



Neutral Citation Number: [2020] EWHC 357 (QB)

Case No: HQ17X00691

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 20/02/2020

Before :

**MR JUSTICE FREEDMAN**

Between :

**TERENCE PHILIP RAMSDEN**  
**- and -**  
**THE COMMISSIONERS FOR HER MAJESTY'S**  
**REVENUE AND CUSTOMS**

**Claimant**

**Defendant**

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**Conrad McDonnell and Steven McGarry** (instructed by **Muldoon Britton**) for the Claimant  
**Matthew Parfitt** (instructed by **HMRC's Solicitors' Office**) for the Defendant

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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.

.....  
MR JUSTICE FREEDMAN

**MR JUSTICE FREEDMAN:**

1. Following judgment given at a trial of preliminary issues, the parties agreed the consequential directions to include that the claim be dismissed and the Claimant to pay the Defendant's costs of the proceedings. The Defendant was to serve a summary statement of its costs broken down into the phases of the approved costs budget by 17 January 2020. This was done. It was then provided that the parties do file on one another written submissions on the question as to whether any payment on accounts should be made, and if so its amount and timing by 31 January 2020. This was done by the Defendant. The Claimant did not serve this document until a short document dated 7 February 2020, filed after the Claimant was contacted by the Court. This has been taken into account.
2. In this case, the actual costs have been considerably below the budgeted costs. The budgeted costs were £322,031.68, and the actual costs were a sum of £167,094.50. This may be explained in part by the effect of the preliminary issue.
3. There has been an order for costs the other way, that is to say in favour of the Claimant. On 10 May 2018, following an unsuccessful application to strike out the claim, costs were awarded in favour of the Claimant in respect of a hearing of October 2017, with assessment to take place at the end of the claim. The other costs of the application were in the case. The costs schedule in respect of that date was a sum of £79,215. The Master expressed reservations about this, saying that it was thought as being "*grossly disproportionate*" and "*markedly unrepresentative of the real issues on the application.*" He anticipated that if he were to assess it summarily, he anticipated that it would be "*in a considerably lower sum than as asked.*" He questioned the need for the involvement and appearance of both Leading and Junior Counsel. He inferred that much of the first Statement of Costs may reflect general advice and review of the merits of the Claimant's case rather than work specifically in response to the application. He said that he anticipated that if he were assessing summarily the Claimant's costs, it would be in a "*considerably lower sum than as asked*", and accordingly he ordered a detailed assessment at the conclusion of the claim rather than a summary assessment. He also directed that his judgment, containing the above observations at paragraphs 13-15, be directed for the attention of the Costs Judge by way of assistance.
4. CPR Rule 44.2(8) provides a starting point of an order of a payment on account of costs in the following terms, namely "*where the Court orders a party to pay costs subject to a detailed assessment it will order that party to pay a reasonable sum on account of costs unless there is a good reason not to do so.*"
5. The reasonable sum does not involve determining the 'irreducible minimum', but what is reasonable will depend on the circumstances: see *Excalibur Ventures LLC v Texas Keystone Inc* [2015] EWHC 566 (Comm) at [22-24] per Christopher Clarke LJ. Where a party's costs are within its approved costs budget, the 'reasonable sum' has been determined at a very high proportion of the approved budget. The reason for this is that where there is an approved budget, when costs are assessed on a standard basis at the end of the case, "*the court will...not depart from such approved or agreed budget unless satisfied that there is good reason to do so.*"

6. Very fairly, the Defendant acknowledges at paragraph 6 of its written submissions that “*the language of the rule requires the matter to be assessed by phase (so underspend in one area does not excuse overspend in another)*”.
7. It follows that the calculation of a payment on account of costs can be made with much greater certainty because of the early fixing of an approved costs budget from which there has to be a good reason to depart. Hence, it has frequently been the case that in respect of estimated costs, parties have been awarded 90% of those approved costs where they have come within budget: see *McInnes v Gross* [2017] EWHC 127 QB; *Thomas Pink Ltd v Victoria’s Secret UK Ltd* [2014] EWHC 3258 Ch and *Cleveland Bridge UK Ltd v Sarens (UK) Ltd* [2018] EWHC 827 (TCC). However, in the *Cleveland Bridge* case, the 90% of costs was only in respect of estimated costs: only they were the subject of approval. By contrast, incurred costs are by definition not the subject of the budget. In the *Cleveland Bridge* case, the amount ordered in respect of incurred costs was 70%.
8. The instant case has the following features:
  - (1) about £25,000 of the costs had already been incurred, and the balance were estimated costs;
  - (2) the final figures incurred relative to budget comprised only just over one half of the approved costs;
  - (3) each stage save for disclosure was less than estimated, and radically so as regards trial preparation, trial and experts, all presumably due in large measure to the decision of the Court to order a trial of preliminary issues;
  - (4) the approved estimate for the disclosure stage was £20,628.20 whereas the actual costs incurred were £46,281.50.
9. How then does one approach the issue where in part there has been expenditure within budget and on one item, there has been a significant amount of expenditure over budget? In the case of *McInnes v Gross* referred to above at [26], Coulson J (as he then was) expressed the matter as follows:

“*One consequence is that, for the purposes of calculating the interim payment on account of costs, the starting point will almost always be the payee’s approved costs budget. Another consequence is that the court assessing the interim payment can ignore the fact that, as here, there may have been significant expenditure on costs by the payee above the budget figure: any increase is a matter for the costs judge and the relatively onerous burden of recovering more than the budget figure is on the payee: see Elvanite Full Circle Ltd v AMEC Earth & Environmental (UK) Ltd (No 2) [2013] EWHC 1643 (TCC).*”
10. The Defendant recognises that it must allow in some way for a set off against some part of the costs ordered in favour of the Claimant relating to the hearing of October 2017 for the purpose of a payment on account of costs. It seeks to do justice in the following way, namely

- (1) To allow the full sum claimed of £79,215, which is called a ‘generous concession’; but
  - (2) To apply the reduction of 10% only on the balance between the full sum claimed of £167,094.50 and £79,215, that is to say  $£87,879.50 \times 90\% = £79,091.55$
  - (3) Against ‘the generous concession’, the Defendant has done the following:
    - (i) It has sought to have recovery of the sum of disclosure stage which exceeded the approved estimate, namely a sum of £46,281.50 minus £20,628.20, being a sum of £25,653.30. (On the aforementioned principles, this ought to have been removed at this stage, absent good reason. No reasons have been given at this stage for the excess, albeit that this does not prevent the Defendant from arguing the position at the time of the detailed assessment);
    - (ii) The Defendant treats the incurred costs which have not been the subject of an approved budget in the same way as the estimated costs which have been, despite the logic of the *Cleveland Bridge* case where the incurred costs were given a different treatment (70%);
    - (iii) The 10% deduction has not been applied until the balance was applied, that is to say on the balance of £87,879.50. Until the balance was applied, there was, on the Defendant’s basis of submission to be 100% of the costs to be ordered.
11. One approach in this case would be for the Court to work on the basis of the ‘generous concession’, and then notwithstanding this, to remove from the sum the excess costs of disclosure, to reduce a higher sum in respect of incurred costs (e.g. so that it was 70% instead of 90%) and to reduce the 10% on all of the incurred costs, and not just on the balance. In my judgment, even for the purpose of a payment on account of costs, this is too rough and ready and does not make allowances for the separate points largely in favour of the Claimant in paragraph 10 above.
  12. The Defendant is right to make substantial deductions in respect of the costs sought by the Claimant in respect of the October 2017 hearing, but this needs to be given effect in a more principled way. In my judgment, a more appropriate way is to make deductions to take into account the criticisms of Master Thornett rather than the “generous concession”. It is also to make deductions of matters referred to in the three points in paragraph 10 above.
  13. On this basis, in order to reflect the remarks of Master Thornett in his judgment of 10 May 2018, there should be allowed only two thirds of the costs sought by the Claimant of £79,215. That gives rise to a reduction of £52,727.33 from the sums in favour of the Claimant. In my judgment, doing the best which the Court can at this stage, it appears from his remarks that there will be a very substantial reduction from the sums claimed on a detailed assessment. It seems likely that that will be greater than a third, but at this stage adopting a conservative basis, a reasonable (not ‘irreducible’) minimum reduction to reflect the criticisms of Master Thornett (e.g. grossly disproportionate), would be one third.
  14. The just and more precise approach than that adopted by the Defendant is to take the sum claimed by way of estimated costs first and deducting therefrom the sum not

incurred in respect of disclosure. That should be reduced by 10%. There should then be added the sum in respect of then incurred costs with a reduction of 30% in respect of the same. Then there should be deducted from this sum the costs payable the other way to the Claimant, subject to a reduction of one third.

15. In order to reflect this and the three points at paragraph 10 above, there should be reductions against the sums claimed as follows:
  - (1) there should be a reduction of the disclosure costs sought by £25,653.30 so as to accord with the approved budget of £20,628.20;
  - (2) there should be a reduction in respect of the incurred costs of £25,000 by 30% instead of 10% so that they should be reduced by £7,500;
  - (3) the 10% deduction should be applied on the whole of the remaining estimated costs, not on the balance before deduction of the costs the other way.
  
16. The effect of the foregoing is as follows for the purpose of a reasonable sum at this stage is the following:
  - (1) Sums claimed: £167,094.50
  - (2) Remove excess over budget in respect of disclosure: £25,653.30 (see paragraph 15(1) above)
  - (3) Remove incurred costs of £25,000 (to be treated differently from estimated costs as per paragraph 15(2) above)  
  
Balance: (£167,094.50 – (£25,653.20 + £25,000)) ie £167,094.50 - £55,653.20 = £111,441.20
  - (4) Deduct 10% of these estimated costs = £11,144.12 (as per paragraph 15(3) above)
  - (5) Balance after deducting the 10% = £100,297.08
  - (6) Add 70% of the estimated costs of £25,000 = £17,500
  - (7) Total of estimated costs at 90% actually incurred plus incurred costs at 70% = £117,797.08
  - (8) Reduce 2/3 of Claimant's costs of £79,215 = £52,727.33 (as per paragraph 13 above)  
  
Overall balance = £65,069.75
  
17. In the circumstances, I shall order a payment on account of costs of £65,069.75, which represents a reasonable sum within CPR 44.2(8).