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COSTS MANAGEMENT: A NECESSARY PART OF THE MANAGEMENT OF LITIGATION

SIXTEENTH LECTURE IN THE IMPLEMENTATION PROGRAMME

LAW SOCIETY CONFERENCE

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Introduction

1. In Sir Rupert Jackson's Final Report he identified the need for the court to take on the important role of costs management as a necessary part of case management. It is no longer acceptable for questions of costs to be left to the end of litigation when the costs have been spent. Some control on the expenditure of costs needs to be implemented as part of the case management of cases. That control will now be provided by costs management which is being introduced by rules changes as part of the implementation of the recommendations in the Final Report.

The Recommendations in the Final Report

2. The Final Report[1] referred to six propositions which were set out in the Preliminary Report[2] and agreed, in principle, in the Law Society's written submission[3]. Those are:
(i) Litigation is in many instances a "project", which both parties are pursuing for purely commercial ends.
(ii) Any normal project costing thousands (or indeed millions) of pounds would be run on a budget. Litigation should be no different.
(iii) The peculiarity of litigation is that at the time when costs are being run up, no-one knows who will be paying the bill. There is sometimes the feeling that the more one spends, the more likely it is that the other side will end up paying the bill. This gives rise to a sort of "arms race".
(iv) Under the present regime, neither party has any effective control over the (potentially recoverable) costs which the other side is running up.
(v) In truth both parties have an interest in controlling total costs within a sensible original budget, because at least one of them will be footing the bill.
(vi) The parties' interests may, in truth, be best served if the court (a) controls the level of recoverable costs at each stage of the action, or alternatively (b) makes less

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[1] FR Ch 40 paragraph 6.8
[2] PR paragraph 48.3.28
[3] Subject to the observation that restricting recoverable costs can lead to inequality of arms as the court cannot restrict the amount that a party wishes to spend.

prescriptive orders (e.g. requiring notification when the budget for any stage is being overshot by, say, 20% or more).

3. Those principles led to Sir Rupert proposing costs management based on four essential elements:[4]
(i) The parties prepare and exchange litigation budgets or (as the case proceeds) amended budgets.
(ii) The court states the extent to which those budgets are approved.
(iii) So far as possible, the court manages the case so that it proceeds within the approved budgets.
(iv) At the end of the litigation, the recoverable costs of the winning party are assessed in accordance with the approved budget.

4. The need for costs management was generally supported during Sir Rupert's consultation exercise, although some concerns were expressed. Sir Rupert identified[5] negative and positive factors of costs management. He said that the fact that costs management generates additional costs and makes additional demands upon the limited resources of the court were negative factors. However there were powerful factors in support of costs management. First, as case management introduced by the CPR and costs management go hand in hand, he considered that it did not make sense for the court to manage a case without regard to the costs which it was ordering the parties to incur. Secondly, if done properly, he agreed that it would save substantially more costs than it generates.[6]

5. To test costs management a number of pilot schemes were set up, initially in the Birmingham Mercantile and TCC courts and in defamation cases in London and Manchester. These pilot schemes continue and apply in all Mercantile and TCC cases[7] as well as those defamation cases.[8] Those pilot schemes have assisted in formulating the rules which have now been passed by the Civil Procedure Rule Committee and are being held in escrow for the commencement date of the cost reforms in April 2013.

The New Rules

6. Annexed to this paper are both those rules (CPR 3.11 to 3.18 and PD 3E) and the new form of precedent H for producing costs budgets.

7. It is worth outlining the scheme of costs management as contained in those rules. First, it will apply generally to all multi-track cases commenced on or after 1 April 2013 in a county court, the Chancery or Queen's Bench Division (except the Admiralty and Commercial Courts) unless the court otherwise orders and to any other proceedings where the court so orders[9]. Secondly, unless the court otherwise

[4] FR Ch 40 paragraph 1.4
[5] FR Ch 40 paragraph 7.1
[6] A view expressed by the Law Society in their written submissions during the costs review.
[7] Under CPR Practice Direction 51G from 1 October 2011 to 30 September 2012.
[8] Under CPR Practice Direction 51D from 1 October 2011 to 30 September 2012.
[9] CPR 3.12(1).

orders, all parties except litigants in person[10] must exchange cost budgets in precedent H[11] within 28 days after service of the defence.[12] In default the budget will only comprise applicable court fees[13].

8. The court may then manage the costs and make a costs management order[14]. However, whether or not it has made a costs management order[15], in making any case management decision, the court will have regard to any available budgets of the parties and will take into account the costs involved in each procedural step.[16] A costs management order will record the extent to which the budgets are agreed between the parties[17] and, where not agreed, record the court's approval after making appropriate revisions.[18] When a budget has been revised, the party has to re-file the approved budget with re-cast figures.[19]

9. Where a costs management order has been made, the court will then control the parties' budgets in respect of recoverable costs.[20] The court may set a timetable or give other directions for future reviews of budgets[21] and may, for instance, consider a revised budget by convening a costs management conference,[22] conducted where practicable by telephone or in writing.[23]

10. The exercise of producing a costs budget and of dealing with and approving costs budgets must, as observed above, be kept under control. There are limits on the costs which can be recovered for preparing a costs budget and in carrying out the budgeting and costs management process,[24] where a costs management order is made.

11. The parties are encouraged to seek to agree costs budgets, in whole or in part after they have been exchanged and the court will record any such agreed budget.[25] In so far as budgets are not agreed, the court has to review, make any appropriate revisions and approve the costs budgets. The practice direction contains guidance which is aimed at limiting the scope of argument which might otherwise occur where costs budgets are not agreed. In summary:

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[10] Where a costs management order is made, a litigation in person is to be provided with a copy of the budget of any other party: see PD 3E paragraph 9.
[11] PD3E paragraph 1. Only the first page need be completed where budgeted costs do not exceed £25,000.
[12] CPR 3.13.
[13] CPR 3.14.
[14] CPR 3.15(1) and (2).
[15] CPR 3.17(2).
[16] CPR 3.17(1).
[17] CPR 3.15(2)(a).
[18] CPR 3.15(2)(b).
[19] PD paragraph 8.
[20] CPR 3.15(3).
[21] PD 3E paragraph 6.
[22] CPR 3.16(1).
[23] CPR 3.16(2).
[24] PD 3E paragraph 3, provides that, save in exceptional circumstances, the costs of initially completing precedent H should not exceed £1000 or 1% of the approved budget and the costs of the process should not exceed 2% of the approved budget.
[25] PD 3E paragraph 4.

(1) The court's approval relates only to the total figures for each phase of the proceedings, although in the course of the review the court may have regard to the constituent elements of each total figure.[26]

(2) The court will not undertake a detailed assessment in advance but rather will consider whether the budgeted costs fall within the range of reasonable and proportionate costs.[27]

(3) The court does not approved costs which have been incurred before the date of any budget. It may however record its comments on those costs and take those costs into account when considering whether the subsequent costs are reasonable and proportionate.[28]

12. During the course of litigation a party is required to revise its costs budget if significant developments in the litigation warrant a revision. The revised budget is then sent to the other party to seek agreement. If there is not agreement the revised budget is sent to the court with reasons for the change and the objections of the other party. The court may then approve, vary or disapprove the revisions, having regard to the developments.[29] If 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.[30]

13. Where there is a costs management order, it then has an impact on the assessment of costs. When assessing costs on a standard basis the court will have regard to the receiving party's last approved or agreed budget for each phase of the proceedings[31] and will not depart from such approved or agreed budget unless satisfied that there is good reason to do so.[32]

Practical aspects

14. **The new discipline of costs management**. Many large firms of solicitors already have sophisticated cost systems which are used to record costs and some have cost budgeting systems. However, as the pilot schemes have shown, the production of costs budgets requires a new discipline for all involved in the process – solicitors, counsel, counsel's clerks and judges. Judicial training in costs management has already started and will continue in the run up to April 2013. Training will be required for the others involved in the process.

15. Summary assessment of costs has shown that interim decisions on the quantum of costs can be made by the courts but the ability to assess the reasonableness and proportionality of costs in advance is a different discipline which needs new skills.

[26] PD 3E paragraph 4.
[27] PD 3E paragraph 4.
[28] PD 3E paragraph 5.
[29] PD 3E paragraph 7.
[30] PD 3E paragraph 10.
[31] CPR 3.18(a).
[32] CPR 3.18(b).

There are two particular aspects which will be important when costs management is introduced from April 2013.

16. First, the court will have to apply new proportionality test[33] to the costs budget. As stated in the Final Report, the judge carrying out costs management will not only scrutinise the reasonableness of each party's budget, but also stand back and consider whether the total sums on each side are "proportionate" in accordance with the new definition. If the total figures are not proportionate, then the judge will only approve budget figures for each party which are proportionate. Thereafter if the parties choose to press on and incur costs in excess of the budget, they will be litigating in part at their own expense. It will be important for judges to apply the test consistently and for parties and their lawyers to be aware of the impact on recoverable costs.

17. Secondly, the court, in deciding what directions to give, will have to consider the cost impact of those steps. A good example is disclosure where, particularly with electronic disclosure, costs can soon become disproportionate. The court will have to question whether, for instance, it is proportionate to have standard disclosure or whether the costs of more limited disclosure is a proportionate way of proceeding in a particular case. Other examples of cases where the court will have to consider the impact of costs include expert evidence and witness statements.

18. **Whether to make a costs management order.** The court is given a discretion as to whether to make a costs management order. In the Final Report it was accepted that in complex high value commercial litigation, such as that in the Commercial Court, it might not be appropriate to make a costs management order[34]. There may also be circumstances where, for instance, a mediation is going to take place within the near future and it might not be appropriate to make a costs management order or to make one prior to the mediation.

19. However, subject to particular cases where it might not be appropriate to make a costs management order or where the timing of the costs management order might be deferred, the courts are likely to make costs management orders both in the cases which are defined in CPR 3.12(1) and in other proceedings outside the defined class. As costs management is a necessary adjunct to proper case management and to the furtherance of the overriding objective[35] there will, in most cases, be a presumption in favour of making a costs management order.

20. **The approach to contentious issues and the approval of costs budget.** The court encourages the parties to discuss and agree costs budgets and it is hoped that, over time, the scope for disagreement will become less as those involved in the process become more familiar with the costs budgeting process. There will however be some cases where the court will need to decide on contested items within the costs budget before the budget can be approved. As set out above, guidance is given in Practice Direction 3E on the approach of the courts.

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[33] See Lord Neuberger of Abbotsbury, MR: Proportionate Costs, the fifteenth lecture in the Implementation Programme (29 May 2012).
[34] FR Ch 27 paragraphs 2.24 to 2.26.
[35] See CPR 3.12(2)

21. The primary focus will be both on the total costs and the overall costs for each stage of the proceedings. Whilst the court will consider the underlying time estimate and applicable rate in reviewing the overall cost of a stage, the court is not embarking on a detailed assessment in advance. In this way there is discouragement of a detailed nit-picking approach which can lead, in itself, to increased costs and satellite issues. Rather there is encouragement for a lighter approach which considers whether the total budgeted costs of each stage fall within the range of reasonable and proportionate costs for a given case.

22. **Regular reviews of costs budgets**. The onus is on the parties to put forward revised costs budgets if significant developments in the litigation warrant such revisions. Those are then provided to the other party or parties for agreement and, if agreed, the agreement of the revised costs budget will be notified to the court. The court will only become involved in that process if there is disagreement, in which case the party seeking to revise the costs budget will send the court that revised budget, the reasons for the revisions and the objections raised by the other party or parties. The court may then hold a costs management conference which, it is thought, will generally be dealt with by telephone or in writing, leading to approval, with or without variations, or disapproval of the revised budget.

23. During the pilot scheme in the TCC it was found helpful to put dates in the diary in particular cases to prompt a party to review the costs budget and to confirm that the budget was still accurate or inform the court of any revised costs budget. This should be unnecessary until the new rules but evidently solicitors need to make periodic checks of the budget to ensure that there have not been developments which might justify a revision. In practice, many of the developments are likely to form contingencies within the budget or are likely to be revisions to the assumptions stated in the budget. This should lead to less need to revise budgets and more agreement of revised budgets in cases where stated assumptions are not met.

24. **The use of costs budgets when assessing costs**. As stated above, costs budgets will form a central part of any costs assessment. However because the costs budget will, on standard assessment the court will not depart from the approved or agreed budget unless satisfied that there is good reason to do so, this is likely to reduce the area of dispute. Equally the fact that a party has seen and considered the other party's budget from an early stage is likely to lead to fewer disputes at the end of the process.

25. **Cost Estimates and Costs Budgets**. The current provisions in the Costs Practice Direction[36] for estimates of costs are being amended as set out in the Appendix to this lecture. The provisions now apply not to costs estimates but to the costs budgets in those cases where there is no costs management order. As can be seen the 20% difference rule now applies to those costs budgets and the other provisions have been changed to reflect this.

Conclusion

[36] Section 6, Estimates of Costs.

26. Costs management forms an essential part of the reforms proposed by Sir Rupert. It will allow the courts properly to implement the new test of proportionate costs and to reduce the overall costs of litigation. The pilot schemes have shown that this is a new discipline which can and is being learnt. With proper training, solicitors, barristers, barristers' clerks and judges can each play an important role in the management of the costs of litigation.

Appendix: The New Rules and Practice Directions

(A) Additions to CPR 3

II. Costs Management

3.12 (1) This Section and Practice Direction 3E apply to all multi-track cases commenced on or after 1st April 2013 in:
(a) a county court or
(b) the Chancery Division or Queen's Bench Division of the High Court (except the Admiralty and Commercial Courts) unless the proceedings are the subject of fixed costs or scale costs or the court otherwise orders. This Section and Practice Direction 3E shall apply to any other proceedings (including applications) where the court so orders.
(2) The purpose of costs management is that the court should manage both the steps to be taken and the costs to be incurred by the parties to any proceedings so as to further the overriding objective.

3.13 Unless the court otherwise orders, all parties except litigants in person must file and exchange budgets as required by the rules or as the court shall otherwise direct. Each party must do so within 28 days after service of any defence.

3.14 Unless the court otherwise orders, any party which fails to file a budget despite being required to do so shall be treated as having filed a budget comprising only the applicable court fees.

3.15(1) In addition to exercising its other powers, the court may manage the costs to be incurred by any party in any proceedings.
(2) The court may at any time make a "costs management order". By such order the court will:
(a) record the extent to which the budgets are agreed between the parties;
(b) in respect of budgets or parts of budgets which are not agreed, record the court's approval after making appropriate revisions.
(3) If a costs management order has been made, the court will thereafter control the parties' budgets in respect of recoverable costs.

3.16 (1) Any hearing which is convened solely for the purpose of costs management (for example, to approve a revised budget) is referred to as a "costs management conference".
(2) Where practicable, costs management conferences should be conducted by telephone or in writing.

3.17 (1) When making any case management decision, the court will have regard to any available budgets of the parties and will take into account the costs involved in each procedural step.
(2) Paragraph (1) applies whether or not the court has made a costs management order.

3.18 In any case where a costs management order has been made, when assessing costs on the standard basis, the court will –
(a) have regard to the receiving party's last approved or agreed budget for each phase of the proceedings; and

(b) not depart from such approved or agreed budget unless satisfied that there is good reason to do so."

(B) New Practice Direction 3E

PRACTICE DIRECTION 3E – COSTS MANAGEMENT

1. Unless the court otherwise orders, a budget must be in the form of Precedent H annexed to this Practice Direction. It must be in landscape format with at least 12 point typeface. In substantial cases, the court may direct that budgets be limited initially to part only of the proceedings and subsequently extended to cover the whole proceedings. A budget must be dated and verified by a statement of truth signed by a senior legal representative of the party. In cases where a party's budgeted costs do not exceed £25,000, there is no obligation on that party to complete more than the first page of Precedent H.

2. If the court makes a costs management order under rule 3.15, the following paragraphs shall apply.

3. Save in exceptional circumstances:

(a) The recoverable costs of initially completing Precedent H shall not exceed the higher of £1,000 or 1% of the approved budget.
(b) All other recoverable costs of the budgeting and costs management process shall not exceed 2% of the approved budget.

4. If the budgets or parts of the budgets are agreed between all parties, the court will record the extent of such agreement. In so far as the budgets are not agreed, the court will review them and, after making any appropriate revisions, record its approval of those budgets. The court's approval will relate only to the total figures for each phase of the proceedings, although in the course of its review the court may have regard to the constituent elements of each total figure. When reviewing budgets, the court will not undertake a detailed assessment in advance, but rather will consider whether the budgeted costs fall within the range of reasonable and proportionate costs.

5. As part of the costs management process the court may not approve costs incurred before the date of any budget. The court may, however, record its comments on those costs and should take those costs into account when considering the reasonableness and proportionality of all subsequent costs.

6. The court may set a timetable or give other directions for future reviews of budgets.

7. Each party shall revise its budget in respect of future costs upwards or downwards, if significant developments in the litigation warrant such revisions. Such amended budgets shall be submitted to the other parties for agreement. In default of agreement, the amended budgets shall be submitted to the court, together with a note of (a) the changes made and the reasons for those changes and (b) the objections of any other party. The court may approve, vary or disapprove the revisions, having regard to any significant developments which have occurred since the date when the previous budget was approved or agreed.

8. After its budget has been approved, each party shall re-file the budget in the form approved with re-cast figures, annexed to the order approving it.

9. A litigant in person, even though not required to prepare a budget, shall nevertheless be provided with a copy of the budget of any other party.

10. If interim applications are made which, reasonably, were not included in a budget, then the costs of such interim applications shall be treated as additional to the approved budgets.

(C) Amendment to Costs Practice Direction, Section 6

Section 6 Costs Budgets

6.1 In any case where the parties have filed budgets in accordance with Practice Direction 3E but the court has not made a costs management order under rule 3.15, the provisions of this Section shall apply.

6.2 If there is a difference of 20% or more between the costs claimed by a receiving party on detailed assessment and the costs shown in a budget filed by that party, the receiving party must provide a statement of the reasons for the difference with his bill of costs.

6.3 If a paying party –

(a) claims that he reasonably relied on a budget filed by a receiving party; or

(b) wishes to rely upon the costs shown in the budget in order to dispute the reasonableness or proportionality of the costs claimed;

the paying party must serve a statement setting out his case in this regard in his points of dispute.

6.4 On an assessment of the costs of a party, the court may have regard to any budget previously filed by that party, or by any other party in the same proceedings. Such a budget may be taken into account when assessing the reasonableness and proportionality of any costs claimed.

6.5 (a) Without prejudice to paragraph 6.4, this paragraph applies where there is a difference of 20% or more between the costs claimed by a receiving party and the costs shown in a budget filed by that party.

(b) Where it appears to the court that the paying party reasonably relied on the budget, the court may restrict the recoverable costs to such sum as is reasonable for the paying party to pay in the light of that reliance, notwithstanding that such sum is less than the amount of costs reasonably and proportionately incurred by the receiving party.

(c) Where it appears to the court that the receiving party has not provided a satisfactory explanation for that difference, the court may regard the difference between the costs claimed and the costs shown in the budget as evidence that the costs claimed are unreasonable or disproportionate.

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