INTRODUCTION

I was appointed as a full time Costs Judge at the Senior Courts Costs Office on 2 April 2013, the day after the "Jackson Reforms" came into being. Previously I was a Deputy Costs Judge for 7 years and was a solicitor in private practice from 1991. I have recently been appointed as a tutor at the Judicial College and have been teaching courses in respect of costs since March.

Together with the other costs judges I have submitted a response to the questions raised. This submission relates solely to the issue of costs budgeting and relates to an idea which occurred to me during the July conference organised by the CJC. I offer it in the spirit of an alternative to the retention / reform / abolition of costs budgeting discussed at the conference. It is but a sketch of an idea but it does have the benefit of affecting costs before court proceedings begin and providing a measure of certainty which fits with the descriptions of digitisation and economic significance in paragraphs 5 and 7 of the consultation document.

THE QUESTIONS

Part 1 – Costs Budgeting

A description of the problems

No-one, when asked the question, "is it a good idea for parties to know the extent of their costs recovery / liability before it is incurred?", will dispute the implication that it is a good idea. Similarly, no-one would, in the abstract, argue that anything other than proportionate costs should be allowed to be recovered / paid between the parties.

Conversely, a requirement of parties to undertake an expensive process on almost every case in order to assist the limited number which reach a court assessment would not appear to be a good idea. That is particularly so where, unless the case reaches a trial, the assistance of the budget is questionable on the budgeted costs and is irrelevant to the incurred costs (which in my experience, at least, involve the majority of the costs in the bill, even where a budget has been imposed.)

Many bills of costs reaching assessment have not been budgeted at all because they have settled pre-proceedings; or by the close of pleadings; or costs budgeting has been dispensed with or otherwise does not apply. Most parties have always resolved costs issues short of a detailed assessment and there is nothing to suggest that costs budgeting has had any appreciable effect on this. If the only reason for costs budgeting is for the reduction of the number of, or time spent in, detailed assessment hearings, it does not seem to be a good use of court time or parties' expenditure. There is no reason to think that will change having had budgets prepared now for nearly 10 years.

The main purpose of budgeting ought to be to modify the behaviour of parties. My conversations with advocates following hearings and in discussion syndicates with other judges, leads me to conclude that there does not appear to be much confidence that parties' behaviour in terms of adopting strategies to limit costs has, generally speaking, been greatly affected.

The concept of proportionality being something other than the lowest reasonable amount a party can spend to pursue their case is one with which very few judges are comfortable. There is no simple method of calculating a proportionate figure and comparing the costs claimed (or assessed) against a list of factors in CPR 44.3(5) which are largely non-monetary tends to be rather impressionistic. The result is that there is generally no further reduction when the test of proportionality is considered so that the reasonable costs are also the reasonable and proportionate costs.

The considerable influx of new district judges and deputy district judges only serves to exacerbate this situation because "stepping back" and reducing costs budgets below those costs considered to be reasonable (where appropriate), as the rules expect, is only honoured by some experienced judges who are comfortable in their understanding of the work required in disparate civil actions.

Most judges that I have spoken to – both experienced in budgeting and inexperienced - hold the view that budgeting is a function which can be carried out once the appropriate directions have been established. Where the parties are agreed on (or virtually agreed on) directions and the issue is the extent of the budgeting, I think that few judges with busy lists are going to rewrite the directions so that the budgets come down in the manner that is expected for costs budgeting to work as originally envisaged. Budgeting once the directions have been dealt with is simply costing rather than managing the costs. This widely held view (of separating directions from costs) suggests that the concept of robust case management to the point that agreed directions are overturned if they lead inevitably to the parties incurring disproportionate costs has not established deep roots in the judiciary as a whole.

The obvious answer would be to revert to the previous arrangements pre 2013 where broad indicative figures would be put in Directions Questionnaires and disputes over costs would be dealt with ex post facto by detailed assessment. It would free a considerable amount of judicial time. The end of the requirement to record time by phasing might also assist in detailed assessment proceedings since its implementation has added a further layer of complexity to bills of costs.

But as parties have at least grasped the concept of contemplating the level of costs before they are incurred to a much greater level than pre 2013, it would be unfortunate if that concept was abandoned entirely. As I indicated at the beginning, almost everyone thinks it is a good idea in principle. The opting in approach would make little difference to the inherent difficulties in budgeting as it is currently deployed. The reduction in CCMCs by the extension of fixed recoverable costs might enable the judiciary to spend sufficient time on relevant cases and therefore consider the proposed directions and their "price tags" as originally intended: but for the reasons I have given, the issues are not simply about available court time.

A suggested solution

The concept of budgeting assumes that reasonably definable steps will be taken towards a case reaching trial. The agreement of directions in many cases suggests that parties, as per previous standard directions, expect their cases to follow a reasonably defined course.

In these circumstances, I submit that it is odd that budgets are expected to be bespoke. The individual tailoring of directions – and therefore costs – only occurs in a limited number of cases. The great majority of cases for say, a breach of contract, follow a well-worn path.

My suggestion would be that standard figures for phases in a budget would be available in the CPR for adoption by a party without having to produce a precedent H document or it be approved by the court. At the end of the case, the costs would be assessed as if the standard figures had been formally ordered as a Costs Management Order.

If a party wished to seek more than the standard figures, then they would make an application at the first CMC for a Costs Management Order. This approach of either accepting a standard figure or contending for a higher figure can be seen in many different areas in the history of costs and indeed in various places such as bills of costs in the Court of Protection and the current scales and fixed costs in Parts 45 and 46.

The obvious concerns would be as to the level of the figures and the variation in the cases with which they would be concerned. But those concerns, to some extent at least, miss the point. The standard figures would be for parties who considered their litigation to be "run of the mill", at least procedurally, and parties would be free to make an application for a bespoke budget – it would not have to pass some exceptionality test.

There would, I suggest, be many cases where the cost / benefit of producing a bespoke budget would encourage the adoption of standard figures. All that would be required would be confirmation of the adoption of the standard figures via a form or as part of the directions overall. If a party decided part way through proceedings that it no longer wanted to use the standard figures, an application for a variation could be made in the same way as if a bespoke budget had been produced under a CMO. The same "significant development" would apply.

The number of standard figures could either be very simple – as used to be the case in the High Court and County Court scales prior to the CPR – which do not distinguish between the nature of cases brought before the court. Or there could be various figures so that they accord with a particular type of case or level of complexity – in a similar way to the grids provided by Sir Rupert Jackson's proposal for the extension of fixed costs in an intermediate track.

The key point in my view is that there could be no "right" standard figure(s). It would be obvious to parties and their lawyers that the figures were not intended to apply specifically to their case but were seen as "a" right figure for the type / level of litigation generally.

Accepting that the figures would not be case specific has 3 advantages:

(1) They can be produced by the CPRC without attempting to obtain a detailed evidence base

(2) They can, if thought appropriate, incorporate a level of proportionality in themselves without any other judicial intervention

(3) They can cover pre-proceedings thereby enabling cases which settle early potentially to benefit from such figures.

In relation to (1), I would make two comments. The first is that many figures in the rules have no obvious evidence base to support them. Examples are the Litigant in Person hourly rate, the numerous fixed costs in Part 45 Section I and VI (the fast track trial costs set out in the first iteration of the CPR) and the Stage fees in the Portals. The use of standard figures is nothing new.

Secondly, one obvious way to calculate the phase figures would be to allocate a certain number of hours to each phase and multiply them by the GHR. At first blush, that sounds daunting, but I would expect that a range of figures for the time spent on each phase could be agreed by stakeholders for an average case and a decision on where the figure should be pitched would be a matter for the CJC.

The advantage of using an Hours x GHR approach would be to provide a means of automatic recalculating the standard figures whenever the GHR are reviewed.

In relation to (3), the published figures would also give the parties at the outset an indication of the figures which would be recoverable in the case as a whole. As well as allowing a party to plan, it would avoid the difficulty of the incurred / estimated costs issue of budgets caused by courts being unable to budget a case until the first CMC. The standard figures would be available in the rules in the same way as the IPEC costs tables cover cases from the outset.

A footnote regarding the GHR

If the CJC were attracted to the approach I have sketched out regarding budgeting, I would suggest that something similar occurred in relation to the GHR.

The original GHR coincided with the removal of the 20 partner limit on solicitors' practices (March 2002). At the time of the original GHR, there was a homogeneity in law firms that no longer exists. It is, I would suggest, therefore pointless to seek to establish even broad approximations via an overly statistical or evidential approach. A 1,000 partner firm with worldwide offices including in the City of London has no resemblance, other than location, to a sole practitioner in Central London, although both may find London 2 rates being applied to some of their work.

There are perfectly good reasons for retaining the GHR but it would be better, I suggest, to take the figures currently in use as the starting point and simply apply any review / recalculation method to those figures. They are as "right" as any other figures will be. It would then be a short step to use those figures as part of the calculation of the standard budget figures.

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13 October 2022