3 Essex CHAMBERS

3+9=Costs
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Introduction

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EDITOR

Welcome to the 10th Edition of 3 + 9 = Costs.

Since the last edition, our team has been out and about, speaking and attending at the Costs Law Reports Conference, the Association of Costs Lawyers Annual Conference, and various in-house attendances not to mention regular appearances in Court! One Court appearance of significance was the Senior Costs Judge's valedictory in Court 58. It was presided over by Birss LJ, attended by many other members of the judiciary and filled with barristers, solicitors, costs lawyers and close family members of Andrew Gordon-Saker. A full-bottom wig from the LJ with robes regaled in real gold, wigs and robes from the Bar, judicial gowns from the judiciary, and the odd cry from the Senior Costs Judge's grandson, made for a splendid occasion. Fitting tributes were paid by Simon Browne KC and Claire Green (past Chair of the ACL). The members of 39 Essex Chambers wish Andrew Gordon-Saker a wonderful retirement.

On to business. We start in the King's Bench Division and provide you with an update on recent experiences in costs budgeting hearings from two decisions of Master Thornett in *Worcester v Hopley and Jenkins v Thurrock*. There are some clear warnings sounded about adverse costs orders to be made at costs budgeting hearings where parties adopt unrealistic positions.

Staying with the KBD corridor, we review the nearly new guidance note for Costs Management Hearings, which ends with the same warning again

about potential adverse costs. You may think a theme is emerging?

Once parties are through case management, and have made it to trial, we take you through a menu of consequential costs issues at trial: incidence, basis, pre- and post-judgment interest and interim payments on account of costs are all servings.

From case management in the KBD, we move to detailed assessment and the Supreme Court no less. *Oakwood Solicitors Ltd v Menzies* has shone a light on what is a "payment" for the purposes of the Solicitors Act 1974. It brings with it clarification that clients must be informed of fees due before monies are transferred from client account to office account, and transferred only if there is consent to do so, if such transfers are to qualify as a 'payment'.

Next, we review *Signature Litigation LLP v Ivanishvili* in the Court of Appeal. Again, the Court examined the qualifying nature of a statute bill, particularly in relation to interim bills in CFA cases which should not be assumed to be interim statute bills. The case highlights the importance of informed consent, and the protection afforded to clients for the assessment of bills, with time running only from when the bill is truly final.

To round up, we review the trend of Budgets and Guideline Hourly Rates becoming a feature in solicitor-client assessments. The approach in *EVX v Julie Smith* [2022] together with the approach in *Rhett St. James v Wilkin Chapman LLP* [2024] serve as timely reminders of what is to be understood from the presumptions in CPR r.46.9(3), the distinction between consent and informed consent and what is meant by unusual leading to unreasonable.

Plenty of stuffing for your festive season! See you very soon.

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Costs Budgeting but with Teeth: Master Thornett's decisions in *Worcester v Hopley* and *Jenkins v Thurrock*

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In two quick-fire decisions this year (handed down on 16 July and 9 September), Master Thornett has made waves by imposing costs sanctions on claimants for attending budgeting hearings with – what he termed – unrealistic budgets. Does this establish a new trend at budgeting hearings and how should parties react?

Introduction

The Masters' corridor of the King's Bench Division has recently started "decoupling" case management from costs budgeting. In other words, having separate hearings to deal first with directions and then sending the parties away to negotiate budgets and come back for a budgeting hearing if they have been unable to agree. The rationale is that often budgets cannot be agreed because the parties are too far apart on directions. We have all been in the position where no useful conversation can be had on budgets because one side is saying it's a 2 day trial and the other side is saying two weeks! But where parties have not been able to agree budgets, and come back before the court for budgeting alone, should the usual 'costs in the case' order be made, or is it open to the court to make a different order? That is the subject that Master Thornett considered in these two cases.

Worcester v Hopley [2024] EWHC 2181 (KB)

This was a clinical negligence claim arising out of mental health treatment. Case management took place on 11 April 2024 and directions were given for the trial of a preliminary issue. A budgeting hearing was listed for 15 May 2024, the aim of which was allow the parties a month to negotiate (and hopefully agree) their budgets. Unfortunately, the parties were unable to agree the Claimant's budget. At the budgeting hearing, the Claimant sought future costs of £342,263. That was reduced to £159,675 at the hearing before the Master (53.35% of the initial amount sought). It was also just 3.58% above the amount offered by the Defendant. The Defendant indicated it was going to seek a costs order and those matters were determined at a further hearing on 16 July 2024.

The Defendant submitted that the court should exercise its discretion by directing that there be no order for costs in respect of the budgeting haring in May 2024. The Defendant submitted that the Claimant served an "unrealistically high budget", and maintained the same having had the opportunity to revise it after the directions hearing. That, plus the considerable reduction made at the 15 May hearing took the case beyond the typical and conventional 'costs in the case' order. In contrast, the Claimant submitted that simply because the budget had been reduced by a large amount did not mean that the original budget was unrealistic. The hearing was no different to any other budgeting hearing and thus the usual 'costs in the case' order should be made.

The Master found that "it would not be appropriate for the court regularly to depart from an "in the case" costs order following "ordinary" costs management just because a party has seen their budget reduced." However, "a party that resolutely proceeds to a separately listed costs management hearing with an overly ambitious budget should not readily assume that the court will be willing to see both its time and resources and those of opposing parties' engaged without any potential consequence in costs." If costs management always saw an order for costs in the case, it would encourage parties to "chance their luck" at the hearing because there would be no adverse costs risk of doing so.

The overall "impression and conclusion" the Master reached was that the Claimant's Precedent

H was unreasonable and unrealistic in terms of proportionality. That led to a "polarised approach" between the parties that prevented settlement and necessitated a further hearing. The Master therefore concluded:

1) there should be no order for costs of the budgeting hearing itself in May;
2) the Claimant should pay the Defendant's costs of the July hearing to argue about costs; and
3) the Claimant's costs management costs should be reduced by 15% to reflect the additional work consequent on proposing an unrealistic budget.

Jenkins v Thurrock Council [2024] EWHC 2248 (KB)

Worcester was followed a couple of months later by *Jenkins*. In *Jenkins* Master Thornett went even further.

This was an accident at work in which damaged exceeded £200,000. The Claimant suffered a significant injury to his right foot and ankle alongside psychological injuries. The Provisional Schedule made the usual claims for loss of earnings, treatment, care and a modest claim for accommodation adaptation. It was a fairly run of the mill case which attracted fairly run of the mill directions.

A case management hearing took place on 7 June 2024. The usual practice of KB Masters was followed in that costs management was listed for a separate date about six weeks later on 17 July 2024. The Master stated the purpose of that approach was: "to enable the parties to revise their Precedent H and R forms in the light of both the directions made at the Case Management Hearing and also to reflect any preliminary comments made about budgeting at that hearing. Further and importantly, to facilitate further discussion and negotiation about each party's budget." The Master had already made comments at the directions hearing about the "apparent disproportionality of the Claimant's budget."

The Master took the view that the Claimant had maintained an "unrealistic and inappropriately ambitious budget" at the costs management hearing. He continued to do so despite the opportunity to modify his position in response to the Defendant's Precedent R, observations made by the Master at the Case Management Conference and the further points made by the Defendant before the budgeting hearing. Overall, the costs management hearing could have been avoided had a more reasonable approach been taken by the Claimant.

The Master ordered the Claimant to pay the Defendant's costs of the budgeting hearing on 17 July 2024 and reduced the Claimant's costs management costs by 35%.

Reflections

Clearly these two decisions mark a step-change in the way the KB Masters are dealing with the costs budgeting element of costs and case management. No longer will claimants simply be able to hide behind the "usual" order of costs in the case. I anticipate it will become more and more commonplace for judges to make costs orders relating to budgeting hearings which could have been avoided if the parties adopted a more reasonable approach.

This does not simply apply to claimants. Defendants must also be wary of adopting artificially low or mean negotiating positions in their Precedent Rs and therefore forcing a budgeting hearing. The question for both sides should be "have we adopted an unrealistic position which has driven the parties to a costs budgeting hearing unnecessarily?" However, as it is usually claimants who have the benefit of a costs in case order (particularly in liability admitted cases), claimants obviously have more to lose from an adverse costs order, and should think very carefully about maintaining extremely high budgets unless they can be properly justified on proportionality grounds. Defendants are also likely to feel emboldened to take more aggressive stances on the costs of budgeting

as a result of these decisions.

The next question which came to my mind is: is this just Master Thornett having a frolic of his own? The answer to this appears to be 'no'. I have heard from various KB Masters (including Senior Master Cook) that the approach adopted by Master Thornett has been supported by the other Masters on the corridor. I'm sure there will be differences of approach, but we should not simply consider this risk only arises when our budgeting hearings are listed before Master Thornett.

Finally, what about Part 36 offers on budgets? My view is that where a separate budgeting hearing has been listed, parties would be well advised to make Part 36 offers in respect of the budget (or indeed individual phases). A Part 36 offer can be made "in respect of the whole, or part of, or any issue that arises…" (see CPR r36.2(3)). That wording is broad enough to encompass making an offer in relation to a party's budget. This is one way in which claimants can seek to rebalance the playing field now costs for budgeting hearings may be at large. Making a competitive offer on their own budget will increase the chances of defendants accepting, or risk the claimant beating the offer at a budgeting hearing and reaping the benefits of the automatic indemnity costs consequences.

Kings Bench Masters Costs Management Hearing Guidance Note – Commentary

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From Old to New

In early October 2024 social media ignited chatter about the new KBD Masters Guidance on Costs Management Hearings (annexed to this newsletter). Articles were written and comments made. The Guide was signed off by Senior Master Cook on 26 September 2024. This was News!

Except it wasn't news at all. Back in March 2024 Master Brown (Costs Judge) had written the KBD Guide of which 98% is repeated in the now definitive version, of the Senior Master.

His changes have removed any reference to the Court of Appeal judgment in *Hadley v Pryzybylo* [2024] EWCA Civ 250 as to costs having to relate to "utility, relevance and attributability". Further, the Hadley case, in relation to attendance at case management meetings, is no longer referred to as having to fit into the statements of case phase (there is nowhere else on the form into which they do fit).

Apart from that, the NHSLA is now the NHSR (section 9.2), the case of Reid is explained as to the costs of the CCMC process (section 13) and disputed incurred costs are referred to only in the Form of Order (section 15).

So, you do not think you are missing any pages between section 3.1 and 4.2, **Section 3** deals with "General Issues that commonly arise". These are:

3.1 Hourly rates;
(N,B, there are no more subheadings under section 3, they become "morphed" into section 4., starting at section 4.2)

4.2 Reservation of hourly rates to detailed assessment.

4.3 Delegation.

4.4 Counsel's fees

Finally, when Senior Master Cook refers to Preparation of Trial Bundles (Para 11.1) by referring to "above in section 6", he means "above in section 5" – the deletions in relation to *Hadley* affected the paragraph numbers.

The Purpose of the Guide

The Guide is clear that it is an attempt to assist parties in advance of cost management hearings in the KBD involving high value personal injury and clinical negligence claims.

Sections 1 and 2 of the Guide refer to the principles of **proportionality** (set out in CPR 44.3(5)) and reasonableness (set out in 44.4 (2)) although reiterating that cost budgeting is not the same as detailed assessment. Indeed, by necessity there are "phases" in which the costs must be generally reasonable and proportionate.

Hourly rates (section 3.1). CCMC hearings neither fix nor approve hourly rates (CPR 3.18(8)). Guideline Hourly Rates are a starting point in determining reasonableness and it may be appropriate to allow enhancements, particularly for the more senior fee earners. Further, it is not appropriate to budget costs on the basis that hourly rates will be reserved to detailed assessment (the Guide refers to *Yirenki v MoD* [2018] EWHC 3102 (QB).

Delegation (section 4.2) – Consideration will be given to work which could be reasonably delegated. Examples given include Grade D junior fee earners obtaining medical records. The court will consider the reasonableness of the fee earner (and hence the hourly rates) for senior and junior tasks.

Counsel's fees (section 4.3) – It is not for the court to determine how a party should be represented such as by leading or junior counsel or by two counsel. The use of two counsel may impact on the allowance for the solicitor. Additionally, the involvement of a Junior Counsel alongside Leading Counsel may lead to an expectation that the extent of the involvement of Leading Counsel would be reduced.

Issue/Statements of Case (section 5) – Whereas it is accepted that by the time of the CCMC much of this phase will have been completed, the Guide recognizes that in high value claims there is much further work to be done on Schedules/Counter Schedule etc. It may be reasonable to budget for Counsel to assist in preparation of any Schedule of Loss.

Disclosure (section 6) – Disclosure in any given case is highly claim sensitive given the nature of the documents and the specific need for examination of them. This acknowledgement extends to case management records. There is a distinction between obtaining updated records (which can be done at a more junior level) and reviewing records (which may require more senior input). Solicitors will be expected to keep a running electronic bundle of documents which will form the basis of any trial bundle. Collating & pagination of records will generally be regarded as administrative and not recoverable.

Witness Statements (section 7) – There is an expectation that the first draft of a witness statement can be undertaken by lower grade fee earners, particularly as the statement should be in the witnesses' own words. The extent of any involvement of senior fee earners will be claim sensitive.

Expert Reports (section 8) – In general the Court will have an expectation that in cases where each party instructs an expert there will be dispute between the experts up and including to trial (8.1). If there is no dispute between them, then this may be a good reason to depart downwards. If a fee quotation is obtained from an expert, it does not follow that the fee will be reasonable, and the Court should set a reasonable and proportionate

fee (8.2). It is accepted that the expert fees for NHSR or insurers may be less than fees paid for by Claimants (stated in the Guide to be on the basis of greater negotiating power – this author thinks probably due to greater volume of instructions which may be the "other side of the same coin"). Attendances at conferences may be allowed if claim sensitive where fees are proposed for in person conferences rather than remotely (8.3).

PTR (section 9) – The Guide states that a PTR is not necessary and therefore should be budgeted on the basis there will not be a hearing but that costs of 2/3 hours are allowed for the PTR phase for listing and associated matters.

Trial Preparation (section 10) – As to *Trial Bundles* (10.1) reference is made to the Issue and Statement of case section (5, not 6 as stated) but there is little guidance therein as to Trial Bundles. A *Pre-Trial conference* (10.2) may not always be reasonable, but it may be allowed, and the allowance is claim sensitive. It is to be remembered that since October 2019 *Brief Fees* (10.3) are within the Trial Preparation phase. The Court should consider the work Counsel will put into the brief and the fact Counsel will be booked in for the trial so may have a gap in their diary if the case settles (which could be difficult to fill at short notice). If Counsel is heavily involved in the earlier phases of a case, then the expectation will be that the work in preparing for trial will be less. This author is of the view that this is an assumption with little merit. An abated Brief Fee should be less than a delivered Brief Fee as per *Hankin v Barrington & Ors* [2021] EWHC B1 (Costs).

Trial (section 11) – Expert attendance (11.1) is a moot point and may not be decided finally at the CCMC. Nevertheless, budgets are expected to provide for expert attendance at trial and typically, according to the Guide on the basis of a provisional assumption of 1- or 2-days' attendance. With regard to the solicitor attendance (11.2), it might not be reasonable for a senior fee earner to attend throughout a trial. As for time allowed, the reasonable starting point is 7 to 8 hours each full day.

ADR / Settlement (section 1) – JSM/Mediation is to be assumed within the budget. This author notes the changes to the CPR on 1 October 2024 encapsulating ADR directions of greater substance and force than previously. The Guide suggests a party may state that an ADR meeting is unlikely to be required; this author believes in the future this is likely to be an extremely rare occurrence. ADR as a phase may be significant in high value claims but the court will have regard to the familiarity of Counsel and the solicitor from earlier involvement in the case when determining what is reasonable and proportionate.

Costs of Costs Management (section 13) – The Guide refers to CPR 44.2 and *Reid v Wye Valley NHS* [2023] EWHC 2843 (KB) which states that if a party pursues an unreasonable or unrealistic claim for costs or "fails to take reasonable steps to agree budgets or make reasonable offers" this could have adverse costs ordered against them (whether or not Calderbank or other admissible offers have been made or beaten).

Form of Order (section 14) – The Guide sets out a recommended form of order to be used for the cost management part of the Order.

Further Observations

Regardless of its appearance and misnumbering, the Guide gives useful pointers to legal representatives, particularly providing starting points from which a party has to argue for greater reward. It also acknowledges that many of the high value cases will turn on their own features of the claim being made (i.e. claim sensitive) but the Guide is of some assistance.

From experience, the Guide could have mentioned that in each Phase, regardless of the hourly rates, it is the number of hours to be spent by various fee earners and counsel which will determine a reasonable and proportionate amount.

One interesting area is the use of two counsel. The Lady Chief Justice recently has encouraged leading counsel to allow junior to conduct more advocacy in trials. These cases rarely reach

trial (hence more should be allowed for ADR particularly in light of compulsory alternative dispute resolution in the CPR). Nevertheless, the issue of two counsel remains divisive when it should not be so. The Guide does recognise the division of work as an important factor. Defence insurers only use senior juniors, often against silks, and that is unlikely to change. The reasons for it are economy and also, as a matter of practise, the defendant reacts to the case against it rather than formulating the case. It so happens, as a by-product, those defence senior juniors get advocacy exposure in the High Court. Albeit rarely insurers may use two counsel, for example, on appeals on points of principle.

The clear use of two counsel (be it a "senior" and "junior" junior, or a silk and a junior) is for Claimant work. The primary motivator is the seriousness of the injury sustained which in turn increases the value of the claim. As the Claimant is formulating the claim it is often cost effective to have junior counsel to do much of the leg work with the solicitor (e.g. reviewing and having cons with some of the experts, reviewing witness statements, and drafting schedules).

The matters noted above can give rise to starkly differential costs budgets between claimants and defendants. Nevertheless, there are two major ways to diffuse any such contrast. The first is to ensure that there is a division of labour between counsel with minimal overlap (e.g. does a conference really need both counsel with certain experts; should junior counsel do the heavy lifting on drafting schedules with review by the leader). Secondly, there must be an education on costs budgeting that the comparator between the parties should be the hours devoted to a task and not the hourly rate (see above). There may be a fear that in some cases the use of two counsel incorrectly would make a costs budget appear disproportionate when it is not.

Finally, it is clear that the authors of the Guide are leaving open the hours and fees in the budgets to be allowed for experts at trial. Many advocates – for both Claimant and Defendant – in a trial over a number of days would wish for their expert to hear the Claimant give evidence, hear their opposite expert, hear other experts, and give evidence themselves. "Hot tubbing" where the experts give evidence at the same time is not a popular useful forensic tool. In the author's opinion Trial attendance for the centrally important experts is not to be determined by a slide rule approach but with a feel for the issues in the case.

Consequential Costs Issues at Trial

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The Incidence of Costs: CROSS Orders vs Prefer Percentage Costs Orders

The Basis of Costs: Indemnity Costs and the effect upon Costs Budgeting

Pre-Judgment Interest on Costs

Post-Judgment Interest on Costs

Interim Payments on Account of Costs

The incidence of costs
Cross orders vs percentage costs orders

Cross Orders, when based upon the issues determined (issue-based costs orders), will always give rise to problems in drafting a bill of costs and on assessment. Where the opposing parties won on separate issues the allocation of work to pursue, and defend, separate issues are often impossible.

In the governing rule as to costs orders to be made following a hearing, the Civil Procedure Rules within CPR 44.2 (6) allow the following:

> *6) The orders which the court may make under this rule include an order that a party must pay –*
>
> *a) a proportion of another party's costs.*

b) *a stated amount in respect of another party's costs.*
c) *costs from or until a certain date only.*
d) *costs incurred before proceedings have begun.*
e) *costs relating to particular steps taken in the proceedings.*
f) *costs relating only to a distinct part of the proceedings; and*
g) *interest on costs from or until a certain date, including a date before judgment.*

Nevertheless, CPR 44.2 (7) specifically states that other cost orders should be considered and preferred prior to any issue-based costs order:

> *7) Before the court considers making an order under paragraph (6)(f), it will consider whether it is practicable to make an order under paragraph (6)(a) or (c) instead.*

So, what happens if a party was successful on a number of issues and not on others? There may have been no overall winner, particularly if the hearing was, by example, for determination of preliminary issues. Sometimes it is difficult to isolate the work performed on each issue dealt with at trial, but one possibility is to have cross-orders for both sides' costs but on a percentage basis of each of their total costs. Of course, this approach may extend the detailed assessment process and the only tribunal capable of calculating the fair and just percentage proportions would be the trial judge and not the costs judge. Because of this, many judges will order a single percentage costs order for one party reducing the percentage to reflect failed issues the receiving party lost on.

The basis of costs: indemnity costs: The effect upon costs budgeting

The Guidance from the Authorities

The notes in the White Book to rule 44.3 deal with the difference between the effect of the standard and indemnity basis at 44.3.5 (WB 2024-page 1411). The general principles as to the award of costs on the standard or indemnity basis are discussed at 44.3.8 and 44.3.9, with those pertaining to the conduct of a party in relation to an award of costs at 44.3.10 (WB pages 1414 – 1416).

It is of note that the Court of Appeal has declined to define the circumstances in which a court could or should make an order for costs on an indemnity basis. In *Excelsior Commercial and Industrial Holdings Ltd v Salisbury Hamer Aspden and Johnson* [2002] EWCA Civ 879 Lord Woolf, Chief Justice, said:

> *"This court can do no more than draw attention to the width of the discretion of the trial judge and re-emphasise the point that has already been made that, before an indemnity order can be made, there must be some conduct or some circumstance which takes the case out of the norm. That is the critical requirement."*

The discretion to award costs on the indemnity basis is to be exercised judicially and having regard to the matters referred to in CPR r. 44.2 (4) and (5). Tomlinson LJ made it clear that "the discretion [to award costs on the indemnity basis] is to be exercised in light of all of the circumstances of the case" (*Excalibur Ventures LLC v Texas Keystone Inc* [2016] EWCA Civ 1144 at [21]).

Neither the CPR nor the relevant practice directions provide any express guidance as to the forensic method that should apply when the Court is deciding whether to award costs on the indemnity basis. Waller LJ stated in *Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hamer Aspden & Johnson* [supra at [39]]:

> *"The question will always be is there something in the conduct of the action or the circumstances of the case which takes the case out of the norm in a way which justifies an order for indemnity costs"*

It is to be noted the test is not simply whether the circumstances are out of the norm, but whether the circumstances are out of the norm in a way that justifies an order for indemnity costs.

Reference to the case of *Esure Services v Quarcoo* [2009] EWCA Civ 595 at paragraphs [17] and [25] is often quoted – see White Book [WB 2024-page 1413]. This states as follows:

> "In *Esure Services Ltd v Quarcoo* [2009] EWCA Civ 595, where further clarification was provided, the Court stated:
>
> 1) That the decision in the Exclesior Commercial case was made in the context of previous decisions where the argument mounted was that under the CPR indemnity costs should only be ordered where there was some sort of lack of probity or conduct deserving of moral condemnation on the part of the paying party.
> 2) That the word "norm" was not intended to reflect whether what occurred was something that happened often, so that in one sense it might be seen as "normal" but was intended to reflect "something outside the ordinary and reasonable conduct of proceedings".
> 3) That to bring a dishonest claim and to support a claim by dishonesty cannot be said to be the ordinary and reasonable conduct of proceedings" (at [17] and [25] per Waller LJ). See also *Whaleys (Bradford) Ltd v Bennett* [2017] EWCA Civ 2143; [2017] 6 Costs L.R. 1241, CA, at [22] per Newey LJ (disagreeing with the judge's holding that the paying parties' conduct was not exceptional "because many debtors try to avoid paying that which is due")."

The phrase of importance from the above is "something outside the ordinary and reasonable conduct of proceedings", and in reality, whether the conduct of the prosecution of the case was "reasonable", that determines whether there should be an order for indemnity costs.

Judges, counsel, and solicitors would have little work if there were no trials. Parties are expected to litigate if attempts at settlement fail. Winners and losers are the product of trials. Save for a standard basis costs order there are no penalties against a losing party at trial. Nevertheless, penalties do follow if a party litigates unreasonably, and particularly if dishonestly.

What happens to the "reasonable and proportionate" phases in a Costs Budget of the receiving party when Indemnity Costs are awarded?

As shown by CPR 44.3, "proportionality" of the costs claimed is brought into play in a standard basis assessment, but not in an indemnity basis assessment. Indeed, since April 2013 under a standard basis assessment proportionality can trump reasonableness. The rules explain this in clear terms (underlining added):

> Basis of assessment 44.3
>
> 1) Where the court is to assess the amount of costs (whether by summary or detailed assessment) it will assess those costs –
>
> a) on the standard basis; or
>
> b) on the indemnity basis,
>
> but the court will not in either case allow costs which have been unreasonably incurred or are unreasonable in amount.
>
> 2) Where the amount of costs is to be assessed on the standard basis, the court will –
>
> a) *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; and
>
> b) *resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party.*
>
> 3) *Where the amount of costs is to be assessed on the indemnity basis,* the court will resolve any doubt which it may have as to whether costs were reasonably incurred or were reasonable in amount in favour of the receiving party.

Proportionality has been a concept in the assessment of costs for many years. It came to the fore, including in trumping reasonableness, in the 2013 amendments to the CPR (as seen in rule 44.3 above).

The judgment of the Court of Appeal in *Lejonvarn v Burgess* [2020] 4 W.L.R. 43 is authority for the approach to be taken on detailed assessment when indemnity costs are awarded, and costs budgets have been approved. In that case the first instance judge had erred in not addressing the issue of whether a reasonable claimant would have concluded that the claims were so speculative, weak or thin that they should no longer be pursued, *Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hamer Aspden & Johnson (Costs)* [2002] EWCA Civ 879, [2002] C.P. Rep. 67, [2002] 6 WLUK 131 followed. He had been led into error by both counsels' focus on whether the claims were "hopeless", which was not the right test (see paragraph above re the *Esure Services* case above). If there was an indemnity costs order, then prima facie any approved budget became irrelevant, *Denton v TH White Ltd* [2014] EWCA Civ 906, [2014] 1 W.L.R. 3926, [2014] 7 WLUK 202 followed. The assessment of costs on an indemnity basis was not constrained by the approved costs budget, *Kellie v Wheatley & Lloyd Architects Ltd* [2014] EWHC 2886 (TCC), [2014] B.L.R. 644, [2014] 8 WLUK 365 applied.

In summary, an application for an award of costs on the indemnity basis, if granted, circumvents the substantial costs budgeting exercises undertaken by the parties and the court and opens the door for assessments of costs without any restriction of the costs budgeting exercise.

Should the Court take regard of proportionality in deciding whether to award indemnity costs?
It is permissible for the Court to ask whether injustice would arise if it denied the paying party the benefit of a standard assessment or a reasonable and proportionate costs budget that is subject to a limitation of proportionality – and then decide whether that approach outweighs the need for indemnity costs. There is case law establishing this as a valid principle of objection to an award of indemnity costs, particularly now relevant in light of the judgment in *Lejonvarn v Burgess* [2020].

In *Digicel (St Lucia) v Cable & Wireless plc* [2010], Morgan J considered an application for indemnity costs which was resisted mainly on the grounds that it would deny the paying party the right to have the proportionality of the bill of costs assessed. Having accepted the issue of proportionality as a valid basis to object to indemnity costs, Morgan J. went on to rule that the claimants in that case had in fact forfeited the benefit of an assessment on a proportionate basis.

In *Ross River Ltd v Waverley Commercial Ltd* [2012] EWHC 3006 (Ch.), Morgan J again reviewed the issue at paras 41-44 and refused to make an indemnity costs order on grounds of the proportionality question. He stated at [43] the question of proportionality should loom very large in this case given the level of the legal costs which have been expended.

In *Euroption Strategic Fund Ltd. v Skandaniaviska Enskilda Banken AB* [2012] EWHC 749 (Comm), Gloster J recognised the principle of objecting to an application for indemnity costs as it denies the element of proportionality but concluded that indemnity costs should be awarded.

It is to be noted that these three cases pre-date April 2013. They apply the common law approach to proportionality as it then was. As noted, since April 2013 proportionality has been a central pillar in the CPR themselves. Given this rule-based centrality, it is reasonable to argue that the issue of proportionality should be given greater weight in applications for indemnity costs than was the case pre-2013. The necessity for this approach has been reinforced by the judgment in *Lejonvarn v Burgess*.

Pre-judgment interest on costs
It is now common, particularly in commercial cases, for pre-judgment interest to be claimed on

costs which have been paid. Prior to any judgment debt interest "compensatory rate" interest can be claimed on money expended during the litigation (as the client has not had use of it).

Any power to award interest on costs prior to the judgment date arises from the Judgment Debts Act 1838. However, the application is purely a discretionary matter under the CPR (see *Rowe v Ingenious Media Holdings plc* [2021] EWCA Civ 29 at [50]). CPR rule 40.8(2) affords the court the power to vary the date on which interest starts to run and CPR rule 44.2(6) (g) creates similar provision as to costs allowing for "(g) interest on costs from or until a certain date including a date before judgment". This provision is utilised regularly in commercial cases.

Nevertheless, given recent interest rate rises that is a difficult matter to calculate (if advanced software is not available).

This is exemplified by the graph below of interest rates 2014 – 2024:

In light of this the sensible approach is for the Court to determine the average of interest over the period of the case when costs were being paid.

Consequently, by way of example, an appropriate order would be similar to the following:

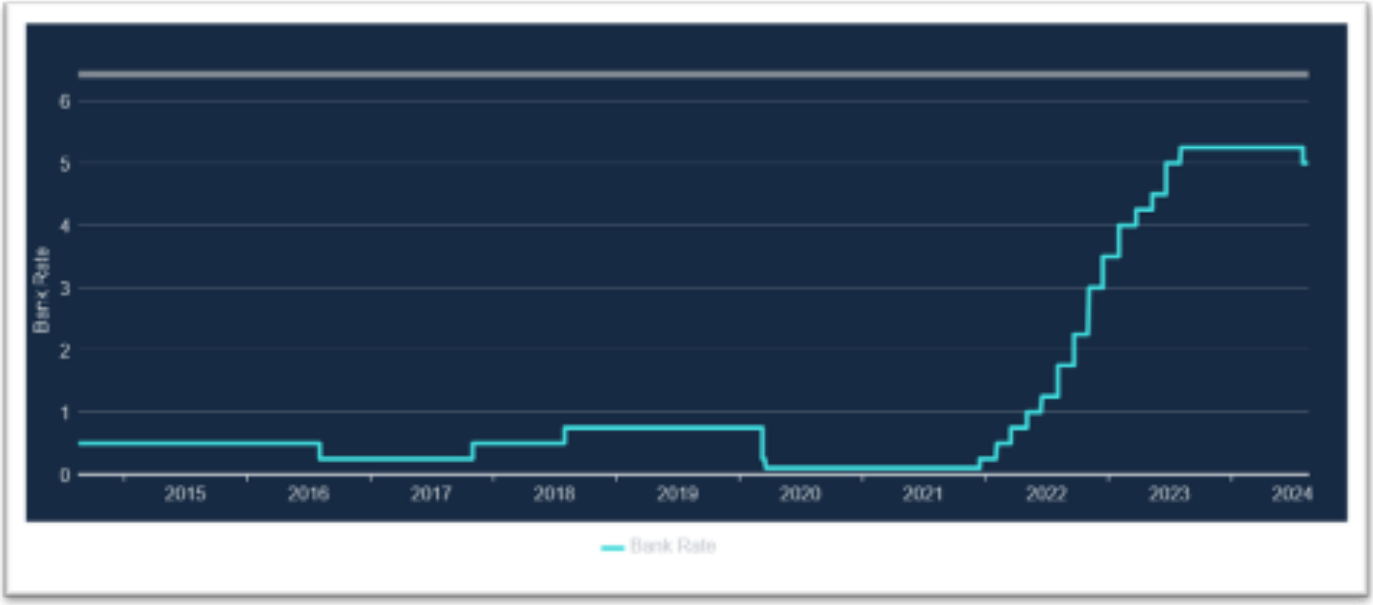
1) From the date on which the relevant costs were paid to the date of the Court's order, interest should be payable at 4%, being an estimate of the average of the Bank of England base rate over the relevant period (3%) plus 1%; and
2) The judgment rate should run from the Court's order, currently at 8% pa.

Post-judgment interest on costs

Since 2015 applications have been made regularly for deferment of the imposition of the Judgement Rate of 8% per annum following the judgment given by Mr Justice Leggatt in the case of *Involnert Management Inc v Aprilgrange Ltd and Others* [2015] EWHC 2834 (Comm).

He ruled that interest on costs, which under the Judgment Act 1838 (Section 17) was at a rate of 8%, should not be applied from the date of Judgment, but would apply from a date of 3 months hence. The reason for this ruling was that it gave both the Defendants and Claimant time to ascertain a full quantification of the Claimant's total liability under the Judgment.

Nevertheless, as costs budgeting increases this approach will diminish and the focus will be on



interim payments of costs which preserves cash flow for the receiving party and reduction of judgment interest of the payment party.

Further, in the absence of costs budgeting, there is nothing to prevent a receiving party serving a schedule of costs, if not a full bill, to support both any interim payment and to resist any delay in interest being applied.

Interim payments on account of costs
Costs budgeting is now a significant factor in the award of interim payments on account of costs. Awards of 90% of the budgeted costs are a common feature at consequential hearings. The following cases illustrate this observation:

Thomas Pink Ltd v Victoria's Secret UK Ltd [2015] 3 Costs LR 463; [2014] EWHC 3258 (Ch) Intellectual property dispute between the shirtmakers Thomas Pink and the undergarment manufacturer where 90% of the approved budgeted costs was awarded by way of interim costs order.

MacInnes v Gross [2017] 2 Costs LR 243; [2017] EWHC 127 (QB); [2017] 4 WLR 49. The court should have regard to the fact that on detailed assessment the costs judge will not depart from the approved or agreed budget unless satisfied that there is good reason to do so (CPR 3.18). Coulson J (as he then was) regarded 10% as the maximum deduction appropriate in a case where there is an approved costs budget.

Puharic v Silverbond Enterprises Ltd [2021] Costs L.R. 499 This case involved a bonus payment for a gambler at a London Casino. The Defendant sought an interim payment on account of costs under CPR 44.2(8), The sum of 50% offered by the claimant was held to be too low because it failed to have regard to the developing body of law as to the relationship between costs management and detailed assessment. 90% was an appropriate sum for those costs which had been budgeted. 50% was an appropriate sum for unbudgeted costs.

Surrey Searches Ltd. & Ors. V Northumbrian Water Ltd. & Ors [2024] EWHC 2283 (Ch) 3rd September 2024: 90% of budgeted costs awarded. 100% requested by Defendants but good reasons not to award the whole amount. Nevertheless, those reasons did not result in an award less than 90%.

For Non-Budgeted Costs the same point does not apply to costs incurred by the time of the CCMC, which were not subject to the court's approval. In respect of those costs, a reasonable sum was granted in accordance with the guidance of Christopher Clark LJ in *Excalibur Ventures LLC v Texas Keystone Inc* [2015] EWHC 566 (Comm) wherein he stated:

> *"The Court is not to look for an irreducible minimum but an estimate of the likely recovery subject to an appropriate margin of error and the potential effect of other factors impinging on recoverability and/or risk of recovery."*

Such an approach oftens results in an award of interim costs being in the region of 50% to 65% of the costs incurred.

Oakwood Solicitors Ltd v Menzies

Daniel Kozelko
Call 2018

Introduction
In *Oakwood Solicitors Ltd v Menzies* the Supreme Court provided useful clarification on when there will be a 'payment' such that the more restrictive regime for the assessment of a solicitor's bill of costs under s.70(4) of the Solicitors Act 1974 ('the Act') will be engaged.

Legal Background
The regime set out in the Act provides a framework for clients to challenge the bills of their solicitors. Once a bill is served, there is an unconditional right to request assessment for 1 month, and then a right to request assessment on terms to be determined by the court for a further 11 months. From 12 months the court

will not order assessment of the bill unless there are 'special circumstances'. However, where there is payment by the client of the bill, the situation changes. Once paid the Act provides that there shall only be assessment in 'special circumstances' in the first 12 months. Once that period has expired no assessment can be made.

Factual Summary

Mr Menzies was involved in a traffic accident and engaged Oakwood Solicitors ('Oakwood') to pursue a claim for damages. A retainer was agreed and set out in a conditional fee agreement ('the CFA'). The CFA provided that, in the event the claim succeeded, Mr Menzies agreed to pay Oakwood's basic charges, disbursements and a success fee set at 25% of basic charges. It was also agreed that the total of those sums would be capped at a maximum of 25% of compensation received (after deducting recovery from the other side). The CFA provided that the charges would be paid 'out of your compensation' and that 'you agree to let us take the balance of the basic charges; success fee; insurance premium; our remaining disbursements; and VAT. You take the rest.'

The underlying claim settled (for £275,000 gross of CRU). As a result of the CFA, Oakwood retained £58,632.79 in its client account ('the retained sum'), from which on 25 March 2019 £25,000 was transferred to its office account. On 18 April 2019 Oakwood provided details of its costs, including what might be recoverable from the defendant, to Mr Menzies. Following negotiation, Oakwood agreed costs in the sum of £38,000 with the defendant. This left a sum of £35,711.20 outstanding ('the outstanding costs'). On 11 July 2019 Oakwood paid Mr Menzies £22,629.09, being the retained sum minus the outstanding costs. It also issued what it described as a 'Final Statute Bill' dated 11 July 2019, with that bill stating 'unless otherwise stated in the covering letter, the total charge has been deducted from your damages, as agreed'.

On 1 April 2021 Mr Menzies commenced an assessment of the 'Final Statute Bill' under s.70 of the Act. He argued that he had not yet paid the bill as he had not been informed of the specific amount due and had not provided agreement to that amount. Oakwood defended on the basis that 'payment' for s.70(4) had occurred on 11 July 2019. The agreement had provided for money to be taken from the client account and, upon receipt of the bill by Mr Menzies, s.70(4) was engaged. They argued that, as a result, that provision barred assessment after the 12 months expired.

At first instance the Costs Judge accepted Oakwood's case (albeit he went on to say that, if he had been permitted to consider whether there were special circumstances in this case, he would have found them). On appeal to the High Court, Oakwood's position was rejected, but then it was accepted on further appeal in the Court of Appeal. Importantly, while the High Court found that there had been no sufficient settlement of account, the Court of Appeal considered that the prior agreement was sufficient to achieve 'payment'.

Judgment

The Supreme Court, in a judgment given by Lord Hamblen, allowed the appeal and rejected Oakwood's defence.

Lord Hamblen began from the proposition that the most obvious example of 'payment' is a situation where a bill is rendered and then paid by the client transferring money to the solicitor. In making the transfer, the client has agreed to the amounts charged in the bill as rendered. However, payment might also be achieved by the client giving a direction authorising a deduction from sums held by the solicitor on the client's behalf. Oakwood's case was a departure from this as, essentially, it argued that payment was carried out on and by the delivery of the bill of costs itself. Lord Hamblen considered that to be a departure from the natural meaning of 'payment'. In doing so, he accepted (at para 46) Mr Menzies' case set out at para 30 which was:

> *A prior agreement between solicitor and client that the client will pay monies generally on*

> *account of costs, or that the client agrees in principle to the solicitor deducting monies to pay costs from monies held on behalf of the client, and then the use by the solicitor of such monies to pay a particular bill without seeking the client's agreement to the amount to be paid in respect of that bill, is not payment of the bill for the purposes of section 70.*

He considered Oakwood's approach was a departure from the purpose of s.70; it provided protection to clients entitling them to challenge a bill of costs. As a result, it would be odd if payment of that bill could be achieved without any opportunity for the client to consider the bill and whether it should be paid. This protection is reflected in the normal rule that no claim for costs by a solicitor against a client can be brought unless the bill has been delivered. Even after delivery, there is for a month an unconditional right of assessment and no claim can be brought in this period. The 12-month period for assessment also runs from delivery. Thus, the opportunity to consider the bill, and the opportunity to challenge the bill without a claim being brought, is central to the framework. Oakwood's case would substantially undermine these protections and make far broader s.70(4), which operates to apply a stricter regime where the client has already in effect accepted and agreed the bill as a result of payment. These considerations pointed in Mr Menzies' favour.

Mr Menzies' position was also supported by the case law. Ranging from *In re Bignold* (1845) 9 Beav 269 to *Harrison v Tew* [1989] QB 307 the cases show a long established understanding that there must be an agreement to the sum to be taken to pay a bill for costs: put another way, there must be a settlement of account. A number of cases emphasised the need for the client to be able to consider and accept the balance of the bill as correct. Oakwood's approach would depart from this case law, and undermine the protections which had been in place for clients for over a century.

Finally, Lord Hamblen rejected the suggestion of negative practical implications for solicitors of accepting Mr Menzies' position. Insofar as solicitors needed finality on the sum to be paid, a fixed fee could be agreed to achieve this. The process of a settlement of account is a long established one, and does not seem to have caused difficulty historically. Further, due to modern communication techniques, the ability to secure agreement from a client is far easier than in the 19th Century, and the solicitors could agree terms to help in achieving acceptance of and agreement to the bill. The process in the Act may be expensive, but it provides a right to insist on assessment in the first month that a bill is rendered, so bills may be assessed in any event; costs of such proceedings may also be recovered if the solicitor is successful. As to a client who does not engage, the assessment is likely to be an abbreviated process.

For all these reasons the Supreme Court confirmed that, in Mr Menzies' case, there had been no agreement of the bill to constitute the settlement of account. As a result, Mr Menzies was not time barred by s.70(4) of the Act.

Implications

This case has significant implications for the solicitor-client relationship. Solicitors should take care not to transfer money from the client account to the office account without express prior agreement of the client, and such agreement must be on the basis of informed consent. This applies as much to interim payments received on account (whether as to damages or costs) as it does a final settlement sum. Where, as here, the client has provided prior agreement to deduction (or transfer), absent a prior bill or settlement of account, it will not meet the requirements of s.70(4) of the Act. Solicitors must take care to actually obtain agreement and a settlement of account before they benefit from the protections in s.70(4).

However, ultimately, it might be said that this case is nothing new. As Lord Hamblen noted:

…prior to the Court of Appeal's decision in this case, the commentary in the White Book in relation to what is meant by "payment" in this context had remained essentially the same for many years (going back to at least 1939). That commentary included reference to Re Ingle in the following terms: "If a bill has been delivered, the retention of moneys by the solicitors is no payment unless there has been a settlement of account; mere acquiescence is not enough" See eg Civil Procedure 2023, vol 2, para 7C-120.

Whether new or not, the case is an important reminder to solicitors to do things in the right way, even if that way is less convenient to their practice.

When is a bill not a (statute) bill?

Rachel Sullivan
Call 2015

This was the issue which arose in *Signature Litigation LLP v Ivanishvili* [2024] EWCA Civ 901 (decided August 2024). The appeal focussed on the principle of "finality". Could an interim statute bill be delivered for part of the fees, even if there was a subsequent liability to pay further fees, depending on later events? As the Court of Appeal recognised, the case raises important issues about the interplay between s. 70 Solicitors Act 1974 and conditional fee agreements, given the "potential tension between the 1974 Act and the authorities (which stress that finality and completeness are required for invoices to be interim statutory bills), and the subsequent widespread usage of CFAs, which are based on a potential additional fee entitlement accruing later, possibly long after any interim invoices based on discounted rates have been rendered and paid" (at [3]).

Mr Ivanishvili had appointed Signature Litigation (SL) to act as global co-ordinating counsel in litigation against Credit Suisse relating to their management of his assets. The parties had agreed a discounted CFA under which SL were entitled to 65% of their standard fees in any event. The additional portion (35%) of standard fees, Success Fee and Uplift Fee (based on damages thresholds) were payable in the event of successful recovery. 79 invoices totalling nearly £13 million had been rendered and paid without challenge. However, by 2022 the relationship between SL and Mr Ivanishvili had soured, and SL terminated the retainer in September 2022.

An issue then arose as to whether the invoices which had been presented could still be challenged or were subject to the deadlines for assessment under the 1974 Act.

Section 70 of the Solicitors Act 1974 sets out the statutory regime for the assessment of the amount due under a bill delivered by a solicitor to a client. It provides that:

""1) Where before the expiration of one month from the delivery of a solicitor's bill an application is made by the party chargeable with the bill, the High Court shall, without requiring any sum to be paid into court, order that the bill be assessed and that no action be commenced on the bill until the assessment is completed.

2) Where no such application is made before the expiration of the period mentioned in subsection (1), then, on an application being made by the solicitor or, subject to subsections (3) and (4), by the party chargeable with the bill, the court may on such terms, if any, as it thinks fit (not being terms as to the costs of the assessment), order –

   a) that the bill be assessed; and

   b) that no action be commenced on the bill, and that any action already commenced be stayed, until the assessment is completed.

3) Where an application under subsection (2) is made by the party chargeable with the bill –

   a) after the expiration of 12 months from the delivery of the bill, or

b) after a judgment has been obtained for the recovery of the costs covered by the bill, or

c) after the bill has been paid, but before the expiration of 12 months from the payment of the bill, no order shall be made except in special circumstances and, if an order is made, it may contain such terms as regards the costs of the assessment as the court may think fit.

4) The power to order assessment conferred by subsection (2) shall not be exercisable on an application made by the party chargeable with the bill after the expiration of 12 months from the payment of the bill."

However, in order to fall within the assessment provisions of s. 70, bills must meet the requirements of the 1974 Act ("statutory bills"). As Coulson LJ noted, the 1974 Act is premised on the assumption that a solicitor cannot put in a bill until the conclusion of work, but "these days, most solicitors endeavour to charge fees on an interim basis, and the question then arises whether such interim invoices are interim statutory bills – with all the restrictions of s.70 – or simply demands for payment on account" [29].

The Court of Appeal considered previous authorities at first instance dealing with claims that discounted invoices issued under a CFA were interim statutory bills: *Sprey v Rawlinson* [2018], *Winros Partnership v Global Energy* [2021], and *Slade v Erlem* [2022]. In each of those cases, it had been held that the interim invoices were not interim statutory bills, although the decisions each turned on separate points.

Considering the issue, Coulson LJ held that an interim statute bill must be "final and complete in respect of the work or period it covers. There can be no subsequent adjustment for any reason": it must be "a complete self-contained bill of costs" (at [48]). Prima facie, the interim invoices issued by SL for the Discounted Fee were not final and complete: the same work and/or the same period covered by any particular invoice could be revisited when SL made a further claim for the additional portion of the standard fee (and potentially the Uplift and Success Fee).

That lack of finality strongly suggested the interim invoices were not interim statutory bills. This was supported by statutory definition of a CFA (s. 58(2) Courts and Legal Services Act 1990), under which the conditional elements are part of fees for work carried out, notwithstanding that they may only be payable in specified circumstances [49].

Implications

SL had argued that if the interim invoices were not interim statutory bills, they faced the possibility of bills going as far back as 2016 being subject to challenge. The Court of Appeal noted that "it is common in costs cases for the appellant to argue that, if the decision at first instance is not overturned, it will have a devasting effect on costs practice and funding", but dismissed the point shortly. Coulson LJ held that this was a risk a solicitor runs if invoices are not statutory bills, and in any event with the benefit of modern computer records, a well-run firm of solicitors should have little difficulty being able to justify their costs in the case of such a challenge.

The wider question of whether it is possible to deliver interim statute bills in CFA cases was not answered by the Court of Appeal. However, Coulson LJ observed that interim statute bills and CFAs are "uneasy bedfellows" [71].

In practical terms, the following steps are likely to be important:

- If it is possible to render interim statutory bills under a CFA, clear terms will be required in the agreement to reconcile the unconditional element with a complete and final interim bill (see the observations of Cost Judge Leonard in the first instance judgment in Ivanishvili at [84]:]2023] EWHC 2189 (SCCO). However, we note the difficulties in this regard presented by the statutory definition of success fees under s. 58(2) 1990 Act.

- Solicitors should take care to avoid overlapping periods in interim bills rendered. Although Costs Judge Leonard was prepared to accept that a *de minimis* overlap in billing periods in *Ivanishvili* did not on the facts of the case mean that there was anything about the form of the invoices which was obviously inconsistent with them being interim statutory bills ([52-53], [56]), see *Landsdowne Group Limited v Weightmans LLP* [2024] EWHC 1600 (SCCO) where any bills featuring an overlap were held not to be interim statute bills.
- The case highlights the importance of good record-keeping, given that non-statutory bills can be challenged years later.

Budgets and Guideline Hourly Rates – traps to beware of even on a Solicitor-Client assessment…

Shaman Kapoor
Call 1999

EDITOR

Introduction

Some would say that the natural inclination on solicitor-client assessments is to presume that budgets are in the litigation and between-the-parties, that the contractual hourly rates will be the applicable rates and there is no place for arguments about the applicability of either budgets or GHRs in a solicitor-client assessment. Apparently, at least in some quarters, such inclination, if it ever was natural, is misplaced. Much more would be required through informed consent for such protections to apply.

Analysis

The Rules set out the presumptions:

CPR 46.9(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.

There appears to be a tension in the reading of the presumptions. If (a) and (b) are satisfied, does that necessarily mean that the costs are reasonable? Or are they only reasonable if (c) remains inoperative? Are (a) and (b) therefore to be read as being always "subject to" (c)? If so, why doesn't the rule say so? If (c) is to preside, then why is the rule drafted so bizarrely?

In *EVX V Julie Smith (personal representative)* [2022] EWHC 1607 (SCCO), Costs Judge Brown considered the presumption in the Rules. He noted that previous authorities shed light on the proper interpretation of the presumption. In particular, he considered *MacDougall v Boote Edgar Esterkin (a firm)* [2001] 1 Costs LR 118 to be instructive, in which Holland J said: *"to rely on the Applicant's approval the solicitor must satisfy me that it was secured following a full and fair exposition of the factors relevant to it so that Applicants, lay persons as they are, can reasonably be bound by it."*

It is of interest that *MacDougall* was a case that was decided under RSC Order 62, but which principles were thought by Holland J. to be equally applicable to a case under the CPR. That was no doubt because the then Order 62 r.15(2) was drafted in similar (not identical) terms:

> On a taxation (of a solicitor's bill to his own client) costs shall be taxed on the indemnity basis …
>
> … but shall be presumed
>
> a) to have been reasonably incurred if they

were incurred with the express or implied approval of the client, and

b) to have been reasonable in amount if that amount was expressly or impliedly approved by the client, and

c) to have been unreasonably incurred if in the circumstances of the case they are of an unusual nature unless the solicitor satisfies the taxing officer that prior to their being incurred he informed his client that they might not be allowed on a taxation of costs inter partes.

A closer analysis points out some key differences between the RSC and the CPR:

i) In the RSC, sub-paragraphs (a), (b) and (c) were intended to be read together, particularly in the light of the word "and" added to the end of (a) and (b), however, in the CPR, the word "and" is omitted.

ii) Sub-paragraph (c) is obviously different in the CPR, but perhaps most importantly in relation to what "unusual nature" is said to relate. In the RSC, it related to the circumstances of the case. In the CPR, "unusual nature" is not so limited, and "unusual amount" will also ground the presumption of unreasonableness.

Furthermore, *MacDougall* was a case where the information provided to the client by the solicitor was held to be "seriously misleading". The process of taxation (as it then was) had not been explained at all and neither had the process of assessing hourly rate, let alone what was referred to as a retrospective fixing of hourly rate.

In such circumstances *of the case,* it might be thought inevitable that the costs were going to be presumed to be unreasonable. But absent that factual matrix, should the Rule in CPR always be read so as to give (c) the "but always subject to" status?

In relation to the omission of the word "and" in the CPR, that was clearly intentional. But what is one to make of it?

It appears to be clear that the CPR intended to be broader in the application of the 'unreasonable' presumption, because of the framing of the definition of 'unusual'. But at what point does it engage, if at all, in the event that (a) and (b) are satisfied?

Dealing with (a) and (b) alone, *EVX* went on to note *Herbert v HH Law Limited* [2019] EWCA Civ 527 [37-38], in which the Court of Appeal considered that the word "approval" in (a) and (b) meant **informed** approval, in the sense that the approval was given following a full and fair explanation to the client. This, according to *EVX*, had to be more than mere 'consent', and required 'informed consent' before the presumptions in (a) or (b) would engage. Indeed, the Court of Appeal at [40] was clear that simply providing documentation, in the absence of additional oral advice or information, would not suffice as *informed* consent.

In *EVX*, where the hourly rates claimed exceeded GHRs *"by a substantial margin",* the Court found those rates to be unusual. In circumstances where the solicitors did not have the client's informed consent, it was held to be unreasonable for the solicitors to recover any more than GHRs.

But *EVX* did not stop at hourly rates. Costs Judge Brown went on to review the decision in *ST v ZY* [2022] EWHC B5 (Costs), a decision of Senior Costs Judge Gordon-Saker, where the Court was there concerned with whether the word "unusual" was limited to the context of a solicitor-client dispute. Despite the fact that Section II of CPR Part 46 is entirely dedicated to "Costs Relating to Legal Representatives", the Senior Costs Judge found that the word "unusual" had to be read in the context of a between the parties assessment because costs were unusual if they may not be recovered (from the other party). Given that reading, the Senior Costs Judge found that the costs claimed by the solicitor on a solicitor-client basis in excess of a budget which had been filed

and served in the litigation between the parties, was unusual. He found that solicitors were obliged to tell clients that, as a result of the unusual nature of any surplus, those costs may not be recoverable from the other party. If the solicitors had failed to tell the client, then it would not be reasonable for the solicitors to recover such surplus from the client: *"…the solicitor's explanation must be directed to the unusual nature of the costs…"*.

Very recently, the High Court has opined on the issue of budgets, in *Rhett St. James v Wilkin Chapman LLP* [2024] EWHC 1716 (KB). Constable J., sitting with Costs Judge Brown as Assessor, held:

> *"In the ordinary use of language, the amount of costs may be regarded as 'unusual' where a solicitor has significantly exceeded the budget set by the Court…To have significantly exceeded the budget, it is likely that the number of hours incurred, or the rate at which they are charged, has changed significantly from the budgeted assumptions, and, unusually, the solicitor has taken no steps to have the budget increased to reflect the changes…If the client has been kept in the dark, as in this case, the application of presumption of unreasonableness does not seem appropriate."*
>
> *"…the size of the overspend against the budgeted costs is so significant that (if the client has not been told about the overspend) the presumption may be engaged. Once engaged, there must be evidence to rebut the consequential presumption of unreasonableness. If there is no evidence, the costs can be deemed unreasonable without more. If there is an explanation seeking to rebut the presumption, it may need to be considered on an item by item basis – but that of itself may depend on the nature of the explanation."*

Conclusion

It is arguable that the true measure of (a) and (b) against (c) has not yet been tested in circumstances where the factual threshold for informed consent remains unclear, even if *EVX* suggests that *"…a sophisticated user of litigation services may have difficulty showing that any consent to the rates was not on an informed basis." [61]* But even if oral advice is given at the time of entering into a retainer, will it be said that such advice should be independent?

It might be said that if one does reach the holy grail of obtaining the informed consent of a client, then (c)(ii) will always be satisfied, and in those circumstances, the effect of (c) is finally neutralised. The bottom line appears to go back more than a century: in *Clare v Joseph* [1907] 2 KB 369 (CA), Fletcher-Moulton LJ said:

> *"…agreements between a solicitor and his client as to the terms on which the solicitor's business was to be done were not necessarily unenforceable. They were, however, viewed with great jealousy by the Courts, because they were agreements between a man and his legal adviser as to the terms of the latter's remuneration, and there was so great an opportunity for the exercise of undue influence, that the Courts were very slow to enforce such agreements where they were favourable to the solicitor unless they were satisfied that they were made under circumstances that precluded any suspicion of an improper attempt on the solicitor's part to benefit himself at his client's expense."*

What a statement. Now you know.

- Consent does not mean informed consent.
- Without informed consent, unusual costs are deemed to be unreasonable.
- Anything that will not be recovered between the parties, is likely to be unusual, and therefore unreasonable.
- Solicitors must be advised to review their retainer documentation and seek advice for re-drafting.

Kings Bench Masters Cost Management Hearing Guidance Note

This Note has been prepared to assist parties in advance of cost management hearings in the King's Bench Division involving high value personal injury and clinical negligence claims. The purpose of the Note is to provide a neutral approach to issues which commonly arise with a view to promoting settlement of issues which commonly arise in the budgeting process.

General approach

1. A costs budget is not reached through the same process as detailed assessment. However, in considering whether a budget is proportionate the court required to have regard to the provisions of CPR 44.3 (5). This provides:

> *Costs incurred are proportionate if they bear a reasonable relationship to –*
>
> *a) the sums in issue in the proceedings;*
>
> *b) the value of any non-monetary relief in issue in the proceedings;*
>
> *c) the complexity of the litigation;*
>
> *d) any additional work generated by the conduct of the paying party,*
>
> *e) any wider factors involved in the proceedings, such as reputation or public importance; and*
>
> *f) any additional work undertaken or expense incurred due to the vulnerability of a party or any witness.*

2. In considering whether costs are reasonable the following factors which are set out at CPR 44.4 (2) are relevant to the amount of a costs budget:

a) the amount or value of any money or property involved;

b) the particular complexity of the matter or the difficulty or novelty of the questions raised;

c) the skill, effort, specialised knowledge and responsibility involved;

d) the place where and the circumstances in which work or any part of it is to be done.

3. General issues that commonly arise

3.1 Hourly rates of solicitors. When undertaking costs management, it is not the role of court to fix or approve rates (see CPR 3.15(8)). There is, accordingly, no requirement for the court to make any *determination* of the reasonableness of hourly rates. Nevertheless, in considering whether a proposed budget is reasonable, regard may be had to the reasonableness of the hourly rates claimed (and the availability of other solicitors to do the work competently at lesser rates). Further, in a detailed assessment it is often recognised that the GHR are a starting point in determining the reasonableness of the rates claimed; thus an allowance of a budget which is based on hourly rates that involve some uplift on the GHR may be appropriate, in particular for more senior fee earners dealing with complex high value claims.

4.2 Reservation of hourly rates to detailed assessment. It is clear and well established that it is not appropriate to costs budget on the basis that hourly rates will be reserved to detailed assessment, see *Yirenkyi v Ministry of Defence* [2018] EWHC 3102 (QB)

4.3 Delegation. When considering the hourly rates claimed, consideration may be given to the involvement of a senior fee earners in work which could reasonably be delegated to a more junior fee earner (at lower hourly rates). Typically, junior grade D fee earners are, for instance, involved in obtaining medical records from medical providers (and the substantial involvement of higher grade fee earners in this task may be unreasonable).

4.4 Counsels' fees. It is not the role of the court to determine how the claimant should be represented, in particular whether by leading or junior counsel or by two counsel. Plainly some cases justify the involvement of two counsel. Experienced junior counsel are however commonly instructed in claims of substantial value. If two counsel are to be instructed, then

this may be reflected in the allowance to be made for the involvement of senior fee earners (of instructing solicitors). Further, where two counsel are instructed, the work anticipated may be assumed to be shared, such that the substantial involvement of junior counsel may reasonably be expected to reduce the extent of leading counsel's involvement.

Phases

5. Issue and Statements of Case

In many cases this phase will have been largely completed by the time of the first CCMC. It is however commonly the case that the schedule of loss requires extensive further work at this stage. It is not the job of the court to determine who should draft a schedule but when considering the allowance to be made in the budget for the work to be done regard may be had to the anticipated costs of counsel (normally those of junior counsel). Indeed, in complex schedules where calculations may be required of pension loss or loss of earnings (which require consideration of contingencies such as, for instance, promotion) the relative familiarity of counsel in dealing with such issues may mean that the work is reasonably done by counsel.

6. Disclosure

6.1 The consideration of the nature of and extent of the documents that may be caught by disclosure, and the extent to which such documents require careful consideration is highly case-sensitive.

6.2 It is recognised that on-going case manager assessments may require careful consideration and the issue as to whether this work and the extent to which this work can delegated is also case sensitive. A distinction is however to be made between obtaining updated records and assessment (generally Grade D work) and reviewing them, which often justifies a higher grade of fee earner.

6.3 In most cases solicitors can be expected to keep a *running* electronic bundle of documents which can be bookmarked and added to as and when new documentation is made available. This is so even in document heavy cases (perhaps particularly so in such cases). This bundle can then be edited (and the index annotated) so that it forms the basis of any trial bundle.

6.4 The assembling and pagination of bundles are generally to be regarded as administrative or secretarial tasks the costs of which are taken into account within the hourly rate of the fee earners involved; it is not generally separately chargeable (cf work done on preparing an index and deciding what documents should be included in a bundle) (see 3E PD.4) .

7. Witness statements

In general, there is an expectation that the first draft of a witness statement can be undertaken by lower grade fee earners including Grade C solicitors and legal executives (and those with similar experience). This is particularly so since witness statements should, in general, be drafted in the witness' own words. Whether and the extent to which a higher level senior fee earners may reasonably be involved in taking the witness statement and/or checking the contents of the statement is case sensitive and may depend on the complexity and value of the case.

8. Experts

8.1 Assumptions

The court, in general, *assumes* that in all cases where parties have instructed different experts there will be, and will remain up to an including trial, a dispute between the experts. If and to the extent that there is no substantial or material dispute between the experts following service of reports or joint statements this may, in general, constitute a good reason for departing from the budget at detailed assessment (or by agreement); this is not however a matter for costs management.

8.2 Fees of experts

The court may have regard to its own experience with the regard to the rates of experts. It is the

function of the court to determine a reasonable and proportionate budget and it does not follow that simply because an expert has asserted that their fees will be a certain amount the court should set a budget which reflects the amount requested. It is however recognised that in general the fees charged by experts who are instructed by the NHSLA or insurers may be less than are paid by claimants (by reason of the greater negotiating power of such organisations).

8.3 Consultations/conference with experts

In some, if not many, cases these can be conducted by videolink without the need for experts to incur travel expenses or to spend time travelling. Whether allowance should be made for attendance of an expert in person is however case sensitive. It isrecognised that where, for instance, liability is in issue in a clinical negligence claim, close scrutiny may be required of scans/x-rays justifying in person attendance and that there may be other instances where in person conferences or consultations with experts may be reasonably be anticipated.

9. Costs of PTR

In general in the KB a PTR is not considered necessary and often costs of 2/3 hours are allowed to deal with issues relating to listing and associated matters together with a listing fee where appropriate.

10. Trial preparation

10.1 Preparation of trial bundles

See comments above in section 6.

10.2 Pre-trial conference/consultation

Whether a pre-trial conference is in principle reasonable is case sensitive and may depend on the extent to which allowance is made elsewhere for conferences and consultations.

10.3 Brief fees

In determining brief fees at detailed assessment the court is generally required to envisage hypothetical counsel capable of conducting the particular case effectively but unable or unwilling to insist on the particular high fee sometimes demanded by counsel of pre-eminent reputation, *Simpsons Motor Sales (London) Ltd v Hendon Corporation (No. 2)* [1965] 1 WLR 112 (per Pennycuick J).

In general, there are two elements to the determination of a brief fee: the *work* counsel will put in on the brief. This is generally regarded as the main element and is generally understood to include time spent preparing a skeleton argument, the opening speech, any examination in chief, cross examination (but also closing submissions, the first day of trial, and the checking of the judgment are also generally included); and, secondly, the fact that counsel has been *booked* for the trial and so will have a gap in their diary if the case settles (which may be difficult to fill at short notice). If counsel is expected to be heavily involved in the earlier phases of a case then this will inevitably have an effect upon the level of a reasonable brief fee because it will impact upon the amount of work required in preparing for trial.

See generally in respect of the rates of leading counsel, and other related matters concerning brief fees, *Hankin v Barrington & Ors* [2021] EWHC B1 (Costs).

11. Trial

11.1 Experts attendance at trial.

At a CCMC the Court may not be in a position to say whether and for how long it would be reasonable for the experts to attend trial. In some cases permission to allow experts to give oral evidence will be determined at a later date; in other cases it may be appropriate to order at the CCMC that the parties have permission to call their experts to give oral evidence to the extent that there remains a substantial and material dispute between the experts (following joint statements). In either case the budgets can be expected to provide for attendance at trial on the *assumption* that attendance is reasonable.

Some experts might be expected to attend only for one day of trial or indeed only for part of the day (typically neuroradiologists when providing an interpretation of an MRI for instance). In cases where it is unclear whether attendance will be reasonably required for more than one day the parties can be expected to agree a budget attendance on the basis of an *assumption* (typically of one day or two days' attendance) without there being any implicit finding or agreement that it would be reasonable for the expert to attend for this period. The allowance for experts can be adjusted in due course should it be the case that two days' attendance of a particular expert has been assumed was not reasonable and/or proportionate and, similarly, if the expert were reasonably required to attend for longer than budgeted. The assumption made (whatever it is) however can and generally should be recorded in the order.

11.1 Solicitors attendance at trial.

11.2.1 Level of fee earner. Issues might arise as to the seniority of the fee earner attending trial if a solicitor's attendance is reasonably required. But even in high value cases it may not be reasonable for a senior solicitor to attend throughout a trial.

11.2.2 Estimating times for solicitor's attendance at trial and associated work. Ordinarily the court sits for five hours, from 10:30 until 1:00 pm and then from 2:00 pm to 4:30pm. There may, in addition, be a reasonable allowance for the solicitors' time at meetings before and after court and for time travelling to and from court; there may also be additional work in ensuring the notes made in the course of hearing are made available to counsel in the course of the trial. It is however generally reasonable to take as a starting point 7/8 hours work for a solicitor's attendance (when the solicitor is not acting as advocate).

12. ADR/Settlement

12.1 Joint Settlement Meetings (JSM). It is not generally an objection to an allowance being made for a JSM that one or other party thinks such a meeting is unlikely to be required (unless it is clear that one will not be required or appropriate). It can be budgeted for on the *assumption* that one will take place. If a JSM is not required, then that is likely to be a good reason to depart downwards from a budget allowance. Again, the order can be expected to state whether attendance at a JSM (or mediation, exceptionally) is *assumed*.

12.2 This is an important phase which in high value claims in particular may require a significant amount of work. But in considering the budget to be made it is necessary to take into account the extent to which counsel and solicitors will be familiar with the issues arising from their earlier involvement in the case.

13. Costs of Costs Management hearings

The parties are reminded that the provisions set out in CPR 44.2 apply, see *Reid v Wye Valley NHS Trust* [2023] EWHC 2843 (KB). Parties who (1) pursue unreasonable or unrealistic claim for costs, or (2) fail to take reasonable steps to agree budgets or make reasonable offers in respect of the costs, may be the subject of adverse costs awards (whether or not *Calderbank* or other admissible offers have been made or beaten).

14. Form of Order

The recommended form of order is as follows:

There shall be a costs management order

The Court recorded that:

1) *The incurred costs set out in the parties costs budgets are agreed/not agreed. [set out the extent of any agreement]*
2) *The budgeted costs set out in the parties costs budgets are approved/agreed in the following sums [following appropriate revisions]:*
   a) *Claimant agreed [as to the following phases: ….] otherwise approved/approved – [£]*
   b) *Defendant agreed [as to the following*

phases: ….] otherwise approved / approved – [£]

3) *Revised (as appropriate) Precedent H front sheets to be e-filed with this order and served within 7 days.*

4) *The assumptions on which the costs budgets are agreed or approved by the court are:*

   (i) *The following experts [ ] will attend trial for [ ] days; etc*

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Simon Browne KC

Call 1982 | Silk 2011

Simon is listed as a Band 1 Silk in costs and litigation funding. In addition to dealing with costs in commercial litigation and advising on litigation funding, Simon has a formidable reputation regarding costs in Group Litigation, be it for the claimant group or defendants. He has advised and conducted advocacy in the Civil Phone Hacking litigation concerning News of the World and the Mirror Group, the Construction Industry Vetting Litigation, The Truck Cartel Claims in the Competition Tribunal, the Sub-Postmaster claims against the Post Office, the Iraqi Civilian Claims against the MoD, the Grenfell Inquiry, and the Hillsborough Misfeasance Claims. He also advises upon CFAs, DBAs, litigation funding and LEI. He is appointed to sit as a Barrister Costs Assessor in the High Court and on the Cost Committee of the Civil Justice Council.

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Shaman Kapoor

Call 1999

Shaman specialises in costs and litigation funding together with a broader practice in commercial and common law litigation and group action work. He appears regularly in the High Court and the Senior Courts Costs Office, often involved in appellate work or complex points of principle and injunctive relief. His recent involvement in group action work includes the claims against the regulatory bodies in the sport of rugby in the concussion litigation and the civil claims arising out of the Grenfell Tower tragedy. He has experience of representing professional sports players in anti-doping proceedings and has contributed to the editorial work towards the regulation of British Wrestling. He is a Fellow of the Chartered Institute of Arbitrators, having specialised in international arbitration, and receives instructions domestically and internationally. He is a frequent speaker at key seminars on the costs and funding calendar and a contributing editor to Thomson Reuters' *"Costs & Funding following the Civil Justice Reforms: Questions & Answers"*, The White Book. He is a Lead Advocacy Tutor for Lincoln's Inn and has been ranked by the Directories as a leading junior for many years. He is the editor of our bi-annual Costs Newsletter (*3+9 = Costs*) and is joint-head of Chambers' Costs Group. He is appointed as a member of Chambers' Management Board and separately appointed as a school Governor. He is a qualified Mediator and is an appointed Deputy District Judge.

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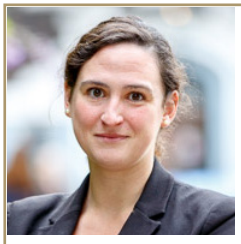

Rachel Sullivan
Call 2015

Rachel has a broad public law practice, with a particular interest in education and healthcare law. She also has a busy inquiries practice, and is currently instructed as junior counsel to the Grenfell Tower Inquiry. She also practises planning and environmental law. She regularly appears in the High Court, Court of Protection and County Courts as well as the appellate courts, on behalf of individuals, central and local government, NHS bodies and companies. Rachel is on the Attorney General's C Panel of counsel. Prior to joining chambers, Rachel worked at the Free Representation Unit and continues to undertake pro bono work on a regular basis, through Advocate and others.

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Daniel Laking
Call 2015

Daniel has a broad civil practice, and specialises principally in the fields of personal injury and clinical negligence, insurance fraud, costs, inquests and inquiries, and health and safety. In his costs law practice he has been instructed in cases dealing with a wide range of costs issues such as the recoverability of ATE premiums and joint/several liability. He is familiar with the law in respect of both pre- and post-LASPO costs and is available to advise on tactics and procedure in relation to Detailed Assessment Hearings and related applications. He is also available to assist in cases where he specialisms overlap, for example recovering costs of inquest proceedings in subsequent civil litigation. As a personal injury specialist, Daniel is familiar with all aspects of costs as they relate to PI and clinical negligence cases. He is frequently instructed in Costs and Case Management Conferences as well as costs applications that arise in civil proceedings. He has a full understanding of the exceptions to Qualified One-Way Costs Shifting and has been successful in recovering costs under both CPR r44.15 and CPR r44.16 in bespoke applications. He has also been instructed in applications for wasted and indemnity costs as well as in relation to Part 36 offers. He is currently instructed as junior counsel to the Grenfell Tower Inquiry alongside his court practice.

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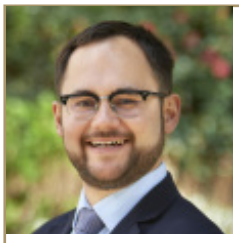

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Call 2018

Daniel accepts instructions in a variety of costs matters, and regularly appears in the County Court in cases raising costs issues. His costs practice also reaches across various areas of Chambers practice, including costs disputes in planning and regulatory matters. While a Judicial Assistant at the Supreme Court, Daniel worked on a number of costs cases including *CPRE Kent v Secretary of State for Communities and Local Government* [2021] UKSC 36. Daniel has also recently been involved in providing costs training to medical defence insurers.

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