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Blog – Big Stories

Controlling litigation costs

The idea that the court must rubber stamp an agreed budget that it believes to be disproportionate goes against the grain of controlling costs.

Telling judges that they can't do what they want to has never made for an easy submission – and the idea that the court must rubber stamp an agreed budget that it believes to be disproportionate or comprise some disproportionate elements sits uneasily with the concept of controlling costs.

In the recent case of *Brown v BCA Trading Ltd and Others [2016] EWHC 1464 (Ch),* Mr Registrar Jones found within the notes to the current White Book a way to interfere with an agreed budget. He picked on the Petitioner's leading counsel's agreed brief fees as the one element that appeared disproportionate.

The note to Rule 3.15 of the CPR says "Rule 3.15(2) provides that, if the costs management order (CMO) is made, the court will then record the extent to which each party's budget is agreed or is approved by the court. Accordingly, the court should decline to make a CMO for the time being if it wishes to urge the parties to reconsider their budgets, whether or not those budgets are agreed."

The CMO was therefore not made in Brown and the Petitioner was asked to reconsider the trial fees of £445,000 (markedly higher than the Respondent's figure of £287,000). The Registrar was in effect saying 'try again', which adds delay and costs while extending the period of pre-budget costs.

CIVIG approach to agreeing budgets

This is not the first time the issue has arisen and I believe it was dealt with more effectively in *Various Claimants v Sir Robert McAlpine and Others [2015] EWHC 3543 (QB)*. This group litigation (known as CIVIG) was brought to secure compensation for the alleged black-listing of construction workers by several firms over a long period. The aggregate budgets for all sides came close to £50m and gave rise to two days in court before Mr Justice Supperstone, assisted by Master Leslie and the Senior Costs Judge, Master Gordon-Saker.

In addition to having to decide figures for those elements of the parties' budgets that had been challenged, the court was troubled by some of the phase totals that had been agreed. It dealt with this concern by marking the selected phase totals to give the costs judge a 'heads up' that there may be good reason to depart downwards from those elements of the budget.

There is logic and pragmatism to the CIVIG approach which is both consistent with the opportunity to comment on incurred costs and allows the budgeting to be completed in one session. Nor will there be any tension with the Merrix and Harrison decisions if, as I expect, that element of Harrison which clarified that good reason was needed to depart from an agreed or approved budget in either direction, is upheld on appeal in the next few weeks. Prior to these two first instance decisions many regarded the budget as an upper cap only which did not narrow the scope of argument sufficiently on detailed assessment.

The other helpful aspect to the CIVIG approach was that it removed the need for reticence on the part of the Claimants to express agreement in case it led to issue estoppel on a subsequent assessment. During the hearing, the Claimants preferred to offer no submission on some aspects of the Defendants' budgets rather than state express agreement.

For those of us who fear that an extension of fixed recoverable costs will lead to a form of injustice that ceases to provide genuine costs-shifting, CIVIG and Merrix/Harrison provide cause to be optimistic that costs management is a workable and preferable alternative.

Jackson recommendations

Experienced Jackson watchers have noticed that his consultation over fixed costs has begun to move him away from key elements of his starting position and that he appears to accept that the same fixed costs scale will not be appropriate for all types of case, and that the threshold of £250,000 is too high. For that reason, and buoyed by the experience in the Intellectual Property Enterprise Court, he is keen to introduce a voluntary pilot in the Mercantile Courts in London and Manchester that would cap rather than fix costs in cases worth up to £250,000.

He also recognises that there would need to be procedural streamlining for fixed or capped costs to become practicable. My sense is that his recommendations in July will be somewhat watered down and will not offer a quick or easy fix to the perceived problem.

In the meantime, at the front and the back ends of costs management, practitioners are coming around to the notion that budgeting is the least worst option of those on the table. Meanwhile those cost lawyers of a technophobic disposition are starting to accept that an electronic spreadsheet-based bill of costs might yet enable detailed assessments to avoid getting bogged down in the minutiae, and emerge as a viable method for resolving any loose ends of costs litigation that cannot be settled around the budget.

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