some of the court Estate is being sold.

Electronic Bills (cont.)

- Recently the National Audit Office (NAO) has found HM Courts and Tribunals Service (HMCTS) faces “a daunting challenge” to deliver the scale of technological and cultural change necessary to modernise the justice system and achieve the required savings - and is behind where it expected to be at this stage of its ambitious reform programme.
- The NAO said there was now “a significant risk” that HMCTS would not be able to achieve all it wants within the time available.
- One innovation that has been brought in (having been spoken about for many years) is the Electronic Bill of Costs.
- According to Lord Justice Jackson two days before his retirement the new e-bill is “bound to save time and costs” and soon “people will be amazed that we had put up with the old paper-based bill for so long”

Electronic Bills (cont.)

- The requirements of the new e-bill are set out within CPR PD 47.
- The e-bill must be used:
 - in Part 7 Multi-track claims, except:
 - cases in which the proceedings are subject to fixed costs or scale costs;
 - cases in which the receiving party is unrepresented;
 - where the court has otherwise ordered.
 - and where the claim for costs relates to costs recoverable between the parties for work undertaken after 6 April 2018.
- Claims for costs relating to costs recoverable between the parties for work undertaken on and before 6 April 2018 do not need to be in e-bill format.

Electronic Bills (cont.)

- Electronic bills may be in either the spreadsheet format which can be found online at <http://www.justice.gov.uk/courts/procedure-rules/civil> or any other spreadsheet format which -
 - (a) reports and aggregates costs based on the phases, tasks, activities and expenses defined in Schedule 2 to this Practice Direction;
 - (b) reports summary totals in a form comparable to Precedent S;
 - (c) allows the user to identify, in chronological order, the detail of all the work undertaken in each phase;
 - (d) automatically recalculates intermediate and overall summary totals if input data is changed;
 - (e) contains all calculations and reference formulae in a transparent manner so as to make its full functionality available to the court and all other parties.

Electronic Bills (cont.)

- Most user friendly version I have found:
<http://www.associationofcostslawyers.co.uk/ACL-Bill>
- Can use any version though, including one you make up, that meets the criteria.
- There are systems out there that, supposedly, enable you to import your time recordings into a compliant e-bill.
- Please remember, any system is only as good as the information that is put into it.
- At present the costs of preparing Bills of Costs are recoverable. To what extent that will continue to be the case remains to be seen.

Electronic Bills (cont.)

- Service provisions:
- 5.A4 provides: “Where a bill of costs otherwise falls within paragraph 5.1(A) but work was done both before and after [6 April 2018], a party may serve and file either a paper bill or an electronic bill in respect of work done before that date and must serve and file an electronic bill in respect of work done after that date.”
- 5.1A says: “Whenever electronic bills are served or filed at the court, they must also be served or filed in hard copy, in a manageable paper format as shown in the PDF version of Precedent S. A copy of the full electronic spreadsheet version must at the same time be provided to the paying party and filed at the court by email or other electronic means.” (Emphasis added)
- This has led to questions on whether it was necessary to file an electronic bill at court at the point that the bill is served on the paying party.
- Note: you are required to serve and serve a paper copy of the e-bill.

Electronic Bills (cont.)

- Are the courts ready?
- The SCCO has a designated email address for e-billing - sccoebills@hmcts.gsi.gov.uk
- The SCCO do now have screens to enable the detailed assessment to be carried out as was intended. As we understand it, not all County Courts do though.
- The judiciary have had training.
- There is still a long way to go though before paperless assessments are possible.

The e-bill goes hand in hand with costs budgeting...

Costs budgeting

- Are you recording your time against the phases of a costs budget?
 - If you aren't, how do you know where you are against a costs budget?
- To what degree do you have to record your time against the phases of a costs budget?
- What is likely to occur if your costs budget is found to be wrong in respect of incurred costs, as they just fall to be assessed anyway?

Costs budgeting (Cont.)

- *Merrix** is a first instance appeal decision by Mrs Justice Carr
“the central message is that set out in CPR 3.18, namely that the approved or agreed budget will bind the parties at the detailed assessment stage (on a standard basis) whether the costs claimed are for less than, equal to or more than the sums approved or agreed by that budget, unless there is good reason otherwise.”
- In other words, save good reason your budget is what you are going to be paid for estimated costs (incurred costs are still to be assessed).

* *Merrix v Heart of England NHS Foundation Trust* [2017] EWHC 346 (QB)

Costs budgeting (cont.)

- What is a good reason to depart?
 - Indemnity principle.
 - A phase hasn't been "completed"?
 - The case did not follow the assumed course, e.g. more or less witnesses were relied upon?
 - The trial lasted longer/less than than was assumed?
- It is important to file and serve your assumptions, even if just the Precedent H is required.

Costs budgeting (cont.)

- What about a reduction in hourly rates?
 - The appeal in *RNB v London Borough of Newham**, from the decision of Deputy Master Campbell that reducing the hourly rates for the incurred costs meant there was a good reason to reduce the budgeted costs, settled
 - *Nash v MoD*** Master Nagalingam found that a reduction in hourly rates in relation to incurred costs did not lead to any reduction of the sums allowed on the costs budget. The hourly rates were only one of many factors.
 - *Jallow v Ministry of Defence*** Master Rowley followed the same approach as Master Nagalingam.

* [2017] EWHC B15 (Costs)

** [2018] EWHC B4 (Costs)

*** [2018] EWHC B7 (Costs)

Costs budgeting (cont.)

- Inevitable question if you exceed your budget - why wasn't an application to vary the budget made when a significant development occurred?
- Similar question can be put to paying parties - if you knew of a significant development why didn't you request a varied budget.

Costs budgeting (cont.)

- *Sharp v Blank & Others** is a very useful authority in relation to applications to vary a costs budget.

“Costs which have been incurred since the date of the last agreed or approved budget ... that relate to significant developments are, for the purposes of revision, placed in the estimated columns of the revised Precedent H in one or more phase. In some cases, it may not be obvious where they go (for example a late application for security for costs) but I can see no reason why Precedent H may not be adapted as necessary to accommodate work that does not easily fit in.”

- So, your incurred costs will always be your incurred costs.

* [2017] EWHC 3390 (Ch)

Costs budgeting (cont.)

- Are you pooling your information? Defendant's are...
- Know your judiciary.
- There are, of course, ways you can use a costs budget to your advantage.
- Early agreement of at least some of the costs claimed? Maybe...
- Can you, at least, get some of the money quicker?
- Where a costs management order has been made, the courts have been prepared to order payments on account of 80% or even 90% where the costs have been set according to a budget:

Costs budgeting (cont.)

- **Pink v Victoria Secrets [2014] EWHC 3258 (Ch)**
 - Payment on account allowed at £645,000, or 90% of the costs budget (£1,000 more than the Claimant had asked for).
- **Excelerate Technology v Cumberbatch [2015] EWHC 204 (QB)**
 - Costs awarded on the indemnity basis and therefore the costs budget wasn't strictly relevant to the assessment of costs.
 - A payment on account of 90% of the budget was allowed.
- **Capital for Enterprise Fund v Bibby**
 - A payment on account of 80% of the budget was allowed.
- **Kellie v Wheatley & Lloyd [2014] EWHC 2886 (TCC)**
 - Claimant sought a payment on account of more than the costs budget on the basis the trial had been longer than estimated.
 - A payment on account of £90,000 against a costs budget of £91,700 was allowed.
- **MacInnes v Gross [2017] EWHC 127 (QB)**
 - Payment on account allowed by Mr Justice Coulson (as he was then at £570,000, being 90% of the costs budget saying this is "the maximum deduction that is appropriate in a case where there is an approved costs budget").

Costs budgeting (cont.)

- In *Cleveland Bridge UK Ltd v Sarens (UK) Ltd* Miss Joanna Smith QC, sitting as a deputy High Court judge, followed the decision of Mr Justice Coulson (as he then was) in *MacInnes v Gross*, but said the Court of Appeal's ruling in *Harrison v University Hospitals Coventry and Another** meant that Coulson J could not have intended his comments (regarding a maximum deduction) to include incurred costs.
- “As to these, it seems to me that (consistent with the approach taken in cases where there is no approved costs budget), the court must determine in every case, a reasonable sum by reference to an estimate which will be dependent upon the circumstances, including the fact that there has as yet been no detailed assessment and thus there remains an element of uncertainty, the extent of which may differ widely from case to case, as to what will be allowed on detailed assessment...”
- We then return back to the days of educated guesswork identified by Jacob J in *Mars UK Limited v TeKnowledge Limited* [1999] 2 Costs LR 44 .

* [2017] EWCA Civ 792

Costs budgeting (cont.)

- No reason we can see that a payment on account of costs of an interim payment shouldn't follow the same lines as payments on account that are being allowed at the end of the trial.
- So, be bold when asking for payments on account.

Thank you and, as always,
good luck!

