COSTS BUDGETING CONSULTATION

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The views expressed here are personal.

Executive Summary

Costs budgeting is a barrier to achieving the Overriding Objective, it:

(a) Increases costs
(b) Causes long procedural delays
(c) Leads to unnecessary disputes at CCMCs and beyond
(d) Fails to improve access to justice
(e) Has no impact on early settlement or ADR
(f) Lacks fairness due to its patchy application (e.g. QOCS & agreed budgets/phases)
(g) Diverts judicial and the parties' attention from substantive issues
(h) Drains training resources
(i) Excludes litigants from the early stages of an action
(j) Makes Statements of Truth meaningless
(k) Is demoralising.

Introduction

1. Predictably, costs budgeting has spawned a whole new category of satellite hearing or part-hearing.
2. It is inefficient, time-consuming, expensive and is a poor use of judicial and court resources.
3. Its results are, at best, questionable, and the process is a barrier to achieving several of the component parts of the overriding objective.
4. I have not seen any evidence, even anecdotal evidence, that budgeting improves access to justice, encourages ADR or has a positive impact on settlement statistics – over and above what everyone knows already – litigation is expensive.
5. QOCS claimants are largely insulated against an adverse result.
6. I am not aware of any evidence that costs management has had any material impact on costs inflation or that it encourages the use of the Courts of England and Wales as a centre for dispute resolution.
7. Cost budgeting should be abolished.
8. My comments are derived from the Common Law (General) List at CCCL including personal injury (including catastrophic injury), clinical negligence, human rights, civil jury trials, commercial Landlord and Tenant and general contractual claims.
9. I have undertaken CCMCs throughout the 10 years they have been necessary. I estimate that I conduct, on average, *at least* 2 a week (and often several more).
10. Commonly, CCMCs are listed for 45, 60 or (if you are lucky) 90 minutes (excluding any preparation time) – add at least 45 minutes preparation just to navigate the

accountancy material. It has always been unclear to me from where I am supposed to retrieve this preparation time. DJs have it *much* tougher.

11. I feel that it is necessary to observe that the entire edifice of costs budgeting appears to have been constructed largely by those who don't do it.

General Material

12. I share a view that is to be found variously expressed on on-line costs forums. I have selected only one, comparatively polite, anonymous contribution:

> *"Could it be that the judiciary is waking up to realise that this procedure is a highly technical and expensive complete and utter waste of time, cluttering up the Courts and delaying litigation, just like a number of procedural steps which have evolved, resulting in satellite litigation, procedural traps and point scoring, none of which have anything to do with justice or the substantive case."*

13. On 8 September 2022 I attended a legal conference (PI liability – Claimants & Insurers) not a single solicitor nor advocate considered budgeting helpful, or anything other than a waste of their time and clients' money. Some solicitor-attendees said it didn't make any difference anyway (I had no opportunity to drill down into what they meant by this).
14. On 13 May 2015, Lord Justice Jackson gave a lecture: *"Confronting Costs Management"*. He highlighted what he saw as the key benefits of costs management:
    - 14.1 Both sides know where they stand financially. They have clarity as to what they will recover if they win and what they will pay if they lose. (Unless the budget is revised).
    - 14.2 It encourages early settlement. (No evidence).
    - 14.3 It controls costs from an early stage. (This is wishful thinking).
    - 14.4 It focuses attention on costs at the beginning of litigation. (It certainly does – but in the worst possible way – as a diversion).
    - 14.5 Case management conferences are now more effective in that there is serious debate about what work is really necessary, what disclosure is required, what experts are needed. (Really? Not in my experience)
    - 14.6 *"Elementary fairness"*: it gives the other side notice of what you are claiming.
    - 14.7 *"It protects losing parties ... from being destroyed by costs"* (Does it?)
15. Recognising that much has happened since 2015, I trespass on this summary of benefits lightly. However, optimism about these perceived benefits is misplaced.
    - 15.1 Using any advocate's or lecturer's routine device, Jackson LJ makes the same point 7 times and calls it 7 reasons.
    - 15.2 More significantly, budgeting does *not* make case management more effective – it hijacks most CCMCs and diverts attention from the substantive issues in the case.
    - 15.3 Far from encouraging settlement or ADR the budgeting process entrenches acrimony – it is a triumph of process over substance.
    - 15.4 In those cases where one or more budgets (or phases) *are* agreed, there is no costs control at all. Advance notice of exposure is meaningless so long as a budget can be amended.
    - 15.5 It is odd that the more valuable the claim (£10m) the less a budget is required. Surely it should be the other way round? A very common problem is that it can be just as expensive to litigate a £250,000 injury claim as a £2m claim.

Proportionality is not just a comparison of potential recovery value and costs. Could it be that the "more important" commercial lawyers consider budgeting beneath their dignity? This state of affairs is also inconsistent with the (deluded) notion that budgeting can encourage the "business of law" – i.e. the choice of English courts as an appropriate and cost-effective jurisdiction.

Practical Judging

16. It is common, even in serious and catastrophic personal injury litigation, for the important case management matters in dispute to be agreed or ruled on in the first 10 or 15 minutes of a CCMC. The remainder of the time is taken up with budgeting.
17. It is very often the budgeting that *prevents* a case being managed by consent.
18. Where important case management issues have to be resolved in detail, everyone is placed under undue pressure of time, knowing that the budgeting process is still looming.
19. It is obvious "on the ground" that the time and qualitative effort put into budgeting submissions is far greater than that devoted to the substantive issues in the case, which demonstrates the lawyers' priorities.
20. One only has to look at the budget cost figures for the CMC itself to see how much time and money budgeting wastes. The lower the value of the action, the more disproportionate the process is.
21. I have not seen any evidence that the litigants themselves have any input into or influence over budgets – or that, as a rule, they even know what the process entails.
22. Example: As I reconsider an early draft of this submission, I have just finished a CCMC in an RTA case. The Claimant was 93 at the accident date and is now 98. She lost her mobility and independence due to her injuries. The CCMC had been adjourned *twice* before NOT due to substantive issues on liability or quantum but because the parties were having problems with their budgets (due to complex medical evidence questions)! Her case is 2 years behind schedule as a result. The whole thing is preposterous. Budgeting is entirely responsible for this – the very antithesis of justice and fairness.
23. Examples are instructive. I have just spent an hour looking at a CCMC (Clinical Negligence) for tomorrow (time estimate 1 hour!) in which the Claimant claims £200K+ - and presents a budget of £600K (having spent £100K so far). Most of the e-bundle is about costs. Each of the 4 parties (C & 3 Ds) has instructed a costs lawyer. The bundle has no schedule of loss; no medical reports, there are no skeletons, no draft directions, no agreement on a split trial. Most of the problems are of the Claimant's own making, but she must now wait *another* 6 months or more for her CCMC to be adjourned into Court (at her lawyers' expense) – and is unlikely to get any sort of trial until early 2024 if she's lucky. This is *entirely* the result of lawyers being consumed by the process of budgeting instead of focusing on the case. Court procedures are brought into disrepute as a result.
24. Sometimes judges "hive off" budgeting (or parts of it) for a separate hearing when time is limited. This is an especially redundant practice because issues, evidence and costs are supposedly intertwined (see Jackson LJ above). Doing a budget later based on already promulgated directions prevents any comprehensive overview.
25. The Statement of Truth required on a Precedent H is meaningless. A Precedent H verified sometimes only hours before the CCMC is breezily abandoned by the claiming party recognising the budget's unreasonableness and lack of proportionality. [Ordering the attendance of the signatory only creates more hearings, more expense and further

delay]. Statements of Truth signed by professional people are, therefore, undermined and devalued.

26. Perhaps I am old fashioned, but I resent having a partner verify a budget for £1.2m 48 hours before a CCMC, only for Counsel to accept that the "real" figure is closer to £½m before any submissions are received. Far from being helpful, this demonstrates the waste in time and resources that the budgeting process causes. It makes liars of the signatories.
27. Clearly many (most?) budgets (at least in my experience) are ratcheted-up in the expectation that they will be cut back down to size, or in the hope that the court will be more generous than in the claiming partner's wildest dreams. I suspect budgeting sometimes *increases* costs in those cases where the budget is inflated and then not deflated to the necessary extent.
28. Alternatively, "*My instructions*", as advocates say, just as often, lead to a dogged determination to justify the unsustainable or squabble over £500 (sometimes less) in a £250K budget. The advocate's real audience is usually not even in the courtroom. Sweeping aside such nonsense during a hearing is itself time-consuming, irksome and is a barrier to collaborative case management.
29. The problems are magnified when the "advocacy" is undertaken by a costs' lawyer/draftsman for whom counsel steps aside. These advocates have a skill in persistence all of their own and, whatever the judicial intervention, as a rule merely carry on where they left off. This duplicates representation at hearings and separates the budget from the issues in the action.
30. The Phases are artificial and often the figures within them are works of fiction. I only wish that as a trial judge I saw any evidence that the thousands budgeted for time-costs in respect of trial preparation bore a passing resemblance to the quality of that preparation.
31. Duplication and even triplication of work is invariably implicit, but difficult and time-consuming to identify.
32. Costs budgeting considerations are closely allied to Allocation and fixed costs regimes. Naturally, I accept that abolishing or curtailing budgeting cannot itself exert downwards pressure on, or costs control over the costs claimed by litigants. The point is that a very large number of claims of comparatively limited value have to get the full budgeting service, and this is a drain on court and judicial resources. A more proactive approach within the rules to Allocation (irrespective of value) and or radical adjustments to the scope of the tracks – or even the implementation of a "Two-day" track - might go some way to address this.

Rulings

33. If costs management is done properly then it surely demands that at least brief reasons are articulated for each decision and the legal framework applicable is also articulated by way of preamble. Justice and fairness (are they different?) demand this in every other situation where a judicial decision is required – otherwise the decisionmaker's conclusion is rightly criticised as "inadequate".
34. It follows that a brisk announcement that "you can have X% or £X" (as a whole or by phases) is *necessarily* inadequate. After all, if proper reasons are not given, the determination would have to be set aside as a matter of course and the process undertaken afresh on appeal in the QBD or (more likely) remitted.
35. To say something is unreasonable or disproportionate is not a *reason* – it is a *conclusion*.

36. If one is to get to grips with the issues in an action *and* all aspects of budgeting in a more than cursory fashion (which is presumably what is intended) and offer reasoned judgments, then each CCMC should be listed for 3 hours (including pre-reading). All too often CCMCs are a race against time. This is not congruent with the Overriding Objective. A reasoned ruling cannot be delivered in less than 15 minutes – and without reasoned judgments the process just becomes what Professor Ronald Dworkin would call a game of "scorer's discretion".
37. Anecdotally, I *often* hear colleagues say: *"Oh! I just look at the totals and say you can have X%"*. Really? Having said that, in the approximately 1,000 CCMCs I have had the misfortune to preside over (40 x 2 (+) x 10) I am not aware that I have been appealed once. I am not aware that any of my "brisker" colleagues has been appealed either. This is evidence that something is badly wrong with the whole process. I have never seen nor heard of an appeal from a DJ. We can't all be right all the time.
38. Of course, one reduces budgets frequently. Nonetheless, I find it charming and a little pathetic that in reporting they have reduced a budget from, say, £200K to £140K some colleagues seem genuinely to believe that they have achieved something other than to reverse the ratchet.

Court Resources

39. Clearing away the debris of costs management, the court would be able to list more case management hearings more quickly and more cheaply for the protagonists. In turn, this would allow trial listing to be brought forward as the time lag between issue date and trial date would be radically foreshortened – usually by many, many months. It would also rid us of the cohort of cases where relief from budgeting sanctions becomes necessary and the equally messy spectre of the "Precedent T".
40. No difference in principle or approach is, or can be, drawn between cases valued at £30,000 and those valued at £3m. Fixed costs should be extended to any low value claim – defined as a claim worth £150,000.00 or less (I would say £250,000) – a small sum in modern financial terms.
41. Just as lawyers often maintain that it can be as costly to litigate a £25K claim as £250K claim, so the budgeting process – assuming it is done properly – consumes the same time and effort irrespective of the value of the claim or the budget. Hourly rates contribute nothing useful to this debate.
42. Civil Jury trials and "police" actions have absurdities all of their own. Much of this may be addressed by fixed costs regimes, CFAs and the abolition of legal aid. Trials that would take 2 days in the Crown Court and cost £1,000 are bloated into 5-10 day monsters preceded by the whole panoply of budgeting. Anyone thinking that these civil jury trials are of public, even constitutional importance, should preside over one, and think again.

Training

43. I am impressed and appalled in equal measure at the time and other resources devoted to budget training.
44. For Barrister-Judges (such as myself) who never ran an office or a business (a set of chambers hardly qualifies) or managed litigation, training *cannot* teach an appropriate and necessary "feel" for budgeting. This is particularly acute in the General List where in the space of a few hours one might have to manage a brain injury RTA; a police jury action valued at £10K (listed for 7 days) and an action involving property rights in a

commercial landlord and tenant case. Even in what might be considered my practice area (PI) I am 13 years "out of the loop".

45. Indeed, I am frequently amused to discover that advocates have no better feel for it than I do, and that we might as well just swap laminated sheets of submissions and rulings in advance and have done with the whole business.
46. This demonstrates, I think, that the whole process has become a procedural "minuet" devoid of real substance. [*"I refer your Honour to the submissions I made at a CCMC 3 weeks ago"*].
47. Submissions on budgeting invariably involve repetitive, subjective comments about what is "too much" or "disproportionate" and endless arithmetical calculations about hourly rates and budget comparisons. All of this is simply unhelpful. Advocates cannot resist attempting an anticipatory detailed assessment and this seldom entails any cross-referencing to the issues or likely evidence in a case.
48. I pride myself on being able to "do a budget", but the result is self-contained, artificial and, I regret to say, vacuous.
49. The end result is very much like teaching someone to play half a dozen pieces on the piano and calling them a musician.

Legal Culture

50. I harbour serious concerns that costs budgeting is one area that illustrates a departure from our adversarial system. This subtle change in culture is hard to pin-point, but it is happening.
51. Even City and metropolitan law firms increasingly look to the Court to be proactive, and blithely sit on their hands waiting for the Court to *do something* rather than seizing the initiative. The result is that parties invariably wait until a CCMC hearing before indicating that the time estimate is inadequate and then seek an adjournment with a longer estimate. More time wasted.
52. I am not suggesting that the Courts should not exercise case management powers, but party autonomy must remain important. The budgeting process pulls us closer into the forum.
53. The reverse of this is that litigators and judges, approach *everything* as an adversarial process. The adversarial system may be the least-worst way of resolving disputed facts and questionable points of law, but it is *spectacularly* ill-suited to business management, administration and finance. Lawyers are so often (not always) poor managers for this reason.
54. Many things of legal interest and importance have come from the Commonwealth of Australia. Costs budgeting is not one of them.

Conclusions

55. Cost budgeting is an idea that was conceived in a theoretical atmosphere and the resulting offspring has been predictably ugly.
56. Our attention might more productively be focused on things such as:
    56.1 An opt-in process that enables costs *capping* to be continued and invoked;
    56.2 Alternatively, if interference cannot be resisted, within a framework of "fixed costs", it is worth considering something like a tabulated sliding scale of

proportional, rebuttable presumptions with costs implications akin to CPR 47.15(10);[1]

56.3 Limiting experts' (particularly medical experts') professional fees, some of which have become a scandal;

56.4 Costs Judges should deal with costs on detailed assessment where necessary in the usual way.

57. Fundamentally, in the absence of evidence that budgeting improves access to justice or improves the prospects of compromise, I believe we are deluding ourselves that this level of interference achieves anything of value at all.
58. I regret to say that the amount of time and effort invested by leadership judges and rules committees in implementing, revising and reviewing costs management processes, and training, is itself evidence that the process is an unwelcome intrusion into or diversion from the administration of justice.
59. The real "lost opportunity" is not about costs at all, but about Early Neutral Evaluation. Litigants would be better served by the "don't be ridiculous" or "mercy killing" intentions of Lord Woolf in the context of e.g. CPR Part 24 (summary judgment) – almost immediately diluted to "a workable case is anything that isn't fanciful". So, case management judges should NOT be the trial judge and have greater latitude to tell litigants that they are going to lose, and it will cost them "shed-loads" of money in the process.
60. What I fear is that we do not have the strength of character to say that costs budgeting was a bad idea; badly executed, and a costly diversion, so that we just tinker around with it instead of consigning it to the dustbin of history.
61. Costs budgeting is a waste of my time; yours and everybody else's and a return to judicial restraint in this context is essential.

Dated: 14th September 2022

Alan Saggerson

JUDICIARY OF
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[1] E.g. Crudely -costs should not exceed the value recovered by C in claims pleaded and verified at £½ million or more; twice the sum recovered in claims valued between £100,000 & £½m; three times for other multi-track claims. Obviously, it would need to be more detailed and sophisticated than this – but something of the sort might work if that something is absolutely necessary.