

Costs Budgeting – Sanctions and Other Recent Developments

White Paper Costs Conference
15 May 2019

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Overview

- Where is costs management now 6 years after its wide-scale introduction?
- (1) Sanctions for failure to serve costs budgets still live years after Mitchell;
- (2) What to do about hourly rates on costs management orders and/or detailed assessments following one?

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Overview

- (3) Proportionality and budgeting;
- (4) What happens if you are under budget?
- (5) Payments on account and costs budgets

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Is it all good on budgeting?

- Budgeting was not part of the MOJ's Part 2 of LASPO review in 2019, as it's origins are not in LASPO although they are from Jackson LJ. But:
 - (a) The review concluded all is rosy in the LASPO garden anyway;
 - (b) Is budgeting less controversial now than it was 3 or 4 years ago?

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Sanctions for Failure

- CPR 3.14 states:
- *“Unless the court orders otherwise, any party which fails to file a budget despite being required to do so will be treated as having filed a budget comprising only of the applicable court fees.”*

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Sanctions

- This of course was the rule in question in *Mitchell v Newsgroup Newspapers* [2014] 1 WLR 795, in November 2013.
- The draconian approach in *Mitchell* led to a feeding frenzy of lawyers v lawyers.
- The Court of Appeal rowed back somewhat in *Denton* – essentially, it needs to be a “*serious or significant breach*” before relief is likely to be refused.
- But the battle goes on, especially on CPR 3.14
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Lakhani

- *Lakhani v Mahmud* [2017] 4 Costs LO 453 – Defendant’s budget served 1 day late.
- DJ refused relief from sanctions under CPR 3.9.
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- Daniel Alexander QC as Deputy upheld that decision, finding it a case management decision with which he would not interfere.

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Lakhani

- But there were unusual circumstances. What did for the Defendant was:
- (a) They disputed it was late and did not make an application for relief until just before the hearing;
- (b) The time for discussing the budgets with the other side was set back by (a) and Christmas intervening, and no or no significant agreement was made on any aspects.

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Mott v Long

- [2017] 4 Costs LR 817 HHJ David Grant QC in the TCC
- Budget 10 days late due to IT meltdown at Defendant's solicitors
- BUT held that it had not in fact had any significant consequence because, even if it had been filed in time, CCMC would not have been completed in 1 day anyway.
- Relief granted. Luck of the draw?

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Ashgar v Bhatti

- [2017] 4 Costs LR 427.
- Claimant had been “*Mitchelled*” under CPR 3.14.
- Then trial estimate increased by 6 days and other side put in increased budget as a result and sought variation.
- C then also sought budget for those extra 6 days alone despite the previous *Mitchell* Order.
- Lewis J allowed it.

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BMCE Bank v Phoenix Commodities

- [2018] 6 Costs LO 767, Bryan J.
- Commercial Court case.
- Defendant's budget served 2 weeks late, argued made no difference.
- Court held the consequence was that there were no budget discussion reports at the CCMC
- Additional CCMC hearing would be necessary
- Waste of valuable court resources – *Mitchell* order made

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Page v RGC Restaurants

- Claimant thought it was too early to budget through to trial and prepared budget through to a 2nd CCMC with no trial prep or trial phases
- Defendant did not agree and filed full budget through to trial
- At CCMC Master held no need for 2nd CCMC. D's budget non-compliant and "Mitchelled" – no costs at all other than court fees.

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- On appeal to Walker J, held:
- (1) Rejected C's argument that as a budget (albeit incomplete) had been filed in time, CPR 3.14 not engaged at all. Precedent H had to be followed in all respects unless agreed otherwise;
- (2) But this was an inadvertent error which was only moderately serious and significant, and the Master failed to ask whether some other lesser sanction should apply

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- Held that the proportionate sanction would be that C was allowed no costs for Trial Prep and Trial phases but otherwise would be allowed an approved budget for the other phases
- A more indulgent approach? Or simply a more just one?
- Remains to some extent in the eye of the beholder

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Hourly Rates and Budgeting

- PD3E para 7.3:
- *“...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”.*

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Hourly Rates and Budgeting

- PD3E para 7.10:
- *“The making of a costs management order under rule 3.15 concerns the totals allowed for each phase of the budget. It is not the role of the court in the cost management hearing to fix or approve the hourly rates claimed in the budget. The underlying detail in the budget for each phase used by the party to calculate the totals claimed is provided for reference purposes only to assist the court in fixing a budget.”*

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Hourly Rates and Budgeting

- *RNB v London Borough of Newham* [2017] EWHC B15 (Costs) Deputy Master Campbell
- Following a CMO, on assessment, Master Campbell reduced the hourly rate on incurred costs and found that this was a “good reason” under CPR 3.18 for reducing the budgeted costs and/or they should be so by application of proportionality.
- Settled on appeal.

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RNB and Hourly Rates

- In *Baines v Royal Wolverhampton NHS Trust* (18.8.2017) DJ Lumb in Birmingham disagreed with the reasoning in *RNB* finding that a reduction in hourly rates in incurred costs was not in itself a good reason to reduce the approved costs under CPR 3.18.
- In *Nash v MOD* [2018] EWHC B4 (Costs) Master Nagalingham agreed with DJ Lumb – hourly rates have no special status

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Jallow v MOD

- [2018] EWHC B7 (Costs) per Master Rowley agreed with DJ Lumb:
- *“It is for the party and his or her solicitor to determine who exactly does the work that needs to be done...If it comes within the budget that has been set, it will turn individually “unreasonable” items into a reasonable and proportionate sum overall. As I put it colloquially at the hearing, two odd numbers added together still make an even number.”*

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Conclusions on the RNB Point

- The decision in *RNB* appears to go against the prevailing grain and not to fit with the costs management regime.
- But the reluctance to grapple with hourly rates on budgeting encouraged by PD3E is not without its critics...

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Capital Markets v Tarver

- [2018] 1 Costs LO per Michael Furness QC sitting as a Deputy High Court Judge
- In high value litigation, the Judge formed a broad view of the hourly rates, held that there was no good reason to allow more than £500 for Grade A rather than up to £705 claimed and reduced the costs by 20% by that reason alone, following the approach of Warby J in *Yeo v Times Newspapers* (2015).
- Does that fit with PD3E para 7.10?
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Do you grapple with hourly rates?

- Warby J himself has steadfastly confronted hourly rates head on in a CMO:
- *Sean Price v MGN* [2018] EWHC 3395 (QB) – CMO on a preliminary issue - hourly rate claimed £350, guideline rate £217, Warby J expressly allowed £250 and allowed specific hours at specific rates

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Do you grapple with hourly rates?

- *Arcadia Group and Sir Philip Green v Telegraph* [2019] EWHC 96 (QB)
- CMO where trial expedited and interim injunction granted
- Claimant's hourly rates claimed at up to £550, allowed up to D's top rate of £450
- Does this comply with PD3E 7.3 and 7.10? If not, are you supposed to pretend that you did not fix an hourly rate?

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Can you instead duck hourly rates altogether?

- In *Yirenki v MOD* [2018] 5 Costs LR 1177 Master Davison had followed his then usual practice at a budgeting hearing of simply reserving any argument on hourly rates to detailed assessment and then
 - (a) allowed specific numbers of hours at the claimed rate, subject to this;
 - (b) allowed specific figures for disbursements.
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Yirenki

- On appeal by C to Jacobs J, held:
- (1) This is contrary to the task under PD3E para 7.3 and 7.10: to come up with a single figure per phase;
- (2) While the court would have to have regard to its constituent parts, it was wrong to fix specific hours and specific figures for disbursements etc as being contrary to 7.3.
- But how does that compare to Warby J's approach?

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Proportionality and Costs Budgeting

- *Harrison v University Hospitals Coventry & Warwickshire NHS Trust* [2017] EWCA Civ 792:
- Decided that costs management does not just operate as a “cap” i.e. maximum amount, but a fixed figure which will only go up or down if there is a “good reason”
- The costs managing judge will consider whether the costs fall within the range of reasonable and proportionate costs in PD 3E para 7.3
- But see also para 52:
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Harrison on Proportionality

- But also at [52] per Davis LJ:
- *“I add that where, as here, 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.”*

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Red & White Services v Phil Anslow Ltd

- [2018] EWHC 1699 (Ch) Birss J.
- Dispute about access to slots in a bus station, listed for 10 day trial, worth on face of it £80,000 to £120,000 damages.
- C's budget and 3rd party's budget allowed at £800K each – money was not the only issue

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Red & White Services

- Further, D's budget of £103,000 was “surprisingly low” and would not be a good guide
- – see also Coulson J in *Findcharm v Churchill* [2017] 3 Costs LR 263 – there it was so low as to be disregarded, with a suggestion that it was a deliberate tactic.

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Budgeting on Preliminary Issues

- Increasingly popular in libel cases on preliminary issues on meaning given the particular risk of disproportionate costs there:
- see *Bokuva v Associated Newspapers* [2018] EWHC 320 (QB) per Dingemans J
- And *Sean Price v MGN* (2018, *ibid*) per Warby J

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Variation of Budgets

- See *Sharp v Blank* [2017] EWHC 3390 (Ch) where Chief Master Marsh allowed an application by D to increase their budget due to a “significant development” under PD3E para 7.6 due to change in trial judge and extension of the trial
- Held: (a) was significant development and

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Sharp v Blank

- (b) re costs already incurred before the hearing of the application: “... *when varying costs budgets, the Court takes the date which the budget was prepared to... as the base reference point. All costs after that date are treated as estimated costs even though they have in fact been incurred.*”
- Necessary to make the rules/PD workable?

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Early Settlement – how is the budget dealt with?

- Given that the vast majority of cases settle, this issue will arise very regularly.
- If a case settles before all the assumptions in the budget have been complete, and less than the budgeted amounts are claimed, how does “good reason” apply?

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Salmon v Barts Health NHS Trust

- Budget approved, case settled prior to joint expert agendas and statements, trial prep and trial
- C comes in under budget for experts, trial prep and trial. D argues should be less given how early it settled.

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Salmon v Barts

- Master Whalan finds that (a) there is a good reason for recovering less than the budget, as less has been claimed, BUT
- (b) it is necessary for the paying party to show a "good reason" why the costs should be even less than claimed, and that is a very high hurdle when the claim is already less than the budget. And the paying party failed.

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Salmon v Barts

- Held on appeal to HHJ Dight (with Master Brown), judgment 17.1.19:
- Once less than the budget is claimed, that is good reason to depart from the budget already and no need to show further good reason if paying party wants to persuade Costs Judge to reduce it further

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Salmon v Barts

- Once the door is down like this, it is up to the Costs Judge how he/she goes about assessing the sum, whether item by item or by taking a broader view cf to the budget
- HHJ Dight reduced the figures further as phases were substantially incomplete and the costs claimed in the light of this were too high.
- Only County Court but persuasive?

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Budgeting and Payments on Account of Costs

McInnes v Gross [2017] EWHC 127 (QB) Coulson J, following a trial, ordered a payment on account of costs of 90% of the budgeted amount re approved part of the budget.

Held: the traditional approach of *Mars v Teknowledge* goes out of the window in costs managed cases as assured that budgeted costs are reasonable and proportionate

NB reasoning approved in Harrison but query the impact of para 52 of *Harrison* on the result

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90% as a benchmark?

- This approach was followed in *Cleveland Bridge v Sarens* [2018] 2 Costs LR 333 Miss Joanna Smith QC (Deputy) – 90% after trial
- But the same principle does not apply to incurred costs (which have not been approved, even if no adverse comment made) – Judge allowed 70% of these on account.
- BUT 90% may be too high where proportionality is a legitimate argument.

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