Measure for measure

Jeremy Glover reports on Henry v Mirror Group Newspapers

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With the reforms to the way costs in civil litigation are managed being introduced on 1 April 2013, everyone is looking for pointers as to how the courts will interpret the new rules.

The Costs Pilots

In the Technology & Construction Court (TCC) and Mercantile Courts, a Costs Management Pilot (the pilot) started on 1 October 2011 and is scheduled to run until 31 March 2013. The pilot, which involves not only the parties but the courts as well, is being monitored by means of questionnaires and follow-up phone calls in order to evaluate how effective costs management is in terms of controlling costs and keeping clients informed about the overall costs position (not just their own budgeted costs), and what additional workload this imposes on judges and court staff. The idea behind the pilot was to bring to light practical problems and provide the opportunity for improvements prior to the full implementation of the cost reforms.

The authors of a paper which provided an interim update on the pilot, given to the Society of Construction Law dated October 2012 (Paper reference D142, www.scl.org.uk.) concluded that:

> The costs management procedure effectively shifts the focus of costs control from retrospective, as it currently is, to prospective, with the court focusing upfront on how much should be spent (or at least recovered) in the litigation. More certainty as to the other side's costs and as to the likely overall costs at the beginning of the litigation seems widely to be regarded as a positive factor of costs management.

The pilot is governed by Practice Direction 51G. This provides that for those claims that fall within the pilot, each party will have to file and exchange a costs budget in the form set out in Precedent HB at the same time as filing the case management information sheet.

The costs budget requires reasonable allowances to be made for:

- intended activities, eg disclosure, preparation of witness statements;
- identifiable contingencies, eg specific applications or resisting applications; and
- disbursements, in particular court fees, counsel's fees, any mediator or expert fees.

The court will have regard to any costs budget filed at any case management conference or pre-trial review and will decide whether or not it is appropriate to make a costs management order. If the court decides to make such an order, it will, after making any appropriate revisions, record its approval of a party's budget and may order attendance at a subsequent costs management hearing (by telephone, if appropriate) in order to monitor expenditure. The TCC pilot was not the only such scheme. The Defamation Costs Management Pilot has been in force since 1 December 2009, governed by Practice Direction 51D.

The *Henry* Case: first instance

It is this pilot, which has provided one or two hints as to how the courts may approach the new costs regime. In May 2012, the case of *Henry v News Group Newspapers Ltd* [2012] was handed down. The

costs at issue were almost £300,000. The case related to a defamation claim, subject to the Defamation Proceedings Costs Management Scheme, where it was agreed that the claimant was entitled to recover her costs on the standard basis. However, both parties had exceeded the budgets approved under that scheme. The question for Senior Costs Judge Hurst was whether or not there was good reason for the court to depart from the court approved costs budget. In the case of disclosure and witness statements, the approved budget had been exceeded by significant amounts. It was common ground, in accordance with para 5.6 of the Practice Direction that the court would not depart from the approved budget unless satisfied that there was 'good reason' to do so, a phrase that was not defined.

It was Henry's case that NGN had maintained a robust defence up to trial. NGN re-amended its defence on more than one occasion and served ten additional lists of documents. Henry submitted that the tactics so adopted gave rise to extra work to the extent which would make it fair and proper to find good reason to depart from the costs budget. NGN noted that those representing Henry had failed to comply with the terms of the Practice Direction, so that neither the court nor NGN were aware of the significant increase in costs such that the budget was being exceeded. NGN did advise of the costs increase on their part. Therefore the fact that both sides exceeded their budgets did not assist Henry.

The judge noted that the provisions of the Practice Direction are in mandatory terms. Each party must prepare a costs budget or revised costs budget (para 3.1), each party must update its budget (3.4), and solicitors must liaise monthly to check that the budget is not being or is likely to be exceeded (para 5.5). The objective is to manage the litigation so that the costs of each party are proportionate to the value of the claim and reputational issues at stake, and so that the parties are on an equal footing (para 1.3). Accordingly, the judge concluded, reluctantly, that if one party is unaware that the other party's budget has been significantly exceeded, they are no longer on an equal footing, and the purpose of the cost management scheme is lost. There was therefore no good reason to depart from the budget. While this was a case heard under a special scheme for defamation hearings, this decision was taken as a clear hint as to where costs management may well go in the future.

In giving judgment, SCJ Hurst referred to the mandatory nature of PD 51D and decided that due to the claimant's failure to comply with the provisions of PD 51D and inform the defendant and the court of the extra costs, there was no good reason to depart from the approved budget:

> Whilst, as I have said, I have no doubt that the claimant could make out a very good case on detailed assessment for the costs being claimed, the fact is the claimant has largely ignored the provisions of the Practice Direction and I therefore reluctantly come to the conclusion that there is no good reason to depart from the budget.

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The *Henry* case – Court of Appeal

However, the judge also gave Henry permission to appeal and that appeal was heard earlier this year. And on appeal, his decision was reversed. The Court of Appeal noted that that on the facts of this case, there was good reason to depart from the approved costs budget. Lord Justice Moore-Bick noted that the objective of the Defamation Pilot was to manage the litigation so that the costs of each party are proportionate to what is at stake and to ensure that the parties are on an equal footing. Lord Justice Moore-Bick also made it clear that he was not attempting to set out an 'exhaustive definition' of the circumstances in which there may be good reason for departing from the approved budget. Having said that he noted that:

> ... the starting point must be that the approved budget is intended to provide the financial limits within which the proceedings are to be conducted and that the court will not allow costs in excess of the budget unless something unusual has occurred. Whether there is good reason to depart from the approved budget in any given case, therefore, is likely to depend on, among other things, how the proceedings have been managed, whether they have developed in a way that was not foreseen when the relevant case management orders were made, whether the costs incurred are proportionate to what is in issue and whether the parties have been on an equal footing.

This common-sense approach is likely to be one which is followed in the future. However, the problem for the Senior Costs Judge at first instance was that, while he thought that there was a strong argument that the costs incurred by *Henry* were both reasonable and proportionate, he was faced with the fact that Henry had largely failed to comply with the practice direction, which obliges solicitors to communicate with each other regularly to ensure that the budgets are not being exceeded.

Lord Justice Moore-Bick considered that SCJ Hurst took too narrow a view of what may amount to a good reason to depart from the agreed budget. For example, while it was assumed that the parties would exchange information about expenditure at regular intervals, he considered that a failure to do so did not of itself put the parties on an unequal footing. Non-compliance with all the requirements of the practice

direction was no more than one factor that the court may take into account in deciding whether there is in fact good reason to do so. It was relevant here that Henry was not the only one at fault. Indeed, not only had both parties failed to raise the issues of the costs budget, the court itself failed to take the initiative by enquiring whether the parties' costs were within the approved budgets. Had it done so, the likelihood is that revised budgets would have been agreed or approved then or shortly thereafter. This is not something that will happen after 1 April 2013.

The Court of Appeal decided that there was good reason to depart from the cost budget. That did not automatically mean that Henry would be entitled to her costs and it would then be the task of the costs judge to decide in what respects and to what extent Henry should be allowed to recover costs in excess of those for which the budget allowed. That assessment would depend on the usual considerations on the extent to which the costs actually incurred were reasonable and proportionate to what was at stake in the proceedings and on the extent to which they could have been reduced if the practice direction had been properly followed. Among the reasons why the Court of Appeal took this view were that the failure of Henry's solicitors to apply for a costs management conference with a view to obtaining the court's approval of a revised budget did not lead to any 'inequality of arms' between the parties. It was also strongly arguable that this failure did not result in Henry incurring costs that were disproportionate to what was at stake in the proceedings. Accordingly, it was open to the court to find that the essential objects of the scheme had not been frustrated.

It should be remembered, especially post-1 April, that the fact that unless the court departed from the budget, Henry would not be able to recover the costs of the action, would not of itself be enough to excuse the failure to update the costs budget. However, the Court of Appeal also noted that NGN were not put at a significant disadvantage in terms of its ability to defend the claim, nor did it appear that the failure led to the incurring of costs that were unreasonable or disproportionate in amount. Further, Henry's solicitors were not alone in failing to comply with the requirements of the practice direction. NGN's solicitors also exceeded their budget (admittedly not to so large an extent) and the court, as noted above, was 'less active' than it should have been in monitoring the parties' expenditure. Finally the Court of Appeal noted the failure of NGN's solicitors to register any protest when they were finally informed of the amount of costs incurred by Henry all led Lord Justice Moore-Bick to allow the appeal.

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The Future

Of course, the Court of Appeal decision is important for what it did not do. It is a decision handed down before the introduction, on 1 April 2013, of the new civil litigation costs reforms. These rules impose even greater responsibility on courts for the management of costs and proceedings. It is telling that LJ Moore-Bick added that the new rules will:

> ... impose greater responsibility on the court for the management of the costs of proceedings and greater responsibility on the parties for keeping budgets under review as the proceedings progress...they lay greater emphasis on the importance of the approved or agreed budget as providing a prima facie limit on the amount of recoverable costs. In those circumstances, although the court will still have the power to depart from the approved or agreed budget if it is satisfied that there is good reason to do so... I should expect it to place particular emphasis on the function of the budget as imposing a limit on recoverable costs. The primary function of the budget is to ensure that the costs incurred are not only reasonable but proportionate to what is at stake in the proceedings. 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.

This is of some significance as the use of costs budgets will generally apply to most multi-track cases once the new regime comes in. As the Court of Appeal has said, the new scheme lays great emphasis on the importance of the agreed budget. It is also importance to remember that the new costs rules are slightly different to the pilots. The new rules impose a greater responsibility on the court to manage the costs of proceedings and on the parties themselves to keep budgets under review. Given, the Court of Appeal's comments about the unusual circumstances of the *Henry* case, it is perhaps more likely that the courts in the future will take the decision of Senior Costs Judge Hurst as their cue, not the subsequent reversal of that decision in the Court of Appeal.

This will mean that the agreed costs budget will provide a limit on the amount of any recoverable costs. The primary function of that costs budget will be to help ensure that the costs incurred by a party are both reasonable and proportionate to the issues which are at stake. Therefore, if budgets are approved (and if appropriate revised and approved by the court at regular intervals during a case) it is expected to be most unlikely that a party entitled to receive its costs will be able to persuade a court that it is entitled to incur any costs that have been incurred in excess of that approved budget sum. ■

Henry v News Group Newspapers Ltd [2012] EWHC 90218 (Costs)