Budgeting: if you can't beat it, join it

With the issue of costs capping and budgeting one of the fastest growing areas of the law today, debate over how to best handle it still rages

BY TONY GUISE

In the case of *Jefferson v National Freight Carriers Ltd* [2001] 2 Costs LR 313, Her Honour Judge Alton said: "In modern litigation, with its emphasis on proportionality, it is necessary for the parties to make an assessment at the outset of the likely value of the claim and its importance and complexity and then to plan the necessary work, the appropriate level of person to carry out the work, the overall time which it would be necessary and appropriate to spend on the various stages in bringing the action to trial and the overall cost".

In the five years since *Jefferson* was decided, there have been 12 cases dealing with the issue of costs capping and budgeting. Those cases have included everything from low-value personal injury claims, group litigation orders concerning clinical negligence, ruined holidays and one case of commercial litigation from about the same time as *Jefferson*.

Solutia (UK) Limited v Griffiths [2001] EWCA Civ 736 was concerned with the costs in an arbitration which far exceeded the value of the claim. LJ Mance had this to say about the place of the courts in controlling costs: "It is to be hoped that... judges conducting cases will make full use of their powers under the practice direction about costs... to obtain estimates of costs and to exercise their powers in respect of costs and case management to keep costs within the bounds of the proportionate in accordance with the overriding objective."

At about the same time as the Civil Procedure Rules (CPR) were introduced, the Law Society introduced the Solicitors' Cost Information and Client Care Code – a much more detailed exposition of a solicitor's obligations toward his or her client than was in place in the former version of rule 15 of the Solicitors' Practice Rules 1990. The relevant parts of the 1999 code provide the following.

ADVANCE COSTS INFORMATION – GENERAL

"The overall costs:

(a) The solicitor should give the client the best information possible about the likely overall costs, including a breakdown between fees, VAT and disbursements...

(c) Giving "the best information possible" includes:

- (i) agreeing a fixed fee; or
- (ii) giving a realistic estimate; or
- (iii) giving a forecast within a possible range of costs; or
- (iv) explaining to the client the reasons why it is not possible to fix, or give a realistic estimate or forecast of, the overall costs, and giving instead the best information possible about the cost of the next stage of the matter."

UPDATING COSTS INFORMATION

"The solicitor should keep the client properly informed about costs as a matter progresses. In particular, the solicitor should:

(a) tell the client, unless otherwise agreed, how much the costs are at regular intervals (at least every six months) and in appropriate cases deliver interim bills at agreed intervals..."

Additional guidance is given in paragraph 13.03 of the code: "Oral estimates should be confirmed in writing and clients should be informed immediately it appears that the estimate will be or is likely to be exceeded. In most cases this should happen before undertaking work that exceeds the estimate. Solicitors should not wait until submitting the bill of costs. The Law Society's Consumer Complaints Service deals with many complaints that have arisen simply because the solicitor does not have a system for tracking costs and estimates are exceeded without the client's authority".

Under paragraphs 6.4 (1) and (2) of the Costs Practice

Direction, the CPR gave the court the power to prospectively regulate a solicitor's charges for litigation work with the requirement to file estimates of costs at the Allocation Questionnaire (AQ), Listing Questionnaire (LQ) stages and whenever the court directed. Such estimates have to be sent to the client.

The dangers inherent in this system for practitioners only become apparent long after such estimates have been filed. These dangers typically arise when negotiations regarding costs take place and the paying party remembers that an estimate was filed with the AQ. On examination it is discovered, horrors of horrors, that the estimate of total costs is (typically) about half the sum being claimed by the victorious receiving party. Why is that?

The problem arises because the receiving party failed to prepare a budget for the relevant stages of the case at the outset and failed to revise it as the case progressed. The preparation of the estimate at AQ may also have been entrusted to less experienced fee-earners leading to too low a figure being given.

Sounds like a basic mistake? That's because it is a basic mistake and one which is being perpetrated in firms throughout the country. It is also a breach of the Costs Information Code and, therefore, a professional issue. The scale of the problems caused by the failure to budget has yet to become fully apparent because the cases have yet to reach detailed assessment.

What are the particular problems that can be caused by a failure to budget from the outset?

- Inability to recover the maximum possible costs from your unsuccessful opponent. This in turn leads to costs between you and your client being disallowed – a breach of the indemnity principle.
- A failure to recover maximum possible costs causes potential exposure to an obligation to repay costs which were, in effect, wrongly paid by the client.
- In addition, a risk of a report to the Consumer Complaints Service for inadequate professional service.
- If there is a finding of inadequate professional service the solicitor in question could be fined up to £5,000 (note (iii) (b) to rule 15 of the Solicitors' Practice Rules 1990).

A five point plan can, however, be adopted which may assist in avoiding these unhappy consequences.

- Introduce a budgeting culture into your litigation department. At the start and on every review of strategy – budget, budget, budget! As a start, it is probably wise to conduct a review of every estimate given at AQ and LQ stage in every case you are handling – now.
- Take no step for granted – always seek authority to proceed.
- Complete accurate costs estimates at AQ and LQ stages and send copies to your client.
- Once the budget is complete make sure the budgeted costs are in proportion to the claim. See, *Home Office v Lownds* [2002] EWCA Civ. 365.
- Always include a healthy contingency element because you never know what lies ahead – especially in litigation.
- Make sure you allow for the time it takes to monitor and review the budget.

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My firm receives instructions from fellow solicitors to advise and mediate where the solicitor's client finds the paying party refusing to pay on one of the grounds set out above, typically because the claim for costs at detailed assessment exceeds the estimate given at AQ. There are arguments that remain available to deal with these issues but the difficulty of such cases must not be underestimated as the courts increasingly seize on the tool of budgeting as a means of controlling costs.

OTHER DEVELOPMENTS

The Civil Justice Council is considering the responses to a consultation exercise last year with a view to making recommendations to the Civil Procedure Rules Committee for the introduction of a budget-based regime probably for cases worth more than £50,000. Those below that level would be subject to the kind of fixed costs regime, we have seen introduced for personal injury cases.

On May 5 this year, the Supreme Court Costs Office hosted a conference in London for costs judges from all over the country to debate budgeting. On July 13 and 14, the Court of Appeal heard the case of *Garbutt and Anor. v Edwards and Anor.* Can a solicitor who has never given a costs estimate to his or her client nevertheless recover costs from the losing party despite the plain breach of the Costs Information Code and, therefore, the indemnity principle? At the time of going to print, the decision had yet to be handed down. Watch this space.

In my view, the trend of judicial and regulatory thinking is only one way. The time remaining before a budgeting system is imposed should be used by all litigators to prepare.

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