

Fixed Costs, Budgets and the Bill of Costs

Gary Knight, Harmans, discusses the implications of Lord Justice Jackson's Review of Civil Litigation Costs on how solicitors recover costs on behalf of their clients.



"To improve is to change; to be perfect is to change often."
Winston Churchill

The legal profession has faced a period of almost continuous change since the introduction of the Civil Procedure Rules in 1999, and never more so than following the publication of Lord Justice Jackson's *Review of Civil Litigation Costs* (The Jackson Report) presented in 2010.

There are many challenges to be faced, but the following may have the greatest impact on how solicitors recover costs on behalf of the client.

- Budgets
- Fixed costs
- New format bill of costs

Budgets

Case management powers under CPR Part 3 enabled the court to consider any available budgets of the parties, and to take into account the costs involved in each procedural step (CPR 3.17). In assessing costs on the standard basis where a costs management order has been made, the court was not to depart from the receiving party's last approved or agreed budget unless *satisfied that there is good reason to do so* (CPR 3.18).

The case of *Valerie Elsie May Merrix v Heart of England NHS Foundation Trust* (2016) considered the relationship between costs budgeting and costs assessment and determined the extent to which the costs budgeting regime under Part 3 of the Civil Procedure Rules ("CPR") fettered the costs judge's powers and discretion at a detailed assessment.

The Court at first instance considered that 'cost budgeting was not intended to replace detailed assessment' as found against the receiving party.

The Claimant's appeal heard by Mrs Justice Carr DBE [2017] EWHC 346 9QB found that the provisions of CPR 3.18(a) and (b) had "*shifted the burden to the paying party to show good reason at detailed assessment or summary assessment why the budget should not be departed from*" given that the consideration of a costs budget at a costs management hearing was not only to establish an individual fund, but to give the parties an indication as to what was reasonable and proportionate to spend prosecuting or defending their claim. Therefore, what was reasonable and proportionate at a detailed assessment, unless the paying party could show good reason as to why it was not the case, should be in accordance with any costs budget set?

Costs Judge, Master Whalan had considered a similar issue when assessing costs in *Harrison v University Hospitals Coventry & Warwickshire NHS Trust* and held that there could be no departure from the incurred costs figures in the budget without good reason.

Fixed costs

In January 2016 Lord Justice Jackson caused a stir by suggesting fixed costs should be applied to all costs in claims valued up to £250,000.

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His comments were perhaps borne out of frustration given the criticism aimed at the costs budgeting process, and fortunately he has distanced himself from the figure.

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New format bill

It may surprise some to discover Practice Direction 51L made under rules 47.6 and 51.2. provides for a pilot scheme ("New Bill of Costs Pilot Scheme") to operate from 1 October 2015 to 30 September 2017.

Initial uptake has been underwhelming, however the new format will become compulsory from October 2017.

In his review of Civil Costs, Jackson LJ suggested any new bill should include:

- a transparent explanation about what work was done in the various time periods and why.
 - a user-friendly synopsis of the work done, how long it took and why.
- The new bill should also be:
- inexpensive to prepare.

To achieve the above, it will be necessary to have a compatibility between time recording systems and a revised bill format. The idea that a bill of costs can be generated automatically and transmitted electronically is an attractive proposition. However, a reliable electronic bill produced using J-codes directly from a case management system would be dependent on faultless data and high levels of quality control.

In a speech given in April 2016, LJ Jackson suggested "decoupling" J-Codes from the new format bill of costs. This has led to the introduction of the new practice direction.

Under the new pilot scheme the parties are permitted to use the new format bill of costs but will not be forced to use J-Codes.

Three major changes to be faced by the legal profession, though one might say that fixed costs will make the need for budgeting redundant. Though if budgets remain and are to be treated as "carved in stone" what need is there for a new format bill of costs? ●

GARY KNIGHT is Partner at Harmans.