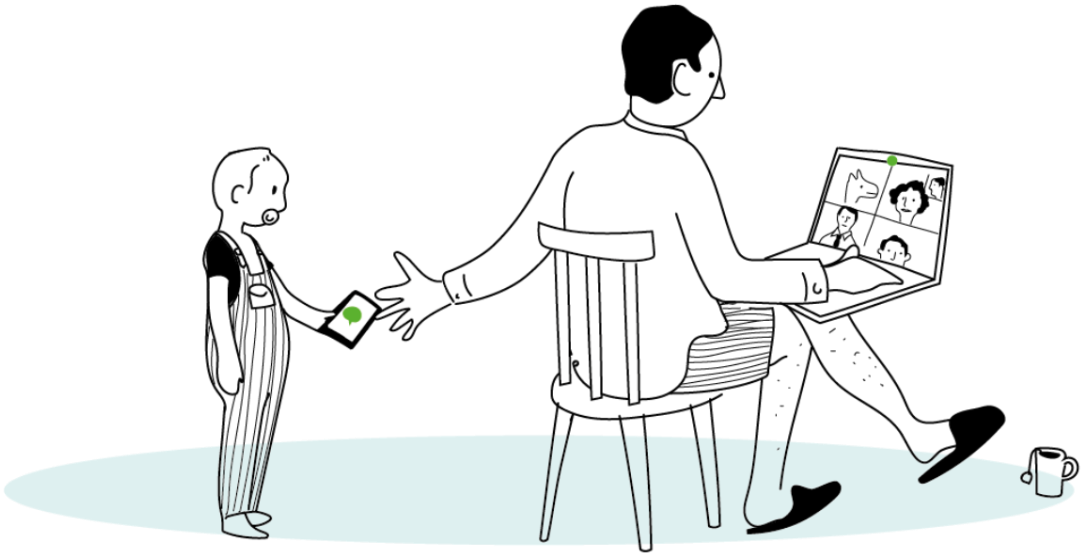
The Costs Briefing

Issue 13, September 2020



Dear Colleague

I am delighted to bring you the September 2020 edition of Costs Briefing.

Our new Costs Briefing format – the long read email – has received good feedback from our clients and professional colleagues and is here to stay.

Our Virtual Roundtables, or as Jeremy likes to refer to them ‘costs chats amongst friends’, are flourishing and are another development which is here to stay.

James Heawood's article sets out what you need to know about the new Precedent T and updated budget variation process which comes into effect on 1 October 2020.

As we move into the Autumn, it’s hard to believe that we have been working

fully remotely for six months now. It has been heartening to see how well we and our clients continue to work together and interact with the court system. The Senior Court Costs Office has made an equally good transition to dealing with more hearings by telephone and video conference, another development which looks like it is here to stay.

As always, we hope that the content of this issue is relevant and useful and ideas for future topics to include are always welcome.

Deborah Burke
Managing Associate

In this issue

Blackpool Borough Council v Volkerfitzpatrick and others [2020] EWHC 2128 (TCC)

Jeremy Morgan QC

There are two good reasons to read this judgment. The first is because it decides an issue of law, namely the test to be applied when deciding the consequences of a party's failure to accept a Part 36 offer which is later withdrawn. The second is that it is a good example of organised, rational and objective decision-making at the end of a complex trial. You would not get brownie points by showing it to the judge in a later case and tell them that this is how it should be done, but it does provide a useful model for advocates on how to structure their own costs submissions at the end of a case where everyone claims to have won and there are any number of countervailing considerations relevant to costs.

The facts

The facts are quite complex but the relevant ones can be stated briefly. The claim arose out of the construction by the defendant for the claimant of a tram depot. The claimant alleged that significant parts of the depot did not meet their design life of 50 years and that they were not suitable for the coastal site on which the depot is situated. A Scott Schedule listed defects under seven main headings and the claim was for over £6m. There were additional claims against 3rd, 4th and 5th party sub-contractors. At trial the claimant was awarded £1.1m, having failed altogether on the biggest item of the claim and recovered about 10% of the next two biggest items together with sums close to those claimed on the remaining, much smaller, items.

On August 15th 2019 the defendant made a Part 36 offer of £750k from which certain named items were expressly excluded. At the same time the defendant referred to an open offer previously made of £137k for all but one of the excluded items (the "tram doors claim"), but without making it clear whether that earlier offer remained on the table in respect of those items.

On November 21st 2019, for perfectly sound tactical reasons, the defendant withdrew its Part 36 offer. Various other offers were made but do not need to be considered for present purposes. The defendant did better at trial than its Part 36 offer in respect of those items included in the offer.

The question of law

There is a long line of authority on the approach of the court to offers to settle which are subsequently withdrawn. The cases go back to the RSC and some of

them hinge on changes in the wording of the rules from time to time. The most recent statement by the Court of Appeal is by Jackson LJ in *Thakkar v Patel* [2017] EWCA Civ 117, 23: "The effect of [two earlier authorities] is that where a purported Part 36 offer under the pre-April 2015 CPR is withdrawn, the crucial question is whether the offeree acted reasonably or unreasonably in failing to accept the offer while it was on the table. In both of those cases, the claimants acted unreasonably. Accordingly, the court made costs orders favourable to the defendants".

That statement leaves open the question, which is decided in the *Blackpool* case, of how to judge whether the offeree acted reasonably or unreasonably in failing to accept the offer. Does one simply look at whether, objectively, the offeror beat its offer or is reasonableness considered by reference to the offeree's reasonable perception of its own interests?

The Judge held that, "(a) the court must put itself into the position of the claimant at the time and not simply decide the case by reference to hindsight; but (b) the focus must be on the reasonableness of the refusal by reference to the facts and matters relevant to the merits of the claim as they ought reasonably to have appeared to the claimant at that time, not by reference to wider commercial factors."

On the facts of this case the Judge held that the claimant had acted unreasonably in not accepting the offer. At the time of the offer it was in a position to undertake its own assessment and valuation of the case, and there was nothing which the defendant had which the claimant had not. The later withdrawal of the offer was irrelevant since there was no basis for thinking it would have been accepted if it not been withdrawn.

So the result would have been the same whichever interpretation the Judge had put on Jackson LJ's dictum in *Thakkar*. The real test of the Judge's ruling will come in a case where, for example, crucial documents or other evidence in the possession of the offeror have not been disclosed to the offeree at the time of the offer or at any time while it is still open for acceptance.

A model decision on costs

A brief schematic analysis is necessary to illustrate my view that the judgment is a model for structuring submissions on costs.

Question 1 – who is the winner? Each side claimed to have won, the claimant because it had come away with a substantial award and the defendant because the claimant had failed on the major issues and recovered only 16% of its claim. The Judge had no doubt that the claimant was the successful party. This was not a case like the personal injury cases where the claimant succeeds on liability and gets damages for a trivial injury but fails to establish the seriously exaggerated injury which the case was all about. The starting point was that the claimant was entitled to its costs.

Question 2 – so the real question was whether to exercise the power under r.44.2(2)(b) to make some other order and if so what.

Question 3 – the effect of the only partial success. The claimant had failed on the major issue of contractual construction and had wholly failed on the largest item of claim which had taken up the greatest amount of trial time and expert evidence: in money terms it had largely failed on the two next biggest items. But the claimant had still recovered over £1m and had success on six of the seven heads of claim. In those circumstances the Judge held that if he

departed substantially from the starting point he would be going too far.

Question 4 – was the claimant's conduct such that it should either be deprived of costs on the grounds of conduct or if ordered to pay costs, should any such award be on the indemnity basis as claimed by the fifth party? The fifth party, it should be explained at this point, had only been brought in as a result of the claim on which the claimant wholly failed. The Judge rejected the submission that that particular claim was "weak, thin and to some degree speculative" (a ground for indemnity costs since *Three Rivers* [2006] EWHC 816 (Comm)). He held that he could not so find in the absence of evidence that the claimant was ignoring the views of its experts or knew or ought to have known that they were wrong or needed further investigation. It had taken a trial to establish that the submissions of the defendant and fifth party were correct.

Question 5 – Part 36 offer. As we have seen, the Judge took the view that the decision not to accept the defendant's Part 36 offer while it was still on the table was unreasonable. On that basis he held that the defendant should get its costs of the issues covered by the offer from 21 days after the offer. However, when coming on to consider the further question whether the decision was so unreasonable as to justify an award of indemnity costs, he held that it was not unreasonable *in such a high degree* as to justify such an award. Although it was now clear that the claim was neither as strong nor as valuable as had been assumed, it was still a viable case which, if successful, would have resulted in a substantial award of damages.

Question 6 – what order should be made? The claimant should get 80% of its costs down to 21 days after the offer, the reduction reflecting the extent of the issues on which the claimant had failed. The defendant should get 80% of its costs thereafter. The reduction here was because there was one substantial

issue (the tram doors) on which no offer had ever been made and on which the claimant succeeded at trial. The Judge reduced the award to the defendant by deducting the defendant's costs of that issue and setting-off a further sum for the claimant's costs of the same issue. His approach to calculating these costs was interesting. He estimated that about 20% of the costs had been incurred on this issue and, as each side had similar levels of budgeted costs, if a straight line approach had been adopted he would have reduced the defendant's award by 40% (20% for its own costs and 20% as a set-off for the claimant's). However rather than looking at the budgets for the actual case he considered the sum that he would have approved by way of budget had the tram doors been the only claim and made a deduction of 20% (10% + 10%).

The new Precedent T

James Heawood - Senior Associate, Practico Limited

On 21 July 2020 it was announced that there will be an amendment to Part 3 of the CPR (Civil Procedure (Amendment No. 3) Rules 2020) which will significantly change the way in which parties deal with budget variations. This change comes into effect on 1 October 2020 and with it comes the new Precedent T.

Why was it needed?

The requirement (PD 3E, paragraph 7.6), as it stands, allows each party to revise its budget upwards or downwards where there is a significant development in the litigation and the opportunity to agree the variation

between the parties. Only where agreement is not reached does the Court have to approve, vary or disallow the changes.

In terms of documentation, parties have tended to use a mark-up of the original budgets, with varying degrees of success, to set out the variations sought and the contentious issues between the parties.

Problems have tended to arise from the non-standardised approaches taken and often lead to lengthy arguments on presentational differences before any discussion on the substantive changes can take place.

Parties end up unclear on what costs appear where, how costs are apportioned and whether they fall into incurred or estimated costs. These issues lead to wasteful arguments at the budget revision stage and add confusion and further argument at detailed assessment, with disagreements on whether parties have breached their budgets and whether costs need to be assessed or whether they should be allowed as part of the estimated costs.

These problems have been further exacerbated by the opportunity provided by the rules to complete this task without Court involvement.

The new Precedent T

So, what does the new document look like and will it make life better?

For starters, it provides a very clear distinction between the previous budget and the variation sought. The summary sheet allows for the previous budget information to be included and a separate column for the variation by phase with a further column for the future total estimated costs sought (including

those from the original budget).

It is also apparent from the document that the focus will be on global figures. The summary page has one column for the variation sought (covering time costs and disbursements) and the particulars page only breaks down that figure into time costs and disbursements (although there is a box allowing for a more detailed breakdown of expert's fees, as in the Precedent H). This supports the approach taken to budgeting by the Courts by dealing with costs on a global phase basis rather than the more detailed breakdown approach required in the Precedent H presentation.

The particulars page allows for arguments both in support of (for the party seeking the variation) and against (for the opposing party), similar to the Precedent R. This ensures that there is one document for the Court to consider. There is an opportunity for parties to provide a general explanation and objection to the variation and further boxes for each phase. However, in what appears to be an attempt to minimise and streamline information, explanation per phase is only required where the variation is above £10,000.

The new document seems to be clear, concise and a helpful addition to the budgeting process which should make the process better, but what about the new rule (3.15(A))?

The rule is fairly streamlined too – setting out clearly what the revising party must serve. However, a couple of key points to note:

1. The Precedent T must be served "promptly" although there is no guidance yet on what promptly might mean.

2. The particulars of variation must be provided to the Court, whether agreed or not, and the Court may vary, allow or disallow the variations sought – presumably regardless of what is agreed between the parties.
3. The Court does have the power to vary budgeted costs incurred after the costs management order and prior to the variation order.

The Precedent T, together with the new rules, should assist in streamlining the process of budget variations, remove the uncertainty created in multiple approaches and enable the Court to have greater clarity and input into costs budget variations and therefore the overall costs. The Precedent T should also assist in reducing arguments on estimated costs at the detailed assessment stage, making it clearer as to what costs are allowed and where good reason to depart will be required.

Virtual Costs Roundtables

Deborah Burke, Managing Associate - Practico Ltd

Our Virtual Roundtables developed directly out of the necessary curtailment of our ever popular breakfasts at the Devonshire Club. Our first VRT saw Ben Williams QC on great form as he took us through some recent case law developments.

Our second virtual event reprises the relaxed ‘costs chat amongst friends’ format, ably led by Jeremy Morgan QC. In this session he is joined by Marion Smith QC and Paul Darling QC both of 39 Essex.

Marion, Paul and Jeremy take a very practical look at costs considerations in commercial litigation and arbitration.

They make the point that costs are up front and central now for clients. Clients want to know what a claim is worth and how much it will cost to pursue or defend. There is also an increasing focus on reducing or eliminating irrecoverable costs.

The discussion covers the tactics of security for costs applications, the increased interest in accessing funding information and the push to costs manage ever larger cases, all of which are of interest to litigators and their clients.

In our most recent Roundtable, the first case looked at by Nick Bacon QC is the appeal to the High Court in the case of Darya Belsner v Cam Legal Services Ltd (High Court of Justice, Sheffield District Registry, Claim no. E90SE056). The client has challenged her liability to pay a greater amount of costs to her solicitors than she recovered from her opponent. Nick discusses how much costs information a solicitor needs to provide to a client in order to show that the client gave informed consent to the level of charges. The case is a timely reminder of the modern consumerist approach to solicitors' costs.

Nick, Jeremy and Andy move on to look at the Bott & Co Solicitors Ltd v Ryanair DAC case where Ryanair paid damages straight to the lay client of a specialist law firm. This was at odds with the usual practice of paying damages to the client's solicitors, from which the solicitors would then deduct their fees before paying the net amount to the client. The court had to consider whether or not an equitable lien arose in the solicitor's favour. On appeal, the Court of Appeal decided that the work done in cases which settle after the delivery of the letter before action does not come within the definition of litigation services and the lien did not apply.

Permission to appeal to the Supreme Court has been granted, throwing into sharp relief both policy and practical issues surrounding the modern way of prosecuting low value claims.

There is mention also of Ho v Adelekun which examines whether there can be a

set-off of costs as opposed to a set-off of damages and interest when Qualified One Way Costs Shifting applies. The interesting point is made that if a costs set-off is permitted, it will often be the lawyers who end up bearing the burden of adverse costs orders.

Moving on to another topic linked to solicitor client assessments, Nick's view is that the Solicitor's Act 1974 is a relic of the past and needs to be fundamentally overhauled. The 20% rule, the existence of a bespoke regime for assessing solicitor's fees despite heavy regulation by the SRA, the difference between the treatment of solicitor's fees and the fees of other professionals are just some of the concerns discussed by Nick, Jeremy and Andy.

Finally, there is reference to the failed attempt by Johnny Depp's lawyers to vary their costs budget on the eve of the trial of his widely publicised defamation case against The Sun. Once again, Nick, Jeremy and Andy provide interesting comment on the risks of not taking prompt steps to amend a costs budget when the circumstances of a case have changed.

Please click on the links below to access these recordings. Watch out as well for our next VRT which features Alex Hutton QC.

Ben Williams QC

Marion Smith QC and Paul Darling QC

Nick Bacon QC

Practico Blog: Assessment v ADR

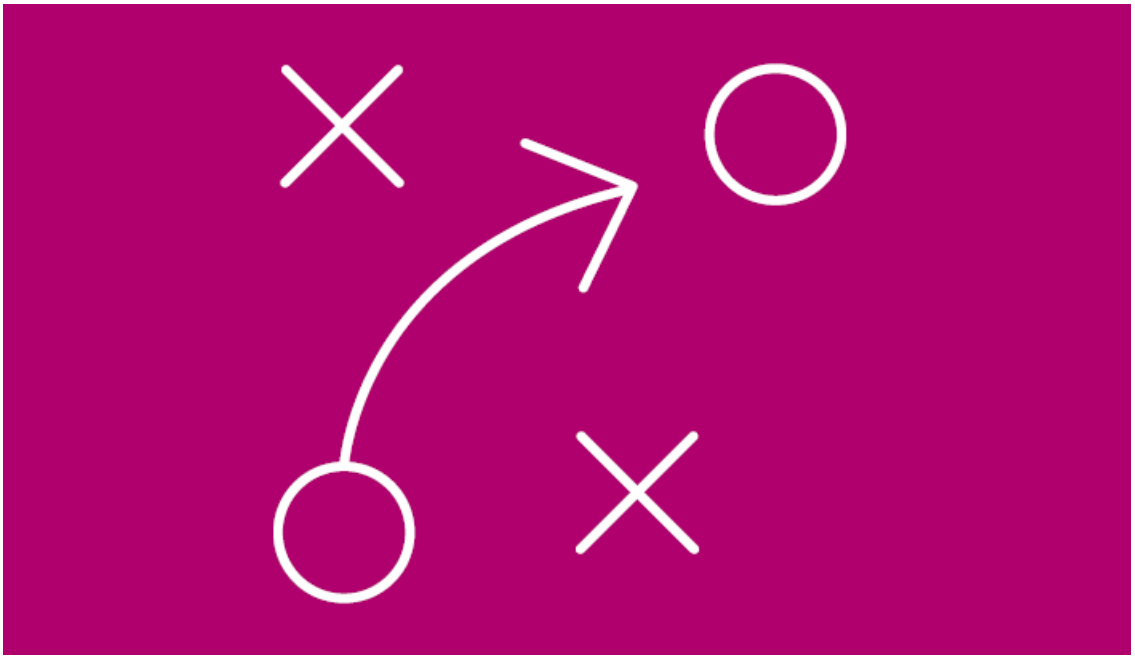
Andy Ellis, Managing Director - Practico Ltd

To see when Andy thinks assessment trumps ADR, click below.

Click here

Practico Blog: Merricks v Mastercard

Andy Ellis, Managing Director - Practico Ltd



The Merricks case is continuing its journey in the Competition Appeal Tribunal. To see how reasonable costs will be identified and managed by the court going forwards in this and other class actions click below.

Click here

Why damages-based agreements aren't more popular

Andy Ellis, Managing Director - Practico Ltd

In a recent article for Law360, Andy gives his view as to why DBAs aren't as popular as we thought they would be. Click below to read the article.

Click here

Meet the team

Francesca Ellis - Senior Associate, Practico Limited

I joined Practico as an Associate in 2012 having finished my law degree in Nottingham. I was initially reluctant to work in costs based on childhood memories of my dad dictating bills and counting letters. Thankfully, my first two years at Practico changed my mind and showed me there was more to it than I had previously thought.

With no previous formal tuition in costs, save for a one-hour seminar in the final year of my degree, I needed to learn on the job. Fortunately, we were instructed on several interesting and high-profile projects which provided me with training opportunities while tackling a range of challenging costs

issues. The broad spectrum of work available, combined with support and advice from highly experienced colleagues, quickly developed my knowledge.

During my first two years at Practico I also continued my studies on a part-time basis and successfully completed the LPC in 2014. I found the LPC to be extremely valuable. It improved my understanding of how law and procedure is applied in practice and it greatly assisted in developing my legal skills, which complimented my training at Practico.

Just when I thought I had finished balancing work and studying, in 2015 the ACL introduced their three-year costs lawyer training program. Whilst it would have been nice to have had a summer not studying for exams, it made sense for my career progression. I completed the ACL training course and qualified as a Costs Lawyer in 2017, which coincided with being promoted to a Senior Associate within the firm.

What struck me early on was Practico's dynamic approach to costs and their focus on analysis and improving the way costs are explained and presented to their clients and the court. Throughout the last eight years I have been heavily involved in developing new and better ways to deal with costs claims, and have played a lead role in many of the firm's largest and most complex projects. We are fortunate to have a highly knowledgeable and friendly team and we frequently get the opportunity to collaborate on larger projects and socialise outside of work. I am looking forward to the next chapter and am confident we will rise to the new challenges that inevitably lie ahead.

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