HARMANS | Experts in legal costs

After much anticipation the new costs rules were published ***The Civil Procedure (Amendment) Rules 2013*** and after a further wait the 60th Update – ***Practice Direction Amendments*** was also finally published – 83 pages excluding the example bills, forms etc

There have been changes, some small and some major affecting the way future claims will be dealt with by the Courts.

Case management is a key to how cases will progress and for case management think costs management.

The Amended rules and Practice Direction 3E deal with **Case Management** which include the much anticipated introduction of Budgets for all cases allocated to the Multi Track and commenced on or after 1 April 2013.

Form H is to be completed by all sides however in matters where costs are below £25,000.00 only the first two pages need be completed. (Form H is now widely available and can be completed on screen – copy available at the Harmans web site - http://www.harmanscosts.com/news/matthew-harmans-damning-verdict-on-new-precedent-h-guidance-notes/).

Each party is required to file and exchange budgets at least 7 days before the first case management conference unless an alternative date is provided by the court.

Fail to provide a budget and the court will treat the matter as a budget being filed seeking only applicable court fees.

Following ***Henry v News Group Newspapers*** expect the courts to be much more pro-active in dealing with budgets and seeking updates from all parties.

Cases that deal solely with the issue of Costs Budgets will be known as "Costs Management Conferences" as opposed to the usual "Case Management Conferences" and where practical should be conducted by telephone or in writing **3.16 (2)**

Costs for preparing Form H are recoverable however Annex A – PD 3E 2.2 states, save for exceptional circumstances:

(1) The recoverable costs of initially completing Precedent H shall not exceed higher of £1,000.00 or 1% of the approved budget;
(2) All other recoverable costs of the budgeting and costs management process shall not exceed 2% of the approved budget.

Costs incurred before the first Case Management Conference are not to be approved however the court may record its comments on those costs and should take those costs into account when considering the reasonableness and proportionality of all subsequent costs.

Each party is expected to revise its budget upwards or downwards in the event of significant developments in the litigation with amended budgets submitted to other parties for agreement and absent agreement the amended budgets are to be submitted to the court with a note as to (a) the changes made and reasons for the changes and (b) the objections of any other party.

Once budgets are approved each party is to re-file and re-serve the budget in the form approved with re-cast figures, annexed to the order approving it.

There is no requirement for a Litigant in Person to provide a budget.

When costs fall to be assessed on the standard basis where a costs management order has been made the court will –

(a) Have regard to the receiving party's last approved or agreed budget for each phase of the proceedings; and
(b) Not depart from such approved or agreed budget unless satisfied that there is good reason to do so.

Whilst ***Henry*** was a case wherein the Court of Appeal found there was good reason to depart from the approved budget expect good reason to be extremely difficult, if not impossible to show.

Much remains unclear with regard to budgets for example no guidance has been provided as to what the Courts comments (if any) on pre-first case management conference will actually mean apart from simply noting in the very little time available that the incurred costs appear "reasonable" in the alternative "disproportionate and/or unreasonable" it is difficult to anticipate what further guidance can be provided without a detailed assessment of the work undertaken; if only form H enabled one to show the various phases pre/post CMC! It also begs the question why have pre-action costs when the same can not be approved?

The "phases" of work are designated:-

Pre-action – the Guidance Notes helpfully explain that this phase deals with work undertaken "pre-action"

Statements of Case – Claim form, issue of proceedings, Particulars of Claim or Defence, Reply and, the guidance note explains, time "taking instructions and "instructing counsel" (does not include Amendments to Statements of Case)

CMC – Preparing the Allocation Questionnaire, arranging CMC, preparing the budget, preparing for and attending the CMC (excludes subsequent CMCs)

Disclosure - Considering documents in the client's possession for disclosure, preparing and considering lists and reviewing documents disclosed (excludes applications for specific disclosure and any third party disclosure)

Witness statements – Identifying witnesses and preparing statements; consulting with Counsel with regard to statements and reviewing opponent's statements (excludes arranging for witnesses to attend trial as this is considered part of the trial preparation)

Expert Reports – Identifying and engaging suitable expert(s) reviewing reports and providing follow up questions; considering opponent's report(s) and preparing agenda for experts' meetings (excludes obtaining permission to adduce expert evidence which is to be claimed in CMC or separate application)

PTR – Includes preparing bundle and updating budgets/considering opponent's updated budget; also to include chronology, pre-trail checklists, correspondence to agree/attempt to agree directions and attending PTR (excludes "assembling and/or copying the bundle" as this is considered to be "not fee earner's work")

Trial Preparation – Trial bundles, arrangements for witnesses to attend to include any witness summonses; supplemental disclosure and statements (if required) agreeing brief fee and any pre-trial

conference with Counsel and/or advice from Counsel (Again assembling and copying the trial bundle is to be excluded on the grounds of being not fee earner's work!; Counsel's Brief and any refresher fees are also not to be included)

Trial – Attending trial, conferences at court and Counsel's Brief and refresher fees

Settlement – Negotiations including Part 36 offers; drafting settlement agreement/Tomlin order and advising the client on settlement (mediation is excluded and should be claimed as a contingency).

As has been pointed out by Matthew Harman there is no "phase" that deals with the significant work usually reserved for ***quantum*** and it seems unlikely that this oversight will be rectified at any stage in the near future.

Form H provides for Contingent Costs A, B and C though the pages to be completed show only Contingent A & B – these sections are to deal with any anticipated costs not falling within the main categories with examples provided such as trial of a preliminary issue, mediation, applications to amend, applications for third party disclosure.

The Civil Procedure (Amendment No.2) Rules 2013 approved 12 March 2013 provide for the exclusion of Chancery, Mercantile Court and Technology and Construction Court cases from automatic costs management subject to the direction of the Chancellor of the High Court and President of the Queen's Bench Division. This direction will say that cases worth more than £2m will be excluded.

Annex B to the Practice Directions set out PD 44 to 48 and most of the directions will be familiar however the same should be read together with the Rules.

Some of the changes that may be of interest are as follows:

In cases where budgets have been filed but no costs management order has been made the budgets are to be treated in the same way that estimates were treated pre April 2013 with the receiving party required to provide a statement of reasons in matters where the costs claimed exceed the budget by 20%.

The court can, on assessment, regard the difference between costs claimed and costs shown in the budget as evidence that the costs are unreasonable or disproportionate (Subsection 3 of the PD)

Subsection 6 (Basis of Assessment) sets out the new wording applicable to costs recoverable on the Standard Basis:

6.2 If the costs are awarded on the standard basis, the court will assessing the costs will disallow any costs-

(a) which it finds to have been unreasonably incurred;

(b) which it considers to be unreasonable in amount;

(c) which it considers to have been disproportionately incurred or to be disproportionate in amount; or

(d) about which it has doubts as to whether they were reasonably or proportionately incurred, or whether they are reasonable and proportionate in amount

Regard should be had to Rule 44.3 (2) (a) which states that the court will:

Only allow costs which are proportionate to the matters in issue, Costs which are disproportionate in amount may be ***disallowed or reduced even if they were reasonably or necessarily incurred*** *– emphasis added.*

Paragraph (b) of the same rule confirms the benefit of the doubt is to be resolved in the favour of the Paying Party on the standard basis and in favour of the Receiving Party on the indemnity basis.

It is the provision for costs to be disallowed even if reasonably and necessarily incurred that has many predicting early case law being required.

The Civil Procedure (Amendment No. 2) Rules 2013 provides that 44.3(2) (a) does not apply to cases "commenced" before April 1 2013 and (b) does not apply to costs incurred in respect of work done before 1 April 2013.

Simply put if the claim was issued before 1 April 2013 the only test to be applied when dealing with the issue of proportionality is the one established by ***Lownds*** (subject to further case law) and where are claims issued after 1 April 2013 bills will be split to show work undertaken pre/post 1 April 2013 to reflect the two different approaches to the proportionality issue.

There is likely to be some debate as to when proceedings are commenced i.e. Letter of Claim or Issue of proceedings though it appears the intention is "issued".

Qualified one-way costs shifting

Costs made against a claimant can be enforced without the permission of the court but only to the extent that the aggregate amount in money terms of such orders does not exceed the aggregate amount in money terms of any orders for damages made in favour of the claimant

Orders for costs against the claimant can only be enforced after proceedings concluded and costs have been assessed or agreed.

Costs will be made against a Claimant in such cases where "a fundamentally dishonest claim" has been made – expect more early disputes as to what a "fundamentally dishonest claim" is

Litigants in Person

LIPs will be allowed, as before, to seek to recover up to two-thirds of the amount which would have been allowed if the LIP had been represented by a legal representative however where the LIP can not prove pecuniary loss the LIP will recover work undertaken at £18.00 ph.

Detailed Assessment Procedure

A few notable amendments:

Points of Dispute have a new precedent "G" which suggests provision should be made to allow a response from the costs judge/costs officer explaining the decision made, no doubt as a result of the "provisional assessments" of which more below.

General points or matters of principal are to be set out before individual items are challenged though over the years this has become the practice of most Costs Lawyers and Costs Draftsmen.

The PD also includes at 47.9 8.3:

The paying party must state in an open letter accompanying the points of dispute what sum, if any, that party offers to pay in settlement of the total costs claimed. The paying party may also make an offer under Part 36.

The first part of the paragraph appears contradictory stating an open offer MUST be made setting out the offer IF ANY. It has long been argued that Part 36 should also apply to the Detailed Assessment Procedure to reward the receiving party for putting forward an offer to accept a lower amount of costs than claimed; it will be interesting to see if the receiving party on receiving more costs that offered to accept recovers a higher rate of interest and costs of the assessment on the indemnity basis. CPR 47.20 (4) confirms the provisions of Part 36 apply to the costs of detailed assessment proceedings with some minor modifications.

The "optional" Reply must now be limited to points of principle and concessions only. It must not contain general denials, specific denials or standard form responses.

As alluded to above there is now a procedure for Provisional Assessment (Rule 47.15)

The expected level of costs for this procedure was £25,000.00 however the PD confirms costs up to £75,000.00 will be the subject of a provisional assessment.

Any Part 36 offers in respect of the costs under this procedure are to be submitted in a sealed envelope. The court is to use its best endeavours to undertaken the provisional assessment within 6 weeks!

Any party dissatisfied with the outcome of the provisional assessment can request a formal hearing however the party requesting the hearing will pay the costs of and incidental to the hearing unless it achieves an adjustment in its own favour by 20% or more.

Part 48 introduces LASPO with the main issues being the non-recoverability between the parties of Success Fees in Conditional Fee Agreements and/or ATE premiums where CFA entered in to or obtained on or after 1 April 2013.

Barristers have already pointed to the difficulties where a Solicitor enters in to a CFA with his client pre April 1 2013 but instructs Counsel post 1 April 2013; in the absence of further rules or directions the Solicitor will recover a success fee Counsel will not; but will this go further with Counsel persuaded to take on cases on no win no fee basis paid only base costs in the event of a successful outcome?

CFAs with recoverable success fees against the opponent will remain for the time being in Mesothelioma claims, insolvency related proceedings and privacy proceedings.

A new provision has been included with regard to Clinical Negligence claims to allow for ATE insurance to cover the costs of experts' reports though the availability for such cover is anticipated to be limited.

In place of Conditional Fee Agreements the Civil Procedure (Amendment) Rules introduce Damages-Based Agreements (DBAs) upon which much scorn has been heaped and, in many respects, rightly so.

As the well known and extremely well informed commentator on all things costs Kerry Underwood has blogged this is a scheme where "*it can involve you taking all the risk and earning nothing and actually paying your client for the privilege of winning*"

The Indemnity Principle applies to DBAs and as a result a Solicitor can not recover more from the losing party a sum in excess of the amount chargeable to his own client under the DBA, which sum itself is capped by Reg. 4 of the DBAs Regulations 2013.

In Kerry Underwood's' excellent blog "**DBA – Dead on Arrival**"***** he sets out an example of an Employer's Liability case which makes for fascinating, if not enjoyable for PI Solicitors, reading showing the Solicitor actually losing money on the case.

No doubt there will be many Solicitors willing to embrace these new arrangements but there is the fear of another Costs War with clients, for example, being happy to enter in to a DBA at the outset but not so happy to pay over a (large) percentage of the damages to the Solicitor when the case is finalised.

There is the issue of conflict as what may be best for the Solicitor may not be best for the client and whilst the new procedure does not include the need for the client to obtain independent legal advice as to the terms of a DBA it becomes clear why such advice was contemplated in the early draft of the rules.

It is likely that market pressure will decide if DBAs work one anticipates a marketing tool whereby Solicitors undercut the competition by offering to apply a lower percentage charge to the damages awarded before Solicitors start advertising no part of the damages deducted to obtain work in an ever decreasing market.

An old Chinese curse is "***may you live in interesting times"*** many of the legal profession may indeed feel cursed to be practising in such "interesting times"

*http://kerryunderwood.wordpress.com/2013/02/15/damages-based-agreements-dead-on-arrival-the-new-cpr/