

**Costs Budgeting Strategy:
What counts and what will sway the court
when you are seeking or resisting a budget
variation supported by practical examples
of "significant developments" in borderline
cases?**

***White Paper Costs Conference
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Introduction

- This is intended to be a lightning review of:
- (a) the latest developments in the case law on costs management, focusing on budget variations – the Present;
- (b) A quick update on where we are on implementing the report on the future of costs management published by the Civil Justice Council (“CJC”) in May 2023 – the Future.

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The Purpose of Costs Management

- The purpose (CPR 3.12(2)):
- *“that the court should manage both the steps to be taken and the costs to be incurred by the parties to any proceedings (or variation costs provided in rule 3.15A) so as to further the overriding objective”.*

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Costs Management

- CPR 3.15(8) – default position is that there will be costs management (unless over £10m):
- *It “concerns the totals allowed for each phase of the budget, and while the underlying detail in the budget for each phase... is provided for reference purposes to assist the court...,*
- *it is not the role of the court in the costs management hearing to fix or approve the hourly rates claimed in the budget.”*

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Costs Management

PD 3D provides:

- 5. *“In deciding the reasonable and proportionate costs of each phase of the budget the court will have regard to the factors set out at CPR 44.3(5) and 44.4(3) including a consideration of where and the circumstances in which the work was done as opposed to where the case is heard.”*
- 12. *When reviewing budgeted costs, the court will not undertake a detailed assessment in advance, but rather will consider whether the budgeted costs fall within the range of reasonable and proportionate costs.*

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Revisions and Variations

- CPR 3.15A:
- (1) A party (“the revising party”) must revise its budgeted costs upwards or downwards if significant developments in the litigation warrant such revisions.
- (2) Any budgets revised in accordance with paragraph (1) must be submitted promptly by the revising party to the other parties for agreement, and subsequently to the court, in accordance with paragraphs (3) to (5).
- To the other side first, and then to the Court.

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Revisions and Variations

- (5) The court may approve, vary or disallow the proposed variations, having regard to any significant developments which have occurred since the date when the previous budget was approved or agreed, or may list a further costs management hearing.
- (6) Where the court makes an order for variation, it may vary the budget for costs related to that variation which have been incurred prior to the order for variation but after the costs management order.

Al Najjar v The Cumberland Hotel

- [2018] EWHC 2532 Master Davison set out 5 principles:
- *“(a) Whether a development is ‘significant’ is a question of fact which depends primarily on the scale and complexity of what has occurred.*
- *(b) If what has occurred is something that should reasonably have been anticipated by the party seeking to revise its budget, then that party will probably be unable to label it significant or, for that matter, a development. (see Sharp v Blank (2017) per CM Marsh)*

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Al-Najar

- *(c) However, there is no requirement that the development must have occurred other than in the normal course of the litigation ...*
- *(d) As a matter of policy, it seems to me that the bar for what constitutes a significant development should not be set too high because, otherwise, parties preparing a budget would always err on the side of caution by making over-generous (to them) assessments of what was to be anticipated.*
- *(e) Lastly, and I think this is uncontentious, if there has been a significant development, then the question is whether the figures in the revised budget are reasonable and proportionate in the light of the development.”*

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Persimmon

- *Persimmon Homes v Osborne Clarke LLP* [2021] EWHC 831 (Ch) per Master Francesca Kaye lays down excellent guidance:
- "*.... even if there has been a significant development, not every significant development in the litigation will warrant a revision to the last approved costs budget...*

Persimmon

- *Not every development will be significant even if it has costs consequences.*
- *Whether a development is a development at all since the last approved costs budget, and whether it is significant and warrants a revision to the costs budget has to be considered in the context of each case”.*

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Persimmon

- *" ... Do the matters raised by the applicant, in fact, change the overall scope and likely cost of that phase? Were they, or should they have been, expressly or impliedly taken into account when the last costs budget was approved?"*
- *...They would have to be able to satisfy the court that the variation only related to the significant development and did not interfere with the exercise carried out by the [original judge]."*

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Persimmon

- Master Kaye held [99-101] that before revisions to a budget can even be considered not only does there have to be “significant development” warranting revision but there also has to be promptness,
- Then the court will consider whether, as an exercise of discretion, it should approve or not the proposed variations under CPR 3.15A(5).

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Variations –

Onya UK v Andrews Excavations

- HHJ Watson, TCC [2021] EWHC 3824 (Comm)
- Applied the approach in *Persimmon*
- Unexpectedly heavy disclosure from a third party, the Environment Agency of 1,000 documents in an otherwise document-light case was a “*significant development*” which changed the nature and scope of the disclosure phase

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Onya v Andrews

- But that did not in itself justify the instruction of leading counsel –

“It may well be that, on reflection the defendants regret not budgeting for instructing leading counsel. The test is not whether I consider the seriousness of the case means it is suitable for leading counsel. It is whether the significant development warrants the instruction of leading counsel. In my judgment it does not”.

- Need to be careful only to allow those extra costs caused by the “*significant development*” alone

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Contrast: *Simpsons (Preston) Ltd v Ms Amlin Underwriting*

- [2023] Costs LR 789 HHJ Pearce
- C's Application to vary by doubling the disclosure phase as C's own 2 unanticipated network drives containing 362,000 documents
- D said C had simply underestimated the disclosure exercise of C's own documents.
- Necessary to work out the basis upon which budget originally set and what was or should have been anticipated at the time

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Simpsons

- No surprise these applications often arise as to disclosure as so much uncertainty about this at the time of the costs management order
- Therefore Master Davison right that the bar as to what is a “significant development” should not be set too high otherwise unfair
- Dividing line b/n what was or could/could not have been known at time budget set
- Not whether “internal” or “external” to the party

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Simpsons

- Held: discovery own disclosure far more substantial than anticipated is capable of being a “significant development”
 - But evidence not specific enough about what impact this had had on C’s burden of work
 - Moral of the story: be very specific in your evidence as to the impact caused just by this development.
- Alexander Hutton KC

Right approach to the amounts

- Leggatt J in *Kazakhstan Kagazy v Zhunus* [2015] EWHC 404 (Comm) had stated that:
- *“What is reasonable and proportionate in that context must be judged objectively. The touchstone is not the amount of costs which it was in a party’s best interests to incur but the lowest amount which it could reasonably have been expected to spend in order to have its case conducted and presented proficiently, having regard to all the relevant circumstances. Expenditure over and above this level should be for a party’s own account and not recoverable from the other party.”*

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Contrast Discovery Land v Axis Specialty Europe

- [2021] EWHC 2146 (Comm) where Peter MacDonald Eggers QC quoted this and then said:
- *“I have only one reservation. I am not certain why the “touchstone” of reasonable or proportionate costs must be the lowest amount which a party could reasonably have been expected to spend....”*

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Discovery Land

- *...Certainly in the context of costs management, the court should allow some flexibility to the parties to ensure that their conduct of the action is not unnecessarily and potentially unfairly hampered by an unrealistically low assessment or by only the lowest assessment of what would constitute reasonable and proportionate expenditure. Expenditure which is within a reasonable and proportionate range is still reasonable and proportionate even if it is not at the lower end.”*

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How to reconcile these?

- HHJ Pearce in *Simpsons* made a valiant effort:
- *“There is of course a substantial difference between the retrospective approach of the assessment of costs, which was the context in which the issue was being considered in *Kazakhstan Kagazy plc v Zhunus* and the prospective management of costs as in *Discovery Land Company v Axis Speciality Europe*, since in the former, the court knows what work it is considering when assessing costs, whereas in the latter the court has to work on assumptions as to what work will be involved...*

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The right test to apply

- *“The inevitable uncertainties of the latter exercise make it right that the court should not simply look to manage costs at the lowest conceivable figure but rather should take a realistic view as to what work is likely to be involved in a particular phase, bearing in mind that, if the court underestimates the work involved, a party will only be able to seek revision of the budget in the narrow circumstances identified above.”*
- **NB** Para 12 PD 3D that the court will consider whether *“the budgeted costs fall **within the range** of reasonable and proportionate costs”*
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Cranstoun v Notta

- [2021] Costs LR 47
- “*Significant development*” found where a 3 day trial had become a 5 day trial + written closing submissions
- But...

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Cranstoun

- The court had ordered costs on the indemnity basis, covering the trial phase
- So didn't need a "significant development" as ***Lejonvarn v Burgess*** [2020] Costs LR 45 (CA) at [93] confirms that the budget simply does not apply where there is an order for indemnity costs
- Perplexing...

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Principles

- (1) “Significant” developments is a substantial hurdle: have they changed the overall scope of the phase?
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- (2) Could you or should you have anticipated something like what has happened at time of costs management?
- (3) If not, be very specific in your evidence as to the impact on each relevant phase in the budget
- (4) Apply early so as not to fail in promptness, but this is a balance with need for specifics which take a while to become clear **Alexander Hutton KC**

Costs of Costs Management

- The number 1 growth area in costs management...
- It used to be assumed that it would “costs in the case” but:
- *Reid v Wye Valley NHS Trust the Robert Jones & Agnes Hunt Orthopaedic Hospital NHS Foundation Trust* [2023] EWHC 2843: 25% reduction to C’s costs if successful

Costs of Costs Management

- *Worcester v Dr Hopley* [2024] EWHC 2181 (KB), Master Thornett, clinical negligence, reduced C's estimated costs from £342K to £159K, 3.58% higher than D's offer:
- [19]: *"In short, a party that resolutely proceeds to a separately listed costs management hearing with an overly ambitious budget should not readily assume that the court will be willing to see both its time and resources and those of opposing parties' engaged without any potential consequence in costs"*

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Worcester v Dr Hopley

- 20. *“Neither do I agree that if there is to be an order other than “in the case”, the starting point is that a party that secures approval of a sum at least something in excess of that offered by an opponent thereby establishes “success” and so should avoid an adverse costs order against them.*
- ***Not least because success could equally be defined as that of the opposing party in securing substantial reductions. Hence, as I am satisfied, why it is appropriate for the court to take a more rounded and general view of the process that took place.”***

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Worcester v Dr Hopley

- Result:
- No order for costs one hearing
- C to pay D's costs of the main hearing
- C's preparation costs management costs reduced by 15%

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Jenkins v Thurrock

- Similar approach by Master Thornett in *Jenkins v Thurrock Council* [2024] EWHC 2248 (KB), PI claim
- *“My conclusion is that the Claimant had presented and maintained an unrealistic and disproportionate approach to his estimated costs in the context of the demands and requirements of this case. He continued to do so despite the opportunity to modify his position in response respectively to the Defendant’s first Precedent R, observations made at the Case Management Conference and then overtures made by the Defendant during an intervening period before the Costs Management Hearing, a period as prescribed by the court specifically to facilitate appropriate discussion and negotiation.”*

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Not just the Masters...

- In *GS Woodland Court v RGCM Ltd* [2025] EWHC 285 (TCC), per Constable J a buildings defects claim re student accommodation:
- C's costs claimed at £8.75 million and allowed at £4,212,126, reduction over 50%
- Rates claimed at £1,089 ph Grade A vs London 1 guideline rate of £566 – agreed London 1 but bear in mind *Samsung Electronics v LG Display*
- Cs "lost" the hearing even though Ds offered £3.5m, unrealistic and failed to listen
- C to pay D's costs of the costs management hearing

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Pan Nox Emissions Litigation

- Couldn't do a costs management talk in 2025 without mentioning it
- 3 day hearing
- Cs: estimated costs claimed at £207m, allowed at £52m
- Ds: estimated costs £211m, Cs' offers £148m, Court allowed £113m, below the offers/agreements (said to have been agreed they could do this).

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The CJC Report

- In 2022, the Master of the Rolls Lord Vos asked the Civil Justice Council/CJC to take a strategic and holistic look at costs, especially given ongoing transformation of civil justice into a digital justice system.
- Reported 2023 including on budgeting and guideline hourly rates (separate CJC sub-committee on “super” guideline hourly rates and GHR for Counsel...)

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Future

- Fundamental recommendation:
- *“Costs budgeting should be retained, however coupled with its retention should be acceptance of the hypothesis that “one size does not necessarily fit all”. We suggest that it should be possible to permit a more tailored approach to costs management, to suit different work types and/or venues where the litigation is conducted.”*

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Simplified Budgets

- Simplified Costs Budgeting-Light (or is it Lite?) for claims between £100K and £1million in Business and Property Courts in Central London CC or Leeds & Bristol DRs
- 2 new PDs PD51ZG1 and PD51ZG2 – funky!
- Applies to claims issued after 1 April 2025 and before 1 April 2028
- Simplified budget (Precedent Z) and Precedent T but not published yet...

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Simplified Costs Budgeting

- (1) Simplified Budget filed 21 before CMC
- (2) Simplified BDR 7 days before CMC
- (3) If CMO made, right to apply to vary for significant developments
- (4) If no CMO made, must file updated simplified budget earlier of either 7 days before trial or before PTR

- If party can show they relied upon it, the return of the 20% rule from the days of *Leigh v Michelin Tyres*: restrict party to no more than 20% above budget.
- Everything in costs goes in circles in the end!
- Sanctions for failing to file budget the same.

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The Future

- Is Sir Rupert Jackson's prediction in 2015 to come true or not:
- *“I predict that within 10 years, costs management will be accepted as an entirely normal discipline and people will wonder what all the fuss was about?”*
- It seems likely it will still be with us, anyway, even though in fewer cases...
- Watch this space for the conclusions!

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