

# Keeping Track of Costs

## Partners in Costs – An essential Costs Update

Reuben Glynn

### Topics:-

- **Costs Budgeting**  
The present state of play – Costs Budgeting and Assessment.
- **Proportionality**  
Guidance and case law – what can you do and what do we know?
- **Fixed Costs**  
How to escape fixed costs and what does the future hold?

### Costs Budgeting - the Present State of play

CPR 44.4(3)(h) added the 8<sup>th</sup> ‘pillar of wisdom’

- The court will have regard to –  
*“(a) the conduct of all the parties, including in particular –  
(b) the amount or value of any money or property involved;  
(c) the importance of the matter to all the parties;  
(d) the particular complexity of the matter/the difficulty or novelty of the questions raised;  
(e) the skill, effort, specialised knowledge and responsibility involved;  
(f) the time spent on the case;  
(g) the place where and the circumstances in which work or any part of it was done;  
(h) the receiving party’s last approved or agreed budget.”*
- It is now difficult to argue against the notion that Budgeting is here to stay.

### Incurred Costs

#### CPR PD 3E

- **7.3** *If the budgeted costs or incurred costs are agreed between all parties, the court will record the extent of such agreement. **In so far as the budgeted costs are not agreed, the court will review them and, after making any appropriate revisions, record its approval of those budgeted costs. The court’s approval will relate only to the total figures for budgeted costs of each phase of the proceedings, although in the course of its review the court may have regard to the constituent elements of each total figure.** When reviewing budgeted costs, the court will not undertake a detailed assessment in advance, but rather will consider whether the budgeted costs fall within the range of reasonable and proportionate costs.*
- **7.4** *As part of the costs management process **the court may not approve costs incurred before the date of any costs management hearing.** The court may, however, record its comments on those costs and will take those costs into account when considering the reasonableness and proportionality of all budgeted costs.*

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### Redfern v. Corby Borough Council

- Psychiatric Injury at work, valued at £700,000.00
- Costs budget equal to the value of the Claim, reduced to £220,000.00
- Court found a Judge can deal with estimated costs through prism of incurred costs
- Held: only way to mark excessive incurred costs was to approve subsequent costs at a level lower than otherwise would have been.
- Deputy Master Eyre had been unhappy that £130,000 had already been spent and said the fact a budget might be set which would give the claimant little room to manoeuvre thereafter ought to have been considered when deciding to spend that much. **“That is the unfortunate arithmetical result that you must live with.”**

### Sir Cliff Richard OBE -v- The BBC & Chief Constable of South Yorkshire Police [2017] EWHC 1666(Ch)

- *The BBC requested that the Court comment upon the Claimant’s “disproportionate and excessive” incurred costs.*
- ***“To my mind there is little or no value in the court recording a general comment about incurred costs along the lines that the incurred costs are “substantial” or they are “too high”. If the court wishes to record a comment that the incurred costs are “excessive” or they are “unreasonable and disproportionate” it will wish to be sure that the comment is made on a sound footing, rather than impression, because commenting is quite unlike the exercise of approving a figure per phase for future costs. The court will also wish to consider the utility of making a comment unless it is specific and well-founded.”***
- ***“I do not accept Mr Eardley’s submission that there is a danger that, if a comment is not made, a Costs Judge will proceed on the basis that the costs are both reasonable and proportionate. That is a fanciful suggestion, given that Costs Judges are experienced in dealing with costs in many different types of claim and drawing conclusions about reasonableness and proportionality in a wide range of different circumstances.”***

### Comparing Budgets:-

### Bloomberg LP v Sandberg (a Firm) and Others [2017] 1 Costs LO 1

- The Court will take into account wider factors and are wise to the issue that there is not always parity between the parties.
- **“there are good commercial reasons why solicitors who act for Insurers often charge less, both in terms of hours and rates, than solicitors who do not receive the same amount of work from one client.”**
- *Sir Cliff Richard OBE -v- The BBC & Chief Constable of South Yorkshire Police [2017] EWHC 1666(Ch)*

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*Speaking regarding the witness statement phase “I note that the [Defendant’s] budget is significantly lower, but that is not in any way determinative and it is possible for parties to take a different view about the likely amount of time that may be involved.”*

### Costs Budgeting and Assessment:-

Merrix v Heart of England NHS Foundation Trust [2017] EWHC 346 (QB) (24 February 2017)

- “where a costs management order has been made, when assessing costs on the standard basis, the costs judge will not depart from the receiving party's last approved or agreed budget unless satisfied that there is good reason to do so. This applies as much where the receiving party claims a sum equal to or less than the sums budgeted as where the receiving party seeks to recover more than the sums budgeted.”

Harrison v University Hospitals Coventry & Warwickshire NHS Trust [2017] EWCA Civ 792 (21 June 2017)

- Budgeted (estimated) costs will be allowed as drawn (so long as the budgeted costs do not exceed the approved costs budget) unless a “good reason” can be given to depart from the same (either upwards or downwards);
- Incurred costs are to be assessed in the usual way;
- For the purposes of CPR 44.3(7), when considering which proportionality test applies proceedings are commenced when the Court issues the claim form and not when a Claimant took steps to have the claim form issued.
- **Where there is an approved Costs Budget the Court may still apply the proportionality test.**
- *“A costs judge on detailed assessment will be assessing incurred costs in the usual way and also will be considering budgeted costs (and not departing from such budgeted costs in the absence of “good reason”) **the costs judge ordinarily will still, as I see it, ultimately have to look at matters in the round and consider whether the resulting aggregate figure is proportionate, having regard to CPR 44.3 (2)(a) and (5): a further potential safeguard, therefore, for the paying party.**”*
- What is ‘good reason’?
- Unfortunately, the Court of Appeal in *Harrison* declined to give any examples of good reasons leaving this to the *“individual appraisal and evaluation of costs judges by reference to the circumstances of each individual case”*.

RNB v London Borough of Newham [2017] EWHC B15 (Costs)

- The rates set out in the cost budget are not representative of the rates which will be allowed upon assessment.

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- Unrealistic hourly rates can still be reduced on assessment, regardless of the totals allowed in the budget.
- **“it is only on that occasion that a paying party has an opportunity to challenge the rate”**
- *RNB* has now been appealed which should result in further guidance.

### Amending a Costs Budget:-

Churchill v Boot (2016) QBD (Picken J) 22/04/2016

- Budget approved in 2014 at which time permission given for experts in various disciplines
- Claimant subsequently sought to revise its budget on the basis of further disclosure including education and employment records, a further order requiring updated expert reports, an increase in the value of the case and delay in the trial by six to nine months
- Claimant submits that these constitute significant developments within the meaning of paragraph 7.6 of PD 3E
- Court holds that the stated issues did not amount to significant developments
- The so-called developments were capable of being envisaged at the time of the original costs budget.
- The need for updating of medical reports and for the experts to review disclosure could have been anticipated at the time of the original budget.

### Budgeting- Tricks and tips

- Know the rules – where the stated value on the claim form is less than £50,000.00 Budgets are to be served with the Directions Questionnaire. In any other case, not less than 21 days before the first CMC (unless the Court orders otherwise).
- Make sure you enter into reasonable negotiations, in *Findcharm Ltd v Churchill Group Ltd [2017] EWHC 1108 (TCC) (12 May 2017)*, the Court disregarded the Defendant’s Precedent R owing to the deliberately low proposals.
- Agreeing a Costs Budget does not mean it is approved (*Brown v BCA Trading Ltd & Ors [2016] EWHC 1464 (Ch) (17 May 2016)*)
- Bill of Costs must reflect the Costs Budget (see CPR PD 47 (5.8))

There are exemptions to budgeting;

- Where a claim is made by or on behalf a person under the age of 18 (note that the rule states “or on behalf” of a child. This may well apply to fatal accident cases where one of the dependants is a child).
- Cases where the Claimant has a limited or severely impaired life expectation (5 years or less remaining).

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- Cases with a value in excess of £10million (albeit the Court can order budgeting anyway, see *Napp Pharmaceutical Holdings Ltd v Dr Reddy's Laboratories (UK) Ltd and Others* [2017])

### Budgeting - Format of the Costs Budget – CPR PD 3E (6)

- (b) Parties **must** follow the Precedent H Guidance Note in all respects.
- (c) In cases where a party's budgeted costs do not exceed £25,000 or the value of the claim as stated on the claim form is less than £50,000, the parties must only use the first page of Precedent H.
- If the claim is pleaded at no more than £50,000.00 a full Precedent H is required.

### Budget Discussion Report

- In the event that a party files and exchanges a [...], all other parties, not being litigants in person, **must** file an agreed budget discussion report no later than 7 days before the first case management conference.
- The budget discussion report required by rule 3.13(2) must set out—
  - (a) those figures which are agreed for each phase;
  - (b) those figures which are not agreed for each phase; and
  - (c) a brief summary of the grounds of dispute.
- The parties are encouraged to use the Precedent R Budget Discussion Report annexed to this Practice Direction.”.

### **Proportionality - Guidance and case law – what can you do and what do we know?**

- Proportionality is central to the Jackson Reforms
- ...But application even over 4 years on still remains vague
- Where is it going?
- The Old Proportionality Test was based on the *Lownds* Test
- Step 1: Are costs proportionate having regard to the '7 pillars' at CPR 44.4(3)
- YES: each item must be reasonably incurred and at reasonable cost
- NO: was each item necessary? If so that the cost of the item is reasonable.

### The 'New' Rule

- Applies to all costs incurred post 1<sup>st</sup> April 2013 enables the Court to deal with cases 'at proportionate cost' (CPR 1.1)
- CPR 44.2 (2) - Where the amount of costs is to be assessed on the standard basis, 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 [...]**

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### Kazakhstan Kagazy v Zhunus [2015] EWHC 404 (Comm)

- The level of costs recoverable from a paying party is the lowest amount a party could reasonably be expected to incur in order to conclude and proficiently present a case having regard to all the circumstances.

### Hobbs v Guy's and St Thomas' NHS Foundation Trust [2015] EWHC B20 (Costs)

- Low value delayed diagnosis case which settled for £3,500.00 pre-issue.
- Bill of Costs of £32,329.12 reduced by 2/3rds at PA (to circa £11k) then further reductions at DA (to circa £9k).
- **Costs allowed still three times the damages recovered.**

### May & May -v- Wavell Group & Dr Bizarri [2016]

- The case of dealt with a Private Nuisance claim.
- The Bill of Costs totalled £208,236.54.
- Following detailed assessment Master Rowley reduced the Bill of Costs to £99,655.74.
- Master Rowley stated that he considered that after assessment the costs were disproportionate.
- Master Rowley had regard to the following facts;
  - Quantum – The claim settled for £25,000.00 prior to receipt of a Defence.
  - Complexity – The Claim was neither legally or factually complex.
  - Conduct – There was nothing in the Defendant's conduct which caused additional work.
  - Other – There were no wider factors (fact Claimant was a public figure was irrelevant in this case).
- Master Rowley then sat back and reduced the Bill of Costs to £35,000.00 (plus VAT).
- Master Rowley stated that *"It seems to me to be clear that where the sums in issue are modest, **the Kazakhstan method is still too generous** to the receiving party under the new approach. **The amount that can be recovered from the paying party is not the minimum sum necessary to bring or defend the case successfully. It is a sum which is appropriate for the paying party to pay** by reference to the five factors CPR 44.3 (5). It is not the amount required to achieve justice in the eyes of the receiving party but only a contribution to that receiving party's costs in many modest cases"*
- *"In cases such as this, it seems to me that **the new test of proportionality ... will require legal representatives to inform their clients that, even if successful, they will receive no more than a contribution to the costs that will be incurred.** It may be that such advice proves to be a driver for the costs to be reduced or for alternative dispute resolution mechanisms to be explored. It is to be hoped that cases such as this one, which are in a transitional phase of understanding the new proportionality test, will be relatively rare."*

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### [BNM v MGN Limited \[2016\] EWHC B13 \(Costs\) \(03 June 2016\)](#)

- The claimant brought an action to prevent the defendant using confidential information after the defendant obtained her phone. The claim was concluded, shortly after Defence was received, by a consent order whereby the defendant agreed to pay damages of £20,000 and the claimant's costs.
- The costs claimed were in the sum of £241,817. That included a success fee in respect of the solicitors' costs of 60 per cent, success fees in respect of the costs of both counsel of 75 per cent and an after the event insurance premium of £58,000 plus insurance premium tax of £3,480.
- Following a "line by line" assessment the total costs came to £167,389.45. However this was reduced to £83,964.80 because of issues of proportionality.
- Apart from the court fee, each of the items was reduced by about one half. The success fees allowed was 33 per cent of the respective base costs allowed. (Reduced from 60% for the solicitor and from 75% for Counsel).
- *"Had it been intended that costs should never exceed the sums in issue the rule could easily have stated that. There will be cases in which the costs bear a reasonable relationship to the sums in issue even though they exceed those sums."* Costs allowed 4 times as much as damages!
- Does *BNM* mean that additional liabilities are now subject to the proportionality test?
- The old Costs Practice Direction at 11.5 reads as follows:
- *"In deciding whether the costs claimed are reasonable and (on a standard basis assessment) proportionate, the court will consider the amount of any additional liability separately from the base costs."*
- Master Rowley in *BNM*: *"When applying the new test of proportionality, the court need not consider the amount of any additional liability separately from the base costs."*
- *BNM* will be heard by the Court of Appeal in October where guidance on proportionality will be provided.
- In the meantime the Court have given conflicting views on this issue:
- In *Rezek-Clarke v Moorfields Eye Hospital NHS Foundation Trust [2017] EWHC B5 (Costs) (17 February 2017)* Master Simons stated that *"CPR 44.3(2) does not make any distinction between profit costs, disbursements or additional liabilities. In my judgment this means that any item contained in a Bill of Costs may be disallowed or reduced on the ground that it is disproportionate even if it was reasonably or necessarily incurred."*
- In *Murrells, Estate of v Cambridge University NHS Foundation Trust [2017] EWHC B2 (Costs) (17 January 2017)* Master Brown followed the judgment in *King v Basildon & Thurrock NHS Foundation Trust* in finding that the test of proportionality did not apply to additional liabilities.
- DJ Besford in *Mather-v-Doncaster & Bassetlaw Hospitals NHS Foundation Trust* found only additional liabilities incurred pre 31 March 2013 were exempt.

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### Fixed Costs - How to escape fixed costs and what does the future hold?

#### Fixed Costs – The Now and the Future:-

- A growing number of claims are now subject to ‘fixed costs regime’.
- LJ Jackson’s ‘Fixed Costs Report’ published on 31 July 2017 seeks to expand the implementation of fixed costs in civil matters.
- We’ve also had reports from the Civil Justice Committee on proposals for fixed costs in Deafness claims and from the Department of Health for proposals for fixed costs in Clinical Negligence cases.
- It is clear that Fixed Costs are not going away.

#### Escaping Fixed Costs - Indemnity Costs:-

- Where an indemnity basis costs award is made, this will trump fixed costs (for now).
- The appropriate test for indemnity costs is set out in the case of *Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hammer Aspden and Johnson (A Firm)* [2002] EWCA Civ. 879 in which the Court of Appeal reiterated that an order for indemnity costs could only be made where there was ‘some conduct or some circumstance which takes the case out of the norm’.
- *Broadhurst v Tan* [2016] EWCA Civ 94 – Indemnity Costs trump Part

#### Escaping Fixed Costs - Does late acceptance of a Part 36 offer equate to indemnity costs?

- There are conflicting judgements on this issue:
  - *Russell v Noble*, 15 May 2017, *Oldham County Court (Unreported)* – DJ Simpson granted the Claimant’s Application for indemnity costs.
  - *Anderson v Ladler*, *Newcastle County Court (Unreported)* – CJ Gargan late acceptance of Part 36 offer (10 months late) does not equate to indemnity costs.
  - *McKeown v Venton*, *Liverpool County Court, 24 July 2017 (Unreported)* – Late acceptance of Part 36 does not itself constitute exceptional circumstances.
  - *Richardson v Wakefield Council (Unreported)* – HHJ Gosnell held that CPR 36.17 trumped CPR 45 and allowed standard basis costs (not indemnity) where there was late acceptance of a Part 36 offer.

#### Escaping Fixed Costs - Part 36

- All the conflicting judgments could be fruitless given the comments made by LJ Jackson in his *Fixed Costs Report*.
- His views on Part 36 are as follows:

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- *“I favour replacing indemnity costs with a percentage uplift of 30% or perhaps 40%. BUT this is a clear issue of policy, which will need to be addressed in the consultation exercise following this report.”*

### Escaping Fixed Costs - CPR 45.29J

- “(1) If [the Court] considers that there are exceptional circumstances making it appropriate to do so, the court will consider a claim for an amount of costs (excluding disbursements) which is greater than the fixed recoverable costs [...]
  - (2) If the court considers such a claim to be appropriate, it may—
    - (a) summarily assess the costs; or
    - (b) make an order for the costs to be subject to detailed assessment.
  - (3) If the court does not consider the claim to be appropriate, it will make an order—
    - (a) if the claim is made by the claimant, for the fixed recoverable costs; or
    - (b) if the claim is made by the defendant, for a sum which has regard to, but which does not exceed the fixed recoverable costs, and any permitted disbursements only.”
- Unfortunately, there is no guidance on what ‘*exceptional circumstances*’ would be, likely because the quantum involved is never significant enough for the issue to reach the Court of Appeal.
- In the SCCO case of *Udogaranya v Nwagwu* [2010] EWHC 90186 (Costs), it was noted that the dictionary definition of ‘exceptional’ means ‘**unusual or not typical**’ and exceptional circumstances were found to exist in circumstances where the Defendant’s conduct had caused the Claimant significantly more work than would otherwise have been necessary.

### **Escaping Fixed Costs – Allocation**

- In with *Qader & Ors v Esure Services Ltd & Ors* [2016] EWCA Civ 1109 (16 November 2016) the Court of Appeal determined that CPR Part 45 section IIIA is automatically dis-applied in any case allocated to the multi-track.
- There is an anomaly for cases which settle pre-allocation but for more than £25,000.00.
- The CPR was amended in April omitting the “*but not more than £25,000.00*” from the relevant Tables, and inserts at rules 45.29B and D, “*and for as long as the case is not allocated to the multi-track,*”
- This appears to unequivocally confirm that if a case is not actually allocated to the MT, even if it is clearly a MT case, then you are caught by 45.29B or D (whichever applies).
- *O’Beirne v Hudson* [2010] EWCA Civ 52 (09 February 2010) supports the contention that the Court can look at what track a case would have been allocated to when deciding what costs were payable. This provides some scope for argument but the CPR wording appears to allow limited room to argue.

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- We also have CPR 46.13 (3) which provides further scope as this states that, “*Where the court is assessing costs on the standard basis of a claim which concluded without being allocated to a track, it may **restrict** those costs to costs that would have been allowed on the track to which the claim would have been allocated if allocation had taken place.*”
- CPR 45.29J also allows in ‘exceptional circumstances’ to seek an amount greater than fixed costs.

### Fixed Costs and Jackson

- Fixed costs to be extended to all cases up to £25,000 (i.e. remaining fast track cases).
- An intermediate track for most civil cases up to £100,000 and which can be tried in three days or less with not more than two experts on each side within which fixed recoverable costs (FRC) will apply.
- Clinical Negligence cases with value up to £100,000.00 where Breach of Duty & Causation are admitted in the protocol period with straightforward quantum issues to be resolved will be subject to intermediate track. “*The majority of cases above £25,000, however, are likely to proceed in the multi-track.*” (Chapter 8, Para 5.5).
- Dilution of the *Broadhurst v Tan* principle, which means parties that fail to accept a reasonable Part 36 offer within a reasonable period will only obtain an uplift on their FRC.
- There will also be a pilot fixed costs scheme for Commercial claims with a value between £100,000.00 to £250,000.00.
- The new regime will likely apply to claims issued on or after implementation.
- Implementation of LJ Jackson’s Fixed Costs Reforms is expected either April or October 2019, subject to Parliamentary approval.

### More Changes are coming...

- The mandatory use of a new electronic Bill of Costs is set to be compulsory from April 2018 in ALL County Courts & the SCCO, subject to parliamentary timetable.
- There has been a voluntary pilot since 2015.
- The Bill details time by phase, task and activity.

*“Lord Justice Jackson has made his mark on civil procedure. The job is incomplete and ongoing. His will be a hard act to follow.”* (Professor Dominic Regan)