Guidance on Costs Budgeting : Methodology and other issues

Tim Yeo MP v Times Newspapers Limited [2015] EWHC 209 (QB)

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The recent case of *Yeo v Times Newspapers Ltd* provides some much needed judicial guidance on a number of common issues involved in costs budgeting. The fact of the matter is that costs budgeting is here to stay and its importance for parties in multi-track litigation should not be underestimated.

In *Yeo*, having heard two hours of oral argument on the issue of costs alone, Warby J reserved judgment on the basis that "*although costs budgeting has now been in place for over 20 months, the detailed implementation of the scheme is still relatively untested*" and the arguments before him addressed issues not only of methodology but also other issues of general importance for the costs budgeting process. He therefore took the opportunity to give judgment and highlight a number of particular issues that arise and offer some guidance for the future.

Hearing or no hearing?

CPR 3.16(2) states that "Where practicable, costs management conferences should be conducted by telephone or in writing". Warby J was of the view that the detailed oral debate which had taken place before him over rates, hours and proportionality did not in fact justify an oral hearing (although it was justified because of the points of more general importance that had arisen).

He hoped that, in the interests of saving time and costs for the parties, that as the costs budgeting exercise becomes a firmly established and well-understood feature of multi-track litigation that parties will propose and agree to dealing with costs management in writing, either through skeleton arguments or very full correspondence.

Incurred costs

Incurred costs are not subject to the approval process and therefore a

successful party's costs incurred before approval of a budget will normally need detailed assessment, in the absence of agreement. Pursuant to PD3E 7.4, if by the time the costs management process takes place substantial costs have been incurred, one thing the court may do is to "record its comments on those costs" and the court will "take those costs into account when considering the reasonableness and proportionality of all subsequent costs".

In his judgment Warby J stated that when a court does reduce a budget, either for reasons which may apply equally to incurred costs, or which have a bearing on what should be recoverable in that respect, it is likely to help the parties reach agreement without the need for detailed assessment later on, if those reasons are briefly recorded at the time the budget is approved.

The approach to approval

It was submitted in the case that when determining an appropriate figure for each phase of the proceedings the court should focus primarily on the proportionality of the costs, applying the test in CPR 44.3(5), and that the process was intended to be one conducted swiftly and economically, and of necessity had to be something of an impressionistic exercise. In support of those submissions reference was made to a speech given by the Senior Costs Judge, Master Gordon-Saker, to the Commercial Litigation Association in October 2014 which emphasised that costs management is not a prospective detailed assessment and described that the training given to judges as having suggested that they should not look at hourly rates or hours but rather at overall reasonableness and proportionality.

In his judgment Warby J noted that whilst PD3E 7.3 states that "When reviewing budgets, the court will not undertake a detailed assessment in advance, but rather will consider whether the budgeted costs fall within the range of reasonable and proportionate costs" it also states that "in the course of its review the court may have regard to the constituent elements of each total figure". He further noted that Precedent H allows the court to review hourly rates and estimated hours by

requiring them to be stated on the form. He stated that his view was that whilst the question of whether totals are reasonable and proportionate would always be the overall criterion, the court may need to consider rates and estimated hours and that a tailored approach will need to be taken to the particular case before the court.

He was also of the view that the overall costs sought may be an influencing factor, stating that in a case involving costs that run to six or even seven figures in total it is appropriate to have regard not only to proportionality and the factors listed in CPR 44.3(5) but also to the hours and rates, as would be done upon a summary assessment. He was clear that in his judgment this is not the same as conducting a detailed assessment.

Contingencies and revision

It was noted by Warby J that the contingencies section of the budgets had caused difficulties in the case before him as six contingencies had been identified between the parties, not one of which was common to them both. Therefore in respect of contingencies he went on to make three important points in his judgment:

(1) Contingencies must involve work that does not fall within the main categories in Precedent H.

(2) In order for the work to qualify as a contingency it must be possible to identify to the opposing party and the court what the work would be. Otherwise it would be impossible to determine whether the work falls within or outside of a specific category and also what the cost of that work would be.

(3) There was also the important issue of how likely it needs to be that the work will be required before it can properly be included as a contingency. In his judgment work should only be included as a contingency if it is foreseen as more likely than not to be required.

In the judgement he stated that his criterion provided a practical solution, consistent with the rules, and that if the work set out in the contingency is not thought to be probable than it can reasonably (and should) be excluded from the budget. This is because the time and costs involved in preparing that part of the budget are not easily justifiable if the work is no more than a possibility or is unlikely. He stated that if the work included as a contingency is not considered probable by the court then no budget for it should be approved. Of course, if the improbable occurs, in the form of an interim application, then the costs will be added to the budget pursuant to PD3E 7.9, unless the matter involves a "significant development" in which case a revised budget should be prepared and agreed or approved as provided for by PD3E 7.6.

Comment

It certainly remains to be seen whether parties (particularly Claimants in personal injury or clinical negligence actions) are inclined to take the risks associated with costs budgeting being conducted on the papers. However, one can of course see the attraction for Defendants in cases where liability is admitted.

As for the approach to be taken to costs budgeting, it is important to remember that any judicial comments made in respect of incurred costs should be recorded at the time the budget is approved (ideally in the recital to any order) which may well help the parties reach agreement on costs in due course at the end of the proceedings without the need for recourse to the detailed assessment procedure, thereby hopefully providing savings in terms of both time and costs. It should also be remembered that whilst the primary consideration is still whether the total costs proposed for each phase of the proceedings are reasonable and proportionate, it can be argued that in any given case it will also be appropriate to consider the rates and hours claimed. One can understand that it is often difficult not to take such matters into account when considering the total costs to be approved for each phase of the litigation and certainly in the writer's

experience this is very much the judicial approach taken on most occasions.

Finally, the costs for work included as a contingency need only be considered for approval where the court is of the view that it is more likely than not that the work is going to be required. If the court is not of such a view then parties ought to feel safer in the knowledge that when the improbable occurs recovery of the associated costs can still be sought, either by way of a revision to the budget, or because the work forms part of an interim application which (reasonably) was not included in the budget and is therefore to be treated as 'additional' to the approved budget figure. This should certainly help parties together decide what sort of work should be included as a contingency and should avoid the need for speculative work to be included in a budget out of concern that it may not be possible to recover the costs of such work in the event that it is indeed required.

About the author

John practices principally in the fields of personal injury, clinical negligence, regulation and professional discipline (particularly healthcare professionals). He regularly deals with actions involving all manner of complex injuries, including but not limited to spinal, brain, psychiatric and chronic pain. He also has particular experience in cases where conscious exaggeration or fraud is alleged and where causation remains firmly in dispute.

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