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PIBA'S OBSERVATIONS ON THE ISSUE OF CONTROLLING INCURRED COSTS IN CLINICAL NEGLIGENCE CASES

1. Introduction – PIBA submits this additional paper addressing the specific issue of controlling pre-budget incurred costs in clinical negligence cases. In order to address this issue Darryl Allen QC has spoken to the following:
   1.1. Master David Cook [QBD Master, RCJ]
   1.2. Lisa Jordan [Solicitor - Irwin Mitchell Birmingham and SCIL Committee Member]
   1.3. Steve Webber [Solicitor - Hugh James, Cardiff and SCIL Committee Member]
   1.4. Alan Mendham [Solicitor - Gadsby Wicks, Chelmsford and SCIL Committee Member]
   1.5. Sarah Lambert[1] [Counsel - 1 Crown Office Row, London – and Deputy Master sitting in the SCCO]
   1.6. Judith Ayling[2] [Counsel – 39 Essex street, London]
   1.7. Ross Olson[3] [Counsel – Deans Court Chambers, Manchester]
2. The MDU has provided a copy of its written submission presented to Sir Rupert Jackson. The NHSLA acknowledged a request for its submission but has not provided at the time of writing; the MPS refused to provide its response to me.

[1] Sarah Lambert specialises in clinical negligence and costs law; she acts for both claimants and defendants and has a wealth of experience as Counsel [CCMC hearings, clinical negligence litigation and detailed assessment] and as a Deputy Master sitting in the SACCO.

[2] Judith Ayling specialises in clinical negligence and costs law; she acts for both claimants and defendants and has a wealth of experience as Counsel [CCMC herings, clinical negligence litigation and detailed assessment].

[3] Ross Olson acts for both Claimants and Defendant insurers in mutli-track personal injury litigation; he has a wealth of experience of CCMC and costs budgeting from the defendant perspective.

3. At the Manchester Seminar there was broad consensus that costs budgeting is now working and is producing costs savings but can be improved. A significant improvement would be consistency between major court centres. That could and should be achieved by investment in regular high quality training of existing and new Judges.

4. According to Master Cook, the Masters are now seeing greater levels of agreement between solicitors who regularly appear before them as the solicitors now have far greater experience and understanding of the allowances generally made by the Masters for particular types of cases. In this way parties are sensibly agreeing budgets in a large volume of cases. The goal **must be** to facilitate and encourage the parties to reach sensible agreements as to the appropriate costs budget in individual cases without involving the Court to determine the issue. However, Master Cook confirmed, as he had at the Seminar, that the level of incurred claimant costs in *some* cases is a cause of concern. This echoes the comments made by John Meade [of the NHSLA] at the Seminar.

5. The merits of costs budgeting – This was addressed in the PIBA submission and addressed by me at the Seminar; we do not propose to rehearse the detailed arguments previously presented. In essence, costs budgeting provides bespoke "*fixed costs*" within which the parties have to operate.

6. Although the costs of both parties are budgeted, in the light of QOCS we are really talking about claimant costs. In any event, concern has only been expressed about claimant incurred costs.

7. Costs budgeting enables the Court, **properly informed as to the complexities/challenges of the individual case** and with the benefit of (a) evidence, and (b) meaningful submissions from both parties, to set a budget which it can/should be confident is reasonable and proportionate and which the parties can sensibly operate within.

8. Costs budgeting does not set the budget or fix costs solely by reference to the value of the claim.

9. Fixing a budget for pre-issue costs - Any system which seeks to set a pre-issue "*budget*" for incurred costs is, in truth, a system of fixed costs. Although escape clauses to exceed the budget can be incorporated into such a system, the reality is that it will be extremely difficult for a party to depart from any pre-issue fixed budget: the "*swings and roundabouts*" argument will carry the day, as it does with Portal and Fast-Track fixed costs.

10. If one accepts that costs budgeting works and provides a proportionate, effective and fair system [for both parties] then it is difficult to identify a principled justification for imposing an arbitrary fixed budget for pre-issue incurred costs which (i) bears no relation to the complexity of the individual case and, (ii) is imposed on the case when so little is known about it.

11. The problem which needs to be addressed - The concern expressed by Senior Master Fontaine and Master Cook was that they felt unable to exercise control over incurred costs. The solution therefore is to enable, empower and/or encourage them to exercise control over incurred costs in individual cases; the solution is not to remove control from them completely by imposing pre-issue arbitrary fixed costs.

12. The way the budgeting system actually operates at present - At the overwhelming majority of Costs and Case Management hearings, Judges [Masters and District Judges] are reluctant to be drawn into any consideration of incurred costs[4]. Defendants routinely argue for the Judge to make some comment to the effect that the incurred costs [or elements of them] appear to be excessive or disproportionate. Some Judges are willing to make that sort of comment but the majority are not[5]. Although the comments are taken into account at the detailed assessment stage, they are of limited value when costs are being assessed against a known outcome. Occasionally, but very rarely, a Judge will expressly take into account the level of incurred costs when setting the budget for the future conduct of the case[6]. In extreme examples, where vast sums have already been spent on phases of case preparation, Judges have allowed nothing for future conduct of the case under that phase[7]. That is very much a rare exception rather than the rule.

13. Suggested solution - The solution to the problem of incurred costs is for the Costs and Case Management Hearing to be properly recognised as a very significant hearing[8] and **for the Judge positively to take into account the amount of costs already incurred when setting the budget for the future conduct of the case**.

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4 Master Cook and Master Roberts have both been identified as Judges who take a greater interest in what has been done and what has been spent as part of the budgeting exercise but even they are reluctant to be drawn into debate about incurred costs save in the most obvious and extreme of cases.

5 Many Judges will make it clear at the outset of the hearing tha they are not interested in a debate about incurred costs.

6 For example, **Redfern v. Corby Borough Council** [2014] 4526 (QB) (HHJ Seymour QC sitting as a DHCJ)

7 Master Cook is in fact one such example.

8 It is already an important hearing in that (a) it allocates the case which in the majority of personal injury case presently dictates whether fixed costs apply, (b) sets the case management framework for the future conduct of the case, and (c) sets the budget for future conduct of the case.

In order to do so, the Judge would have to be provided with essential information as to what steps have been taken to date and what evidence has been obtained[9]. That places the incurred costs into a proper context and informs the judge as to how much work is yet to be done. As Master Cook described it, "*Pursuing a case to its conclusion is like a car journey. In order to budget for the rest of the journey, I need to know how far you have travelled already.*" Starting with a provisional global budget to pursue a case of a particular type to its conclusion, the budgeting Judge could then adjust that initial global budget recognising the particular circumstances of the individual case and then *sets the budget for the future* taking into account and reflecting (a) what has been done to date, (b) what has to be done in the future, and (c) how much has been spent thus far.

14. If this approach is adopted then the Court would be able to exert appropriate control over incurred costs by bringing those costs *into account* in the budgeting exercise. It would also retain ultimate control over incurred costs with its power to assess incurred costs at the detailed assessment stage and to depart from the budget if one party establishes good reason to do so to justify a detailed assessment in a budgeted case.

15. This approach would encourage good behaviour from claimants as any attempt at front loading and incurring excessive pre-issue costs would (a) result in a reduced budget for future costs, (b) limit their ability to complete the necessary future steps to bring the case to its conclusion, and (c) be vulnerable to challenge at two stages – the budgeting stage and the detailed assessment stage. It would enable the court and both parties to have far greater confidence in the budgeting process, knowing that the budget took account of the work done and the costs incurred in the individual case.

16. If costs incurred were taken into account as a standard component of the budgeting process then the interlocutory skirmishes of advocates arguing for comments on the incurred costs would be eliminated and the budgeting exercise would be much more straightforward.

17. None of the above is intended to suggest, nor should it be taken to suggest, that the costs management hearing descends into some form of mini-detailed assessment of incurred costs. The opposite is the case: the Judge is not required to express any view as to whether the incurred costs are reasonable or proportionate;

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[9] A pro forma two page form seeking essential information could be devised and used. An additional half page or single page [no more than that] could be used for additional information peculiar to the individual case.

he/she is simply required to take them into account when setting the budget for future conduct of the case. It is the global budget, the combination of incurred and future budgeted costs which ultimately matters; if a party has "*front loaded*" incurring early substantial costs then there will be little left to spend on future conduct of the case.

18. Further, PIBA does not suggest that a budgeting exercise which "*takes into account*" the level of incurred costs would or should operate as a bar to detailed assessment. Incurred costs would remain liable to detailed assessment as would "*budgeted costs*" [provided that good reason was established to justify detailed assessment of the budgeted costs]. However, the paying party is ultimately interested in its overall costs liability; if a budget has been set which takes account of costs already incurred then the overall costs liability should be reasonable and proportionate; if it is not then the paying party retains the ability to challenge those costs on detailed assessment, at which stage the Court retains ultimate control over the costs to be recovered from the paying party.

19. A system of budgeting which actively takes account of incurred costs is likely to (a) produce more meaningful budgets, and (b) reduce the number of detailed assessments.

20. <u>The arguments against fixing costs</u> – In its original submission to Sir Rupert Jackson and at the Manchester Seminar, PIBA argued that multi-track personal injury and clinical negligence cases are not suitable for fixed recoverable costs. PIBA remains of that view. The arguments against fixed recoverable costs in personal injury litigation are, in summary: (i) the unique nature of personal injury litigation; (ii) no current access to justice or equality of arms problems; (iii) reduced access to justice if FRC is introduced; (iv) unlevel playing field; (v) cases will be managed with a view to maximising costs recovery; (vi) adverse financial consequences for claimants; (vii) no known issue of excessive costs being incurred or allowed in personal injury litigation; (viii) costs budgeting is working; (ix) reduced involvement of the Bar; (x) absence of justification for FRC in personal injury litigation.

21. All of the arguments against fixed recoverable costs in that wider context apply with equal force, we would suggest even greater force, to pre-issue incurred costs. Insofar as there is concern about incurred costs **<u>in a minority of cases</u>**, the appropriate and proportionate solution is to enable and encourage Judges to sensibly address the issue at the budgeting stage and at detailed assessment if

necessary, rather than impose some form of arbitrary pre-issue fixed costs or budget.

22. Defendant behaviour - The emphasis, at present, appears to be on controlling claimant costs in clinical negligence cases. There is an assumption that responsibility for those costs lies exclusively or primarily with claimant solicitors. In some cases that may well be the case. However, it has to be recognised that the behaviour of defendants, the conduct of the NHSLA and other defence organisation being the most striking examples, routinely contributes to the escalation in costs. Where the NHSLA quotes cases in which the claimant costs have been 10 times the damages recovered, one has to ask where was the early admission of liability and/or the early Part 36 or Part 44 offer which would have led to settlement at an early stage? Alternatively, an early Part 36 or Part 44 offer would have provided realistic costs protection and avoided liability for substantial subsequent costs. In any event, the costs paid by the NHSLA are the costs which the NHSLA has either been *ordered* to pay following judicial determination or has *agreed* to pay. If the costs were genuinely disproportionate or unreasonable then they would and should have been challenged and reduced.

23. Under the current regime there is no incentive for defendants to look to settle claims at an early stage. PIBA suggests that it is essential that this aspect of the costs review does not simply focus on the actions of claimant lawyers and their responsibility for excessive incurred in certain cases; the review must also consider the behaviour of defendants and defendant lawyers; it should actively consider some adjustment to the system to incentivise and encourage early admissions of liability [even partial liability] and genuine attempts at early settlement.

24. The decision in Merrix – Mrs Justice Carr has now handed down judgment in the case of **Merrix v. Heart of England NHS Foundation Trust** [2017] EWHC 346 (QB). The issue in that case was whether, as the paying part argued, (i) a budget operates simply as one factor, merely "*a guide*", to inform a Judge at detailed assessment and the paying party is entitled to a detailed assessment *de novo* in every case irrespective of whether good reason to depart from the budget has been established [see CPR 3,18(b)]; or whether, as the receiving party argued, (ii) a receiving party is entitled to his costs as claimed if he litigates the case within budget unless the paying party establishing a good reason to justify departure from the budget and detailed assessment [see §4].

25. At first instance the Birmingham Regional Costs Judge [District Judge Lumb][10] held that although the paying party did not have "*open season*" to challenge the costs claimed, the budget did not fetter the discretion of the costs Judge and was simply a strong guide as to what would be allowed on detailed assessment.

26. On appeal, the Regional Costs Judge's decision was overturned, Mrs Justice Carr preferring the paying party's analysis and holding,

> *67. The words [of CPR 3.18] are clear. The court will not – the words are mandatory - depart from the budget, absent good reason. On a detailed assessment on a standard basis, the costs judge is bound by the agreed or approved costs budget, unless there is good reason to depart from it. No distinction is made between the situation where it is claimed that budgeted figures are or are not to be exceeded. It is not possible to square the words of CPR 3.18 with the suggestion that the assessing costs judge may nevertheless depart from the budget without good reason and carry out a line by line assessment, merely using the budget as a guide or factor to be taken into account in the subsequent detailed assessment exercise. The obvious intention of CPR 3.18 was to reduce the scope of and need for detailed assessment. The Respondent's approach would defeat that object.*

And later,

> *71. The approach is also consistent with the thinking of Coulson J in MacInnes (at [25]). Again, he could not go further than he did in the context of an application for an interim payment on account of costs. But, as he commented, the significance of the rule in CPR 3.18 cannot be overstated. The setting of a costs budget is an exercise of fundamental importance: underpinned by consequences of failure to file a cost budget as required (as set out in CPR 3.14). Its importance is underlined by the detailed provisions within CPR 3 section II, Practice Direction 3E and Precedent H in setting out the exercise that is to be carried out. There is thus, for example, express provision for the updating and revising of the costs budget as the proceedings progress, if necessary and appropriate. **It is fair to ask the question that, if it be right that an agreed or approved costs budget is no more than a guide at detailed assessment, even if a strong one, what point there can be in the parties and the court spending so much time on the cost budgeting exercise. The Respondent counters that it will***

[10] [2016] EWHC B28 (QB)

> ***still have value in that it can be a strong guide and so be likely to deter some detailed assessments altogether. But it is still difficult to see why so much time and money would be invested at the costs management stage if the budget were to be no more than a guide in any case where there is an underspend.*** [***emphasis*** added]

27. It seems likely that the decision in **Merrix** will progress to the Court of Appeal. In any event, the same issue arose in the case of **Harrison v. Coventry NHS Trust**, unreported, 16th August 2016 (Senior Cost Judge Master Gordon-Saker) in which permission has been given for a leapfrog appeal to the Court of Appeal but no date for the full hearing has yet been given [see §66 and §95 of **Merrix**].

28. In all probability, this issue will be resolved definitively by the Court of Appeal in due course. However, at this stage it is worth noting the comments of Mr Justice Carr on the issues of costs management, the importance of the budgeting exercise and the value of properly set budgets as tools to reduce the need for detailed assessment and avoid incurring "*the costs of costs*",

> *83. Fundamentally, this conclusion reflects what is in my judgment the clear intention of costs management as set out in CPR 3.18(b), namely to reduce the cost of the detailed assessment process by the treatment of agreed or approved cost budgets as binding, absent good reason to proceed otherwise. If this approach be right, the scope and cost of detailed assessment of costs on a standard basis will indeed be reduced materially. Jackson LJ's view that the burden of costs management, if done properly, would save substantially more costs than it generates, even if he reached no final conclusions and made no final recommendations in the Final Report as to how that would be achieved. It is achieved if there is a saving in the time and costs needed for detailed assessment, rather than duplication of time and expense in an unfettered landscape (even if the budget is seen as a strong guide). Such a solution might appear to be an obvious one, even if not one upon which Jackson LJ fixed conclusively in the Final Report.*
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> *84. The Costs Judge expressed concern that such an approach would, on the other hand, lead to longer and more expensive cost management hearings. With proper and realistic co-operation and engagement between the parties that should not be the case. The costs budgeting exercise already takes up significant amounts of court time and the parties' time in preparation. There is already a very*

substantial investment. Further, the costs budgeting exercise is not intended to be a detailed assessment, and the parties and the court should not approach it as such. It is a broad, phase-based assessment which will, albeit performed on a principled and carefully timetabled basis, inevitably be rough and ready in places. The clear intention behind and effect of the cost budgeting regime is that it is nevertheless to result in a budget from which the court will not depart on detailed assessment on a standard basis, unless there is good reason to do so. There is a balance to be struck: on any view, the Respondent's approach would involve very significant duplication and the added burden of having to cross-refer at each stage to the costs budget as a guide, albeit not a binding one.

And, perhaps most significantly for the purposes of the current consultation,

> *90. Fidelity to the clear words of CPR 3.18, as set out above, will achieve the dual purpose both of reducing the costs of the detailed assessment process and of securing greater predictability on costs exposure/recovery for the parties. Both the receiving and paying party have the benefit of the legitimate expectation. This is a central pillar of access to justice in a world where costs will always be a primary consideration for those contemplating or participating in litigation, and consistent with the overriding objective. The expensive costs of the detailed assessment procedure are reduced and the case is dealt with justly, with both parties knowing from an early stage what their potential costs liability is, absent good reason to depart from the budget.*

29. We would be happy to discuss the contents of this Note, any of the issues raised in it or the issue of fixed costs generally.

26th February 2017

Robert Weir QC, Chair of PIBA

Darryl Allen QC, Vice Chair of PIBA