

Costs - where are we now?

Paul Walton (costs lawyer)

Fixed fees

- Higher echelons of the judiciary “are keen to extend the fixed costs regime to as many civil cases as possible.”
- A review is being undertaken by Lord Justice Jackson as I speak with a report due by the end of July 2017.
- The time for putting in submissions has now passed.
- A consultation will follow the review.
- Possible dates for implementation: April or (more likely?) October 2018

Fixed fees (cont.)

- Better the devil you know - “One strong message... in many of the submissions... is that (despite all the criticisms in the past) costs management is now working much better.” “Many people are arguing that this does away with the need for fixed costs in the multi-track”
- Those in favour of fixed costs don’t agree, crying what about incurred costs?
- They are coming - fast track is the sacrificial lamb!
- There is talk of an “Intermediate track” for lower value multi-track cases. New procedural rules are to be considered for this new track. Consideration is being given to piloting such a regime on a voluntary basis.

Fixed fees (cont.)

- LJ Jackson will be looking at all areas of law.
- It appears to be accepted that a “one size fits all” approach won’t work. What is a lower value claim in commercial litigation (indicated to be £250,000) is different to a lower value personal injury claim.
- LJ Jackson’s report will provide bespoke recommendations on all areas of law.
- Data is being used when compiling the report, such as approved costs budgets.
 - There is an initial indication that 31% of a Claimant’s costs budget is incurred and 14% of a Defendant’s within an costs budgeting are approved.

Costs budgeting

- *Merrix** - first instance appeal decision - causing much excitement
- Mrs Justice Carr “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.”
- Does this mean that, save good reason, your budget is what you are going to be paid for estimated costs (incurred costs are still to be assessed)? It would appear so.
- To what degree, if any, will the court look at the work done that makes up the claim for costs?
- In May the CoA is due to hear an appeal from a similar decision in an unreported case of *Harrison v Coventry NHS Trust*. *Merrix* may therefore be superseded/confirmed, or the two appeals may be heard together.

* *Merrix v Heart of England NHS Foundation Trust* [2017] EWHC 346 (QB)

Costs budgeting (cont.)

- What is a good reason to depart?
 - Hourly rates are not fixed at the costs budgeting stage?
 - Within her Judgment, Mrs Justice Carr suggests that if lower hourly rates are allowed upon assessment this may be good reason to depart.
 - Indemnity principle.
 - A phase hasn't been "completed"?
 - The case did not follow the assumed course, e.g. more or less witnesses were relied upon?
 - The trial lasted longer than was assumed?
 - The trial lasted less time than was assumed.
- Inevitable question if you exceed your budget - why wasn't an application to vary the budget made when a significant development occurred?
- Similar question can be put to paying parties - if you knew of a significant development why didn't you request a varied budget.

Costs budgeting (cont.)

- *Car Giant Limited & Anor v London Borough of Hammersmith and Fulham**
- A trial before Mr S Furst QC, a Deputy High Court Judge.
- C failed to beat D's Part 36 offer. D had an approved costs budget, but had spent an additional £89,000 and sought an indication from the trial judge that these were reasonably incurred.
- "Absent [particular views on costs or an aspect of costs, having conducted the trial], it would seem to be that a court should not seek to trammel the costs judge's discretion, particularly where the costs judge has much greater experience of such matters than I have."
- There was nothing in the nature of the application to exceed the phases of the costs budget that couldn't be explained "equally well" to the costs judge.

* [2017] EWHC 464 (TCC)

Proportionality

- Tail of woe 1 - *May & Anor v Wavell Group Plc & Anor**
- Private nuisance case brought by Queen guitarist Brian May and his wife Anita Dobson, which settled after they accepted a £25,000 Part 36 offer prior to the Defendants entering their defences.
- Claim for costs of £208,000.
- Upon assessment, Master Rowley assessed the C's reasonable costs at £99,655.74.
- The costs were then further reduced to £35,000.00 on the basis of proportionality.
- That decision is going to appeal in October 2017 with tail of woe 2:



* [2016] EWHC B16 (Costs)

Proportionality (cont.)

- BNM v MGM Ltd*
- Claim about a primary school teacher with no public or media profile who had a relationship with a successful premiership footballer. Was awarded £20,000 and an undertaking was given not to disclose confidential information illegally obtained.
- Clearly not a claim “just about the money”.
- Substantial admissions made in Defence and settled by a Consent Order.
- C’s claimed costs totalled £241,817.00.
- The following happened upon assessment:

* [2016] EWHC B13 (Costs) 3 June 2016

Proportionality (cont.)

	Allowed as reasonable
• Base profit costs	£46,321.00
• Base counsel's fees	£14,687.50
• Court fees	£1,310.00
• Base costs for preparing the BoCs	£4,530.00
• Success fee on base profit costs (33%)	£16,780.83
• Success fee on counsel's fees (33%)	£4,846.88
• ATE premium	£61,480.00
• VAT	£17,433.24
• Total base costs (excluding BoCs prep')	£62,318.50
• Total disbursements	£167,389.45

Proportionality (cont.)

	Allowed as reasonable	Allowed as proportionate
• Base profit costs	£46,321.00	£24,000.00
• Base counsel's fees	£14,687.50	£7,300.00
• Court fees	£1,310.00	£1,310.00
• Base costs for preparing the BoCs	£4,530.00	£2,250.00
• Success fee on base profit costs (33%)	£16,780.83	£7,920.00
• Success fee on counsel's fees (33%)	£4,846.88	£2,409.00
• ATE premium	£61,480.00	£30,000.00
• VAT	£17,433.24	£8,775.80
• Total base costs (excluding BoCs prep')	£62,318.50	£32,610.00
• Total disbursements	£167,389.45	£83,964.80

Proportionality (cont.)

- Question arising - does the “new” test of proportionality apply additional liabilities?
- Master Rowley thinks not - *King v Basildon & Thurrock University Hospitals NHS Foundation Trust** That decision is being appealed.
- Nor did District Judge Beresford in *Mather v Doncaster and Bassetlaw Hospitals NHS Foundation Trust*** That decision is also being appealed.
- In *Mather* it was also adjudged that when considering proportionality the total of the [relevant] costs is looked at, even though some of these may have been incurred pre April 2013.

* [2016] EWHC B32 (Costs) 3 November 2016

* Citation unknown

Fixed costs

- *Qader & Oths v Esure** [2016] EWCA Civ 1109
 - Began life in the RTA Protocol for Low Value Personal Injury Claims ('the Portal').
 - Exited the portal.
 - Briggs LJ made the following decision:
 - There is an obvious drafting error in the rules, which the court is able to rectify and which it did by the insertion of the following words in bold into CPR 45.29B:
Application of fixed costs and disbursements – RTA Protocol 45.29B
Subject to rules 45.29F, 45.29G, 45.29H and 45.29J, **and for so long as the claim is not allocated to the multi-track**, if, in a claim started under the RTA Protocol, the Claim Notification Form is submitted on or after 31st July 2013, the only costs allowed are -
 - (a) The fixed costs in rule 45.29C;
 - (b) Disbursements in accordance with rule 45.29I.
 - Therefore, unless actually allocated to the Multi-track, fixed costs apply.

* [2016] EWHC Civ 1109

Fixed/capped costs - a way through?

- *Part 36 offers:*

- CPR 36.13(4)(b) - where a Part 36 offer is accepted after expiry of the relevant period, the liability for costs must be determined by the court unless the parties have agreed the costs.
- CPR 36.13(5) - where (4)(b) applies, but the parties cannot agree, the court must, unless it considers it unjust to do so, order that -
 - a) the claimant be awarded costs up to the date on which the relevant period expired; and
 - b) The offeree pay the offeror's costs for the period from the date of expiry of the relevant period to the date of acceptance.
- If it is a C's Part 36 offer, it is discretionary, but the court's seem to be agreeing that the costs of the period covered by CPR 36.13(5)(b) should be on the indemnity basis. For example -
 - *Sutherland v Khan**
 - *Jockey Club Racecourse Ltd v Willmott Dixon Construction Ltd***
 - *Car Craft Test Centre & John Martin v Kirsty Trotman & Advantage Insurance Company****

* Kingston-upon-Hull County Court, Case number A81YM424

** [2016] EWHC 167 (TCC)

*** Stoke County Court, District Judge Etherington 3 February 2017

Fixed/capped costs - a way through? (Cont.)

- *Broadhurst & Anor v Tan & Anor*
 - 2 cases started under RTA protocol where the Claimants beat their P36 offers.
 - Establishes that a successful Part 36 claimant, that is one who matches or beats his or her own offer, is entitled to indemnity costs.
 - Decision of Lord Dyson “Where a claimant makes a successful part 36 offer in a section IIIA case, he will be awarded fixed costs to the last staging point provided by rule 45.29C and Table 6B. He will then be awarded costs to be assessed on the indemnity basis in addition from the date that the offer became effective. This does not require any apportionment. It will, however, lead to a generous outcome for the claimant.”
 - i.e. indemnity costs trumps fixed costs.

Fixed/capped costs - a way through? (Cont.)

- *Lowin v W Portsmouth and Co. Ltd.*
 - The Queen's Bench Division of the High Court held that where a receiving party matched or beat its own Part 36 offer in provisional assessment proceedings it was entitled to costs on the indemnity basis under CPR 36.17(4) which overrode the cap of £1,500.00 plus VAT and court fees contained in CPR 47.15(5).
- It is reasonable to assume that this extends to the capped costs prescribed in relation to costs budgeting and costs management.
- All the more reason for early competitive Part 36 offers to be made.

Fixed costs - Appl' for pre-action disclosure

- *Sharp v Leeds City Council* addresses the cost consequences of a PAD application where the substantive matter is subject to the fixed costs regime.
- As per CPR Part 46.1(2) 'The general rule is that the Court will award the person against whom the order is sought that person's costs'. The District Judge treated the PAD Application as separate from the fixed costs regime, awarding £1,250.00. This was overturned on Appeal where it was ruled that:
 - “the fixed costs regime plainly applies to the costs of a PAD application made by a claimant who is pursuing a claim for damages for personal injuries which began with the issue of a CNF in the Portal pursuant to the EL/PL Protocol but which, at the time of the PAD application, is no longer continuing under that Protocol.”
- Pursuant to this decision, the tariff figure of £305 was payable.

Insurance premiums

- *Rezek-Clarke v Moorfields Eye Hospital NHS Foundation Trust**
 - This was a clinical negligence claim that settled for £3,250.00.
 - The total costs claimed were £72,230.00, which included a LASPO ATE premium of £31,976.49.
 - The sum allowed on provisional assessment was £24,604.40, which included an ATE premium of £2,120.00.
 - In keeping with Chief Master Gordon-Saker, Master Simons agreed that additional liabilities should be taken into account when considering proportionality.
 - C relied upon *Rogers v Merthyr Tydfil County Borough Counsel*
 - *If the premium was necessarily incurred and reasonable in amount having regard to the litigation risk then it was therefore also proportionate.*
 - Master Simons did not make a decision on the reasonableness of the premium, but upheld his earlier decision on the basis that a premium of £2,120.00 was proportionate.

* [2017] EWHC B5 (Costs) (17 February 2017)

Some practical points

- J-codes. To use or not to use?
 - Budget category/phase name
 - Task name, e.g. Communication with client; communication with other; communication; documentation; etc.
 - Activity name, e.g. letter; telephone call; drafting; considering; advocacy; travelling; waiting; etc.
- Time recording against budgets.
- Costs orders
- ADR

Costs - where are we now?

On things such as costs budgeting and proportionality -

Your guess is as good as mine!

But we should know more in a few months.

Maybe!

Thank you.
Oh, and good luck!

