Case No: A90BM096

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
BIRMINGHAM DISTRICT REGISTRY

Birmingham Civil Justice Centre
33 Bull Street
Birmingham

Date: 13/10/2016

Before :

DISTRICT JUDGE LUMB
SITTING AS A REGIONAL COSTS JUDGE

- -

Between :

VALERIE ELSIE MAY MERRIX	**Claimant**
- and -	
HEART OF ENGLAND NHS FOUNDATION TRUST	**Defendant**

- -
- -

Daniel Frieze (instructed by **Irwin Mitchell**) for the **Claimant**
Richard Wilcock (instructed by **Acumension**) for the **Defendant**

Hearing dates: 21 September & 13 October 2016

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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DISTRICT JUDGE LUMB

District Judge Lumb:

Introduction

1. This judgment concerns a preliminary issue that has arisen in the detailed assessment of the Claimant's costs following her successful claim for damages arising from the clinical negligence of the Defendants.

2. The preliminary issue may be phrased as *"to what extent, if at all, does the costs budgeting regime under CPR Part 3 fetter the powers and discretion of the costs judge at a detailed assessment of costs under CPR part 47."*

3. To answer this question it is necessary to consider the inter-relationship between costs budgeting at the start and throughout a case and the assessment of costs at the conclusion of the claim. In particular there is a need to carry out a detailed analysis of the perceived tension between the wording in the rules for cost budgeting and assessment. This includes a consideration of the meaning of the wording in CPR 3.18 which has been at the heart of the debate.

4. Both processes share a common objective to identify reasonable and proportionate costs. However, looking from opposite ends of a procedural timeline they are not necessarily focussed on exactly the same thing.

5. Cost budgeting has been in existence for all multitrack claims issued after 1 April 2013 and prior to that in pilot schemes for defamation cases and in the specialist Technology and Construction and Mercantile Courts.

6. Although aspects of costs budgeting have been considered in a number of authorities there appears to be no direct case authority on the relationship between costs budgeting and costs assessment. The debate in the legal profession concerning this issue reflects wide-ranging views and interpretations and the parties in the present case have taken entrenched positions which can only be described as polar opposites.

7. In summary, the Claimant receiving party submits that if her costs are claimed at or less than the figure approved or agreed for that phase of the budget then they should be assessed as claimed without further consideration. The budget fixes the amount of costs recoverable and the costs can only be reduced if the Defendant paying party satisfies an evidential burden that there is a good reason to depart from the figure in the budget. The Defendant paying party's position is that the Costs Judge's powers and discretion are not fettered by the budgeted figure for the phase but that the budget is but one factor to be considered in determining reasonable and proportionate costs on assessment.

8. Without a ruling on the appropriate approach to detailed assessment both parties agreed that, save for certain stand-alone items which fall outside the budgeting process, such as an after the event insurance premium and perhaps the success fee, the detailed assessment could not proceed until this was determined as a preliminary issue.

The Civil Procedure Rules and Practice Directions

9. Detailed assessment is defined in **CPR 44.1** as follows:

In Parts 44 to 47, unless the context otherwise requires – detailed assessment means the procedure by which the amount of costs is decided by a costs officer in accordance with Part 47.

10. **CPR 44.3** sets out the test to be applied when carrying out a costs assessment:

(2) where the amount of costs is to be assessed on the standard basis the Court will:

(a) only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred and

(b) resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred reasonable and proportionate amount in favour of the paying party

11. **CPR 44.4** describes the factors to be taken into account by the Court when deciding the amount of costs:

(1) the Court will have regard to all the circumstances it deciding whether costs were

(a) if it is assessing costs on the standard basis –

(i) proportionately and reasonably incurred or

(ii) proportionate and reasonable in amount

(2) in particular, the Court will give effect to any orders which have already been made.

(3) the Court will also have regard to;

(a) the conduct of all the parties, including in particular

(i) conduct before as well as during the proceedings and

(ii) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute

(b) the amount or value of any money or property involved

(c) the importance of the matter to the parties

(d) the particular complexity of the matter or the difficulty or novelty of the questions raised

(e) the skill effort specialised knowledge and responsibility involved

(f) the time spent on the case

(g) the place where the circumstances in which work or any part of it was done and

(h) the receiving party's last approved or agreed budget

12. **CPR 47** sets out the procedure for detailed assessment including provisional assessment cases and provides that the parties must comply with the procedure set out in that part.

13. The purpose of costs management is provided in **CPR 3.12 (2**) as follows:

(2) the purpose of costs management is that the Court should manage both the steps to be taken and the costs to be incurred by the parties to any proceedings so as to further the overriding objective

14. **CPR 3.15** provides that the Court may manage costs to be incurred by any party and for that purpose may make a costs management order. A costs management order is a recording of the extent to which budgets are agreed between the parties or in respect of budgets of parts of budgets which are not agreed, a record of the Court approval after making appropriate revisions. Once a costs management order has been made the Court will thereafter control the parties' budgets in respect of recoverable costs.

15. **CPR 3.17** provides that when making any case management decision the Court will have regard to any available budgets of the parties and will take into account the costs involved in each procedural step, irrespective of whether any costs management order has been made.

16. **CPR 3.18** states:

In any case where a costs management order has been made, when assessing costs on the standard basis, the Court will –

(a) have regard to the receiving party's last approved or agreed budget for each phase of the proceedings; and

(b) *not depart from such approved or agreed budget unless satisfied that there is good reason to do so.*

17. **CPR 3 PD 3E** provides a useful supplement to the costs management rules and includes:

7.3 If the budgets or parts of the budgets are agreed between all parties, the Court will record the extent of such agreement, in so far as the budgets are not agreed, the Court will review them and, after making any appropriate revisions, record approval of those budgets. The Court's approval will relate only to the total figures for each phase of the proceedings, although the course of its review the Court may have regard to the constituent elements of each total figure. When reviewing budgets, 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 budget. The Court may, however, record its comments of those costs and will take those costs into account when considering the reasonableness and proportionality of all subsequent 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 costs 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 claim is provided for reference purposes only to assist the Court in fixing a budget.

Defendant's arguments

18. The Defendant's primary position is that regardless of any approved or agreed costs budget the Court is obliged by the mandatory terms of CPR 47 to carry out a detailed assessment in accordance with the rules and that such an assessment includes both the incurred and estimated future costs contained in the budget in precedent H.

19. They contend that the appropriate test and procedure for detailed assessment is and always has been set out in CPR 44 and 47 respectively. On detailed assessment the Court will make an individual, line by line assessment of reasonable costs and then decide on any issues of proportionality, applying the appropriate test factors contained in CPR 44.3 and CPR 44.4. Any doubt as to whether any item of costs was reasonably or proportionately incurred or reasonable and proportionate in amount will be resolved in favour of the paying party on a detailed assessment on the standard basis.

20. Nowhere in CPR 44 or 47 is the Court directed that on a detailed assessment the paying party is required to show good reason why any item of costs should be reduced or disallowed where there is an approved or agreed cost budget.

21. The nearest to a tension between the rules on costs budgeting and detailed assessment is the reference in CPR 44.1 to "unless the context otherwise requires" and that in CPR Part 3.18 to what the Court should do "when assessing costs" However, to interpret budgeting as overriding the procedure for assessment would be entirely converse to the standard and burden of proof expressly stated by the rules. The relevance of an agreed or approved costs budget on detailed assessment is limited to CPR 44.4 (3) (h). It is therefore but one factor to take into account.

22. That proposition is reinforced by CPR PD 3E that during a costs management hearing the Court will not undertake a detailed assessment in advance. Furthermore, the Court is expressly dissuaded from fixing hourly rates and the hourly rates and time claimed in a budget are for guidance purposes only. The time for dealing with those matters in detail must and can only be at an assessment.

23. The purpose of approving and/or agreeing costs budgets is to set a limit on recoverable costs subject always to the ordinary principles of costs assessment. An agreed or approved cost budget is not a substitute for detailed assessment, nor does it create a presumption of reasonableness and proportionality rebuttable only if the Defendant shows ' good reason' why any item of costs should be reduced or disallowed.

24. CPR 3.18 (b) only relates to cases where the bill of costs exceeds the cost budget (or any of its constituent phases). Assessing a bill of costs below the total of an agreed or approved cost budget does not involve a "departure".

25. The Defendants submit that their interpretation is consistent with the new overriding objective and the greater emphasis placed on proportionality. This is best illustrated by the approach to be adopted in relation to proportionality on assessment. In **May and May v Wavell Group plc and another [2016] EWHC B16 (Costs)** Master Rowley set out the test clearly defined by the rules:

"CPR 44.3 (2) (A) gives rise essentially to a two-stage test. First, an assessment of the costs which are reasonable has to be carried out on an item by item basis and the calculation of the aggregate of those reasonable sums made… The second stage of the test required by CPR 44.3 (2) (a) is to consider whether the reasonable sum allowed is also a proportionate sum. In doing so, the Court must have regard to CPR 44.3 (5).

If the sum within the budget was fixed as contended by the Claimant then it would be impossible for the Court to apply the new proportionality test.

26. Support for the Defendant's position can be found in the judgment of Moore-Bick LJ in **Henry v News Group Newspapers Ltd [2013] EWCA Civ 19** which was a case based on the pre-April 2013 pilot scheme in defamation proceedings. Paragraph 5.6 of the associated practice direction was analogous with the present CPR 3.18.

"The essence of cost budgeting…. is that the costs of litigation are planned in advance; the litigation is then managed and conducted in such a way as to keep the costs within the budget"

"It is implicit in paragraph 5.6 of the Practice Direction that the approved cost budget is intended to provide the framework for detailed assessment and that the Court should not normally allow costs in an amount which exceeds what has been budgeted for in each section. That makes good sense if the proper procedure has been followed and the costs have been managed in a way that ensures that they are restricted to an amount that keeps the parties on an equal footing and is proportionate to what is at stake in the proceedings. However, paragraph 5.6 expressly recognises that there may be good reasons for departing from the budget and allowing a greater sum. On the other hand, cost budgeting is not intended to derogate from the principle that the Court will allow only such costs as have been reasonably incurred and are proportionate to what is at stake; it is intended to identify the amount within which the proceedings should be capable of being conducted and within which the parties must strive to remain. Thus if the costs incurred in respect of any stage fall short of the budget, to award no more

than has been incurred does not involve a departure from the budget; it simply means that the budget was more generous than was necessary. Budgets are intended to provide a form of control rather than a licence to conduct litigation in an unnecessarily expensive way'

"It will be for the costs judge to decide in what respects and to what extent the appellant should be allowed to recover costs in excess of those which the budget allows. That will depend principally on the extent to which the costs actually incurred were reasonable and proportionate to what was at stake in the proceedings and on the extent to which they could have been reduced if the practice direction had been properly followed."

27. The Defendants rely upon these comments as confirmation that a costs budget is not intended to substitute the normal basis of detailed assessment. Indeed the judgment emphasises the importance of the approved or agreed budget as providing a prima facie limit on the amount of recoverable costs.

28. They contend it would be absurd if CPR 3.18 could be construed that the paying party would have to show good reason why the receiving party should not recover the absolute maximum amount of a significantly less detailed cost budget which is agreed or approved very early in the proceedings, without any detailed assessment and in circumstances where the actual test under CPR 44.3 concludes by stating that any doubt as to whether costs were reasonable or proportionate will be resolved in favour of the paying party.

29. Moore-Bick LJ reiterated his views in **Troy Foods V Manton [2013] EWCA Civ 615** when he said;

"The Defendants concern is that, on any detailed assessment, costs judges are likely to treat the approval of the budget, or any relevant part of it, as ipso facto establishing that the costs incurred in respect of the matter generally, or that particular element of it, are reasonable if they fall within the approved budget. In Henry v News Group Newspapers at paragraph 16 I expressed the view that an approved budget was not to be taken as a licence to conduct litigation in an unnecessarily expensive way. It follows that I do not accept that cost judges should or will treat the Court's approval of the budget as demonstrating, without further consideration, that the costs incurred by the receiving party are reasonable or proportionate simply because they fall within the scope of the approved budget."

30. As that case was a consideration by a single Lord Justice of a renewed application for permission to appeal it is not strictly speaking an authority. However, it is very persuasive and cannot be ignored.

31. The issue as to which costs can be challenged post budgeting has to some extent been thrown into confusion by the decision of the Court of Appeal in **Sarpd Oil International Ltd v Addax [2016] EWCA Civ 120**. In an application for security for costs the judge at first instance had taken into account the Defendant's costs budget, which had been agreed by the Claimant, in setting a figure for security for costs. The Claimant sought to argue that the judge below was wrong to assess the amount of security by reference to the agreed costs

budget and should have gone behind the budget to assess whether certain sums already incurred were reasonable and proportionate.

32. The Court of Appeal made the following observations:

"If the Court does record comments about the incurred costs, they will carry significant weight when the Court comes to exercise its general discretion as to costs under CPR part 44 at the end of trial."[judgment at 42]

"For example, if a Court has commented that incurred costs in a costs budget appeared to be reasonable and proportionate, it would usually require good reason to be shown why such costs should not be included in an award of costs on the standard basis at the end of the trial…. Therefore, depending on what is said by the Court by way of comment, the practical effect of a comment on already incurred costs made by a Court pursuant to paragraph 7.4 of PD3E may be similar to the effect under part 3.18 (B) of formal approval of the estimated costs element in a costs budget."[judgment at 43]

"The proper interpretation of the order made in relation to each costs budget, therefore, is that the estimated costs element in each case was approved by the order (so that part 3.18 (B) was engaged in relation to that element) and the Court commented on the incurred costs element in each case (and on the total figure which included that element) as it was entitled to do under the 2nd sentence of paragraph 7.4 to the effect that it agreed the claim made on the face of the costs budget those costs were reasonable and proportionate costs in the litigation. The effect of this comment was that it was likely that the incurred costs element would be included in any standard assessment of costs at the end of the day, unless good reason was shown why it should not be. There was little, if any, difference between the practical effect of the Court's order in relation to incurred costs and its order in relation to estimated costs.'[judgment at 47]

"Moreover, CPR part 3.17 makes it clear that cost budgets are to be important instruments for all case management decisions, so parties must appreciate that if they wish to take issue with others costs budget they should do so at the first CMC, when there is to be debate about the costs budgets. In this case the first CMC, and the process leading up to it, afforded each party a fair opportunity to make any submissions they might wish on each other's costs budgets."[judgment at 50]

33. It is a combination of these comments that causes the Claimant to suggest that where, on a detailed assessment, there is an agreed or approved costs budget, that provided the bill of costs falls within the total, or the costs claimed on the bill do not exceed the amount allowed for a particular phase of a budget, then no reduction should be made without good reason.

34. The Defendant maintains that the Claimant's interpretation is wrong for a number of reasons. Firstly, this interpretation flies in the face of CPR 44 and 47 as well as the comments of Moore-Bick LJ in **Henry** and **Troy Foods**. Secondly, in **Sarpd Oil** the Court of Appeal was dealing exclusively with an application for security for costs and in particular whether the judge at first instance was correct to treat the costs budget as a reference point when deciding the amount for security of

costs. There was no discussion or debate whatsoever as to the relevance of costs budgeting during a detailed assessment hearing.

35. The reference in paragraph 42 of the judgment to CPR part 44.2 is referring to the Court's discretion as to costs following trial. That provision is clearly concerned with the type of order to be made at the conclusion of the case. Those costs would still be subject to assessment of amount under the other parts of CPR 44 and consequently they argue that there is no scope whatsoever that this comment means the bill of costs should be assessed as claimed at the detailed assessment.

36. A comment during a CMC that incurred costs appear to be reasonable and proportionate on the face of the costs budget cannot equate to a detailed assessment under CPR 47 of whether the costs later detailed in the bill of costs are actually reasonable and proportionate. The Court has no right to interfere with the incurred costs in a costs budget and indeed would be unable to do so as full details including a breakdown have not been provided. That would also be inconsistent with the practice direction that when budgeting the Court is not carrying out a detailed assessment.

37. The Court of Appeal was simply highlighting that as prescribed in CPR 3.17, the costs budget should be considered when making any case management decisions during the proceedings, and that any party wishing to challenge the amount sought for security should have objected to the costs at the CMC. An order for security of costs is a case management decision. The exercise of a detailed assessment hearing is not a case management decision but instead has its own set of rules under CPR 44 and 47.

The Claimant's arguments

38. The Claimant contends that the Defendants approach is flawed in that it fails to take into account the modern approach to litigation and the emphasis that parties are required to engage in alternative dispute resolution at every stage of a claim. This underlying philosophy is designed to prevent a return to the costs wars in the early days of conditional fee agreements and their enforceability which led to a prevalence of satellite litigation that was rightly deplored by the senior Courts. Parties are required to engage in negotiation and discussion at the earliest possible stage of the claim. This is clearly reflected in the terms of CPR 3.18 and in the Court of Appeal judgment in **Sarpd Oil**. The Claimant does not accept that the reason for the introduction of cost budgeting was merely to manage costs in relation to case management decisions but was part and parcel of the overall approach to attempt to deal with costs in a proportionate and reasonable way.

39. The Claimant contends that the intention of costs budgeting at a CCMC is to limit the matters that would need to be considered at a detailed assessment to those that are; outside the budgeting process (such as an after the event insurance premium and success fee); incurred costs provided that a recording is made by the budgeting judge that the incurred costs appear to be disproportionate; and any other items that Mr Frieze describes as having been "carved out" that is to say where the Defendants have expressly reserved their position such as hourly rates and the Court has recorded that position.

40. The Claimant submits that the wording of CPR part 3.18 is clear. It provides an approach for the Court on assessment of costs that the budget will only be departed from if there is good reason to do so. Mr Frieze submits that the term "budget" does not mean "limit" but means a "fund and any figure within that fund". "Departure" in the context of CPR part 3.18 does not mean only one way (upwards). It can also mean a departure downwards from a specific sum which is within the budget.

41. He submits that that is the purpose of the existence of the form Precedent Q which identifies whether costs incurred for each phase come within the total permitted in the budget. If the figure in the incurred column of precedent Q is less than the budget allowance then that figure should be allowed unless there is good reason to depart from that figure.

42. He further submits that this places an evidential burden upon the paying party to establish "good reason" before the Court will depart from the figure in Precedent Q. If having raised an argument of "good reason" the paying party fails to satisfy the Court on the evidential burden then the figure claimed is allowed.

43. Mr Frieze relies upon a decision of HHJ Simon Brown QC in **Slick Seating Systems v Adams [2013] 4 Costs LR 576** who adopted the "fix" approach of a sum fixed by the budget in summarily assessing costs at the conclusion of a trial. He also makes the rather brave submission that the law has moved on since the analysis of Moore-Bick LJ in **Henry** and **Troy Foods** and rather like in relation to applications for relief from sanctions the Court of Appeal's decision in **Mitchell** was originally misunderstood and only interpreted correctly following the decision in **Denton**.

44. He also relies upon the observations made by Warby J in **Simpson v MGN Ltd [2015] EWHC 126**

"It is clear that if costs management is to work, conclusions reached upon reviewing costs budgets must be adhered to, and not second-guessed at a later stage. The wording of CPR 3.18 (b) that if a figure has been agreed or approved for a particular phase of proceedings the amount recoverable by the receiving party in respect of that phase will be capped at that figure, unless there is good reason to depart upwards. (If the receiving party has incurred costs less than budgeted there will be good reason to depart downwards.)"

45. The Claimant seeks to argue that the judgment in the Court of Appeal in **Sarpd Oil** extends to the first costs and case management hearing as being the only opportunity to challenge and put down markers for later challenges of aspects of the Claimant's costs. It is arguable that if the Court could not reconcile any issue of cost budgeting that it could refuse to budget a phase on the grounds of not having enough information to make a decision as to what the proportionate costs were.

46. If it is the case that everything is left to a detailed assessment, this is not consistent with the time and expense of providing a precedent H and undertaking the cost management process. The inevitable purpose of budgeting is not a costs capping order (that is dealt with expressly in other parts of the CPR [CPR 3.19 et

seq]), but an attempt to limit the use of the Court's resources and avoid, save where there was good reason and a change in circumstances, the need for lengthy detailed assessments, which increase costs and take up too much of the Court's time.

Discussion and conclusions

47. The Defendants must be correct in their submission that cost budgeting was not intended to replace detailed assessment. There are numerous examples to support this not least that had that been their intention the Rules Committee would undoubtedly have made wholesale changes to CPR parts 44 and 47. They did not. The amendment that was made was to CPR 44 was to include an additional factor (h) in the "pillars of wisdom" under CPR 44.4 (3). The receiving party's last agreed or approved budget is just another factor that the Court will have regard to. No special weight is attached to that budget. The rules were not amended to say that "first consideration" would be given to the budget or that it would be "of paramount importance" which are familiar terms in family law when weighing up the interests of children. No amendment was made to CPR 47.

48. That it was envisaged that there was always a possibility of detailed assessment is supported in paragraph 52 of the judgment in **Sarpd Oil** that *"the budgets approved by Blair J and appended to his order will be a strong guide on the likely costs to be made after trial."* The words "strong guide" and "likely costs" are a clear indication that the budget does not fix the costs and that a later assessment is not excluded.

49. Further evidence that there was no intention to preclude the availability of detailed assessment can be found in the Practice Direction. PD 3E expressly states that in budgeting the Court is not carrying out a detailed assessment in advance. The words "in advance" must mean that this will be available at the conclusion of the case. PD 3E also states that the hourly rates and time to be expended are for guidance purposes only to assist the Court in setting a budget. The time to consider those in detail must therefore come later, at assessment.

50. What undoubtedly was intended was that effective costs and case management would greatly reduce the need for detailed assessment of some or all of the parties' costs by ensuring that the costs budgets were within the range of reasonable and proportionate costs for each phase. In so doing the scope for disagreement should be reduced to a level where a paying party would be unwise to risk incurring the significant costs of the detailed assessment process for what would only be limited potential gains.

51. There is no doubt that the factors in CPR 44.4 (3) to be taken into account when deciding the amount of costs to be allowed apply both at the budgeting and assessment stages. However, as the tests are applied at different times when considering different documents (a budget and a bill) there is no certainty that they would produce identical results. The most obvious difference is the need to apply the new proportionality test as explained by Master Rowley in **May** at the conclusion of any assessment. It would appear impossible to apply this test if the Claimant's arguments are correct, for the reasons argued by the Defendant. The

more effective and considered the costs management at the case management stage the closer the results of these two exercises should be.

52. I do not agree with either party's definition of "budget". It does not mean either a cap or a fixed amount. The ordinary meaning is more of an available fund. A costs budget for CPR purposes comprises the available fund reflected in the form precedent H, the assumptions accompanying that form, any budget discussion report and any recorded comments by the case managing judge. The available fund is considered to be within the reasonable range of proportionate costs but nowhere is it stated to be a fixed assessed amount. If that had been the intention then the rules would surely state as much.

53. It is not helpful in the context of this debate to consider "departure" within the meaning of CPR 3.18 as being upwards or downwards. It is important to understand that the departure refers to a departure from the budget not from a fixed sum. Just because a party has incurred costs that come in at under the total for a phase is not a departure from the budget. Applying the ordinary meaning of the words the party is still within the budget unless or until the Court revises the budget. It is not the replacement of one fixed sum with another fixed sum. The purpose of the form Precedent Q is to set out the differences between the actual expenditure and the budgeted figures for each phase. It is not intended to be some advanced assessment of the recoverable costs. If having completed a line by line assessment of the reasonable costs the Court considers that the costs are still disproportionate, the Precedent Q could be a useful breakdown for the Court to use to make adjustments to ensure the resulting figure is proportionate.

54. A costs budget is a living document that the parties and the Court are obliged to keep under review throughout the case. If in a serious injury case there is a material change such as an admission of liability where previously all matters were in issue that would be a good reason to depart from the original budget and set a revised (lower) one. Similarly, if there was an unexpected deterioration in a Claimant's medical condition which now meant that there was need for evidence from an accommodation expert, that would be a good reason to depart from the original budget and set a revised (higher) one. This further demonstrates that the Claimant's contention that the figure is fixed at the first CCMC must be incorrect.

55. In the context of CPR 3.18 where the budget has not been revised by the Court before assessment, a departure in practical terms has to be to something outside the original budget which can only be to a sum in excess of the amount allowed for a phase and therefore must be upwards only.

56. Budgeting and assessment of costs of any phases are not mutually exclusive. There are different tools available to the Court to manage costs to ensure that ultimately any costs to be paid by a paying party to a receiving party are reasonable and proportionate. A helpful analogy may be to view costs budgeting as setting out the general landscape for the claim, whereas the assessment of costs performs a different function by surveying the terrain within that landscape in more detail.

57. Viewed in that way the perceived tension between the wording of the provisions for costs budgeting and assessment falls away. The comments made by Moore-

Bick LJ in **Henry** and **Troy Foods** are as true today as they were at the time that he made them. The attempt to distinguish those comments as being under a previous pilot regime and from a bygone age was a brave but mistaken submission.

58. The analogy of landscape for budget and examination of the terrain for assessment also holds true when considering the comments of the Court of Appeal in **Sarpd Oil**. Paragraph 50 of the judgment makes clear *"costs budgets are to be important instruments for all case management decisions"* and that if parties *"wish to take issue with others budgets they should do so at the first CMC when there is to be [that] debate."* That debate is about the budget not about the costs in a future bill for assessment. That distinction is important. What the Court of Appeal do not say is that costs budgets fix the amount to be allowed at an assessment of costs. Indeed the judgment in **Sarpd Oil** does not mention assessment of costs at all. A security for costs order is a case management order and it was entirely appropriate that the Court should use the case management tool of budgeting as a reference point of the general landscape in setting the level of security.

59. "Departure" in CPR 3.18 refers to a departure from the budget as defined above as an available fund – the landscape - not a departure from a fixed sum or a sum claimed in a bill that happens to be within the budget. This is also consistent with the comments of Warby J in **Simpson.** It also follows that the arguments raised by the Claimant that CPR 3.18 raises an evidential burden on the paying party to show a "good reason" to contend for a lower figure on assessment are misconceived.

60. The approach of HHJ Simon Brown QC in **Slick Seating Systems** can be explained as a summary assessment by a judge in the Mercantile Court who had been involved throughout the case, first in approving the budget at the case management stage in line with the case management directions that he gave, all the way through to the trial itself. He had a unique understanding and feeling for the case and the proportionate costs of it such that he felt confident to be able to summarily assess the costs at the end of the trial. It is also doubtless of relevance that the Defendant paying parties did not attend nor were they represented at the trial. In such circumstances where the Court felt equipped to carry out a summary assessment, to direct a full detailed assessment where the other party was no longer engaging in the litigation would only have caused further delay, expense and taken up a disproportionate share of the Court's resources contrary to the overriding objective.

61. The strict answer to the question of the preliminary issue in the present case is that the powers and discretion of a costs judge on detailed assessment are not fettered by the costs budgeting regime save that the budgeted figures should not be exceeded unless good reason can be shown.

62. However, the full answer to the issue is more nuanced than the Defendant's position of "open season" and complete discretion to attack a bill on detailed assessment and the Claimant's opportunistic attempt to impose a straight-jacket on the costs judge and claim a fixed figure. There is some merit in elements of both parties' arguments in the present case. At the same time, their entrenched

positions illustrate why some observers consider that costs budgeting has failed to be as successful in practice as it ought to have been. The analysis in this judgment demonstrates that the preliminary issue question itself as posed was based upon a misunderstanding of the objectives and function of costs budgeting which is a different costs management tool from costs assessment. If the Claimants arguments were correct and that for large sections of a parties costs the only opportunity to challenge those costs, absent "good reason", would be at the CCMC those hearings would be at risk of being far lengthier than they already are. That cannot be consistent with the overriding objective of dealing with cases expeditiously at proportionate cost.

63. It is the duty of the parties to help the Court to further the overriding objective by narrowing the issues between them. By adopting an ADR like philosophy in negotiation and the preparation of budget discussion reports it should then be possible, in the majority of cases, to produce a proportionate budget that is so accurate when compared to the actual, yet still proportionate costs, incurred at the conclusion of the case that the difference between the parties should be so negligible that it would not be worth the time, trouble or risk to pursue a detailed assessment.

64. To get to that ideal position requires a realistic engagement by the parties and by the case managing judge who has not only the experience of effective case management but also of the proportionate sums involved in the efficient conduct of the case. The benefits to all, if this panacea can be achieved, are obvious. Costs will be far more likely to be agreed or the remaining issues between the parties will be narrow and dealt with much more quickly. Receiving parties will be paid earlier. Paying parties including insurers and the NHSLA will be able to reserve on a more accurate basis, save costs by avoiding preparing points of dispute, protracted negotiations and further hearings when the claim itself has been resolved and Court resources will be freed up through fewer detailed assessment hearings.

District Judge Lumb

Regional Costs Judge and

Specialist Clinical Negligence District Judge,

Birmingham.