An eye on reform
The future of legal costs
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Eversheds Sutherland welcomes ex-Government Head of Costs

18th October 2017

Eversheds Sutherland has welcomed James Barrett as the new Senior Costs Lawyer to its Global Costs Litigation team. Based in the UK, James joins Eversheds Sutherland from Lampton 360 where he was a Business Manager. He was formerly Head of Costs at the UK Government’s Legal Department (GLD) where he advised on high profile cases such as the Iraq war and Guantanamo Bay.

His expertise includes cases at County Court, High Court and Supreme Court level. James also has experience in public sector audit, compliance, litigation and business development, including business support systems, policies and procedures. The Global Costs Litigation team is uniquely placed to provide the wider litigation team with a competitive advantage. It is comprised of five fully qualified Costs Lawyers, and a Solicitor specialising in costs work.

Glenn Newberry, Legal Director and Head of Costs, Eversheds Sutherland, commented:

“James brings with him a wealth of knowledge and experience in the public and private sectors covering statute and common law and having advised on a variety of challenging and high profile cases.

“As we continue to undertake a great portfolio of complex and challenging work advising on commercial litigation and funding, costs recovery and case and costs management, I am confident James’s skills and experience will be a superb asset to the team.”

James Barrett, commented:

“I’m delighted to join the team and very much look forward to the challenges ahead. I’m pleased to have the opportunity to work with highly skilled professionals in costs litigation and to support the team in raising the profile of Eversheds Sutherland, as expert leaders in the sector and the profession as a whole.”
Welcome to the Autumn edition of Costs Guru and may I begin by thanking those who recently attended our Cardiff Costs Seminar, and put a note in your diaries for our up and coming London litigation funding seminar which will take place in Wood Street on 29 November. Speakers will include Costs Judge Master Rowley, Ben Williams QC and Stephen O’Dowd from Harbour Litigation Funding. You will find a flyer and details elsewhere in Guru.

**Lord Justice Jackson’s Report on Fixed Recoverable Costs in Litigation matters**

Bang on time, on 31 July 2017, Lord Justice Jackson published his long-awaited second report on the costs of litigation, with this report focusing on proposals for fixed costs in lower value litigation matters. As many of you will know, there is already a suite of fixed costs in many personal injury matters, and Jackson LJ, in his initial report, made no secret of his view that fixed costs should apply in all fast track matters.

Unexpectedly, in January 2016, Jackson LJ gave a paper in which he advocated the introduction of fixed costs in all litigation matters up to £250,000 damages. This paper received considerable comment. There was a sentiment that budgeting should be given a chance to bed in as we were still in relatively early days. In May 2016, the MOJ announced that Jackson LJ had been appointed to consider the issue of fixed costs. A working party was formed, and a series of roadshows arranged for interested parties to express their views.
I had the pleasure of attending the last of those roadshows in Cardiff which focused upon judicial review matters but also, touched upon general concerns and comments. What is clear from the findings is that the views of those attending the roadshows and the views of other lobbyists, including colleagues on the bench, had been taken into account.

Jackson has recommended the introduction of what he calls the “intermediate track” for cases up to £100,000 damages and which require a limited number of days in court, limited number of experts and witnesses. Whilst suggesting there may be a voluntary pilot scheme for business claims up to £250,000, his report stops short of insisting on one. The costs on the intermediate track would be fixed by reference to the stage of settlement and complexity. Cases would be graded from 1 through to 4 at the outset and this track would determine the level of fixed costs to be paid. The table is set out elsewhere. You can read more about the report in the article written by my colleague Louise Hoyle.

Implementation? Possibly legislation to be drafted in the next 12 months and at the earliest, on the statute books in April 2019.

The Costs Law Reports Conference 2017

With the ink barely dry on his report, Lord Justice Jackson attended our Wood Street office as keynote speaker in the 2017 Costs Law Reports Conference. In his talk, he sought to lay out the terms of reference and the stages through which the report went to reach the final version. Mentioned were the roadshows and that he had assembled a team of 15 experts from a number of legal and non-legal disciplines to assimilate, assist and advise. The team analysed budgets both submitted and approved to and by courts up and down the country.

The list of speakers was like a who’s who in the world of costs, Nick Bacon QC, Alex Hutton QC, Senior Costs Judge Master Gordon-Saker, Costs Judge Master James, Roger Mallalieu and retired Costs Judge Campbell.

It is difficult to pick out one theme from the talks but hot topics over the next 12 months include the implementation of a new style bill of costs and time recording protocols, the long awaited Court of Appeal decision on proportionally in BNM1, and the continued fallout from the Harrison2 decision on budgets as to what exactly constitutes “good reason”.

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1 BNM v MGN [2016] EWHC B13 (Costs)
2 Harrison v University Hospitals Coventry & Warwickshire NHS Trust [2017] EWCA Civ 792
As always with costs litigation, change is the only constant.

Happy reading.

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Managing the costs of litigation
Alternative fee arrangements and third party funding options
Wednesday 29 November 2017 - London

We are delighted to extend an invitation to you to join us for what promises to be an exciting and informative seminar (followed by Q&A session) exploring the options which exist to fund litigation. The seminar will explore a number of aspects of litigation funding, including:

- alternatives to traditional hourly rates
- opportunities created by third party funding
- the courts approach to funded cases
- current case law and pitfalls
- a plenary Q&A session

Our speakers will include Senior Courts Costs Office costs judge, Master Jason Rowley, costs silk from 4 New Square Chambers, Benjamin Williams and senior director of litigation funding at Harbour Litigation Funding, Stephen O'Dowd.

If you would like to attend our costs seminar, please click below to reserve your free place.

Venue
Eversheds Sutherland, 1 Wood Street, London EC2V 7WS

Programme

<table>
<thead>
<tr>
<th>Time</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>17:00</td>
<td>Registration</td>
</tr>
<tr>
<td>17:15</td>
<td>Seminar begins</td>
</tr>
<tr>
<td>19:00</td>
<td>Refreshments</td>
</tr>
</tbody>
</table>

Please email hannahsmith-pickup@eversheds-sutherland.com to reserve a place.
Who are we?
Our costs unit services

Our costs unit provides a wide range of services, from traditional costs drafting services to bespoke costs budgeting and management, drafting and reviewing retainers and arranging litigation funding through our network of third party funders. The costs unit has a proven track record in all manner of costs disputes, regularly dealing with multi-million pound claims and highly complex commercial matters.

Why are we different?
Situated within a large litigation team, and with litigators working alongside specialist costs lawyers, we draw on our experience, not only of costs cases, but of being involved in and running large litigation and investigation projects. This provides the team with a valuable insight resulting in a bespoke costs offering. We provide a service that has regard to the commercial realities of business as well as the ‘black letter’ law, allowing clients to make decisions that best suit their business needs.

Services and expertise
Our services are split into three main areas:

1. Pre-project/litigation and retainers
2. During project/litigation budgeting and costs
3. Post-project/litigation traditional costs services
Pre-project/litigation:
- bespoke retainer and alternate fee advice
- advice on third party funding options
- advice on after the event (ATE) insurance and managing litigation risk

During project/litigation:
- preparation of budgets and case plans
- monitoring of spend versus budget on a “phase-by-phase” basis
- preparation of precedent H forms for case management conferences
- advice on and negotiating budgets
- attendance at costs management conferences
- advice on the costs implications of without prejudice and part 36 offers
- preparation of statements of costs for interim hearings
- advice on and preparation of statements to support schedules of costs for security for costs applications
- provide expert witness services in relation to costs recovery and procedure in the UK
- consideration of and advice in relation to draft judgments to include preparing or assisting with the preparation of costs submissions

Post-project/litigation, we offer a full cradle to grave costs service for both paying and receiving parties including:
- schedules of costs
- bill drafting
- points of dispute / replies
- advice on settlement and points of law
- negotiating with third parties and insurers
- part 8 costs only proceedings
- representing clients in disputes with their previous solicitor
- attendance at detailed assessment hearings
Jackson’s future proposals for costs certainty

One of the issues arising out of Lord Justice Jackson’s first substantive report on the costs of litigation was that in order to better control costs and provide more certainty as to the potential and recoverable costs of litigation, awaiting the detailed assessment of costs at the end and relying on the concept of proportionality was proving ineffective. The only way to effectively control the costs of litigation in advance is by way of fixed costs or budgeting.

Following Jackson’s initial January 2010 report and recommendations, fixed costs were implemented for the majority of fast track cases up to £25,000 and in an attempt to control costs in larger or more complex cases, costs budgeting was introduced for multi-track cases. Jackson envisaged back in January 2010 that fixed recoverable costs would eventually extend beyond £25,000 fast track claims, however this limb was not implemented in the 2013 legislation, now colloquially known as the ‘Jackson reforms’.

The reluctance to further extend fixed costs was a constant frustration to Jackson and he made no secret of his desire to introduce a wider raft of fixed costs. The extent of which has been a hot topic of discussion since January 2016 when Jackson gave a talk setting out a table of fixed costs for claims up to £250,000, and with Jackson’s subsequent comments being scrutinised for any hint as to the likely future for fixed costs. The latest being his January 2017 speech, given to the Insolvency Practitioners Association, where he hinted the impending report would recommend fixed costs be extended to claims up to £150,000, irrespective of complexity.
On the 31 July 2017, Lord Justice Jackson released his long awaited review of the costs regime. His recommendations, building on his 2010 review, proposed all fast track cases be covered by fixed costs and a new “intermediate” fixed costs track for certain claims up to £100,000 be introduced. Claims for mesothelioma and other asbestos related lung diseases are excluded from this proposed new track. To take into account the different types and complexities of cases, each track will accommodate a range of fixed costs by way of a banding system contained in a grid table for each track, with band 1 being the least complex and band 4 being the most complex. There will also be an opt out system so once again, we may see substantive arguments about costs at the start rather than the end of the case.

The intermediate track would include a streamlined resolution process, for example, no more than two experts per side, no more than a three day trial. If either of these conditions cannot be met, the case would not be suitable for the intermediate track.

Whilst Jackson’s proposals for the extension of the fixed costs scheme for both the fast track cases and the new intermediate track does provide certainty on costs from the outset, it will inevitably create much argument as to the correct banding of a case with both parties seeking to gain a tactical advantage and exploit any grey areas of the new rules. The proposed grid table for the new intermediate track is set out at the end of this article.
The report also attempts to control costs in other areas. For judicial review claims, Jackson proposes the protective costs rules under the Aarhus Convention should apply. At present, such limits on costs recovery are reserved for environmental cases.

A pilot scheme is proposed for business and property cases up to £250,000, where parties choosing to opt in can expect cases to be heard within eight months of the first case management conference, with limited disclosure and evidence, and a trial lasting no more than two days.

Jackson accepts that clinical negligence cases are not suitable for fixed costs on the fast track or new “intermediate” track. Whilst the majority of cases were on the multi-track and therefore subject to costs management by way of budgeting, he believes there is scope to go further and fix costs for the smaller claims. In his report he encourages collaboration via a working group to create a workable fixed costs scheme for the claims under £25,000.

I think it is fair to say people’s worst fears have not been realised. Overall, the report, whilst advocating extending fixed costs, goes a step further. Recognising imposing a band of fixed costs on the current process will not work, Jackson has set out how he considers the process should be revised, and then the costs fixed.

The report provides the Rules Committee with a draft framework of rules to extend fixed costs with a recommendation that there be a further review after a four year period. Given Jackson’s retirement in March 2018, however, the mantra will be passed to someone else to carry on his legacy, although his report does leave some guidance for his replacement, concluding that if the proposed changes are working satisfactory, he recommends further consideration be given to expanding the scope of the intermediate track to include monetary claims above £100,000.

The next step is for the Government to consider the report and consult with the necessary bodies. Any changes are likely to be gradual rather than a sudden shift of the goal posts, but they will certainly provide more transparency on costs. The challenge will be for litigators to conduct such cases within the fixed fees, making costs management and planning from the outset even more important.
### Proposed matrix of costs for Intermediate Track

<table>
<thead>
<tr>
<th>Stage</th>
<th>Complexity Band</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
</tr>
</thead>
<tbody>
<tr>
<td>S1 Pre-issue or pre-defence investigations</td>
<td>£1,400 + 3% damages</td>
<td>£4,350 + 6% damages</td>
<td>£5,550 + 6% damages</td>
<td>£8,000 + 8% damages</td>
<td></td>
</tr>
<tr>
<td>If claim settles pre-issue, for PI claims, S1 figures are fixed; for non-PI claims, they are capped</td>
<td>£4,350 + 6% damages</td>
<td>£5,550 + 6% damages</td>
<td>£8,000 + 8% damages</td>
<td></td>
<td></td>
</tr>
<tr>
<td>S2 Counsel/ specialist lawyer drafting statements of case and/or advising</td>
<td>£1,750</td>
<td>£1,750</td>
<td>£2,000</td>
<td>£2,000</td>
<td></td>
</tr>
<tr>
<td>S3 Up to and including CMC</td>
<td>£3,500 + 10% damages</td>
<td>£6,650 + 12% damages</td>
<td>£7,850 + 12% damages</td>
<td>£11,000 + 14% damages</td>
<td></td>
</tr>
<tr>
<td>S4 Up to end of disclosure/inspection</td>
<td>£4,000 + 12% damages</td>
<td>£8,100 + 14% damages</td>
<td>£9,300 + 14% damages</td>
<td>£14,200 + 16% damages</td>
<td></td>
</tr>
<tr>
<td>S5 Up to service of witness statements and expert reports</td>
<td>£4,500 + 12% damages</td>
<td>£9,500 + 16% damages</td>
<td>£10,700 + 16% damages</td>
<td>£17,400 + 18% damages</td>
<td></td>
</tr>
<tr>
<td>S6 Up to PTR, alternatively 14 days before trial</td>
<td>£5,100 + 15% damages</td>
<td>£12,750 + 16% damages</td>
<td>£13,950 + 16% damages</td>
<td>£21,050 + 18% damages</td>
<td></td>
</tr>
<tr>
<td>S7 Counsel/ specialist lawyer advising in writing or in conference</td>
<td>£1,250</td>
<td>£1,500</td>
<td>£2,000</td>
<td>£2,500</td>
<td></td>
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**An eye on reform**  
The future of legal costs

<table>
<thead>
<tr>
<th>S8 Up to trial (deduction if party did not prepare trial bundle)</th>
<th>£5,700 + 15% damages (£500)</th>
<th>£15,000 + 20% damages (£750)</th>
<th>£16,200 + 20% damages (£1,000)</th>
<th>£24,700 + 22% damages (£1,250)</th>
</tr>
</thead>
<tbody>
<tr>
<td>S9 Attendance of solicitor at trial per day</td>
<td>£500</td>
<td>£750</td>
<td>£1,000</td>
<td>£1,250</td>
</tr>
<tr>
<td>S10 Advocacy fee: day 1</td>
<td>£2,750</td>
<td>£3,000</td>
<td>£3,500</td>
<td>£5,000</td>
</tr>
<tr>
<td>S11 Advocacy fee: subsequent days</td>
<td>£1,250</td>
<td>£1,500</td>
<td>£1,750</td>
<td>£2,500</td>
</tr>
<tr>
<td>S12 Hand down of judgment etc</td>
<td>£500</td>
<td>£500</td>
<td>£500</td>
<td>£500</td>
</tr>
<tr>
<td>S13 Counsel/specialist lawyer at mediation or JSM (if instructed)</td>
<td>£1,200</td>
<td>£1,500</td>
<td>£1,750</td>
<td>£2,000</td>
</tr>
<tr>
<td>S14 ADR: solicitor at JSM or mediation</td>
<td>£1,000</td>
<td>£1,000</td>
<td>£1,000</td>
<td>£1,000</td>
</tr>
<tr>
<td>S15 Settlement approval</td>
<td>£1,000</td>
<td>£1,250</td>
<td>£1,500</td>
<td>£1,750</td>
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<tr>
<td>Total if damages eg:</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>(a) £30,000</td>
<td>(a) £19,150</td>
<td>(a) £33,250</td>
<td>(a) £39,450</td>
<td>(a) £53,050</td>
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<tr>
<td>(b) £50,000</td>
<td>(b) £22,150</td>
<td>(b) £37,250</td>
<td>(b) £43,450</td>
<td>(b) £57,450</td>
</tr>
<tr>
<td>(c) £100,000</td>
<td>(c) £29,650</td>
<td>(c) £47,250</td>
<td>(c) £53,450</td>
<td>(c) £68,450</td>
</tr>
</tbody>
</table>

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An eye on reform
The future of legal costs
Relief from sanctions: a return to stricter times?

The summer of 2017 has seen an interesting change of direction from the judiciary in its approach to relief from sanctions, much to the consternation of the legal industry. As the pendulum swings back in favour of a Mitchell approach, we ask whether this is a sign of things to come, or simply the balancing out of approach?

Many of you will remember the case Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1526, part of the “plebgate” saga. For those interested in costs and court procedure, the case was notable for the Court of Appeal’s decision to uphold the decision not to grant relief from sanctions for failure to service a budget in time. In its judgment, the court stated:

“In the result, we hope that our decision will send out a clear message. If it does, we are confident that, in time, legal representatives will become more efficient and will routinely comply with rules, practice directions and orders. If this happens, then we would expect that satellite litigation of this kind, which is so expensive and damaging to the civil justice system, will become a thing of the past.”

The decision in Mitchell received considerable criticism, not least due to the large number of cases reaching the High Court in relation to relief from sanctions. Further criticism was levied at the lack of consistent approach in the handling of these cases.

The Court of Appeal subsequently revisited Mitchell in Denton v TH White Ltd [2014] EWCA Civ 906, with the “trivial” test established in Mitchell being replaced by a three-limb approach:

- what was the breach and was it serious or significant?
- why had the default occurred?
- what were the circumstances of the case?
Still further, the inflexible strict adherence to the rules advocated in Mitchell was somewhat watered down with a proviso that if the non-defaulting party were to “unreasonably refuse” a request to consent to an application for relief from sanctions, not only could the non-defaulting party find themselves having to meet the costs of the application, but potentially facing additional costs sanctions.

Roll forward to June 2017 and the courts appear to be moving away from the decision in Denton. In Gladwin v Bogescu [2017] EWHC 1287 (QB) Turner J not only overturned the decision of the circuit judge to grant relief from sanctions for late service of witness statements, but went further to strike out the claim.

This was followed in July by Lakhani v Mahmud [2017] EWHC 1713 (Ch) where the decision taken by the district judge, not to grant relief from sanctions for serving a budget one day late was upheld. The consequences of which limited the recoverable future costs to court fees only, pursuant to CPR 3.14. The decision was made, in spite of the parties commenting on the budgets and agreeing the majority of the defendant’s schedule in advance of the CMC.

The position in both Bogescu and Lakhani are in contrast to the earlier 2017 decision of Warren J in Intellimedia Systems Ltd v Richards & others (2017), where relief from sanctions was granted for the late filing of a budget due to the illness of the conducting solicitor, with the sanction limited to the costs of the application being awarded on the indemnity basis. A fairer outcome perhaps?

Whether the approach taken by the courts in Bogescu and Lakhani are an indication of the future of relief from sanctions remains to be seen. It would however be prudent to keep them in mind, when dealing with costs and procedural matters. In this regard, we would very much encourage litigators to:

- refresh themselves of the court requirements for service of budgets
- ensure that their team is aware of the timetable for the case
- start the budgeting process early
- in larger matters, consider ‘light touch’ legal project management, to ensure the matter is reviewed and stays within budget.

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The new electronic bill of costs – are you ready for change?

After much anticipation, it looks likely that the new format electronic bill of costs for detailed assessment will, subject to ministerial approval, become compulsory from 6 April 2018, and will apply to all costs incurred from that date.

The requirement for time to be set out on the basis of the phase (e.g. witness), task (e.g. taking, preparing and finalising witness statement) and activity (e.g. communicate with witness) is a key feature of the new format. As such, consideration needs to be given to how time is recorded to enable bills to be produced with this level of detail. Every letter, telephone call, email, meeting and item of consideration or drafting, will need to be separately identified and claimed in the bill.

Of course, even with the most sophisticated of time recording systems, firms will still require expert input from a costs professional to check that the costs contained in the bill are reasonable, properly included, and in the right section of the bill.

Background

The origins of the new format bill of costs can be traced back to Lord Justice Jackson’s 2013 reforms when he charged the Hutton Committee, headed by Alexander Hutton QC (hence the name), with the task of developing a set of universal time recording codes for litigation (so-called J codes) and designing a new format bill of costs for detailed assessment.

Lord Justice Jackson’s motivation for change was that, in his view, bills were expensive and cumbersome to draw and did not always contain the necessary information to enable an assessment to
take place. This was particularly so in light of budgeting and the Precedent H. He considered reform and making better use of modern technology would both speed up drafting time and reduce the cost of the process.

**About the new format bill**

When it becomes mandatory, it is anticipated that the new format bill of costs will apply in all part 7 multi-track claims, with limited exceptions. The format will be compulsory for all costs incurred from the date the new bill becomes mandatory. As such, initially at least, claims for costs will likely be prepared in 2 parts with the first part mirroring the current, traditional bill of costs, and the second part being in the new format.

Receiving parties will be able to choose whether to adopt the bill template annexed to the Practice Direction, or to produce their own version of the bill using alternative software. The final amendments to the rules and Practice Direction to Part 47 are yet to be published, but they are likely to mirror the following in respect of requirements of the new bill, which must include:

- a capability to produce reports and aggregates based on phases, tasks, activities and expenses (as currently set out in schedule 1 to Practice Direction 51L)
- a capability to produce a summary of totals in a form comparable to the court’s Precedent AB
- a capability to automatically recalculate totals where input data is amended
- offering full functionality to the court and all parties by containing all calculations and reference formulae

Even if the new format bill does not become compulsory in April 2018, it is more a matter of ‘when’ rather than ‘if’ and we must all be prepared for change.

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3 Exceptions include proceedings that are subject to fixed costs, scale costs, cases where the receiving party is a litigant in person, or where the court has made another order. The new format bill will also not apply to legal aid claims or Solicitors Act assessments.
The effect of costs budgets on detailed assessment, continued…

In Guru’s Summer 2017 publication, we reported the decision in *Harrison v University Hospitals Coventry & Warwickshire NHS Trust* [2017] EWCA Civ 792, concerning the effect of budgets on detailed assessment hearings. In *Harrison*, the principle that an approved/agreed budget would not be departed from upwards or downwards without “good reason” was upheld. You will recall the court held there would still be a detailed assessment of the costs which had been incurred at the point the budget was set, but no assessment of the post-budget costs unless the good reason test could be satisfied.

Deputy Master Campbell, in the case of *RNB v London Borough of Newham* [2017] EWHC B15 (Costs), was asked to consider whether a reduction to the hourly rates in the incurred costs was good reason to depart from the budget and reduce the budgeted costs. The Deputy Master held that this was good reason not least because were the rates in the second part not reduced, the overall costs would be disproportionate. As we discovered at our recent seminar, this is not a view that is universally supported by the judiciary with at least one Regional Costs Judge making it clear that he did not feel at all bound by this decision and would take some persuading to alter the budgeted costs at all.

*Lakhani v Mahmud - Mitchell mark II?*

In the recent case of *Lakhani v Mahmud* [2017] EWHC 1713 (Ch) the defendant failed to file an updated costs budget 21 days before the CMC by one day and the automatic provisions of CPR 3.14 applied and the budget was deemed to be limited to that of court fees only.

The defendant had initially sought to argue that the date of filing was correct, but later accepted it was late and made a last minute application for relief from sanctions, which was served on the claimant on the day of the CMC.

Relief was refused. Whilst the judge accepted that one day late might not be regarded as “terribly serious”, in the current case there were a number of matters which led him to take a different view, including:
the late acceptance resulted in wasted time arguing about the breach rather than the budgets

the solicitors knew their offices were shut over Christmas and New Year foreshortening still further the time to agree budgets

the impact of late service had created an environment which was not conducive to agreement and was more conducive to the defendant presenting the costs as highly contentious

Applying the three stage test in Denton v TH White Ltd [2014] EWCA Civ 906, it was held that the breach was not trivial, but was a serious breach. The budget was therefore allowed at court fees only even though the parties had in fact been able to speak and agree the budgets. The decision was upheld on appeal. It was accepted that the decision was “on the tougher end of the spectrum as to substance and on the leaner end as to analysis”, but the defendant had not been deprived of a trial and if the claimant succeeded at trial, the decision would have limited adverse impact.

The decision is a reminder of the importance of complying with court deadlines and to seek relief as soon as possible if required, as opposed to, in the Judge’s words, “making a mountain of procedural annoyance out of a molehill of missing a deadline”.

The decision in *Lakhani* is considered further James Barrett’s article on relief from sanctions in this edition of Costs Guru.

**Budget not limited to court fees after it is filed 10 days late**

In the case of *Mott & Anor v Long & Anor* [2017] EWHC 2130 (TCC), the defendants filed their costs budget 10 days late and sought relief from sanctions. The court considered the 3-stage test established in *Denton* in order to establish the seriousness of and reason for the breach.

The claimants submitted that late service of a budget “sufficiently distracts from the co-operative process of entering into discussions [about budgets]”, citing the *Lakhani* judgment (above). The defendants filed a witness statement citing IT issues as the reason for the delay, namely a firm wide issue which caused “difficulties including saving Word documents and printing those documents and there were issues around the system crashing during the course of working on documents”.

HHJ Grant found that the defendants’ breach was not “serious and significant” and given that the court made directions at the CCMC requiring the parties to file revised budgets, the parties were now in precisely the same situation they would have found themselves in if the breach had not occurred at all.

Notwithstanding the defendants’ seemingly lucky escape, they were ordered to pay the claimants’ costs of the application.

**£10k ATE premium challenge rejected based on ‘hindsight’**

*Mitchell v Gilling-Smith* (2017) saw the defendant challenge the claimant’s ATE premium of £10,000, which was taken out to cover expert fees. The defendant’s submission was that the £10,000 premium was unreasonable in amount, given that the expert fees amounted to only £2,000.

Master Leonard, sitting in the Senior Courts Costs Office, expressed the view that waiting until risks are properly identifiable before purchasing ATE insurance rather missed the point of purchasing insurance at all. In his judgment there was nothing to support the contention that the claimant ought to have known the costs of expert evidence would have been in the region of £2,000 at the time the insurance was purchased. Furthermore, this was not the test to be applied when considering proportionality. The premium could not be characterised as disproportionate in a clinical negligence claim that settled for £200,000. The premium was allowed as claimed.
An eye on reform
The future of legal costs