St John's CHAMBERS

Costs budgeting in personal injury claims – the inherent difficulty of predictive assessment

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Justin Valentine, costs barrister, discusses the inherent difficulties of costs budgeting and the on-going amendments being made to the scheme to try to make it work better. Costs budgeting was intended to bring both the procedural steps to be taken and the costs to be incurred in complex cases under the management of the Court. However, litigation is uncertain, unforeseen costs will and do arise and judges have shown little inclination to manage the steps to be taken, merely the costs. How is a solicitor to cope with these contradictions and what is the best approach to take in relation to revising a budget?

1. Costs budgeting was introduced for most multi-track cases issued on or after 1st April 2013. The aim was to remedy the problems of unpredictability and disproportionality. Concerns were expressed at the time as to how a system akin to a predictive detailed assessment could control costs. Those concerns have to some extent been borne out.

2. According to CPR 3.12(2) "*The purpose of costs management is that the court should manage both the steps to be taken and the costs to be incurred by the parties to any proceedings so as to further the overriding objective*". Controlling costs in advance raises a legitimate concern that if circumstances change expended costs will not be recovered, one response to which is for a solicitor[1] to front load the budget thereby defeating the purpose of costs budgeting at least in relation to proportionality.

1 Primarily claimant solicitors in the context of cases captured by QOCS.

3. The 83rd Update to the CPR ("the update") commencing 6th April 2016 made significant changes to Practice Direction 3E – Costs Management ("the practice direction") and the Guidance Notes to Precedent H ("the guidance notes"). The rules were amended by statutory instrument[2]. The breadth of the changes illustrates the difficulties implicit in the costs budgeting exercise. The aims of the Rules Committee are clear – a more efficient, document-light exercise providing clarity to parties – but it is unclear whether these aims can be achieved or whether the process can resolve the inherent tension of pre-emptive costs setting in the context of uncertain litigation.

4. Prior to a costs management hearing budgets in the form of Precedent H have to be prepared by each side and exchanged. There is some difficulty as to what has been incurred and what lies in the future. For example, there is often a delay in listing CCMCs. CPR 3.13 has been amended (improved) so that where the stated value of the claim on the claim form is less than £50,000 the budget must be filed with the directions questionnaire but in other cases not later than 21 days before the first CCMC, ie later than previously. However, this still results in the CCMC costs themselves being in the past by the time the CCMC actually takes place whereas they would have been in the future at the time the costs budget is prepared.

5. Certain problematic cases have been removed from costs budgeting entirely. By CPR 3.12(1)(c) budgeting is excluded "*where in proceedings commenced on or after 6th April 2016 a claim is made by or on behalf of a person under the age of 18*[3]*".* Further by CPR PD 3E.2(2)(b) "*In cases where the Claimant has a limited or severely impaired life expectation (5 years or less remaining) the court will ordinarily disapply cost management under Section II of Part 3*[4]*."*

Costs Management Orders – Incurred Costs and Estimated Costs

6. The interplay between incurred costs, estimated costs, agreement as to costs and parties' and the Court's comments on incurred costs is not straightforward.

7. CPR 3.15(2) provides:

> *(2) ... By a costs management order the court will—*
>
> (a) *record the extent to which the budgets are agreed between the parties;*

2 The Civil Procedure (Amendment) Rules 2016 which came into force 6th April 2016.

3 This change was likely introduced to reflect the many years that catastrophic injuries involving children may take to resolve but reference to "*on behalf of*" arguably includes fatal accident claims with a child dependent so may be a wider exception to costs budgeting than perhaps anticipated.

4 There is no requirement that the limited life expectation is a result of the accident.

(b) *in respect of budgets or parts of budgets which are not agreed, record the court's approval after making appropriate revisions.*

8. In relation to incurred costs paragraph 7.4 of the practice direction provides:

7.4 As part of the costs management process the court may not approve costs incurred before the date of any budget. The court may, however, record its comments on those costs and will take those costs into account when considering the reasonableness and proportionality of all subsequent costs.

9. Accordingly, the Court cannot costs manage incurred costs but they can be commented upon and the parties can agree them. The interplay between the various costs categories and the Court's powers has been clarified by the Court of Appeal in *Sarpd Oil v Addax Energy SA and another* [2016] EWCA Civ 120. The Court held:

41. It may thus be seen that although a costs budget sets out the incurred costs element and the estimated costs element, as a result of para. 7.4 of PD3E the court does not formally approve the incurred costs element but only the estimated costs element; and it is only in relation to that approved estimated costs element that the specific rule of assessment in Part 3.18(b) applies, namely that the court will not depart from the approved budget "unless satisfied that there is good reason to do so". ***It should be noted that there is no restriction in the Practice Direction regarding parties agreeing costs budgets as set out in the form of Precedent H, so in a case where the parties agree a costs budget in whole or in part and that is recorded in the relevant costs management order (as contemplated by Part 3.15(2)(a)), the rule in Part 3.18(b) applies both to the agreed incurred costs element and to the agreed estimated costs element.*** *[emphasis added].*

...

43. ... depending on what is said by the court by way of comment, the practical effect of a comment on already incurred costs made by a court pursuant to para. 7.4 of PD3E may be similar to the effect under Part 3.18(b) of formal approval of the estimated costs element in a cost budget.

44. Parties coming to the first CMC to debate their respective costs budgets therefore know that that is the appropriate occasion on which to contest the costs items in those budgets, both in relation to the incurred costs elements in their respective budgets and in relation to the estimated costs elements. ....

10. *Sarpd Oil* has been widely interpreted as meaning that parties should register their objection to incurred costs even if they cannot be approved of by the Court. In the absence of such objection there is an implied approval from the Court that those incurred costs are reasonable and proportionate.

11. Although clearly correct, this approach somewhat undermines the costs management process since in many cases, especially where there is delay in listing a CCMC or a hearing to amend the budget, incurred costs may be substantial and there will be no effective assessment of those costs until after the conclusion of the claim. It appears unlikely, and it is not consistent with the scheme of the budgeting process, that a costs judge will embark on a assessment of those costs in detail.

Streamlining the Process

12. In relation to the assessment process several changes have been made intended to reduce the material that the assessing judge must consider and generally to streamline the process:

(a) The Court should not fix or approve hourly rates[5]. There is a new paragraph 7.10 in the practice direction which provides:

7.10 The making of a costs management order under rule 3.15 concerns the totals allowed for each phase of the budget. It is not the role of the court in the cost management hearing to fix or approve the hourly rates claimed in the budget. The underlying detail in the budget for each phase used by the party to calculate the totals claimed is provided for reference purposes only to assist the court in fixing a budget.

(b) Documentation should not be filed with budgets. Paragraph 2 of the guidance notes provides:

Save in exceptional circumstances, the parties are not expected to lodge any documents other than Precedent H and the budget discussion report. Both are available in Excel format on the MOJ website with PD 3E. If the Excel format precedent on the MOJ website is used, the calculation on page one will calculate the totals automatically and the phase totals are linked to this page also.

(c) The assumptions section should be more concise. Paragraph 8(a) of the amended guidance note provides:

5 Warby J notes in *Yeo v Times Newspapers* [2015] EWHC 209 (QB) that in a speech given by the Senior Costs Judge Master Gordon-Saker hourly rates or hours should not be looked at though he (the Master) noted "*that the most common question raised by Judges was how they could approach the overall question without reference to hours and rates*". If judges themselves find that process unhelpful then it is suggested that such a change is not appropriate.

The assumptions that are reflected in this guidance document are not to be repeated. Include only those assumptions that significantly impact on the level of costs claimed such as the duration of the proceedings, the number of experts and witnesses or the number of interlocutory applications envisaged. Brief details only are required in the box beneath each phase. Additional documents are not encouraged and, where they are disregarded by the court, the cost of preparation may be disallowed, and additional documents should be included only where necessary.

(d) A new Precedent R Budget Discussion Report has been introduced in which the parties set out the figures which are agreed, those not agreed and a brief summary of the grounds of dispute.

13. Whilst these changes have the effect of reducing the burden on the Court, it is questionable whether they will increase parties' confidence in the process. Additional documents were presumably filed in an attempt to persuade the Court of the complexity of the issues to be resolved. The risk is that judges will adopt a "one size fits all" approach to costs management. There is widespread complaint of inconsistency in the setting of budgets.

Revising the Budget – What is a Significant Development?

14. The purpose of a costs management order is to provide predictability as to the costs of the litigation. However, there will inevitably be unforeseen developments in the course of litigation which alter the costs needed to be expended. Paragraph 7.6 of the practice direction provides:

7.6 Each party shall revise its budget in respect of future costs upwards or downwards, if significant developments in the litigation warrant such revisions. Such amended budgets shall be submitted to the other parties for agreement. In default of agreement, the amended budgets shall be submitted to the court, together with a note of (a) the changes made and the reasons for those changes and (b) the objections of any other party. The court may approve, vary or disapprove the revisions, having regard to any significant developments which have occurred since the date when the previous budget was approved or agreed.

15. Reference to providing a note and submitting the amended budgets to the court suggests that the exercise should be a paper one and relatively informal. It is not clear that this is always the approach in practice.

16. In *Churchill v Boot* [2016] EWHC 1322 (QB) Picken J considered an application for permission to appeal against a decision to refuse the claimant permission to amend his costs budget from the approved budget of £114,000 to nearly £240,000. The Master declined on the basis that there had not been a "*significant development*" as required by the Practice Direction.

17. In that case the claim had doubled in size from £1 million to £2 million, the trial had been adjourned and further disclosure had been sought. Picken J refused permission to appeal. He held at paragraph 10:

"… I agree with the submission which is made by Mr Lewers, on behalf of the defendant, that a doubling of the size of the claim does not necessarily mean or justify an increase in costs. In any event, it seems to me that there is considerable force in the observation which is also made by Mr Lewers, that the so called developments relied upon by the claimant would have been capable of being envisaged at the time that the original costs budget was set. …"

18. Perhaps of most concern in Picken J's judgment is the expression "*capable of being envisaged*". That a matter is capable of being envisaged is no guarantee that it will be envisaged nor is there a right to include such an expense in the budget unless it is "*more likely than not to be incurred*" according to paragraph 6 of the practice direction[6].

19. The high hurdle suggested by Picken J before a party can amend a budget seems out of keeping with the informality suggested by paragraph 6 of the guidance notes. It is noteworthy that the table contained with the guidance notes includes reference to "*Preparation of updated costs budgets and reviewing opponent's budgets*" presumably in recognition that costs budgets in multi-track cases will invariably require amendment.

20. The Master was clearly unimpressed with the claimant's solicitors in the case of *Churchill v Boot* (his comments are set out in Picken J's judgment at paragraph 8) and the case should be confined to its particular facts.

21. The earlier case of *Elvanite Full Circle Ltd v AMEC Earth; Environmental (UK) Ltd* [2013] EWHC 1643 (TCC) suggests a more relaxed approach to the meaning of the word "*significant*" (albeit under the different scheme of the Costs Management in Mercantile Courts and Technology and Construction Courts Pilot Scheme). Although on the facts not allowing the amendment Coulson J held at paragraph 37:

37. When should an application to revise/amend a costs management order be made? In my judgment, it ought to be made immediately it becomes apparent that the original budget costs have been exceeded by a more than minimal amount. On the facts of this case, that appears to be late January/early February 2013. Whilst Ms Day argued that the defendant was entitled to concentrate on preparing for trial, rather than

6 The use of the word "contingencies" as an additional phase on Precedent H suggests items that may occur (since that is what the word means). However, it is clear from paragraph 6 of the guidance notes that the contingencies section actually means anticipated costs which do not fall within the main categories, eg an infant approval hearing, the trial of a preliminary issue. "Other" would be a more apposite name for this section.

taking time out to deal with the costs management aspect of the case, it seems to me that the defendant was taking a significant risk in continuing to incur costs which were so far outside the approved costs budget, without doing anything about the existing costs management order. I note that there is no evidence from the defendant explaining why an application was not made in February or at the start of the trial.

22. An interpretation advocating an application when the original budget costs have been exceeded by a more than minimal amount is more in keeping with the costs budgeting process especially when dealing with complex cases though of course once the budget has already been exceeded those costs cannot be approved and can only be commented upon.

Side Agreements

23. An approach adopted by some to increasing or unforeseen costs is to agree with the other party that certain items should stand outside the budget. For example, the Court may have allowed £1,500 for a joint accommodation expert but it proves impractical to obtain an accommodation report for £1,500. In that circumstance, the parties may agree to spend more but that the additional sums should stand outside the budget. That agreement would be a relevant factor in an application to disapply the costs budget pursuant to CPR 3.18 or to vary the budget. However, if this approach is adopted parties should be careful that such agreements are comprehensive. If, for example, several such agreements are made then inevitably more profit costs will be required for consideration of additional reports or procedural steps. Counsels' fees may also increase in relation to the drafting of Schedules and Counter Schedules. It would be wise to agree that the costs of and occasioned by the additional report (including solicitors and counsels costs) do stand outside the budget as a standard form of words.

24. The better practice would be to amend the budget at the time the agreement was made, to send it to the other side for agreement and in default of agreement to the Court pursuant to paragraph 7.6 of the practice direction. That such agreements are made reflects the inherent difficulty of fixing a budget in advance and only allowing amendments where there is a "*significant development*".

The CPR 3.18 Jurisdiction

25. CPR 3.18 provides:

3.18 Assessing costs on the standard basis where a costs management order has been made.

In any case where a costs management order has been made, when assessing costs on the standard basis, the court will—

(a) *have regard to the receiving party's last approved or agreed budget for each phase of the proceedings; and*

(b) *not depart from such approved or agreed budget unless satisfied that there is good reason to do so.*

26. In cases where parties wish to recover more costs than the last approved or agreed budget, "*good reason*" at the assessment stage must be shown. At first sight, this should be a more difficult hurdle to meet than an amendment of a budget. Otherwise, parties would merely wait until the end of the case and seek to persuade the Court that there is a good reason to depart from the previous approved or agreed budget. However, failure to comply with the requirement to amend a budget constitutes a breach of the rules which may attract a sanction.

27. In *Simpson v MGN Ltd* [2015] EWHC 126, Warby J held that an automatic sanction of disallowing costs not contained within a budget was not permissible. He held at paragraphs 21 and 23:

> ***[21]*** *It is true that the Claimant failed to comply with PD3E para 7.6 by submitting a revised budget for the court's approval prior to the hearing. However, having regard to the wording of CPR 31.18 it seems to me that what the Defendant seeks, strictly speaking, is that by way of a sanction for this failure the Claimant's recoverable costs of success on the applications should be assessed at nil. That is not a sanction prescribed by the Practice Direction or the rule. The order sought would in my judgment be an unjustly disproportionate sanction, not sufficiently justified by the overriding objective, the need to enforce compliance with rules, practice directions or orders, or any of the other specific aims listed in CPR 1.1(2).*
>
> *...*
>
> ***[23]*** *The approach I took to the assessment of costs, as described in para 3 above and further detailed later in this judgment involves a sanction for the Claimant's failure to comply with the Practice Direction which is in my judgment just and proportionate in the circumstances of this case, and one which in more general terms provides a sufficient incentive to parties to comply. That approach involves an assessment which makes every assumption against the party which has failed to submit an amended budget, and properly compensates the Defendant for the additional costs involved.*

Considering the Trial Judge's Comments as to Costs on Assessment

28. There is a long line of authority that a trial judge can and should provide a judge assessing costs with information relevant to that assessment[7]. This approach was approved by Simon Brown J in *Excelerate Technology Ltd v Cumberbatch and others* [2015] EWHC 204 (QB) at paragraphs 15 to 17:

> *15. As rehearsed with counsel, I cannot increase a "budget" once the costs have already been "incurred" (as they have been), no application for variance has been made and no contingencies[8] have been provided for such items of increase; it is too late to do that (see Elvanite Full Circle Ltd v AMEC Earth & Environmental (UK) Ltd [2013] 4 Costs LR 612.*
>
> *16. However, I accept that each of these three items of costs were quite properly incurred and were not remotely foreseeable in ordinary breach of covenant litigation. It was also not practicable or viable to make applications for variance or agree them with litigants in person as the First two Defendants became shortly before trial.*
>
> *17. What I can do upon this application, and do so, is to "record" a note upon the "reasonableness" and "proportionality" of such "additional" costs incurred for the purposes of any Detailed Assessment of them.*

29. This is reassuring for matters which reach trial but as most cases do not, the better approach is to amend the budget before significant additional costs have been incurred.

Periodic Budget Amendment

30. Taken as a whole the changes to the scheme of costs budgeting are logical. There is an attempt to make the process more streamlined, to reduce documentation, to encourage judges not to get into the details of the budget and to make amendment a more informal process. However, the sums involved are substantial and decision-making not always consistent.

31. Attention to varying a budget at regular intervals must be made and certainly before any major additional expenditure. If an application is made to vary a budget when significant non-budgeted costs have already been incurred, the Court will be reluctant to make comment on such costs. This may result in the judge assessing costs at the conclusion of the case referring to the previous approved budget with potentially draconian outcomes. If necessary, there should be a request to expedite hearings so as not to cause delay and consideration should be given to

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7 See, for example, LJ Waller's comments at paragraph 37 of *Drew v Whitbread* [2010] EWCA Civ 53.

8 Simon Brown J appears to think that contingencies are costs that may be required rather than costs which do not fit into the main phases.

requesting that there be a docketed judge dealing with the case so that applications can be made to that judge on paper.

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