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COST BUDGETING, MITCHELL & RELIEF FROM SANCTION

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A Quick Recap

- ❖ Defamation Pilot Scheme case
- ❖ C's budget (for £500k costs) was filed late.
- ❖ CCMC had to be adjourned.
- ❖ Relief refused – C allowed Court fees only
- ❖ CA dismissed appeal
- ❖ Test for relief under 3.14 (“unless Court otherwise orders”) same as under 3.9

Doomed before you begin

“Although it seems harsh in the individual case of Mr Mitchell’s claim, if we were to overturn the decision to refuse relief, it is inevitable that the attempt to achieve a change in culture would receive a major setback.”

[jgmt para 59]

The New Order

The new provisions of CPR 3.9 are of “paramount importance” (jgmt para 36)

- ❖ Litigation to be conducted efficiently and at proportionate cost

[but not with proportionate sanctions – see para 58!]

- ❖ To enforce compliance with rules, PDs and court orders.

When will relief be granted?

- 1) No test of “exceptional circumstances”?! [35]
- 2) Trivial breaches / insignificant failures,
provided apply promptly [40]
- 3) Otherwise a “good reason” required. [41]

Trivial Breaches?

- Narrowly missing deadline
- Form rather than substance

Good Reason?

- Debilitating illness *may* be
- Later developments in the case
- But not “well-intentioned incompetence” [48]

Lessons to Learn?

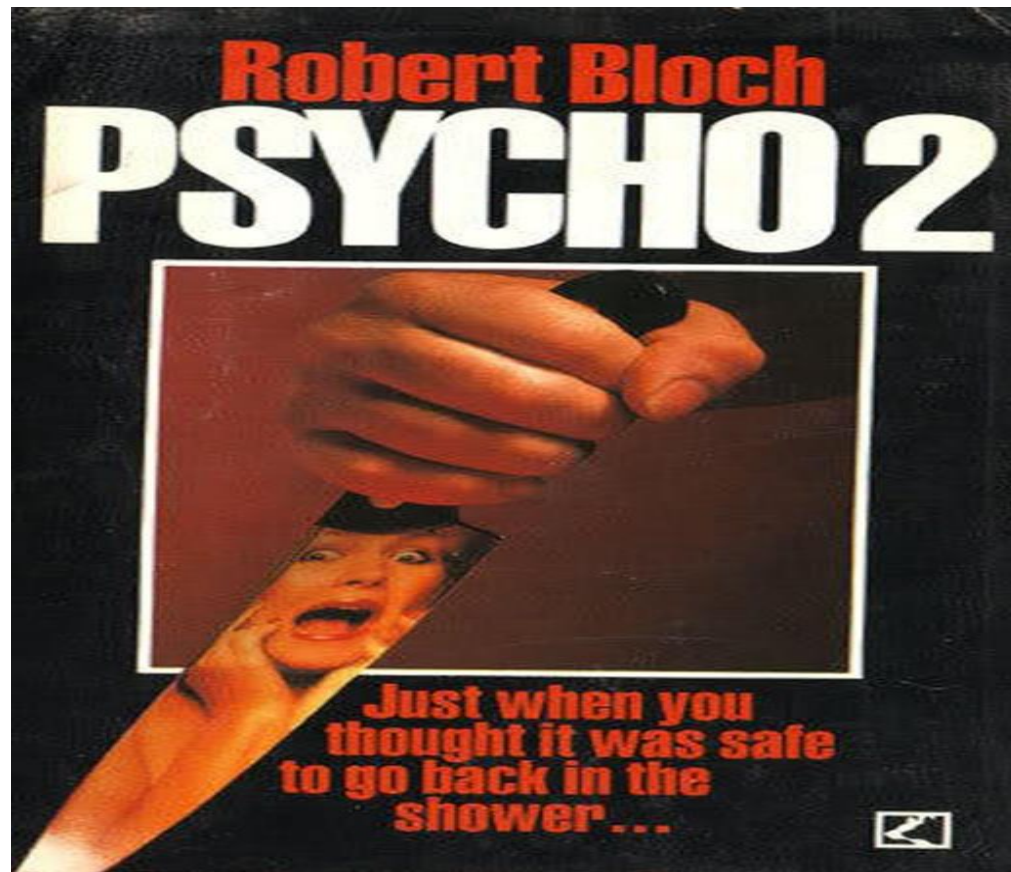
1. Ensure the original timetable is realistic [34]
2. Does the Order carry a sanction?
3. Apply to extend BEFORE deadline expires
4. Apply PROMPTLY for even trivial breaches
5. Have your application ready if budget is late
6. Agree budgets?

Bring Me Sunshine?????

- Still recovered incurred costs (£100k).
Frontload cases?
- If costs awarded on indemnity basis: see CPR 3.18 - early P36 offers?
- The Nuclear Option? Back to square one



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And There's More

- ❖ Durrant v CC of Avon & Somerset [2013] EWCA Civ 1624
- ❖ Thevarajah v Riordan [2014] EWCA Civ 15
- ❖ Lloyd & Sons v PPC International [2014] EWHC 41 (QB)
- ❖ Webb Resolutions v E-Surv Ltd [2014] EWHC 49

And in the costs arena

Late Cost Schedules

- Old CPD 13.5(4)
- New 44nPD9.5(4)
(the 24 hour rule)

Pre 1/4/13

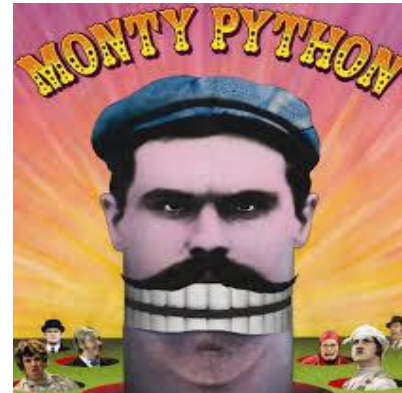
- MacDonald v Taree

Now

- Williams v Hardy (Mstr Hurst)

Notification of CFAs

- Death / loss of capacity / change of firm / change of status of firm
- Cases so far: 2 – 1 for common-sense



AUDIENCE PARTICIPATION TIME



The Formalities

- 1) Only applies to pre-1/4/13 cases. Or does it?
- 2) Must use the correct form: 3EPD1
- 3) Dated and verified with stmt of truth: 3EPD1
- 4) When? Usually 7 days before CMC: 3.13
- 5) If costs less than £25k, front page only:
3EPD1
- 6) Limit on costs for completing: 3EPD2.2

Help is at Hand

- Guidance Note – points to note: pre-action; CMC; ADR
- Reviewing your past cases
- Assistance from costs draftsman
- Get input from all those involved in the case (counsel, experts)

Identify the Assumptions

- Likely value of the claim
- Split trials?
- How many files of disclosure? Not more than
- How many witnesses (on each side)
- How many experts (on each side)
- Likely duration of the case until trial
- Likely trial length
- Negative assumptions (no surveillance, no contested applications)

And amend promptly if subsequently confounded

Common Issues

- At what stages will counsel be involved?
- Instruction of Leading Counsel?
- Liaising with Case Managers / INAs
- Up-dating Schedules
- Up-dating witness statements
- How many rounds of expert reports?
- Multiple CMCs
- IFAs for PPOs

Contingencies

“Known Unknowns”

Anticipated Costs

- A further CMC?
- A JSM
- A split trial

Unanticipated costs

- Video surveillance
- Contested IP application
- Specific disclosure application
- Change of expert

The Hearing

- CPR The Purpose of the Exercise
- 3.12: To manage steps & costs to further O.O.
-
- 1.1: Includes managing cases at
proportionate cost
-
- 44.3(2): Disallow disproportionate costs even if
reasonably and necessarily incurred

CPR 44.3(5)

Costs are proportionate if they bear a reasonable relationship to:-

- a. Sums in issue
- b. Value of non-monetary relief
- c. Complexity of the litigation;
- d. Additional work generated by opposing party
- e. Any wider factors (duration of case?)

Issues to Consider

- Is agreement feasible?
- Discretion to make costs management order (CPR 3.15):-
 - a. High value cases / TCC?
 - b. Budgets still relevant: 44n.PD3 (20% rule)
 - c. Master Roberts approach
- Can be limited to certain phases: 3EPD1
- High Court practice re incurred costs
- Master Leslie's "summary budgets"
- Arguing the hourly rate

And Finally

- Record the assumptions upon which the budget was approved.
- Work to the budget
- Amend (promptly) if necessary: 3EPD2.6