

BUDGET, DON'T BODGE IT!

Charles Dickens well knew the importance of observing a budget. In his day, fail to cut one's cloth to suit one's pocket and you could end up in gaol. Indeed, that is exactly what happened to Mr Wilkins Micawber, a character in David Copperfield based on Dickens' father, who himself ended up in a debtors' prison. As Mr Micawber famously said:

"Annual income twenty pounds, annual expenditure nineteen pounds nineteen and six, result happiness. Annual income twenty pounds, annual expenditure twenty pounds ought and six, result misery."

Whilst incarceration will not await those who exceed the soon to be introduced litigation costs budgets, explaining to your client (or the Senior Partner!) why a proportion of the costs incurred are irrecoverable for reason of budgetary excess, will not be very nice either.

If "*budgets, what budgets?*" has been your reaction so far, it would pay you to read Mr Justice Ramsey's paper for the Law Society Conference on 29th May 2012. It can be found at: <http://www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/costs-management-sixteenth-implementation-lecture-300512.pdf>

The paper details the Government's intention to bring clarity and certainty to the cost of litigation before cases have been concluded and the money spent. Not a bad thing on the face of it, as without some form of insurance or success-based funding arrangement, many people are frightened off litigating legitimate claims for fear of what it could cost them – the fear of the unknown, or '*blankchequeophobia*' as it

might be termed. So, if the intention is to introduce budgetary constraint with teeth, how will it be done?

The 1st April 2013 sees the advent of costs budgeting for all multi-track cases commenced on or after that day in a county court, the Chancery or Queen's Bench Division (except for the Admiralty and Commercial Courts). The provisions, set out in the new Rule 3 and Practice Direction 3E, are designed to enable the courts to manage cases in order to control the amounts being spent in pursuing them.

The Court will exercise this control by way of determining a costs budget for matters in costs management orders. The budgets will need to be monitored and updated and re-approved (or otherwise!) as the case progresses. The provisions are detailed, but if the costs budgeting applied under PD 51D in defamation cases since 1st October 2009 is any guide, put simply, stick to the budget and you should recover the costs within it; stray from it and you will struggle to recover the excess. Indeed, this has been codified (almost), in Rule 3.18. This states:

3.18

In any case where a costs management order has been made, when assessing costs on the standard basis, the court will –

(a) have regard to the receiving party's last approved or agreed budget for each phase of the proceedings; and

(b) not depart from such approved or agreed budget unless satisfied that there is good reason to do so."

The mechanism of the scheme is basically as follows. A costs budget has to be prepared and exchanged by all parties (except Litigants in Persons) within 28 days of service of the Defence and an attempt made to agree them. The court will then consider the budgets and either approve or revise them, making a costs management order to do so.

The budget has to be set out in a detailed spread-sheet showing the costs already incurred and, as a separate amount, the estimated costs required to conclude the case. There is provision for the inclusion of contingencies in the budget and these might save you embarrassment on some occasions. There is also provision for applying to amend budgets once set and it is essential that one does so in order to stand a chance of recovering the costs being incurred over budget.

As can be imagined, the potential pitfalls are considerable - get the budget wrong and it is likely to cost your client (or firm) dear. So how do you beat the budget and come out smiling (or at least not grimacing) at the end of the case? The answer appears to be simple, yet difficult – plan ahead, keep on top of the costs being incurred and apply to revise budgets whenever necessary. Of course, despite the best and most carefully thought out plan, you'll still be in the lap of the gods, but at least you will have done all that is possible to secure as good an outcome as possible.

So what are the imperatives? I think they can be encapsulated thus:

1. Start your 'informal' budget at the outset of the case and revise it regularly as you proceed. 'Laggardly' conduct will not be rewarded.

2. You should do this by carefully considering exactly what you will need to do in order to successfully conclude the matter and how much it will cost to do so.
3. Once a formal budget is required, prepare an accurate account of costs incurred to date and revise the last 'informal' budget you did to bring it up to date re past and future costs.
4. Consider what contingencies you can build in as a safeguard – a good term for this would be “kitchen-sinking” – I don't think it's in the Oxford English, but you'll know what I mean.
5. Once you have filed / served the budget and it has been set by the Court, don't forget about it, but use it as the over-arching framework to your conduct of the case.
6. Keep on top of the costs incurred and to be incurred and compare them to the set budget. If the budget is proving to be deficient, apply early to amend it if your opponent won't agree.
7. Keep a record of the conduct of the opposing party that has led to any unforeseen additional costs being incurred and don't be slow to warn them in respect of such conduct and the costs consequences of it.

The key thing is to keep your opponents, the court and, last not least, your client informed of the true costs likely to be incurred and obtain their approval of them. And one more thing, for obvious reasons you should make it clear to your client if their

instructed steps are likely to lead to excessive costs being irrecoverable. This way, at the end of the action you will (hopefully) either find yourself within the budget, or if not, you will have provided yourself with the best chance of persuading the court that you had good reason for exceeding it and that the excess costs should still be allowed. And if they aren't, your client will have little cause for complaint. Happy budgeting!

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