

GUIDANCE NOTES ON PRECEDENT H

It is bad enough that we have had to wait until the 11th hour to see the final version of the new practice direction for Costs Management but now we are faced with an ill thought out and contradictory guidance note on Precedent H and the phases.

The new practice direction at **2.4** states '*As part of the costs management process the court may not approve costs incurred before the date of any budget. The court may, however, record its comments on those costs and should take those costs into account when considering the reasonableness and proportionality of all subsequent costs.*'

In other words the Court cannot impose a budget on work already carried out. A clear and simple concept to grasp. But, the guidance note states that the pre action phase does NOT (their emphasis) include '*any work already incurred in relation to any other phase of the budget*'. Suddenly, everything is as clear as mud as this suggests that the Court will impose budgetary control over work already carried out if it falls into the later phases. This cannot be correct. Apart from anything else it is a tacit admission that the other phases do not cover all areas of the litigation or else how would there be anything left to be included in the pre action phase?

Having set out the exclusions it is worth looking at what is included in the pre action phase. One interesting heading is *Considering ADR, advising on settlement and Part 36 offers*. Now go to the settlement phase and what do we see? You've guessed it *Settlement negotiations, including Part 36 and other offers and advising the client*. What this means is that the guidance note as to what should be included in the pre action phase is directly contradicted by what should not be included in the pre action phase.

Now let's briefly turn to the practical application of the phases. There is one word that does not feature anywhere in the guidance but forms an essential part of every single case – quantum. Which phase covers this? The quantum experts part is easy and I suppose it is arguable that the Schedule of loss will come under statements of case but it does not fit comfortably. In a clinical negligence case for

instance, once liability has been dealt with everything focuses on quantification of the claim. What about an advice from Counsel on quantum? Where does that fit in to the template? How about medical records? Do they come under the disclosure phase or maybe the expert report phase since they are obtained for that purpose.

I suppose the answer is to pick your phase and argue it before the Court.

The guidance note appears to have been prepared in an almighty rush and with little regard to the practitioners who have to make it all work. It is clumsy and contradictory. The precedent H for instance has a phase *Issue/Pleadings* which has become *Statements of Case* in the guidance.

It is perfectly clear to me that the guidance note has not been prepared by anyone who has conducted litigation on a day to day basis. Guidance is meant to assist but it singularly fails so to do.

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