



Costs Budgets: Incurred Costs

David Marshall
Partner, Anthony Gold Solicitors
26 April 2016

- The Court can only make orders in respect of issued cases (or for pre-action matters in defined circumstances (eg pre-action disclosure))
- The statutes of limitation allow time to prepare cases before issue
- The pre-action protocols are designed to facilitate pre-issue exchange of information and settlement
- Only policed by the court post-issue (post-settlement costs disputes via Part 8)
- Reluctance to allow pre-budget costs jurisdiction (eg via Part 8) because of resources, additional cost, delay and may hamper settlement

- The purpose of costs management
- is that the court should manage
- both the steps to be taken and the costs to be incurred by the parties to any proceedings
- so as to further the overriding objective.

- As part of the costs management process the court may not approve costs incurred before the date of any budget.
- The court may, however, record its comments on those costs
- and will take those costs into account when considering the reasonableness and proportionality of all subsequent costs.
- N.B. PD amended to say 'will' take incurred costs into account , previously 'should'
- Case law
 - Mostly TCC and Defamation (CCMC before High Court Judge)
 - Few appeals from Masters or DJs yet
 - 'Blind' budget setting in the absence of any guidance as to the new meaning of proportionality

*Redfern v Corby [2014] EWHC
4526 (QB)*

AnthonyGold

- Stress at work case
- Deputy Master Eyre considered that a proper figure for the costs of the case as a whole was £220,000.
- That was broadly equivalent to what had already been spent.
- Nothing further was allowed in the costs budget
- Appeal to HHJ Seymour

*Redfern v Corby – HHJ Seymour
on appeal*

AnthonyGold

- "That, I think, must be a consequence, potentially, of taking into account in fixing the budgets the amount of the costs already incurred in deciding what would be reasonable and proportionate in respect of all subsequent costs. The only way in which one can take into account excessive costs 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".
- Permission to appeal to the Court of Appeal was granted...
But the substantive cases (and costs) settled at mediation

- “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 cost of preparing witness statements is excessive. If so, it is likely to help the parties reach agreement without detailed assessment later on if these reasons are briefly recorded at the time the budget is approved. I make some comments of this kind below.”
- [Coulson J in CIP]: “But “In *Yeo*, however, I note that the amount of the incurred costs did not create as acute a problem as it did in *Redfern*, and as it does here.”

*CIP Properties (AIPT) Ltd v Galliford Try
Infrastructure Ltd and others [2015] EWHC 481
(TCC)*

- Coulson J – "I have formed such a dim view of C's costs budget'
- 2 full day hearings on budgets
- "At one point, there were 26 people in court, excluding me, considering the detail of its costs budgets."
- In first CCMC C said incurred costs £1.57m of total of £3.42m
- Before Coulson J, incurred costs were now said to be £4.2m of £9.2m!
- D's budget was £1.5m of total of £4.5m
- C's total costs broadly equivalent to the costs of all 4 other parties combined

- Alleged defects in construction work to development on site of old children's hospital in Ladywell
- £18m claimed but disputed
- 82% of the claim relate to 6 items
- Schedule of Assumptions – "There are so many of these assumptions, and they are so widespread in nature and effect, that they alone render the Claimant's costs budget wholly uncertain and therefore unreliable."
- "I am driven to conclude that the Claimant's costs budget has been deliberately manipulated. The Claimant did not and does not wish the court to make costs management orders..."

- “...this is not a particularly complex claim. It is a relatively standard TCC defects case and, as is typical, a handful of individual defects will take up the lion's share of the case. There will not be the need for extensive witness statements or a lengthy chronological bundle. The issues of both liability and quantum will almost certainly turn on the expert evidence.”
- Hourly rate claimed Grade A £370 – GHR £217
- Too much time claimed for Grade A
- Total incurred and estimated allowed £4.28m (= costs already incurred)

Option

1A: order C to file new budget

1B: decline to approve budget

2: set budget by phase looking at estimated more than incurred

3: allow no more in budget as already spent on incurred

Consequence

1A no prospect of better budget, and real problem is incurred cost

1B easiest solution, but risk C will spend & take chance on DA

2 Comment on incurred & set for future – but budget overall unreasonable & disproportionate

3: Risk that D will also reduce on DA, double jeopardy for C

- The answer?
- Tailored option 2 – comment on each phase as follows:
- “On DA C should recover no more than £X for the phase []
- “To the extent that the Claimant recovers more than £X on assessment, it would mean that more work had been legitimately done in the earlier stages of the case than I thought, which would in turn mean that less remained to be done in the future. Thus the prospective costs figures approved below would again fall to be reduced by an equivalent sum.”

GSK Project Management Ltd (in liquidation) v QPR Holdings Ltd [2015] EWHC 2274 (TCC)

- Stuart Smith J
- Work a Loftus Road
- £805,675 in dispute
- C's Budget £824,308 (£310,000 incurred)
- D's budget agreed at £455,554 (inc much higher hourly rates)

- “Experience in the TCC has shown that 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, analysing the makeup of figures in detail.”

- “Coulson J's approach [in CIP should as the parties agree be applied but] may better be seen as a guide rather than a straightjacket.”
- “C did not address incurred costs “as the court cannot amend the incurred Costs”... Because of the stance taken by the Claimant, the Defendant has virtually no information about or explanation of the significance or otherwise of the Claimant's incurred costs.”
- “a case would have to be wholly exceptional to render a costs budget of £824,000 proportional for the recovery of £805,000”
- Not exceptional

- “I am very conscious that a detailed investigation might run the risk of impinging on areas of legal professional privilege; and also that I have been given no explanation at all to justify these astonishing figures.”
- Total budget £425,000
- Incurred cost £310,000
- Phase by phase budget on same basis as CIP

*Various Claimants v Sir Robert
McAlpine and others [2015]
EWHC 3543 (QB)*

- Very large group action claims relating "to the secret vetting of activities carried out by a group of major construction companies over many years, through two organisations", with multiple solicitors on both sides
- Senior Costs Judge ordered:
- “The costs budgets shall be prepared in accordance with precedent H of the Practice Direction to Part 47, but include in addition:
- (a) Schedules of hours spent ... with brief descriptions of work done to date and anticipated, within each phase.”

Sarpd Oil International v Addax Energy SA [2016] EWCA Civ 120

- “A comparatively ordinary international purchase contract case proceeding in the Commercial Court. The subject of the purchase and sale was a quantity of gas oil & there is a short string of 3 parties.”
- A security for costs application - £896,161.27 sought (C and 3rd Party)
- Sarpd – BVI company: secrecy & no public financial records
- Commercial Court Judge
 - At an earlier hearing had approved budget
 - refused application for security
- CA allowed appeal for security for costs
- Judge had said if security were granted it would be based on the allowed costs budget for C’s costs (£380,000).
- D argued that incurred costs (especially) pleadings were too high.

Sarpd Oil International v Addax Energy SA [2016] EWCA Civ 120

- “Parties coming to the first CMC... know that that is the appropriate occasion on which to contest the costs items in those budgets, both in relation to incurred costs elements....”
- Rubric to precedent H
 - This budget is a fair and reasonable statement of incurred and estimated costs which it would be reasonable and proportionate for my client to incur in this litigation.”
- “The proper interpretation of the [CMO] is that... the court commented on the incurred costs... to the effect that it agreed the claim made on the face of the cost budget that those costs were reasonable and proportionate costs in the litigation.”
- “Sarpd chose not to dispute the reasonableness and proportionality...”
- “It would be contrary to the over-riding objective to allow Sarpd to reopen costs issues which it had already had a fair opportunity to address.

Sarpd Oil International v Addax Energy SA [2016] EWCA Civ 120

- Is the decision obiter only?
 - Security for costs application
 - For purpose of deciding if J was right to take approved budget as start
- Wrong to rely so heavily on the rubric required on a form (not the Rule or PD)?
- Only applies to approved budgets – so never approve?
- How far does challenge to incurred costs need to go?
 - Simply raise the point and seek order that incurred costs be determined at detailed assessment?
- Develop standard form of wording for comment that approval of the budget does not have the meaning given in Sarpd?
- A change to the CPR required to clarify that agreeing a budget does not preclude a party challenging afterwards the amount of incurred costs?

Jackson LJ: Harbour lecture
13/5/2015

“(i) Precedent H should have separate total columns for incurred and budgeted costs. If you combine the two (as now) you are not adding like to like and may cause confusion.

(ii) In the general run of cases, where incurred costs are a small part of the whole, the court should only budget future costs, leaving incurred costs for detailed assessment if not agreed.

(iii) In any case where the court has or procures sufficient information for the purpose, it should have the power (a) to comment on the incurred costs; (b) summarily to assess the incurred costs; or (c) to set a global budget figure for any phase, including both incurred and future costs.”

Jackson LJ: Harbour lecture
13/5/2015

“In most cases the court will simply budget for future costs. A separate investigation of incurred costs will usually be a disproportionate exercise. Nevertheless the existence of the residual power set out in sub-paragraph (iii) above will be an incentive for solicitors not to put forward excessive incurred costs. Also the residual power will provide a way of dealing with problems such as those which arose in Redfern and CIP Properties, discussed above.”

Jackson LJ: Harbour lecture
13/5/2015

“Even if the costs budgeting regime is ineffective for regulating past costs, it is still a highly worthwhile exercise. The mere fact that money has been wasted in the past is no reason to abandon cost control in the future. At the time of the first case management conference there is still much to play for, including the future costs of disclosure, witness statements, expert reports, ADR and trial.”

Jackson LJ: Harbour lecture
13/5/2015

“In cases where the incurred costs tend to be high, pre-eminently clinical negligence, there is a clear need to introduce pre-action costs management. In the Final Report I recommended that pre-action costs management should be piloted and introduced: see FR chapter 23 and chapter 40, paragraph 7.21. I respectfully suggest that these proposals should now be taken forward. Five years have elapsed since I published the Final Report and two years’ experience of costs management has accumulated. Although I am not a member of the Rule Committee or the Coulson Committee (and it is right that I should not be), I would be happy to prepare a detailed paper on pre-action costs management if (and only if) (a) I am asked to do so and (b) the MoJ and the Rule Committee indicate that they are willing in principle to move on to this next stage.”

- Front loading work
 - No 'assessment' at budget stage
 - Time spent – 'comment' risk only if disproportionate
 - Experts Fees – choice
- Do you need to evidence/justify?
 - An 'incurred costs schedule' setting out summary details (grades, rates, hours etc) as for prospective cost
 - J often reworks hours claimed into weeks or months of continuous work. Do this yourself as a reality check and think in advance as to why justified if exceptional (and prepare evidence).
- Has the court ordered it anyway?

Ways forward? (1)

- 'Steady as it goes'
 - How big a problem is it?
 - Incurred costs will always be subject to detailed assessment at the end
 - Is CIP the right (or only) answer?
 - Is an economic incentive to front load and delay in the interests of the client?
- Fixed costs
 - Jackson proposals
 - Staging/weighting – economic incentives
 - Escapes
 - IPEC 'fixed costs'

Ways forward? (2)

- **Scale Costs**
 - County Court Scale 2
 - For the whole case (or stages rather than phases)
 - Flexibility for case-type (or bolt owns)
 - Escapes
- **Benchmark costs**
 - Flexibility for case-type (or bolt owns)
 - Escapes
 - A true budget (review afterwards in light of actual events) as opposed to CPR3 which is not in fact a budget, but rather bespoke capped costs both by phase and overall

- Any new fixed costs (or benchmark or scale costs) should:
 - Be Evidence based (not back of the envelope)
 - Fairly reflect the work required
 - Variation by case-type may be unavoidable to achieve justice
 - Avoid perverse incentives (for paying or receiving parties):
 - Difficult to predict or avoid these
 - So Incremental implementation best
- If the intention is to reduce costs:
 - Do not front load even more costs
 - Fix the process alongside the costs