

COSTS MANAGEMENT: Where are we now?

Oliver Moore, Guildhall Chambers

PURPOSE OF COSTS MANAGEMENT

- Manage the steps to be taken and costs to be incurred by parties to any proceedings so as to further the overriding objective: enable the Court to deal with cases justly and at proportionate cost
- Costs management has to be considered in context of case management
- 3.17 (1) – when making any case management decision, court will have regard to any available budgets and will take into account costs involved in each procedural step
- Significance in respect to costs recovered?

PROPORTIONALITY TEST – r. 44.3 (5)

- Costs incurred are proportionate if they bear a reasonable relationship to:
 - sums in issue;
 - complexity of litigation;
 - any additional work generated by conduct of paying party;
 - wider factors in proceedings - reputation or public importance.
- What is a “reasonable relationship”?
- Cases going to Court of Appeal – will they help?

SOME CASES ON PROPORTIONALITY

- *Redfern v Corby Borough Council* [2014] EWHC 481
- *Kazakhstan Kagazy v Zhunus* [2015] EWHC 404 (Comm)
- *CIP Properties v Galliford* [2015] EWHC 481 (TCC)
- *GSK v QPR* [2015] EWHC 2274 (TCC)
- *BP v Cardiff & Vale University LHB* [2015] EWHC B13 (Costs)
- *Hobbs v Guy's and St Thomas' NHS Trust* [2015] EWHC B13 (Costs)
- *BNM v MGM* [2016] EWHC B13 (Costs)
- *May v Wavell* [2016] EWHC B16 (Costs)

APPLICATION - CPR 3.12

- Applies to multi-track with a few exceptions
- £10 million +
- Fixed costs applies
- New exception - 3.12 (1) (c):“where in proceedings commenced on or after 6 April 2016 a claim is made by or on behalf of a person under the age of 18 (a child) (and on a child reaching majority this exception will continue to apply unless the court orders otherwise)”

DISCRETION ON APPLICATION

- Practice Direction 3E
 - Discretion
 - para 5 (f) CMO may be particularly appropriate in PI and CN £10 million +
 - Life expectation 5 years or less (para 2(b))
- *Iraqi Civilian Litigation* – no budget
- *Campbell v Campbell* [2016] EWHC 2237– litigant in person – budget ordered as substantial costs (despite PD 3E 7.8)

AMENDMENT TO 3.13: filing/exchanging budgets and Budget Discussion Report

- Limit cases in which full Precedent H is required
- Value of claim <£50k – budget with DQ – only 1st page Precedent H (3EPD.6 (c))
- £50k+ : Budgets not later than 21 days before CMC
- Budgets up to date
- Agreed BDR to be filed not later than 7 days before
 - Figures agreed/not agreed for each phase
 - Brief summary of grounds of dispute (3E PD.3)
- Compel parties to discuss their budgets

BUDGET IN “SUBSTANTIAL CASES”

- 3E PD paragraph 6 (a):
In substantial cases, court may direct that budgets be limited initially to part only of proceedings and subsequently extended to cover whole proceedings
- Order prior to preparation of budget?
- Split trials?

AMENDMENTS TO PD 3E (B): Budget format

- Parties must follow Precedent H Guidance Note in all respects.
- No additional documents to be filed
- Regard to Rules 44.3(5) and 44.4 (3)
- Contingent costs section: anticipated costs which do not fall in the main categories e.g. trial of preliminary issues
- Application if other party behaving oppressively in seeking to cause applicant to spend money disproportionately on costs
- Budget preparation separate
- Some revised descriptions of what is and is not included in each phase, but still problems: subsequent CMC, specific disclosure, mediation, updating budget at PTR

COSTS MANAGEMENT ORDERS

- Rule 3.15 (1)...the Court may manage the costs to be incurred by any party
- Court may at any time make a CMO
- Rule 3.15 (2): Where budgets filed Court will make CMO unless litigation can be conducted justly and at proportionate cost without such an order

THE CMO

- The Court will:
 - (a) Record the extent to which the budgets are agreed between the parties;
 - (b) In respect of budgets or parts of budgets which are not agreed, record the court's approval after making appropriate revisions.
- If CMO the court will thereafter control parties' budgets in respect of costs

PD 3E – D - CMOs – Para 7.3

- If budgets or parts of budgets agreed Court will record the extent of such agreement
- In so far as the budgets are not agreed, Court will review and after making any appropriate revisions record its approval of those budgets
- Court's approval will only relate to total figures for each phase of proceedings, although in course of review may have regard to constituent elements of each total figure
- Not detailed assessment in advance. Consider whether budgeted costs fall within range of reasonable and proportionate costs

PD 3E – D - CMOs – Para 7.4

- Court may not approve costs incurred before date of any budget, however may record comments on those costs and will take those costs into account when considering reasonableness and proportionality of all subsequent costs
- Costs incurred before the date of the budget and hearing?

PD 3E – D – CMOs - amendment

- New paragraph 7.10
- Making of CMO concerns totals allowed for each phase of budget
- Not role of Court in cost management hearing to fix or approve hourly rates claimed in budget
- Underlying detail in budget for each phase used by party to calculate totals claimed is provided for reference purposes only to assist court in fixing a budget

SOME ISSUES WITH MAKING CMO

- “Precise mechanics of costs management not prescribed”
- No standard approach
- Not following Rules or PD
- No standard order
- What is proportionate?
- Costs more than damages
- High value cases
- Parties having different views as to complexity and value
- Disproportionate/high incurred costs

WRIGHT V ROWLAND [2016] EWHC 2206 (Comm)

- C's budget agreed. Ds' budgets not agreed.
- Different views as to complexity and issues in dispute
- Flaux J concerned that in approving Ds' budget could lead to costs being recoverable without detailed assessment; but could be unfair to set budget at very low level if complex as suggest
- Approved some elements of budget but remainder left for detailed assessment

PROBLEM OF HIGH INCURRED COSTS - 1

CIP Properties v Galliford

- Very high level of incurred costs
 - Effectively budgeted entire costs
 - Recorded amount which considered reasonable for C to have already incurred
 - Limit to costs regardless of incurred/estimated
 - Formula: if incurred costs higher on assessment then corresponding reduction in estimated costs
- Inconsistent with rules/PD
- Adopted in *GSK*

PROBLEM OF HIGH INCURRED COSTS - 2

Cook on Costs and White Book supplement on Costs & Funding 2nd ed. (DJ Middleton):

- Court indicates and recites overall view of proportionality of each party's costs
- Case and costs managed by phase
- Where incurred costs already equal/exceed what Court decides is proportionate sum for phase nothing is budgeted and Ct recites finding on proportionate sum
- Less prescriptive than CIP approach
- Discretion "good reason"
- Clarity intended outcome

3.18 – ASSESSING COSTS ON THE STANDARD BASIS WHEN CMO

- Court will:
 - (a) have regard to the receiving party's last approved or agreed budget for each phase of proceedings
 - (b) not depart from such approved or agreed budget unless satisfied that there is good reason to do so(Attention is drawn to r.44.3(2)(a) and 44.3(5), which concern proportionality)
- Meaning of departure?
- What is a good reason?
- *Simpson v MGN* [2015] EWHC 126 – no good reason
- “more questions than answers”

HOURLY RATE AT DETAILED ASSESSMENT

Note in White Book:

- Court may allow hourly rates which are lower, or, possibly, higher, than the rates specified in the last approved or agreed budget.
- In certain circumstances Court assessing costs may treat its allowance of different rates as a good reason for allowing less, or possibly more, than some of the phase totals specified in last approved or agreed budget

WHITE BOOK NOTE ON 3.18

- Whilst costs incurred at time of budget cannot form part of budget and so fall for assessment unfettered by restraints of budget, the total of reasonably incurred and reasonable in amount incurred costs and budgeted costs subject to overall assessment of proportionality
- Unless good reason to depart from budget overall figure can never be less than budget, but it can be less than total of budget sum plus reasonably incurred and reasonable in amount non-budgeted sum

MERRIX V HEART OF ENGLAND

- DJ Lumb, Regional Costs Judge, 13.10.16 at Birmingham DR
- Preliminary issue at detailed assessment:

“To what extent, if at all, does the costs budgeting regime under CPR Part 3 fetter the powers and discretion of a costs judge at a detailed assessment of costs under CPR Part 47”

FACTORS TO BE TAKEN INTO ACCOUNT IN DECIDING THE AMOUNT OF COSTS

- Rule 44.4 - Court will have regard to all circumstances in deciding: whether costs were proportionately and reasonably incurred; or were proportionate and reasonable in amount (if assessing costs on standard basis)
- Will have regard to the “8 pillars of wisdom”:
conduct; value; importance; complexity or difficulty or novelty; skill, effort, specialised knowledge and responsibility involved; time spent; place where and the circumstances in which work was done; and
- Last approved or agreed budget.

CASES REFERRED TO IN *MERRIX*

- *Henry v News Group Newspapers* [2013] EWCA Civ 19 – pilot scheme
- *Troy Foods v Manton* [2013] EWCA Civ 615 – permission to appeal
- *Slick Seating v Adams* [2013] 4 Costs LR 576 – summary assessment at trial
- *Simpson v MGN* [2015] EWHC 126
- *Sarped Oil v Addax* [2016] EWCA Civ 120 – “thrown into confusion” issue as to which costs can be challenged post budgeting

SARPD OIL v ADDAX ENERGY [2016] EWCA Civ 120

- Issue: relevance of costs budgets in security for costs application
- Where the parties agree a costs budget in whole or in part and that is recorded in relevant CMO, 3.18 (b) applies both to the agreed incurred costs element and to the agreed estimated costs element (para 41)
- BUT 3.12 (2) and 3.15 makes clear only relates to incurred costs
- Obiter?

SARPD OIL - 2

- Comments on incurred costs will carry significant weight when exercising general discretion as to costs under CPR Part 44 at end of trial (para 42)
- Practical effect of a comment on already incurred costs might be similar effect to formal approval of estimated costs in budget (para 43)
- Legitimate expectation that costs likely to be recovered (para 43)
- Parties coming to the first CCMC know that is occasion on which to contest the costs items in those budgets, both incurred and estimated
- Statement of truth (para 44)

SARPD OIL - 3

- Effect of order that costs budget is approved in [total sum] was: estimated costs were approved and court commented on incurred costs element (para 47)
- Likely that incurred costs would be included in any standard assessment of costs unless good reason was shown why it should not be
- Little if any difference between practical effect of order in relation to incurred and estimated costs

SARPD OIL - 4

- Correct to take budget as reference point for security (para 48):
 - parties should have appreciated first CMC was appropriate occasion to raise issues re incurred and estimated costs;
 - Rule 3.17: costs budgets important instruments for all case management decisions
- Did not dispute budgets when had opportunity; contrary to overriding objective to re-open
- “Approved” costs budgets “strong guide” to likely costs order after trial re incurred and estimated (para 52)

MERRIX – decision - 1

- Costs Judge's powers on d.a. not fettered by costs budgeting save budgeted figures should not be exceeded unless good reason
- Budgeting not intended to replace d.a. – no wholesale changes to Part 44 or Part 47; PD 3E “not d.a. in advance”
- Possibility of d.a. supported by para 52 of Sarpd
- Costs management reduce need for d.a. by ensuring within range of reasonable and proportionate costs
- Rule 44.4 applies to budgeting and d.a. but different time and different documents – no certainty identical results

MERRIX – decision - 2

- Budget is available fund not a cap or fixed amount
- Budget within range of reasonable and proportionate costs but not fixed amount
- Material change would be a good reason to depart from budget
- Departure had to be something outside original budget and could only be upwards
- Budget is living document not fixed

MERRIX – decision 3

- Budgeting and assessment are not mutually exclusive – different tools
- Budget: general landscape;
- Assessment: surveying terrain
- Analogy consistent with Sarpd: do not say costs budgets fix amount to be allowed at assessment
- States (wrongly) no mention of assessment
- Question posed based on misunderstanding of objectives and function of costs management

MERRIX – decision 4

- Not consistent with overriding objective for only opportunity to challenge at CCMC – far lengthier than already are
- Duty of parties to narrow issues
- In most cases should be possible to produce proportionate budget sufficiently accurate that difference between parties so negligible not worth trouble of d.a.
- Appeal – expedited

ALTERNATIVE VIEW

- DJ Middleton and Master Rowley (Cook on Costs):
 - Irreducible minimum budgeted costs unless there is a good reason
 - Already been subject to proportionality and reasonableness analysis
 - Revisiting reasonableness and proportionality on assessment will be extremely rare and only done within argument there is good reason to depart
- White Book supplement: “unless there is good reason the budgeted costs will be assessed as budgeted and any assessment will focus on the non-budgeted costs”

INDEMNITY COSTS

- 3.18 only applies to standard basis
- Confirmed in *Denton v TH White*
- Proportionality no part to play on indemnity basis
- Part 36
- Indemnity basis part way through phase - effect and relevance of budget not clear

REVISION OF BUDGETS

- 3E PD para 7.6
- Significant developments in the litigation
- Submit to other parties for agreement and in default submit to court with note of: changes, reasons and objections of other party
- Approve, vary or disapprove having regard to any significant development since previous budget
- Applications for variation or addition of case management directions should be accompanied by revised budget
- Necessary for case management as well as costs management

RETROSPECTIVE REVISIONS

- *Yeo v Times Newspapers* [2015] EWHC 126 (QB) – only prospective revision of budgets is possible
- Only allowed later if good reason on assessment
- Comments from Court us
- White Book note: view in *Yeo* not universally accepted by Judges of the Commercial Court
- Suggestion discretion or first budget only