

Costs management update

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Topics

- Recent case-law
- 3% cost of budgeting
- Forthcoming CPR amendments
- The future - fixed costs?

(1) Recent case-law

- Reminder that costs management restricted to future costs
- *Venus Asset Management Limited v Matthews* [2015] EWHC 2896 Chief Master Marsh
 - Surveyor’s negligence action
 - Directions given up to exchange of witness statements
 - Budgets approved for entire action – on basis trial would last 4 days
 - Further CMC listed for directions to trial and to “consider any application to revise costs budgets”

- At CMC – trial estimate 8-9 days
- C and D issued applications to revise budgets (PD3E para. 7.6) retrospectively (costs incurred) and prospectively
- C sought retrospective increase of witness statement phase by £54K
- C and D argued court could review costs already incurred as part of remit of budget revision – PD3E 7.5 - court may give directions for review of budgets

- Master: CPR 3.12 and 3.15 limit court's costs management powers to future costs, as does PD3E (7.4 and 7.6)
- Application to revise costs incurred refused
- May be appropriate for court to direct review of budgets at later date **BUT FUTURE COSTS ONLY**
- Futurity of costs is taken from date of revised budget (not the hearing)
- Agrees Warby J Yeo – party may need to act swiftly to apply for prospective revision

Learning points

- Keep a track of expenditure under phases – time recording by phase
- Make application to revise before approved budget figure reached
- Remember PD3E 7.9: interim applications, reasonably not included in budget, treated as additional to approved budgets
- In substantial cases, seek direction for phased budgeting (PD3E 7.6). Downside – incurred costs on phases not yet budgeted (e.g. experts)

Recent case-law cont..

- Reasonableness and proportionality not assessed only by reference to overall budget figure
- *King v Thipthorp & Ors* TCC Stephen Furst QC 11/2/16 (full judgment not yet available)
- C and 3D budgets not large by TCC standards
- But Judge looked at some of individual items claimed – counsel fees, experts reports and trial prep – and considered excessive.
- Judge approved lower figures for some phases.

- Judge accepted that on one view correct approach was to look at overall budget figure only and decide if reasonable and proportionate without further investigation (*Yeo, GSK Project Mgt v QPR* [2015] TCC)
- BUT Warby J in *Yeo* – approval is only to total figures for each phase (PD 3E 7.3) but court may have regard to constituent elements of each phase (PD 3E 7.3)
- Judge was applying PD 3E 7.3 – see forthcoming CPR amendment about underlying detail in budget

(2) Costs of budgeting

- PD3E 7.2
- Save in exceptional cases:
 - Recoverable costs of initially completing Precedent H shall not exceed £1,000 or 1% of approved or agreed budget
 - All other recoverable costs of budgeting and costs management process not to exceed 2% of approved or agreed budget
 - Overall cap of 3% of approved or agreed budget

- How apply in cases where budgeting in stages?
- Difficult –
 - More one Precedent H
 - More than one CCMC
- Take a view at the outset:
 - Ask court to disapply
 - Accept only recover %

- Difficulties that can arise:
 - If want to stick to 3% to a case budgeted in stages:
 - In so far as possible, budgeting costs to be incurred costs for purpose of each stage
 - Calculate 3% of each budget
 - Be careful how draw stages
 - Don't include costs of second CCMC in first budget (as costs to be incurred), otherwise court has to approve figures for second Precedent H/second CCMC. Don't know if will exceed 3%

(3) CPR amendments

- 6 April 2016
- Filing of budgets:
 - Low value (less £50K) with direction questionnaire
 - Other cases – 21 days before first CMC
- Budget discussion reports (figures agreed by phase, figures not agreed by phase and summary of grounds of dispute) – 7 days before first CMC

CPR amendments cont..

- First page of Precedent H – where value of claim under £50k or costs less than £25K
- In proceedings commenced on or after 6.4.16 claim made by or on behalf of a child excluded from budgeting
- PD3E: In cases where C has limited or severely impaired life expectancy (5 years or less) court will ordinarily disapply costs

CPR amendments cont..

- New paragraph PD3E 7.10:

“The making of a costs management order under rule 3.15 concerns the totals allowed for each phase of the budget. It is not the role of the court in the cost management hearing to fix or approve the hourly rates claimed in the budget. The underlying detail for each phase used by the party to calculate the totals claimed is provided for reference purposes only to assist the court in fixing a budget.”

(4) Fixed costs

- Department of Health promoting rule changes to introduce fixed costs in clinical negligence cases
 - Civil Procedure Rule Committee July 2015 – DoH proposal is for all clin neg claims up to £50k and possibly consulting on up to £250K
 - No public consultation as yet
- Sir Rupert Jackson – Fixed Costs – The Time Has Come – IPA annual lecture 28 Jan 2016
 - Political decision whether fixed costs for all claim
 - Proposes fixed costs for fast track and lower reaches of multi-track
 - “grid” based on ten stages of Precedent H as starting point for discussion

Fixed costs cont..

- Master Cook, Lecture 18 February, Costs Budgeting v Fixed Costs
 - Inevitable conclusion is that there is “*now a very strong momentum perhaps irresistible momentum*” towards fixed costs in civil claims.
 - Must apply to all civil litigation – not just clin neg
 - Gradual
 - Start by extension of low value Pt 45 scheme to all claims including fast track
 - Gradual extension from £25K to £50K to £150K – subject to monitoring
 - Suitable uplifts for difficult/complex cases
 - Flexibility in rates
 - Robust and flexible mechanism for updating rates
 - Before fix costs beyond £50K – review working of current costs regime and its effects

Fixed costs cont..

- Concerns
 - Access to justice
 - Increase in litigants in person
 - Court fee rises