

What is the point of cost budgeting if judges are also allowed to reduce agreed recoverable costs at the detailed assessment stage on completion of the case, asks **Simon Gibbs**

The pervasive reach of the new 'global basis' test

With implementation of Lord Justice Jackson's costs reforms in full flow, we are now certain of two things. Firstly, there will be a new test for proportionality. Secondly, costs management will be introduced for most multi-track cases. What is less clear is how these two concepts will work together.

The idea of costs management is straightforward. Each party will prepare a budget of their anticipated legal costs.

standard basis, proportionality should prevail over reasonableness and the proportionality test should be applied on a global basis. The court should first make an assessment of reasonable costs, having regard to the individual items in the bill, the time reasonably spent on those items and the other factors listed in CPR rule 44.5(3). The court should then stand back and consider whether the total figure is proportionate. If the total

"First, the court will have to apply new proportionality test to the costs budget. As stated in the Final Report, the judge carrying out costs management will not only scrutinise the reasonableness of each party's budget, but also stand back and consider whether the total sums on each side are 'proportionate' in accordance with the new definition.

If the total figures are not proportionate, then the judge will only approve budget figures for each party which are proportionate. Thereafter if the parties choose to press on and incur costs in excess of the budget, they will be litigating in part at their own expense. It will be important for judges to apply the test consistently and for parties and their lawyers to be aware of the impact on recoverable costs."

"The costs management process implies that once the court has decided that certain steps in litigation are reasonable, the full cost of undertaking that work will be recoverable"

The court will consider the budgets and adjust as necessary. At the conclusion of the litigation, when assessing costs on a standard basis, the court will have regard to the receiving party's last approved or agreed budget for each phase of the proceedings and will not depart from such approved or agreed budget unless satisfied that there is good reason to do so.

In practical terms this will mean the court will consider, for example, whether e-disclosure is an appropriate step in the litigation. If so, it will allow for a reasonable amount of time for that task and consider the appropriate grade of fee earner to undertake the work. Once that has been done for each anticipated step in the litigation, it should be a simple matter of arithmetic to determine the total of the approved budgets and the parties can proceed accordingly.

On the other hand, Jackson LJ's anticipates the approach a judge will take on detailed assessment will be:

" ... in an assessment of costs on the

figure is not proportionate, the court should make an appropriate reduction."

Apparent tension

It can be immediately seen that there is an apparent tension between these two processes. The costs management process implies that once the court has decided that certain steps in litigation are reasonable, the full cost of undertaking that work will be recoverable. This is because the judge on assessment will not normally depart from the approved budget.

The new proportionality test, as Jackson LJ anticipates it will operate, means that a judge on detailed assessment may determine that, despite a certain step within the litigation being deemed reasonable, the full cost of that work may not be recovered once the 'global basis' test is applied.

Without expressly acknowledging the tension between these two principles, Mr Justice Ramsey, in a recent lecture on costs management, stated:

The idea that a successful party should recover less than 100% of their reasonably incurred costs is, certainly in personal injury litigation, controversial. However, as a basic concept it is understandable and, if it limits the recoverable costs to an amount proportionate to what is at stake, perfectly logical.

However, there will be those who wonder what the point is of expensive and time consuming costs management and detailed assessment hearings to determine what costs are reasonable if, at the end, the judge can then knock the figure down further, on an apparently arbitrary basis.



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