



JUDICIARY OF
ENGLAND AND WALES

CONFRONTING COSTS MANAGEMENT

HARBOUR LECTURE BY LORD JUSTICE JACKSON: 13th MAY 2015

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1. INTRODUCTION

1.1 Purpose of this lecture. The costs management regime has now been in place for two years. The purpose of this lecture is to review how it is working and to suggest how the rules might be developed in the light of experience. Tomorrow this paper will go onto the Judiciary website. The Rule Committee has set up a sub-committee chaired by Mr Justice Coulson to review the operation of the costs management rules and report back to the Rule Committee. This lecture sets out the matters which I respectfully invite that sub-committee to consider.

1.2 Abbreviations. In this lecture I use the following abbreviations:

"ACL" means the Association of Costs Lawyers.

"ATE" means after the event insurance.

"CCMC" means case and costs management conference.

"CJC" means Civil Justice Council.

"CMC" means case management conference.

"Coulson Committee" means the sub-committee chaired by Mr Justice Coulson referred to above.

"CPD" means continuing professional development.

“CPR” means the Civil Procedure Rules 1998, as amended.
“DCJ” means designated civil judge.
“FR” or “Final Report” means Review of Civil Litigation Costs Final Report.
“GHRs” means guideline hourly rates.
“Hutton Committee” means the working group chaired by Alexander Hutton QC, referred to in paragraph 9.3 below.
“PD” means Practice Direction
“PIBA” means Personal Injury Bar Association
“Preliminary Report” means Review of Civil Litigation Costs Preliminary Report.
“Q&A” means the Practical Law handbook “Costs and Funding following the Civil Justice Reforms: Questions and Answers” published with the White Book 2015.
“QOCS” means qualified one way costs shifting
“QBD” means Queen’s Bench Division.
“SCCO” means Senior Courts Costs Office.
“TCC” means Technology and Construction Court.
I will use the word “judges” collectively to denote both judges and masters.

1.3 Who does most of the costs management? In London the Chancery masters, the Queen’s Bench masters, the Commercial Court judges, the TCC judges and the district judges of the Central London County Court do most of the costs management. Outside London district judges and (in the specialist courts) TCC and Mercantile judges do most of the costs management

1.4 Preparation for this lecture. Two judicial assistants¹ have canvassed the views of numerous practitioners and judges. A number of practitioners and judges have sent to me their comments in writing. It is simply not feasible for me to carry out a full scale consultation exercise in the limited time available and whilst sitting full time as a judge in the Court of Appeal. Nevertheless I have gathered a fair amount of feedback.

1.5 Discussions with key judges. I have selected a small number of key judges in London for detailed discussion of the issues. These are (for obvious reasons) the Chief Chancery Master, the Senior QBD Master, the Judge in Charge of the Commercial Court, the Judge in Charge of the TCC and the senior district judge of the Central London County Court. Outside London, I have had detailed discussions with the Mercantile/TCC judge in Bristol and the TCC judge in Leeds. Also, in view of the particular problems with clinical negligence, I have had detailed discussions with the head of the costs department of a major national firm specialising in claimant clinical negligence work. I attach the notes of those discussions (in each case approved by the person I was talking to and incorporating their amendments) as an annex.

1.6 Group meetings. At a late stage, owing to a gap in listing, I had an opportunity to spend two days in Leeds and Manchester. I had meetings with large groups of practitioners and fairly large groups of district judges. A range of (sometimes conflicting) views were expressed. These meetings were enormously helpful and I

¹ Sarah Mackie and Nicholas Petrie

thank all who gave up their time to attend.

1.7 Comments volunteered by PIBA. At a very late stage in my work, Judith Ayling a member of PIBA's Executive Committee (having heard about my trip to Leeds and Manchester) collated and sent to me some comments from PIBA members about costs management. The concerns which PIBA identify largely coincide with the concerns expressed by others. PIBA also observe that the system is beginning to 'bed down'. PIBA note that at Central London County Court CCMCs are now reduced to about 45 minutes. That fits exactly with what DJ Langley has told me.

1.8 My own perspective. Between January 2010 and April 2012 I had the lead role in implementing the reforms recommended in the Final Report, subject to the supervision of the Judicial Steering Group² to which I reported every fortnight. That role included setting up pilots; liaising with those who monitored the pilots; preparing draft rules and presenting them to the Rule Committee; delivering 'Implementation Lectures' to explain the draft rules once approved; numerous meetings with judges, practitioners and MoJ officials. As a result of an operation and lengthy medical treatment, I dropped out of the process altogether during April 2012 (a year before the reforms came into effect). Since then I have had no role or involvement in implementing the reforms which bear my name.³ This curious circumstance means that I can watch what is happening with a measure of detachment. On two occasions I have given lectures drawing attention to where I thought things were going wrong.⁴

1.9 The comments in this lecture represent my personal opinion. They have no formal status. They certainly do not fetter either the Master of the Rolls (as Head of Civil Justice) or the Rule Committee in any way.

2. WHEN DONE PROPERLY COSTS MANAGEMENT WORKS WELL

2.1 Conclusion from the first two years of costs management. The first and most important conclusion to be drawn from the experience of the last two years is the same as that which was drawn from the pilots. Costs management works. When an experienced judge or master costs manages litigation with competent practitioners on both sides, the costs of the litigation are controlled from an early stage. Although some practitioners and judges regard the process as tiresome, it brings substantial benefits to court users.

2.2 First benefit of costs management – knowledge of the financial position. Both sides know where they stand financially. They have clarity as to (a) what they will

² Lord Neuberger MR (chairman), Maurice Kay LJ, Moore-Bick LJ and myself. Peter Farr was the secretary.

³ Except for responding to the Rule Committee's public consultation in June 2013

⁴ On 30th September 2014 (re the need to fix costs in the fast track and to provide proper funding for the County Court) and on 20th October 2014 (re the need to amend the DBA Regulations and to adopt a balanced approach towards relief from sanctions).

recover if they win (difference between own actual and recoverable costs), (b) what they will pay if they lose (own actual costs + other parties' recoverable costs). In many cases the litigation costs form a substantial part of what the parties are arguing about. This information is of obvious benefit for those taking decisions about the future conduct of litigation. Practitioners say the information is extremely helpful in the context of mediation. Also I am told that insurers (who in practice end up footing many litigation bills) find costs budgets valuable for the purpose of setting reserves.

2.3 Comments of others on this benefit. Most solicitors, including many who are otherwise hostile to costs management, accept that this knowledge is helpful for their clients. The Chief Chancery Master believes that this knowledge justifies the requirement to exchange budgets, regardless of whether or not it reduces costs: see the annex.

2.4 Comments of the Senior Costs Judge. Senior Costs Judge Gordon-Saker stated in his lecture to the Commercial Litigation Association on 1st October 2014: "Litigation is like a train journey. You cannot get off the train, without injury, unless everybody else agrees that the train can stop before its destination. Yet if you stay on the train to the end of the journey, you will only know the cost of the journey after you get off. So we need costs budgeting as a matter of fairness to litigants... [He then discussed the lack of court resources and the need for more judicial training] ...That said, I am told that – although different judges are taking different approaches to costs budgeting – people are generally happy with the overall results."

2.5 Second benefit of costs management – it encourages early settlement. One intractable problem of civil litigation has been that cases which are destined to settle often drag on for far too long before the parties come to terms. In the Final Report I identified this as one of the fourteen causes of excessive litigation costs.⁵ The new costs management regime makes a real contribution to tackling this problem, in that it encourages early settlement. Once all parties can see (a) the total costs of the litigation and (b) the extent of their own exposure, they are inclined to 'see sense' or bite the bullet early. Numerous practitioners have confirmed this to me. It appears from the Chief Chancery Master's comments that the very exercise of preparing and exchanging budgets tends to promote settlement: see the annex.

2.6 Third benefit of costs management – controlling costs. When costs management is done properly, it controls costs from an early stage. This is for two reasons: (i) In some cases⁶ the very act of preparing a budget, which will be subject to critical scrutiny, tempers behaviour. Any party who puts forward an over-elaborate case plan or an excessive budget (a) invites criticism and (b) encourages similar extravagance by the other party/parties. (ii) Effective costs management by the court generally reduces the costs payable by the losing party. Also it brings down the actual costs of the litigation for both

⁵ FR chapter 4, section 3

⁶ Except QOCS cases, where claimants generally feel no such inhibitions

parties, despite the additional costs involved in the costs management process.

2.7 Interface with the new rules on proportionate costs. The 2013 civil justice reforms were designed as a coherent package. For a discussion of how the new proportionality rules interrelate with costs management, see the Final Report, chapter 40, section 7. Rule 44.3 (5) contains a new definition of proportionate costs.⁷ Rule 44.3 (2) provides that when costs are assessed on the standard basis no more than proportionate costs will be recoverable. Therefore the judge at the costs management stage applies the proportionality test and limits the recoverable costs accordingly. It is by no means unusual for a judge to say that (regardless of hourly rates or numbers of hours) no more than £x is proportionate for a particular phase or that no more than £y is proportionate for the case as a whole. Absent an order for indemnity costs, no losing party should be ordered to pay more than proportionate costs to its adversary.

2.8 Is it a problem that the winner may recover less costs than in the past? No. There is extensive academic literature and research to demonstrate that the costs shifting rule tends to drive up costs: see chapter 9 of the Preliminary Report. If the 2013 civil justice reforms make a modest inroad into that rule, it is no bad thing. Once people know that they will only recover proportionate costs if they win, they have a greater incentive to be economical.

2.9 Fourth benefit of costs management – it focuses attention on costs at the outset of litigation. A number of solicitors and judges have drawn attention to this benefit. In the majority of cases, costs are a major factor. A failure by the victor to recover sufficient costs may render the whole litigation futile.⁸ The costs burden on the loser may be crushing, quite regardless of the damages which he may have to pay or the property rights which he may forfeit. It is therefore necessary that all concerned should be forced to focus on the costs involved at the outset.

2.10 Fifth benefit of costs management – an old chestnut is conquered. The ‘summons for directions’ under the pre-1999 Rules of the Supreme Court was intended to be an occasion when the court would get a grip on the issues and give effective directions. The habitual complaint was that in practice this never happened. Summonses for directions were formulaic and ineffectual. The new style ‘case management conference’ introduced by Lord Woolf was intended to overcome all that and be a real occasion for effective case management. The evidence which I received during the 2009 Costs Review was that, outside the specialist courts, this still wasn’t happening. CMCs were simply becoming formulaic occasions.

⁷ There is some debate as to whether the PD should give more guidance about the meaning of proportionate costs. The Senior Costs Judge believes that this is unnecessary: see his lecture to the Commercial Litigation Association on 1st October 2014, pages 6-7. DJ Simon Middleton agrees. He states: “[The flexibility of the five factors covers all cases \(see Q & A 28 - 30\). Accordingly I endorse the comments of Master Gordon-Saker. I was "cross examined" by an audience largely unreceptive to the concept of proportionality at last year's Association of Costs Lawyers Annual Conference. However, when thrown a scenario by the audience I immediately applied the 5 factors and gave a figure to show the exercise could be done. Rule 44.3\(5\) works.](#)”

⁸ This was the effect of the first instance decision in *Begum v Birmingham CC* [2015] EWCA Civ 386.

Accordingly I put forward a series of proposals in the Final Report at chapters 37 – 39 to convert CMCs into effective occasions when the judge “takes a grip on the case, identifies the issues and gives directions which are focused upon the early resolution of those issues”.⁹ One consequence of costs management is that this is now happening. With price tags attached to work, everyone takes more interest. There is serious debate about what work is really necessary, what disclosure is required, what experts are needed and so forth. Even practitioners who dislike the recent reforms reluctantly concede this.

2.11 Sixth benefit of costs management – elementary fairness. It is elementary fairness to give the opposition notice of what you are claiming. The rules require litigants to set out with precision the damages which they seek. Why treat costs differently? From the point of view of the client, costs are often just as important as damages.

2.12 Seventh benefit of costs management – it prevents legal catastrophes. A regional costs judge in Bristol makes the following point about costs management: “It protects losing parties (particularly the ‘real’ people, as opposed to insurance companies in PI claims) from being destroyed by costs when they lose.”

2.13 Practitioners are now coping with the new regime. The introduction of the new regime came as an unwelcome shock for many in the profession. Nevertheless a number of practitioners tell me that their initial fears have not been borne out. A clinical negligence practitioner in Leeds states that the process has been a learning curve, but in general terms she is now getting reasonable budgets approved. A small firm in Newcastle states that “costs management is now running fairly smoothly”. The Treasury Solicitor’s office has generally positive experience of costs budgeting, with one representative stating that he “much prefers” the new regime. AB, the head of the costs department of a major national firm doing claimant clinical negligence work, considers costs management “generally OK” and “a good thing”, but he raises a number of specific points which require attention: see annex.

2.14 A Leeds barrister with a chancery and 'business' practice, who was unable to attend the group meetings, tells me that her experience of costs management is positive. The judges before whom she appears in the North East and North West of England hold effective CCMCs in her area of work. An awareness of the costs position often promotes early settlement. Her account of CCMCs coincides with what the judges concerned have told me.

2.15 Feedback from Birmingham. The chairman of the Dispute Resolution Committee of the Birmingham Law Society told me in August 2014 that he had spoken to the heads of litigation in six or seven major law firms in his area. They all thought that costs budgeting and costs management were helpful. The discipline focused the minds of both lawyers and clients upon costs (which were the number 1 concern) at the outset. Precedent H was an extremely useful tool for the purposes

⁹ FR chapter 39 paragraph 5.5

of arriving at a realistic costs estimate. Indeed precedent H could be used to create the estimate of costs which was sent to the client with the original letter of engagement. The Birmingham lawyers consulted also found it useful to see the other side's estimate of costs. The exchange of costs information assisted in achieving settlement. This feedback is interesting because Birmingham was the first area where costs management was piloted (albeit only in the context of 'business' litigation).

2.16 Support of the key judges and masters. The key judges and masters to whom I have spoken are all supportive of costs management, although with varying degrees of enthusiasm. The TCC judges in both London and the regions express the strongest support. This may be because costs management was piloted in that court for two years before the general regime was introduced. They therefore have a head start on other courts. The fact that the judges with the longest experience of costs management are the most supportive may be significant.

2.17 Collective view of the Leeds district judges. It is the collective view of the Leeds district judges (though not shared by some of their colleagues at other court centres) that for the most part costs budgets have a very good purpose. Nevertheless they are concerned about the costs of the process for low value multi-track cases (i.e. up to about £50,000). They recommend fixed costs for such cases. I strongly endorse that recommendation for fixed costs in the lower reaches of the multi-track.¹⁰

2.18 The perception of the parties themselves. In the limited time available I have not had the chance to talk to actual litigants.¹¹ However, I recall from the 2009 Costs Review that clients were always more enthusiastic about the idea of costs management than were their lawyers. That is understandable – the clients have to pay the bills. The judicial assistants currently taking soundings have received feedback from one litigation funder, who has extensive experience of litigating on the claimant side. That funder describes costs management as “absolutely brilliant” and believes that it has changed the culture of litigation for the better.

2.19 Objections to the process. Having set out the benefits of costs management, it is only fair that I set out some of the objections to the process and my responses.

2.20 Objection (i): lawyers now spend more time debating costs and less time on the issues. First, this is not a new problem, as those who practised during the “Costs War”¹² may remember. Indeed it was one of the problems which gave rise to the Woolf Review. In the *Marchioness* case the costs of the detailed assessment were greater than the costs of the action. Secondly, it is true that lawyers spend much time talking about costs. On the other hand, what matters to the client is the end

¹⁰ See FR chapter 16 and my lecture at the ‘Costs Law and Practice’ conference on 30th September 2014, which is on the Judiciary website.

¹¹ In any such survey it would be important to seek the objective views of clients, rather than the comments of clients who are simply repeating what their lawyers have said about costs management (whether hostile or supportive).

¹² See Preliminary Report, chapter 3.

result of the case. The costs recovered or the adverse costs payable are, in practice, a substantial part of that end result and sometimes overshadow all else. Lawyers traditionally study in great detail the nuances of damages, but pay insufficient regard to costs. It is right that they should focus properly on the costs element of the case from day one.

2.21 Objection (ii): most cases settle, so what is the point of budgeting? There are four answers to this:

(i) Many settlements involve the payment of costs by one party. The existence of an approved costs budget facilitates agreement of those costs (depending on the stage that the case has reached).

(ii) Even if a 'global' settlement is agreed, an understanding of the receiving party's costs is integral to negotiating the total figure.

(iii) An awareness of the adverse costs risk and the risk of irrecoverable costs (both properly quantified) tends to promote a realistic settlement.

(iv) One cannot usually identify in advance those cases which will settle early.

2.22 Objection (iii): Costs management requires disproportionate front loading of costs. Bringing or defending claims is generally a commercial project. There is no other commercial project upon which anyone would embark without a budget. No one argues that the process of drawing up and pricing of bills of quantities or pre-estimating construction costs is money ill spent. The benefits of clarity and certainty justify the costs of the budgeting process. The costs of that process are gradually reducing as solicitors become familiar with that process. Even those litigants for whom litigation is not a commercial project (eg bereaved parents) have a need for clarity and certainty about their costs position.

2.23 Objection (iv): some litigation is complex and you don't know what will happen.

In the great majority of cases an experienced lawyer can assess what work will be required and can price it. It is very beneficial that he/she should do this at the outset, as many practitioners concede. If events are genuinely unforeseeable, the rules provide for that. For example, if you need to apply to the court to make the other side give proper disclosure, the costs of that application would fall outside the budget: see rule 3.18 (b). In addition the court has power to approve revised budgets. The court can also order staged budgets. I accept that in some complex cases staged budgets are appropriate. But caution is required, because so far as possible the parties need to know their costs exposure at the outset.

2.24 Does costs management promote access to justice? Access to justice is, of course, the overriding concern. Unfortunately a number of recent reforms have inhibited access to justice. In particular, the slashing of civil legal aid and the progressive growth of court fees culminating in the massive increase in March 2015. Those are the factors which drive people away from the courts. Costs budgeting does not inhibit access to justice. On the contrary it protects litigants against an open ended costs risk and thereby promotes access to justice.

2.25 The proof of the pudding. In many cases where costs management does not

apply, one or other party asks the court to manage costs. For example, the *Kenya Litigation* began before April 2013 and so is outside the new rules. There are numerous claimants and that litigation is highly complex. Both parties asked the assigned judge, Mr Justice Stewart, to undertake costs management. He is now doing so, by all accounts most effectively.

2.26 The position of experts. Experts are well used to working within budgets and being held to quotations. One commented to me at a recent seminar that expert witness work occupied 20% of his time. All of his other work was done within budgets and there was no reason why litigation work should be any different. He is regularly instructed for both claimants and defendants, and finds that his clients welcome the clarity which costs management brings.

2.27 Overseas interest. Singapore is now in the process of introducing costs management into its procedural rules.

3. PROBLEMS WHICH HAVE EMERGED AND PROPOSED SOLUTIONS

3.1 Particular problems. The following have emerged as particular problems:

- (i) Differing approaches adopted by individual judges and courts.
- (ii) The length of some costs management hearings and the tendency of some judges to micro-manage the litigation.
- (iii) The wide variation in the forms of costs management orders issued by different courts.
- (iv) Delays in listing CCMCs as a result of the time spent on costs management, leading to a backlog of work.
- (v) No effective mechanism for controlling costs incurred before the first CCMC.
- (vi) Some courts require parties to file and exchange costs budgets too soon. The work then has to be re-done shortly before the CCMC.
- (vii) Difficulties at detailed assessment because costs budgets and bills of costs are in different formats.
- (viii) Shortcomings in Precedent H.

I shall address each of these matters in turn.

3.2 (i) Judicial inconsistency. One major city firm, while acknowledging the benefits of costs management, writes:

“The inconsistent approach being taken by the judiciary, in terms of the detail in which costs budgets are examined and the processes involved, is also unhelpful. [Examples given.] In general it is unclear whether budgets will be addressed in any detail at the CMC, and the approach the court will take if there is to be a detailed consideration budgets.”

Many practitioners in both London and the regions echoed those concerns.

3.3 The solution. The solution to this problem lies in better judicial training. The costs management training provided to all civil judges in early 2013 was necessarily brief, because there were many other aspects of the 2013 civil justice reforms to be

covered. Now, however, there is a full day module on costs management available on judicial refresher courses. This module has been developed in the light of experience and is now, by all accounts excellent. Unfortunately it is elective, not compulsory. I respectfully recommend that (a) this course should be compulsory for all civil judges; (b) all civil judges should be encouraged to read the comprehensive chapter on costs management in Q & A (pages 41 – 81). If these recommendations are adopted, the problems caused by judicial inconsistency should be much reduced. Finally the Coulson Committee might consider whether, with the benefit of two years' experience, the costs management rules can be simplified.

3.4 (ii) Unduly long hearings and micro-management. Here again the solution lies in better judicial training. When revising/ approving litigation budgets, the court will have regard to the numbers of hours and the rates¹³ proposed by each party. If they are excessive, that will be a reason for reducing the end figure. The court will also apply the proportionality test in rule 44.3 (5), which is often a separate ground for reducing the end figure. At the conclusion of the exercise the court should approve a single total figure for each phase of the proceedings. The party is then free to spend that sum as it sees fit. The court should not specify rates or numbers of hours. That adds to the length of CCMCs and is unnecessary micro-management. See Q & A pages 62-64.

3.5 The costs judges – an under-used resource? From time to time the costs judges sit in as assessors at costs management hearings in large group actions. I understand from the Senior Costs Judge that, although he and his colleagues are under considerable pressure of work, they could assist in other cases if appropriate. If any judge would like the assistance of a costs judge with a difficult costs management hearing, he/she should contact the SCCO well in advance to see whether arrangements could be made for this.

3.6 (iii) The wide variation in the forms of costs management orders issued by different courts. This point has been made by practitioners and it is a valid one. As Judge Allan Gore QC pointed out during the Manchester meetings, what is needed is a standard form of costs management order. I recommend that this be developed by the MoJ (or the Rule Committee) in conjunction with the Judicial College. Obviously, courts will have discretion to depart from the standard form of order, as the circumstances of individual cases may require.

3.7 One possible form of order. One form of costs management order which has been suggested to me reads as follows:

" A costs management order is made as per the attached pages 1 of the respective Forms H. The budgeted phases are those where the total column is in bold type and the budgeted sum for those phases is the total sum less the incurred sum"

No doubt those preparing the standard form (or possibly forms) will look critically at all the 'local' forms of order which different courts have been issuing over the last two years. Once this work has been done all the 'local' forms will become a thing of

¹³ The consideration of rates will be much easier once the recommendations in para 6.1 below have been adopted.

the past.

3.8 (iv) Delays and backlog. This is a serious issue, which I address in section 4 below.

3.9 (v) No effective mechanism for dealing with costs already incurred. This too is a serious issue. I address it in section 6 below.

3.10 (vi) Time for filing and exchanging budgets. Rule 3.13 in conjunction with rule 26.3 (1) gives courts a discretion as to when costs budgets should be lodged. Some courts, with the laudable intention of getting an early grip on costs, are requiring budgets to be filed and exchanged at an early date, for example at the same time as directions questionnaires. The problem with this approach is that the budgets are then overtaken by events and the work has to be done all over again shortly before the CCMC. Other courts, mindful of this problem, are directing that budgets be lodged 7 days before the CCMC. The problem with this approach is that it leaves very little time for discussion and agreement of budgets.

3.11 The solution. Having listened to extensive debate on this issue, I respectfully suggest that the rules should be amended so that 14 days before the CCMC becomes the specified time (rather than merely the default position) for lodging costs budgets. The court must retain a discretion to specify a different period, when the circumstances of a particular case so require.

3.12 (vii) Difficulties at detailed assessment. I understand from several sources that (outside personal injury/clinical negligence litigation) it is rare for cases which have been subject to costs management to proceed to detailed assessment. This is because the parties are usually able to reach agreement on the basis of the approved budgets. In respect of those cases which do go to detailed assessment, a number of practitioners and judges have expressed concern that it is difficult to marry up the approved budget with the final bill of costs.

3.13 The short term solution. In those cases where detailed assessment proceedings are commenced, the practice of some courts (including the SCCO) is to order the receiving party to lodge a summary of its bill of costs in a format which matches Precedent H. Costs Judge Colum Leonard states that, in the small number of budgeted cases referred to him so far, he has received no indication that such orders are causing any undue difficulty. I recommend that all courts should adopt this approach. It is only a short term expedient. As explained in section 9 below, work is now afoot to develop a new form bill of costs which will be readily comparable with costs budgets.

3.14 (viii) Shortcomings of Precedent H. I agree with the commentators who opine that Precedent H is capable of improvement. Views differ as to what form those improvements should take. It will be for the Coulson Committee to choose between the competing suggestions. In particular, the provisions in respect of assumptions and contingencies may need attention. There needs to be further guidance about

how to deal with expert costs.¹⁴ Also both the Bristol Mercantile judge (see Annex) and the Leeds District Judges say that ADR and settlement discussions should not be combined in a single section of Precedent H. They point out that bilateral discussions are a different process from mediation and anyway mediation does not happen in every case. The Coulson Committee may wish to consider these issues.

3.15 Timing of Precedent H revisions. It is not practicable within the confines of this lecture to embark upon an analysis of Precedent H, but I do wish to make one general point. Over the last three years solicitors have been developing their IT systems for the purpose of completing Precedent H. It is therefore important to avoid making successive changes. When the new form bill of costs (discussed in section 9 below) is introduced, changes to Precedent H will be inevitable. It may therefore be sensible for any other amendments which find favour with the Rule Committee to be held back until that time.

3.16 Summary. It is clear that the rules and the forms need some amendment in the light of experience over the last two years. One or two amendments are obviously urgent, in particular to tackle the backlog of clinical negligence cases which has built up at certain courts. That apart, it may be worth taking some time over this exercise and collating the experience of both practitioners and judges across the country, in order to ensure that the Coulson Committee has identified best practice. It would also be wise to draw upon the experience and expertise of the Judicial College. At most courts the initial problems encountered in costs management have now abated. Furthermore in the short term, while the committee is deliberating, hopefully this paper will be of some assistance to both judges and practitioners.

4. THE DELAYS AND HOW TO DEAL WITH THEM

4.1 My original recommendation. In the Final Report I recommended: “Rules should set out a standard costs management procedure, which judges would have a discretion to adopt if and when they see fit, either of their own motion or upon application by one of the parties.”

4.2 The original rules. The original costs management rules, which I drafted (on the basis of experience of the pilots) and which the Rule Committee enacted, gave the courts a discretion whether or not to costs manage. Rule 3.13 required the parties to exchange budgets “unless the court otherwise orders”. Rule 3.15 provided that the court “may” manage the costs and “may” make a costs management order.¹⁵

4.3 Subsequent amendment of the rules. CPR rule 3.15 has subsequently been amended to provide: “Where costs budgets have been filed and exchanged the court will make a costs management order unless it is satisfied that the litigation can be conducted justly

¹⁴ Should they all go into the ‘Expert Reports’ section or should some of costs referable to experts go into other phases?

¹⁵ CPR rule 15 (2)

and at proportionate cost in accordance with the overriding objective without such an order being made.”

Also PD 3E has been amended so as to include the following additional sentence: “Where costs budgets are filed and exchanged, the court will generally make a costs management order under rule 3.15.”

4.4 Practical consequence. The practical consequence of the rules as amended is that the courts are making costs management orders in virtually every case where such an order is available. At some court centres that causes no problem. At others it is causing delays as backlogs of cases awaiting CCMCs build up. This problem is most acute in clinical negligence cases, as discussed in section 5 below. Such delays do not promote access to justice at proportionate cost. On the contrary, they inhibit access to justice and tend to drive up costs.

4.5 The solution. I propose that the recent amendments to rule 3.15 and PD 3E identified above be repealed. In place of those provisions PD 3E might set out criteria to guide courts in deciding whether or not to make a costs management order. The formulation of the criteria must be a matter for the Coulson Committee. But I would suggest that in formulating criteria the committee should bear in mind the following principles:

- (i) In most contested Part 7 cases and in most cases of the type identified in PD 3E paragraph 2, costs management by a competent judge or master promotes financial certainty and reduces the costs expended on the litigation to proportionate levels.
 - (ii) However, the court should not manage costs in any case if it lacks the resources to do so without causing significant delay and disruption to that or other cases.
- Possibly the directions questionnaire should include an additional question to assist the court in exercising its discretion.

4.6 Concerns expressed about the above solution. A number of judges who are skilled and swift at costs management have expressed concerns about the above solution. They fear it will become an excuse for certain of their colleagues to ‘opt out’ and thus lead to forum shopping. I do not share these fears. I believe that once criteria are laid down all judges will conscientiously follow them. It is important that there be a uniform approach across all civil courts. There will be an obligation on all judges with leadership roles actively to monitor how ‘their’ judges are exercising the discretion to costs manage. If different practices emerge, this should be drawn to the attention of the Deputy Head of Civil Justice, so that he can give appropriate guidance.

5. SPECIFIC ISSUES CONCERNING CLINICAL NEGLIGENCE

5.1 A special case. It has always been known that costs management in clinical negligence would pose particular problems. In the Final Report I proposed that a different method of costs managing clinical negligence cases (including pre-issue

costs management) be piloted. Unfortunately that pilot never got off the ground.¹⁶

5.2 Resources issue. London has always been a major centre for clinical negligence litigation. In the Final Report I recommended that an extra QBD master be appointed in order to facilitate the costs management of clinical negligence cases. Contrary to that recommendation no extra master was appointed. Instead the number of QBD masters has been reduced by two: see the comments of the Senior Master quoted in the annex.

5.3 Volume of cases in London. In 2009 there were approximately 800 new clinical negligence cases per year. By 2012 the number was 993. In 2013 the number was 1535. In 2014 there were 1486 new clinical negligence actions in London.

5.4 Consequence. As a result of costs managing almost all clinical negligence cases, a large backlog of CCMCs has now built up in London. The waiting time for a first case management conference is now running at about 9 months. Delays of that order are unacceptable and defeat the object of the 2013 civil justice reforms.

5.5 How to cut the Gordian knot. In my view the way to resolve this impasse is by granting a one-off release. All London clinical negligence cases which have CCMCs already listed between October 2015 and January 2016 should be released from costs management and called in for short old-style case management conferences at the first opportunity. On this basis Master Roberts (the principal clinical negligence master) believes that he and his colleagues would be able to clear the backlog by the end of September 2015.

5.6 The future. If the rules are amended as suggested in section 4 above, the masters would then make costs management orders only in those clinical negligence cases which they have the resources to costs manage. Master Roberts proposes that the very large clinical negligence cases should drop out of costs management, because (a) the damages in these cases run into many millions and the costs tend to be proportionate and (b) the exercise of costs managing such cases is hugely time consuming.¹⁷ If these cases are excluded and the changes recommended at paragraph 4.5 above are adopted, Master Roberts believes that he and his colleagues could costs manage the majority of clinical negligence cases without undue difficulty and without lengthy delays building up.

5.7 The position outside London. At some court centres such as Leeds, Newcastle and Sheffield, costs management is not generating significant delays and there is no need for remedial action. Indeed while I was in Leeds, my judicial assistant sat in on a highly effective CCMC in a clinical negligence case which was proceeding smoothly. But this is not the position everywhere. At Birmingham and Manchester the position is similar to London. A similarly drastic solution may be required. If the solution which I suggest commends itself to the Master of the Rolls and the Rule Committee,

¹⁶ This was because no additional master was appointed, which the pilot would have needed.

¹⁷ Such cases typically involve more than twenty experts, each of whose costs have to be considered.

the question of granting a one-off release¹⁸ at specific court centres outside London could perhaps be a matter for resolution between the relevant DCJs and the Deputy Head of Civil Justice.

6. INCURRED COSTS¹⁹

6.1 The concerns. Judges and practitioners have expressed a number of concerns about incurred costs. In some cases, especially clinical negligence, the costs incurred before the CCMC are substantial. All that the court can do at the moment is to “comment” on the incurred costs, which (it is feared) may have little effect. Usually the court has little information about the build up of the incurred costs. There are stories of practitioners doing as much work as possible before the CCMC in order to shelter their costs within the ‘incurred’ column. In some cases judges have regarded the incurred costs as grossly disproportionate and have sought to find ways of controlling them.²⁰ As a separate problem, I am told that some judges at detailed assessments are treating absence of “comment” on the incurred costs as approval. In my view that is incorrect.

6.2 The way forward. Having listened to a variety of different views, I suggest that the following might be the way forward:

(i) Precedent H should have separate total columns for incurred and budgeted costs. If you combine the two (as now) you are not adding like to like and may cause confusion.

(ii) In the general run of cases, where incurred costs are a small part of the whole, the court should only budget future costs, leaving incurred costs for detailed assessment if not agreed.

(iii) In any case where the court has or procures sufficient information for the purpose, it should have the power (a) to comment on the incurred costs; (b) summarily to assess the incurred costs; or (c) to set a global budget figure for any phase, including both incurred and future costs.

6.3 What will happen in practice. In most cases the court will simply budget for future costs. A separate investigation of incurred costs will usually be a disproportionate exercise. Nevertheless the existence of the residual power set out in sub-paragraph (iii) above will be an incentive for solicitors not to put forward excessive incurred costs. Also the residual power will provide a way of dealing with problems such as those which arose in *Redfern* and *CIP Properties*, discussed above.

6.4 General comment re incurred costs. Even if the costs budgeting regime is ineffective for regulating past costs, it is still a highly worthwhile exercise. The mere fact that money has been wasted in the past is no reason to abandon cost control in

¹⁸ In respect of CCMCs already listed, where there is a significant backlog

¹⁹ There is a thoughtful discussion of incurred costs and many other costs management issues in the judgment of Warby J in *Yeo v Times Newspapers* [2015] EWHC 209 (QB).

²⁰ E.g. *Redfern v Corby BC* [2014] EWHC 4526 (QB); *CIP Properties v Galliford Try* [2015] EWHC 481 (TCC)

the future. At the time of the first case management conference there is still much to play for, including the future costs of disclosure, witness statements, expert reports, ADR and trial.

6.5 Pre-action costs management. In cases where the incurred costs tend to be high, pre-eminently clinical negligence, there is a clear need to introduce pre-action costs management. In the Final Report I recommended that pre-action costs management should be piloted and introduced: see FR chapter 23 and chapter 40, paragraph 7.21. I respectfully suggest that these proposals should now be taken forward. Five years have elapsed since I published the Final Report and two years' experience of costs management has accumulated. Although I am not a member of the Rule Committee or the Coulson Committee (and it is right that I should not be), I would be happy to prepare a detailed paper on pre-action costs management if (and only if) (a) I am asked to do so and (b) the MoJ and the Rule Committee indicate that they are willing in principle to move on to this next stage.

7. A HOLISTIC APPROACH TO THE 2013 CIVIL JUSTICE REFORMS

7.1 A coherent package of reforms. As previously stated, the 2013 civil justice reforms were designed as a coherent package. The link between the new costs management rules and the new rules on proportionate costs is obvious: see paragraph 2.6 above. However, other rule amendments introduced in April 2013 are equally linked in with costs management. In particular:

- (i) Amendments to CPR Part 31 enable the court to get a grip on disclosure at the outset, by means of preliminary disclosure reports etc. The new rule 31.5 contains the "menu option", as recommended in FR chapter 37. This requires the court to choose between a series of different disclosure orders, ranging from no or very limited disclosure through to full or *Peruvian Guano* disclosure.
- (ii) Amendments to rule 32.2 enable the court to limit the number of factual witnesses, the length of their statements and the issues which they will address.
- (iii) Amendments to rule 35.4 require any party seeking permission to adduce expert evidence (a) to identify the issues which the expert will address and (b) to furnish an estimate of the expert's costs. The amended rule also enables the court to limit the issues which the expert will address.

7.2 The package of new rules enables the court effectively to control costs. The filed costs budgets enable the court to see what the parties' planned work will cost. The amended case management rules enable the court to steer the case, so that it proceeds within the bounds of proportionate costs. (It would be absurd, for example to order a disclosure exercise costing £2 million, if the sum at stake is only £500,000.) The costs management rules enable the court to set recoverable costs for the work which the parties are actually going to do. The objective of the 2013 civil justice reforms is to enable the court to manage each case so that it proceeds at proportionate cost.

7.3 Related reforms. This is not the occasion to review the entire package of the

2013 civil justice reforms, but they are all directed to the same objective. The following are examples:

(i) The introduction of fixed costs for lower value cases sets costs at proportionate levels and avoids all the expense of costs management in such cases.²¹

(ii) The abolition of recoverable success fees, with a raft of measures to protect personal injury claimants,²² removes one of the main drivers of excessive costs.

(iii) Ending recoverable ATE premiums removes another driver of excessive costs.

(iv) Having lost recoverable ATE premiums, personal injury claimants need protection against swingeing adverse costs orders. QOCS has been introduced for this purpose. As a result of QOCS defendant budgets are usually so low that they take little time to review. That in turn simplifies the costs management exercise.

(v) Firmer enforcement of compliance (as recommended by the Law Society)²³ is necessary to make costs management and indeed all the reforms work effectively.

I mention the above examples, because without those reforms it would be impossible to manage cases so that they proceed at costs which are proportionate to the sums at stake. Also it is important to look at the costs management rules in the wider context. They are part of a complex web of interlocking reforms, all designed to control the escalating costs of civil litigation and to bring them down to proportionate levels.²⁴

7.4 Combination or separation of case and costs management? At the moment there are different practices between courts. For example, at Sheffield there are separate case and costs management conferences, whereas at Leeds there are single CCMCs. I agree with the many practitioners who say that there needs to be clear guidance, so that all courts adopt the same approach (subject to the requirements of individual cases). One solicitor in a large London firm (who strongly supports costs management) states:

“The great regret is that costs management is following directions having been made as opposed to dealing with cost and case management together.”

7.5 The norm should be a single hearing. I have heard much debate on this issue. In my view the norm should be for the court to do both case management and costs management at a single hearing: see Q & A pages 41 and 61. It should be an iterative process.²⁵ In other words, first give case management directions; then budget the costs; then revise the case management directions if the costs are still disproportionate – for example by restricting disclosure or directing a single joint expert in place of adversarial expert evidence on a particular issue.

²¹ So far this recommendation has only been implemented in part. Fixed costs still need to be introduced for fast track non-personal injury claims and for lower value multi-track claims: see FR chapters 15 and 16.

²² Ten per cent increase in general damages; cap on what success fee can be charged to the client; enhanced reward for effective claimant Part 36 offers etc

²³ See Final Report, page 388. This recommendation was implemented by the new CPR 3.9 and the Court of Appeal’s decision in *Denton v White* [2014] EWCA Civ 906; [2014] 1 WLR 3926.

²⁴ The terms for the 2009 Costs Review required me to design such a package of reforms. I made 109 recommendations, most of which have now been implemented.

²⁵ The Leeds Law Society in conjunction with the district judges have developed an excellent ‘cost budget comparison’ document for use in CCMCs. This is self-calculating and enables the judge’s decisions to be incorporated as the hearing proceeds.

7.6 Examples of the iterative approach. District Judge Simon Middleton, who sits in Bodmin and Truro, describes his method as follows:

“I do a short judgment on the relevant 44.3(5) factors and give brackets for overall proportionality of each party's budget. I then give the individual case management direction for a phase and costs manage all parties' costs for that phase (i.e case and costs manage by phase simultaneously). At the end I step back. If the result is still not proportionate, then we revisit phases to look for a more proportionate direction and spend on it. I find it easier to steer to a proportionate direction if I am doing the cost for that direction at the same time.”

Judge Mark Raeside QC, who sits in the Leeds TCC and Mercantile Court, describes a similar approach: see the annex. The procedures adopted by these judges are a good illustration of how courts should use the whole package of the 2013 civil justice reforms in the course of costs management.

7.7 Exceptional cases. Sometimes there is need for decisions of principle to be taken before the parties can prepare their budgets. For example, there may be an issue about whether to have a split trial or whether (exceptionally) to limit the budgeting up to a certain stage. The court should have discretion to direct a preliminary CMC (usually by telephone) where that is necessary and where the sums in issue warrant the expense of that additional step. Even where this exceptional step is necessary, the subsequent CCMC should still involve the iterative process described above.

8. OTHER ISSUES AFFECTING COSTS MANAGEMENT

8.1 Initial directions. At the moment there is a variety of initial orders which courts send out at the start of the costs management process. I respectfully suggest that a small number standard form orders should be developed, for use in different types and sizes of case. A convenient way to embark upon this task may be to collate the standard form directions used by the Chancery masters, the QBD masters, the Commercial Court, the TCC, the Central London County Court and the various regional court centres. All of these ‘local’ directions have been bench tested for many months. It ought now to be possible to identify best practice and standardise it.²⁶

8.2 Hourly rates. The GHRs are intended to be a guide for summary assessment. Inevitably, however, they are also considered in detailed assessments and in costs management. There is a growing problem here. For reasons which are widely known the GHRs have not been revised since 2010. In my view there is now a need for the CJC Costs Committee to resume its work and to propose new rates for consideration by the Master of the Rolls. That committee should also set out appropriate complexity uplifts for specialised areas of litigation,²⁷ such as clinical

²⁶ District Judge Matharu, who sits in Manchester and is supportive of costs management, commented to me bluntly that the courts have “got to get their act together” in this regard.

²⁷ As the Manchester practitioners point out, it may be possible to formulate some complexity uplifts as a first stage, while detailed work is in progress on revising the basic rates.

negligence and defamation. This material will be of assistance to costs managing judges when they are setting total figures for each phase of litigation.

8.3 The way forward on GHRs. Practitioners have made a number of constructive suggestions as to how the problems which beset the last exercise might be avoided. In particular, perhaps the next request for information should be more focused and targeted. Whilst not stopping others from writing in, the committee could seek defined information from identified large and small firms specialising in particular areas. There is also a need for proper funding of the exercise. I appreciate that money is a real problem. In the age of austerity the Ministry of Justice may not be able to help. The Law Society may not see this exercise as a proper use for its funds. If that is so, perhaps other avenues could be explored, such as the various foundations which support socio-legal research. Another option might be to involve a university in the work. (In 2010-2012 three universities monitored the pilots which I initiated. They received no payment, only the opportunity to publish the results as original research.) From the point of view of the public interest I question whether it is acceptable that the present state of limbo should continue indefinitely.

8.4 The increased court fees introduced in March 2015. Many practitioners and commentators deplore the increased court fees introduced in April 2015, pointing out that (a) they inhibit access to justice and (b) they are self defeating in that, by driving people away from the courts, they will reduce the likely receipts.²⁸ I share that concern. For the purposes of costs management, I propose that the court should disregard court fees when considering whether a party's costs are proportionate.

8.5 Should defendants be exempt from costs management in QOCS cases? Views differ on this question. In my view defendants (unless they disclaim any future intention to seek an award of costs) should not be exempt from costs management in personal injury or clinical negligence cases for four reasons. First, it takes little time to review a defendant's budget because the figures are generally low. Secondly, defendants occasionally obtain costs orders in their favour, for example after making effective Part 36 offers. In such cases claimants should have the protection of costs management. Thirdly, it is wrong in principle that well resourced liability insurers should be 'let off' the work which the claimants have to do. Fourthly, the court will be able to control its workload as a result of the rule amendments discussed above. In those circumstances the small amount of additional time needed to review defendants' budgets should not be a problem.

8.6 Agreement of budgets. A consistent message which I receive from judges is that the percentage of cases in which costs budgets are agreed is steadily rising. (This does not apply to personal injury and clinical negligence cases, where agreement is rare.) The other consistent message is that, for the most part, solicitors are not collaborating to agree inflated budgets. That is unsurprising. Such conduct would be directly contrary to solicitors' duties to their clients. A number of solicitors

²⁸ I am told that this has been the effect of the recent substantial increase in employment tribunal fees.

(practising in the 'business' field) tell me that they take proper instructions from their clients before agreeing opposing budgets and that reaching such agreements is in the interests of all concerned. Nevertheless there are exceptional cases. I therefore recommend that the court should have a residual power to revise agreed budgets where (a) they are obviously excessive or (b) the assumed case management directions upon which budgets were based have changed.

8.7 Education of law students. Both BPP and the University of Law state that in their civil procedure courses they cover costs management (including the preparation of costs budgets in accordance with Precedent H and the management of litigation within budget) in some depth. These courses include practical exercises. The next generation of lawyers will undoubtedly take costs budgeting in their stride. They will not face the challenge of adapting to the new culture of costs control mid-career.

8.8 Against this background, it would be a big mistake to water down the present costs management regime, in order to meet short term concerns.

8.9 Continuing professional development for the profession. Proper training in the preparation of budgets and the process of costs management is now vital for all barristers and solicitors who practise in the field of civil litigation. The University of Law tells me that it provides such training as part of its post-qualification courses for solicitors in the first five years of practice. I have no doubt that other CPD providers do the precisely same. I recommend that bodies providing training for the profession should liaise with the Judicial College, to ensure that all trainers (both of judges and practitioners) are singing from the same hymn sheet. The obvious way to do this is for the Judicial College to prepare a standard pack outlining the training which it provides to judges. In this 'Freedom of Information' age, there is no reason why such material should be confidential.

8.10 The training objective. The purpose of all training for both judges and practitioners is to ensure that the courts deliver a cost effective service to the public. As one judge recently commented to me:
"If I were a client, I would want costs management and I would want it done properly so that I could make informed decisions."

9. DEVELOPMENT OF NEW FORM BILLS OF COSTS AND ACCOMPANYING SOFTWARE

9.1 FR recommendations 106 and 107 were:

"106. A new format of bills of costs should be devised, which will be more informative and capable of yielding information at different levels of generality.

107. Software should be developed which will (a) be used for time recording and capturing relevant information and (b) automatically generate schedules for summary assessment or bills for detailed assessment as and when required. The long term aim must be to harmonise the procedures and systems which will be

used for costs budgeting, costs management, summary assessment and detailed assessment”.

9.2 In October 2011 the Association of Costs Lawyers (ACL) produced a report “Modernising Bills of Costs” as part of the implementation of those recommendations. That report recommended investigating whether the Uniform Task-Based Management System (UTBMS) operated by Legal Electronic Data Exchange Standard (LEDES) could be adapted for use in producing a new Bill of Costs. The UTBMS consists of standard time recording codes for litigation. American law firms, including those based in the UK, use this system. I understand that some of the Magic Circle firms also use UTBMS.

9.3 Senior Costs Judge Peter Hurst asked Jeremy Morgan QC to set up a working group, known as the “Jackson Review EW-UTBMS Development Steering Committee” to take forward the proposal in the ACL Report. That committee is now chaired by Alexander Hutton QC and it includes Costs Judge Colum Leonard. The Hutton Committee carried out a detailed review. It then and recommended adapting the codes in the existing UTBMS into new “J-Codes”, which have been formulated for an UTBMS code set for use in England and Wales (EW-UTBMS). Developing the J-Codes to capture time-recording information is an essential aspect of the implementation of the recommendations in the Final Report.

9.4 On the 30th July 2014 Lord Dyson MR, Senior Costs Judge Peter Hurst and I sent a written request to the Hutton Committee to move on to the next stage of their work.

9.5 Since then the committee has made good progress and will shortly be putting forward its detailed proposals to the Rule Committee, with a view to commencing a pilot at the SCCO in April 2016. Senior Costs Judge Gordon-Saker (who has taken over following the retirement of Peter Hurst) is supportive of the proposal.

9.6 The new scheme will work as follows. The J-Codes are designed to be compatible with commercial time recording software. Participating solicitors will adapt their time-recording systems by using the following codes. A number with J as prefix denotes a task (i.e. the subject matter of the work). A number with A as prefix denotes an activity, i.e. what you are doing within that subject matter. For example, if you wish to record your time drafting a witness statement as a result of an earlier meeting with the witness, you would select your Task Code as JG-10, defined as “*Taking, preparing and finalising witness statement(s)*” and then select your Activity Code as A103, namely “*draft/revise*”. There is therefore no need to select a Phase Code, only a Task Code and Activity Code as the Task Code always includes the Precedent H phase within it (in the above example, JG-10 relates only to Witness Statements). Thus all time-recorded work is assigned to the Precedent H phases. You can then additionally enter manually on the time recording system for that same entry as detailed a description as you wish of the particular work done, such as “*drafting the Claimant’s witness statement, including....*”.

9.7 Additional codes record disbursements. For example a number with X as prefix denotes expenses (such as external photocopying charges – X103).

9.8 All work contemporaneously recorded in this way is then fed into a bill detail worksheet. This spreadsheet will be too cumbersome to print out in full, but it can easily be read electronically. Also it can be transmitted electronically.

9.9 It will then be possible to print out summaries of work done and the costs claimed for that work at different levels of generality, depending upon the purpose for which the summary is required (summary assessment, detailed assessment, client bill etc). Further, at the press of a button or two, you can produce any required detail relating to work in the bill recorded by J-Code, such as, for instance, a detailed list of all time spent drafting/revising witness statements.

9.10 It is proposed that the Civil Procedure Rules be amended to permit (and later require) bills of costs for detailed assessment to be in spreadsheet form, matching up with the layout of precedent H and, in particular, setting out the work done under the precedent H phases. The software will be able automatically to generate draft bills of costs in this format. The solicitors will need to provide very limited input to create the final bill of costs for filing and serving.

9.11 The new bill of costs will enable instant comparison between the costs being claimed and the receiving party's last approved budget.

9.12 The precedent bill or template (in technical terms a 'schema') will be on a universal format (XML). This will be made publicly available on the HMTCS website. Court users will be able to use this if they have any of the standard spreadsheet packages, including but not limited to Microsoft Excel.

9.13 While costs software companies may adapt the precedent bill as part of their commercial packages, the precedent bill will be available for all to use without the need to buy any costs software. Furthermore the precedent bill, like the existing format, will be such that it can be completed manually by those who so wish.

9.14 Once the new form bill of costs has been established and is working satisfactorily, the Hutton Committee will develop a new form bill of costs for summary assessment. This too will be in spreadsheet form. The model bill will allow software automatically to generate summary assessment bills. This will be a fairly straightforward reform and may not need a pilot.

10. IF COSTS MANAGEMENT IS SO MARVELLOUS WHY DOESN'T EVERYONE SUPPORT IT?

10.1 A balanced assessment. I do not say that the new regime has "no possible fault or flaw" per *Iolanthe*. Indeed this paper acknowledges a number of problems which need attention. I do say, however, that the new regime is in the public interest and

is here to stay.

10.2 Why then do quite a few lawyers dislike it? Because it means more work and requires people to develop new skills.

10.3 Are the views of lawyers the litmus test? No, they are not. The civil justice system exists to deliver civil justice to the public at proportionate cost, not to promote the contentment or convenience of lawyers.

10.4 Changing attitude of the judiciary. Many judges did not welcome the new regime, when it came in. Despite that there has been a softening of judicial opposition over the last two years, as judges have become more comfortable with the process and more skilful at it. Of course certain judges still dislike the process and feel no inhibitions about saying so. To some extent this is a generational issue. Traditionally the Bar, from which many judges are drawn, took no interest in costs. However, attitudes are changing. Younger judges have had experience of arguing summary assessments when they were in practice. Some may even have practised at the Costs Bar, a sector which developed in the early years of the 21st century. An increasing number of judges were solicitors and have good background knowledge of costs: see the comments of the Chief Chancery Master in the annex. Those civil judges appointed since April 2013 must all have demonstrated ability and willingness to costs manage. Otherwise they would not have been suitable for appointment.

10.5 Changing attitude of the profession. I readily accept that many practitioners dislike the process for a variety of reasons. This is especially true of (a) those practitioners who have only done costs management in a few cases and (b) those who practise in courts where the process causes delay or where the judges are less enthusiastic. All this is gradually changing. The extent of professional opposition is steadily declining: see paragraphs 2.13 – 2.17 above. Many practitioners have spotted that clients like to know what their litigation is going to cost. To some extent, again, this is a generational issue. Younger practitioners are growing up under the new rules and have no difficulty with them. See the discussion of training and CPD in paragraphs 8.7 – 8.10 above.

10.6 Prediction. I predict that within ten years cost management will be accepted as an entirely normal discipline and people will wonder what all the fuss was about.

Rupert Jackson

13th May 2015

SHORT QUESTION AND ANSWER SESSION FOLLOWING THE LECTURE

Question by Desmond Browne QC: Is there now any place for costs capping?

Answer by Jackson LJ: No. In my view the costs capping rules should be repealed.

ANNEX

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(i) The experience of the Chancery Masters²⁹

In the Chancery Division in London it is normally masters rather than judges who do costs management. At the first case management conference the master has before him/her the parties' statements of case, directions questionnaires, disclosure reports and proposed directions.

Even if the directions are agreed, it is the experience of the Chief Chancery Master that the court can usually add value, for example by narrowing the scope of disclosure pursuant to CPR 31.5 (7).

Quite often costs budgets are agreed either in whole or in part. Generally these agreements are reasonable and do not represent a 'ganging up' by the solicitors against the clients.

The Chief Chancery Master would prefer to have the power to set budgets for the whole litigation, rather than just future costs. In his view, merely recording comments pursuant to PD 3E para 7.4 is little use. If the court had such a power, there would be a number of advantages. First, the master would be able to deal effectively with excessive incurred costs (which are sometimes seen). Secondly, this reform would eliminate the problem of how to deal with costs incurred between the date of preparing the costs budget and the date of the hearing.

The Chancery masters costs manage lightly. They try to adopt a reasonable approach, rather than slashing budgets for the sake of it.

The introduction of costs budgeting in the Chancery Division has not led to backlogs. Two of the six Chancery masters are former solicitors. That number will soon go up to three out of six. The deputy masters are all barristers. They have received training and seem to be coping with the new regime satisfactorily. The Chancery masters sit during vacations. When they are on leave, the deputies cover for them. In this way the Chancery masters deliver a continuous service to court users.

²⁹ The information in this section comes from Chief Chancery Master Marsh.

The Chief Chancery Master states:

“1. We have developed standard directions which require the parties to consider each other’s budgets, establish which phases are agreed and provide the court with a one page tabular summary showing the figures for all phases and showing which are agreed and which are not agreed. This is a really useful tool with which to conduct a CCMH. We also require the parties to say briefly (in two sentences) where they disagree, what is the source of disagreement.

2. We are finding fewer cases coming through to a CMC than before. Our requirement to lodge the full suite of documents in response to Form N149C has encouraged parties to pause and reflect. We often grant stays for settlement at that point.

3. We conduct a paper review after all the N149C documents have been filed in every case to decide whether the claim should stay in the High Court, whether a CMC or CCMH is required etc. In view of your reforms, and the outcomes from the Chancery Modernisation Review, we find it is necessary to have a CMC type hearing in almost every case. Previously, directions were often given on paper. I regard the current position as preferable because of the added value we can supply.”

The Chief Chancery Master adds that, regardless of whether or not costs management reduces costs, he strongly favours an exchange of information about costs incurred and anticipated future costs “because it brings a sense of reality to litigation and litigants cannot ignore that reality”.

(ii) The experience of the Queen’s Bench Masters³⁰

Clinical negligence litigation

There is a real problem here because CCMCs take much longer than case management conferences under the old rules. As a result delays in clinical negligence cases are mounting up. The Jackson Report recommended that an extra QB master be appointed specifically to deal with clinical negligence cases. That recommendation was not implemented. Instead there are now two QB masters fewer than there were in 2009, when that recommendation was made.

In the Senior Master’s view, time could be saved by dispensing with defendants’ costs budgets. Because of QOCS there are seldom costs orders in favour of defendants. In the few cases where there are such orders, it would be more efficient simply to have an old style detailed assessment. Defendants’ budgets are often artificially low for tactical reasons.

The NHSLA tends to take an unreasonable stance challenging everything in claimants’ budgets. The rules should incentivise reasonable conduct by the defence. One possibility would be to penalise failure by defendants to make or accept reasonable offers re each phase of the claimant’s budget.

³⁰ The information comes from the Senior Master, Barbara Fontaine

General QB litigation

Costs management is generally working effectively here. Budgets are sometimes agreed. Indeed the proportion of budgets being agreed is slowly increasing.

In general QB litigation the parties on both sides are often commercially minded and have a mutual interest in (a) controlling costs, (b) having their own budgets approved by the court and (c) seeing the opposition's costs. Clients often want to know (a) what the action will cost if they win (i.e. their own irrecoverable costs) and (b) what the action will cost if they lose (i.e. their own actual costs + the other side's recoverable costs).

The Senior Master's experience of costs budgeting in general QB cases is broadly favourable.

Personal injury litigation

This has some of the problems of clinical negligence litigation, but not on the same scale. Here again, in the Senior Master's view, time and resources could be saved if defendants were exempted from the costs management regime.

Some specific points raised by the Senior Master

(i) Costs budgets should be exchanged 14 days before the CCMC and lodged 7 days before the CCMC. To require them earlier is a waste of resources and effort.

(ii) If the level of incurred costs is too high, that should be a matter for comment, not a reason for reducing future budgeted costs.

(iii) The court whilst looking at hours and rates should not micro-manage the litigation. It should approve a single lump sum for each phase.

(iv) Practice Direction 3E should give more guidance about how to deal with contingencies. At the moment parties adopt different approaches. This makes the master's task more difficult.

(v) A fixed costs regime should be introduced in the lower reaches of the multi-track, as recommended in chapter 16 of the Jackson Report. This could perhaps cover claims up to £250,000. That would reduce the number of cases which require costs management.

(iii) The experience of the TCC in London³¹

It is the experience of the London TCC judges that generally the parties are lodging their budgets on time. Sometimes the budgets are agreed and sometimes not.

³¹ The information in this section comes from Mr Justice Akenhead after consulting with his fellow TCC judges in London.

Where the budgets are agreed, there are occasions when the TCC judges would like a residual power to override the agreement and make reductions. This is in a minority of cases. It would help if the rules required solicitors (before agreeing) to confirm that their clients have seen and approved the other side's budget.

Where budgets are not agreed, the costs management hearing takes on average half an hour. The hearing may take longer than that (if numerous items are in dispute) or less time, if the disputes are narrow.

Where (as sometimes happens) budgets are lodged late, the court takes a pragmatic view. The judge usually orders the parties to exchange their budgets within – say – a week and agree what they can. The judge is usually able to deal with items not agreed in writing. This avoids the need for an extra hearing.

Where trial directions are altered such that they may increase or reduce the budgets, the parties will be asked to produce revised budgets with any challenges to be resolved in writing.

There is one problem which occurs infrequently and to which the TCC judges can see no obvious solution. That is what should be done in cases where a party has incurred excessive costs before the costs management process starts. That may happen, for example, if a case above the £10 million threshold comes into the costs management regime at a late stage as result of the parties' request or the court's decision.

Over all, in the words of Akenhead J, "we are not phased by costs management and so far none of our costs management decision have been challenged on appeal".

It is understood that the litigating clients value having breakdowns of their own costs and the others side's costs in a similar format. This assists in taking decisions about settlement and the timing of negotiations.

(iv) The experience of the Commercial Court³²

The majority of Commercial Court cases are above the cut-off point of £10 million. So the Commercial Court judges have only had limited experience of costs management to date. In Flaux J's view, the cut-off point of £10 million is pitched at about the right level.

Commercial cases below £10 million often fall into recognised categories of case, requiring trials of – say – one, two or three weeks. Experience to date has been that the budgeted costs generally fall within the range expected. Sometimes counsel's fees stand out as excessive. That is also apparent at summary assessments. Approving budgets for these cases has not to date proved unduly troublesome. Solicitors practising in this jurisdiction are accustomed to co-operating. They may

³² Based on a discussion with Mr Justice Flaux, Judge in Charge of the Commercial Court

agree the entirety of their respective budgets, but more often they will identify points of principle for decision by the court.

Commercial court judges adopt a broad brush approach to costs management. They do not get bogged down in the details. They are aware that the exercise is not intended to be assessment of costs. The fears and horror stories about half day hearings to approve costs budgets have not materialised in the Commercial Court.

Solicitors are not now so hostile as they were at the outset to the costs management regime, although concerns remain about the costs of the exercise. They accept that it is here to stay.

If the rules are amended, it would be helpful to have greater clarity as to how the approved budgets impact upon detailed assessment.

(v) The experience of the Mercantile Court and TCC in Bristol³³

The court sends out standard directions requiring parties to exchange and discuss budgets, then to file a brief statement identifying what is agreed and what is not agreed when filing the budgets (not later than 7 days before the first CMC). At the moment budgets are agreed in about 25% of cases. That percentage is gradually rising, but there are no signs of 'cosy' deals between solicitors.

In contested costs management hearings, the court adopts a realistic approach and treats each case separately. The court does not adopt an *a priori* or formulaic approach to making budget reductions.

The introduction of costs management adds about half an hour to a CMC, but this does not lead to backlogs of CMCs. Because trials settle so often, the requisite CMCs can always be 'fitted in'.

HH Judge Havelock-Allan QC believes that costs management is a valuable process. It is enormously helpful for parties to see at the outset realistic budgets for what the litigation will cost each side and what costs are recoverable.

There is, however, a shortcoming in form H. The costs of settlement negotiations and mediations should be separated out, not rolled into a single box as now. This should eliminate what is the current practice of some parties, namely adding mediation as a separate contingency.

(vi) The experience of the Mercantile Court and TCC in Leeds³⁴

HH Judge Mark Raeside QC manages and tries all the TCC cases in Leeds and a good number of the mercantile cases. In the majority of cases he does the CCMCs by telephone in half hour slots, starting at 9 or 9.30 a.m. This enables the judge to do

³³ Based on discussion with HHJ Havelock-Allan QC, the Bristol Mercantile and TCC judge

³⁴ Based on information from HHJ Mark Raeside QC, the Leeds TCC judge.

two or three CCMCs before starting the main case of the day at 10.30 a.m.

Heavier cases may require CCMC hearings in court lasting an hour or more. The really heavy and complex claims over £10 million may require half day CCMCs. These cases are few in number and would require careful case management, even if there were no costs management.

In cases up to £250,000 in value the solicitors are only required to lodge one page budgets, using the front sheet of precedent H.

The experience of the Leeds Mercantile Court and TCC is that the introduction of costs management has not given rise to logistical problems or to delays in listing case management hearings or trials. Smaller cases are usually listed for trial within six months, larger cases within nine months.

Judge Raeside does case management and costs management together. He 'prices' the directions which he gives. He uses the new rules to limit disclosure and to control the scope of factual or expert evidence, so that the budgeted costs of each side will be proportionate to the value of the claim + any counterclaim. In his view the 'secret' of effective costs management is to spend the money where it matters and to pare down the costs elsewhere. For example, if a case turns on expert issues, then the judge will allocate more money to the expert evidence and cut down the allowance for witness statements.

Applications to vary approved budgets are rare, but occasionally they are made and some of them succeed. A high percentage of cases in the Leeds TCC and Mercantile Court settle. If a case goes to trial the judge summarily assesses the costs of the winning party in accordance with its last approved budget. So far this has not given rise to any difficulty, complaints or appeals.

(vii) AB's experience of costs management

C LLP is a national firm of solicitors which litigates at all court centres across the country. It has a huge claimant clinical negligence practice, but does much other work as well, including commercial/business litigation.

AB is head of the costs department at C LLP. His department has prepared about 1200 budgets, of which some 400 have been presented to the court and (after any appropriate amendments) duly approved. He finds the process "generally OK", but there are some specific issues that need attention:

(i) There is inconsistency of approach between different judges/masters. Some, whilst looking at the build-up, approve a global figure for each phase of the litigation, leaving the lawyers discretion as to how they expend that sum. Others specify numbers of hours and rates, effectively micro-managing the litigation. AB believes that the former approach is (a) better and (b) more in accordance with the rules.

(ii) At some (but not all) court centres the backlog of CCMCs in clinical negligence cases is causing excessive delays.

(iii) Some courts are happy to receive the budget forms 7 days before the CCMC. Others require it to be lodged with the allocation questionnaire. The former practice is much better, because budgets prepared at the AQ stage require updating later, thus increasing the amount of work.

(iv) There is inconsistency in dealing with incurred costs. If the incurred figure appears excessive, some courts restrict themselves to commenting. Others treat this as a reason for restricting future costs. AB's view was that whilst courts should consider the incurred costs, they should restrict themselves largely to commenting if needed, largely because there is not sufficient time to consider those incurred costs and what work has been undertaken to date. To significantly restrict future costs has a number of ramifications for clients.

(v) There is some inconsistency in dealing with contingencies – i.e. how extensive this category should be. AB thinks it should be broad, to avoid repeated future applications to the court.

(viii) The experience of the Central London County Court³⁵

When costs management began, CCMCs took one and a half hours. Now district judges at Central London County Court can carry out case and costs management in 45 minutes, although additional time is needed if there are more than two budgets to consider. The profession has become much more familiar with the process over time. Usually most elements of the budgets are agreed. The court then determines the outstanding issues.

There are aspects of costs management which still need attention. In particular, if the court orders a split trial, it cannot usually budget beyond the initial trial. In DJ Langley's view an initial case management conference by telephone to resolve issues such as whether to have a split trial would not be wise, because that would add to the costs unduly. DJ Langley disapproves of the practice of some courts of ordering points of dispute to be served in respect of opposing budgets. There is an urgent need to establish a uniform approach to these matters across all courts.

The Central London County Court has developed standard pre-hearing directions as follows:

"It is **ordered** that:

- 1) This case be allocated to the multi track.

³⁵ Based on information provided by DJ Margaret Langley, the senior district judge at Central London County Court

- 2) The claim shall be listed for a costs and case management conference on the first available date after _____ before District Judge /HH Judge _____ with a time estimate of forty-five minutes.
 - a) If a notice giving details of the time and place of the hearing is not enclosed with this Order, one will be sent to you shortly.
 - b) The costs and case management conference shall not be conducted by telephone.
 - c) The parties do each file and serve updated Costs Budgets 14 days before the costs and case management conference.
 - d) The parties do then seek to agree some or all of the phases of the budgets by 4 days before the costs and case management conference.
 - e) At least three days before the case management conference the Claimant must file and send to the Defendant (preferably agreed and by email):
 - i) The disclosure reports, if not already filed and served.
 - ii) Details of the names, experience, specialism and estimated fees of any proposed expert who the court is to be invited to give permission to any party to rely upon their report;
 - iii) draft directions, and where some but not all of the directions have been agreed the Claimant must indicate clearly which proposed directions are subject to disagreement;
 - iv) a case summary;
 - v) a list of issues;
 - vi) a one page summary of the Precedents H of both parties to enable the judge to undertake a comparison of the total for each party of each phase of the litigation and which should also indicate which of the phases, if any, have been agreed.;
 - vii) these documents should also be sent to the court by email to: ContralLondonCJSKEL@hmcts.gsi.gov.uk or to CentralLondonDJSKEL@hmcts.gsi.gov.uk not less than two clear days before the hearing.
 - viii) a breakdown of the pre-action and issue/pleadings costs included in the respective Forms H.
- 3) This listing is made on the basis that much of the costs budgets will have been agreed before the hearing. If this is not the case, the costs and case management conference may be adjourned part heard.
- 4) If the parties fail to provide the above documents in time, the judge might place this costs and case management conference hearing at the end of the day's list or may refuse to hear it altogether and re-list it for another occasion.
- 5) Because this Order has been made without a hearing, the parties have the right to apply to have the order set aside, varied or stayed. A party making such an

application must send or deliver the application to the court (together with any appropriate fee) to arrive within seven days of service of this Order.”

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