COSTS BUDGETING AT THE COALFACE

The Queen's Bench Masters' Corridor

Possibly the greatest impact of the introduction of costs budgeting on the courts in terms of resources and numbers has been in the Queen's Bench Division. In particular, this has affected the progress of clinical negligence cases. That is because of the number of such cases issued in the Queen's Bench Division and that, naturally enough, the budgets for these cases are large and complex.

When Sir Rupert Jackson proposed costs budgeting, he had in mind that the system should be fully piloted. It was not and, therefore, virtually all cases issued in the Queen's Bench Division are now subject to costs budgeting.

In other divisions that is not the case. Even in the Chancery Division, costs budgeting will only apply to Part 7 claims and many claims in the Chancery Division are started by way of a Part 8 claim. Other divisions have been exempted entirely.

The results in the Queen's Bench Division are well known. They are summarised in the talk that Master Cook gave at the 21st Annual Clinical Negligence Residential Seminar of the Professional Negligence Bar Association. He highlighted the following problems.

Previously, most initial case management conferences were disposed of by agreement and those that were not agreed were disposed of within 30 minutes. Now, virtually every costs budget is disputed and hearings take between one and two hours. This causes delay and Master Cook said:

> "*The problem will have to be addressed. If budgeting cannot be made to work there remains in the background the threat of scale fees.*"

He listed a number of factors causing an inability of the parties to agree budgets. They included:

(i) The imbalance between rates charged by claimant and defendant lawyers.

(ii) The fact that the existing hourly rates for summary assessment were out of date and inappropriate with no new rates being published.

(iii) The remote chance of a defendant being entitled to costs and unrealistic defendant's budgets.

(iv) Unrealistically high claimant's budgets, allowing for every conceivable contingency.

(v) The use of specialist costs lawyers at the costs and case management hearing.

(vi) A lack of confidence that a detailed assessment after a budget will enable a paying party to challenge costs or a receiving party to justify increases because of the requirement for good reason.

He said:

> "*Unless something is done or there is a radical change in culture the system will cease to function.*"

Master Cook made 13 suggestions as to how the costs budgeting system could be made to work. They were as follows:

(i) The claimant should provide the defendant with an estimate of costs already incurred in investigating the claim at an early stage, preferably at the stage of the Letter of Claim.

(ii) The bare minimum of experts should be instructed and on condition and prognosis, save in exceptional cases, only one for the case management hearing with additional experts controlled by the court at that stage.

(iii) Linked to that, parties should comply with CPR 35(4) in the Directions Questionnaire, providing separate estimates of costs of the experts.

(iv) The parties should not file their costs budget with the Directions Questionnaire.

(v) Discussions about budgets should start at the earliest possible stage, with global offers being made in respect of each phase and responded to.

(vi) If agreement is possible, the court should be informed at the earliest possible date.

(vii) Discussions should not start at the door of the court.

(viii) Costs lawyers may be employed to assist in drawing the budget, but their costs should not be included in the filed budgets but governed by paragraph 2.2 PD 3E and the percentages there specified. He acknowledged that that was contrary to the published Guidance Notes for Precedent H.

(ix) Costs lawyers should be discouraged from attending budgeting hearings, save in exceptional cases.

(x) Assumptions should be realistic and the power of the court to review and revise budgets upon significant developments should be borne in mind.

(xi) Interim applications reasonably not included in a budget will be assessed separately (usually summarily).

(xii) Provide a breakdown of what has been achieved for costs incurred before the date of the budget and make sure budgets are finalised in the period immediately before the budgeting hearing and not earlier, so that the budget is not already out of date.

(xiii) "*Above all, remember the court is not performing a detailed assessment when approving a budget. Submissions must therefore be focussed on the total sums for each phase and whether or not such sums fall within a range of reasonable and proportionate costs. We need to be told what the important issues are and why it is*

proportionate to incur the proposed spend. Of course hourly rates and time spent lead to a total and will be behind the calculations put forward, but please focus on the bigger picture."

Master Leslie's Alternative Approach

If the parties agree, Master Leslie will manage costs on a summary basis. Both parties have to agree to this and if they will not, the case is stayed so no further unbudgeted costs can be incurred and relisted for a hearing two to two-and-a-half hours in up to three months' time.

If the parties agree, then he asks both parties for their best without prejudice estimate of value and submissions as to other factors to support the budget as proportionate and then will set a budget that is proportionate to what he considers to be the best estimate.

The budget is the overall sum for the whole case, including incurred costs and not phase-by-phase. The order will provide that the budget is then allocated pro rata across all phases, including incurred costs, in proportion to the proposed and allowed budgets. He allows 30 minutes for this process.

The writer's only experience of this is one case where the claimant's budget was £240,000. The Master reduced this to £150,000 and approved the defendant's budget at £36,000. That case was a relatively straightforward road traffic accident where liability was not in dispute and the injuries, although serious, not remotely comparable to those suffered by a child with serious birth-related cerebral palsy for which, plainly, the summary process would not be appropriate.

Another approach, adopted in one case by Master McCloud, was to look at the overall budget for the whole case and decide whether the total of the budgeted costs fell within the range of reasonable and proportionate. Such an approach appears to be justified by PD3E 7.3 even if within that total figure the budget for a particular phase may be outside that range. Given the Appeal Court's attitude in the ***Redfern*** case, it is unlikely that any Appeal Court would say that that was outside the discretion of a judge making a case management decision.

Costs Management Trumps Costs Capping

In *Hegglin v Persons Unknown and Google Inc* [2014] EWHC 3793 (QB), Edis J was faced with a costs capping application in relation to the costs of Google Inc in an action the claimant had brought to restrain publication of malicious falsehoods. The claimant's costs budget was £283,395 incurred and £321,010 estimated. Google's was £910,339 incurred and £770,970 estimated. The judge would not impose a cap but performed a limited (because of time constraints) budgeting exercise.

He limited Google's counsels' trial brief fees to £98,000 (the same as the claimant's and reduced from £247,000), he reduced solicitor's trial preparation from £237,000 to £125,000 *"given the enormous amount of time....already devoted to this case"* and approved £25,000 for time spent dealing with an expert instead of over £58,000.

The end result was in effect a reduction of the budget by £294,000 odd leaving a figure not far off the cap (£1.25m) for which the claimant had contended. From the report, it is plain the judge approached costs budgeting on a lump sum basis rather than looking at hours and rates.

Outside London

As the *Havenga* case shows, in Newcastle, at least, some judges will approach a costs budget by looking at the number of hours spent and, possibly even, hourly rates. In Manchester, by contrast, in a tetraplegia case, the District Judge refused to look at the constituent elements of each phase but, rather, gave a figure, without breakdown, as the reasonable and proportionate figure for the phase in question.

In that case, possibly because of the lower number of costs management hearings in Manchester compared to those in the QBD, the District Judge had had ample time to consider the budgets and, before the advocates appeared, arrived at provisional figures for the approved budget. This shortened the costs management part of the hearing considerably.

This gives rise to a possible solution to the log jam caused by long costs management hearings. To a great extent they will be a waste of time because there will be budgeting for phases that almost inevitably will not occur. Why should a court listen to arguments, possibly taking about an hour, about the budget for a trial that in all probability will not take place?

Provisional assessments have radically reduced the number of detailed assessment hearings. If the court ordered budgets after it had given directions and then provisionally approved sums for those budgets, much time could be saved. The experience is that provisional assessments of costs are rarely challenged.

An alternative is to follow the approach of one District Judge in Norwich, and that is, routinely, only to costs budget in cases of any complexity up to the next CMC. So long as

that is made clear to the parties in an order fixing the first CCMC, then significant time and costs could be saved.

The Future

The position in the Queen's Bench Masters' corridor is uniquely difficult and probably untenable. There will soon be moves to appoint a new Master but still, unless the number of automatically contested costs budgeting hearings reduces, obtaining dates for hearings before QB Masters will continue to be a difficult and lengthy process.

It is difficult to see how parties will suddenly start agreeing costs budgets. This is especially so if judges are prepared to allow very small future budgets on account of large incurred costs overall as defendants will continue to have the incentive of the chance at an early stage to limit claimants' costs..

In complex cases, routine stage by stage budgeting would seem sensible. Otherwise, perhaps, some form of provisional budgeting system might help.

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