In the loop

Andrew Hogan outlines the importance of keeping clients involved in budgeting decisions

An issue that is often passed over in litigation until disaster strikes, is the involvement of lay clients in matters of costs, as a case progresses. Do clients have to be troubled with the nitty gritty of costs budgeting and management? Is that a matter that can be sensibly left to solicitors and their instructed costs lawyers to get on with, while the client sleeps an untroubled sleep of ignorance? At the conclusion of a case, is a solicitor at liberty to settle the client's claim for costs against an opposing party, without the authority of her client? And if she does, what are the consequences for claiming any shortfall in recovered costs from her own client?

COSTS BUDGETING, MANAGEMENT AND CONSENT

The starting point when considering any issues of solicitor-client costs must be the SRA code of conduct for solicitors, RELs (registered European lawyers) and RFLs (registered foreign lawyers). This provides:

'8.6 You give clients information in a way they can understand. You ensure they are in a position to make informed decisions about the services they need, how their matter will be handled and the options available to them.

'8.7 You ensure that clients receive the best possible information about how their matter will be priced and, both at the time of engagement and when appropriate as their matter progresses, about the likely overall cost of the matter and any costs incurred.'

This obligation is not discharged by offering a vague estimate of costs in the initial client care letter. Costs budgeting and management are central to the conduct of litigation these days: they will largely determine what sums a party is able to recover by way of costs from the opposing party to litigation, and because of the requirement to draw a budget fairly and accurately to reflect both incurred and estimated costs, a costs budget will be 'the best possible information' as to what a party's liability for costs will be.

It follows, to my mind, that a solicitor is professionally obliged to provide the client with a draft costs budget for approval when the issue of costs budgeting and management comes to be considered.

FAIR AND ACCURATE

The costs budget must reflect the client's actual liability to their own legal representatives: there is no scope for creative accounting or putting in rates other than those that the client has agreed to pay. Solicitors who do so may find themselves in difficulties; as the case of *MXX by her Litigation Friend RXX v United Lincolnshire NHS Trust* [2019] EWHC 1624 (QB) illustrates. In the *MXX* case, hourly rates were put forward in the budget which breached the indemnity principle, and when this was discovered a sanction was applied by the court: the disallowance of the £23,404.30 plus VAT spent in preparing the budget. By Practice Direction 22, there is a requirement that a costs budget be verified by a statement of truth.

'2.2A The form of the statement of truth verifying a costs budget should be as follows: "This budget is a fair and accurate statement of incurred and estimated costs which it would be reasonable and proportionate for my client to incur in this litigation."'

It will be noted that the form of statement of truth is subtly different from the statement of truth applied to statements of case and witness statements, as it appears to contemplate that the signatory is the lawyer and not the client: possibly rendering inapposite the later paragraph in Practice Direction 22 which provides: '3.7 Where a party is legally represented, the legal representative may sign the statement of truth on his behalf. The statement signed by the legal representative will refer to the client's belief, not his own. In signing he must state the capacity in which he signs and the name of his firm where appropriate.'

Unless a budget is agreed, in full, there is a reasonable prospect that the court will adjust a client's budget downwards, during costs management, and create a potential shortfall between what the client is likely to have pay her legal representatives and the costs that she will recover from the opposing party.

If a solicitor then seeks to recover the shortfall in costs from her own client, the engagement of the client (or not) with the budgeting process is likely to be determinative of any solicitor-own client assessment under section 70 of the Solicitors Act 1974 of the bills delivered to the client.

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This is because of the effect of the presumptions contained in rule 46.9(3) of the Civil Procedure Rules 1998, which can create rebuttable presumptions that whole tranches of costs are reasonably or unreasonably incurred by the solicitor and chargeable, or not chargeable to the client. Rule 46.9(3) states:

'(3) Subject to paragraph (2), costs are to be assessed on the indemnity basis but are to be presumed –

'(a) to have been reasonably incurred if they were incurred with the express or implied approval of the client;

'(b) to be reasonable in amount if their amount was expressly or impliedly approved by the client;

'(c) to have been unreasonably incurred if –

'(i) they are of an unusual nature or amount; and

'(ii) the solicitor did not tell the client that as a result the costs might not be recovered from the other party.'

As can be seen from the text of subrules (a) and (b), if the client has given her express or implied approval to the incurrence of items of costs, and/or to the amount of those costs, then the presumptions are engaged in the solicitor's favour when it comes to assessment.

So, by sending a draft costs budget to the client, which the client

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then gives authority to be filed and served, the solicitor should be able to demonstrate in any later dispute with the client that items have been expressly approved by the client, as has their amount. This may render those items effectively immune from challenge on any solicitor-own client assessment of costs.

REBUTTING PRESUMPTIONS

Although the Practice Direction notes that the presumptions created by the rule are rebuttable, as Holland J explained in *Macdougall v Boote Edgar Esterkin (a Firm)* [2001] 1 Costs L.R. 118, there may be little scope to rebut them: 'As it seems to me, if there was client approval of that rate as uniformly applied to those hours then a presumption is raised for the purposes of r. 15(2) sufficient to displace indemnity taxation of that item – whether that is a presumption under 15(2)(a) or (b) may be difficult to say but matters not.

'My further conclusion is that the quality of the approval has to be such as to raise a presumption. In the course of argument I talked of "informed" approval and even with reflection I adhere to that concept. To rely on the applicants' approval the solicitor must satisfy me that it was secured following a full and fair exposition of the factors relevant to it so that the applicants, lay persons as they are, can reasonably be bound by it.

'What if I uphold Master Pollard's finding in favour of a presumption? I have no doubt but that then his taxation of this item has to be upheld. True, I accept the submission that the 1986 change from the terms of Order 62 r. 29 to the already cited Order 62 r. 15(2) served to leave any such presumption rebuttable, but I can conceive of no basis for rebuttal when and if I am satisfied of informed approval.'

AFTER COSTS MANAGEMENT

Conversely, after a costs management order has been made, the client's budget may be in tatters after a tough costs management hearing. A solicitor should then provide a copy of the approved amended budget, showing the discounts that the court has made to her client.

The solicitor should then explain to the client that she will not recover all the costs in the original budget: the client should be asked whether she wishes to incur those costs, even though they are likely to prove to be irrecoverable from the opponent. If, however, a solicitor does not bother to have that discussion with the client and then simply goes on to incur the costs anyway without the client's express approval, I consider she is unlikely to be able to charge her client with those costs.

This is because, at this point, presumption (c) in rule 46.9(3) is likely to come into play. The excess costs in question may well be regarded

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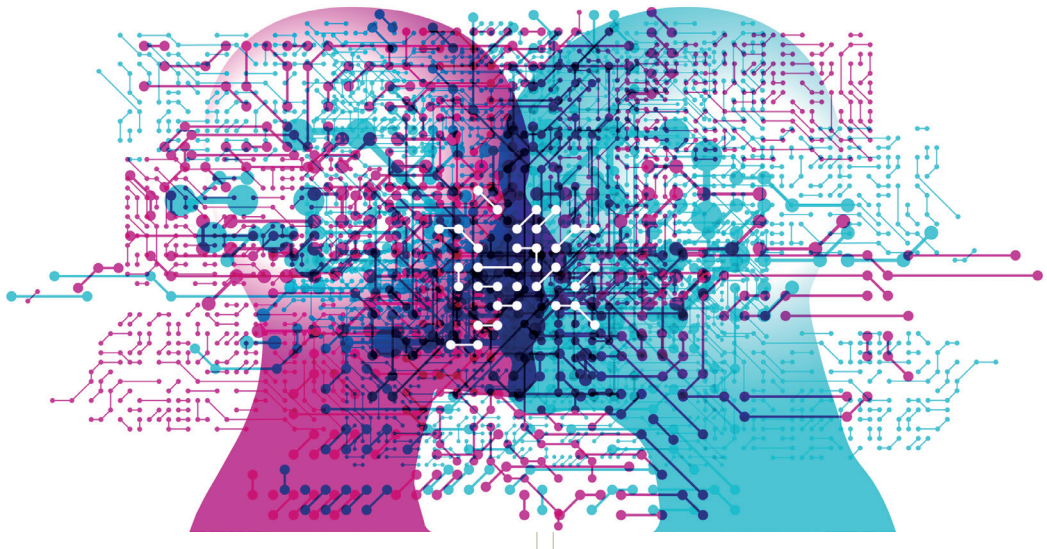
as 'unusual' costs. What is meant by this Delphic phrase, an 'unusual' cost? Although the point is not free from doubt, in my view 'unusual' costs must be costs that, by reason of their context, are unlikely to be recovered from the opponent to litigation. Thus, a silk's brief fee would not be an unusual cost for a trial in the Commercial Court: it would be an unusual cost for a fast track personal injury trial. If these simple steps are not taken before and after a costs management hearing, then a solicitor is risking a world of pain, when shortfalls in costs must be considered at the conclusion of the case.

COSTS, COMPROMISES, AND CONSENT

One of the basic rules of costs, which all solicitors must have in mind, is that the costs recovered in an action belong to the client: they do not belong to the solicitor. A further consideration is that when pursuing and negotiating a settlement of costs, the exercise is identical – in terms of the need to get the client's instructions and authority to act – to that of pursuing and negotiating a settlement of damages.

In the unfortunate recent case of the *Solicitors Regulation Authority v Anjan Patel* (SDT 28 October 2020) Mr Patel was struck off. One of the allegations found proved against him was that he had settled a costs claim belonging to a client without authority.



As the tribunal found: '14.30 It was not in a client's best interests to act contrary to his express instructions. Nor was it in a client's best interests for a solicitor to take decisions on his case and act on them without any reference to his client. Client A did not lack capacity, thus the respondent had no scope to make a best interests decision on his behalf that was contrary to his instructions.

'It was his duty to act on his client's instructions and not to unilaterally decide to ignore those instructions as he considered that they were not wise. The tribunal found that in acting as he did, the respondent's conduct was in breach of Principal 4.

'In so doing the respondent had also failed to provide Client A with a proper standard of service in breach of Principle 5. Members of the public expected a solicitor to act on instructions. Where the solicitor considered an alternative approach was better, the public expected the solicitor to advise on the position but ultimately to act as instructed. In failing to do so, the respondent had failed to maintain the trust the public placed in him and in the provision of legal services in breach of Principle 6.

'14.31 The tribunal found that no solicitor acting with integrity would unilaterally make decisions in relation to a matter in which the client had a direct financial interest, nor would a solicitor so acting act contrary to express instructions. In doing so the respondent had failed to act in accordance with the standards expected of him by the profession and to adhere to the profession's ethical code in breach of Principle 2.'

Thus, if a solicitor settles a costs claim without the authority of the client, as well as facing regulatory difficulties, she is unlikely to be able to charge any shortfall in costs to her client. The client will have a multiplicity of remedies and arguments open to her: whether the argument for non-payment is framed in terms of a breach of a fiduciary duty; or a breach of the contract of retainer; or in negligence; or pursued as a complaint to the Legal Ombudsman; or simply that the extraneous costs were unreasonably incurred on a solicitor-own client assessment; the aggrieved client has plenty of bullets to fire at the defaulting solicitor.

CONCLUSIONS

In conclusion, solicitors who work on the basis that costs budgeting at the beginning of the case, and costs negotiations at the end of a case, are nothing to do with the client, are likely to be labouring under a series of expensive misapprehensions.

Conversely, engagement with the client on costs matters during the case can pay dividends in reducing or eliminating the scope for a dispute with the client over costs at the conclusion of the case.

Acting without a client's authority when engaging with costs management or when negotiating and compromising claims for costs is a course fraught with peril - and must be avoided.

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