12
King's Bench Walk

Next Talk: 10:00 – 10:40

Costs: Top Tips for PI Litigators

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Introduction

- Costs law is a minefield.
- It is littered with traps for the best litigators.
- A lot of costs arguments can (with the perfect 20/20 perspective of hindsight) be avoided.
- A lot of costs arguments are lost which could have been won.
- So we have sifted through recent to identify practical tips to avoid those costs arguments which can be avoided, and to win those which cannot.

Introduction

We will cover the following topics:

(1) Offers and settlement.

(2) Costs applications.

(3) Budgets.

(4) Detailed assessments.

(1) Offers and settlement

- **<u>Be super clear and careful when drafting offer letters, consent orders, etc</u>**
- Avoid any room for ambiguity.
- Spell it out.
- “For the avoidance of doubt” is not a heretical phrase.
- Set out the meaning and consequences in plain English.
- Doubly important if a party is not legally qualified.

(1) Offers and settlement

- **Likewise be 100% clear as to the terms of any offer, etc. before accepting.**
- If in doubt ask for clarification.
- If you are guessing what the consequence of an offer would be if you accepted it, you shouldn't be.
- Compare and contrast ***Ho v Adelekun (No. 1)*** [2019] EWCA Civ 1988 [2019] Costs LR 1963 with ***Turner v Cole*** [2019] 12 WLUK 619

(1) Offers and settlement

- See also ***Seabrook v Adam*** [2021] EWCA Civ 382; [2021] 4 WLR 54 Low value RTA. D admits breach of duty but denies causation. C made Pt 36 offers to accept 90% of damages be assessed. C recovers 100% of damages in respect of his neck injury, but failed to proved in respect of his back injury, Recovers damages of c.£1,500 as against c.£10,000 claimed.

- DJ Reeves held that offers were not genuine ones to settle. HHJ Walden-Smith on appeal held that it was D who had bettered the Pt 36 offer.

- C/A, dismissed C's second appeal. Held that offers were to accept liability (subject to a 10% discount) for the causation of both injuries (neck and back).

- Per Asplin LJ at [22] "*Cases of this kind turn, inevitably, on the precise wording of the pleadings and the particular terms of the Part 36 offer. In order to avoid the kind of dispute which has arisen here, especially in a low value claim,* ***it is important to make express reference in the Part 36 offer to whether the offer relates to the whole claim or part of it and/or the precise issue to which it relates****, in accordance with CPR 36.5(1)(d). In particular,* ***if the issue to be settled is "liability", it would be sensible to make clear whether the defendant is being invited only to admit a breach of duty, or if the admission is intended to go further, what damage the defendant is being invited to accept was caused by the breach of duty***."

(1) Offers and settlement

- **<u>Make sure Pt 36 offer complies with Pt 36.</u>**

- Per Moore-Bick LJ in ***Gibbon v Manchester City Council*** [2010] EWCA Civ 726; [2010] 1 WLR 208

> *Certainty is as much to be commended in procedural as in substantive law, especially, perhaps, in a procedural code which must be understood and followed by ordinary citizens who wish to conduct their own litigation. In my view, Part 36 was drafted with these considerations in mind*

- This is wishful thinking.

- Pt 36 is a highly technical and prescriptive code.

- The rules (**rr.36.5, 36.18, 36.19, 36.20**) contain mandatory requirements. Follow them.

(1) Offers and settlement

- **<u>Make sure you tie up loose ends</u>**

- See ***Pourghazi v Kamyab*** [2019] EWHC 1300 (Ch):
  - Tomlin order settling litigation silent re C's extant application.
  - Mann J, dismissing appeal against Chief Master Marsh, held that the application was not compromised, so the court had jurisdiction over it and the costs associated with it. The application was dismissed as now academic, C paying the costs

- So do a stocktake before you settle.

(1) Offers and settlement

- **Beware *Medway Oil and Storage Co Ltd v Continental Contractors Ltd* [1929] AC 88**

- This is a really nasty bear trap.

- The principle is that C who successfully defends a counterclaim is "*only entitled to such **extra** costs as were occasioned by the counterclaim*". Applies to **any** additional claim (e.g., any Pt 20 claim).

- Any costs which would have been occasioned by the primary claim, including costs common to both (e.g. dealing with liability in an RTA)), are not recoverable at all under an order for costs of the counterclaim.

- Absent an agreement or order to contrary no apportionment i.e. can't claim 50% of liability costs under an order for costs of a counterclaim.

(1) Offers and settlement

- **Example (recent case)**
- C is D2's passenger.
- Collision between D1 and D2.
- C brings claim against D1.
- D1 issues contribution proceedings against D2.
- D2 had already brought his own claim against D1.
- Actions ordered to be tried and managed together.

(1) Offers and settlement

- Given that C's claim was bound to succeed, D1 and D2 sensibly agreed to meet 50% of it each, to be adjusted as necessary in light of the resolution of liability between each other.

- C's claim settled on this basis.

- D2's Part 20 claim against D1 and D1's claim against D2 were subsequently compromised 75%/25% in D1's favour.

- Liability agreement in respect of D2's claim against D1 embodied in a consent order :

  D1 shall pay D2's costs of liability *(such costs to include the costs of the medical evidence served with the particulars of claim)*

- NB: not D1 shall pay 25% of D2's costs of liability.

(1) Offers and settlement

- Quantum of D2's claim was subsequently agreed. Agreement embodied in a consent order:

  D1 shall pay D2's costs of the action on the standard basis

- NB: no reservation re common costs e.g. of liability

- Liability agreement in respect of D1's contribution claim against D2 embodied in a later consent order:

  D2 shall meet D1's costs of the Part 20 Claim to be assessed if not agreed

- NB: says nothing about the costs of C's claim against D1, or of D2's claim against D1.

(1) Offers and settlement

- D1 serves a bill on D2 claiming all costs of dealing with liability, etc in respect of C's claim and D2's concurrent claim against D2, applying a 50% apportionment.

- D2 responds that:

  - D1 can only recover any extra liability costs consequential to D1's claim against D2 i.e. cannot recover any costs which would have been incurred in any event dealing with C's'D2's claim.
  - There are no such extra costs. So go whistle.

- D1's reply is to the effect; that's unfair. Between D1and D2 we won 75/25.

(1) Offers and settlement

- Unfair or not, D1 might well lose that argument (judgment currently reserved). But in any event it was an argument which D2 would have been better off avoiding.
- D1 is at one level right. ***Medway Oil*** generates unfair results. H/L explicitly recognised that the rule "*may work out apparently harshly*".
- But it also spelt out the solution; "*the remedy in such an event is for the aggrieved party "to apply at the trial for special directions as to issues and details.*
- In other words, agree otherwise obtain an order the provides e.g. D1 shall recover 50% of the costs of liability.
- So we come back to the very first point; spell out the consequences of any proposed settlement.
- D1 could and should have done so.

(1) Offers and settlement

- **Use the power of Pt 36**
- Potent consequences.
- Obviously for D.
- But also for C e.g. no proportionality, not constrained by budget figures.
- Especially potent where damages are ultimately low.

(1) Offers and settlement

- ***Shah & Anor v Shah & Anor*** [2021] EWHC 1668 (QB)
- Protracted and bitter family property dispute.
- Cs made a Pt 36 offer to accept nominal damages of £1.
- At trial they were awarded nominal damages of £10.
- HHJ Saggerson held that the Pt 36 offer was effective.

(1) Offers and settlement

- He therefore ordered indemnity costs for the post-expiry period.
- Particularly important as it meant that those costs would be inured from proportionality reductions to which they would otherwise be extremely vulnerable.
- Ds appealed.
- Collins Rice J upheld that CJ's decision.
- The C/A refused permission for a second appeal.

(1) Offers and settlement

- ***Shah*** illustrates the value of a well pitched Pt 36 in cases where C recovers much less than is claimed. (See also ***Kings Security Systems Ltd v King & Anor*** [2021] EWHC 653 (Ch); [2021] Costs LR 191)

- And in low value cases generally.

- c.f. ***Carder v Secretary of State for Health*** [2016] EWCA Civ 790; [2017] I.C.R. 392 at [43]:

> *Mr Carder has been awarded a sum which is small when compared with the costs of this litigation. That is regrettable. But litigation of this kind is often necessarily factually complex. Defendants faced with claims whose costs are likely to be out of proportion to the damages likely to be awarded after a trial should try to settle them early.*

(1) Offers and settlement

- ***Shah*** also underlines that it does not matter by how little a Pt 36 offer is bettered.

- See also ***Telefonica UK Ltd v The Office of Communications*** [2020] EWCA Civ 1374; [2020] Cost LR 1461. Impermissible use of discretion to reintroduce the near miss rule in ***Carver v BAA Plc*** [2008] EWCA Civ 412; [2009] 1 WLR 113 which the Rules Committee had chosen to abolish.

- Therefore:

1. **Make a Pt 36 offer as early as possible (revise if needs be).**

2. **(Ds especially) leave a margin of error.**

(1) Offers and settlement

- Re: early offers, not being able to quantify a claim at the time an offer is made will not render it ineffective.

- See ***Equitix Eeef Biomass 2 Ltd v Fox*** [2021] EWHC 2781 (TCC) at [25]:

> *A well judged Part 36 offer is often based on inspired and educated guesswork, which the other party must also display when deciding whether to accept it.*

- Therefore: **a speculative offer is better than no offer.**

- **Exception:** if C is child/protected party, offer is no use unless and until the court would be able to approve it; ***SG v Hewitt*** [2012] EWCA Civ 1053; [2012] 5 Costs L.R. 937.

- This will often be quite late in a quantum only case. Although ballpark valuation might suffice if e.g. liability is seriously in issue.

(1) Offers and settlement

- **Be aware of *Ho v Adelekun (No 2)*[2021] UKSC 43; [2021] 1 WLR 5132 and *Cartwright v Venduct Engineering Ltd* [2018] EWCA Civ 1654**

- These cases concern QOCS.

- A full discussion of this topic would require a talk in itself.

- The following is a summary of the main points.

(1) Offers and settlement

- In a QOCS claim, leaving aside exceptions such as FD, costs orders against C can be enforced "*only to the extent that the aggregate amount in money terms of such orders does not exceed the aggregate amount in money terms of any* ***orders*** *for damages and interest made in favour of the claimant*." **(CPR 44.14(1))**

- C/A held in ***Cartwright v Venduct Engineering Ltd*** [2018] EWCA Civ 1654; [2018] 1 WLR 6137 that D could therefore not enforce costs where case settles e.g. by Tomlin order or acceptance of Pt 36 offer.

- SC held in ***Ho*** that setting off D's costs against C's was a species of enforcement and therefore precluded where it exceeded the cap reflecting the sum of any orders for damages and interest made in favour of C.

- So no costs set off unless there is an order in C's favour, and even if there is such an order set off is capped at the total of C's damages and interest.

(1) Offers and settlement

- Given that the vast majority of personal injury claims settle, the consequences of ***Ho*** in combination with ***Cartwright*** are numerous and significant.

- (1) Ds will normally only be able to recover its costs if an order for damages is made in the claimant's favour at trial. Given that going to trial and losing is generally the last outcome that D would wish to seek, in practical terms the scope for D to obtain any effective costs recovery in a normal claim is vanishingly small.

- (2) There will be no adverse costs penalty to C who accepts D's Pt 36 offer out of time. Whilst D would normally be entitled to costs following expiry of the relevant period for acceptance, such costs cannot be enforced against the C's damages or C's costs by way of set off. D's costs order will of no practical use or value. C's pre-offer costs will be protected. Even if C one day before trial accepts an offer made years before.

(1) Offers and settlement

- (3) Where D makes a Pt 36 offer which claimant fails to beat at trial, there can be a shortfall. e.g. C claims £500K. D makes an early Pt 36 of 50K and the spends 100K litigating. C's quantum case collapses at trial. C is awarded £25K. D can only recover £25K and is left with a shortfall of 75K.

- (4) Where C loses the claim but wins an interim hearing along the way, C will recover the costs of that interim hearing (including any subsequent appeal) notwithstanding the order in D's favour for the costs of the action. e.g. C wins interim application for expert evidence and is awarded costs of £10K. D wins the action and is awarded costs of £100K. D cannot enforce this. Must bear the entire £100K. C keeps the £10k (**NB** Ds should nevertheless resist immediate payment of C's costs on interim applications as the case might go to trial, with result that C's costs could be extinguished by set off).

- (5) Where C wins but is subject to an adverse costs order in any consequential costs proceedings (again including a subsequent appeal), they will not have to meet the costs of the costs proceedings. D will have to bear its own costs. This was the case in ***Adelekun*** itself. Strikingly, C in a settled personal injury claim will not be at any risk of adverse costs if for example D makes an effective Part 36 offer in subsequent DA proceedings.

(1) Offers and settlement

- (6) These consequences are self-evidently crucial in respect of costs, which are important in themselves. Their effects moreover feed into (or should feed into) to settlement dynamics, and thus into both strategy and tactics. C's and D's need to factor these considerations into any decision, as to (i) what offers to make, accept or reject; (ii) when to make, accept or reject an offer; (iii) the form of any offer; (iv) if and when to withdraw or revise an offer.

- (7) For example, in many cases the commercial bottom line for D will be in favour of offering more damages as opposed to incurring further irrecoverable costs.

- (8) C's likewise can and should use these considerations to exert settlement pressure.

- (9) ***Ho*** also affects the cost/risk/benefit analysis of making or resisting interim applications. C will be a minimal risk of having to meet the D's costs even if they lose.

- (10) C's who are subject to, or at risk of, adverse costs need to think very carefully before going to trial. There is now an even stronger disincentive to do so, given that this will expose C to adverse costs against which they will normally otherwise be protected.

(1) Offers and settlement

- **<u>Don't forget about interest.</u>**

- New rule re post offer interest, **CPR 36.5(5)**:

> *A Part 36 offer to accept a sum of money may make provision for accrual of interest on such sum after the date specified in paragraph (4)* [i.e. 21 days assuming that this is the relevant offer period]. *If such an offer does not make any such provision, it shall be treated as inclusive of all interest up to the date of acceptance if it is later accepted.*

- C's Pt 36 offers should generally now include such a provision.

- Especially in cases where PSLA constitutes a significant proportion of the claim. And doubly so in DAs (8% is a lot to give away).

(1) Offers and settlement

- Thus presumably in respect of a substantive claim would require a breakdown on interest on PSLA and interest on past losses.
- And differentiating between ongoing/future loss and crystallised past losses.
- Could be fiddly and entail revealing more detail of the make up of the award than might otherwise be desirable.
- Query; if the interest provision is too ambitious, would that endanger the bite of the Pt 36 offer?
- Probably best to err on the side of caution.

(2) Costs Applications-Example 1

- **<u>Always makes sure the court has power to make the order you are are seeking.</u>**
- C accepts D's Part 36 Offer out of time;
- CRU has increased in the many months post-offer;
- Application made that Court order a settlement on the basis that D's costs since the expiry of the relevant period can be set off
- Court's power limited to (**r.36.11**):
  - 1. Give or refuse permission to accept under P36;
  - 2. Make an appropriate costs order.

(2) Costs Applications-Example 1

- Court cannot order the C accepts on D's terms nor displace QOCS in this way;
- Court therefore would have to refuse permission to accept with the result the case heads to trial because of a settlement stalemate.
- D had to discontinue application day before the hearing.
- Possible Answer?:

(i) Write to C in open letter specifying offer D's wants;

(i) Inform C that if they do not accept you will ask the Court to refuse permission to accept the P36 offer out of time

(2) Costs Applications-Example 2

- **<u>Formulate your application properly. Identify the order sought and the rule relied upon that empower the court to make that order.</u>**

- D's application:

> "*that the Court exercise its powers under CPR 44, specifically CPR 44.2(4) and 44.2(5) to vary the order dated XXXX*";

- Neither **CPR 44** in general, nor **CPR 44.2(4)** or **CPR 44.2(5)** provide any jurisdiction to set aside, vary or otherwise challenge a previously made order;

- D also argue that if the order was not set aside, they would be precluded from challenging the costs related to this order at detailed assessment.

(2) Costs Applications-Example 2

- This was wrong as a matter law. None of the rules cited in the application provide such power.

- D's counsel sought in his skeleton argument served shortly before the hearing to seek an order on the correct – and entirely different basis - namely the court's powers to set aside an order made without a hearing (**CPR r.3.3(5)**).

- C was thus facing an entirely different application to the one set out in the application notice.

- The hearing was adjourned, and D ordered to pay the costs thrown away.

- A less merciful judge might simply have dismissed the application.

(2) Costs Applications-Practice Points

- What do you want?
- Does the Court have the power to make the order you are seeking?
- Formulate the application properly:
  - Identify the order;
  - Identify the rule relied upon to empower the Court to make that order;

(2) Costs Applications-Time Estimates

- **Identify realistic time estimates. Review as necessary.**

- ***E v B (Interim Maintenance Inaccurate Time Estimate)*** [2021] EWFC B90 at [7, 11];

"Just as practitioners should not receive unreasonable demands from the judiciary, so judges should not be put in the sort of position this court faced in the present case … Realistic time estimates must be given … parties should not be placing the court in this sort of position, or, if they do, they should be aware of the possibility of adjournment and costs sanctions."

- **CPR 1.3 :**

1.3 The parties are required to help the court further the overriding objective

(2) Costs Applications-Practice Points

- Increasingly an issue of which judges are acutely aware of;
- Carefully consider how long the hearing may take (reading, number of applications, submissions, judgment, costs arguments);
- Review in light of developments;
- Consider time estimate given by other party-if too short let them know and try and agree a sensible approach;
- If no success in discussions this can be set out in open correspondence/part of a witness statement if applicable.

(2) Costs Applications-Evidence

- Make sure any application is supported by evidence.
- These (including other non-trial hearing such as DAs) are won on lost on the evidence like any other hearing;
- Particularly important in explaining delay (as applicant or respondent);
- A rigorous approach to obtaining and presenting the evidence is needed;
- Identify what needs to be proved/addressed and make sure it is dealt with by the best evidence (including documentary and/or expert evidence where appropriate).

(2) Costs Applications-Evidence

- Follow **PD 32**

- In particular **18.1** "*The witness statement must, if practicable, be in the intended witness's own words*"

- And **18.2** "*A witness statement must indicate:*

  (1) which of the statements in it are made from the witness's own knowledge and which are matters of information or belief, and

  (2) the source for any matters of information or belief".

- This is consistent with general good practice ensuring that contentions within a statement are properly explained and supported. **Assertion ≠ Proof**

(2) Costs Applications-Evidence

- The basic rule of setting facts not opinion/argument must be adhered to;
- A witness statement, even in support of an interim application, is **not** a skeleton argument;
- It is acceptable to stray beyond the bare facts to identity the arguments you are relying on;
- But keep it as factual as possible.

(2) Costs Applications-Evidence

- Set out that is what your doing e.g.:

  Most of the points to be made in support of our application are maters of argument rather than evidence. I will endeavour not to stray into argument, although it will necessary to set out the arguments which form the basis of our application.

- And then as appropriate set out e.g. "*The Claimant's position is that* ..." and then identify the argument and points you will rely upon to support it.

- But do so (1) as briefly as possible; (2) in as neutral and factual a manner as possible i.e. do not treat this as a pretext for lengthy or controversial argument, comment, etc.

(2) Costs Applications-Open Letters

Open offer – to be placed before the court at the application hearing

C's application to set aside the unless order is academic. The Bill has been served and the assessment is proceeding.

Indeed, the unless order itself was otiose by the time it was made given that the Bill had already been served.

The only purpose the application could serve is to vary a costs order for £XXX

Whilst we maintain that our application and the ensuing order were properly made, we have taken the view that it would be wholly disproportionate (in terms of both costs and use of court resources) for there to be a hearing to argue about costs of less than £XXX

The D therefore makes an open offer that the order be set aside and that there be no order for costs on either application.

(2) Costs Applications-Other

- CFA's-be aware of CFA implications (Can C recover costs before there is a final win?)

- See Guide to Summary Assessment §4, in CFA cases "*An order for the payment of the summarily assessed costs should not be made unless the court is satisfied that the receiving party is at that time liable under the agreement to pay to the legal representative at least the amount of those costs. If the court is not so satisfied, it may direct that the assessed costs be paid into court to await the outcome of the case or shall not be enforceable until further order.*"

- Serve a statement of costs 24 hours before a hearing (See: ***Mahandru v Nielson*** [2021] EWHC 2297 (QB)

> *The claimant submits that the appropriate order in these circumstances is to make no order for costs. In my judgment, that would be unjust given the ordinary rule that the successful party is entitled to their costs. Nevertheless, the fault for not providing a schedule of costs clearly lies with the defendant and it seems to me, in the circumstances, the only sums that I can properly summarily assess are the costs which I am told have been incurred in respect of counsel's appearance at the hearing today and drafting of the skeleton argument.*

(3) Budgets

- **Be aware of the stringent requirements for variation.**

- ***Persimmon Homes Ltd & Anor v Osborne Clark LLP & Anor*** [2021] EWHC 831 (Ch).

- Master Kaye's judgment prescribes an **extremely** demanding test:

> *20. The applicant must therefore first satisfy the court that there has been a significant development in the litigation since the last approved or agreed budget which warrants a revision (upwards or downwards) to the last approved or agreed budget; and second that the particulars of the variation have been submitted promptly both to the other parties and the court in accordance with CPR 3.15A (2) to (4).*

> *21. It is only if the applicant can satisfy the court that it has met these mandatory requirements – the threshold test – that the court goes on to consider the exercise of its discretion in relation to the variation itself and the incurred costs caught by the application to vary in CPR 3.15A (5) and (6). An application to vary therefore involves a two-stage process.*

(3) Budgets

- This strictness of the test was underlined at [101]:

It is only if both these mandatory requirements are met that the threshold test is satisfied – significant development warranting a revision to the last approved costs budget and promptness - that the court goes on to consider whether as an exercise of discretion it should approve, vary or disallow the proposed variations …

- As regards the first mandatory requirement:

97… even if there has been a significant development, not every significant development in the litigation will warrant a revision to the last approved costs budget. Not every development will be significant even if it has costs consequences …

98… An order for variation cannot be made in order to remedy a budget in respect of developments which could or should have been covered at an earlier approval or variation.

- It might be said this approach seems rather too restrictive. In remains to be seen whether it is adopted in later cases. In the meantime, however, it is a potent authority for respondents to such applications.

(3) Budgets

- An apparently more permissive approach was taken in ***Thompson v NSL Ltd*** [2021] EWHC 679 (QB).

- PI claim. C received medical evidence increasing claim for £150,000 to £3.9M between filing her budget and the CCMC. Master McCloud allowed the variation for the following reasons.

(a) C could not reasonably have foreseen the massive increase. Although she could have been expected to anticipate that an increase was possible, the extent was unknown.

(b) The test for what the original budget should have catered for was what C "*reasonably should have expected*" [30].

(c) That such a massive increase was a possibility was insufficient. At [36]: "*Mere possibility I think would be to set the bar too high and to encourage inflated, precautionary budgets.*"

(3) Budgets

- (d) At [45]:

"*... there will be cases, and I think this is in part one of those, where the nature of the claim evolves and a time comes when it is reasonably appreciated that it is a different type of beast from the claim which was initially pursued, and that one may not be able to point to one specific event which led to that so much as a collection of factors. A change of value may not alone be enough. If a solicitor was to be expected to 'jump' at the earliest possible date when some development takes place but before it is reasonably clear what the effect will be, then one would see inflated, precautionary budgets …*"

- C had not been guilty of undue delay. C had no real choice but to produce her budget on the basis of a £150K claim, lest she be ***Mitchell***–ed. If a development occurred between filing and a CCMC, best practice was to, if possible, draft a revised budget and provide it to the other side with a view to agreement, only making an application if it was not agreed. Doing so would entail not just ascertaining the significant development itself but also its costs impact. That had not been feasible here within the timescale.

- So a good case for those seeking to vary. However (i) it was the clearest possible case of a significant development; (ii) its timing vis-à-vis budgets was unusual; (iii) C acted promptly.

(3) Budgets

- ***Pasricha v Pasricha*** [2021] EWHC 1017 (Ch); [2021] Costs LR 403 establishes something of a back door/on the hoof alternative to applying to vary.

- Property dispute. Parties failed to file budgets. ***Mitchell***-ed and limited to court fees. Original trial at Central London adjourned due to lack of a judge. The order relisting the trial was therefore marked "*Do not bounce*". The relisted trial was then bounced due to lack of a judge.

- On appeal Marcus Smith J held that notwithstanding the ***Mitchell***-limited budgets, the court had jurisdiction to award costs in relation to the abortive trial under either or both of the following bases:

CPR 3.14 enabled the court to award more than court fees if there has been a material change in circumstances. Same test as for **CPR 3.1(7); *Tibbles v SIG Plc (t/a Asphaltic Roofing Supplies)*** [2012] EWCA Civ 518; [2012] 1 W.L.R. 2591.

CPR 3.18 enabled the court to depart from a budget if there was a good reason to do so. This could be invoked in respect of a summary assessment just as at a detailed assessment.

(3) Budgets-Practice Points

- Make sure budgets cater for all reasonably expected possibilities. Contingencies are useful for discrete extra costs, but not for developments which alter the entire shape of the claim. There is a high hurdle for variation.
- Do not fail to serve and file because assumptions are unclear.
- If the shape of the claim may change at an identifiable future point, consider seeking to adjourn the CCMC.
- If an assumption is not adopted because it is a mere possibility, flag this up and have it recited in the order.
- When applying to vary, rely on ***Thompson***.
- When resisting, rely on ***Persimmon*** – NB whilst there is a debate about how authoritative a Master's decision is, ***Persimmon*** was apparently applied and approved by HHJ Watson, sitting as a judge of the high court in ***Omya UK Ltd v Andrews Excavations Ltd*** [2021] 8 WLUK 111 (no transcript currently available, just a Westlaw summary).
- Invoke the ***Pasricha*** jurisdiction in appropriate cases.

(3) Budgets-Practice Points

- If there is a counter-claim/Part 20 claim consider a separate budget for the same;

- Don't present the Court with a fait accompli: ***Page v RGC Restaurants Ltd*** [2018] EWHC 2688 (QB); C omitted figures for trial and trial preparation; C's budget deemed to fall foul of CPR r.3.14 hence whole of C's budget was deemed to compromise of applicable court fees. On appeal limited to Court fees for these phases.

- If seeking e.g. budgets limited to a preliminary issue trial, get the court's approval first. Absent such a direction or indication, alternative budgets will be required.

- Phase figures in Prec. R's should be broad brush; ***Yirenkyi v Ministry of Defence*** [2018] 11 WLUK 53. Calculating them to the nearest penny by reference to precise times, hourly rates, etc is not legally correct and makes it unlikely that the judge will adopt your figure.

(3) Budgets-Practice Points

- Type size-do not expect the Court to have a microscope. At best annoy, at worst ignore important detail;

- Be realistic; ***Findcharm Ltd v Churchill Group Ltd*** [2017] EWHC 1108 (TCC); [2017] 3 Costs L.O. 263:

> *9. In my view, Churchill's Precedent R is of no utility. It is completely unrealistic. It is designed to put as low a figure as possible on every stage of the process, without justification, in the hope that the court's subsequent assessment will also be low. In my view, therefore, it is an abuse of the cost budgeting process. I make clear that none of this is intended to be a criticism of Ms Akyol, the solicitor at Kennedys who appears this morning, because she told me that both Churchill's cost budget, and its Precedent R, were prepared by Kennedys' costs department. It is, unfortunately, a criticism of them.*

- For C, don't challenge D's budget if C's is miles higher (or vice versa).

(3) Budgets-Practice Points

- **<u>Don't expect to be able to appeal bad budgeting decisions.</u>**

- ***Gray v Commissioner of Police for the Metropolis*** [2019] EWHC 1780 (QB); [2019] Costs LR 1105. (Lambert J) makes clear that, absent some error of law, a judge's assessment of budgeted figures will be virtually impossible to appeal. The requirement on a judge to give reasons is a very undemanding one here.

- See also ***Easteye Ltd v Malhotra Property Investments Ltd & Or***s [2019] EWHC 2820 (Ch); [2019] Costs LR 2181

"It is not, in general, conducive to the efficient and cost-effective dispatch of costs management decisions if every part of those decisions has to be justified with extensive reasons like a judgment after trial"

(3) Budgets-Practice Points

- ***Gray*** also illustrates the breadth of the court's discretion on budgeting. Lambert J held that, not only was the Judge (HHJ Baucher) entitled to award a phase figure lower than that offered by D (at [26] "*It goes without saying* [sic] *that, if a Defendant (or any party) makes an offer, that offer does not become the benchmark below which the cost cannot be budgeted*", she was not even required to explain why she was doing so.

- That particular judge habitually awards lower figures than our offered.

- Contrast with HHJ Roberts (in the same court) who habitually awards higher figures than are claimed.

(3) Budgets-Practice Points

- **<u>Therefore know your judge</u>**
- And be ready to revisit your figures and the offers once you find out who they are.
- As per above judicial approaches to budgeting vary enormously and are not challengeable on appeal
- Particularly true with DDJ costs budgeting (or even some DJ's/Recorders); Some inherently dislike exercise/are unsure as to correct methodology to carry out exercise;

(3) Budgets

- **<u>Persuade the court to adopt a relatively generous approach</u>**

- Peter MacDonald Eggers QC (sitting as a deputy HC judge) in ***Discovery Land Company, LLC & Ors v Axis Specialty Europe SE*** [2021] EWHC 2146 (Comm) at [18]:

… in the context of costs management, the Court should allow some flexibility to the parties to ensure that their conduct of the action is not unnecessarily and potentially unfairly hampered by an unrealistically low assessment or by only the lowest assessment of what would constitute reasonable and proportionate expenditure. Expenditure which is within a reasonable and proportionate range is still reasonable and proportionate even if it is not at the lower end.

(4) Detailed assessment

- **<u>Makes sure you have a right to DA before commencing</u>**

- **PD47 13.3** sets out an exclusive list of documents giving such a right:

> *(a) a copy of the judgment or order of the court or tribunal giving the right to detailed assessment;*
>
> *(b) a copy of the notice sent by the court under Practice Direction 3B paragraph 1, being notification that a claim has been struck out under rule 3.7 or rule 3.7A1 for non-payment of a fee;*
>
> *(c) a copy of the notice of acceptance where an offer to settle is accepted under Part 36 (Offers to settle);*
>
> *(d) a copy of the notice of discontinuance in a case which is discontinued under Part 38;*
>
> *(e) a copy of the award made on an arbitration under any Act or pursuant to an agreement, where no court has made an order for the enforcement of the award;*
>
> *(f) a copy of the order, award or determination of a statutorily constituted tribunal or body.*

- Absent one of these e.g. the claim settles on non Pt 36 terms you need to obtain an order.

- Otherwise the Bill will be struck out; ***Bayliss v Powys*** [2021] EWHC (QB)

(4) Detailed assessment

- **<u>Make sure the Bill is drafted correctly – do not just sign it off</u>**

- It should be transparent and provide all necessary information e.g. identify of the person signing the Bill, ; ***Barking, Havering & Redbridge University Hospitals NHS Trust v AKC*** [2021] EWHC 2607 (QB)

- Make sure it does not include any costs not recoverable in principle.

- Remove any costs which are not going to be recovered inter partes on the grounds of reasonableness/proportionality. Do no leave all concessions to the Replies.

- Do not fall into a kneejerk approach of including all time, etc spent as would be recoverable against the client. The indemnity principle is just a ceiling.

(4) Detailed assessment

- Including excessive and irrecoverable time will be criticised.

- See DJ Ian Besford in ***Morris v Sandahtay*** unreported 2 February 2015 Kingston upon Hull CC:

  It is incumbent on the [receiving part] to "stand back" and prune any aspect that is likely to be irrecoverable on a standard basis. To do otherwise can be seen as failing to further the overriding objective and being opportunistic

- This might well attract a costs penalty.

- See e.g. ***Millbrooke Construction Ltd v Jones*** [2021] EWHC B20 (Costs), where a 39% reduction to the Bill was by itself held sufficient to warrant a 30% reduction to C's costs of the assessments despite D not any effective made offer.

- Although judicial approaches vary; see ***Mullaraj v Secretary of State for the Home Department*** [2021] EWHC B5 (Costs)

(4) Detailed assessment

- **Make sure that PoDs and Replies are as concise as possible, and are measured, fair, accurate, and persuasive in both tone and content.**
- Do not give free reign to the drafter and run the risk that they go OTT.
- You know the case better than they do. You have ultimate responsibility for it, including for the costs claim.
- Too many costs pleadings are overly long, overly tendentious and frankly aggravating.
- This is counter productive. It increases costs. It gets in the way of sensible settlement discussions.
- Crucially, it will not persuade a costs judge. It will alienate them.

(4) Detailed assessment

- This is not new. Sir Rupert Jackson in his 2019 Final Report observed:

> *2.7 Points of dispute and points of reply. Points of dispute are said to be overlong, therefore expensive to read and expensive to reply to. Points of reply are similarly prolix. Both of these pleadings are in large measure formulaic and are built up from standard passages held by solicitors on their databases. In addition, there are lengthy passages in the points of dispute and points of reply dealing with time spent on documents. It would be better if the points of dispute…concentrated on the reasoning of the bill, not the detailed items…*
>
> *5.11 Points of dispute and points of reply. Both points of dispute and points of reply need to be shorter and more focused. The practice of quoting passages from well know judgments should be abandoned. The practice of repeatedly using familiar formulae, in Homeric style, should also be abandoned. The pleaders on both sides should set out their contentions relevant to the instant cases clearly and concisely. There should be no need to plead to every individual item in a bill of costs, nor to reply to every paragraph in the points of dispute.*

- The new costs rules were intended to remedy this. However, the penny has not dropped for an alarming number of drafters.

(4) Detailed assessment

- Admittedly PoDs need to be sufficiently detailed to identity what is disputed and why; ***Ainsworth v Stewarts Law LLP*** [2020] EWCA Civ 178

- However, ***Ainsworth*** was an extreme case. It does not say that PoDs must laboriously plead individually to every disputed item.

- On proper reading it says the opposite. It specifically endorses dealing with repeated/general objections compendiously within a single point rather than via Homeric repetition.

- All that is needed is to concisely identify which items are in dispute and why.

- This can be done with degree of broad brush. Precedent G itself does precisely that.

(4) Detailed assessment

Point 3 (6), (12), (17), (23), (29), (32)	(i) The number of conferences with counsel is excessive and should be reduced to 3 in total (9 hours). (ii) There is no need for two fee earners to attend each conference. Limit to one assistant solicitor in each case.
	Receiving Party's Reply:

Point 4 (42)	The claim for timed attendances on claimant (schedule 1) is excessive. Reduce to 4 hours.
	Receiving Party's Reply:

Point 5 (47)	The total claim for work done on documents by the assistant solicitor is excessive. A reasonable allowance in respect of documents concerning court and counsel is 8 hours, for documents concerning witnesses and the expert witness 6.5 hours, for work done on arithmetic 2.25 hours and for other documents 5.5 hours. Reduce to 22.25 hours.
	Receiving Party's Reply:

(4) Detailed assessment

- Like any written (or indeed oral) advocacy, the principal aim is of PoDs/Replies is to persuade the judge.
- Pleadings which are hyperbolic, prolix, repetitive, unrealistic, gladiatorial, etc. will not achieve this. They will have the opposite effect.
- So make sure both tone and content are appropriate.
- Make sure that any factual contentions are scrupulously accurate. This applies to costs pleadings just as much as substantive ones.
- Indeed, the duty to be accurate on a PP is a particularly high one given that the RP will not have sight of many of the relevant materials.

(4) Detailed assessment

- Do not endorse OTT pleadings. Be measured.
- Not every arguable excessive item is "*grossly inflated*". Not every disputable point made in the PoDs is "*absurd*" or "*wholly misconceived*".
- Pick your best points. (Especially important when challenging prov. assessments)
- Avoid ad hominem attacks. Play the ball not the man.
- Replies should not eschew tit for tat relation in favour of explaining why the dispute item is reasonable and proportionate i.e. what the work achieved, why it took as long as it did.
- This is especially important in Provisional Assessments; the costs judge will not normally have the file to inspect.
- Make reasonable concessions.

(4) Detailed assessment

- **Do <u>not</u> make or insinuate allegations of misconduct without proper foundation (e.g. accusing the RP of deliberately inflating costs, or the PP of being disingenuous).**

- This applies to costs pleadings exactly as with substantive proceedings.

- Again as with substantive proceedings, if there are well-founded allegations they need to made clearly and precisely.

- Although sometimes all the PP will properly be able to do is to raise the point and reserve their position pending any explanation from the RP and the judge's consideration of the file.

(4) Detailed assessment

- An allegation of misconduct would almost always need to met by evidence in the form of a witness statement.

- But do not overlook the benefits of evidence generally. Whilst many matters can proved by reference to the file itself, there will be others where a well drafted statement can be of immense value.

- The points in relation to evidence on applications apply equally here.

- Be particularly aware of the dangers of statements being self-serving and not reflecting the position at the time the work was done. Anchor the evidence to the papers.

- One sometimes see e.g. a witness statement seeking to justify high CFA uplift which is entirely one sided, contains arguments rather than facts, refers to matters not present or predicted when the CFA incepted (and often not by the person who actually carried out the risk assessment). This is not persuasive.

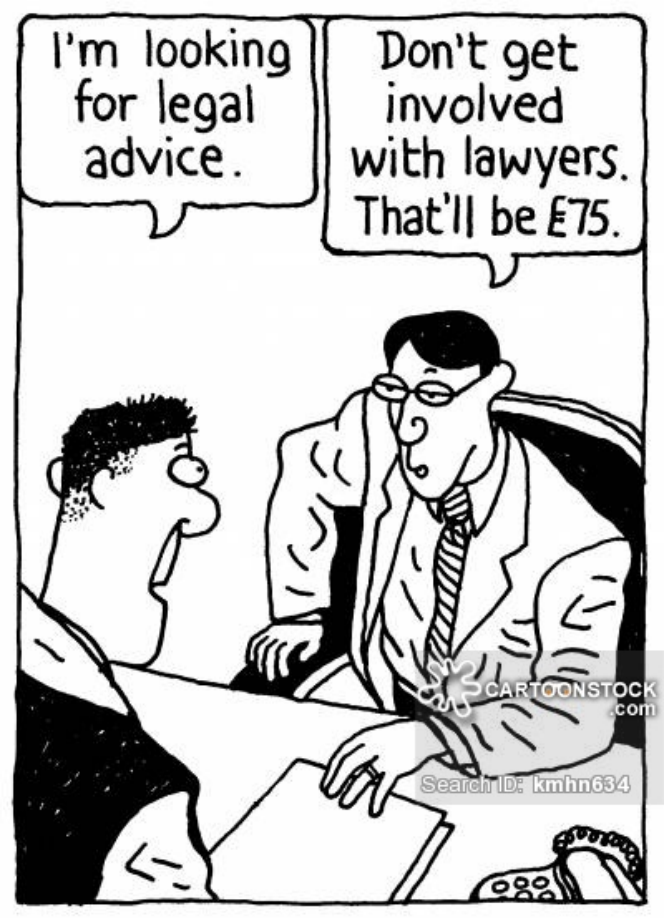
(4) Detailed assessment

- That said, the primary evidence will be the contemporaneous evidence in a file.
- The better your file notes, the better your chances of recovering your costs.
- The costs judge needs to be to **see** what exactly has been done, why it has been done, what it achieved and why it took as long as it did.
- A good detailed file note will do this.
- A sparse uninformative one will not. It will leave doubt as to the reasonableness of the time spent. On the standard basis that doubt will be resolve in favour of the PP.
- Likewise, make sure that your advocate/the judge can readily find the documents needed to support a given item. Ideally there would be a paginated PDF bundle together with a copy of the PoDs/Replies which cross-refences the page numbers in respect of each disputed item.

(4) Detailed assessment

- The points made about offers apply to DAs. Be particularly aware of ***Ho*/*Cartwright***
- Although PPs often favour all inclusive offers, Pt 36 offers provide superior protection.
- If the result is close, it will be difficult for us establish a like for like comparison, taking into account the costs of the assessment and interest to the PP relevant date.
- Most such offers would no longer be open for acceptance e.g. if rejected. A withdrawn Pt 36 offer is of little or no effect. Given that a Part 36 offer is the gold standard of offers providing costs protection, it is difficult to see why a withdrawn ***Calderbank*** offer should bite when a withdrawn Pt 36 offer would not.
- If the judge were to ask, why did not you give yourself the sure protection of a Part 36 offer, the PP will struggle to provide a good answer.

Thank you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