

Will budgeting be extinguished completely or altered, and how, following judicial/CPRC scrutiny? Should it be postponed until after directions?

***White Paper Costs Conference
2023***

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Introduction

- Following pilot schemes, costs management became part of the mainstream litigation process from April 2013, almost exactly 10 years ago.
- It applies in every Part 7 multi-track claim save if the claim is for more than £10 million (where there is a discretion to order costs management anyway - see e.g. *Sharp v Blank* [2015] EWHC 2685).

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The Purpose

- 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 variations) so as to further the overriding objective*”.

Costs Management

- CPR 3.15 – 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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Variations

- CPR 3.15A (October 2020 onwards):
- A party must revise its budgeted costs upwards or downwards if significant developments in the litigation warrant such revisions.
- Such particulars of variation must be filed and served and
- The court may approve, vary or disallow variations, having regard to any “*significant developments*” since the CCMC

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Approval/Comments

- CPR 3.17(3):
- (a) The court may not approve costs incurred up to and including the date of any costs management hearing but
- (b) may record its comments on those costs and take those costs into account when considering the reasonableness and proportionality of the budgeted costs.
- Unanticipated interim application costs can be allowed on top.

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Budgeted Bills

Tick through or good reason to depart?

- CPR 3.18: on standard basis, the court **will**
- *(a) "have regard to the receiving party's last approved or agreed budgeted costs for each phase of the proceedings;*
- *(b) not depart from such approved or agreed budget unless satisfied there is good reason to do so..."*
- *(c) Take into account any [comments on incurred costs] recorded on the face of the order*

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Civil Justice Council

Consultation June 2022

- (i) Whether costs budgeting should continue in its current form;
- (ii) Whether it should be restricted in scope and, if so, how;
- (iii) Whether it should be abolished altogether; and
- (iv) if it is to be restricted or abolished, how an early focus on costs could nevertheless be retained.

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CJC Consultation Paper

- Costs management currently “default on” below £10 million, “default off” above £10 million.
- Should this change, and, if so, how?

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Questions

- These include:
- (1) Is budgeting useful?
- (2) If it is applied inconsistently, then why and how do you solve this?
- (3) Does it promote access to justice for smaller parties vs rich opponents?
- (4) Does it result in a waste of costs? If so, what is your alternative?

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Questions

- (5) Is the current £10m cut-off about right?
- (6) how should incurred costs be dealt with?
- (7) Who should carry it out: specialist costs judges?

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Answers – The Responders

Despite considerable disquiet expressed for years about costs budgeting, almost no-one proposed abolition

- And this was the majority position at the CJC conference on 13.7.2022
- The context cannot be ignored that the alternative might be ever more fixed recoverable costs...

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Law Society Response

- The Law Society proposed:
- (a) Costs-budgeting-lite with one page budgets to determine case management and discretion to judge to order detailed budgets if required
- (b) Lowering the “default off” level from £10m to about £250,000
- (c) Separate out case and costs management

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Bar Council/PIBA

- Joint Response:
- Budgeting is useful, a valuable & proportionate way of controlling costs and focusses parties' minds on costs at outset
- Keep £10m default on cut-off but ability to opt out if all parties agree in case over £1m
- Default of no need for D's costs budget in QOCS cases
- Should be discretion to “uncouple” costs management from case management

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Association of Costs Lawyers (ACL)

- Strong support for retaining costs management (Turkeys and Christmas come to mind) – otherwise unmanaged costs at end or FRC
- 75% costs lawyers say it helps reduce detailed assessment afterwards
- Decouple case management from costs management, budget after case management
- Precedent R should be one document recording comments like Replies
- Should be same test for revising budget vs “good reason” on DA

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Medical Protection Society

- In favour of fixed recoverable costs in clinical negligence claims up to £250K
- Supports costs management on a “default on” basis but defendants should not have to do budgets [But **note** recent changes to QOCS rules make it more likely D will get costs]
- More costs management should be done on paper or by remote hearing

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What impact will Extension of FRC have?

- The plan is that FRC will be extended to essentially all multi-track cases up to £100K (from £25K) in value, i.e. a very substantial proportion and inevitably reduces the application of costs budgeting
- Was to be April 2023, now October 2023
- No rules published as yet, but it seems it really is coming

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Abolition?

- The abolitionists appear to be swimming against the tide now
- But some revisions seem very possible:
 - express discretion to decouple?
 - Costs judges?
 - No defendants' budgets in QOCS cases?
 - Change in the “default on” level?

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Decoupling?

- Would appear essential in large, complex actions, e.g. GLOs such as Mau Mau, VW Emissions, Lloyds/HBOS etc.
- In smaller actions might just add unnecessarily to the cost unless there is a serious dispute on the case management directions

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Default on/Default off

- Remarkably few decided cases on applying costs management in “default off” position:
- *Sharp v Blank* [2015] EWHC 2685 per Nugee J, a GLO case where Cs’ ATE insurers wanted to know what cover was required
- And *Vattenfall AB v Prysmian* [2021] Costs LR 143 in the CAT, Trower J: budgets a useful case management tool, esp re proportionality, and encourages transparency re costs
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Costs Management in QOCS cases

- It appears the theory was that Ds should prepare budgets so as to inform the court what the other side is spending
- But is it simply an empty process in which Ds, usually with their anaemic hourly rates, simply try to “low ball” and the Judge ignores them anyway?
- It would not be a surprise if Ds no longer had to do them

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Big Cases

- Having a cut off of £10m is like “*having a budget for building a shed but not for building a house*”, per Kerry Underwood
- It works very well in GLO cases, budgeted in stages and exerting control in cases where costs can spiral out of control disproportionately
- Why not £10m + cases? Are costs in those cases really proportionate without it?

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Is it worth it?

- Interested parties' contentions have to be viewed with their/their clients' interest in mind.
- There is little doubt that costs management has significantly reduced the extent, and costs, of detailed assessment. But it has added another layer to the costs of (and delays in) the main action.
- Is it worth it?

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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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