

Grains of sand

How costs are being managed post-Jackson is still in flux, says **Georgina Squire** as she looks at the difficulties surrounding Form H



The Jackson Reforms may still be in their infancy but practitioners are already seeing how the court's new case management powers, particularly around costs, are being applied. The overriding objective of the CPR 1.1 has been amended to reflect the new post-Jackson era, requiring cases to be dealt with "justly and at proportionate cost".

Is the judiciary getting involved in cost management from the outset of a case? The simple answer is yes.

Predicting and controlling costs in advance of them being incurred is central to the Jackson reforms. Costs must be proportionate to the value of the dispute to be capable of recovery in successful claims. Parties to multi-track cases must now exchange detailed costs budgets at an early stage in the new Form H, usually seven days in advance of the first case management conference (CMC).

At the same time they must file and serve on the opposing parties to the claim a Disclosure Report explaining how they anticipate handling disclosure and the comparative cost of their proposed course as compared with standard disclosure. The costs estimates in that report should fit with the Form H costs.

Early indications are that it is likely costs judges may look closely at Form H when assessing costs. It is assumed that they will not award costs in excess of the Form H budget by category of work, on assessment. It is also seen as unlikely that judges will allow applications to change the Form H budget once approved, unless there is a very sizeable change to a claim. All the more reason to spend time on it and ensure it is as close as possible to the best prediction of the cost of the claim.

Recent decisions in *Henry v News Group Newspapers* [2013] EWCA Civ 19 and *Murray & anor v Neil Dowlman Architecture*

Ltd [2013] EWHC 872 (TCC), in which the Court of Appeal and High Court allowed departure from agreed budgets under defamation and TCC pilot schemes, were thought potentially to undermine the spirit of the new regime, although the facts of those cases were unusual.

The *Murray* decision, in particular, demonstrates the risks in circumstances where an application for rectification of the costs budget was allowed only because of a mere technicality.

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In *Elvanite Full Circle Limited v AMEC Earth & Environmental (UK) Limited* [2013] EWHC 1643 (TCC), the judge made clear the need to make a formal application to amend the costs budget as soon as it becomes apparent that the original budget has been exceeded "by a more than minimal amount".

Form H is a complex document requiring granular detail of hours spent for particular compartments of work in the life of a claim – split by level of fee earner, counsel, experts and disbursements. It is not easy to complete. It is difficult, some say impossible, to predict at the point of the first CMC when they have to be filed, as to what course an action will take to trial, so there is a lot of budget guesswork involved. Form H does not accommodate all elements of a claim. It is necessary to fit the work likely to be done into the categories offered on the form. The contingencies section is available

for additional elements. The assumptions section at the end is probably the most important part of the form. This is where the practitioner can limit in detail the work anticipated and covered by the budget. Care and time spent in drafting the assumptions is time well spent.

Judges are using their new case management powers to cut Form H costs levels at the CMC, giving as their main reason proportionality to the claim value. Some judges appear to be comparing the bottom-line figure for damages in a claim with the bottom-line costs figure to take the case to trial, including disbursements such as counsel and experts.

Recent cases demonstrate that the court is likely to take a firm line on costs budgeting. In *Fons HF v Corporal Ltd and another* [2013] EWHC 1278 and *Berg v Blackburn Rovers Football Club and another* [2013] EWHC 1070 (Ch), an application for an extension of time was very nearly refused in circumstances where the judge cited the new rules requiring him to "pay close attention to the failure of parties to comply with rules, directions and orders. A failure to comply with a rule, direction or order is of itself a clear breach of the overriding objective and is likely to result in severe sanctions".

- Take care to prepare the Form H. Do not assume you can amend it when the claim evolves. It is likely to be fixed.
- Use the contingencies and assumptions sections.

Costs budgeting is here to stay.



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