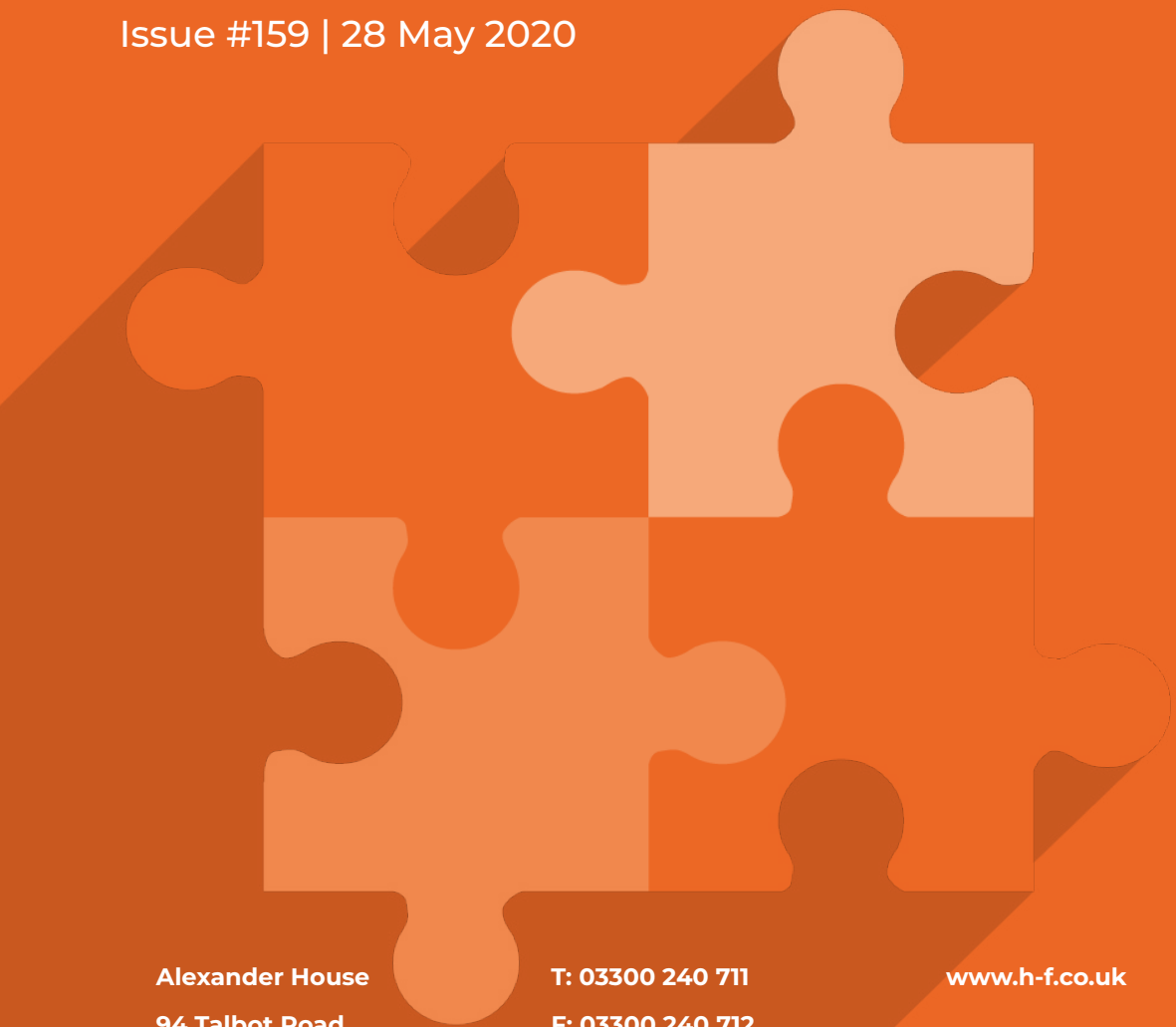
Horwich Farrelly

THE *large & complex injury* SPECIALISTS

Insight

from Horwich Farrelly's Large & Complex Injury Group

Issue #159 | 28 May 2020



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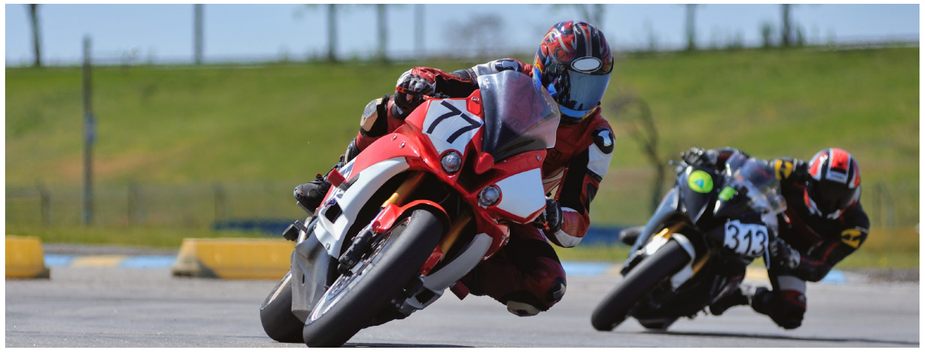
Welcome to Insight

Welcome to this week's edition of Insight in which we report cases relating to:

- A collision between two motorbikes on a race track
- A costs order reflecting the conduct of the parties
- The use of a ''Calderbank'' offer in a costs case
- Costs budgeting

Malcom Henké
Partner & Head of LACIG



Public Liability

Brand v No Limits Track Days Limited (2020) EWHC 1306 (QB)

This claim arose from a motorbike accident that occurred when the claimant was on the track at Oulton Park participating in an open session, organised by the defendant, with fast riders. During that session a group of riders were taken on the track by an instructor for sighting laps. One of the riders in that group collided with the claimant, who suffered life changing injuries as a consequence.

The track days organised by the defendant allowed motorcyclists to experience racetracks, such as Oulton Park, at speed. The riders attending tracks days as clients varied in experience. As a consequence of the varying levels of customer's experience and skill, the riders were divided into groups that had three levels: fast, intermediate and novice. That was the arrangement on the day of the accident.

The evidence was that the defendant relied on customers to decide which group they should register for. The lack of any real checks on which group a rider should join suggested that riders could choose to ride in groups that did not reflect their true ability. In practice that seemed to have happened.

It was obvious that an alternative to relying on riders to decide which group they joined would be to keep a record of riders' experience. A rider's experience would not be the only matter that affected a rider's speed. Other matters would affect speed such as the motorbike used, the tyres used, whether tyre warmers were used and a rider's aptitude. All of these matters meant that rider speed with any group could vary significantly.

The variety of matters that could influence a rider's speed meant that it was best to assess the speed of riders during the course of a track day. Instructors were selected because they were able to assess the manner in which a rider rode during 'sighting' laps. If they concluded that a rider was in the wrong group, they could suggest a rider dropped down a group. Part of the claimant's case was that sighting laps should not take place during fast open sessions. Concerns were raised before the accident in question about this practice of allowing sighting laps during open sessions.

The claimant was an instructor for the defendant at the track day held on the day of the accident. A Mr Hollinshead arrived for the track day as a reserve rider. That meant that he was aware the track day was full but was hoping that a space would arise during the day so that he could participate in at least some of the open sessions. His evidence is that he was a very experienced track rider. He was also an experienced mechanic who was used to repairing and servicing motorbikes. On this day he was riding a 1000cc Yamaha R1.

At the start of the afternoon, there were a number of riders who wished to ride but who had not undertaken sighting laps and so needed to undertake sighting laps during an open session. Another instructor took three riders out for sighting laps during the fast-open session. One was Mr Hollinshead. The sighting group containing Mr Hollinshead entered the racetrack while an open fast group was taking place. The instructor led the group and Mr Hollinshead was at the rear. This group was three quarters of the way into its first lap when the accident occurred.

At the time when the sighting group went on to the track, the claimant was already on the track supervising the fast group. It was his case that he would not have anticipated riders undertaking sighting laps halfway through an open fast group.

The accident occurred when the claimant collided with Mr Hollinshead. There was CCTV of the accident, although it was not of high quality as the camera was a significant distance from the accident. One of the wheels on Mr Hollinshead's motorbike appeared to leave the track and it performed a manoeuvre commonly called an endo or a stoppie. The endo caused the motorbike to fall on its side and the claimant collided with it.

There was no evidence that the claimant and Mr Hollinshead would have collided had there been no endo.

The Deputy High Court Judge identified the issues to be determined as:

i) What, as a matter of fact, was the mechanism of the accident?

ii) Did the defendant breach the duty of care owed to the claimant?

iii) Was the accident caused by any breach of the duty of care admittedly owed by the defendant?

On the first issue the judge held that the accident was caused because Mr Hollinshead's motorbike performed an endo. On the basis of the expert evidence, the endo was due to an unforeseen mechanical accident and the claimant being too close to Mr Hollinshead. In light of that conclusion, it could not be proved to the balance of probabilities that the accident was caused by anything other than an unforeseen mechanical accident.

'…any rider in a fast-open session must expect that there would be riders riding at a range of speeds'

On the second issue (breach of duty), volume 4.1 of the defendant's Instructors' Manual was correct to recognise that there were a range of matters that might cause a rider to ride slower during a sighting lap than they would in an open session. As a consequence, there was good reason why an instructor should be cautious before taking a rider out for a sighting lap in a fast group.

However, volume 4.1 of the Instructor Manual did not set a rigid rule. There was good reason for that. There were reasons why a sighting lap should not be conducted too slowly. There were obvious safety issues if a fast sighting lap was undertaken while a slow novice open session was taking place. Fast riders also needed to keep their tyres warmed up. The risks associated with sighting laps involving riders from the fast group taking place at the same time as a fast-open group were

not as great as might first appear. One implication of the evidence was that any rider in a fast-open session must expect that there would be riders riding at a range of speeds. First, it was not uncommon for there to be sighting laps. In addition, other factors such as equipment and experience would affect a rider's speed. It was implicit in the decision to arrange track days so that there were three groups, that each group would include riders riding at a range of speeds. The difference in speed between open sessions and sighting laps was not as great as that claimed by the claimant's witnesses. That was particularly true where sighting laps were taking place at the same time as open sessions.

The claimant had failed to prove on the balance of probabilities that the defendant failed to act with the skill and care expected of a reasonably competent organiser of motorbike track days when it allowed Mr Hollinshead and others to participate in a sighting lap while others were participating in a fast-open session. There were good reasons why individual instructors should be allowed to decide whether it was appropriate for riders to participate in a sighting lap while others were participating in a fast-open session.

Further, the claimant had failed to prove on the balance of probabilities that the other instructor failed to act with the skill and care expected of a reasonably competent motorbike track day instructor. His evidence was clear that he assessed Mr Hollinshead before taking him out for a sighting lap. Most of the evidence accepted that instructors were in the best position to assess whether a rider should be taken out in a particular sighting group.

The findings above as to whether there has been a breach of duty of care meant that this claim could not succeed. However, in case he was wrong about those issues, the judge went on to consider further issues raised by the claim.

Although causation could have been established as a matter of fact, the findings regarding the mechanism of the accident meant that it could not be proved to the balance of probabilities that any breach of duty was the legal cause of the accident. The direct cause of the accident had nothing to do with any breach of duty. That was because it could not be said that the direct cause was anything other than a mechanical fault. As a consequence, it could not be said that any breach of duty was the 'real, substantial, direct or effective cause' of the accident or that the accident was 'so closely mixed up' with the defendant's breach of duty that it ought to be regarded as causative of the accident.

If wrong about legal causation, there was a more fundamental problem. The claimant had not established that the endo was caused by anything other than a mechanical failure. There was no evidence that suggested that mechanical failure was caused by the tortious acts of Mr Hollinshead or anyone else. That mechanical failure would have been sufficient to cause the accident as it did not depend upon any breach of duty. As there was an intervening act that meant that causation could not be established.

The claimant was represented by Hudgell Solicitors

The defendant was represented by BLM

Comment

Although finding that the defendant was not legally liable for the accident, the judge suggested that there might be lessons to be learnt from this accident. He hoped that consideration might be given to whether safety could be improved. For example, the adequacy of records kept when decisions were taken as to whether a rider participated in a sighting lap at the same time as a particular open group.

Costs

DBE Energy Limited v Biogas Products Limited (2020) EWHC 1285 (TCC)

Following the judgment on liability in this commercial case, a number of issues arose as to interest and costs. This summary is limited to the costs issues that are of wider interest.

The claimant's submissions on costs were that, as the winning party, it was entitled to recover all of its costs of these proceedings to be assessed on a standard basis, if not agreed. The defendant accepted that it was inevitable that, as the losing party, it would have to pay a substantial proportion of the claimant's costs on the standard basis, but it contended that in circumstances where the claimant had been unsuccessful in relation to two distinct elements of its claim this was an appropriate case for the court to make an issues-based costs order.

It argued for a reduction in the claimant's costs of 50%, alternatively a reduction in the costs payable by reference to the approach in CPR 44.2(7) by a fixed percentage. If the latter approach was to be adopted, the defendant argued that it should be ordered to pay only 75% of the claimant's costs of the action.

After citing the relevant legal principles, the Deputy High Court Judge held that it would not be appropriate in this case to make an issues-based costs order, but that a proportional costs order would be appropriate to reflect the defendant's success in defending the two issues.

The reasons for reaching this conclusion were as follows:

a. First, the central issue (and the issue that took up far and away the most time at trial and in the main judgment) was the issue of liability. The claimant won on this central issue.

b. Second, the issues arising in relation to liability were substantially the same in relation to the first of those on which the defendant had succeeded. The length and cost of the trial would not have been significantly different if the claim had been limited to the claim had not included that issue.

c. Third, the length and cost of the trial would not have been significantly different if the second issue on which the defendant succeeded (a delay claim) had been limited to a two week, rather than a 15-week, period. There was no expert evidence on the issue of delay. The quantum experts would always have been required to provide evidence as to the daily/weekly loss of revenue that would be sustained by the claimant.

d. Fourth, each party could be criticised (with some justification) for its conduct at differing times in the proceedings and the

defendant was right to say that insofar as its own unreasonable conduct had caused the claimant to incur additional costs, those would be recovered as part of the order. However, the defendant's criticisms of the claimant's approach to the two issues in question had considerable force. The first issue was doomed to failure by reason of the lack of any adequate evidence on causation. It should not have been pursued and it was unreasonable of the claimant to pursue it absent appropriate evidence. The delay claim of 15 weeks was, on any proper analysis of the evidence, over-stated.

'…an issues-based costs order invariably created practical difficulties (not least because of the difficulties involved in seeking to dissect the issues and the costs incurred in relation to each issue)'

However, in circumstances where an issues-based costs order invariably created practical difficulties (not least because of the difficulties involved in seeking to dissect the issues and the costs incurred in relation to each issue) and given the terms of CPR 44.3(7), the factors identified above militated in favour of a proportional order for costs.

The defendant should pay 90% of the claimant's costs to be assessed on the standard basis if not agreed.

The claimant argued that the costs order in its favour should cover not only the costs of these proceedings generally, but also other discrete issues, including the costs of compliance with the Pre-Action Protocol and the costs of a failed mediation.

S51 Senior Courts Act 1981 provided that the court had the discretion to award "the costs of and incidental to all proceedings". The claimant submitted that those words gave the court a broad discretion to award costs for compliance with the Pre-Action Protocol and for a failed mediation.

The judge held that she was not satisfied that it would be just to order that the defendant should pay the claimant's costs of either its compliance with the Pre-Action Protocol or its costs of mediation. She gave the following reasons:

a. In relation to the pre-action protocol, the judge was not satisfied that the claimant did in fact comply satisfactorily with the Protocol. The chain of events at that time did not evidence proper compliance with the Pre-Action Protocol by the claimant. This was not a case in which the defendant had been dragging its feet for a significant period after first receiving notification of a potential claim. Whilst there had been a few weeks' delay, there was no reason to suppose that the defendant would not have provided a detailed letter of response to the letter of claim or that it would have refused thereafter to mediate.

b. In relation to the costs of the failed mediation, the parties both made global offers to settle and those offers came relatively close to each other, but the court had no further information about what occurred. In Vellacott the parties agreed that the court could be given information about what had been going on behind the "without prejudice" curtain that would ordinarily be drawn across a failed mediation – a stance that was not adopted in this case. In the circumstances the judge was not in a position to conclude that justice required the claimant to recover its costs of the mediation. The parties would each bear their own costs.

The claimant was represented by Reynolds Porter Chamberlain LLP

The defendant was represented Mills & Reeve LLP

Comment

Two particular points arise from this judgment. The first is that an issued based costs order will only be made where the costs of the issue(s) in question can be clearly identified as discrete from the costs of the claim overall. Secondly, to criticise successfully another party's pre-action conduct, the party raising the criticism must ensure that its own conduct cannot be called into question.

Costs and Calderbank offers

MEF (Protected Party) v St George's Healthcare NHS Trust (2020) 1300 (QB)

The question at the heart of this appeal was whether a "Calderbank" offer to settle (without express time limit) could be accepted once the relevant substantive hearing (and in particular here, a detailed assessment of costs hearing) had commenced or whether such an offer lapsed at the commencement of the hearing.

Following a series of offers and counter-offers over the previous 16 months, on 19 August 2019, the defendant/appellant offered to settle the claimant/respondent's claim for costs at a figure of £440,000 on condition that the claimant paid certain of the defendant's costs of the assessment ("the August 2019 offer").

The hearing of the detailed assessment, due to last three days, commenced on 17 September 2019. Just before the end of the second day, the claimant's solicitors sent an email purporting to accept the August 2019 offer. By that stage of the assessment hearing, it was the case that, if the assessment continued to a conclusion, the claimant would recover less than £440,000. The dispute as to the effect of the purported acceptance was transferred to a costs judge, who, after argument the next day, held that it constituted a valid settlement of the claimant's claim.

CPR 44.2, which applied equally to the costs of detailed assessment proceedings, sets out the court's discretion as to costs. CPR 44.2(4) provided that, in deciding what order to make about costs, the court would have regard to all the circumstances, including "(c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which the costs consequences under Part 36 apply". Thus, a "Calderbank letter" (an offer made without prejudice save as to costs) which had not been accepted would be taken into account when the court exercised its discretion as to the costs of the proceedings.

CPR 47.20 addressed "Liability for costs of detailed assessment proceedings". The receiving party was, generally, entitled to those costs: CPR 47.20(1). The court had a discretion to make some other order; relevant factors being set out at CPR 47.20(3). CPR 47.20(4) expressly provided that the CPR Part 36 provisions applied to the costs of detailed assessment proceedings, with certain modifications. As to CPR Part 36 itself, the regime for offers under CPR Part 36 was a self-contained code; general contract principles of offer and acceptance did not apply. In view of the modifications in CPR 47.20(4)(b) and (c), where a Part 36 offer was made in respect of the costs of detailed assessment, the court's permission was required to accept such an offer, once the detailed assessment hearing had started and until the bill had

been finally assessed or agreed.

As to the relevant contract law principles (relevant to 'Calderbank' offers) of offer and acceptance the High Court Judge hearing the appeal cited Chitty on Contracts (33rd edition). An offer which was rejected was no longer valid. An offer could be withdrawn by the offeror at any time prior to acceptance by the offeree.

"Where the duration of an offer is not limited… the offer comes to an end after the lapse of a reasonable time. What is a reasonable time depends on all the circumstances; for example, on the nature of the subject matter and on the means of communication…"

Dismissing the defendant's appeal, the judge held:

1. The August 2019 Offer was an offer to settle proceedings; more particularly to settle detailed assessment proceedings. In a detailed assessment hearing, each party would almost certainly know, as the hearing progressed, how well or badly the hearing was going. They would be able to re-calculate the bill from time to time as the costs judge made "mini-decisions" on individual issues. This feature of detailed assessment made the position distinct from that pertaining in other types of proceeding, where a party might well perceive that the hearing was not going well, but was less likely to know whether or not the ultimate outcome would be better or worse than an offer which had been made.

2. The Part 36 procedure was available to be used in such proceedings; it was available to the defendant, which chose instead to use the different "Calderbank" offer approach. There could be no direct "read across" from Part 36 procedure to the contractual position of a Calderbank offer.

'…the defendant was aware throughout that it could withdraw the offer made, but consciously decided not to do so'

3. The course and content of the defendant's prior offers since April 2018 was highly relevant context. First, none of the earlier offers had an absolute time limit. Rather an initial April 2018 offer was subject to a time condition with costs consequences. It was a reasonable inference that the subsequent offers (September, October and January) were subject to the condition that if they were not accepted within a reasonable time, the claimant would be responsible for the defendant's costs. Thus, an ability to accept the offer(s) late but subject to that costs condition was inconsistent with an absolute time limit upon acceptance. Secondly, the defendant was aware throughout that it could withdraw the offer made, but consciously decided not to do so. Thirdly, the fact that the £440,000 offer remained "open" and at the same level, despite the continuing weakening of the claimant's claim following service of the Replies to the Points of Dispute indicated the defendant was not necessarily concerned with the precise amount of the likely outcome.

Accordingly, the August 2019 offer did not lapse at the door of the court, but remained open for acceptance.

4. As regards costs, the defendant remained fully protected. If the claimant accepted the offer, during the assessment, he was bound to pay the defendant's costs incurred since as far back as September 2018, and including its costs of the detailed assessment hearing. On the other hand, if the claimant did not accept the offer, then the defendant would be able to refer the costs judge to the offer on the issue of the costs of the assessment under CPR 44.2(4).

5. The situation fell to be considered at the time that the offer was made, or at the very latest, at the door of the court prior to commencement of the hearing. (The defendant's case on appeal was that the offer was impliedly withdrawn at that point in time; not that the offer lapsed only once it became clear that the claimant would recover less than the offer.) It might be that, with the benefit of hindsight, it turned out that the defendant was likely to be worse off than if the offer had not been made, but that was not the question. Here, when the offer was made, and at the door of the court, the defendant's assessment was that the claimant would recover a sum at or close to the level of the offer. If at that point the defendant's assessment was that the claimant was going to recover substantially less than the offer, then he would not have made the offer or would or could have withdrawn it or reduced it. In this regard, on the facts here, it was noticeable that the defendant did not reduce the level of the offer, despite the fact that the value of the claim appeared to reduce by at least £100,000. It was always open to the defendant to put a time limit on the offer. Equally it was open to it to withdraw the offer at any time. The defendant could have withdrawn the offer at lunchtime on the second day of the hearing.

As to the construction of the August 2019 offer, it had to be construed against the background of the previous offers. Taking into account of all the available background knowledge and relevant surrounding circumstances, a reasonable person would have understood the defendant to have meant, by the language used, that the condition of the offer was that the claimant should accept, in principle, to pay the defendant's costs of the detailed assessment after 27 September 2018, to be assessed if not agreed. The terms did not require the claimant to agree a precise figure for the defendant's costs before accepting the offer.

The claimant was represented by Stewarts Solicitors

The defendant was represented by Acumension Ltd

Comment

This case illustrates both the potential benefits of a Calderbank offer over a Part 36 offer, and the possible pitfalls. The basic laws of contract must be borne in mind at all times.

Costs Budgeting

Utting v City College Norwich (2020) EWHC B20 (Costs)

This judgment concerned two issues relating to costs budgeting. The first issue was whether a so-called 'underspend' in respect of budgeted sums was of itself a "good reason" to depart from a budget pursuant to CPR 3.18; the second, in the event that this amounted to a "good reason", was whether the court should reduce the sums claimed for the respective phases.

CPR 3.18 provides:

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;……

The defendant argued that on a proper construction of the relevant provisions, if the amount of the claim in the Bill of costs in respect a of a particular phase did not match or exceed the budgeted sum then the costs of that phase were necessarily subject to a detailed assessment. This principle was to be applied whether the 'underspend' was very modest or large but arose simply on the basis that the sum claimed had not reached the full amount allowed on the budget The claimant submitted this did not amount to a "good reason" and resisted any reduction to the sums claimed on the basis sought.

The claimant's claim arose out of an accident at work. An admission of liability was made but no admission as to the extent of the injuries suffered. Proceedings were issued in the High Court. The relevant costs management order was made following substantial agreement as to the allowances to be made for the respective budget phases. Directions were also made at the same hearing taking matter through to trial.

In her initial schedule the claimant sought damages of just over £1.65 million. The claim progressed towards a trial listed for 15 May 2019, but settled 20 days before trial. By the terms of settlement damages of £300,000 were payable plus costs on the standard basis. Net of CRU benefits and interim payments the sum payable by way of damages amounted to £296,850.

Save for the Trial Preparation and Trial phases (and possibly one other matter) it was clear that the phases had been completed or at least substantially so. That was to say that the work that was assumed would be done in the relevant phase had been done.

'…there was a clear and obvious distinction between an 'underspend' and the… substantial non-completion of the phase'

Finding in favour of the claimant on both issues, the Master held that there was a clear and obvious distinction between an 'underspend' and the situation that arose in respect to the Trial and Trial Preparation phases where plainly there was, at the very least, substantial non-completion of the phase. As to whether an 'underspend' amounted to a "good reason", if an underspend were to be a good reason for departing from a budget it would be liable to substantially undermine the effectiveness of cost budgeting.

Solicitors who had acted efficiently and kept costs within budget would find their costs subject to detailed assessment, whereas less efficient solicitors who exceeded the budget would, absent any other "good reason", receive the budgeted sum and avoid detailed assessment. This was to be contrasted with the situation where a phase was not substantially completed, where it would be unjust for a receiving party to receive the full amount of a budgeted sum in circumstances where only a modest amount of the expected work had been done.

Alternatively, the "good reason" for departing from the budget must dictate the route of departure. Such an approach flowed from a purposive reading of CPR 3.18. Thus, even if 'underspend' were a "good reason" for the purpose of CPR 3.18 it did not follow that there should be a deduction from the sums claimed. Plainly, the fact that a party had spent less than its budget for a phase did not mean there was therefore in fact a good or appropriate reason for any further reduction.

Further, and ignoring for current purposes the Trial and Trial Preparation phases, the Master was not satisfied that it would be appropriate to make any reduction from the sums claimed. He could see no proper basis for having a line by line assessment in respect of the other phases. The sums claimed fell within those sums which were agreed or approved as reasonable and proportionate for the work to be done. Inevitably budgets were not produced with a degree of precision that could be applied in a detailed assessment; but that was not a justification for having a line by line assessment: indeed, it seemed to be incompatible with the aims of costs budgeting.

In respect of the Issue and Statements of Case phase the defendant argued that no Counter Schedule was served as anticipated. This might, potentially, have amounted to a "good reason" for departing from the budgeted sum as it might have been argued, that the phase was not substantially completed. However, given that the sums claimed for the phase fell substantially short of the budgeted figure, taking a broad-brush approach, it did not justify any further reduction.

The more general point made by the defendant, was that the case settled for substantially less than claimed and this of itself justified a substantial reduction. However, the sum recovered in the substantive action, was nevertheless substantial and not of itself sufficient to justify the conclusion that costs incurred were unreasonably incurred.

It was also said by the defendant that there were costs in relation to applications not budgeted for but nevertheless included within the budgeted phase. These costs, it was said, not having been budgeted should be the subject of scrutiny by the court. It might be thought the fact that further work which was done in relation was not anticipated at the time of the budget would, if anything, have justified an increase in the budgeted sum. In any event it was not clear how this of itself could justify a further reduction.

In relation to the ADR phase it was clear that the phase was completed or at least substantially so. Not only had there been a JSM but there was substantial negotiation thereafter. Merely because the negotiation did not carry on quite up to the date the trial was due to start was not enough to justify

any further reduction from the sums claimed.

In any event, bearing in mind all these points and taking a broad-brush approach, the Master was not satisfied that the relevant costs were unreasonably incurred having regard to all the circumstances including in particular the agreed/approved phases of the costs budget.

The claimant was represented by a Costs' Draftsman

The defendant was represented by DWF Solicitors

Comment

This seems to be a common sense decision, if costs budgeting is to serve its purpose. Unless a party applies to increase or decrease a budget, the approved budgets will determine what costs may be recovered, unless there is good (and perhaps obvious) reason for doing so.

Useful links:

Brand v No Limits Track Days Limited

DBE Energy Limited v Biogas Products Limited

MEF (Protected Party) v St George's Healthcare NHS Trust

Utting v City College Norwich