

AnthonyGold



Incurring Costs

David Marshall
Managing Partner, Anthony Gold



*What are/how much
of the costs are
'incurred'?*

- Costs incurred prior to completion of the Precedent H
- In the columns marked ‘incurred’ (White Book note to CPR 3.12.3)
- A single figure required in Precedent H for each grade of fee earner, compared to estimated costs which require a rate applied, the number of hours and a total.
- All items in the ‘Pre-action’ phase will of necessity be incurred costs.
- Not all items incurred before issue will fall into the ‘pre-action phase’ – pre-action work on disclosure should be marked in the incurred column of the disclosure phase, pre-action work on witness statements should be in the witness statements phase etc.
- Tasks in the J-Codes for pre-action phase include:
 - Factual investigation
 - Legal Investigation
 - Pre-action protocol

Jackson Supplementary Report – analysis of claimant budgets

Claimant

Approved/Agreed	Number of Cases	Average (£):			Incurred/Total Cost
		Incurred	Future Cost	Total Cost	
Clinical Negligence	51	60,280	128,754	189,034	32%
Personal Injury	55	27,198	52,841	80,039	34%
Business Disputes	5	21,272	62,653	83,924	25%
Chancery and Property	8	15,352	34,925	50,277	31%
TCC	1	43,555	97,717	141,272	31%
Defamation	0	0	0	0	0%
Other	12	8,942	31,627	40,569	22%
PALG	59	49,555	69,007	118,562	42%
Total including PALG (this gives distorted picture: see para 3.2)	191	41,500	76,306	117,806	35%
Total excluding PALG	132	37,816	79,618	117,434	32%

Jackson Supplementary Report – analysis of defendant budgets

Defendant					
Approved/Agreed	Number of Cases	Average (£):			Incurred/Total Cost
		Incurred	Future Cost	Total Cost	
Clinical Negligence	46	11,930	71,956	83,886	14%
Personal Injury	58	6,587	41,114	47,701	14%
Business Disputes	6	8,947	47,076	56,023	16%
Chancery and Property	6	7,005	29,916	36,921	19%
TCC	2	10,109	69,980	80,089	13%
Defamation	1	2,230	18,397	20,627	11%
Other	8	5,868	18,936	24,804	24%
PALG ¹	56	13,471	38,481	51,952	26%
Total including PALG (this gives distorted picture: see para 3.2)	183	10,111	46,836	56,947	18%
Total excluding PALG	127	8,628	50,580	59,209	15%

The meat in the sandwich?

- What is in the budget?
- Incurred costs approx. 1/3 of budget
 - always incurred if you get to CCMC
- Trial preparation and trial approx. 1/3 of budget
 - rarely incurred
- Post CCMC, pre-trial costs 1/3 of budget
 - So only up to approx. 1/2 of the actual total costs will actually be subject to a budget in most cases and usually much less.



*The status of incurred costs in the budget –
Sarpd and reversal*

- “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 ...”
- They drew attention to the 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’ and said:
- “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” and
 - ‘Sarpd chose not to dispute the reasonableness and proportionality’, and
 - ‘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’.
- On the face of it, the decision appeared to require the opponent to ask the court to investigate incurred costs at a budget stage or lose the right to do so later.

- 6 April 2017: CPR 3.15 and 3.18 amended to effectively reverse the decision in Sarpd (by making it clear that the provisions apply only to budgeted costs and not incurred costs) and return the position to as had been understood prior to that decision.
- CPR 3.15: In performing its costs management functions the court has oversight of both the incurred and future costs.
- The extent to which the parties disagree with one another's budgets will be recorded.
- When making a costs management order, the court is also required to record any comments it has about the parties' incurred costs (CPR 3.15(4)) and these will be taken into account at the detailed assessment stage.

Harrison -v- University Hospitals Coventry & Warwickshire Hospital NHS Trust [2017] EWCA Civ 792

- “It follows, in my view, that incurred costs are not as such within the ambit of CPR 3.18 (in its unamended form) at all. Accordingly such incurred costs are to be the subject of detailed assessment in the usual way, without any added requirement of “good reason” for departure from the approved budget.”
- “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.”



What if the incurred costs are 'too high' at the time of the CCMC Comments on CMO

Redfern v Corby Borough Council [2014]
EWHC 4526 (QB),

- His Honour Judge Seymour QC upheld the decision of Deputy Master Eyre in a stress at work case where 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. On the appeal it was argued that the consequence was that the amounts which had been allowed for costs yet to be incurred were inadequate. Judge Seymour rejected that submission, saying:
- “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 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.”
- The decision of His Honour Judge Seymour in Redfern was to have been appealed to the Court of Appeal, but the whole case, including costs, settled at a mediation before the issue could be heard by the Court of Appeal.

CIP Properties v Galliford Try [2015] EWHC 481 (TCC)

- Coulson J was highly critical of the claimant's budget saying it was 'entirely unreliable', disproportionate and unreasonable.
- This was the second hearing about budgets (the claimant had first argued that costs management did not apply) and the judge was unhappy that at one point there had apparently been 26 people in court arguing about the budget.
- The claim was a building dispute pleaded at £18m, although the judge felt this was exaggerated and in any event relatively simple to determine as factual or expert issues. In addition, in this case the judge felt that the defendant had a greater burden in determining these than the claimant.
- The claimant's costs had originally been estimated in 2014 at £3,420,425.39, including £1,575,425.39 already spent. But by the time of the hearing in 2015, its total estimated costs were £9.5m including incurred costs of £4,226,768.16. The claimant's estimated costs were broadly equivalent to the costs of all four other parties combined.
- Coulson J pointed out that the value of the claim was not the sole determinant of proportionality. Complexity was also to be considered and he felt that the costs were disproportionate and unreasonable. He felt that £4.5m was at the 'upper end' of reasonable and proportionate costs which was only a little more than the claimant claimed to have already incurred.

CIP Properties v Galliford Try [2015] EWHC 481 (TCC)

- The options:
 - to decline to approve the budget, but that would place to no constraints on the amounts the claimant could spend going forwards
 - to order the party to prepare a new budget, but this would waste yet more time;
 - To go ahead and set budget figures for the work to be done but ‘I would arrive at an overall figure that was far in excess of that which I consider to be a reasonable and proportionate figure for the costs as a whole ... In addition, this would have the effect of allowing the claimant to ride roughshod over the costs management process; to be rewarded for the wholly unreasonable stance that they have taken throughout.’
 - to endeavour to set costs budget figures on a phase by phase basis, looking primarily at the estimated rather than actual costs;
 - to refuse to allow anything more in the costs budget beyond that which had already been spent, so that the party could not recover anything more than the costs already incurred, but ‘the claimant may then be doubly penalised because its costs incurred would be the subject of significant reduction on assessment, and it would not have got anything further in relation to the costs to be incurred because I would have set its prospective costs at nil’.
- Coulson J decided to set a budget for the work to be done, but also gave his estimate of what should have been reasonably incurred to date so that the assessed costs/costs budget for the claimant of a total of £4.28m ‘made up of the figures which I consider to be recoverable on assessment in respect of the costs said to have been incurred, and the approved budget figures in respect of the estimated costs. As noted above, 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.’

*Yeo v Times Newspapers Ltd [2015] EWHC
209 (QB), Warby J*

- “[61] However, if by the time the costs management process takes place substantial costs have been incurred, one thing the court may do is to “record its comments on those costs”: see PD3E 7.4.
- What the court will do is to “take those costs into account when considering the reasonableness and proportionality of all subsequent costs”: *ibid*.
- 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.”

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

Stuart Smith J

- Claims about work at Loftus Road Stadium. £805,675 was in dispute. The claimant's budget was £824,308 (with £310,000 incurred costs) and the defendant's budget had been agreed at £455,554 (including much higher hourly rates). Stuart Smith J said:
- “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.”
- And: ‘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.’
- In this case the claimant did not address incurred costs ‘as the court cannot amend the incurred costs’ but as a result the defendant had virtually no information about or explanation of the significance or otherwise of the claimant's incurred costs.
- He went on to say that ‘... a case would have to be wholly exceptional to render a costs budget of £824,000 proportional for the recovery of £805,000’. And this was not an exceptional case. However:
- “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.”
- He allowed a total budget of £425,000 including the incurred cost (£310,000) and made an order on a phase by phase budget on the same basis as in CIP.

Group Seven Limited v Nasir & others [2016] *EWHC 620 (Ch) Morgan J*

- Fraud cases managed together
 - Group 7: 9 million euros (£7.08m) – budget £3,576,249.77
 - ETS: £12 million Euros (£9.22m) – budget £1,476,925.95
 - Total budgets: £13,325,721
- Proportionality
 - “Rule 44.3(5)(a) refers to the relationship of the amount of the costs to the sums in issue.”
 - “the decided cases do not give much direct help when considering this relationship.”
- “I have commented earlier on various matters which the costs judge might consider relevant when carrying out a detailed assessment of the incurred costs. Those comments dealt with the hourly rates for solicitors and counsel and my comments on proportionality”.
- “I note the approach taken in CIP and in GSK in relation to incurred costs
- I do not consider it is appropriate in this case to make similar orders to the orders made in those cases. On the material before me, I do not feel that I could confidently and accurately identify a reasonable and proportionate figure for incurred costs nor do I feel able to say that if a costs judge later allowed a higher figure that it would necessarily be appropriate to deduct the difference between the budgeted figure and the costs judge's higher figure from some other figure for future costs which I am otherwise prepared to approve as reasonable and proportionate.”

Various Claimants v Sir Robert McAlpine and Others [2015] 6 Costs LR 1085

- Supperstone J
- “When considering reasonable and proportionate costs post 2 October 2015, 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”



*Hourly rates
What happens to
incurred costs if
hourly rates for
estimated costs are
reduced on
assessment?*

- '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.'

- RNB v London Borough of Newham [2017] EWHC B15 (Costs),: Deputy Master Campbell found that a reduction to the hourly rates for on detailed assessment with regard to the incurred costs was good reason to depart from the budget figures as that same reduction should be reflected and applied to the budget figures.
- This was doubted by in Nash v MoD (SCCO 22 February 2018) (unreported) by Master Nagalingam
 - Hourly rates are not supposed to be considered on budget setting – the budget figure is the case managing judge’s view of the proportionate costs required going forward. That should not be amenable to a mathematical reduction by a single factor – the hourly rate.
- and by Master Rowley in Jallow v MoD (SCCO 1 May 2018) (unreported) as causing ‘double jeopardy’.
- In Yirenki v MoD [2018] EWHC 3102 (QB) Jacobs J on an appeal from a CCMC before Master Davidson where “save that the parties reserve their positions as to incurred costs and as to hourly rates, the Master approved the budgets subject to the proviso that it remains open to them to dispute those matters (and to that extent the figures for each phase) at a detailed assessment...” In addition “the approval which was actually given... was an approval at a detailed level of a number of hours by various fee earners of different grades.” This was apparently the Master’s “usual practice” and he said “I’m not going to depart from my usual practice.”
- The respondent agreed that the appeal should be allowed as this was clearly contrary to the Practice Direction. Jacobs J went on to say “The idea of the budget... is that figures should be given, for each phase of the proceedings, which fall within the range of reasonable and proportionate costs... A party then has the advantage of knowing what his budgeted figure is...” subject to review, but only for good reason. He points out the “anyone involved in litigation knows that it is difficult to work out and predict in advance exactly who is going to be doing what and for how long” and the Master’s approach would remove flexibility.



Practice points

- Incurred costs subject to limited challenge at CCMC, but subject to a detailed assessment
- Budgeted costs can be challenged at CCMC, but limited challenge at detailed assessment
- There are no estimated costs in the pre-action phase, so the incurred costs here will not directly affect the estimated costs to be allowed.
- Think about separating out items of recorded time and/or disbursements that potentially cover more than a single phase.
- Avoid if possible any one phase becoming over-inflated with the risk that this is reduced at the CCMC.
- Then mark the file note or voucher accordingly. The final bill should now match the approved costs budget as closely as possible.

Various Claimants v Sir Robert McAlpine and Others [2015] 6 Costs LR 1085

- A 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, the Senior Costs Judge sought to deal with the problem of information relating to incurred costs and 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.”
- This might be a sensible approach in all cases where there are very significant incurred costs and arguments about proportionality of the total incurred and budgeted costs.

Jackson: “Overstatement of incurred costs”

- At a late stage in the review my attention was drawn to *Tucker v Griffiths* (Senior Courts Costs Office, 19th May 2017). Master Rowley held that the claimant’s solicitors were using an incorrect rate to calculate incurred costs. At [35] he said:
- “Whatever the reason, it is an approach which must be deprecated. It is self-evident that a solicitor preparing a costs budget should not overstate a party’s liability to his solicitor for costs that have already been incurred. It is to all intents and purposes a breach of the indemnity principle. It is bound to mislead both the opponent and the court in circumstances where neither has any opportunity to examine the costs claimed in any detail at a budgeting hearing. It is no answer to say that the opponent’s liability to pay such costs is ultimately protected by the option of going to a detailed assessment. The whole purpose of costs management is meant to limit the need for detailed assessments and part of that must involve the parties and the court being able to rely upon the information provided by the other party.”
- *Tucker* is subject to an application for permission to appeal. I do not know how widespread is the approach to incurred costs which Master Rowley deprecated. If the decision stands and if that approach is widespread, it will mean that many of the incurred costs figures quoted throughout this report are overstated.
- “This budget is a fair and accurate statement of incurred and estimated costs which it would be reasonable and proportionate for my client to incur in this litigation.”

Split trials: Page v RGC Restaurants Limited
[2018] EWHC 2688 (QB)

- An appeal to Walker J by the claimant against a sanction limiting the costs budget to applicable court fees only. The claimant had filed an “interim costs budget” with £0.00 for trial preparation and trial, asserting that “a second CMC will take place in approx six months when directions for further experts and trial will be given. It is too soon to budget to trial” and “it is too soon to budget on quantum as expert evidence is to be obtained.” They argued that a further CCMC would be required. There was negotiation between the parties on the budget phases but no court order to this effect prior to the hearing of the CCMC.
- The Master was not minded to agree to a further CCMC and thus that the budget filed by the claimant did not comply with the PD. He invited an application for relief from sanctions which failed. Walker J held that the principles of Mitchell applied equally to the filing of an incomplete budget as to not filing a budget at all.

Split trials: Page v RGC Restaurants Limited *[2018] EWHC 2688 (QB)*

- It would not be a proportionate sanction on the facts of this case to disallow all costs in the budget.
- But Walker J disallowed any costs for trial and trial preparation (which had been budgeted at £0.00).
- In cases where a split trial is sought or where it is considered that the court should limit the budget to a particular stage of proceedings, it is very important not to simply assume the court will agree, even if the parties do (whether wholly or in part).
- If there is such agreement then this must be put to the court for an order to that effect. In the High Court in London at least, the Master is usually contactable by email.
- Unless and until such order is made a full costs budget should still be filed – one option is to file two or more alternative budgets depending upon the orders made by the court. That can also have the beneficial effect of crystallising the additional costs of various steps so that the Judge can make an informed view when making a decision.

On revision of the budget, do estimated costs turn into inured costs?

- From 6 April 2017
- CPR 3.15 (1), introduces the term “budgeted costs” in preference for the term “budget”
- White Book Guidance
 - “If after the approval of that budget, the party submits a revised budget seeking an increase in respect of any part of it, the costs previously shown in the incurred costs column should remain the same; unless and until the court approves any revision, the costs previously approved in the estimated columns (the budgeted costs) should remain in the estimated columns even if substantial amounts of them have now been incurred”



Payment on account

Payments on account

- If the costs have been the subject of costs management, then in *Thomas Pink Ltd v Victoria's Secret Ltd [2014] EWHC 3258 (Ch)* Birss J ordered that the losing party pay 90% of the winner's costs budget. In that case the whole budget including incurred costs had been agreed.
- If the incurred costs had not been agreed, it is likely that the court would award 90% of the budgeted costs and a reasonable proportion of the incurred costs.
- In the TCC case of *Cleveland Bridge UK Ltd v Sarens (UK) Ltd [2018] EWHC 827 (TCC)*, the court set out the principles for calculation of the interim payment on account of costs in a budgeted case.
- The receiving party will normally be entitled to an order for 90% of the estimated future costs in the budget and a 'reasonable sum' in respect of the incurred costs in the budget.
- In this case (where there was to be an argument in respect of hourly rates for the incurred costs), the receiving party was entitled to an interim payment of 70% of the amount in the budget as incurred costs.



Jackson

- “Costs management is now working distinctly better than it was two years ago, although there is still room for improvement.
- This is borne out both by the written submissions during this review and by numerous contributions during the seminars.
- It is not my function in this review to tinker with the costs management rules or with judicial training modules. It must be a matter for the Rule Committee whether any further amendments are required in relation to incurred costs.
- That does not, however, dispense with the need for extending FRC.”

The problem of incurred costs

- “3.1 The problem. Defendant representatives are particularly concerned that costs incurred before the first costs and case management conference (“CCMC”) are not subject to budgeting. Mr John Mead (technical claims director of the NHS LA) describes this as “the main problem with costs budgeting”. To their credit, many claimant representatives acknowledge that this is a serious problem which needs to be tackled.
- 3.2 The figures. During the budget exercise my team received 191 agreed or approved claimant budgets and 183 agreed or approved defendant budgets. Table 6.1 below sets out the total incurred costs and the total future agreed or approved costs in those budgets. On average, in the claimant budgets, incurred costs represented 35% of the total budget figure; in the defendant budgets, incurred costs represented 18% of the total budget figure. For present purposes, it is probably appropriate to treat actions against the police separately ... They often have higher incurred costs because of inquests and/or IPCC investigations. Also, those actions form a relatively small specialist area of litigation.
- If we focus on cases other than actions against the police, the figures are as follows: on average, in the claimant budgets, incurred costs represented 32% of the total budget figure; in the defendant budgets, incurred costs represented 15% of the total budget figure.”

What about fixing pre-issue and pre-budget costs?

- “4.3 ... I see considerable merit in Master Cook’s proposal ... It would be necessary to draw up quite an elaborate grid of pre-issue and pre-budget provisional costs, with different figures for different types of case. It would then be necessary to develop a procedure for pre-action applications to the court for approval of expenditure above the provisional figures. Such a scheme would probably require primary legislation, to give the court appropriate pre-action jurisdiction. The best way to do that would be by amending section 33 of the Senior Courts Act 1981 and section 52 of the County Courts Act 1984. In my view it would be premature to take this proposal forward now for three reasons:
 - (i) I am already recommending some significant reforms. Those reforms should be allowed to bed in before we take this quite major step.
 - (ii) There will be resource implications for district judges and masters if applications for pre-action costs budgeting are added to their workload. This is not an objection to the reform, but the resource implications must be addressed first.
 - (iii) By definition this scheme will only apply to cases which are above the proposed intermediate track and are subject to costs management. The experience of a fixed costs regime in the intermediate track will be highly relevant to the development of any grid of any pre-issue/pre-budget provisional fixed costs for multi-track cases.
- My only recommendation, therefore, is that in the future consideration should be given to developing (a) a grid of FRC for incurred costs in different categories of case and (b) a pre-action procedure for seeking leave to exceed the FRC in the grid.”