

Cutting your cloth

Rani Mina considers the impact of the new Practice Direction on costs budgets



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'The new Practice Direction may increase the risks that lawyers face as, should the approved costs budget prove to be wide of the mark, they will not only have an unhappy client but could face a claim if the budget was prepared negligently and the client is penalised on an assessment.'

Despite popular perception, lawyers are acutely conscious of the risk of costs becoming disproportionate in litigation and the importance to clients of understanding the likely amount and when costs will be incurred. Clients often request a costs budget for the delivery of legal services and require the engagement to be managed consistently with the budget. This is soon to be formalised in a new Practice Direction (PD51F) due to commence on 1 October 2011. It will take effect as a pilot in the Technology and Construction Court and Mercantile Court, and is likely to be rolled out to other courts in due course.

Birmingham pilot

The pilot represents an extension of a scheme currently running in the Birmingham Mercantile Court. His Honour Judge Simon Brown QC reports that this scheme has been 'enthusiastically welcomed and practised here in Birmingham', although there is little hard data available with which to assess its operation.

PD51F will require a costs budget to be completed by each party, filed with the court and exchanged with the other side. This should follow a standard template, which is attached to PD51F, and requires a cost estimate for each of the intended activities to be undertaken (eg disclosure, preparation of witness statements and obtaining expert reports). Mediation is included in PD51F as one of the intended activities for which the costs budget should make reasonable allowance, providing judges with another opportunity to urge this process on the parties, especially in cases where the costs budget indicates that costs are at risk of exceeding the value of the claim.

Costs budget structure

In addition to intended activities, the assumptions on which the costs budget is made, and any 'identifiable contingencies', will need to be identified. Examples of identifiable contingencies may include an application for specific disclosure or resisting an application threatened by the other side. There are myriad assumptions that might be made and added to the costs budget, including assumptions about:

- the behaviour of the lawyers on the other side;
- extensions of time;
- the need to amend statements of case;
- issuing Part 20 applications to join additional parties; and
- the co-operation of witnesses.

The real skill will be in assessing the case properly, bearing in mind that the precise course of any dispute is difficult to predict at the outset, while resisting the temptation to include innumerable caveats that will render the costs budget meaningless (and annoy the judge).

PD51F also provides that the court will review the budget for each party and decide whether to make a 'costs management order'. If the court decides to make an order, it has a wide discretion to make 'appropriate revisions' prior to approval of the budgets. In essence, if a party submits a budget that is considered to be disproportionate to the value of the claim, the court may refuse to approve the budget and effectively replace it with another budget. This might involve or lead to:

- limiting the length of statements of case, witness statements and written submissions;
- questioning the use of larger law firms or senior counsel in cases where such costs are disproportionate to the value of the claim or the significance of the issues to be determined;
- refusing to make a standard disclosure order and requiring disclosure to be issues-based;
- insisting on competitive tendering for expert services or encouraging parties to use third-party vendors or outsourcers for disclosure exercises;
- limiting the number of expert issues and increased insistence on joint experts (particularly amongst co-claimants or co-defendants); or
- guillotining the time allowed at trial for opening and closing submissions or cross-examination.

PD51F provides that a party must notify and explain to the court any increase in the budget and the court may approve or disapprove of departures from the budget. The court will not depart from the approved budget without good reason. Either party is free to exceed their approved budget but, if a party does so, it may not be awarded all of its recoverable costs, insofar as these exceed the approved budget, if it wins the case. Similarly, if the initial budget is off the mark, or costs are not managed carefully throughout the case, the court may refuse to approve a revised budget and the successful party may be penalised on assessment.

The court may also order attendance at a subsequent costs management hearing in order to monitor expenditure.

Under PD51F the parties are encouraged to discuss their budgets while they are being prepared and before each CMC and other hearings. Any party may apply to the court if it considers another party is 'behaving oppressively in seeking to cause that party to spend money disproportionately on costs'. These provisions allow for a degree of tactical thinking around costs budgets and could, for example, be deployed

where there is a disparity in the resources available to each party, in an attempt by one party to level the playing field.

Even where the parties are evenly matched in terms of resources, there are other ways in which these provisions may be used as a tactical weapon. For example, if the issue in dispute relates to the interpretation of a contract, it may be that it is in one party's interests to limit the amount of factual matrix evidence that may be produced. One means of trying to achieve this may be to submit a budget with a particularly low estimate for disclosure activities. It is likely that the other party will be under pressure in this situation to justify a significantly higher estimate and to demonstrate to the court that a more wide-ranging and expensive disclosure exercise is appropriate and proportionate. Tactics of this type are not new in the litigation process, but the PD51F will bring a sharper focus on the cost aspect of such considerations.

Case management

Clearly, the PD51F will require the court to take an even more active role in managing cases consistently with the overriding objective of dealing with them justly. This already requires the court, so far as practicable, to ensure that the parties are on an equal footing to save expense and deal with cases in ways that are proportionate. It may also increase the risks that lawyers face as, should the approved costs budget prove to be wide of the mark, they will not only have an unhappy client but could face a claim if the budget was prepared negligently and the client is penalised on an assessment.

Internal systems

Judges and lawyers alike will need to hone their legal project management skills if they are to implement the PD51F effectively. Some limited training is being provided to judges for this purpose, while law firms will need to audit their current systems or implement new systems to ensure that their lawyers are able to provide robust costs budgets, monitor costs throughout the case and are alerted promptly if costs are being incurred at a rate that is likely to exceed the approved budget. This will involve utilising a law firm's existing accounting system

and may also require the development and implementation of new software packages designed for cost-budgeting purposes.

Of course, there is a danger that introducing new practice requirements such as this will prove to be counterproductive (if the costs of the case management increase due to the additional time and cost incurred in complying with PD51F and arguing about changes to the budget). This possibility needs to be balanced against the benefits that will come from increased transparency about each party's approach and costs, and the emphasis on holding parties to their approved budgets. This should enable litigants to assess their financial risks with more certainty and at an earlier stage, which will in turn allow for more informed decisions to be made about the merits of pursuing a case or settling.

On an even more positive note, his Honour Judge Simon Brown QC has commented that cost budgeting will help to enlighten the eye of justice by doing away with 'lengthy woolly pleadings, verbose witness statements drafted by lawyers and reams of irrelevant paper', and that it may lead to detailed assessments becoming redundant, all of which would represent real cost savings for litigants and the court.

Conclusion

The bottom line is that costs management and budgeting should not be regarded as anything new or as imposing new burdens and responsibilities on lawyers. The Woolf reforms introduced the concept of active case management many years ago, and costs management has always been an inherent aspect of active case management. Lawyers have long been required to provide their clients with cost estimates and to keep these under review and updated throughout a matter. PD51F, which ties in closely with the proposals made by Jackson LJ in his Review of Civil Litigation, is another step along this path. It should not only be seen as an effort to control costs in civil litigation. It is an opportunity for lawyers to strengthen their client relationships by helping to ensure that expectations in this important area are met and exceeded. ■