



***At the coalface of case management and costs
budgeting in international injury and overseas
illness claims***

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30 November 2012 Sarah Crowther
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Tips : The Health Warning

- No consistency
- Different approaches between courts e.g. QB Masters and county court district judges
- Different approaches within courts e.g. Mayor's and Birmingham
- Hearing time estimates

The Basics

- Precedent H annexed to Practice Direction 3E. Parties **MUST** follow the Precedent H Guidance Note in **ALL** respects
- In cases where budgeted costs do not exceed £25,000 on the MT or the claim form value is less than £50,00, the parties **MUST** only use the first page of Precedent H
- In claims commenced on or after 6 April 2016 in which a claim is made by or on behalf of a minor (on that person reaching majority this exception will continue to apply unless the court orders otherwise)
- In claims where C has a limited or severely impaired life expectation (5 years or less)

Time to File

- Budgets
 - (1) Where the stated value of the claim is less than £50,000 – with DQs
 - (2) In any other case – not later than 21 days before the first CMC
- Sanction limited to court fees - r3.14
- Budget Discussion Reports – not later than 7 days before the first CMC
- What sanction for failure to file Precedent R?

Input from whom?

- Your client!
 - ✓ What is their budget?
 - ✓ Number of documents
 - ✓ Number of witnesses
 - ✓ Get an update on their recovery. Do they agree with the prognosis to date? Is more medical evidence needed? Does the schedule need dramatically revising?
 - ✓ Do they want a conference with you? With counsel? With absolutely everyone?

- Counsel about like stages especially if the matter is a CFA matter

- Counsel's clerk about likely fees

- Local agent

Costs Draftsman vs Counsel

- the unbiased view

- Preparation vs presentation
- Drafting the Precedent H, preparing the instructions and MAYBE attending court to provide further instructions – usual role for the cost draftsman
- Persuading, charming and dealing with the unpredictability of the future – usual role for counsel
- Not about detailed assessment and retrospective justification
- Consult the advocate on the Budget Discussion Report

Assumptions

- Discuss with the Defendant
- Input from the client, expert, counsel, foreign agent
- Consistent with your draft directions and DQs
- Assumptions are not to be repeated through different phases and should only be stated if they impact significantly on the level of costs
- Advising the client, taking instructions and corresponding, translating documents etc. in relation to the phase will be a cost in each phase and does not need to be repeated in each phase
- Use of foreign agent, number of experts, number of witnesses, length of trial all likely to impact significantly on the level of costs

Treatment of Incurred Costs

- Treated as 'untouchable'. Calculate estimated costs as at the date of the budget and then add those to the incurred costs
- Recording comments on unreasonableness – rare
- Incurred costs 'assessed', estimated costs 'approved' and then added together to create the phase total
- Approving total phase totals even where incurred costs were criticised



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Treatment of Incurred Costs

- *SARPD Oil International Ltd v Addax Energy SA* [2016] EWCA Civ 120
 - Comments about incurred costs will be recorded and treated as defining the incurred costs unless ‘good reason’ is shown otherwise
 - The appropriate time to deal with both incurred and estimated costs is the costs management hearing

- Civil Procedure (Amendment) Rules 2017 and CPR Update 88 (February 2017)

Incurred Costs

7.3 If the budgeted costs or incurred costs are agreed between all parties, the court will record the extent of such agreement. In so far as the budgeted costs are not agreed, the court will review them and, after making any appropriate revisions, record its approval of those budgeted costs. The court's approval will relate only to the total figures for budgeted costs of each phase of the proceedings, although in the course of its review the court may have regard to the constituent elements of each total figure. When reviewing budgeted costs, the court will not undertake a detailed assessment in advance, but rather will consider whether the budgeted costs fall within the range of reasonable and proportionate costs.

7.4 As part of the costs management process the court may not approve costs incurred before the date of any costs management hearing. 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 budgeted costs.

Treatment of Incurred Costs

- Only approving the estimated/ budgeted costs
- Will record the extent of any agreement on incurred costs
- May record any comment it has about the incurred costs and the court will take the comments into account in any subsequent assessment proceedings
- Incurred costs are controlled by detailed assessment

Problems

- How does the court approve a phase total which is an aggregate of incurred and budgeted costs?
- What happens if the court declines to make a comment when the opposing party argues that the incurred costs are wholly unreasonable?
- How does the court form a view on incurred costs without evidence of what those incurred costs cover?
- How does the court form a view on budgeted costs without evidence of what the incurred costs cover?



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Hourly Rates

7.3 ... In so far as the budgeted costs are not agreed, the court will review them and, after making any appropriate revisions, record its approval of those budgeted costs. The court's approval will relate only to the total figures for budgeted costs of each phase of the proceedings, although in the course of its review the court may have regard to the constituent elements of each total figure. When reviewing budgeted costs, the court will not undertake a detailed assessment in advance, but rather will consider whether the budgeted costs fall within the range of reasonable and proportionate costs.

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.

Hourly Rates

- So how might 'regard be had to the constituent elements'?
- Hourly rate may be abnormally high which may be an indication that the budgeted phase costs are too high
- But what about the argument that the time spent reflects the experience of the fee earner?
- But surely the starting point must be the budgeted phase total
- Practicality of filing an approved Precedent H

RNB v Newham LBC

- It is not the role of the judge at the cost budgeting stage to fix hourly rates
- The cost budget was made by reference to phases without the court commenting upon the hourly rates, either in respect of the incurred or budgeted costs
- *Merrix v Heart Of England Foundation NHS Trust* [2017] 1 Costs LR 91
“... As the notes to CPR 3.18 in the White Book reflect, the fact that hourly rates at the detailed assessment stage may be different to those of the budget may be a good reason for allowing less or more, then the phase totals in the budget”.
- Applied the hourly rates assessed on detailed assessment to the budgeted costs

RNB v Newham LBC

- In *Group Seven v Nasir* [2016] 2 Costs LO 303 Morgan J also decided the hourly rates which were to apply prospectively, and gave guidance about the locality of the firms of solicitors that it was reasonable for the parties to instruct (see judgment at paragraphs 40 to 45 entitled “Solicitors Hourly Rates”). Whilst the judgment was delivered two weeks before PD 7.10 was implemented, the draft amendment would have been available prior to the date upon which the judgment was handed down in that case.
- “It follows in my judgement, that if the court approves hourly rates in terms as was the case in *Stocker* and *Group Seven*, neither a paying nor receiving party on any subsequent detailed assessment can challenge them.”

Incurred and Pre-Action Costs

- Pre-Action Costs do not include any work already incurred in relation to any other phase on the budget
- Investigating the merits and advising the client, pre-action protocol correspondence, settlement discussions, advising on settlement and Part 36 (according to the guidance – but why the latter?)
- Foreign agent costs – distinct from expert costs
- Translation costs
- Use of counsel



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Issue/ Statements of Case

- CF, POC, Def and Reply
- Further investigations, advice, conference with client and counsel may be required
- Part 18
- Updating the Schedule and Counter Schedule – likely upon finalisation of the expert evidence

CMC

- DQs, CMC, correspondence with other party and reviewing other party's directions and budget, instructing counsel, attendance at the hearing, arranging the hearing and filing documents, finalising the order
- Subsequent CMCs
- Preparing the cost budget is a separate item
- Incurred or budgeted costs – *Medac Gesellschafte Fur Klinischespezialpraparate GmbH v Star Pharmaceutical Ltd* [2015] EWHC Ch 4063 (Ch)



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Disclosure

- Obtaining documents from the client, explaining the disclosure duties, translating the CPR, reviewing documents and preparing the list, providing inspection, reviewing the other party's list, requesting inspection and considering copies
- Consulting counsel as appropriate
- Specific disclosure requests not included
- Translating disclosure document – duties vs practicalities

Witness statements

- Identifying witnesses, obtaining statements, consulting counsel, reviewing opponent's statements and taking instructions
- Agency costs to obtain the statements
- Interpretation costs to obtain statements
- Interpretation costs to check other party's translations
- Certified translations of the statements



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Expert Reports

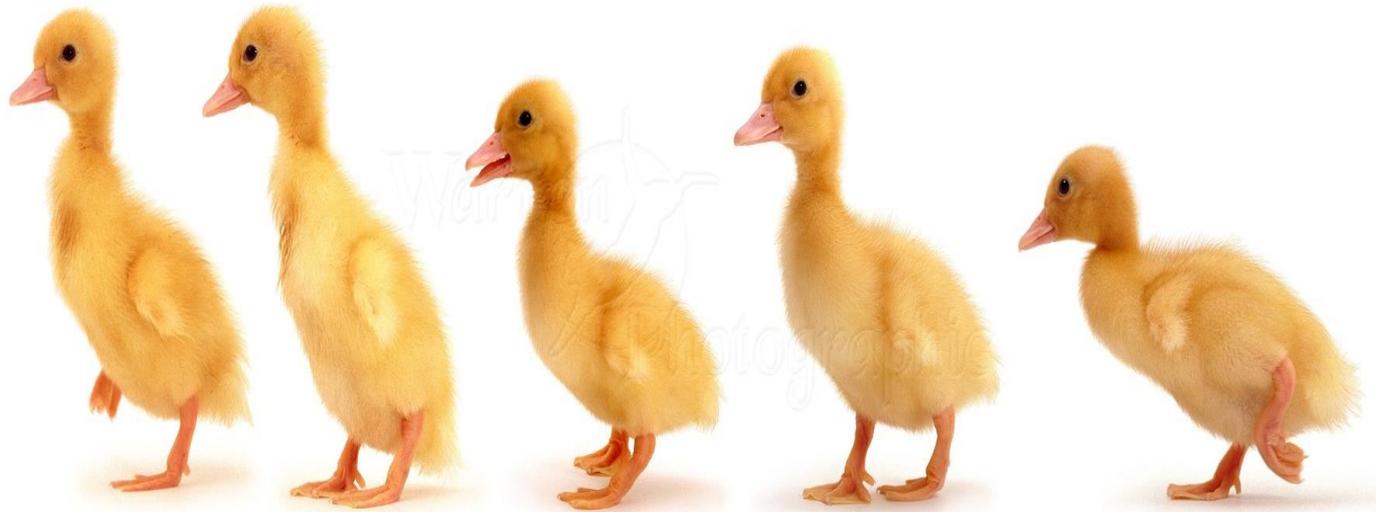
- Identifying and engaging experts, reviewing and approving draft report, considering other party's expert reports, conferences with counsel, drafting Part 35 questions, considering other party's Part 35 questions, considering responses, drafting agenda for joint statement, considering joint statement, advice or conference with counsel
- Excludes application to obtain permission to adduce expert evidence and arranging expert to attend trial
- Distinct from foreign agent work
- Fees – evidence to show range or attempts to source an expert

Pre-Trial Review

- Bundle, updated cost budgets and reviewing other party's, preparing and agreeing chronology etc, PTCs, correspondence, preparation for and attendance at PTR, instructing counsel
- In international cases aim to agree a timetable for witnesses

Trial Preparation

- Bundle, witness summons and arranging travel, supplemental disclosure and statements, agreeing brief fee, pre-trial conference and advice
- Arranging foreign travel
- Arranging interpreter
- Explaining the English court process to the expert and lay witnesses



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Trial

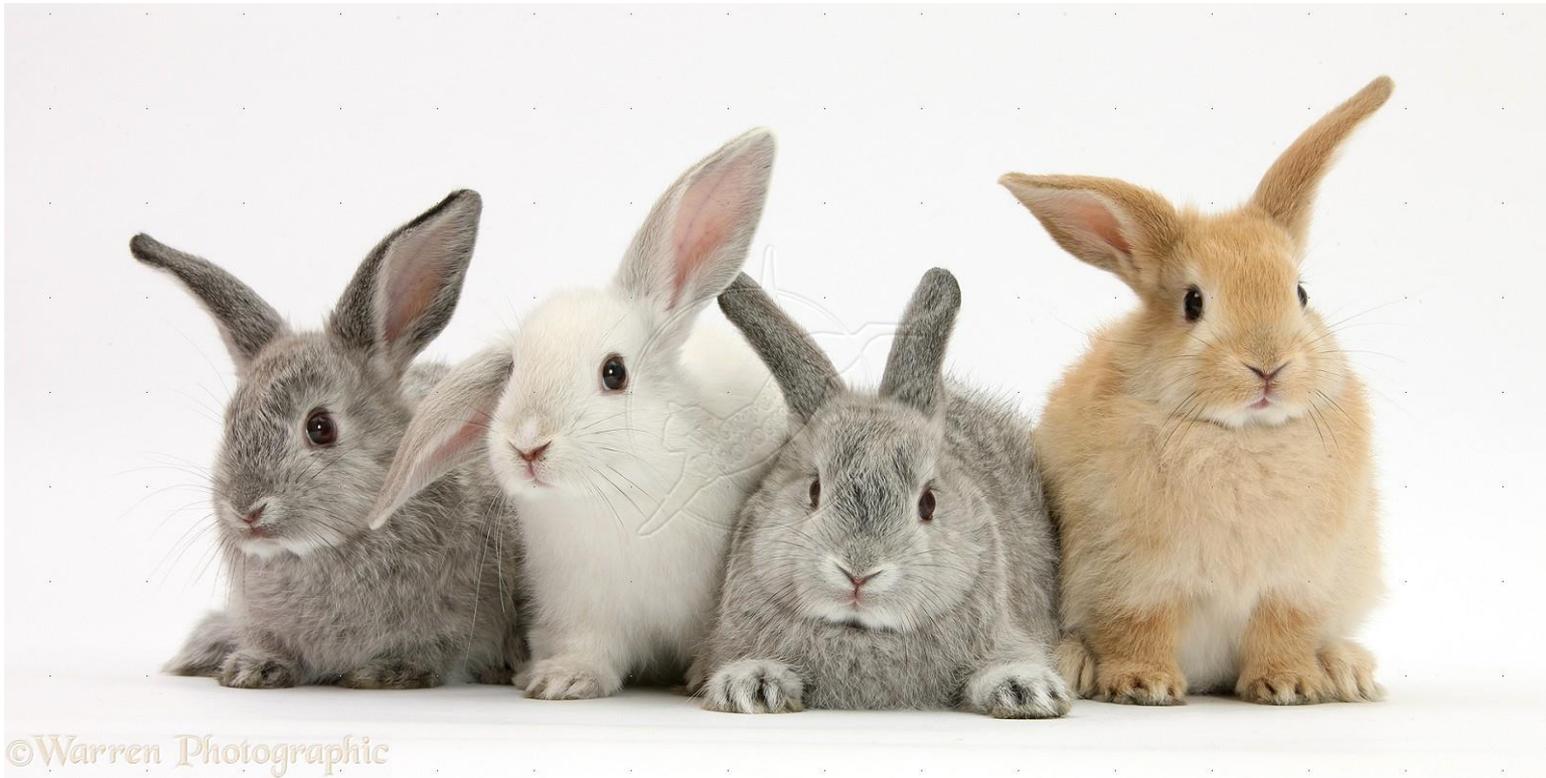
- Solicitors' attendance at trial
- Conferences and activity outside of court hours
- Attendance on witnesses
- Counsel's brief fee and refreshers
- Dealing with draft judgment and consequentialia
- Interpreter – for whom, for evidence or outside court conference or to explain what is happening in court, location

Settlement

- Conferences and advice from counsel relating to settlement, negotiations and meetings, advising on part 36, drafting settlement or other agreement advice to the client on settlement excluding pre-action phase
- Advice from foreign agent or expert
- Interpretation costs

Contingent Costs

- Costs which are anticipated as more likely than not to be incurred
- Examples: Trial of preliminary issues
Mediation
Applications for third party disclosure
Applications to amend
- Discuss with the defendant to agree a common approach



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The Budget Discussion Reports

- ENCOURAGED to use Precedent R annexed to PD 3E
- Set out the figures agreed, the figures which are not agreed and a brief summary of the grounds of dispute
- A potential trap for the opposing party?

Revising cost budgets

7.6 Each party shall revise its budget in respect of future costs upwards or downwards, if significant developments in the litigation warrant such revisions. Such amended budgets shall be submitted to the other parties for agreement. In default of agreement, the amended budgets shall be submitted to the court, together with a note of (a) the changes made and the reasons for those changes and (b) the objections of any other party. The court may approve, vary or disapprove the revisions, having regard to any significant developments which have occurred since the date when the previous budget was approved or agreed.

- A failure by a party to vary its cost budget when it became aware of an overspend was not an absolute bar to a departure from the budget (*Sony Communications International AB v SSH Communications Security Corp* [2016] EWHC 2985 (Pat))

General Tips

- Do check that the totals have transposed correctly on to the first page
- Do check that your cost budget is consistent with your draft directions and DQs
- Do check that you have factored in the usual delay, use of foreign agents, translation costs
- Make sure the advocate on the day understands the unique features of international personal injury work

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