

**COSTS UPDATE -
BUDGETS, PROVISIONAL
ASSESSMENT, J CODES
AND THE COURTS**

Gary Barker

COSTS BUDGETING

Heggin v Person(s) Unknown & Google Inc [2014] EWHC 379 (QB)
Under CPR 3.15, a court had to grant a costs management order where it was not satisfied that the litigation was being conducted at proportionate cost.

COSTS BUDGETING

Heggin v Person(s) Unknown & Google Inc [2014] EWHC 379 (QB)
Accordingly, the court had a complete discretion to decide whether costs budgets should be filed and exchanged.

COSTS BUDGETING

Heggin v Person(s) Unknown & Google Inc [2014] EWHC 379 (QB)
if a party continued to oppose the provision of such budgets, the case management conference would need to be re-fixed for the matter to be argued out on the detail.

**PART 36 AND LIMITED
COSTS**

36.23(1) This rule applies in any case where the offeror is treated as having filed a costs budget limited to applicable court fees, or is otherwise limited in their recovery of costs to such fees.

(2) "Costs" in rules 36.13(5)(b), 36.17(3)(a) and 36.17(4)(b) shall mean—

(a) in respect of those costs subject to any such limitation, 50% of the costs assessed without reference to the limitation; together with

(b) any other recoverable costs.

BUDGETING

Redfern v Corby Borough Council [2014] EWHC QB 3 December

The deputy master had not sought to approve or disapprove costs which had already been incurred. He had recorded his comments on those costs and had taken them into account when considering the reasonableness and proportionality of all subsequent costs, as he was bidden to do by PD 3E.

BUDGETING

It had been sensible to fix a figure which would be reasonable and proportionate for the costs of the whole action. The practice direction had been applied correctly. The only way in which one could take into account excessive costs already incurred was to limit approved subsequent costs at a lower level than would have otherwise been approved.

CONTINGENCIES

Yeo v Times Newspapers Ltd [2015] EWHC 209 (QB)
Mr Justice Warby ruled that judges should only allow a contingency in a costs budget “if it is foreseen as more likely than not to be required”, in striking out £50,000 worth of contingencies that one party had included for ‘strategy review and consultation’ and ‘possible further work’.

PROPORTIONALITY

Yeo v Times Newspapers Ltd [2015] EWHC 209 (QB)
“It seems to me that whilst the question of whether the totals are reasonable and proportionate will always be the overall criterion, the court’s may need to consider rates and estimated hours. The approach will need to be tailored to the case before the court.”

THE HEARING

Yeo v Times Newspapers Ltd [2015] EWHC 209 (QB)
Mr Justice Warby suggested that costs management hearings should generally be done on paper.

ROBUST APPROACH

CIP Properties (AIPT) LTD (Claimant) v Galliford Try Infrastructure Ltd (Defendant) & EIC LTD (Third Party) Kone PLC (Fourth Party) DLG Architects LLP (Fifth Party) Damond Lock Grabowski & Partners (A Firm) (Sixth Party) [2015] EWHC 481 (TCC)

ROBUST APPROACH

Mr Justice Coulson said the claimant’s solicitors had provided a ‘wholly unreliable’ costs budget with a deliberate absence of any explanation for a huge increase in costs incurred and estimated. The firm claimed to have incurred costs of £4.2m, with estimated further costs of £5m. Taking into consideration other sums which had been excluded, the total claim was for £9.5m.

ROBUST APPROACH

The judge capped the total incurred and estimated costs at £4.28m.

In contrast, the defendant claimed around £4.5m in total costs. This figure was reduced to £4.23m.

ROBUST APPROACH

'The claimant's costs both incurred and estimated are disproportionate to the complexity and value of this claim. In my view they bear no relation to what is required to be spent to advance this case in a proportionate way. There is no reason – and no reason has been put forward – why the claimant's overall costs figures should not be similar to that of the defendant.'

BUDGET REVISION

Yeo v Times Newspapers Ltd [2015] EWHC 209 (QB)

"If the improbable occurs, in the form of an unexpected interim application, the costs will be added to the budget pursuant to PD3E 7.9, unless the matter involves a "significant development" within para 7.4 in which case, if time permits, a revised budget should be prepared and agreed or approved."

BUDGET REVISION

Excelerate Technology Ltd v Cumberbatch [2015] EWHC 204 (QB) QB (Merc) Birm HH Judge Simon Brown ruled that no approval could be given for an increase in the Claimant's approved budget to cover the fact that the trial lasted 8 days not 6. This was because these extra costs had already been incurred before a request to vary the budget had been made.

BUDGET REVISION

Excelerate Technology Ltd v Cumberbatch [2015] EWHC 204 (QB) QB (Merc) Birm However, his order recorded that costs had been properly incurred because of the extra 2 days, that those costs had not been foreseeable and it had not been practicable or viable to make applications for variance or to agree them with litigants in person as the first two Defendants had become shortly before trial began.

APPEALING A BUDGET

Havenga v Gateshead NHS Foundation Trust & South Tyneside Hospitals NHS Trust [2014] EWHC B25 (QB) Appeal dismissed where a Budget was reduced from £769,854 to £463,915. Although the Appeal Judge would have allowed more time, the hours allowed were not outside the ambit of the DJ's discretion.

INDEMNITY COSTS v BUDGET

Denton & Others v TH White Ltd & Another
Decadent Vapours Ltd v Bevan & Others
Utilise TDS Limited v Davies
[2014] EWCA Civ 906

INDEMNITY COSTS v BUDGET

“If the offending party ultimately wins, the court may make a substantial reduction in its costs recovery on grounds of conduct under rule 44.11. If the offending party ultimately loses, then its conduct may be a 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.”

BUDGET DEVELOPMENT

Abandon budgeting if court short of resources;
Full-day refresher course for all civil judges;
Standard form of costs management order;
Budgets lodged 14 days before the CMC;
Summary bill in Precedent H format;
Single hearing for case/costs management;
Proportionality to disregard court fees;
Power to revise agreed budget;
Summarily assess incurred costs.

J CODES

The Hutton Committee, chaired by Alexander Hutton QC and including Costs Judge Colum Leonard recommended adapting the codes in the existing Uniform Task-Based Management System (UTBMS) operated by Legal Electronic Data Exchange Standard (LEDES) into new “J-Codes”, which have been formulated for use in England and Wales (EW-UTBMS).

J CODES

The J-Codes are designed to be compatible with commercial time recording software.

A number with J prefix denotes a task (i.e. an area of work within a case).

A number with A prefix denotes an activity, (i.e. what you are doing within that area of work).

J CODES

For example, time spent drafting a witness statement, would be:

Task Code JG10 Taking, preparing and finalising witness statement(s).

Activity Code A103 Draft/Revise.

The narrative would be the name of the witness.

J CODES

Additional codes record disbursements. For example a number with X as prefix denotes expenses (such as X103 External photocopying charges).

All work recorded in this way feeds into a bill detail spreadsheet.

This spreadsheet is too cumbersome to print out in full, but it can easily be read and transmitted electronically.

J CODES

The CPR will be amended to permit (and later require) bills of costs for detailed assessment to be in spreadsheet form, matching up with the layout of precedent H.

The software will be able automatically to generate draft bills of costs in this format. The solicitors will need to provide very limited input to create the final bill of costs for filing and serving.

J CODES

The precedent bill will be in a universal format which will be made publicly available on the HMTCS website for use with most spreadsheet software such as Excel.

The new bill of costs will enable instant comparison between the costs being claimed and the receiving party's last approved budget.

COSTS CASES

Coventry v Lawrence

The defendants raised arguments that the claimants' claim for success fees and an ATE insurance premium were not Human Rights Act compliant.

A hearing took place in February 2015. Judgment expected by end of July.

COSTS CASES

Blankley v Central Manchester NHS Trust [2015] EWCA Civ 18

A client's loss of mental capacity terminates the solicitor's authority to act on behalf of that client but does not terminate the retainer; in the circumstances the solicitors could continue acting under a pre-April 2013 CFA once the client had regained capacity or on the appointment of a deputy.

COSTS CASES

Conlon v Royal Sun Alliance Plc [2015] EWCA Civ 92

In this "credit hire" case allocated to the small claims track the claimant was awarded some compensation, successfully appealed for more and then brought a second appeal in order to obtain the full compensation she had claimed. No costs as allocated to small claims.

COSTS CASES

Cox v Woodlands Manor Care Home Ltd
[2015] EWCA Civ 27 January
A CFA is “made” when it is signed even if, at that time, its operation is conditional upon the willingness of a legal expenses insurer to provide funding.
Thus the Consumer Contracts Regs. requirements need to be complied with.

COSTS CASES

Excalibur Ventures LLC v Texas Keystone Inc [2014] EWHC 3436 (Comm)
Held that it is wrong to assume that the court should never allow an interim payment on account of costs of more than the “irreducible minimum”.
CPR 44.2(a) provides that the court, “will order” a paying party “to pay a reasonable sum on account of costs unless there is good reason not to do so”.

COSTS CASES

Kazakhstan Kagazy Plc v Zhunus [2015] EWHC 404 (Comm)
Leggatt J in assessing an interim payment of costs would estimate the recoverable amount in broad terms based on his knowledge of the case and the issues raised by the applications and also experience gained from summarily assessing costs and in awarding payments on account of costs in other cases.

COSTS CASES

Kazakhstan Kagazy Plc v Zhunus [2015] EWHC 404 (Comm)

He would then discount this figure to reflect the margin of error in his estimate.

As a matter of principle, an interim payment should err on the side of caution.

COSTS CASES

Thomas Pink Ltd v Victoria's Secret UK Ltd
[2014] EWHC 2631 (Ch)
This case centred on a trademark infringement claim where costs budgets were agreed between the parties during the course of the litigation.

The payment on account of costs was set at 90% of the costs budget.

COSTS CASES

Savoie v Spicers Ltd [2015] EWHC 33 (TCC)
Applying the current test of proportionality Akenhead J held that, the claim value being about £900,000, the prevailing party's claim of about £200,000 were disproportionate.

In the result the costs were assessed at about £96,000.

COSTS CASES

Purser v Hibbs & Another [2015] EWHC QB 19 May

Despite the variation in wording between the old CPR 36.10(5) and the new CPR 36.13(5), the appropriate test was whether, bearing in mind the factors listed under CPR 36.17(5), the usual costs rule should be departed from because it would be unjust to apply it in the particular circumstances of the case.

COSTS CASES

Purser v Hibbs & Another [2015] EWHC QB 19 May

In respect of the costs of surveillance, the court disagreed from the note in the current White Book which suggested that some allowance for surveillance should be expressly made in a defendant's costs budget.

COSTS CASES

Hailey v Assurance Mutuelle des Motards [2015] March SCCO CCD 1405291

In an RTA claim the bike rider was named as potential defendant in the CFA, but the insurer was not. The proceedings were eventually issued against the insurer. Despite winning a £400,000 settlement the claimant was not entitled to recover its costs from the defendant insurer (except disbursements).

COSTS CASES

Broni v Ministry of Defence [2015] EWHC 56 (QB)

Supperstone J held that the fixed success fee rules do not apply to claims for injuries suffered at work if the claimant is a servant of the Crown. This is because the term "employee" used in those rules incorporates the definition given in the Employers' Liability (Compulsory Insurance) Act 1969 s.2(1).

COSTS CASES

Dalton v BT Plc [2015] EWHC 616 (QB)
Phillips J decided that noise induced hearing loss is a disease not an injury and therefore, in cases settling before trial a fixed success fee of 62.5% applies, not 25%. He did not share the view in *Patterson v Ministry of Defence* [2012] EWHC 2767 (QB), which held that NFI (trench foot) was an injury not a disease.

COSTS CASES

Bentine v Bentine; Stone Rowe Brewer v Just Costs Ltd

These two second appeals (concerning, amongst other things, the meaning of "special circumstances" entitling a costs judge to depart from the one fifth rule) are now listed for hearing by the Court of Appeal over two days starting in the last week of July 2015.