Maximising Hourly Rates and Tactical Budgeting in CP and Brain Injury Litigation

Introduction

What is special about CP and brain injury litigation?

- Individual Importance
- Public and social importance
- Complexity
- Uncertainty
- Value

What does this mean for rates and budgets? They should be sufficient/adequate, and as far as your opponent (and probably the Court) is concerned, that means high.

The title of this talk is 'Maximising Hourly Rates and Tactical Budgeting in CP and Brain Injury Litigation', but before we can talk about tactics, we need to understand where we are with budgeting, and in order to talk about hourly rates, there has to be some discussion of the elephants in the room, proportionality, and, budgeting.

Rules Amendment

We're about to see another amendment to the budgeting rules and which will come into force on the 6th April 2017.

The amendments would appear to come about so as to overturn the decision of the Court of Appeal in SARPD Oil International Limited - v – Addax Energy SA & Anor [2016] EWCA Civ 120, in which the Court of Appeal considered that the appropriate time to debate incurred costs was at the time of the CMC and if not objected to or commented upon then, there may in principle be little practical effect between the court's approval of the estimated costs and tacit acceptance of incurred costs.

> '[B]y reason of para. 7.4 of PD3E the court could not approve the incurred costs element of these costs budgets in a way which would engage the effect of CPR Part 3.18(b). 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 second sentence of para. 7.4, to the effect that it agreed the claim made on the face of the costs budget that 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. '

The decision caused considerable disquiet and appeared to fly in the face of section 7.4 of Practice Direction 3E:

'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 on those costs and will take those costs into account when considering the reasonableness and proportionality of all subsequent costs.

The amendments are made substantially by replacing various references to 'budget' in the rules with 'budgeted costs', where 'budgeted costs' are the 'costs to be incurred', and so making a clear distinction between 'incurred costs' and the costs which the Court will actually control, the 'budgeted costs', and by an addition of 3.15(2)(c) reversing the presumption of incurred costs having been agreed where no comment is made.

In consequence, the amended CPR 3.15 looks like this:

'(1) In addition to exercising its other powers, the court may manage the costs to be incurred (the budgeted costs) by any party in any proceedings.

(2) … By a costs management order the court will—

(a) record the extent to which the budgeted costs are agreed between the parties;

(b) in respect of the budgeted costs which are not agreed, record the court's approval after making appropriate revisions;

(c) record the extent (if any) to which incurred costs are agreed

(3) If a costs management order has been made, the court will thereafter control the parties' budgets in respect of recoverable costs.

(4) Whether or not the court makes a costs management order, it may record on the face

of any case management order any comments it has about the incurred costs which are to be taken into account in any subsequent assessment proceedings.'

With substitution of 'budgeted costs' for 'budget' and addition of a new rule 3.18(c), 3.18 is amended to:

'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 budgeted costs for each phase of the proceedings;

(b) not depart from such approved or agreed budgeted costs unless satisfied that there is good reason to do so; and

(c) take into account any comments made pursuant to rule 3.15 (4) or paragraph 7.4 of Practice Direction 3E and recorded on the face of the order.'

A Recent Case - Merrix

Valerie Elsie May Merrix – v – Heart of England NHS Foundation Trust [2017] EWHC 346 (QB)

• Deals with the provisions of CPR 3.18 (prior to amendment but which has no impact here) and the extent to which this binds the Court on detailed assessment.

• HHJ Carr found that the approved budget sets the reasonable and proportionate costs, not a ceiling for those costs, and if there is no good reason to depart then that is what will be allowed on assessment, unless less has been spent than was budgeted for, and then that lesser amount will be allowed.

• In HHJ Carr's view, it is not possible to 'square' the words of CPR 3.18 with a suggestion that the assessing judge on detailed assessment could depart from the budget without good reason and carry out a line by line assessment in which the budget was to be used only as a guide or a mere factor to be taken into account, considering that the intention of CPR 3.18 to reduce the need for, and scope, of detailed assessment, would be frustrated were that the case.

The case may be subject to appeal and there is apparently an appeal from a decision of Master Whalan in *Harrison v Coventry NHS Trust* to be heard in the Court of Appeal in May 2017 and in which he reached much the same conclusion as HHJ Carr.

If the decision is upheld, where does it leave us? Absent a good reason to depart, the budget will be what is allowed in costs unless a party has spent less, so depending on your previous level of apprehension, the setting of the budget at the CMC stage will now be of greater or equal importance to that which you always thought.

Brief Review of Some Salient Rules

In what circumstances is a budget required?

Unless the court orders otherwise, budgeting applies to all Part 7 multi-track claims but doesn't apply to claims:

> ' (a) where the claim is commenced on or after 22nd April 2014 and the amount of money claimed as stated on the claim form is £10 million or more; or
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> (b) where the claim is commenced on or after 22nd April 2014 and is for a monetary claim which is not quantified or not fully quantified or is for a non-monetary claim and in any such case the claim form contains a statement that the claim is valued at £10 million or more; or
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> (c) where in proceedings commenced on or after 6th April 2016 a claim is made by or on behalf of a person under the age of 18 (a child) (and on a child reaching majority this exception will continue to apply unless the court otherwise orders); or
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> (d) where the proceeding are the subject of fixed costs or scale costs; or
>
> (e) the court otherwise orders.'

Per PD3E 2(b):

> 'In cases where the Claimant has a limited or severely impaired life expectation (5 years or less remaining) the court will ordinarily dis-apply cost management under Section II of Part 3.'

• Be wary, it does actually have to dis-apply it and until it does it still applies

• Do remember that PD3E suggests that personal injury and clinical negligence cases where the value of the claim is £10 million or more may be particularly appropriate for having budgeting applied.

• Budgeting will also apply to any other proceedings (including applications) where the court so orders – that power may be exercised by the court on its own initiative or on the application of a party.

When do you have to file and serve your budget?

'Unless the court otherwise orders, all parties except litigants in person must file and exchange budgets—

(a) where the stated value of the claim on the claim form is less than £50,000, with their directions questionnaires; or

(b) in any other case, not later than 21 days before the first case management conference.'

Budget discussion reports

'In the event that a party files and exchanges a budget under paragraph (1), all other parties, not being litigants in person, must file an agreed budget discussion report no later than 7 days before the first case management conference.

The budget discussion report required by rule 3.13(2) must set out—

(a) those figures which are agreed for each phase;

(b) those figures which are not agreed for each phase; and

(c) a brief summary of the grounds of dispute.'

Parties are encouraged to use the Precedent R Budget Discussion Report annexed to the Practice Direction .

Why is it important?

- Any party which fails to file a budget despite being required to do so will be treated as having filed a budget comprising only the applicable court fees.

- Per CPR 3.18 and *Merrix,* the budget may well dictate what you actually recover, for better or worse

What goes into a budget?

PD3E provides that parties must follow the Precedent H Guidance Note in all respects and the guidance note states:

> The 'contingent cost' sections of this form should be used for **anticipated costs** which do not fall within the main categories set out in this form. Examples might be the trial of preliminary issues, a mediation, applications to amend, applications for disclosure against third parties or (in libel cases) applications re meaning. Only include costs which are more likely than not to be incurred. **Costs which are not anticipated** but which become necessary later are dealt with in paragraph 7.6 of PD3E.

This reflects the view taken by the High Court in *TIM YEO v TIMES NEWSPAPERS LTD [2015] EWHC 209 (QB)*

However, it's a sensible approach to budgets generally given the provisions of PD3E:

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

7.9 If interim applications are made which, reasonably, were not included in a budget, then the costs of such interim applications shall be treated as additional to the approved budgets.

• If you throw in every conceivable thing, it's unlikely the court will approve in any event, and it may well prejudice the court against you.

• It is then important however that you do seek to revise the budget when needed – you must have an eye on the future; don't be overtaken by events.

Judicial Training

Judicial College Costs Training - all new District Judges and Deputy District Judges are required to undertake a two-day course, which is to be rolled out to all judges dealing with costs so that there is consistency in approach to costs budgets:

- The Judge will look at the whole case in outline and will indicate where the true issues lie.
- They will then apply the Pillars of Wisdom to decide into what sort of bracket the budgets should fall and give that indication.
- The judge will then go through each direction and the accompanying phase, and review each party's budget for that phase.
- If the final figure matches the original indication, good. If it does not, they will consider what changes if any, to make, to make it reflect their initial indication.
- The fact that parties have agreed a phase will apparently not stop a judge reducing that phase at budget approval stage (though how this is to be 'squared' with the provisions of PD3E 7.3 we will have to see)

Various commentators voice the concern that *Merrix* will lead to CMCs taking longer as the parties fight harder over the budgets, but this may not be the case as the courts seek to deal with the issues and the budgets on this principled and broad brush 'bracketed' approach

And so, finally:

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In the context of budgeted cases, they're actually both very much bound together.

Hourly Rates – budgeting and detailed assessment

There has always been a tension within the budgeting rules, given the provisions of PD3E:

> **7.10** The making of a costs management order under rule 3.15 concerns the totals allowed for each phase of the budget. It is not the role of the court in the cost management hearing to fix or approve the hourly rates claimed in the budget. The underlying detail in the budget for each phase used by the party to calculate the totals claimed is provided for reference purposes only to assist the court in fixing a budget.
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> **7.3** If the budgeted costs or incurred costs are agreed between all parties, the court will record the extent of such agreement. In so far as the budgeted costs are not agreed, the court will review them and, after making any appropriate revisions, record its approval of those budgeted costs. The court's approval will relate only to the total figures for budgeted costs of the proceedings, although in the course of its review the court may have regard to the constituent elements of each total figure. When reviewing budgeted costs, the court will not undertake a detailed assessment in advance, but rather will consider whether the budgeted costs fall within the range of reasonable and proportionate costs.

Merrix throws into the pot a comment that the fact that hourly rates at the detailed assessment stage may be different to those used for the budget may be a good reason for allowing less, or more, than some of the phase totals in the budget.

> • How is this to be resolved with the provisions of paragraph 7.10 of PD 3E which provides that it is not the role of the court in the cost management hearing to fix or approve the hourly rates claimed in the budget?

With judicial training apparently having previously encouraged judges not to look beyond the front page of the budget if they can avoid it, if when making the costs management order the judge only indicates phase totals and does not specifically comment on the hourly rates (i.e. the rates that they are, presumably and hypothetically, taking into account in their own mind when setting the budget), how will an argument be advanced that the hourly rate itself is good reason to depart from the budget?

Unless the judge specifically confirms the notional rate they are applying without then overriding it by making an overarching proportionality reduction, or gives a specific indication that they budget only the number of hours, that approach probably won't work if *Merrix* is upheld.

Loathe as the Court may be to consider it openly, you will likely need to address the hourly rates at the stage of budgeting, so that the rate the judge is hypothetically using is your rate.

That means addressing those points raised at the start of this talk in terms of the importance, complexity and value of the claim.

Expense of Time Calculations

• It is distinctly unlikely in the context of the budgeting exercise that you will be able to deploy evidence of direct costs to the firm and expense of time calculations, and you can only seek to persuade in broad terms by reference to the issues and the 'seven pillars'.

• However, there will still be a place for some level of detailed assessment even in budgeted matters, and there will be matters that are not budgeted, so how do you maximise rates in those matters?

The first point is whether you want to submit evidence of the operational costs of your firm

Prior to 1999, costs were assessed on the 'A' and 'B' factors:

- A factor – overheads and salary costs
- B factor – profit element, and reflecting issues of care and conduct required, e.g the complexity of the matter and responsibility involved

Whilst this was the approach prior to 1999, it is an approach that dies hard and is still taken into account by the Courts as a balance on occasion to aid consideration of rates or cross check them.

Guideline rates notionally include a 50% mark up as profit on a notional 'A' element, so split two thirds to one third for cost to the firm versus profit.

If the direct costs of running the law firm are greater than the average in that area, such evidence may be of use where there is justification for instructing a specialist firm by virtue of the complexity and value of the claim.

Therefore, if you are dealing with complex cases that require specialist expertise, it is sensible to undertake an expense of time calculation across your firm to determine the 'direct' costs of doing work, and if relevant and justifiable, seek to deploy that evidence.

You may also take the view that the operational costs for your area are actually on average higher than is built into the guideline, and seek to deploy such evidence so as to undermine the relevance of guideline rates.

- This will be difficult where the only evidence put forward is that for your firm.

- It may also be treated with an amount of scepticism given that when the Master of the Rolls last tried to review the guideline rates, there was limited cooperation within the profession, and of the material submitted in a number of areas it pointed towards reducing hourly rates.

Secondly in this scenario, there is the 'B' factor, or the level of 'care and conduct' (and which will be the main thrust of your argument if not pursuing an expense of time point) which you seek to demonstrate by reference to the 'seven pillars' under CPR 44:

'(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 all 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 and the circumstances in which work or any part of it was done; and

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

Delegation

- The court will expect to see senior fee earners dealing with matters befitting their attention. This becomes an issue of division of labour and management of the work to be done on the case, and is as theoretically relevant to budgeted matters as it is to detailed assessment.

• Evidencing proper delegation, the senior fee earner can be seen to be much more the coordinator providing high level insight and oversight, thereby increasing the responsibility and burden placed upon them each time they touch the file.

• If work is not delegated properly where it requires less expertise, the court may well say that there are various aspects of the work you have undertaken that should have been done by more junior fee earners and therefore allow rates applicable to more junior fee earners for those aspects of work.

• If this is not done, the hourly rate you truly realise for the work done across the board will be markedly lower than the rate you are personally awarded by the court.

• The second challenge in this context is to manage that delegation efficiently. The court will frequently disallow time spent in delegation and checking. If too much time is spent in these aspects then the savings made are quickly lost.

• The extent to which this is possible and the way in which it is achieved will depend on your business. Ideally fee earners work alongside each other, with consistent involvement in cases of the same people, rather than support being involved sporadically or involving different personnel on each occasion necessitating substantial reading in, instruction and supervision.

Tactical budgeting

Purpose:

• Ensuring that your client has available to them within a budget sufficient resources to enable the case to be pursued to a successful conclusion

• Ensuring that you make a profit

We assume that your overall strategy is to obtain the maximum budget possible

Budgeting only part of the case

• Is it appropriate to ask the court to limit the budgets in the first instance to part only of the claim? Does the opponent agree in that proposal? In the cases you deal with this will

likely be a particularly important consideration, but do be aware that absent a specific order from the court, a full budget needs to be provided.

• Think about this as soon as you issue, and if it is appropriate seek agreement from your opponent and make an application early, before budgets are due. Do be alive to the likelihood that without the agreement of your opponent, the court may say that it is too early for it to say whether that is sensible or not and that such matters should be decided at the CMC, by which time the budget will have been prepared as required by the rules.

Timing

The timing of the submission of your budget – do you want to do it earlier than the rules indicate and then update if not agreed, allowing more time to negotiate?

Constructing the budget

• The budget should be drawn on the basis of things that will probably happen, and needs to be sensible and credible. That doesn't however mean that you shouldn't be 'generous' in your assessment of the likely costs, allowing for the uncertainties of litigation.

• Therefore think carefully about the building blocks, the time elements, what you actually need to do and what time is actually required by the different people involved

• Experts and counsel will likely be a substantial part of your spend. Make sure you know who you're using and how much they cost. Do your best to negotiate with the clerks and the experts. By all means put their fees in the budget as per their terms and conditions, but get ready for the negotiation and the CCMC by trying to drive a bargain so that you can show the best that can be done.

Negotiation

• Negotiate with your opponent and establish what is important to them and to you. The courts will likely begin to drive down budgets, so establish what's on offer from your opponent, weigh up how workable it is and consider the risks.

• It goes without saying that you should try and agree the more 'at risk' or weaker areas of your budget. Maximise your recovery of those areas by your skill in negotiation and where you can't strike an acceptable compromise and you're satisfied with the risk, get ready for Court

The CCMC

When you get to Court you will have to confront the elephants in the room, hourly rates (which we have said will need to be addressed in some manner), and that other stalking horse, proportionality.

CPR 44.3(5):

(5) Costs incurred are proportionate if they bear a reasonable relationship to –

(a) the sums in issue in the proceedings;

(b) the value of any non-monetary relief in issue in the proceedings;

(c) the complexity of the litigation;

(d) any additional work generated by the conduct of the paying party; and

(e) any wider factors involved in the proceedings, such as reputation or public importance.

The overriding objective:

CPR 1.1

(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.

(2) Dealing with a case justly and at proportionate cost includes, so far as is practicable –

(a) ensuring that the parties are on an equal footing;

(b) saving expense;

(c) dealing with the case in ways which are proportionate –

(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issues; and

(iv) to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly;

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases; and

(f) enforcing compliance with rules, practice directions and orders.

Proportionality is currently a dangerous and fluid concept, with the potential to be used as a tool to reduce or disallow costs the court agrees are reasonable and necessary:

CPR 44.3(2)(a):

> … Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred

Proportionality must be protected and defended against:

- Make the most of the value of the claim
- Emphasise the complexity and importance of the claim
- Get the court to engage with the idea that the parties are ordinarily on a very unequal footing in financial terms.
- Do your best to make the court uncomfortable with how budgets work in practice for lay and commercial clients – for a claimant litigant in any form of personal injury claim, the budget will ordinarily be an absolute limit on what they can spend and will constrain the work they can do. For a commercial client, that is likely not true; it may limit what they can recover but not what they can spend
- Try and get the court to grapple with the ideological concept of the proportionality test as it is now expressed

While CPR 44.3 enables the court to disallow disproportionate costs, by the overriding objective the purpose of the court is to enable you to conduct the case at proportionate cost. If the court wants to make reductions on the basis of proportionality having already assessed what is reasonable and necessary, it needs to be invited to look again at the directions and therefore the work you re obliged to do so that the directions don't give rise to disproportionate cost. It is not the role of the court to impose an irrecoverable cost burden on solicitors or litigants. By looking again at directions and streamlining the work required, it can continue to reflect and not set the market, and so comply with the overriding objective.

Be ready:

- to make the argument that while the court 'may' take your incurred costs into account when considering the future budget to be allowed, it should only be by making some comment on them, and not as a reason to actually reduce the costs allowed for the future work it anticipates needing to be done.

- to justify the incurred costs if need be, and if the court is determined to reduce future costs on the basis of incurred costs, ask the court to make a recording that it has done so and to be clear that what it is actually doing is effectively setting a budget for incurred as well as future costs, rather than providing a negligible budget for future costs that you will later be limited to, with your incurred costs again subject to reduction on assessment

- to justify your anticipated value, or your top-line value, at least broadly and credibly

- to justify and evidence the actual costs of your experts and counsel

- to demonstrate that you have tried to negotiate with counsel and experts and show the projected fees are the best bargain that can be struck

After the CCMC

So the court has set your budget, but what then?

- It is a good idea to ask the court to make some form of recording of the assumptions on which they have set the budget, even if only broadly, but preferably by the things they expect to happen and expect not to happen.

- If you think you have obtained a super-abundant budget, you may want to leave it at that, but if you have any concerns at all, it will be better to ask the court to set some form of timetable for future review of budgets, and so obviating the need for you to subsequently make a specific application to vary your budget which may carry costs implications with it if you fail in your effort to vary

- Keep the budget under close review, be clear on what the court intended for you to do and be alive to any aspect where the case is going off course. Use the court's power on application to vary the budget if there is a substantial change. Following *Merrix*, parties are expected to and effectively encouraged to make greater use of this power

- If the opposing party is being disruptive and causing you to incur unnecessary or disproportionate costs, consider making an application to the court, as under the guidance:

> 'Any party may apply to the court if it considers that another party is behaving oppressively in seeking to cause the applicant to spend money disproportionately on costs and the court will grant such relief as may be appropriate.'

And that is tactical budgeting fitting the overall strategy of maximising your budget:

- limit budgets where sensible and possible
- create a strong defensible budget but don't pare it to the bone
- involve yourself in negotiation to identify what's important to your opponent, the strength of their attack and the weaknesses of your defence
- come to agreement where strategically sensible
- concede the periphery
- be clear on those overarching issues of rates and proportionality
- be clear on the way in which the court is setting the budget and how it is dealing with incurred costs
- plan the need for future review and seek directions if necessary
- keep the budget under review and don't be overly cautious of making applications to vary where something changes
- use the rules effectively where your opponent is behaving oppressively

Good luck, and if you do need help, please get in touch.

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