

## **COSTS BUDGETING**

### **A response to the Civil Justice Council Costs Working Group Consultation**

#### The regime.

1. Costs Budgeting is useful (**Q 1.1**) in so far as it seeks to achieve three main objectives:
  - to enable parties to appreciate at the outset the likely cost of litigation both overall and on a stage by stage basis
  - to enable the proportionate management of civil litigation
  - to simplify the process of detailed assessment of costs

It is submitted that these objectives can be achieved by a modified scheme that addresses some of the shortfalls in the existing system. Wholesale abolition is neither necessary nor desirable (**Q1.3**).

#### The problem.

##### **Knowledge and experience**

2. Costs budgeting is (in the County Court) almost exclusively carried out by DJs and DDJs. The overwhelming majority of the cases that are budgeted are personal injury and clinical negligence claims.
3. A substantial proportion (if not the majority) of the salaried and fee paid District Bench are family practitioners with little or no professional experience of inter partes costs. A further proportion of civil practitioners (particularly if they are members of the Bar) will have little or no experience of personal injury work in general or costs budgeting in particular.
4. The principles of costs budgeting are well taught by the Judicial College but in reality less experienced DJs (sadly now the majority) and DDJs find budgeting a difficult exercise. They have no real idea of the time it takes to complete disclosure or draft witness statements. The fees for experts are largely a matter of guesswork. Many struggle with the task of fixing an overall figure for a proportionate budget. They are not assisted by parties who inflate budgets in the expectation of having them cut down.

##### **Time**

5. Almost all civil litigation is now managed on paper or online. Multi-track work is the exception. This is routinely listed on allocation for a CCMC, usually for one and a half or two hours.
6. In many parts of the country salaried (and fee paid) DJ/DDJs are in short supply and there is huge pressure on lists, with concomitant delay. A one and a half/two hour slot is a valuable resource. One may not be available for 4, 5 or even 6 months. Quite apart from displacing other work, this introduces front-loaded and extravagant delay which makes achieving targets for disposal nigh on impossible.

## The Solution (Q 1.2).

### **Awareness**

7. It is not proposed that the process of requiring parties to prepare budgets should change; this preserves the important objective of ensuring that parties are aware of the likely costs of the litigation. Accordingly, CPR3.13 should be retained subject to the deletion of the costs limit in 3.13(1)(a) and of 3.13(1)(b). CPR3.14 (rarely applied in practice) should be revoked.

### **Proportionality**

8. It is proposed that costs management becomes an 'opt in' process rather than an 'opt out' one (**Q 1.4**). The words 'unless it is satisfied' in CPR3.15(2) should be replaced with 'where it considers that this is required in order' with the deletion of the last 6 words. The guidance in PD3E-A regarding when to direct costs management should be re-worked to suggest that costs management is more likely to be appropriate in relatively modest value claims where issues of proportionality are likely to be most acute.
9. For other cases, CPR3.17 should be re-worded to make it clear that in making case management directions, the Court will have regard to the budgets and will not approve a direction proposed by a party to the extent that it consider that it would not be proportionate to do so. This should provide some disincentive to exaggerate budgets. This form of summary costs and case management would enable a procedural judge to decide that, for example, a joint expert should be appointed in place of the parties own proposed experts. This would of course be subject to the usual right to apply under CPR3.3.

### **Assessment (Q 1.5)**

10. It is proposed that CPR3.18(a) should be revised to refer to the parties' filed budgets (unless subsequently approved or agreed in a different sum at a costs management hearing). CPR3.18(b) should be revised to provide that the Court will not on assessment allow costs which exceed the budget unless there is good reason to do so, thus reversing the effect of *Harrison v. UHCWH NHS Trust [2017] EWCA Civ 792*.
11. To mitigate the disadvantages identified by the Court of Appeal in *Harrison* of treating budgets as maximums only, it is proposed that the limit provided for by PD47-14.1 be revoked. Provisional assessment should apply to all detailed assessment proceedings. During the height of the pandemic, I trialled a process of 'provisional paper assessment' in my then capacity as a Regional Costs Judge. This in effect applied a procedure equivalent to CPR47.15 to high value detailed assessment proceedings provided that the parties consented. The parties always did consent and only in one case (and then on a technicality related to retainer) was a subsequent oral hearing required. The practical effect of these changes as a whole would not it is suggested therefore lead to a significant increase in detailed assessment hearings.

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