NEW SQUARE

The tactical use of costs budgets during litigation

2nd March 2016

White Paper Costs Conference

Roger Mallalieu

Tactical Point 1 – controlling the shape of the litigation

"First, case management and costs management go hand in hand. It does not make sense for the court to manage a case without regard to the costs which it is ordering the parties to incur. The Rubicon was crossed on 26th April 1999, when the court assumed under the CPR wide powers and responsibilities for case management."

- CPR 3.12:
  - The purpose of costs management is "*that the court should manage both the steps to be taken and the costs to be incurred by the parties to any proceedings*";
  - Costs management may (should?) therefore be a key determinant in how the case is to be conducted;

Relevant issues where budgeting might bite

1. Witness evidence; number of witnesses, length of statements and issues that they may address – CPR 32.2(3)

2. Expert evidence; - identity & number of experts, fields, single or joint, updated reports, oral evidence, whether concurrent, recoverable fees, – CPR 35.4

3. Disclosure; the disclosure menu at CPR 31.5(7), scope of searched, staged disclosure, format of disclosure etc;

4. Litigation team – level of fee earners to be deployed, Counsel team;

5 ADR – court encouragement -v- the risk of providing an opponent with a reason not to participate;

Practical Examples – witness evidence

Fenty v Arcadia Group [2013] EWHC 1945 (Ch)

- *" we are moving towards a regime more like the Patents County Court system. The significance of that is that the ability to restrict evidence does not now depend on whether it is characterised as expert evidence or not. It is now clear that evidence can be controlled, however it is characterised."*
- *"… a party will need to be able to say at the case management conference what sort of evidence they intend to call."*

Maclennan v Morgan Sindall [2013] EWHC

- Severe brain injury case
- Quantum only;
- C proposed 43 witnesses;
- Court limited C to 14 witnesses on comparative earnings plus potentially a further 14 witnesses;
- Tight directions for witness evidence given

GSK v QPR [2015] EWHC 2274 (TCC)

- 2-3 witnesses;
- 260 hours of fee earner time, 20 hours of counsel and 67 hours of QS;
- Where most of the evidence had already been obtained;
- The claim for time was 'quite simply absurd'
- 80 hours allowed for (including reading D's evidence);

Practical Examples – expert evidence

Kranidiotes v Paschali [2001] EWCA Civ 357

- Accountant single joint expert;
- Fee quote - £75,000;
- Court prospectively held the fee was disproportionate and ordered use of a different expert;
- Old test of proportionality;

CIP v Galliford Try [2015] EWHC 481 (TCC)

- *"…the claimant's experts rates are excessive and there is a real risk that those involved…are overcharging rather than allowing the claimant the benefit of appropriate economies of scale"*
- Future spend of £1m reduced to £650k.

Lewis v Narayanasamy [2013] EWHC 3952 (Ch)

- Permission to rely on expert evidence overturned on appeal;
- A failure to give the court proper details of the likely cost meant it had been denied a chance to consider proportionality and permission should therefore not have been given

Practical Example – disclosure

Dorchester Group Ltd v Kier Construction Ltd [2015] EWHC 3051 (TCC)

- D's budgeted figure for disclosure £120,000;
- By time of application, sum spent by D on disclosure circa £500,000;
- Argument that C's specific disclosure application should be dismissed as disproportionate rejected. The flaw was in D's handling of disclosure;
- Further and specific disclosure was ordered (though not as wide as sought);
- No mention of any application to vary the budget – though the specific disclosure application may have been caught by CPR 3 PD 3E 7.9;

Tactical point 2 – controlling expenditure

- Maximising own available resources;
- Maximising likely between the parties recoverability;
  - Therefore minimising client risk
- Minimising opponent's resources;
  - Especially if the opponent's legal team is only being paid by recovery;
- Maximising opponent's likely shortfall;
  - Impact on the commerciality of the litigation;
- "*What is reasonable and proportionate … must be judged objectively. The touchstone is not the amount of costs which it was in a party's best interests to incur but the lowest amount which it could reasonably have been expected to spend in order to have its case conducted and presented proficiently... Expenditure over and above this level should be for a party's own account and not recoverable from the other party…"* (Kazakhstan Kagazy [2015 EWHC 404)

Maximising the budget

Clear and sound assumptions;

Clarity as to what is included (and not) – Yeo v Times Newspapers [2015] EWHC 209;

Understanding contingencies & PD 7.9;

Ability to explain and justify;

Understanding the process (?)

The CIP v Galliford Try [2015] EWHC 481 (TCC) / GSK v QPR [2015] EWHC 2274 (TCC) debate;

Monitoring the budget and the case – and making prompt applications for revisions where appropriate – PD 7.6;

Being prepared for the end of the case:

- Good reasons;
- Judicial Comments (query whether possible at the end of trial – see CEF v Bibby & contrast Elvanite);
- Precedent Q;

Tactical point 3 – improve cashflow

- An approved budget is a basis for a substantial payment on account;

- See;
  - Pink v Victoria Secrets [2014] EWHC 3258 (Ch);
    - "*The impact of costs budgeting on …a payment on account of costs is very significant*";
    - But for costs budgeting, the payment on account would have been £350,000 (approx.);
    - In light of the budget, the payment on account was £645,000 (£1,000 more than C asked for) – 90% of the budget
    - Note the court's treatment of the approved budget as being covering both incurred and estimated costs;

- Need to be ready for the argument – especially where the claim concludes part way through a phase;

Two further examples

Excelerate Technology v Cumberbatch [2015] EWHC 204 (QB)

- Costs awarded on the indemnity basis – therefore the budget was strictly irrelevant to the assessment;
- 90% of the costs (incurred and estimated in the approved budget) allowed as a payment on account;
- Note also Capital Enterprise Fund v Bibby – 80% of approved budget allowed on account, even in a 'cautious' case;

Kellie v Wheatley & Lloyd [2014] EWHC 2886 (TCC)

- Approved budget (incurred and estimated costs) was £91,700;
- Claimant sought a payment on account of more than that sum – in light of a longer trial than had been estimated;
- The Court refused – but ordered a payment on account of £90,000;

Thank You

Roger Mallalieu

2nd March 2016

4 NEW SQUARE LINCOLN'S INN
LONDON WC2A 3RJ

WWW.4NEWSQUARE.COM

T: +44 20 7822 2000
DX: LDE 1041
E: CLERKS@4NEWSQUARE.COM