

# LONDON SOLICITORS' LITIGATION ASSOCIATION

## Budgeting - a response to the Civil Justice Council's review

### INTRODUCTION

The London Solicitors Litigation Association (LSLA) is over 50 years old and represents the interests of a wide range of litigators in London handling a broad range of civil and commercial litigation. Through its 950 solicitor members and strong links with a wide number of professional bodies, it represents nearly all civil litigation practices in London. The LSLA operates through a Committee of some 15 members which includes members of the Civil Justice Council, Civil Procedure Rules Committee, Law Society Civil Litigation Committee and local Law Societies. The Association has a long track record of responding to consultation papers and has drawn on a wide range of views in responding to the current consultation paper.

### 1 SUMMARY

- 1.1 As one approaches the topic of budgeting it is vital not to confuse the Court based method of controlling costs between the parties: estimates, with the tool that is essentially a means of the client controlling and monitoring his or her legal spend with the Solicitor – the budget.
- 1.2 Consequently we find confusing references to budgets being “signed off” by the Court and budgeting being a Court based process. In particular it should be apprehended that the more stages one introduces into Court proceedings the more expensive that procedure will become.
- 1.3 We advocate greater use of the Court's scrutiny of estimates at the Allocation Questionnaire and Listing Questionnaire stages of litigation. We urge the Council to examine how this system is being used and how it may be developed further.
- 1.4 In our view it is essential to understand the relevant terminology in this area:
  - Costs capping – a process whereby the Court sets, retrospectively, a fixed sum in relation to a party's or the parties' historic and future costs of court proceedings on the application of one or more of those parties.
  - Estimate – a summary prepared by each party to proceedings of the costs incurred and to be incurred required usually in Form H (but not necessarily in that format) at the Allocation Questionnaire and Listing Questionnaire stages. They can also be used to illustrate the

comparative costs of choosing between competing proposed directions.

- **Budget** - a summary of estimated costs prepared by a Solicitor for his or her client of the likely costs to be incurred in connection with contentious business. This will include both the pre-issue and post – issue costs. Usually prepared at the outset of instructions and revised as the case develops at intervals of no more than 6 months.

1.5 A budget is a function of the following factors:

- 1.5.1 client’s instructions;
- 1.5.2 the evidence available at the time the budget is produced;
- 1.5.3 the advice to one’s client;
- 1.5.4 the strategic and tactical choices made by the client in the light of the above.

1.6 An estimate expresses the costs incurred and to be incurred as a result of the process of developing the budget at the outset of the instructions. As such the budget may inform any debate about the issues but is not directly relevant to the issues at the Case Management Conference.

1.7 To introduce another stage in the litigation process called a “budget sign off” stage is not feasible given that litigation (under the pre-action protocols) begins so much earlier than the issue of proceedings.

1.8 Budgets are important for all litigation whether Fast Track or complex Commercial Court actions but are a matter for professional judgment in their preparation.

1.9 The Courts may exercise appropriate control over the costs of an action through estimates provided the Judges are properly trained and allowed sufficient time to consider and address the issues that arise.

## **2 Professional and commercial background**

Solicitors have been obliged to provide estimates to their clients about the cost of their services for some time. The relevant provisions are set out below:

Rule 15 of the Solicitors’ Practice Rules 1990 requires that(see Chapter 13.01):

**Solicitors shall:**

**(a) give information about costs and other matters, and**

**(b) operate a complaints handling procedure,**

in accordance with a Solicitors' Costs Information and Client Care Code made from time to time by the Council of the Law Society with the concurrence of the Master of the Rolls, but subject to the notes.

#### **Notes**

***(i) A serious breach of the code, or persistent breaches of a material nature, will be a breach of the rule, and may also be evidence of inadequate professional services under section 37A of the Solicitors Act 1974.***

***(ii) Material breaches of the code which are not serious or persistent will not be a breach of the rule, but may be evidence of inadequate professional services under section 37A.***

***(iii) The powers of the Office for the Supervision of Solicitors on a finding of inadequate professional services include:***

***(a) disallowing all or part of the solicitor's costs; and***

***(b) directing the solicitor to pay compensation to the client up to a limit of £5,000.***

The detail in rule 15 was replaced in September 1999 with the Solicitors' Costs Information and Client Care Code (the Information Code). The material parts of this are worth bearing in mind:

#### **3. Informing the client about costs**

***(a) Costs information must not be inaccurate or misleading.***

***(b) Any costs information required to be given by the code must be given clearly, in a way and at a level which is appropriate to the particular client. Any terms with which the client may be unfamiliar, for example "disbursement", should be explained.***

***(c) The information required by paragraphs 4 and 5 of the code should be given to a client at the outset of, and at appropriate stages throughout, the matter. All information given orally should be confirmed in writing to the client as soon as possible.***

#### **4. 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.***

***(b) The solicitor should explain clearly to the client the time likely to be spent in dealing with a matter, if time spent is a factor in the calculation of the fees.***

***(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.*

Additional guidance may be found in paragraph 13.03 at sub-paragraph:

2. **Wherever possible, a Solicitor should give an estimate of the likely cost of acting in a particular matter.....**
  3. **Oral estimates should be confirmed in writing and clients should be informed immediately it appears that the estimate will or is likely to be exceeded. In most cases this should happen before undertaking work that exceeds the estimate. The Solicitors should not wait until submitting a bill of costs. The Office for the Supervision of Solicitors 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...."**
  6. **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;**
    - (b) **explain to the client (and confirm in writing) any changed circumstances which will, or which are likely to affect the amount of costs, the degree of risk involved, or the cost-benefit to the client of continuing with the matter;**
    - (c) **inform the client in writing as soon as it appears that a costs estimate or agreed upper limit may or will be exceeded; and**
    - (d) **consider the client's eligibility for legal aid if a material change in the client's means comes to the solicitor's attention.**
- 3 Under the present rules a Solicitor can avoid providing any estimate at all if he or she can justify the decision not to provide an estimate. This remains the case under the Law Society's new proposed professional rules which are in the final stages of consultation at present (see draft Rule 2.03(5) which may be found on the Law Society's website: [www.lawsociety.org.uk](http://www.lawsociety.org.uk)). The consultation closes on 12 July 2004.
- 4 In Slade v Boyes Turner, a decision of Costs Judge Campbell sitting at the SCCO on 17 October 2003, the Costs Judge had this to say about hourly expenses rates:
- "It is plain from Wong that the client must be told if hourly rates are to increase. In my judgement it is insufficient for notification to be by inference, which happened in the present case. Whilst in theory with some detective work, the Slades could have worked out from the printouts**

**attached to the bills that Mr Parkinson’s rate had gone up from £170 to £180 per hour, in my opinion they were entitled to be told in terms about the increase.”**

As for the estimates:

**“In my judgment, it was or ought to have been clear to Mr Stephens by the end of January at the latest, that the December estimate would overshoot. Yet the problem was not raised with the Slades, even on the Solicitors’ case, until three days before the trial....Both Wong and the Practice Rules make it abundantly clear that clients must be told as soon as possible when it becomes clear an estimate is likely to be exceeded. It is incorrect for the notification to be given after the work is done, or the bulk of the fees are incurred, as happened here.”**

The provision of a budget for a piece of civil or commercial litigation is a more accurate method of fulfilling the Solicitor’s obligation to provide an estimate of the cost of the work he or she is being asked to undertake. It is our view that, in the proper context, budgeting should come to provide a means of accurately answering one of the 3 perennial questions any client seeks to answer at the outset of his or her case: how much will it cost?

In turn this enables an accurate risk/benefit analysis to be performed thereby assisting the Solicitor to fulfill another professional obligation, see rule 4(k) of the Information Code:

#### **Cost-benefit and risk**

**(k) The solicitor should discuss with the client whether the likely outcome in a matter will justify the expense or risk involved including, if relevant, the risk of having to bear an opponent’s costs.**

- 5 In the wider commercial context there is every expectation that a Solicitor should be able to provide a reasonably accurate estimate of the cost of his or her services. In other professional contexts such estimates are part of the fabric of the service. For example, architects. Many hundreds of thousands of pounds are expended on building projects based on estimates. These estimates may be subject to revision but the estimates are nevertheless provided as a means of assessing performance and enabling the client to budget for the cost of the exercise.
- 6 However, in the Law the procedure has been to deal with costs at the end of the project. It has often been said that it is “impossible” to estimate costs accurately at the outset of a case. It is our understanding that the Law Society continues to maintain that argument. It is possible for solicitors to provide to their clients budgets at the beginning, but only on the basis that those budgets are regularly reworked and updated during the course of the case. It often means that

the end figure incurred bears little relationship to the costs estimated at the beginning of the case, but there is no complaint from the client since the client has been kept fully informed along the way.

- 7 The imperative for budgeting to be adopted as a good business practice by Solicitors in civil and commercial litigation is being given additional impetus by third party funding sources such as Insolvency Management and After The Event insurance providers. All of whom expect a budget to be produced before they agree to fund a case or provide insurance to cover costs.
- 8 Increasingly commercial clients are expecting budgets to be presented. The provision of a budget is also seen as a tool to aid decisions about strategy and tactics and is invaluable in determining the cost/benefit analysis of any particular action.

## 9 Judicial trends

The debate about budgeting arises from a number of decisions of the Courts beginning with an otherwise anonymous decision of HHJ Alton at Birmingham County Court in June 2000 when he made the observations quoted by Lord Woolf in Jefferson v National Carriers [2001] 2 Costs LR 313 at para 40(CA):

**“In modern litigation, with the emphasis on proportionality, there is a requirement for parties to make an assessment at the outset of the likely value of the claim and its importance and complexity, and then to plan in advance the necessary work, the appropriate level of person to carry out the work, the overall time which would be necessary and appropriate spend on the various stages in bringing the action to trial and the likely overall cost. While it was not unusual for costs to exceed the amount in issue, it was, in the context of modest litigation such as the present case, one reason for seeking to curb the amount of work done, and the cost by reference to the need for proportionality.”**

Closely followed by Griffiths v Solutia 26 April, 2001, CA, unrep. in which two members of the Court expressed themselves thus:

**"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" (Mance L.J.) "... surely case management powers will allow a judge in the future to exercise the power of limiting costs, either indirectly or even directly, so that they are proportionate to the amount involved" (Sir Christopher Staughton).**

and ending most recently with the decisions in Slade (above) and Leigh v Michelin Tyres decided by the Court of Appeal on 8 December 2003. These decisions concern questions about cost-capping and estimates in cases involving clinical negligence, ruined holidays and personal injury claims. Some were

concerned with individual claimants with substantial claims. Most were cases involving low value claims in the Fast Track. Only one has been concerned with commercial litigation - Griffiths v Solutia.

10 Some judges have embraced the role of estimates (e.g. District Judge Lethem at Tunbridge Wells County Court) whereas others do not appear to understand the role of estimates at all. For example, His Honour Judge Mitchell at Telford County Court on the hearing of the first appeal in Leigh. In contrast we understand that the Costs Judges at the Supreme Court Costs Office are in favour of the use of budgets in litigation.

11 None of the cases have yet addressed the proper role of a budget in civil and commercial litigation. Hence the criticism by the Court of Appeal in AB v Leeds Teaching Hospitals for the time lavished by both parties' lawyers in the preparation of estimates of costs. In the Court of Appeal's judgment in Leigh the Court invited the Civil Procedure Rules Committee to review the role of budgeting. This plea has led to the involvement of the Civil Justice Council in this issue.

## 12 **Budgeting methodology**

The budget in modern practice should take its place within project managed litigation. Following the implementation of the Civil Procedure Rules in 1999 the law and practice of civil and commercial litigation in England and Wales has, paradoxically, become much more complex than was previously the case; especially in relation to costs. Project managing has therefore become essential.

13 The pre-issue stages of a claim are the latest battleground with pre-action disclosure applications and the Protocols becoming fertile ground for the growth of work and consequently cost.

14 This development has tremendous significance for the difference between estimates provided at Allocation Questionnaire stage and those costs claimed on detailed assessment. If the preparation of an estimate is left until this, now relatively late, stage it is more likely than not to be inaccurate; as the Courts are discovering when these cases come before them. There is almost always a wide discrepancy between estimated costs and actual costs.

15 Solicitors are finding challenges to costs being made at detailed assessment based on breaches of the Indemnity Principle. The argument being that because the estimates provided at AQ stage were far below that of the actual costs the client does not have informed consent about those costs and cannot, therefore, be liable to pay them.

16 The proper place and role for a budget is in the development of the Solicitor's

- retainer with the client at the outset of instructions. So much work is undertaken prior to issue that to leave a budget until the Allocation Questionnaire is completed is probably negligent and professionally unacceptable.
- 17 However, once a budget is in place it may be reviewed regularly (at least every 6 months) and revised as the understanding of the case develops. Appropriate provision may be made to reflect the unexpected in the form of contingencies. As such the budget becomes a highly effective tool in the estimating of costs at the AQ and LQ stages.
- 18 There is a divergence of view amongst our members about the viability of budgeting in commercial litigation. Some of us take the view that the stages of a piece of litigation are a known quantity, that the uncertainties are limited, that they may be provided for by way of contingency items and that the discipline of regular review and revision may allow for the changing understanding of cases. On that basis the result would be a figure which can be used to measure performance and allow clients to anticipate and plan for likely costs as one's understanding of a case develops. However, we must make it clear that other members do not share this opinion and are of the view that it is not possible to predict the costs of commercial litigation in this way.
- 19 There is software available to calculate budgets for cases. We are aware of Legal Budgets' software which is available for free trial from their web site ([www.legabudgets.com](http://www.legabudgets.com)). Wragges, the Birmingham law firm, have produced a software package (called Midas) which is based on cost data from their own cases. How successful this will be remains to be seen. Masons undertook a similar exercise which proved to be unsuccessful because the diversity of cases defeated the attempt to produce a standard analysis applicable to all cases. Hence we do not accept the "benchmark pricing" approach advocated by Professor Peysner at page 31 of his interesting article on budgeting in Civil Justice Quarterly 23 (2004). Such data can be indicative but not uniformly conclusive. An attempt to achieve such a database for internal use may be found at [www.guisesolicitors.co.uk](http://www.guisesolicitors.co.uk).
- 20 There is also Microsoft's Project software tool. This is used in large building projects to plot the build plan and associated costs. In our experience this software is too sophisticated for most civil and commercial cases. The use of Legal Budgets' software for larger claims or an Excel spreadsheet in lower value claims may be sufficient to provide a budget with the clarity sought by most clients.
- 21 This point addresses an important misconception about budgeting. It is not a tool for "predicting" costs in the sense of predetermining what the costs of an action may be. It is therefore quite a different creature to the Matrix of

Professor Zuckerman or the Personal Injury Protocol recently developed by the Civil Justice Council for "bent metal with injury" cases.

- 22 The complexity of civil and commercial litigation is such that the rigidity of prediction cannot apply. However, it is a highly flexible tool for monitoring costs and producing an estimate at any one time that is more accurate than the current hit and miss approach adopted by many Practitioners.
- 23 As such we do not see the budget as something to be approved by the Court. It cannot be because the budget addresses costs incurred in the Protocol period which is usually long before Court proceedings are issued in modern litigation. However, it is invaluable as a tool to fulfill professional obligations, to plan cases and to facilitate more accurate estimates at the AQ stage.
- 24 The budget may become relevant at detailed assessment especially in the context of justifying estimates given at AQ and LQ stages. At this stage it may become discloseable and the subject of debate. Such debate would be much more informed than hitherto has been the case in the absence of a plan for the case accompanied by a contemporaneous progression of budgets. Indeed we would expect the number of detailed assessments to diminish dramatically as the effect of accurately prepared estimates backed by budgets reduces the scope for argument to a debate about quantum. However, other of our members take the view that issues of privilege
- 25 Interestingly the Association of Law Costs Draftsmen at their National Conference on 5 March 2004 expressed concern that their role in detailed assessments may be diminished as a result of the rise of budgeting.

## 26 **Some criticisms of budgets**

It is useful to examine some typical arguments against the budget to illustrate contemporary misconceptions.

### a) **Budgets would be a tool for attacking the other party's evidence base**

In our view the budget as such would not be disclosed at the outset but issues about tactics and strategy would be open to parties, as they are already, under the costs-capping jurisprudence which is becoming quite sophisticated. Budgets do not therefore give rise to this but do assist in enabling a coherent debate by providing an accurate forecast of costs.

### b) **CFA litigation means that clients have no interest in the level of costs and budgets would be irrelevant to them.**

As we have explained (para. 15 above), whilst the Indemnity Principle remains in place Receiving Parties will continue to face arguments about

breaches of that Principle arising from poor estimates. Dealing with the relevance of budgets in the CFA context itself we observe that the budget is directly relevant to questions of proportionality of success fee and risk assessment.

- c) **Judges do not have the training or experience to be able to deal with budgets accurately.**

As we have explained, budgets should not come before the Courts save as the basis for estimates at AQ and LQ stages. However, the Courts are showing through the decisions referred to in paragraph 9 to be more than competent to deal with the issues arising.

In any event, lack of training or experience should not be a reason for not undertaking a thorough examination of estimates at AQ stage. Rather a reason for investing in the training to enable judges to understand the issues underlying estimates.

- d) **There will be a significant increase in Court time as there will be a budget in every case, whereas very few cases go to detailed assessment.**

The budget should not, in our view, be presented to the Court. However, at present there is a requirement to prepare an estimate at AQ stage and that may be reviewed at the Case Management Conference. In the future it is likely estimates will be the subject of greater scrutiny and that cannot be avoided given the decision in Leigh.

- e) **Costs will be inflated as parties feel the need to overstate budgets for fear of them being cut and then there will be pressure to make the costs match the budget.**

This again should not, in our view, be an issue for the budget but for debate at AQ stage in the context of costs-capping and estimating.

- f) **Experience in clinical negligence claims shows the difficulty in producing an accurate budget in the early stages of a case.**

The views and experience of members of our Association differ on this issue. Some of us are firmly of the view that in commercial litigation the uncertainties are limited and may be provided for by way of contingency items. The discipline of regular review and revision allows for the changing understanding of cases. The result is a figure which can be used to measure performance and allow clients to anticipate and plan for likely costs. However, we must make it clear that other members do not share this opinion and are of the view that in a significant proportion of complex commercial litigation it is not possible to

predict costs in this way and to the extent necessary for any realistic ongoing case management purpose.

**g) Budgets will become determinative of the issues and an end in themselves.**

We agree that the budget will determine which issues should be pursued and those which should not based on cost and risk benefit analyses inferred by an understanding of the costs involved. In our view this is a reason for budgeting not the other way around.

**h) No case may be suitable for budgeting**

In view of the kind of cases that have come before the Courts involving estimates and the points made in those decisions it is our view that every case is susceptible of a budget. Although the level of sophistication applied in preparing the budget will vary from case to case.

**i) A pilot cannot be conducted because there is too little information available.**

In our view a pilot is not required. What is required is for the guidance to the new professional rules about estimating costs to contain the requirement to budget as part of a project management approach. Training of lawyers will be required to enable them to grasp the principles of project management and budgeting. However, this is not a reason for not seeking to enshrine best practice in professional rules.

The Association does not consider that there is a role for the Court in budgeting, contrasted with estimates, which are already a part of the CPR.

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