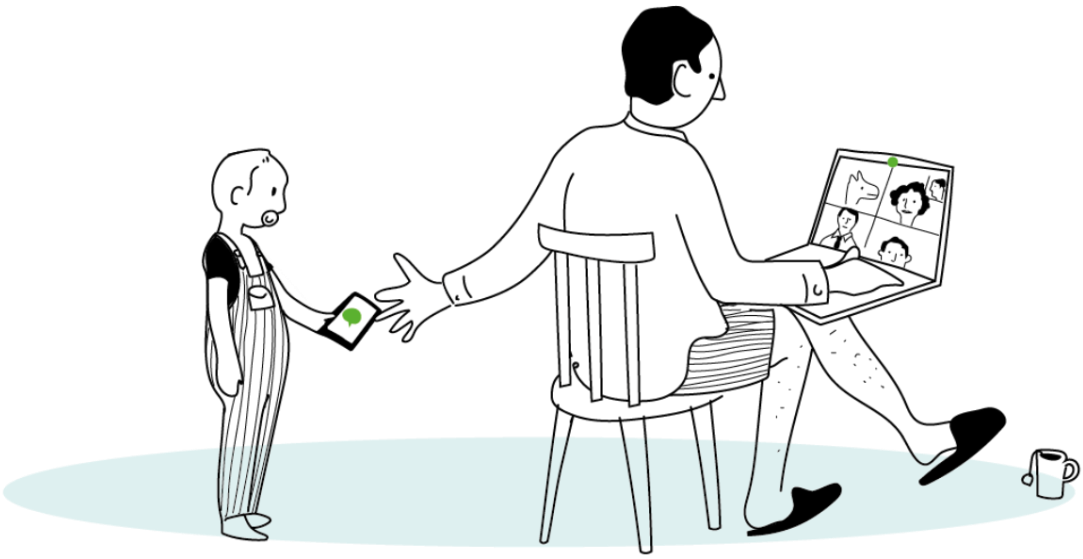
The Costs Briefing

Issue 12, March 2020



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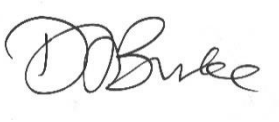
We are all experiencing a unique situation both in terms of our daily work and the short and long-term effects on the business of litigation.

Here at Practico, our business systems are holding up well. We remain fully operational and our team is working from home. Business as usual is the order of the day and helping to keep litigation moving for our law firm clients is our absolute priority.

Please do not hesitate to contact me or any members of the team.

Keep safe and stay well.



Deborah Burke
Managing Associate

Two contrasting cases on what amounts to good reason to depart from an approved costs budget

Jeremy Morgan QC

Costs budgeting – back to the Court of Appeal?

Davis LJ's refusal in *Harrison v University Hospitals NHS Trust* [2017] EWCA Civ 792 [44] to 'proffer any further, necessarily generalised, guidance or examples' of what constitutes 'good reason' to depart from a budget might need to be revisited. A duo of conflicting County Court decisions on whether to make a downwards departure for a phase where work is incomplete at the conclusion of the case raise an issue of principle which cannot 'safely be left to the individual appraisal and evaluation of costs judges by reference to the circumstances of each individual case.'

Harrison established clearly that 'good reason' is required as much for a downwards departure as for one upwards. But what if a case settles at a stage when only a small amount of the work envisaged by a phase has been carried

out? It seems not to be in doubt that the indemnity principle prevents the receiving party from claiming any more for that phase than is billable to the client, but does that go far enough? Or can the costs judge try, whether by conventional detailed assessment of the costs of that phase, or by some rough and ready apportionment of the budgeted figure, to allow only so much of the budget as seems reasonable and proportionate for the work actually done?

The first of the County Court decisions was *Barts Health NHS Trust v Salmon*, HHJ Dight (with a Costs Judge assessor), Central London CC, 17 January 2019. That was a clinical negligence case settled by the acceptance of a Part 36 offer of £7,000. The Costs Judge had assessed the bill at £52,000 on conventional grounds and then reduced that sum to £40,000 on the ground of proportionality. The Defendant argued that he should have gone further, particularly in relation to the phases of Experts and ADR, neither of which had been completed. For each of these two phases the Claimant had limited her claim to the amount actually billed, on indemnity principle grounds, and the Costs Judge had allowed those figures. But the Defendant argued that the costs claimed in the two contested phases were so much higher than expected for the work actually completed as to constitute 'good reason' for further reduction.

Judge Dight, in a tightly reasoned judgment, set out the principles which he derived from the CPR and Practice Direction as well as from *Harrison* and an earlier authority. He reversed the Costs Judge and did so on alternative bases:

1. Firstly, in his view once a good reason for departing from the budget for a phase had been established, neither party needed to establish a further good reason for a different adjustment to the bill in either direction. In the present case the fact that the sums claimed were, by virtue of the indemnity principle, lower than the sums budgeted for these phases was capable of being ‘good reason’ and, that hurdle having been overcome, the Costs Judge should not have simply allowed the figures claimed by the Claimant, but should have heard submissions on what alternative figure should be allowed.

2. Secondly, and this was the basis on which the Defendant put its case, the fact that the two phases were substantially incomplete at the point of settlement itself was capable of constituting 'good reason' for reconsidering the budgeted amounts, over and above the indemnity principle reductions that the Claimant had conceded.

The Judge clearly had in mind the practical objection that would be made to this approach, namely that it would generate further detailed assessments, and further complicate such detailed assessments as would take place in any event. He stressed that the precise approach to be taken by the costs judge would be a matter for his 'good sense and expertise': he was not necessarily bound to conduct a line-by-line detailed assessment of the phase in question but might use a more broad brush approach to arrive at the sum to be allowed.

A little over a year later the same issue came before DJ Lumb in *Chapman v Norfolk and Norwich University Hospitals,* Birmingham County Court, 4th March 2020. He declined to follow Judge Dight, holding that the Court was 'not expected to carry out a micro-assessment of how much work has been done in each particular phase' and that 'very clear evidence of obvious overspending in a particular phase would be required before the Court could even begin to entertain arguments that there was a good reason to depart from the budgeted phase figure'. He relied on the practical arguments that the point of budgeting was (i) to reduce the number and complexity of detailed assessments and (ii) to give both sides certainty from the time of the Costs Management Conference onwards.

So who was right? Each side tends to put its argument in apocalyptic terms, whilst really doing no more than justifying self-interest in the usual way. The Defendant's argument in *Harrison* was described by the Court of Appeal as based on 'doom-laden predictions' and Claimants point to the assumed explosion of detailed assessments if their approach is rejected.

What is important is that this issue arises very, very commonly because almost

every case concludes without a trial, and therefore with at least one phase incomplete. The practical consequences of the decision are accordingly very important. If Judge Dight's approach is rejected, there will be cases where the Claimants' lawyers get a windfall benefit. On the other hand, if his approach is accepted there are likely to be more detailed assessments and those which do take place will be more complex.

This writer's view is that there should be a middle way. On the one hand, Judge Dight's approach of saying that once 'good reason' is triggered by the indemnity principle the paying party has carte blanche to argue for further reductions is too extreme. The more measured approach put forward by the Defendant in *Salmon* is to be preferred – ie the paying party has to show a second 'good reason' for further interference, and that would take the form of showing that even the reduced claim is still substantially disproportionate to what was actually achieved in that phase. On the other hand, DJ Lumb's requirement of 'clear evidence of obvious overspending' is also too extreme. An experienced costs or district judge should be able to take a broad brush to a comparison of the work contemplated for a phase when the budget was set and the work which was actually done, and should only find 'good reason' for further adjustment when the two are seriously out of kilter.

The interplay between costs budgets and an indemnity basis costs order

James Coleman, Senior Associate - Practico Ltd

Defendant delight

Following a successful outing in the Court of Appeal, Rupert Cohen of Landmark Chambers has provided us with some well-informed guidance following Lord Justice Coulson's judgment in *Lejonvarn v Burgess and another* [2020] EWCA Civ 114 –

1. *The test for indemnity costs is whether there was a point in the lifecycle of the claim at which it could be objectively described as 'speculative, weak or thin'.*

2. *Where a Defendant has beaten his or her Part 36 offer at trial to get costs on the indemnity basis, the Defendant needs to pinpoint a time from the date of the offer to the date of the outcome at which the reasonable claimant would have concluded that the offer represented a*

better outcome than the likely outcome at trial in which case indemnity costs will be awarded from that date.

3. *Budgets are irrelevant on an assessment of costs on the indemnity basis.*

From a practical point of view, the decisions on Defendant Part 36 offers and the effect of indemnity basis costs on budgets are particularly noteworthy, so we have augmented Rupert's helpful summary with some additional analysis.

Defendant Part 36

As things presently stand, there is no automatic entitlement on the part of a defendant to indemnity basis costs if that defendant beats its own Part 36 offer. Lord Justice Coulson reiterated this but went further by dismissing the proposition that the changes to the proportionality rules in 2013 was a game-changer which could or should give rise to a presumption in favour of a defendant who beats his or her own Part 36 offer. However, it was noted that '*the absence of an automatic entitlement is the beginning, rather than the end, of the analysis. The fact that a defendant has beaten his or her own Part 36 offer is plainly a matter of importance in the exercise of the court's discretion under CPR Part 44*'.

Although each and every decision regarding the consequences of failure to beat a Part 36 offer will be decided on its own facts, there was consensus that a key question is *'At any stage from the date of the offer to the date of the outcome, was there a point when the reasonable claimant would have concluded that the offer represented a better outcome than the likely outcome at trial*'.

Although Lord Justice Coulson was not addressing a novel point of law, this guidance does help to demystify what can be a rather grey area and may embolden defendants, particularly those who, for whatever reason, failed to keep their costs within their approved costs budget.

Relevance of the Costs Budget

Neatly dovetailing with the above, Lord Justice Coulson also clarified the relevance of costs budgets when an indemnity costs order has been made. This was rather apt, as it allowed Mister Justice Coulson to revisit his own comments from *Elvanite Full Circle Ltd. v Amec Earth & Environmental (UK) Ltd* [2013] EWHC 1643 (TCC) and Bank of Ireland and another v Watts Group Plc [2017] EWHC 1667 (TCC). Both judgments have routinely been deployed by unsuccessful parties to shoehorn the effect of CPR 3.18 (assessing costs on the standard basis where a costs management order has been made) into an indemnity basis detailed assessment.

In *Lejonvarn*, the departure (75%) from the approved budget was stark and, absent of any good reason to depart, the Defendant would be limited to the approved budget. However, recognising that it was deliberate that CPR 3.18 did not refer to an indemnity basis assessment, Lord Justice Coulson departed from his earlier obiter comments in *Elvanite* and held that '*the assessment of costs on an indemnity basis is not constrained by the approved cost budget*'.

This is a welcome clarification and a timely warning that highly unreasonable conduct can result in the forfeiture of the right to the safeguard of a proportionate assessment of an opponent's costs.

Breakfast Roundtable - February 2020

Andy Ellis, Managing Director - Practico Ltd

Since we last reported the full discussion of Arkin at our recent Roundtable event the world has turned on its axis. But, in the short period between the event and the health crisis, the Court of Appeal handed down judgment in the case we discussed with Robert Marven QC – Chapelgate Credit Opportunity Master Fund Ltd v Money & Ors [2020] EWCA Civ 246 (25 February 2020). The report is available here.

As widely expected, the Court of Appeal dismissed the appeal and found no fault in the first instance decision not to be bound by the Arkin cap in circumstances where the funder was not funding a discrete part of the claim, stood to gain a significant reward had the case succeeded and had not insisted upon ATE cover. Had the cap been applied, the successful party would have been significantly out of pocket, despite being in receipt of an indemnity basis costs award.

The Court did not exclude the possibility that the Arkin cap may continue to be applied justly in other cases, but it dismissed the notion that it was in any respect binding.

Click here to view the full summary.

Practico Ltd featured in the Law Society Gazette

Deborah Burke, Managing Associate - Practico Ltd

Practico's White Paper, 'Beyond the electronic bill' was launched last November.

Our intention is to prompt debate on the future of civil costs assessment.

The White Paper explores how the electronic bill of costs might be further developed to help make detailed assessment in high value and complex litigation more streamlined, efficient and, ultimately, a key driver for effective and timely dispute resolution.

We are delighted that Andy was interviewed by the Law Society Gazette on this topic and his article can be found here.

The new E-filing requirements for bills of costs

Deborah Burke, Managing Associate - Practico Ltd

E-filing has come to the Senior Courts Costs Office and my article for the Law Society's Civil Litigation Section newsletter can be found here.

Practico PodCosts, a series is born…

Andy Ellis, Managing Director - Practico Ltd

Our occasional series of interviews with thought leaders and friends of the firm now has seven chapters and rightly deserves its newfound home on our website.

It is an eclectic mix of specialist costs discussions with leading figures and more general chats about business with the good people we work with behind the scenes.

Click here to listen.

Meet the Team

Liz McAulay, Associate - Practico Ltd

Life in the costs world began for me almost 30 years ago. Andy Ellis was just beginning his own career in costs when he established 'Andrew Ellis Costs Drafting' and I became his very first assistant. My own career path changed dramatically from working as a wages clerk for a firm of chartered accountants in Glasgow City Centre, to sitting at my dining table at my new home in London with a new PC, typing solicitors' three-column bills of costs from dictation tapes Andy dropped round to me.

In 1993 we formed Ellis Grant and then in 2012 Practico was born.

Andy and Kevin Wonnacott, who joined us in 2003, have always been on the front foot on implementing changes and developing new practices well ahead of the pack. We have all had to show great resilience when, despite challenging times, adapting to wide-ranging legal reforms and helping to shape policy. In many respects staying up is harder than starting up.

Over the years I have seen many changes as the business has developed and I have gained new skills. My main role today is as a member within the operations team. Using my advanced and ever-developing knowledge of Excel I work with the team across a wide and varied range of projects, which I enjoy very much.

However, it's not enough to reflect upon the past. We continue to build an inclusive and strong focused team at Practico where everyone truly cares about the business and our future and that is a rare thing these days.

So, here's to empowering people at all levels for the next 30 years!