**Costs Budgets** continue to raise matters requiring appeals to provide guidance if not answers; in the case below the Claimant experienced difficulties in addressing the Judge at the CCMC as to the content of the Defendant's Costs Budget and took umbrage with the manner adopted by the Judge.

MR JUSTICE KERR (sitting with Judge Brown, assessor appointed under Part 35 of the Civil Procedure Rules 1998) was required to consider an appeal against a decision of Her Honour Judge Baucher, sitting in the Central London County Court, to approve the amount of the costs budget of the appellant, the claimant in a personal injury action against the respondent, the defendant to the action.

The trial had been fixed for two days in July 2024 and in her order, the Judge had approved the amount of the Claimant's estimated costs to £26,225.00 having concluded that Claimant's budget appeared disproportionate.

**There were two grounds to the appeal:**

**First**, in determining which costs of the Claimant's budget were 'reasonable and proportionate', the Learned Judge explicitly refused to have regard to the Defendant's budget, which the parties had agreed. This amounted to an error of law because (a) r.3.17 of the CPR required her, when making any case management decision, to 'have regard to any available budgets of the parties'; and (b) it was a relevant consideration in determining which costs were 'reasonable and proportionate' in the case.

**Second**, the Learned Judge failed to consider and ensure that 'the parties were on an equal footing'.

This the Claimant submitted amounted to an error of law because the purpose of costs management was to further the overriding objective by way of dealing with a case justly and at proportionate cost - ensuring that 'the parties are on an equal footing'.

In the circumstances, the CMO restricted the Claimant – with whom lay the burden of proof – to estimated costs of £26,225 where the Defendant's equivalent costs were £37,727 (or 42% more)."

The CCMC was conducted remotely and lasted from 3pm to 3.30pm, on 2 June 2023 later than planned. The judge's list was, as she explained, overloaded. She apologised that counsel had been kept waiting. She had a defendant's bundle in front of her, which she explained, she had read, or at least the proposed directions, agreed draft directions and pleadings. After a minor technical issue, the hearing was resumed and the judge confirmed that she understood the directions were agreed.

It was established that the claimant would call one witness only (himself), while the defendant was likely to call two witnesses. The defendant intended to serve a Part 18 request for further information but it was not ready yet. That was not in the agreed directions. The judge said she thought the process of getting the request served and answered would slow the preparation of witness statements. She decided, without objection from either side, to put back the date for exchange of witness statements from 4 September to 6 October 2023.

The judge asked the value of the claim and was advised *about £80,000* though the defendant thought that was unrealistic. The judge agreed that, on present indications, the pleaded award for pain, suffering and loss of amenity of £50,000 to £55,000 appeared unrealistic. The next topic was the length of the trial. The judge considered and decided she would list it for two days. She was not impressed by the suggestion of the claimant, that CCTV evidence would prolong it beyond two days. There is no complaint in the appeal about the two day listing.

The judge then turned to costs budgets. It was confirmed that the defendant's costs budget was agreed and that it was based on a two day trial. She asked if the claimant's budget was agreed and was told that it was not. She ascertained that the defendant's (agreed) budget was for about £58,000. She then found the claimant's budget and noted that it was for £121,886. Inviting the Claimant to address her on proportionality as "*it does not seem proportionate to me on the face of it*".

Following the discussion the judge made her case and costs management order which included paragraph 10, the subject of the appeal:

"10. Upon the Court concluding that the Claimant's budget appeared disproportionate, the Claimant's budget is approved as follows on the basis that the following figures for estimated costs (totalling £26,225) are reasonable and proportionate:

(l) £1,500 for issue /statements of case;

(2) £1,000 for disclosure:

(3) £2,800 for witness statements;

(4) £3,500 for expert reports;

(5) £3,175 for pre-trial review;

(6) £8,000 for trial preparation;

(7) £3,250 for trial; and

(8) £3,000 for alternative dispute resolution."

On appeal the Claimant referred to Rule 3:17:

*"The CPR have the overriding objective of enabling the court to deal with cases justly and at proportionate cost (r.1.1(1)). The court must seek to give effect to the overriding objective when exercising any power given to it by the CPR, including any case management power (r.1.2). This rule reinforces the point that the court's 'costs management' powers are 'a feature of or adjunct to' case management. The intention is that every case management decision should be made with full consideration of its cost implications. If the effect of making a particular case management direction is to render*

*a particular phase of the proceedings or procedural step of the claim disproportionate (by reference to the definition of proportionality stated in r.44.3(5)) then that direction will not be given."*

For the Claimant, Mr Grütters submitted that the judge discourteously interrupted him on three separate occasions when he attempted to refer to the content of the defendant's costs budget, on each occasion refusing to consider it. That, he said, was contrary to her duty under rule 3.17 because the amount to be allowed for the claimant's budget was a "case management decision" and the court was therefore required "to have regard to any available budgets of the parties".

Even if rule 3.17 was not directly applicable, it was submitted, that the defendant's budget was not immaterial to the proportionality of figures in the claimant's proposed budget and he should have been allowed to make submissions based on the content of the defendant's agreed budget for the various phases. The judge, however, refused to have regard to it and therefore misdirected herself by disregarding a relevant consideration. It was also procedurally unfair, he said, to refuse to allow the claimant to make relevant submissions in support of his case.

Whilst it was made clear that he was not arguing that there had to be anything like parity as between the parties' respective budgets; the Claimant's representative pointed out that the judge had indicated that a figure in the range from about £60,000 to £80,000 overall would be about right for a case such as this one yet the defendant's total budget, at nearly £59,000 was just below the bottom end of that range, meaning the figures in it could in principle be of some help in arriving at proportionate equivalent figures for the various phases in the claimant's budget.

Had the judge not unfairly refused to hear his arguments it was argued, he might have secured approval for the amount of £11,000 in respect of the trial phase (albeit it excludes the brief free, which is part of the earlier trial preparation phase); that was the amount offered in the defendant's Precedent R document which she had referred to earlier when approving certain agreed figures for earlier phases in the budget. He said the claimant wanted to rely on, but was prevented from relying on, the figure of just under £14,000 in the defendant's budget for cost of the trial.

For the Claimant it was submitted that the judge failed to consider, as required by the practice direction PD 3D (costs management) the factors set out in rule 44.3(5) (sums in issue, complexity, additional work generated by the other party, wider factors such as reputation or public importance and additional work or cost arising from vulnerability of a party or witness); and in rule 44.4(3)(c) and (h) (importance of the matter to all parties and the receiving party's last approved or agreed budget) and that in particular, the judge took no account of the claimant's vulnerability, which was supported by a psychiatric report and would mean he would have to take frequent breaks when giving evidence.

Kerr J in his reasoning and conclusions **firstly** accepted that decisions of this kind are likely to be made at speed, under time pressure and item by item as the hearing progresses, with summary reasoning at best. It will sometimes be sufficient to say that the submissions of X are preferred to the submissions of Y. The judge's reasoning is then taken as that in X's submission and that nothing in this judgment should be taken to

require more detailed reasons for cost management decisions than are currently given. The rules need not be referred to; the judges know them and, absent any contrary indication, are taken to apply them.

**Secondly** the Judge acknowledged that the value of comparisons between budget figures for particular phases is, limited and may in some cases be nil or virtually nil referencing the Chief Master Marsh in the *Various Claimants v. Scott Fowler Solicitors (a firm)*, adding the point that budgets may be drawn and sometimes agreed at levels influenced by tactical considerations. The claimant's solicitors suggested as much in this very case, commenting that although the defendant's budget was "pitched tactically and unrealistically low", it was agreed. Noting that the Defendant may budget on the low side in a personal injury claim knowing that it is unlikely (because of qualified one way costs shifting) to recover its costs even if successful in defending the claim, in the hope of exerting a downward pull on the claimant's budget and that, conversely, a claimant may have little incentive to challenge the amount of the defendant's budget, knowing that the claimant is unlikely to have to pay the defendant's costs even if the claim fails and preferring to use the size of the defendant's budget to make the claimant's appear the more respectable; thus there are good reasons for caution about the value of comparison between budgets; adding that is not the same as saying that the other side's budget is intrinsically irrelevant and should *a priori* be disregarded as an irrelevant consideration. None of the authorities goes that far. Chief Master Marsh rightly recognised that "some comparison between budgets may be informative". That obvious proposition flows from the equally obvious point that the parties are litigating the same case on the same issues; and, particularly in the latter stages of trial preparation and conduct of the trial, the tasks to be performed tend to be quite similar – though less so in the early stages of the claim where the claimant's costs are front-loaded.

**Thirdly** the Judge stated that *the rival interpretations of CPR rule 3.17 were not critical and I need not express a concluded view on them. There is some force in both sides' arguments. On the one hand, approving the amount of a budget phase is, as a matter of ordinary language, an act done as part of the court's management of the case. On the other hand, Part 3 treats case management separately from costs management. Whichever interpretation is correct, rule 3.17 is clearly directed primarily at the expense of a procedural step such as disclosure or expert evidence, rather than at the making of a costs management order.*

**Fourthly** Kerr J added that agreed budget phases are outside the scope of the court's approval function but are subject to the court's right to comment if it has reservations about the agreed amount. In the words of Chief Master Marsh, "*the agreement of a budget phase removes the court's ability to set a budget for that phase*"; but the other party's unagreed figure for the same phase may be approved at a lower or higher level; the agreed figure may be "*only of passing interest to the court*".

In addressing the instant matter before him and referencing the interaction between Mr Grütters and the judge at the CCMC, Kerr J found that it was *inescapable that that judge closed her mind to any argument based on a comparison with items in the defendant's costs budget. It is no answer to that proposition that the judge said she had read the bundles. She had not had sufficient time, through no fault of her own because of her overloaded list, to look at the documents in detail. She did not claim or demonstrate familiarity with the defendant's budget or the figures in the defendant's*

*Precedent R. Her responses to Mr Grütters' attempts to refer to the defendant's budget show that she was not prepared to entertain arguments based on its content.*

The judge had *thereby disregarded a relevant consideration, as the claimant asserts in the first ground of appeal. The defendant's budget was not intrinsically irrelevant; "some comparison between budgets may be informative", as was said in Various Claimants v. Scott Fowler Solicitors. The defendant's budget did not become irrelevant merely because it was agreed or because the judge may have disagreed with the reasonableness of the amounts in it. Mr Grütters was entitled to make submissions about it, for what they were worth, and was prevented from doing so.*

There was accordingly, *in my judgment, a procedural or other irregularity within CPR rule 52.21(3). The irregularity was the judge closing her mind to a relevant consideration and not entertaining argument on it. It was, in my judgment, a serious irregularity because of the language used by the judge when addressing Mr Grütters on three occasions: when she used his word "imagine"; when she used his word "strange", twice; and when she suggested he was not familiar with the rules.*

Whilst Kerr J had *some sympathy* with the judge because of *the difficult, pressurised conditions in which she had to do her job*. He found that most judges had experienced *similar stresses in their court work and it may be difficult to maintain the utmost courtesy at all times, but when treatment of a party or his counsel falls short as in this case, the appellate court's duty is to say so. The language used was indefensible.*

Whilst the Judge considered it might be that *Mr Grütters' points based on a comparison with the defendant's budget were likely to be weak forensic jury points which may not have impressed the court. That is of potential relevance to the question of remedy, to which I will come shortly. It does not excuse the refusal to hear the arguments. The first ground of appeal succeeds on that basis.*

Dealing with the second ground of appeal that was failure to consider and ensure that the parties were on an equal footing

Kerr J considered the point *added nothing to the first ground and has no merit independently of it. In so far as the complaint is that the judge failed to weigh in the scales the amount the defendant would be able to spend on the case compared with what the claimant would be able to spend, I have already addressed the complaint when upholding the first ground of appeal. The judge should have been willing to consider arguments based on a comparison with items in the defendant's budget, even if the comparison might be of only passing interest to the court.*

**The Judges remedy**

By CPR rule 52.21(3), the court will allow an appeal where the decision of the lower court was (a) wrong or (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court. It is in one sense difficult to say that the decision was "wrong". The claimant's allowed budget for estimated costs was within the range open to the judge and not so low that the claimant is unable to bring his claim to court and secure justice. Had the judge been willing to hear the claimant's arguments about the defendant's budget, the outcome might have been no different. But the real

problem with the decision below is that it was marred by a serious procedural and other irregularity, as I have explained.

The Defendant had *made submissions to the effect that nothing Mr Grütters could have said about the defendant's budget would be likely to have persuaded the judge to allow a greater amount than she in fact allowed. The outcome was fair and the appellate court should not disturb it. However the question here is whether the decision of the lower court was unjust because of the serious procedural or other irregularity. That is not the same test as whether, on the balance of probabilities (or applying some other perhaps higher standard), the outcome would have been the same if the irregularity had not occurred.*

*In the cases cited in the White Book notes to rule 52.21 (see in the 2023 edition at 52.21.5), I find none where a remedy has been refused because a serious procedural or other irregularity occurred but the decision was nonetheless just.*

*Normally, if the irregularity is serious, the decision will be unjust. Conversely, if the decision is just, the irregularity will not be serious. A rare case where a remedy was refused despite a serious procedural irregularity is, as it happens, my own decision in Samuels (t/a Samuels & Co Solicitors) v. Laycock [2023] EWHC 1390 (KB).*

In this case Kerr J found that he had concluded that *the decision was unjust* and could not stand for a number of reasons.

*First, the irregularity occurred and,*

*Second, it was unusually serious because it occurred in court and violated the fundamental principle of equal treatment of the parties before the court.*

*Third, it is an unattractive proposition to say that a person whose mind was closed to a particular line of argument would have made the same decision if her mind had been open to it.*

*Fourth, I am far from sure that the outcome would have been the same if the judge had heard Mr Grütters' submissions in full. The judge might have adopted the offered amount of £9,000 for trial preparation, instead of £8,000. She might have adopted the offered amount of £11,000 for the trial, or a figure closer to that amount, than the £3,250 she chose. She had previously shown interest in some, though not all, the amounts "offered" by the defendant in its Precedent R document and had adopted some, though not all, the defendant's offered amounts. That is normal practice and in the spirit of CPR rule 3.15(2)(a), requiring the court to indicate to what extent the budgeted costs are agreed. If the agreement is reached before the costs management hearing, the court and the parties are bound by it. Figures may also be informally "agreed" at the hearing in the manner that happened in this case, by the claimant accepting a figure offered in a Precedent R document and the judge adopting that figure. While that is not normally treated as agreement within rule 3.15(2)(a), the defendant's offer can exert an influence on the court.*

*Fifth, the parties have faced uncertainty about the claimant's budget since this appeal has been pending. They have known since the appeal was brought that the judge's*

*decision is challenged and, since Sir Stephen Stewart's order of 20 October 2023 granting permission to appeal, that the challenge would be allowed to proceed. The trial is fixed for this summer, in July 2024. I do not know what sums may have been expended by the claimant during the period of uncertainty but if any have, the balance between incurred and estimated costs will have changed.*

Thus Kerr J considered the just solution was to remit the whole of the claimant's costs budget back to the county court for reconsideration by another judge unless the amount of that budget was agreed. If it is not agreed within 14 days of the court's order in this appeal, the matter should be relisted in the county court.

It is interesting to consider the lack of real consideration that appears to be given to the Defendant's costs budget when making the comparison point.

One can see Kerr J's dilemma acknowledging the stress faced by judges when dealing with cases but finding there to be a line in the sand that judges should not cross; the exchange that took place at the CCMC is appended to the full judgment found below.

Woolley v Ministry of Justice [2024] EWHC 304 (KB) (16 February 2024) (bailii.org)