

Are there yardsticks you can apply to reasonable allowances for the purpose of costs budgeting?

Master Peter Haworth SCCO

Can you compare cases and so object to budgets?

- Simple answer no. Each case on its own merits.
- The story so far. Case law on budgeting limited uncertain results.
- Not so much the budget but what the recoverable costs are likely to be.
- Detailed assessment, how is that end of the spectrum working?
- Do reasonable allowances matter when it is “Proportionality” that counts?
- Do Assumptions and Contingencies add anything to the mix?

The Yardstick is the CCMC

- No “Pre Hoc” detailed assessment
- No “Post Hoc” detailed assessment
- CCMC only place to influence recoverable costs

Detailed Assessment

Merrix v Heart of England NHS [2017] EWHC 346 (QB) Carr J

67. The words are clear. The court will not – the words are mandatory - depart from the budget, absent good reason. On a detailed assessment on a standard basis, the costs judge is bound by the agreed or approved costs budget, unless there is good reason to depart from it. No distinction is made between the situation where it is claimed that budgeted figures are or are not to be exceeded. It is not possible to square the words of CPR 3.18 with the suggestion that the assessing costs judge may nevertheless depart from the budget without good reason and carry out a line by line assessment, merely using the budget as a guide or factor to be taken into account in the subsequent detailed assessment exercise. The obvious intention of CPR 3.18 was to reduce the scope of and need for detailed assessment. The Respondent’s approach would defeat that object.

68. This straightforward conclusion reflects the fact that costs budgeting involves the determination of reasonableness and proportionality (see paragraph 7.3 of Practice Direction 3E and paragraph 3 of the Guidance Notes to Precedent H). It is important to remember at

the outset (and also in the context of the debate as to the meaning of the word “*budget*” addressed below) precisely what a judge is doing at the cost-budgeting stage. He/she is not identifying what is the maximum amount by way of future costs considered to be reasonable and proportionate. He/she is identifying what future costs are reasonable and proportionate.

92. In my judgment, the answer to the preliminary issue is as follows: **where a costs management order has been made, when assessing costs on the standard basis, the costs judge will not depart from the receiving party’s last approved or agreed budget unless satisfied that there is good reason to do so. This applies as much where the receiving party claims a sum equal to or less than the sums budgeted as where the receiving party seeks to recover more than the sums budgeted.**

94. To use a preliminary issue in a factual vacuum for resolution of issues such as this is inevitably to apply a blunt tool. There are so many potential variables and nuances that the answer on any particular given set of facts might require refinement. But the central message is that set out in CPR 3.18, namely that the approved or agreed budget will bind the parties at the detailed assessment stage (on a standard basis) whether the costs claimed are for less than, equal to or more than the sums approved or agreed by that budget, unless there is good reason otherwise.

95. One can be confident that this decision on first appeal will not end the debate. I respectfully make the perhaps obvious point that the issue would appear to be ripe for early consideration by the Court of Appeal raising, as it does, an important point of principle or practice. Indeed, I learned only days before the appeal came before me that there is in fact an appeal already listed to be heard in the Court of Appeal this May against Master Whalan’s decision in *Harrison* (by way of “*leapfrog*” direction and albeit on a “*floating*” basis only). It may be that any appeal from this decision could be listed alongside that matter, if that were thought appropriate.

96. Whatever the future holds, however, it is important that a growing body of judgments on the same issue does not emerge in piecemeal manner. It is essential that there is procedural co-ordination. The same solicitors and/or counsel are involved in many of these matters in what is a relatively small world. I am told that many stays of detailed assessments are already in place, pending the outcome of this appeal. The parties may accept my judgment as binding for their purposes. Alternatively, it may be that further stays need to be imposed, to prevent unnecessary court and judicial time and expense being devoted to a debate which the Court of Appeal is very shortly going to consider.

Car Giant Ltd and Anor v LB Hammersmith [2017] EWHC 464 (TCC) Stephen Furst QC

The deputy High Court judge refused to provide a receiving party with an “indication” of whether it acted reasonably in exceeding its costs budget. Trial judges should “not seek to trammel the costs judge’s jurisdiction” unless there are specific issues they want to raise.

The Defendant had an approved costs budget of £111,000, but spent an extra £89,000, of which £56,000 was due to expert fees. It sought an indication from the judge that these were reasonably incurred. In my view, whilst there are authorities showing that the courts can give such indications as are sought here, the court should be slow to do so.

The circumstances in which a court should find 'good reason' to depart from the approved budget were likely to be considered by the Court of Appeal shortly in Merrix. It is unclear whether the trial judge in making such comments should temper them in the light of CPR part 3.18 and, in any event, if such comments or observations are made as to what weight a costs judge would or should place on them. I can understand that there might be cases where the trial judge has a particular view of costs or on an aspect of costs, having conducted the trial or where he has had to decide an issue which is directly relevant to the assessment of costs.

Absent such circumstances it would seem to me that a court should not seek to trammel the costs judge's jurisdiction, particularly where the costs judge has much greater experience of such matters than I have."

In this case, the judge said, there was nothing in the nature of the applications to exceed the costs budget which could not be explained "equally well" to the costs judge and so he declined to give any indication.

So what's left for Detailed Assessment?

- Hourly Rates.
- Incurred Costs
- Issue Based Orders
- Interim Applications
- Indemnity Costs
- "Good Reason"

The Court's power to order budgets under CPR 3.12(1)(a)-(e)

CIP Properties v Galliford Try [2014] 6 Costs LR 1037 Coulson J.

Even in a claim to which costs budgeting does not automatically apply because the claim is over £10 m (CPR 3.12(1)(a)), the court has a complete discretion to decide whether costs budgets should be filed and exchanged.

Simpkin v Berkeley Group Holdings PLC [2017] 1 Costs LO 13 Foskett J

"What the defendant chooses to pay its lawyers is, of course, a matter entirely for it to decide. Those lawyers will not be restricted to recovering from their client sums well in excess of anything that may be permitted by the court by way of costs budgeting. However, the advantages of costs budgeting from the claimant's point of view is that he, or those who may in due course fund him all know the potential downside of losing the case. They will know that it would have been assessed by the court is reasonable in advance of proceeding further, rather than simply awaiting the outcome of an assessment in due course.... It [costs budgeting] will help to even the playing field between the parties and keep everyone focused on what they are spending on this litigation."

Various Claimants v Ministry of Defence (the Iraqi Civilian Litigation) [2016] 3 Costs LO 477
Master Fontaine

Application by the MOD for the budgeting of the claimants' costs at the direction of Leggatt J refused. There would have to be a detailed assessment in any event because of the extent of the incurred costs (£4,711,588.66) and it was simply not proportionate to proceed to a costs budget in circumstances where the parties had transparency in respect of incurred and estimated costs in considerable detail - (see also [2016] 3 Costs LO 471).

Incurred costs to which Section II of CPR Part 3 PD 3 paragraph 7.3 applies

Yeo v NGN [2015] 2 Costs LO 243 Warby J

"The court may reduce a budget for reasons which apply equally to incurred costs, or for reasons which have a bearing on what should be recoverable in that respect, for instance, that so much had been spent before the action began that the budgeted costs of preparing witness statements is excessive..... In a case that goes to trial, the successful party's costs incurred before approval of the budget will normally need detailed assessment"

CIP v Galliford [2014] 6 Costs LR 1037 Coulson J.

Overspend pre-budget and you knock off £1 for £1 the excess amount from the budgeted costs at the detailed assessment.

" In relation to the pre-action costs.... These should not exceed £680,000. I take that figure into account when assessing each element of the prospective/estimated costs... To the extent that the claimant recovers more than £680,000 on assessment under this head, it would mean that more work had been legitimately done in the early stages of the case than I thought, which would in turn mean that less remained to be done in the future. ... The estimated costs fall to be reduced £ for £ to the extent that the amounts actually recovered on assessment in respect of costs incurred are higher than the figures which I have indicated"

Redfern v Corby Borough Council [2015] 5 Costs LO 583 HHJ Seymour

"... The only way in which one can take into account excessive costs already incurred in determining the reasonableness and proportionality of subsequent costs is to limit the approved subsequent costs at figures below what they might otherwise have been approved at, but for the excessive sums which have already been expended"

Group Seven v Nasir [2016] 2 Costs LO 303 Morgan J

Approach in *Galliford* not followed for incurred costs because "I do not feel able to say that if a costs judge later allowed a higher figure, that it would be necessarily be appropriate to deduct the difference between the budgeted figure and the cost judge's higher figure from

some other figure for future costs which I am otherwise prepared to approve as the reasonable and proportionate”

Various Claimants v Sir Robert McAlpine [2015] 6 Costs LR 1085 Supperstone J

“When considering reasonable and proportionate costs post 2 October 2015 [date of costs directions order] , we have taken into account the costs that have been incurred before that date, and have proceeded on the assumption that of such incurred cost, only those which are reasonable and proportionate will be allowed on detailed assessment”

Sarped Oil v Addax Energy SA [2016] 2 Costs LO 227. Longmore , Sales LJJ , Baker J

“...if a court has commented that incurred costs in a costs budget appear to be reasonable and proportionate, it would usually require good reason to be shown why such costs should not be included in an award of costs on the standard basis at the end of trial. The parties coming to the first CMC to debate their respective costs budgets therefore know that that is the appropriate occasion on which to contest the costs items in those budgets, *both in relation to the incurred costs element in their respective budgets* [emphasis added] and in relation to the estimated costs elements...”

New rule changes to CPR 3.15, 3.18, 44.1, PD 3E 7.7, 7.4 and 7.7 from 6th April 2017 with the aim of:

- Decoupling costs incurred from the budgeted costs.
- Ensuring that the court can properly apply CPR 44.4
- Retaining the courts power to comment on incurred costs so as to provide clarity as to the interrelationship between budgeted costs and the costs to be incurred with a steer which might promote agreement of the costs incurred
- Retaining the power of the parties to agree the incurred and budgeted costs.

A Broad brush or item by item approach?

GSK Project Management Ltd v QPR [2015] 4 Costs LR 729 Stuart-Smith J

“...most costs budgeting reviews can and should be carried out quickly and with the application of a fairly broad brush. Only exceptionally will it be appropriate or necessary to go through a Precedent H with a fine tooth-comb...”

Bloomberg v Sandberg [2017] 1 Costs LO 1 (TCC) Mr Acton Davis QC

“In deference to the detailed arguments advance before me and the sums claimed in the costs budget, I considered it appropriate to reserve judgment and to apply a relatively fine tooth- comb..... As I conceive my task, it is to consider proportionality in terms not only of the volume of hours claimed, but also by the total sum which the claimant hopes to recover from either or both defendants after judgment in respect of each phase...”

“Pre-action costs. I would not be prepared to accept a figure of more than £120,000 as a reasonable sum for pre-action costs. I would not expect counsel to be involved to the extent that they have been at such an early stage. It will be for the costs judge on any assessment take account as he thinks fit of my view.”

Wright v Rowland [2016] 5 Costs LO 713 Flaux J

Where the court cannot decide those elements in the budget which can be approved and those that cannot, it will be a matter for the costs judge on detailed assessment to make the appropriate allowances. This may occur in a case where one party contends that the action is straightforward and the other that it is complex and the court cannot decide which is correct. Here, witness statements, expert evidence and the Pre-Trial Review would be budgeted. Trial preparation, trial, ADR and contingencies would be for detailed assessment. Order accordingly.

Marks and Spencer plc v Asda Stores Ltd [2016] 5 Costs LR 837 HHJ Hacon

A starting point when assessing the proportionality of costs in costs budgeting is to compare the costs budget and the value of the claim. However, where value significantly resides in the benefit of the claimant of an injunction being granted, it is difficult to assess that value with any degree of certainty. Accordingly, as the starting approach of comparing the costs budget with the value of the claim in those circumstances would be extremely difficult to apply, it is necessary to look at the other matters set out in CPR 44.4 (3) , such as the complexity of the litigation, the importance of the matter to the parties and the sort of costs incurred generally by litigants in the Patents Court.

Agents' Mutual Ltd v Gascoigne Halman Ltd [2016] 5 Costs LR 893 Roth J

Whilst the filing of monthly costs schedules would be excessive and burdensome in the Competition Appeal Tribunal, a full regime of costs management by analogy in part 3 of the CPR would apply. Accordingly, the parties would be required to serve a schedule in the form of Precedent H together with a budget report, and there would be a costs management hearing, unless the parties could deal with the budgets using written submissions.

Hourly rates versus “phase”

Stocker v Stocker [2015] 4 Costs LR 651 Warby J

Hourly rates agreed and approved

Yeo v Times Newspapers [2015] 2 Costs LO 243 Warby J

Figures in the budget reduced because the court considered that the solicitor's hourly rates were too high by 20 – 25%

GSK Project Management Ltd v QPR [2015] 4 Costs LR 729 Stuart-Smith J

Hourly rates agreed at between £575 and £600 for the defendant's grade A and £275-£300 for the claimants grade A, approved by the court

Group Seven v Nasir [2016] 2 Costs LO 303 Morgan J

"Local solicitor" point addressed by ruling that the work could be carried out by solicitors outside the City of London. Hourly rates, uplifts thereon, Counsel's brief fees and refreshers all fixed.

Note, however, two weeks after the judgment was handed down, the 82nd update to the Practice Direction was published; PD 3E 7.10, says "it is not the role of the court to fix or approve the hourly rates claimed. The underlying detail in the budget is provided for reference purposes only to assist the court in fixing a budget".

MacInnes v Gross [2017] EWHC 127 (QB) Coulson J

25. ...In my view, the first defendant's approved costs is the appropriate starting point for the calculation of any interim payment on account of costs. CPR 3.18 makes plain that, where there is an approved or agreed costs budget, when costs are assessed on a standard basis at the end of the case, "the court will... not depart from such approved or agreed budget unless satisfied that there is good reason to do so." The significance of this rule cannot be [over]stated. It means that, when costs are assessed, the costs judge will start with the figure in the approved costs budget. If there is no good reason to depart from that figure, he or she is likely to conclude the assessment at the same figure: see *Silvia Henry v News Group Newspapers Ltd* [2013] EWCA Civ 19.

26. One of the main benefits to be gained from the increased work for the parties (and the court) in undertaking the detailed costs management exercise at the outset of the case is the fact that, at its conclusion, there will be a large amount of certainty as to what the likely costs recovery will be. One consequence is that, for the purposes of calculating the interim payment on account of costs, the starting point will almost always be the payee's approved costs budget. Another consequence is that the court assessing the interim payment can ignore the fact that, as here, there may have been significant expenditure on costs by the payee above the budget figure: any increase is a matter for the costs judge and the relatively onerous burden of recovering more than the budget figure is on the payee: see *Elvanite Full Circle Ltd v AMEC Earth & Environmental (UK) Ltd* (No 2) [2013] EWHC 1643 (TCC)."

Made a mess of it?

Americhem Europe Ltd v Rakem [2014] 4 Costs LR 682 Stuart-Smith J

Serving and filing Precedent H a few minutes late was a trivial delay and the signature by a costs draughtsman was an irregularity that did not make the budget a nullity. The document had been served in a form stating that it was the defendant's costs budget and would be immediately recognised as such.

Simpson v MGN [2015] 1 Costs LR 139 Warby J

Where the claimant had won a preliminary issue not provided for in the costs budget and no revised budget had been submitted in advance of the hearing for the court's approval, the claimant would still recover his costs. However, there would be a 10% reduction to reflect the failures on the claimant's part that had caused the defendant to incur additional costs.

Jamadar v Bradford Teaching Hospitals NHS Foundation Trust [2016] 5 Costs LR 809
Jackson, Lindblom LJJ

Parties must exchange costs budgets in cases allocated to the multitrack in default of which they are treated as having filed a budget comprising only the applicable court fees.

Jamadar's contention that no budget needed to be filed before the case management conference within the time prescribed by CPR 3.13 because no formal notice of allocation had been in force, failed. The litigation had self-evidently been a multitrack case since the CMC had been listed for 2 hours, the parties had agreed that there should be 5 experts and directions had been agreed appropriate for a multitrack case, but inappropriate for a fast track case. Accordingly, *Jamadar*, having only served a budget in draft form on the morning of the hearing, had been in breach of CPR 3.13 and would be treated as having filed a budget comprising only the applicable court fees. Application for relief from sanctions under CPR 13.9 refused.

Avoiding a detailed assessment

Sony v SSH Communications (2016) 6 Costs LR 141 Mr Roger Wyand QC

The parties requested the trial judge to carry out a summary assessment at the conclusion of trial based upon the costs budgets. He agreed and duly did so.

Slick Seating v Adams [2013] Costs LR 576 HHJ Brown QC

Summary assessment of costs in a budgeted case

Costs budgeting and indemnity basis costs

Denton v White [2014] 4 Costs LR 752. If you obtain an order for costs on the indemnity basis, as receiving party, that is a “good reason” to depart from the costs budget.

“If the offending party ultimately loses, then its conduct may be good reason to order it to pay indemnity costs. Such an order would free the winning party from the operation of CPR rule 3.18 in relation to its costs budget “Lord Dyson MR Paragraph 43.

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