

Costs in Focus

Issue 46

Welcome to the 46th issue of Costs in Focus. This edition is going to consider a number of recent developments in costs law and the impact they will have on Costs Drafters and Practitioners.

Costs budgeting and detailed assessment

Jessica Winter-Riley considers the case of *Merrix v Heart of England NHS Foundation Trust* [2016] EWHC B28 (QB), in which the impact of costs budgeting on the detailed assessment of costs was analysed.

In this matter the regional costs judge, District Judge Lumb considered a preliminary issue of “to what extent, if at all, the budgeting regime under CPR Part 3 fetters the powers and discretion of the judge at detailed assessment of costs under CPR Part 47.”

The claimant argued that if the costs in the bill were less than the budgeted costs they should be assessed as claimed, unless good reason to depart from the budget was established. Budgeting was an

attempt to deal with costs in a reasonable and proportionate way, and would limit matters to be considered in a detailed assessment to matters outside the budgeting regime like insurance premiums.

The defendant argued that the court was required to undertake a detailed assessment of both incurred and estimated costs, and the last approved or agreed budget was one factor to be taken into account when assessing costs. No provision in CPR 44 or 47 showed that the paying party

must show good reason why a lower figure in the agreed budget should be allowed. The defendant further argued that budgeting was not a detailed assessment and does not override the assessment procedure.

District Judge Lumb confirmed that the powers and discretion of a costs judge on detailed assessment is not fettered by costs budgeting, save that any departure from a budget requires a good reason.

Comments

He further confirmed that budgeting does not replace detailed assessment but is an added factor in CPR 44.4(3) to which no special weight is given. The aim of budgeting is to produce effective costs and case management, and this should reduce the need for detailed assessment by ensuring the costs are reasonable and proportionate for each phase. Any disagreement about costs will therefore be reduced, so that detailed assessment should have

limited gains. The judge disagreed with both parties as to the meaning of budgets and stated that budgets are neither a cap nor a “fixed amount” but an “available fund”.

Essentially, cost budgeting and assessments are different tools to help the court manage costs to ensure the amount paid by the paying party is reasonable and proportionate. Even where a bill of costs falls within a costs budget, an assessment of the bill is still needed because there is no

assumption that costs will be assessed as claimed. Parties should ideally adopt an ADR-like approach in negotiation and budget discussion, and thereby produce a proportionate budget that is accurate, and the difference between budgeted and actual costs so negligible, that the time, trouble and risk of so that pursuing detailed assessment would not be worthwhile.

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Winning Part 36 offer “too high”

Carys James considers the recent case of *Transocean Drilling UK Ltd v Providence Resource Plc* [2016] EWHC 2611, in which the High Court considered the commercial realities of the case when deciding the appropriate costs order

Following a trial in 2014, subsequent judgment including costs in 2015 and an appeal to the Court of Appeal on a limited issue in 2016, the defendant was ordered to pay the claimant approximately US\$13.85 million. The 2016 judgment increased the sum that had been ordered in the 2014 trial and, as a result, the claimant submitted that it had beaten a Part 36 Offer made in August 2014. The claimant made an application for an order that the Part 36 consequences should apply from the expiry of the "relevant period" in 2014.

The matter concerned CPR 36.14 as in force pre-April 2015. The High Court considered, when determining an appropriate Part 36 costs order whether to take account of commercial realities, including the payment of costs and dishonest conduct.

Although the claimant was successful in beating his offer, in 2015 the defendant had succeeded on points on which around 70-75% of the costs of the action had been spent and therefore there was no order for costs. The claimant's conduct had also been raised, including dishonesty.

On consideration, it was found that a Part 36 Offer was engaged and, in accordance with *Mitchell*, costs should not be taken into account when determining whether the judgment was at least as advantageous to the claimant as the Part 36 Offer, since the sum awarded in 2016 was more advantageous than the Part 36 Offer. It was further considered whether it would be unjust to make the usual costs order. Because of the unusual procedural history of the

case, it was determined that no order as to costs would have been made at the time of the offer.

Therefore, when deciding if it was unjust that the costs consequences should apply, it was necessary to consider whether the court was bound to ignore the costs position.

Mr Justice Popplewell held that the information could be taken into account and found that it would be unjust for the full Part 36 consequences to be ordered. However, it would not be right that if they were disapplied in full. The defendant was ordered to pay the claimant's standard basis costs from the end of the relevant period; interest would not run at 10% on the principal sum or on costs and there would be no surcharge.

Comments

Cases where it is appropriate to consider how costs would have been allocated in the absence of a Part 36 Offer will be rare. However, in exceptional cases, the court may take account of the commercial

reality of an offer being rejected when considering the costs consequences that should follow, particularly if the winning party's conduct is also the subject of criticism.

The claimant's application for permission to appeal against the Court of Appeal's judgment to the Supreme Court is pending.

Services we provide

We deal with all aspects of costs including the preparation of Bills of Costs, Schedule of Costs, Points of Dispute, Points in Reply, negotiating settlement, solicitor own client disputes, auditing, providing estimates, costs budgeting and costs advocacy.

Our dedicated costs team is made up of 50 employees based in Bristol and New Malden with a wealth of experience including Costs Lawyers, Solicitors and members of the ACL.

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The purpose of this newsletter is to highlight some of the recent developments and changes in costs law. It should not be taken as legal advice and should not be relied upon as such.