Case No: JR 1707078

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Thomas More Building
Royal Courts of Justice
London, WC2A 2LL

Date: 04/07/2018

Before:

MASTER ROWLEY

- -

Between:

MXX (a Protected Party by her husband & Litigation Fried RXX)	**Claimant**
- and -	
United Lincolnshire NHS Trust	**Defendant**

- -
- -

Roger Mallalieu (instructed by **Irwin Mitchell LLP**) for the **Claimant**
Nicholas Bacon QC (instructed by **Keoghs LLP**) for the **Defendant**

Hearing date: **11 May 2018**

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Approved Judgment

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

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MASTER ROWLEY

Master Rowley:

1. This is my reserved judgment on the defendant's application for an order pursuant to CPR 44.11 arising out of what the defendant describes as a miscertification of the claimant's budget in the substantive proceedings. As a result of that miscertification, the defendant seeks various sanctions to be imposed, as well as, in due course, the provision of documentation by the claimant's solicitors.

2. The underlying proceedings arise from a substantial and high value injury claim brought on behalf of MXX who suffered injury whilst giving birth to her second child in April 2012. Breach of duty was admitted by the defendant prior to the commencement of any proceedings. The quantification of the claimant's significant injuries was eventually resolved in November 2016. Proceedings were commenced in order to enter judgment with the court's approval.

3. Detailed assessment proceedings were commenced on 3 March 2017 and the bill served with the Notice of Commencement came to just under £1.3 million. The hourly rates claimed in the bill for the conducting fee earner were claimed at £335 and then £350 per hour. Lesser sums were claimed for the more junior fee earners.

4. Upon receipt of the bill of costs, the defendant compared the sums claimed with the budget which had been the subject of a Costs Management Order. It noted that the conducting ("Grade 1") fee earner had claimed an hourly rate of £465 per hour in the budget and this set in train enquiries by the defendant which have ultimately culminated in the application before me. The application was originally issued in the Leeds District Registry since the substantive proceedings had been issued in Leeds. However, the regional costs judge there noted reference in the papers to a decision of mine in a case called Tucker v Hampshire Hospitals NHS Trust and Griffiths. On the face of it, there are obvious similarities with the Tucker case and it is not surprising therefore that the regional costs judge considered there may be some benefit in sending this case to the SCCO. I held a directions hearing on 11 January 2018 and gave directions as to the production of evidence prior to the hearing which took place before me on 11 May 2018.

Background

5. In the next few paragraphs I give a description of the hourly rates set out in various documents that have been disclosed. For simplicity I have then drawn them together in a table. The description I give only concerns the Grade 1 fee earner i.e. the partner or other Grade A fee earner (to use the Guideline Hourly Rates' description). Whilst Grades 2, 3 and 4 also vary I have only set them out in the table and have not referred to them in the next few paragraphs since they do not vary by anything like as much as the Grade 1 rates.

6. The claimant instructed Irwin Mitchell under a CFA dated 24 July 2012 and at which time a rate of £335 per hour was agreed. The CFA allowed for the revision of hourly rates following annual reviews in May. Those reviews, I am told, generally take place between May and August and it is certainly the case here that the letters confirming the reviewed rates were usually sent out in the following August. One letter was not sent until the following January (2015) and it is said that this was because of Irwin Mitchell awaiting the outcome of the report of Foskett J on guideline hourly rates and

the Master of the Rolls' decision upon whether to accept that report's conclusions. Nothing turns on the dates of those letters. Mr Bacon QC for the defendant queried whether the claimant would ever be liable for rates claimed in such a retrospective fashion, particularly the rates set out in the January 2015 letter and which were said to apply from May 2014. Even if that were a point that the claimant could take against her own solicitors, I have no doubt that she would not do so for reasons I will set out later.

7. In August 2013, the Grade 1 rate increased to £460 per hour effective from May 2013. As I have just described, the May 2014 review was not undertaken until sometime later and the results of that review were communicated in January 2015. The date of the letter is 20 January 2015 which is important because it is a fortnight after the claimant produced her budget for the purposes of the court proceedings. Accordingly, at the time of the production of that budget, the hourly rate of £460 applied to work from May 2013 onwards. A fortnight later, that hourly rate was reduced to £350 per hour for work from May 2014 onwards.

8. The budget produced on 6 January 2015 actually utilised a rate of £465 per hour for the Grade 1 fee earner. The CCMC took place on 2 March 2015 but no variation of the budget was produced for that hearing to reflect the reduced Grade 1 hourly rates that were then applicable.

9. Further variations to the hourly rates took place in August 2015 (effective from May 2015) to increase the rate to £360 per hour; and August 2016 (effective from May 2016) to £365 per hour. Those later increases do not appear in the table below because they have no material relevance to the costs claimed either in the bill or the budget.

	CFA	Review August 2013	Budget 6 Jan 2015	Review 20 Jan 2015
Grade 1	£335	£460	£465	£350
Grade 2	275	285	290	290
Grade 3	225	225	230	235
Grade 4	120 / 140	135	140	140

10. The CCMC was attended by Martha Sweet the conducting fee earner and Jeremy Smith from the costs department on behalf of the claimant. Both a typewritten and a manuscript attendance note prepared by Ms Sweet were produced for the purposes of this hearing. The latter contained more detail and was the one referred to by the parties.

11. Having recorded that the defendant's budget was agreed as revised, the advocates addressed District Judge Thomson on the claimant's precedent H. It would appear that the defendant raised the question of hourly rates and to which the District Judge said that he would not do a detailed assessment of the sums in the budget but that he usually allowed an amount for the CMO at a rate which the claimant's solicitors then apportioned within the firm. He indicated that he "can't do anything re: incurred costs" although they "seemed high". They were a matter for detailed assessment. He would look at the estimated costs on a phase by phase basis.

12. According to his note, Mr Smith said that if a composite notional rate was to be used, then since this was a significant and difficult and complex case requiring care and skill and expertise, £300 per hour would be an appropriate composite rate for what was a Grade A case. The defendant counter proposed £275 per hour given the input of leading counsel to the claimant. The District Judge indicated that for budget purposes only £280 per hour would be used as a composite rate but that he was not making any decisions as to who did what work. The attendance note then records figures for the various phases based on the number of hours and their monetary equivalent at £280 per hour.

13. The defendant's report of the costs budgeting hearing was also available in the hearing bundle. The key points noted in the report tally with the note of Mr Smith in all material respects.

The evidence of the witnesses

14. In addition to the disclosed documents, the parties rely on the evidence of one witness statement each. The essential facts of this case are not really in dispute. The witness statement of Mr Benjamin Petrecz for the defendant sets out his calculations based on the disclosed documents. He then goes on to refer to the case of Tucker and, perhaps peculiarly in a witness statement, sets out several paragraphs from that judgment. He then goes on to refer to what he describes as other examples of the same issue regarding discrepancies between the hourly rates and times claimed in the budget when compared with subsequently served bills of costs.

15. Mr Petrecz then sets out the ways in which he says the defendant, NHS Trusts generally, the court, other court users, other legal representatives and indeed the claimant herself are prejudiced by the approach taken by Irwin Mitchell in this case.

16. The statement of Steven Andrew Green, a partner in the firm of Irwin Mitchell and the head of costs, is relied upon by the claimant. Mr Green explains that both Mr Tempest and Ms Sweet, the fee earners with conduct of this case at the relevant time, have moved on from Irwin Mitchell. It is for that reason, and also because his department prepared the costs budget, that he is considered to be the appropriate person to make a witness statement.

17. Mr Green sets out the background to this case before getting to the subject of why the hourly rate for the Grade 1 fee earner increased from £335 to £460 per hour. At paragraph 15 of his statement, Mr Green says that he does not know why this increase took place. He says that the hourly rates charged by his firm normally depend on the value and complexity of the case. There are five "value" bands and Mr Green says that this case would ordinarily have been in band two. However, it appears that the

rate for band one was used instead. Presumably, given the size of the increase, the original rate was based on band two.

18. When describing the preparation of the budget, Mr Green says that both the incurred and estimated time costs were calculated using a set of "composite" or "blended" hourly rates. He says, at paragraph 24:

> "It seems to me that the composite rates in this case were based on the rates that applied at the time the budget was prepared – as set out above – but allowing for increases over time which took into account that some of the work had already been done at lower rates, some would be done at current rates and some would be done at higher rates. The purpose was not to set the rate at the highest rate that would be likely to be incurred if the case continued all the way to trial (the assumption underpinning the budget), but to set a composite rate which reflected all work done across the assumed lifetime of the case."

19. At paragraph 26 Mr Green says that:

> "Each composite rate was therefore £5 per hour higher that the contractual rate which had been agreed with the Claimant at that time."

20. A little later in his statement, Mr Green refers to the delayed hourly rate review in January 2015. He says, at paragraph 32:

> "I do not know why the hourly rate for the Grade 1 fee earner was reduced. However, it appears the value band 2 rates were used during this review. Again, I cannot now say whether this was an error. What I am able to say is that the step of reducing the Grade 1 hourly rate whilst increasing marginally the others was not one that had been anticipated by either Kris or Steven at the time when the costs budget was prepared, nor is it something that represents usual practice within the firm or something which I would therefore expect members of the team to anticipate when producing a budget."

21. In relation to the failure to revise the budget given the reduced hourly rates, Mr Green says that on reflection it was regrettable that no updated budget was produced prior to the CCMC. He says that *"again, I do not know why we did not prepare an updated costs budget but suspect that it was something which was simply overlooked, with the connection between the two not having been made."* He then apologises to the court and the defendant for this but does say immediately thereafter that he thinks it was unlikely that the defendant was in fact prejudiced by that oversight since the district judge had used a composite rate of £280 an hour to calculate the amounts which allowed for the estimated costs and this was well below the £465 per hour set out in the budget.

22. Mr Green also provides information regarding the amount of hours claimed in the budget. He confirms that a total of 1003.7 hours had been recorded on the case up to the time the budget was prepared. Excluding the 27 hours relating to the costs budgeting process itself would leave a figure of 976.7 hours which was the number of hours stated in the costs budget.

23. Mr Green's evidence then deals with the bill of costs and in particular the amount of hours claimed in the bill when compared with the amount of the budget and sets forth an explanation of why the difference occurred. This is put down largely to "self-editing" time which would be vulnerable to challenge such as costs of funding, non-progressive file reviews and administrative matters. There was also time recorded for Court of Protection work which the drafter of the bill considered to be solicitor and client work rather than between the parties'.

24. Thereafter Mr Green's evidence is largely matters of argument although he does deal specifically with the use of composite hourly rates at paragraphs 55 to 57. The last of those three paragraphs states:

> "To summarise, we focused on the total amount for each phase and the overall total for the costs budget being reasonable and proportionate. We thought that a composite hourly rate – as I have explained above – would be the most straightforward way to achieve this. We were concerned that to add in multiple hourly rates for every Grade A fee earner (which are often increased on a year by year basis) would dramatically change the layout and size of the costs budget and would therefore not comply with precedent H. We noted the guidance in the court rules about hourly rates not forming part of the costs budgeting process and the footnotes that emerged in the White Book in this regard. We thought that our approach was consistent with the statement of truth which was changed shortly after the introduction of the current regime."

The law

25. CPR 44.11, under the heading of the Court's powers in relation to misconduct, states:

> (1) The court may make an order under this rule where –
>
> (a) a party or that party's legal representative, in connection with a summary or detailed assessment, fails to comply with a rule, practice direction or court order; or
>
> (b) it appears to the court that the conduct of a party or that party's legal representative, before or during the proceedings or in the assessment proceedings, was unreasonable or improper.
>
> (2) Where paragraph (1) applies, the court may –
>
> (a) disallow all or part of the costs which are being assessed; or

> (b) order the party at fault or that party's legal representative to pay costs which that party or legal representative has caused any other party to incur.

26. The wording of this provision, as was confirmed by the Court of Appeal in Lahey v Pirelli Tyres Ltd [2007] EWCA Civ 91, owes a considerable debt to the wasted costs jurisdiction considered by the Court of Appeal in Ridehalgh v Horsefield [1994] 1 WLR 462. Subsequent decisions have made it clear that the words "unreasonable" and "improper" used in 44.11(1)(b) should be construed as per the definitions set out in cases such as Ridehalgh. I do not think that the definition is contentious but, as Mr Mallalieu, counsel for the claimant, was keen to refer to the full wording of the descriptions in Ridehalgh I have set them out here:

> ""Improper" means what it has been understood to mean in this context for at least half a century. The adjective covers, but is not confined to, conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty. It covers any significant breach of a substantial duty imposed by a relevant code of professional conduct. But it is not in our judgment limited to that. Conduct which would be regarded as improper according to the consensus of professional (including judicial) opinion can be fairly stigmatised as such whether or not it violates the letter of a professional code.
>
> "Unreasonable" also means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment, but it is not unreasonable."

27. In order to demonstrate apparently improper or unreasonable conduct Mr Bacon referred to the statement of truth signed by a party in respect of its budget. PD22 paragraph 2.2A prescribes the wording as follows:

> "This budget is a fair and accurate statement of incurred and estimated costs which it would be reasonable and proportionate for my client to incur in this litigation."

28. Mr Bacon also referred to the SRA Code of Conduct and the Principles which it is convenient to set out here:

> "Principle 1: you must uphold the rule of law and the proper administration of justice.
>
> You have obligations not only to clients but also to the court and to third parties with whom you have dealings on your clients' behalf – see, e.g., Chapter 5 (Your client and the court) and Chapter 11 (Relations with third parties) of the Code.
>
> Principle 2: You must act with integrity.
>
> Personal integrity is central to your role as the client's trusted adviser and should characterise all your professional dealings with clients, the court, other lawyers and the public."

The defendant's submissions

29. Having taken me through the relevant documents, Mr Bacon summarised his client's argument as being that the startling difference between the rates claimed in the budget and subsequently in the bill of costs meant that this case was materially different from the case of Tucker and consequently the defendant was seeking remedies which were much more significant than had been levied in Tucker.

30. He said that the difference in the rates was completely unacceptable. The assumptions in the budget ought to have recorded that the hourly rate claimed was higher than the rates contractually agreed with the client at the time. The claimant had failed to reduce the budget correctly originally and furthermore had failed to correct it once the position had been made even more stark by the reduction in the Grade 1 hourly rate. The evidence of Mr Green was unconvincing in Mr Bacon's submission since it was no more than a succession of variations of "I don't know". These are important matters and the defendant was surprised by the lack of knowledge demonstrated by the evidence of Mr Green as to how matters had occurred.

31. The effect of the overstatement of the hourly rates meant that DJ Thomson, when considering the estimated costs was inevitably influenced by the rates that were claimed. It could not be a coincidence, in Mr Bacon's submission, that the hourly rates, if added together and then divided by four came to within a pound of the £280 per hour that the District Judge decided to use in his assessment of the reasonable and proportionate estimated costs. The inflated rate also meant that the incurred costs were higher than they ought to have been and which is a matter that the District Judge specifically said he could do nothing about.

32. In addition to the lack of first hand evidence given by Mr Green, it was surprising to the defendant that Mr Smith, who was at the CCMC and who was present in court at this hearing, had not given any witness statement as to what had happened. In Mr Bacon's submission the very least the claimant should have done was to inform the court after the CCMC that there had been an error in the figures claimed in the budget so that the District Judge could consider whether to vary the figures.

33. Given the erroneous information before the judge, the whole of the budget was vitiated such that it must be considered to be a good reason to depart from the budget in its entirety. The failure on the part of Irwin Mitchell to produce appropriate figures

in the budget had caused prejudice to all concerned. He referred to the evidence of Mr Petrecz at paragraphs 39 to 52. There Mr Petrecz described Irwin Mitchell's miscertification of cost budgets as being systematic and consequently defendant hospital trusts, their insurers and legal representatives could no longer rely on any budgets filed by Irwin Mitchell. The inaccurate information caused unnecessary time and expense in dealing with costs management exercises which turned out to be flawed and required otherwise avoidable time and costs in detailed assessment proceedings to be incurred. The insurers could not reserve matters properly and could not seek to settle costs at the right level with any confidence.

34. According to Mr Petrecz's evidence, there was also prejudice to the court in this approach to costs budgeting as well as to other legal representatives and to other court users. Mr Bacon endorsed all of those comments. It was no answer, in Mr Bacon's submission, for Mr Green to suggest that the only party prejudiced by the figures for incurred costs being higher than might have been the case was the claimant herself because of the possible effect it would have on the budget allowed for the estimated costs. The prejudice was widespread as demonstrated by Mr Petrecz's evidence.

35. In addition to the erroneous hourly rates, Mr Bacon highlighted the "missing" hours in the bill of costs. The budget had claimed 976.7 hours but the bill only included 829.6 hours. According to the defendant, that was 147 hours that were missing. Mr Green accepted that the bill contained 144 fewer hours than the budget but attributed the difference to matters which were not recoverable between the parties such as time spent on the cost of funding or on Court of Protection work. Mr Bacon accepted that some solicitor and client time might well be recorded on the system and which ought not to have been claimed from the defendant. But that did not come anywhere close to 144 hours. In Mr Bacon's submission, the court should have been made aware of this discrepancy.

36. If it were the case that the time recorded on Irwin Mitchell's system had simply been included in its entirety in the budget when more than a hundred hours of it was not recoverable from the defendant, that was equally bad. The incurred figures were in play in relation to the budgeting process and the figure needed to be fair and accurate. A party could not abdicate responsibility for that fair and accurate figure simply because, for example, the amount allowed between the parties for preparing the budget did not remunerate the solicitors for going through the time recording carefully and excluding what was not recoverable.

37. Mr Bacon then took me to the replies to the points of dispute in which it was said that the phase totals needed to be considered in respect of both the incurred and the budgeted costs. Mr Bacon demonstrated how that approach would increase the costs potentially payable by the defendant if the inflated incurred costs were simply added to the estimated costs without any form of penalty. He submitted that this was another reason why there was a need to depart from the budget so that the bill could be scrutinised.

38. In so far as sanctions for the miscertification were concerned, Mr Bacon sought all of the remedies set out in the draft order annexed to the application. Given the use of hourly rates by District Judge Thomson in setting the estimated costs, it was clear that this was a much more serious matter than in the case of Tucker. Indeed, the whole case was more serious in Mr Bacon's submission. I should not therefore be

constrained by the approach that I took in Tucker and Mr Bacon contended for a 75% reduction to the claimant's bill of costs. In his submission, bills have been struck out for far less.

39. Mr Bacon informed me that his clients viewed the penalty imposed in Tucker as being "pretty low". It was not one which his clients considered to be appropriate but had not been appealed because of other unspecified reasons.

The claimant's submissions

40. Mr Mallalieu joined with Mr Bacon in indicating that he did not think that I had been entirely correct in my decisions in Tucker. However, in Mr Mallalieu's submission, it was not the case that I had imposed insufficient sanctions but that I had concluded that there had been improper conduct in the first place. If I had considered the full version of the description of improper conduct in Ridehalgh, rather than setting out a shortened version from a subsequent case, I would not have considered the conduct to be improper in a sufficiently serious way to merit a sanction at all. It was not enough to show that a failure had caused a breach of a rule or practice direction. It had to be shown that the breach was sufficient to warrant the stigma that such a categorisation would cause. In addition to the quotation from Ridehalgh set out above, Mr Mallalieu also relied on the postscript in the case of Lahey to confirm that a narrow interpretation of the word "unreasonable" was appropriate in this area.

41. Mr Mallalieu's argument was founded on the basis that Irwin Mitchell had sought to deal with the new concept of costs management in a sensible and pragmatic way which was entirely justifiable. The fact that I had concluded in Tucker that it was not appropriate did not mean that it was improper or indeed unreasonable, since it provided a reasonable explanation which was the acid test.

42. As Mr Green had set out in his witness statement, the approach of using a composite or blended rate would increase the incurred costs level but this would be evened out by the later work which would justify a higher hourly rate than the blended rate that was actually used. There is only one column in which to put hourly rates into precedent H and there is no realistic prospect of expanding the precedent in order to include work at various rates to reflect the reality of long-running litigation. It could not be said that choosing a rate somewhere between the starting rate and likely end rate to calculate all of the costs was an unreasonable approach.

43. If Irwin Mitchell had taken the approach that I considered appropriate in Tucker i.e. using the contractual rates for the incurred costs and a blended rate for the estimated costs, then that blended rate would be at least as high as the one actually used and probably would be higher in Mr Mallalieu's submission.

44. Irwin Mitchell had made a genuine attempt to estimate costs in the budget which should be said to be reasonable and proportionate overall. It was a different exercise from the drafting of the bill of costs and the statement of truth had to be seen in that light. The signatory to the statement of truth was stating that the budget as a whole was a fair and accurate summary of both the incurred and estimated costs likely to be incurred. It is not a statement of compliance with the indemnity principle. That could have been required by the CPR but it is not.

45. Subsequent to the material events in this case, it is now clear from Court of Appeal decisions, according to Mr Mallalieu, that the incurred costs and the estimated costs are to be treated differently. That was not the case at the time that this budget was considered. DJ Thomson explicitly stated that he was going to consider the estimated costs by reference to a composite hourly rate. The CMC took place before the change in the practice direction which made it clear that the budgeting judge should not take that approach. The fact that the rate allowed by the judge when considering the estimated costs was below any of the Grade 1 rates claimed, meant that the unfortunate error in not correcting the budget prior to the CCMC was, in fact, of no effect. Mr Mallalieu, said that his client did not shy away from the fact that an error had been made and that Irwin Mitchell apologised for it. It was unfortunate but in fact it had made no difference. The hourly rate alighted upon by the District Judge was, as is very often the case, a figure between the parties' contended for rates.

46. Consequently, the effect of the erroneous figures in the budget came to naught in respect of the estimated costs. The incurred costs were always going to be the subject of a detailed assessment and the rates claimed in the bill of costs were the rates correctly claimed in any event. The only effect on the incurred costs was the potential for the higher figure to affect the District Judge's view of the level of the estimated costs to be allowed.

47. Mr Mallalieu accepted that, in principle, the error in relation to the Grade 1 rate being used in the budget was capable of being a good reason to depart from the budget. However, given the District Judge's decision to use a much lower rate to assess the estimated costs, Mr Mallalieu submitted that it was not a good reason in practice. He also pointed out that all of the hourly rates other than the Grade 1 rate in the budget were in line with the revised 20 January 2015 letter and it was the only the Grade 1 rates which had gone awry.

48. As described above, Mr Mallalieu submitted that the approach of Irwin Mitchell to use a blended rate over the lifetime of the case was a well-intentioned attempt to deal with completing the precedent H in a meaningful fashion. That approach did not satisfy the definitions of either "improper" or "unreasonable" as set out in Ridehalgh.

49. Mr Mallalieu accepted that I could simply say that the costs had been unreasonably incurred under CPR 44.3 without going to the test of 44.11 itself. In so far as the error regarding the Grade 1 rate not being corrected was concerned, Mr Mallalieu submitted that the test in Ridehalgh was not aimed at errors of this kind. Again, he said it might reach a CPR 44.3 disallowance but it was not unreasonable or improper. Irwin Mitchell accepted that it was an error that should not have happened but when there are the volume of cases with which a firm such as Irwin Mitchell deal, mistakes will occur from time to time. Mr Mallalieu readily acknowledged that this was an explanation rather than an excuse.

50. In respect of the "missing" hours, Mr Mallalieu queried the relevance of this challenge. The costs lawyer had spent 95 hours drafting the bill of costs and had decided to exclude somewhere between 144 and 147 hours of time. Whatever reason was given for excluding that time, it could not remotely approach the impropriety or unreasonable test required by Ridehalgh. The budget had been produced using a number of hours which was within the time recording on Irwin Mitchell's system. A

more careful scrutiny of that time had been carried out in order to produce the bill. Neither of those activities could be said to be improper in any way.

51. In Mr Mallalieu's submission, the focus of the budgeting hearing was not on the incurred costs but on the estimated time. The defendant's approach regarding the statement of truth would give the budget the same status as a detailed bill of costs. That could not be correct. The budget was in fact more like an estimate and Mr Mallalieu referred to the provision at paragraph 3 of the Practice Direction to Part 44. The budget in a non-CMO case was treated in the same manner that an estimate was treated prior to April 2013 in respect of having to explain a discrepancy of more than 20% between the estimate / budget and the actual bill.

52. Accordingly, Mr Mallalieu said that the claimant's primary position was that the threshold required by CPR 44.11 of improper or unreasonable conduct was not met. But if I considered that the threshold had been met, the sanction imposed in Tucker would be the most that could be considered just.

Decision

53. I think it would be appropriate to start by commending counsel for their elegant and diplomatic submissions as to why my previous decision was wrong in one way or another. It was an inevitability on both sides for some criticism to be rendered in order to seek to distinguish my previous decision as the gateway for seeking a different result in this case. Nevertheless, having considered matters carefully, I have come to the conclusion that there is in fact no material difference between this case and the case of Tucker and therefore I propose to levy the same sanction i.e. to disallow the costs of the costs management elements in the claimant's bill.

54. At the directions hearing, I specifically asked the parties' representatives whether or not this case was brought as some form of test case or that other cases should be joined to it given the defendant's reference to other cases both in Mr Petrecz's witness statement here and his statement in the Tucker case. I was told that, in fact, most of the cases referred to anonymously in Tucker had settled and that this case should be dealt with on its own. Consequently, whilst Mr Bacon and indeed Mr Petrecz are entitled to suggest that the perceived problems are widespread, I do not think that that is a legitimate factor for me to take into account. Mr Green's evidence is clear that Irwin Mitchell took a particular approach at a particular time and so it would be a surprise if the same issue did not arise in a number of cases. But it does not seem to me to be appropriate to seek to levy ever-increasing sanctions on cases coming before the court simply by reason of the fact that they are subsequent to earlier decisions.

55. In the case of Tucker, I said the following in respect of the approach taken to the incurred costs figures:

> "In my judgment, this is not an approach which would be endorsed by solicitors in general and as such it seems to me to satisfy the threshold of improper conduct in accordance with Ridehalgh."

56. Mr Mallalieu described this finding as not fully appreciating the test that I needed to apply. Whilst, on reflection, I can see that I did not explain this finding fully, it is

because I thought it was frankly self-evident that the approach was improper and as such needed little elucidation.

57. The need to comply with the indemnity principle must be on page 1 of any introduction to the law of costs. It is fundamental and runs throughout the issues regarding what sums can be claimed from one party by another. It is, or should be, ingrained in everyone dealing with solicitor's costs. Whether it is a detailed bill of costs that is being produced, a summary assessment schedule or even simply a breakdown in a letter being provided to the opponent, it is imperative that the costs set out as being payable by the opponent do not exceed the sums payable by the client to their solicitor. The case of Harold v Smith [1850] 5 H. & N. 381 is more than 150 years old but it remains correct that the sum claimed should not be a punishment to an opponent nor a bonus to the client (or solicitor) which is the effect of claiming more costs from the opponent than are payable by the client.

58. I do not accept that the statement of truth for a precedent H is intended to be a composite statement or one akin to signing an estimate. If that were so, in my judgement, the statement would simply say that the document was a fair and accurate estimate of the costs which it would be reasonable and proportionate for the client to incur in the litigation. But that is not what it says. It specifically refers to incurred and estimated costs separately and it seems to me that a solicitor signing a statement of truth has to consider whether the incurred costs figure is fair and accurate separately from whether the figures for estimated costs are fair and accurate. There is absolutely no reason why the incurred costs figure should not be accurate. There are many reasons to understand that the estimated costs figure is no more than educated guesswork. The change in the hourly rates for future work identified by Irwin Mitchell is but one of those reasons.

59. The cells into which the incurred figures are populated in the precedent H contain no formula to be calculated by reference to the hourly rates set out in that document. The formulae only apply to the estimated costs. It is clear even from this that it has always been understood that the incurred costs and estimated costs were to be approached differently. I do not think that it would even occur to solicitors in general to set out anything other than the sums calculated by the time spent to date multiplied by the rates agreed with the client as the incurred costs. But if those solicitors were asked whether claiming more from an opponent than the client is obliged to pay was actually improper, I have no doubt the answer would be yes. To do so deliberately, as Irwin Mitchell have done, seems to me to have flouted the fundamental requirement to comply with the indemnity principle. In my judgment it should clearly carry the stigma of improper conduct as required by Ridehalgh.

60. I do not think that the same can be said for the failure to revise the precedent H prior to the CCMC, albeit it would have been preferable for that to have happened. My reading of the claimant's note of the hearing is the same as Mr Mallalieu's. It seems to me that District Judge Thomson had no intention of approving a budget based on the sort of rates set out in the claimant's budget and would not have done so even if the Grade A rate had been reduced to £350 per hour. He had clearly formed a view of what he considered to be a reasonable composite rate on which to allow reasonable and proportionate sums for each phase. Whilst the budget was drafted on the basis that the Grade A fee earners would carry out 50% of the work, the district judge was clear that he was making no assumptions as to who did what work. Given that

comment, I think it very unlikely that the hourly rate that he chose as the composite rate was a simple division of the aggregate of the four different grades. In my view it is much more likely that he either decided on a figure between the parties' submissions or he used a figure that he already had in mind which he considered to be reasonable and multiplied hours by that figure. Consequently, the error by the claimant in failing to correct the budget prior to the CCMC was in fact of no effect.

61. Similarly, I do not think that the claimant's approach to the amount of hours claimed in the budget and subsequently in the bill founds any significant criticism. My understanding of the limit of 1% of the total budget for the preparation of the precedent H was originally allowed for on the basis that clients would have been billed for the incurred costs by that point and so relatively little work would be needed to consider the incurred costs. If that is correct, it takes no account of matters dealt with under contingency arrangements such as a CFA when no bill will have been rendered by the time the precedent H is prepared.

62. It seems to me to be unrealistic to expect a party to vet the time recorded on a line by line basis in the manner suggested by the defendant here. The bill of costs has taken nearly one hundred hours to prepare and that involves a considerably greater sum than would be allowed by 1% of the budget. Whilst I accept Mr Bacon's comment that the extent of the remuneration is not the touchstone for the effort that should be involved, it does seem to me to be a pointer as to the expectation of the time to be spent in preparing a budget. Most of the time will be spent in the estimation of future costs and much less will be spent in relation to the incurred costs. Including items which are unlikely to be recoverable on a between the parties' assessment runs the risk of the budgeting judge concluding that those costs are high and commenting about this in the CMO.

63. I do not think that it can be said to be unreasonable for a solicitor to include in the budget the time that the various fee earners have recorded on their system as being sums which the client is potentially liable to pay.

64. Similarly, having considered that time to be vulnerable to challenge on a between the parties' assessment, it can only be reasonable for the drafter of the bill of costs to exclude such time. Where, as here, the time is extensive, the incurred costs actually claimed between the parties will be significantly reduced. But that does not necessarily mean that something improper has occurred when the budget was prepared, in my view.

65. Accordingly, I do not think the error regarding the Grade A rates has caused any prejudice given the District Judge's approach at the CCMC. Nor do I think that the allegedly missing time is a matter which is relevant to the allegedly improper conduct. As such the only issue is the inflated sums claimed as incurred costs. That was the position in Tucker and I am driven to the conclusion that the same situation applies here and that I should apply the same sanction as a result.

66. At paragraph 43 in Tucker, I expressed my view as to why the appropriate sanction was to disallow the items claimed in the bill corresponding to the CMO work.

> "CPR 44.11(2)(a) indicates a possible sanction of disallowing *"all or part of the costs which are being assessed"*. The sums

> claimed in the bill themselves do not offend the indemnity principle and I do not think a general disallowance of, for example, a percentage of the overall bill would be appropriate. It seems to me that the egregious aspect of the conduct here relates solely to the approach to the costs management of the underlying claim. Consequently, it is the costs claimed in the costs management activities that should be penalised. I have concluded that, in order sufficiently to mark the court's disapprobation of Irwin Mitchell's conduct in this case, I should disallow all of the costs management elements, or "non-phase" part, of the bill."

67. Whilst those behind the Defendant in both cases may have considered the sanction in Tucker to be insufficient, it seems to me to be the only appropriate sanction. There is nothing wrong with the bill in terms of the indemnity principle. The problem lies with the budget. I consider it to be entirely appropriate to impose a sanction in respect of the work which caused the problem.

68. That work is the non-phase time spent creating and maintaining the budget. It would be wrong in my view retrospectively to disallow some of the budget itself.

Next steps

69. I have set out on the front page of this judgment the date on which I propose to hand it down (and for which no attendance is necessary). If a consequential order cannot be agreed and submissions are required, then a further hearing date convenient to counsel will be arranged and any time sensitive matters, such as permission to appeal, will be extended to that hearing.