

Date: 30/09/2022

Dear Sirs,

**Re: CJC Costs Working Group – Consultation Paper (June 2022)**

The following responses are prepared by Sarah Bingham and Gerard Courtney, both specialists in cost litigation. Our responses are focused on Part 1 of the consultation only.

**Part 1 – Costs Budgeting**

**1.1 Is costs budgeting useful?**

Cost budgets are a useful tool for settling cases more efficiently. In practice we see the approved or agreed budget being used to settle costs at JSM's which not only improves cash flow, but limits interest on costs as well as cost drafting fees for a Bill of Costs to be prepared.

The effect of an agreed or approved cost budget limits the scope of successfully challenging the recovery of budgeted costs. This limits the negotiation between parties to the incurred spend and any costs which fall outside the Cost Management Order, therefore there are far fewer cases progressing to long and expensive detailed assessment hearings. Even if it is necessary for a matter to proceed to detailed assessment, the judicial time required is reduced due to the narrowing of the scope of disputes between the parties.

Furthermore, an approved or agreed cost budget is beneficial for a client to have clarity over the costs being incurred on their matter. Costs management ensures greater transparency over the total costs of a litigation and allows parties to have greater regard to proportionality from an early stage. This is particularly relevant to clients who do not have the benefit of QOCS protection as clients are more easily able to weigh up what they have to gain or lose by proceeding with litigation. To that end it is often a very useful instrument in driving negotiated settlements.

Lastly, cost budgets are a useful tool to assist the court on ordering payments on account of costs and are also used by the court when summarily assessing success fees in applications for deductions to damages.

## **1.2 What if any changes should be made to the existing costs budgeting regime?**

There would be a real benefit to removing costs budgeting from the first CCMC for several reasons:

1. Reduces delays in cases being listed for just CMC;
2. Reduces hearing time from 90 mins to less than 60 mins meaning CMC's can be heard remotely,
3. More CMC's cases can therefore be heard;
4. Improves the chances of agreeing cost budgets (or narrowing the scope of disagreement) because directions have been approved;
5. In the event cost budgets cannot be agreed a Cost Management Hearing can be listed for no more than 45 mins.

The main reason why cost budgets cannot be agreed or narrowed ahead of a CCMC is because of the unknown outcome of directions (largely impacting Expert Report phase and Trial phase). Therefore, separating out the cost management element from a CMC would present as follows:

- Day of CMC approving directions,
- + 7-14 days – Budgets are updated and re-served to reflect the approved directions,
- + 14-21 days - Budget Discussion Reports (Precedent R's) filed and served,
- +21-28 days - Cost Management Hearing if cost budgets not agreed.

The provisions in CPR 3 and PD3E would apply and would not require amendment to facilitate this split CMC/CMH approach. There may be delays in sealing the directions order so the timescale illustrated above could be adjusted.

The requirement for parties to exchange costs budgets with directions questionnaires in matters pleaded below £50,000.00 is also something that ought to be considered. There is little to no material benefit in preparing budgets prior to the point where there has been any collaboration between the parties on directions. Such an approach leads to unnecessary work on revision and causes confusion at CCMC's as those budgets fail to reflect the parties updated position on directions.

## **1.3 Should costs budgeting be abandoned?**

There has been mention of abandoning cost budgeting for Defendants particularly those represented by the NHSR as they are rarely challenged, if this were the case there would have to be some cost reporting alternative. In the event QOCS is disapplied or the Defendant obtains a cost order which they can enforce due to the mechanism of settlement, the adverse cost risk should be known and managed throughout the litigation. A lack of costs budgets from Defendants also makes obtaining sufficient ATE cover for Claimants more difficult when it comes to assessing suitable levels of indemnity required.

Sarah Bingham

Cost budgeting should not be abandoned for any party.

#### **1.4 If costs budgeting is retained, should it be on a “default on” or “default off” basis?**

Cost budgeting should be “default on.”

Costs management is at its greatest utility when dealing with more modestly valued matters. Whilst costs in large matters are substantial, it is worth noting that generally this is weighed and measured against the substantial sums in issue and inevitable complexity of such matters. This means proportionality is rarely an issue. Cases valued at between £50,000.00 and £500,000.00 require more careful costs management so that the court can be satisfied that directions being sought are proportionate and budgeting is a vital tool in this regard.

Despite CPR 3.12 disapplying cost budgeting to cases issued at £10 million or more, the courts are readily departing from that “default off” rule in these matters. It can be argued that costs in these larger cases would equally benefit from cost management. Dispensing with costs management should be a matter of judicial discretion, as opposed to a default position dictated by value or case type.

We have experienced many instances where the court have been able to place proportionality squarely in focus when deciding whether to try preliminary issues or allow particular evidence. Absent costs budgets, this data would be unavailable to the Judge.

#### **1.5 For cases that continue within the costs budgeting regime, are there any high-level changes to the procedural requirements or general approach that should be made?**

Bringing the requirement to exchange Precedent R’s forward from 7 days before to 14 days before the budgeting hearing would demonstrate to the parties that the court has an expectation that the parties should be seeking to narrow the issues. The fewer issues that remain in dispute the less judicial time costs management will occupy.

Yours faithfully

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