

Cost Budgeting in a Living Mesothelioma Case

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Whilst mostly of academic interest rather than of broader practical relevance, an interesting case management decision was made by Master Thornett in a living mesothelioma claim by ordering that the claim be subject to cost budgeting.

It is usual for cost budgeting to be dispensed within the asbestos list, for the obvious reason that in mesothelioma claims the court is dealing with dying or recently bereaved claimants, with living claims being particularly time sensitive. The lack of cost budgeting frees up the Masters' list to offer short notice CMCs under the show cause procedure to either resolve the issue of liability or to set down prompt directions to trial. However, certain cases can involve significant, expensive, expert evidence and it was for this reason that the potential for cost budgeting arose.

The claim involved a living mesothelioma sufferer who was undergoing private immunotherapy and who also advanced a substantial claim for the future private care of his disabled wife. It was claimed he would have provided for his wife but for his death due to mesothelioma.

The claimant was permitted to rely on expert evidence from a respiratory surgeon, consultant oncologist, a care expert, and a further report in respect of the life expectancy of the claimant and his wife. The defendants were granted permission to rely on their own expert care evidence as well as life expectancy evidence.

In light of the significant expert evidence and trial time estimate of 3 days, the Master ordered the claimant to provide an estimate of cost and thereafter the defendants had the opportunity to request a budgeting hearing. The claimant chose to serve the estimate of costs, in the form of a Precedent H costs budget, totalling around £230,000.00 with future costs being approximately £135,000.00. The defendants duly requested a budgeting hearing. The parties exchanged budgets with the claimant serving 2 further budgets which increased his overall costs to over £260,000.00. Precedent Rs were exchanged but a day before the hearing it was confirmed that the claimant's position would be that any cost budgeting would be opposed.

The claimant argued that such cases were unsuitable for cost budgeting saying they are wildly unpredictable. It was submitted that the lack of cost budgeting did not mean the claimant has a free hand in incurring costs as detailed assessment would still take place at the end of the action. The claimant's position was that cost budgeting would increase satellite litigation in the list and that in this case the majority of costs had already been incurred.

Master Thornett was not convinced and ordered that cost budgeting take place, but highlighted that it was not to be intended to be prescriptive generally in the asbestos list. The Master held that whilst the convention was to not cost budget, those engaged in asbestos list are not immune from proportionality of costs. Whilst it may well be that the overwhelming percentage of cases have no suggestion of costs management, the usual protocol is that the issue is expressly canvassed at every CMC even if the order to dispense with cost budgeting usually goes through "on the nod".

The Master pointed out that in catastrophic PI and high value medical negligence cases there is often a degree of uncertainty about prognosis and these are routinely budgeted. If matters arise outside of the predicted path there can also be variation to the cost budgets. Flexibility is regularly required and this was nothing that should challenge experienced solicitors. The fact that 3 different cost budgets were filed all within the space of weeks begged the question as to whether strategizing of litigation and costs was under control and the assertion that the majority of costs had been incurred was not born out in the cost budgets.

This was an unusual case and a better prepared claimant would likely have better prospects of opposing cost budgeting. The Master was not particularly impressed but the claimant's solicitors raising the objection very close to the hearing and the increasing cost budgets by the claimant served within a short period did them no favours.

When dealing with claims in the asbestos list, it is often presumed that the claim is not going to be budgeted. With advances in treatment options for victims of mesothelioma showing some success in prolonging life and function, it may be that fewer claimants will be seeking 1 day assessments as soon as possible with the need to preserve the position in relation to the funding of future treatment likely to take priority over a quick determination of the claim.

That being said, it is universally accepted that it is vital that there is capacity within the Masters' list for short notice hearings to be arranged in living mesothelioma cases. As both claimants and defendants negotiate the until-recently uncharted waters of agreeing suitable agreements for the funding of uncertain private treatment, this also creates the potential for the need for short notice hearings. Cost budgeting on a more regular basis could obviously impact this. However, the Masters also deal with less time sensitive asbestos injury claims such as diffuse pleural thickening and asbestosis. These cases are rarely time sensitive in the same way as living mesothelioma cases and could arguably be dealt

with in the County Courts or District Registries, where cost budgeting could take place. Currently there seems to be little judicial appetite for such changes with the Masters usually unwilling to reallocate such cases out of the RCJ and it is understood that the updated practice direction is expected to explicitly cover all asbestos related injuries.

This case is however another example of costs inflation on mesothelioma claims which quite exceeds the additional damages paid for immunotherapy treatments. Cost budgeting is perhaps one way of monitoring this and challenging unnecessary costs on cases where on many occasions defendant lawyers and insurers are keen to agree funding for reasonably incurred treatment. The eventual outcome of the budgeting exercise was that the claimant's future costs were reduced by around £70,000.00, effectively cut in half.

Our Disease team deal with a number of mesothelioma and asbestos related claims on a regular basis. For more information, please get in touch.

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