

Post-Jackson: satellite litigation and turmoil ahead

Something beats nothing, so make reasonable assumptions, be generous and submit your budgets on time, says **Seamus Smyth**



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Ramsey J says it will take five years for the Jackson reforms to settle in. But it may be longer as some Woolf reforms (e.g. part 36) have only just settled in. With precedent H budgets, we will endure years of turmoil while the ‘tensions’ between judicial decisions are resolved before we can advise with confidence about preparing budgets, relief from sanctions (if necessary) and detailed assessment. The next few years will not be easy.

Estimating total costs to trial even before the case management conference is very difficult. Litigation is unpredictable. Opponents make it more so. Yet we must predict not only the overall cost but the itemised cost in each of a dozen phases for each of a dozen operators.

If you agonise about the figures, predictions and assumptions, you’re in good company. Just get on with it.

Doing it late, or not at all, is just dumb – read CPR3.14 and Mitchell. Even if you think the lateness is trivial or for good reason, you cannot bank on relief from sanctions.

Having to seek relief is bad enough. If you don’t get it: disaster. Court fees only and you are on the hook to carry on acting forever without being paid. Put in a budget. Any budget. Even a budget with only halfway sensible figures is much better than none, or being late.

Detailed assessment

It is naive to expect that an approved (or agreed) budget will, after success at trial, automatically entitle you to the budget total (Moore-Bick LJ in *Troy Food*) – let alone immediately. SCJ Hurst says there will be many arguments, and he should know.

The likelihood that any litigation will proceed as predicted before the CMC by even the most prescient is very remote. And even if, miraculously, it did, detailed assessment would often still be required, e.g. where each



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of multiple defendants argues about their share of the costs payable.

What if the claimant overspends on witnesses but comparably underspends on experts: will the overspend be allowed? What if a claimant succeeds on certain issues but fails on others?

Budgets will not remove the need for detailed assessments. Their effect will be to limit costs. So, in budgeting, we must be very generous in every phase and in every category. Most careful budgets will overstate probable costs.

Worst-case scenario

One advantage is that a budget rams home to the client just how expensive their case may be. (It is naive to require lay clients to approve budgets.) The brute total may not be helpful, however, if it is not accompanied by balanced advice about the ways in which litigation can be concluded apart from trial.

More important, for many clients whose ability to fund litigation is relevant (i.e. just about all clients except oligarchs, publicly funded litigants and giant corporations with virtually unlimited budgets) a ‘worst case’ budget has been known both to deter meritorious claimants from suing and meritorious defendants from defending. Neither enhances access to justice. Worst-case advice can be bad advice.

QOCS aside, Jackson upheld costs shifting. Depriving a litigant of the difference between their actual costs and approved budget costs dilutes that. The client will pay that bit.

There will be plenty of satellite litigation. Look at the relief-from-sanctions applications which, like toadstools, have sprung up already. **SJ**

EARLY ACTION

- Draft your budget early, not on the eve of the CMC.
- Put in any budget rather than none.
- Don’t use tactically low figures, or play last-minute games: file and serve a couple of days ahead of the deadline (currently seven days), whether “exchanged” or not.
- Assume there will still be detailed assessment at which your opponent will conjure up wickedly ingenious arguments based on all the shortcomings in your budget.
- In deciding figures for each phase and operation, make every reasonable adverse assumption and then be generous.
- List all your assumptions: it may not do you any good but it will not do you any harm. Accumulate useful assumptions from your opponents.
- Strap yourself in for five years of satellite litigation before we find out where budgeting (and its effect on detailed assessment) end up.