All but the kitchen sink

Dominic Woodhouse reflects on how the courts' approach to budgeting has developed

When costs budgeting was introduced for most multi-track claims in April 2013, a large part of the profession could have been forgiven for taking an 'everything but the kitchen sink' approach to budgeting. We had just been told that the courts would be setting a budget soon after issue of proceedings, at a point in time when the future conduct of the litigation was uncertain, the budget would almost invariably limit what could be recovered inter partes, and if something was missed from it, then tough luck, we had had our chance. There was some vague idea that the parties might later be able to ask the court to look at the budget again, and the suggestion of a further test that might permit departure from the budget come detailed assessment; but which was pitched against one of the key underlying principles of budgeting: that parties should know in advance what they were in for if they lost the case, and to too readily permit parties to change or escape the budget would be corrosive of that fundamental aim.

RECENT DEVELOPMENTS

Times have moved on to some extent. October 2020 saw various changes to costs management under section II of CPR 3 and substantial revision of PD 3E (as then was, now PD 3D). One key point was to take the existing provisions requiring that the parties 'shall' seek to revise budgets where significant developments in the litigation warranted it, and make explicit that parties 'must' take such steps. Judges at conferences around the country indicated a view that the courts were expecting to deal with, and positively invited, such applications, seeing them as key to a workable costs management process, not cast in stone but fluid as the needs of a case dictated. Yes, even pre-October 2020, per *Al-Najar and Ors v The Cumberland Hotel (London) Ltd* [2018] EWHC 3532 (QB), the bar for what constituted a significant development was not supposed to be too high, as otherwise parties might be overly pessimistic about how efficiently and cost-effectively claims could be pursued; but anecdotally, we hear that in the event courts have not been inundated with such applications.

Last year, in *Reid v Wye Valley NHS Trust & Anor* [2023] EWHC 2843 (KB), Master Brown, dealing with costs management at a separate hearing after the court had already set directions at a previous CMC, found elements of the claimant's budget to be unrealistically high and outside the bracket of realistic contention; and in so doing decided it was appropriate to modify what was taken to be the usual order of costs in the case, instead ordering that in the event the claimant recovered costs at the end of the case, there would be a reduction of 25% to the costs of the budgeting hearing.

The claimant must have a taken a 'kitchen-sink' approach then? That is not clear from the judgment, nor is exactly what allowances and reductions were made, save to say that the budget, in a case accepted to be reasonably and realistically valued in excess of £1m, was reduced 'substantially'.

We can however glean various points that Master Brown was unhappy with, and which presumably prompted that reduction. A Manchester firm claiming £425 per hour for a grade A fee-earner was worthy of comment, but most particularly in the context of very limited delegation of work to more junior fee-earners, where a fee-earner charging at such a rate might be expected to take a back seat for much of the more mechanical aspects of the claim, instead providing a guiding mind behind the litigation and in overall direction of junior fee-earners undertaking the bulk of work. That was not the case, however, with the budget demonstrating almost all work being done at a grade A level (for instance in expert reports, the grade A fee-earner anticipated spending 226 hours versus two hours by grade Ds), with the grade A attending the entirety of trial with counsel, on the assumption of an average of 12 hours per day. Beyond some more limited concern as to aspects of counsel's fees and the experts' fees for trial, the essence of the court's concerns then appear to stem from a failure to provide for downward delegation of work and an overgenerous or pessimistic (depending on how we look at it) approach to the amount of future time required.

A 25% reduction to the costs of the costs management hearing is perhaps not too frightening a prospect, but a note published more recently by Master Brown in March this year, already referred to by Masters in the King's Bench Division, highlights the case and the court's discretion as to costs, in order to assist parties in advance of cost management hearings in the KBD involving high-value personal injury claims. It highlights various issues, and provides some guidance on particular points that might be expected to keep parties apart in their views of budgets, significantly as follows:

- The court does not set rates, but may have to consider their reasonableness; they cannot be reserved to assessment per *Yirenkyi v Ministry of Defence* [2018] EWHC 3102 (QB).
- The court may consider what work should be delegated, for example the note expresses the view that grade D fee-earners will typically obtain medical records, and substantial involvement of higher grade fee-earners may be unreasonable (though reviewing such records would justify a higher grade).
- It is not for the court to decide whether there should be leading counsel / junior counsel / two counsel, but experienced juniors are commonly instructed in claims of substantial value. If two counsel are instructed, it may impact on senior solicitor time, and work will likely be shared between counsel so instruction of a junior would be expected to reduce leading counsel's involvement.
- It is not for the court to consider who should draft a schedule of loss, but in complex schedules, counsel's greater familiarity in dealing with pension claims and loss of earnings subject to various contingencies may mean the work is reasonably done by counsel.
- In most cases solicitors can be expected to keep a running electronic bundle of documents, bookmarked and added to as and when required, where the assembling and pagination of bundles will generally be regarded as administrative.
- There is a general expectation that first drafts of witness statements can be dealt with by grade C fee-earners.
- Where parties are permitted opposing experts, the court makes a general assumption that there will be a dispute between them up to and including trial and will budget accordingly, whereas if there is no material dispute between experts following service of reports or joint statements, this will in general constitute good reason for departing from a budget. Parties can agree budgets on the basis of an assumption of the number of days' attendance by experts, recorded in the order, and the allowance can be adjusted later by use of the good reason test.
- The court has to consider reasonable and proportionate expert

fees, not just allow what they assert; though in general, fees claimed by experts instructed by NHSR or insurers will be less than those instructed by claimants.

- Expert conferences can often be done remotely, though in-person attendance may be justified, for example in clinical negligence cases where close scrutiny of scans or x rays is required.
- A PTR hearing is not normally required in the KBD, and usually costs of 2 or 3 hours plus court fees will be allowed.
- Even in high-value cases it may not be reasonable for a senior fee-earner to attend throughout trial, and it is generally reasonable to take as a starting point 7 to 8 hours per day for fee-earner attendance, though additional work may be required
- Unless it is clear one will not be required or is inappropriate, it is not normally an objection to provision for a JSM in the ADR phase for one party to say it is unlikely; a JSM can be budgeted on the assumption one takes place, and if not it will constitute good reason to depart from the budget.

Useful insight then as to how parties can avoid kitchen-sink budgets and plan their future spend so as not to be considered entirely outside the bracket of realistic contention, or alternatively highlight the issues that the court will likely need specific explanation and argument on.

It is certainly not an issue that is going away any time soon, and the decision in *Reid v Wye Valley* has been followed more recently this year in decisions of Master Thornett (see article, page 6) in *Worcester v Hopley* [2024] EWHC 2181 (KB) (budgeted costs reduced by more than 50% leading to no order for costs for the separate costs management hearing, the claimant paying the costs of a hearing to determine the incidence of those costs, and a general reduction to otherwise recoverable costs of costs management of 15%) and *Jenkins v Thurrock Council* [2024] EWHC 2248 (KB) (claimant ordered to pay the costs of the separate costs management hearing and their costs otherwise recoverable in relation to costs management be reduced by 35%). In both cases, the court considered that the claimant had taken an unrealistic and disproportionate approach to its budget (again with the court concerned about the nature and scope of delegation demonstrated), and which was maintained despite the opportunity for the parties to reconsider their approach to budgeting once directions had been set.

It is because of that intervening period for reflection that the courts may well, as in these cases, start to treat separate costs management hearings as a rather different animal to other aspects of case management, with particular scope for orders other than costs in the case. There is therefore a warning here that all practitioners would be wise to take heed of.

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