Costs and case management: putting the "C" into "CCMC"

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CPR 3 Section II (rr 3.12-3.18)

With so much change presently afoot in the world of personal injury it is easy to take your eye off the ball and miss something. Unfortunately, the new post-Jackson Costs and Case Management Hearings have for some personal injury lawyers proved to be a sticky wicket.

Following *Bank of Ireland & Anor v Philip Prank Partnership* [2014] EWHC 284 (TCC) it is possibly not a breach of the rules to omit the full costs statement of truth, that decision sending a shot across the bows of petty point scoring parties. The Honourable Mr Justice Stuart-Smith brought a bit of much-needed sanity to the post-Jackson world by stating:

"*The logical consequence of the Defendant's argument would be that any failure to comply with the form Precedent H or PD 22 would render the filing of a budget a complete nullity. It would, presumably, apply if the prescribed form for verifying a costs budget had been followed generally but words had been omitted, mis-spelt or muddled up; or even if the order of two sentences had been reversed.*
Such a conclusion would, in my judgment, serve only to bring the rules of procedure and the law generally into disrepute."

Pursuant to Mitchell he decided the failure in the instant case was in fact a trivial one and the penalty should not follow. It isn't clear if the Claimant would still have succeeded if they had not included the words "Statement of Truth" as the Court indicated it was "*inappropriate to characterise the absence of the statement of truth as 'trivial'*". Nor is it clear if the Court of Appeal will be preoccupied with such points in future (though it seems likely).

The fact is, when thousands of pounds in costs are at stake, the only way to be sure you are safe is to dot all the i's and cross all the t's, whether you are a claimant or a defendant.

Help is at hand if you take care to read the relevant rules and use a bit of common sense.

The most obvious pitfall is the need to file and serve the new Precedent H in time. Mr Andrew Mitchell MP (and his solicitors) can testify to the need for lawyers to comply with this particular rule. The impact of that error on other aspects of litigation is widely discussed in other forums. For present purposes it is vital to observe the provisions in the CPR.

CPR 3.13 states:
"*Unless the Court otherwise orders, all parties except litigants in person must file and exchange budgets as required by the rules or as the court otherwise directs. Each party must do so by the date specified in the notice served under rule 26.3(1) or, if no such date is specified, seven days before the first case management conference.*"

So if no other date is specified, you must get your form H in at least a full week before the CCMC. This seems to be the most common pitfall for solicitors and with a bit of careful diarising ought to be avoided. On the other hand filing one too early may mean you fail to take into account the changing landscape of the case.

The costs consequences of a failure to comply with CPR 3.13, as anyone who has read *Mitchell* knows, are catastrophic (the White Book describes them as "Draconian"). You are limited to your court fees only.

Be aware that you don't need the whole of Precedent H if your costs are estimated at less than £25,000. In that case, pursuant to Practice Direction 3E para.2., all you need file and serve is the front page summary (page 1), saving you a lot of unnecessary work.

Do make full use of the forms and include as much detail as you can. Be aware of using Contingencies at the end of the form for the potential increased costs of unpredictable eventualities (perhaps a further CMC or the need for a Joint Settlement Meeting). Judges are likely to approve such thoughtful crystal ball reading which may avoid the need to come back and ask for more costs later (see below).

Courts are frequently ordering parties to outline their points of agreement and areas of disagreement in their costs budgets along with the reasons for their positions sometimes asking for Position Statements ahead of the CCMC. This is an opportunity for some effective written advocacy and spending some time analysing the case at this stage can pay dividends.

Issues are likely to include:

- The need for expert evidence (joint or separate)
- Whether expert evidence should be provided on the papers or orally at trial

- How many witnesses are likely to be called
- The length of trial
- The need for a JSM

Bear in mind the principle of proportionality underpinning the whole of this process. (CPR r 1.1 insists courts deal with cases justly "and at proportionate cost").

A very important get-out clause is included by virtue of CPR 3.15 which states:

"(2) The Court may at any time make a "costs management order". By such order the court will –
(a) record the extent to which the budgets are agreed between the parties;
(b) in respect of budgets or parts of budgets which are not agreed, record the court's approval after making appropriate revisions.
(3) If a costs management order has been made, the court will thereafter control the parties' budgets in respect of recoverable costs."

Therefore, if you can reach agreement on costs with the other side, do so. It is a shield you cannot afford to neglect and reduces the chance that sections of your budget will be slashed back by a court which proves more Draconian than your opponent.

As the White Book points out this ability to gazump the Court continues in relation to agreeing variations in the budget thereafter as provided by para.2.6 of Practice Direction 3E. CPR 3.15(3) requires the Court to control the budgets once it has made its costs management order but that ability is undermined where parties agree to vary the budget. Should they do so, the parties are not even required to file an agreed varied budget.

Do properly brief Counsel in advance of the CCMC. As a solicitor you are better placed than anyone to criticise or explain time costs for particular elements of your or your opponent's budget. If your budget is going to be controversial and particularly high you may wish to incur the cost of sending a costs advocate along to provide joint submissions with Counsel.

It is clear that the Court cannot interfere with costs already incurred such as pre-action costs, issue etc. CPR 3.12(2) states the purpose of costs management is to manage the steps "to be taken" and the costs "to be incurred". But the Court can take into account the costs already incurred for informing its decision on future costs (Practice Direction 3E para.2.6). Unusually high pre-CCMC costs are therefore fair game in terms of submissions by your advocate as to overall time costs.

Don't forget the "CM" part of your CCMC. It is easy to be overwhelmed by the precedent H and lose the initiative in terms of Directions. Make sure as usual you file and serve a set of draft directions, where the same are not agreed, fighting your

corner (for example seeking separate medical experts). Judge's are much more likely to adopt your directions if they have been filed in black and white with the Court.
And afterwards? The costs management order is not a totally inflexible costs cap.

You can come back to court and seek revisions (Practice Direction 3E 2.6), agreed if possible, but on application if necessary. But good reasons must be provided for such proposed revisions (*Elvanite Full Circle Ltd v Amec Earth and Environmental (UK) Ltd* 2013] EWHC 1643 (TCC) Coulson J at [43]). The expectation is such costs management conferences will be by telephone or on paper (r.3.16(2)).

The biggest risk is a typo in the budget; that crucial missing zero. Coulson J warned in *Murray v Dowlman Architecture Ltd* [2013] EWHC 872 (TCC) that:

"*[16]..if approved costs budgets can be revised at a later date because of mistakes or self-induced inadequacies in the original, the whole purpose and effect of the new costs management regime may be thwarted.*"

Although you may get away without the full costs statement of truth it seems unlikely a major error in terms of figures for costs would be treated with the same leniency.

Finally when assessing costs on the standard basis the Court will only depart from the costs subject to the costs management order if there is good reason (CPR 3.18(b)).

In *Henry v News Group Newspapers Ltd* [2013] EWCA Civ 19 the claimant filed for costs which exceeded their budget by £250,000 and was refused by the court. In allowing the claimant's appeal Moore-Bick L.J. emphasised the need for consistency and regular revision of budgets as a means of a party ensuring it secures its costs: "*If, as is the intention of the rule, budgets are approved by the court and revised at regular intervals, the receiving party is unlikely to persuade the court that costs incurred in excess of the budget are reasonable and proportionate to what is at stake.*"

He held that the order imposes a "prima facie limit" on the amount of recoverable costs.

And the thought to take away from all this? To paraphrase the old adage, "preparation prevents poor performance". Never has it been truer, at least in relation to your costs.

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