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Costs management needs to be reviewed

A leading judge has expressed his “deep unease about the desert of applications” to vary costs budgets - with practitioners responding that they are positively avoiding doing so.

A roundtable made up of judges and leading practitioners, organised by the Association of Costs Lawyers (ACL) to mark two years of costs management, also heard concerns over continuing lack of knowledge on both sides of the bench about how to do it. District Judge Chris Lethem – a member of the Civil Procedure Rule



Costs are under the spotlight

Committee and Judicial College trainer on costs – said he “hardly ever” saw applications to vary budgets. He said: 'I am deeply uneasy about that desert of applications, because either I have achieved a crystal vision which I thought I did not possess, or the parties are storing up a heap of problems later on down the line because they did not apply to vary, and when they get to the end of the process they are suddenly going to find they have overspent.'

Avoiding making applications to vary

Francesca Kaye, a partner at Russell-Cooke and immediate past president of the London Solicitors Litigation Association, said she was “positively avoiding” making applications to vary. She said: 'The risk of making an application to amend or vary a budget is firstly that the proposed amendment, depending on why you are applying to amend, might not be allowed; secondly, we have heard some horror stories of making an application to amend, and the judge taking one look at the budget that previously had been granted, and taking it as an opportunity to have another go at it.'

This led on to a discussion about the use of contingencies in budgets, and Mr Justice Warby said he found them “problematic”. He explained: 'What I have found in the few cases where I have seen this, is that people are packing their budgets with contingencies to give them a bit of wriggle room. Some of the contingencies are not even labelled; they are just ‘Contingency B’. A lot of them are wholly speculative, and it does not seem to me to be a very helpful exercise.'

Unsurprisingly, although most lawyers are getting to grips more with budgeting, the consensus around the table was that it is mainly smaller firms that are still struggling. District Judge Margaret Langley said: 'There are still a few who just do not file their budgets on time and get caught out... They do tend to be the smaller firms, and when they prepare their budgets, you do wonder if it has been done on the back of an envelope because there is no rhyme or reason to it.'

Participants shared anecdotal tales of district judges outside of London refusing to budget cases where liability has been admitted, or only budgeting some way forward in the expectation of a settlement. District Judge Ian Besford added: 'Anecdotally, I have heard some colleagues are setting up budgeting to be done by the enthusiastic deputies, which is definitely not what is meant to happen.'

No budgeted cases

Senior Costs Judge Gordon-Saker confirmed that no budgeted cases have yet reached the Senior Courts Costs Office for detailed assessment, but District Judge Lethem said he still expected there to be 'huge fertile ground for detailed assessment'. He said: 'Statistically, most of these cases are going to settle. Then the whole issue arises about how much of the phase it was reasonable to have spent, because the receiving party will say, “Gosh, yesterday I finished taking all of my witness statements, so I will have that phase in its entirety”, and the other side will say, “(a) you did not, and (b) if you did, that was unreasonable”. Therefore we have still got a huge area there. Plus we have got the whole area of what is good reason [to depart from the budget].'

ACL chairman Sue Nash said: 'The roundtable demonstrated that while practitioners and judges have gained a good deal of experience over the past year in particular, there is still a considerable way to go before we fully understand the best way to approach every aspect of costs management, especially those later on in the process, such as variation and detailed assessment. It is important that practitioners look at the process from the wider perspective of cost management, of which budgeting is part. It needs to be managed, reviewed and overseen, and I am finding that Costs Lawyers are in the perfect position to co-ordinate this exercise.'

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