

March 2016

Costs Budgeting: Changes Commencing April 2016

83rd Update to the Civil Procedure Rules

The latest update to the Civil Procedure Rules will introduce important changes to the Costs Management and Detailed Assessment Procedure in respect of proceedings issued on or after 6 April 2016. The changes are quite dramatic in certain circumstances with amendments to the procedure and the Precedent documents in both areas.

Costs Management Process

Exemptions

CPR 3.12(1) has been expanded so that where a claim is made by or on behalf of a child, and even upon that child reaching maturity, such claims will be exempt from costs budgeting. The exemption also applies to cases subject to fixed costs or scale costs or where the Court otherwise orders. The exemption for litigants in person also remains within CPR 3.13.

A further paragraph has been added to Practice Direction 3E para 3 stating that the Court will ordinarily disapply Costs Management where the Claimant has a limited or severely impaired life expectancy (5yrs or less remaining). This seems to be the most problematic of the changes in this section because unless the N149 or the Court makes an order that Costs Management is disappplied, there remains the obligation to file and serve a Budget. Given the draconian sanction that applies where there has been a default in respect of filing and serving a Budget, practitioners must err on the side of caution and, where there is any doubt, file and serve their budget.

Filing, service, and form of Costs Budget

Key changes are made to the existing dates for filing and service of the budget at CPR3.13. The rule stipulates that for matters where the value of the claim on the claim form is less than £50,000, the budget must be filed and served with the Directions Questionnaire but in any other case (value equal to or exceeding £50,000) the budget must be served no later than 21 days before the first CMC. As ever, practitioners will need to keep a keen eye on the timetable.

Practice Direction 3E, para 6 has been expanded to state that the Precedent H *must* follow the Guidance Note in all respects and where the budgeted costs do not exceed £25,000 or the value of the claim as stated on the claim form is less than £50,000, then parties *must* only use the front page of the Precedent H.

Rather unexpectedly, the MOJ has revised the Form H and the Guidance Notes in addition to the rules and practice direction. The revised documents can be found on the MOJ website (<https://www.justice.gov.uk/courts/procedure-rules/civil>) under the 83rd Update. It would appear that these apply as of 6th April 2016 irrespective of when your claim was issued, in contrast to the rules on deadlines.

One very important point to note from the Guidance Notes concerns the detail and content of the assumptions. It is clear that the MoJ and/or the judiciary are looking to reduce the volume of supporting documents that have on occasion been filed with budgets. The majority of parties have been including their assumptions within a separate schedule due to the single line per phase on the current front page being insufficient. You will note that assumptions are no longer on the new budget front page but instead located beneath each individual phase. This begs the question, are assumptions not necessary for budgets where only the front page of the budget is required??? Well, the Guidance Note states at para 8(b) that *“Written assumptions are not normally required by the Court in cases where the parties are only required to lodge the first page.”* We would still propose to provide you with an assumptions narrative to assist you in understanding how the budget has been approached and to aid in the preparation for the CCMC. We would’ve expected a judge to want to know what assumptions have been made even in a “small” budget but we’ll have to see how this plays out. As for the remaining budgets, the Guidance Note indicates that *“Save in exceptional circumstances, the parties are not expected to lodge any documents other than Precedent H and the budget discussion report”*. It further states *“Additional documents are not encouraged and, where they are disregarded by the court, the cost of preparation may be disallowed, and additional documents should be included only where necessary”*. Obviously we will discuss with you whether we feel an additional document will be necessary and of use to the Court on your particular budget. Fundamentally, we consider the assumptions when required are still vital to support the claims for the phases for estimated costs and should outline such matters as duration of proceedings, number of witnesses and experts required. These changes, now perhaps more than ever, demand that the budget is prepared to the highest quality.

Another welcome point to note from the Guidance Note, is the provision that the Court will grant such relief as appropriate where the Court considers that another party is behaving oppressively in seeking to cause the Applicant to spend money disproportionately on costs.

A further interesting development on an issue which has been the cause of considerable debate is where the costs of preparing the budget and subsequent costs budgeting should go. The Guidance Note now confirms, contrary to previous guidance, that the cost of preparing the budget should *not* be included within the CMC phase. Instead, this should, upon approval of the budget, be inserted on the front page of the budget where a 1% allowance is to be provided for. Similarly, there is provision for the remaining costs of the “Budget process” to be provided for subject to a 2% cap. Rather

confusingly, the Guidance Note does however still refer to amending budgets etc. being work to be included under the PTR phase. It is hoped there might be clarification on this point. On larger budgets valued in the millions it will be interesting to see whether Courts simply award the 1% and 2% “pots” on the approved budget or also consider what is reasonable and proportionate to allow.

Budget Discussion Reports

This is a new document found in the precedents as ‘Precedent R’, which is intended to inform the Court for the CCMC of the figures agreed for each phase, the figures not agreed for each phase and a brief summary of the grounds of dispute in relation to the phases not agreed. Precedent R *must* be filed no later than 7 days before the first CMC. Again, the emphasis is on brevity and as such, any grounds of dispute must be succinctly made out.

CCMC

One aspect, which I suspect practitioners will gratefully note due to the level of inconsistency amongst judges, concerns the hourly rates claimed. PD3E para.7 now states that the Court can no longer interfere with the hourly rates detailed in the budget. Instead, the Court will concentrate on the total sum for each phase of the budget.

Detailed Assessment Procedure

Following on from the introduction of Precedent Q and Master Gordon-Sakar’s comments in *BP & Cardiff Vale University Health Board*, Part 47.6 and CPD47, para 5.8 have been expanded to require that where proceedings were issued after 1 April 2013, the Bill must be divided to distinguish the costs incurred before and after 1 April 2013. In addition, where a Costs Management Order has been made, the Bill of Costs must be divided into parts to show the costs for each phase of the Costs Budget. Each part must further distinguish between the costs shown as incurred in the last agreed or approved budget and costs shown as estimated and finally, the costs of initially completing the Form H and the other costs incurred thereafter in the costs management process must be set out in separate parts.

These changes place ever more emphasis on the need for the budgets to be precise and accurate so that the Bill of Costs seamlessly matches up with the budget. Any budget that is prepared at the last minute or is thrown together could present significant difficulties at the time that the Bill for Detailed Assessment is prepared. Any issue in that regard is overcome through the engagement of Kain Knight throughout the costs management process by virtue of the vast experience and specialist skill sets of its Costs Lawyers.

Kain Knight continue to take the lead during these times of significant industry change – it’s Precedent H management software Konnect <http://kain-knight.co.uk/our-services/> is currently being altered to accommodate and adhere to the new CPR requirements; and our costs lawyers have already reconfigured our internal processes to accommodate the same.

Kain Knight will shortly be announcing dates for costs seminars to address updates to budgeting and costs case law generally.