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5. The procedural code
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Introduction to prospective costs control - costs and case management

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Chapter 15 Prospective Costs Control – Costs and Case Management
INTRODUCTION TO PROSPECTIVE COSTS CONTROL – COSTS AND CASE MANAGEMENT

[15.1]

Sir Rupert Jackson's Final Report in 2009 identified that, in conjunction with the requirement for the court to case manage proceedings, there was also need for costs management to become part of that process. His view was that case and costs management are inextricably linked – that no claim should be case managed without consideration of the costs implications of any given step in those proceedings. This view became central to the costs management scheme introduced in CPR Part 3. Indeed CPR 3.12(2) could not make this any clearer:

> "The purpose of costs management is that the court should manage both the steps to be taken and the costs to be incurred by the parties to any proceedings so as to further the overriding objective."

However, the link between the two exists even if we take a broader view of costs management than that within the formal scheme at CPR 3.12–CPR 3.18. This is because the overriding objective makes it plain that proportionality of costs lies at the heart of every case – whatever track it may be on and in whatever division it may be issued. This is reinforced in multi-track cases by CPR 3.17(1) which leaves no room for doubt that even in non-budgeted cases every case management decision comes with a price tag. This link was recognised in the Civil Justice Council Costs Review – Final Report May 2023 ('the CJC Report'). In the executive summary of the response to the question whether costs budgeting is useful, the view was unambiguous:

> "However, the response was clear and the Working Group's unanimous recommendation is simple. Costs budgeting has proved itself to be useful. It has brought consideration of the costs of litigation into the heart of the litigation process.'(Executive Summary, para vii)'

This report removed any doubt about the availability of the practice of considering, and, indeed, applying a staged approach to costs management (considering the directions at a first hearing and costs managing those directions at a second hearing). Whilst this is not an approach we favour (because, amongst other things, we believe that in most cases, this will increase the costs spent on costs management when, actually, for little extra time and expense, the court is perfectly able to costs and case manage simultaneously), the report stressed the importance of having costs information available at the first stage, even if not costs managing on that occasion:

> "This would allow, but not require, that the costs management and case management tasks would not have to take place simultaneously, but rather can be staged, always underpinned by the costs information exchanged ahead of the first hearing, given that good case management always has regard to the likely cost of a step.' (para 1.22)'

When the Civil Justice Council review was in the consultation phase, some had expressed doubts as to whether costs management would remain. The conclusions of the review were that it will, but with a recognition that 'one size does not fit all'. In a previous edition of this text, we predicted that it was likely that certain adjustments would be tested by pilot schemes, and so it has come to pass that, effective in respect of claims issued on or after 6 April 2025 and before 6 April 2028, no less than three separate costs budgeting pilot schemes will operate, applicable to three distinct categories of litigation, details of which are set out below.

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What is costs management?

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[15.2]

A costs management order ('CMO') enables the court to control the parties' expenditure throughout the proceedings. Strictly this is qualified to the extent that all that the court does by a CMO is set the amount that, in the absence of a 'good reason' to depart from the prescribed budget, will be recoverable between the parties on an assessment on the standard basis in respect of the budgeted costs of those phases costs managed (an oddity is that whilst the court may make a costs management order in respect of any agreed incurred costs, CPR 3.18 only prescribes the effect of a costs management order in respect of budgeted costs. The rules do not make any provision for the effect of a costs management order made under CPR 3.15(2)(c) – see [15.11] below). In any event, as we shall see when looking at some specific examples of routine case management decisions, the inextricable tie between case and costs management means that the effect of a CMO may trespass into, and influence, solicitor and client costs. This is because the requirement for the parties to provide information as to their estimated costs, as well as costs already incurred, will enable the court to consider the estimates alongside the directions to be given for the case management of the proceedings. Where a court considers the estimated costs to be disproportionate, taking account of the incurred costs, it will tailor the directions to bring the costs down to a reasonable and proportionate level; this is particularly likely to affect those phases of the litigation where costs have traditionally been disproportionate such as disclosure, experts' reports and trial.

CMOs may take one of the following three forms:

- A record of the extent to which budgeted costs (to be incurred costs) are agreed between the parties (CPR 3.15(2)(a)) – it is clear from the reference to the extent of any agreement, that a party may agree some, but not all, phases of another party's budget.
- Where no agreement has been reached a record of the court's approval of budgeted costs (to be incurred costs) after the court has made appropriate revisions (CPR 3.15(2)(b)). Where some phases are agreed and others not, then the CMO will be a mix of recording agreement and approval.
- A record of the extent, if any, to which incurred costs are agreed (CPR 3.15(2)(c)).

As is clear from the third type of CMO above, the court may only costs manage incurred costs if there is agreement about these. In the absence of any agreement, both CPR 3.12(2) and CPR 3.15(1) are clear that the court may only manage costs 'to be incurred' (these are defined in the latter of these two provisions as 'the budgeted costs'). When agreeing costs for the first costs management order, parties must be clear whether that agreement extends to incurred costs, enabling an order under CPR 3.15(2)(c) to be made.

The court may consider holding further costs management conferences (eg where it only budgets to a certain stage in the proceedings) (see CPR 3.16).

The costs management experience to date

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[15.3]

Although costs management has now been part of the civil litigation landscape for almost 13 years (not including the two limited pilot schemes), its application has been the subject of perceived inconsistency; it has already been subject to a number of procedural revisions and, as we have already stated, the 2023 CJC Report following a consultation on its future, in which abolition was an option. Our view is that the combination of rule change and some welcome clarification by the Court of Appeal has provided necessary (but, dare we say it, fairly obvious) certainty in most areas of contention. The run-up to the October 2023 extensions to the fixed recoverable costs schemes had, inevitably, seen a warming of attitudes to the costs management regime, primarily because many of those who previously 'protested too much' about costs management were less attracted to the offered alternative and chose no longer to hide behind the arras. The fact that the CJC Report makes recommendations for some, but not wholesale, change, suggests that Sir Rupert Jackson's conclusion in his May 2015 'Confronting Costs Management' lecture that 'I predict that within ten years costs management will be accepted as an entirely normal discipline and people will wonder what all the fuss was about' may prove to be prescient.

Accordingly, it seems that the discipline of costs management is finally firmly entrenched as a part of proportionate case management. This is not to say that there are no remaining areas of uncertainty. However, we assume that those identified in the CJC Report will be addressed. Certainly, on past performance, the Civil Procedure Rules Committee ('CPRC') has been prepared to revisit the provisions to provide clarity where needed. An area where we had hoped that there would be some further intervention (whether by the CPRC or by the higher courts) is to provide assistance on the effect on budgets where claims resolve mid-phase/s. The CJC Report did not descend to this level of detail, deliberately so as the brief was to undertake a 'strategic and holistic look at costs'. For what it is worth, we would prefer the assessing court to be able to adopt a broad brush approach, simply setting the reasonable and proportionate sum from within the budgeted sum for the phase by reference to the factors at CPR 44.3(5), any wider circumstances under CPR 44.1, and the factors at CPR 44.4(3), remembering the primacy of proportionality under CPR 44.3(2)(a), rather than undertaking a line-by-line assessment of the claimed costs in the incomplete phase/s. This seems to resonate far more with a proportionate procedure complementing a discipline designed, in part, to avoid costly assessment hearing.

The scope of the costs management regime under CPR 3.12-CPR 3.18 and CPR PD 3D

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THE SCOPE OF THE COSTS MANAGEMENT REGIME UNDER CPR 3.12–CPR 3.18 AND CPR PD 3D

[15.4]

The formal costs management scheme applies to most multi-track cases commenced on or after 1 April 2013. There have been some revisions to the provisions, but the upshot is that the current rule found at CPR 3.12 provides that the costs management regime applies to all multi-track Part 7 claims except those:

- where the claim commenced after 21 April 2014 and the amount of money claimed on the claim form is £10m or more;
- where the claim commenced after 21 April 2014 and which are monetary claims which are not quantified (at all or in part), but where the claim form contains a statement of value of £10m or more;
- where in proceedings commenced after 6 April 2016 a claim is made by or on behalf of a child (and this exemption continues upon a child reaching majority unless the court otherwise orders). In *PXT (a child by her mother and litigation friend, AXD) v Atere-Roberts [2024] EWHC 1372 (KB)*, the court was keen to stress that there is no absolute exemption for claims involving children when deciding to costs manage a claim that was also valued at in excess of £10m. Applying the overriding objective to reach this decision, the court concluded that such an order would reduce the risk that costs became excessive and disproportionate;
- subject to fixed or scale costs regimes;
- where the court itself orders that costs budgeting will not apply. (There remains no assistance within the rules as to why the court might make such an order – although CPR 3.15(2) provides guidance on the limited circumstances in which the court may decide not to costs manage once budgets have been filed. We suspect that there is no specific guidance because the reasons will be entirely case-dependent.) There is a school of thought that costs management may be unnecessary for defendants in those claims subject to the QOCS provisions. Why put the defendant to the expenditure of budget production when, in the majority of cases, the maximum recovery will be limited to the level of damages (excluding any consideration of costs set off under CPR 44.12 – see CHAPTER 22 at [22.33])? There are many answers. Two obvious ones are that if there is a valid offer under CPR Part 36 in a high-value case the defendant might still be able to recover all the costs by way of set off (under CPR 44.14). Another is that the court needs the costs information to fulfil its function to case manage proportionately. Sir Rupert Jackson considered this in his May 2015 lecture and concluded that defendants' costs in QOCS cases should be budgeted. The majority of the Civil Justice Council working group in 2023 made recommendations that may appease both sides of the QOCS divide – see para 1.18 of the CJC Costs Review Final Report.

In addition, CPR PD 3D, para 1 provides that the court will ordinarily disapply the costs management regime in cases where the claimant has a limited or severely impaired life expectation (five years or less remaining).

However, there is a sting in the tail as CPR 3.12(1A) permits the court to apply the costs management provisions to any other proceedings. This was considered in *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd [2014] EWHC 3546 (TCC)*, where the court was unequivocal that it has an unfettered discretion to bring claims within the costs management regime. The court should weigh up all the particular circumstances of the claim in exercising

that discretion. In *Simpkin v The Berkeley Group Holdings plc [2016] EWHC 1619 (QB)* the court exercised its discretion to costs manage a claim that might have a value of over £10m because there was an enormous disparity of resource between the parties and costs management might level the playing field and would certainly inform the claimant and any funders of the extent of the potential costs liability. Similarly, in *PXT (a child by her mother and litigation friend, AXD) v Atere-Roberts [2024] EWHC 1372 (KB)*, involving a high value personal injury claim for a child to which cost budgeting would not normally apply, the claimant had been required to file and serve regular updates as to costs, but upon application by the defendant owing to a fear that costs were becoming a cause for concern, the court directed that costs management apply.

CPR PD 3D provides more guidance on other types of case that may be particularly appropriate for costs management at CPR PD 3D, para 2. It will be a matter for the court when it may invoke this discretion. In *Vattenfall AB v Prysmian SPA [2021] CAT 3*, when ordering full costs budgets rather than 'summary statements of costs' that had been ordered previously under CAT Rules, r 53(2)(m), the Competition Appeal Tribunal recognised that the court should be astute to the significant exercise and considerable resource involved in the production of budgets, but concluded that 'properly prepared costs budgets are a useful case management tool, particularly where questions of proportionality arise' and that the court should consider whether 'the greater cost scrutiny which they facilitate is a proportionate response to the proper control of the costs of the litigation'. This seems an equally sensible approach to adopt under CPR PD 3D, para 2.

Of course, the number of multi-track cases will, inevitably, be fewer following the introduction of the intermediate track and the extended fixed recoverable costs schemes.

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Filing and service of the budget

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THE PROCEDURAL CODE

Filing and service of the budget

[15.5]

Apart from litigants in person who are excluded from the requirement to prepare costs budgets (CPR 3.13(6)), all parties in cases falling within the regime must file and exchange budgets. In general terms, where the value of the claim stated on the claim form is less than £50,000, these should be filed and served with the Directions Questionnaire. In reality, this requirement will rarely apply, given that nearly all claims valued at less than £50,000 will fall within the intermediate track and be subject to the fixed costs provisions applicable in that track. In all other claims, the budgets must be filed and exchanged not less than 21 days before the first case management conference. In respect of those cases where the court exercises its power under CPR 3.12(1A), either of its own initiative or on the application of a party, to order budgets in cases not otherwise within the scheme, the court will make provision for when these are to be filed and exchanged. Note that in the Damages Claims Pilot under CPR 51 PD ZB, para 7.5, CPR 3.13(1)(a) is disapplied and so if there are any cases within this PD with a value less than £50,000,which are allocated to the multi-track and not the fast or intermediate tracks, the time to file and exchange budgets is not later than 21 days before the first case management conference, regardless of the statement of value on the claim form.

Having said that litigants in person are excluded from the requirement to file and exchange costs budgets, there have been cases where the court has expressly ordered them so to do (see for example *Campbell v Campbell [2016] EWHC 2237 (Ch)*). An amendment to the CPR from October 2020 to add CPR 3.13(3), now expressly permits the court to order the filing and exchange of costs budgets from parties not otherwise required so to do by CPR 3, Section II.

In *CJ & LK Perk Partnership v Royal Bank of Scotland [2020] EWHC 2563 (Comm)* (a case in which the claimant resorted on occasions to Direct Access representation), the court considered this to be a balancing exercise, weighing the benefit to the represented party of having some costs clarity against the difficulty for the unrepresented party in estimating costs realistically. In another case involving direct access, this was necessary 'as part of ensuring effective costs management' as there would be a significant claim for counsel's fees if that party secured an order for costs in its favour (*Cotham School v Bristol City Council [2024] EWHC 824 (Ch)*).

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The consequence of not filing and serving the budget

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[15.6]

The timing of the trigger for filing and exchange of costs budgets is not a matter of idle academic speculation. Failure to comply with the rules has a draconian consequence. CPR 3.14 provides that a party failing to file the budget in accordance with the rule will be treated as having filed a budget limited to court fees only! Whilst the court has the discretion to order otherwise, it is clear that CPR 3.14 is a sanction and so CPR 3.9 is engaged. Although each case is fact-specific, parties may well find that the court is unsympathetic. In the case of *Mitchell v News Group Newspapers Ltd [2013] EWHC 2179 (QB)*, the court limited the claimant's budget to court fees only as the claimant had failed to file and serve his costs budget in accordance with the Defamation Pilot at CPR PD 51D. The master subsequently also refused relief from this sanction (*Mitchell v News Group Newspapers Ltd [2013] EWHC 2355 (QB)*). The Court of Appeal famously or infamously (depending upon your point of view) dismissed the appeal (*Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1537*). While the Court of Appeal revisited 'triviality' in *Denton v T H White Ltd [2014] EWCA Civ 906* (see below at [15.31]), the reality is that the case-specific decision in *Mitchell* stands and those relying on a less robust approach do so at their peril. That this is so was confirmed by the Court of Appeal in *Jamadar v Bradford Teaching Hospitals NHS Foundation Trust [2016] EWCA Civ 1001*. *Lakhani v Ibrahim Sheikh Abadullah Mahmub [2017] EWHC 1713 (Ch)* is a salutary reminder that, depending upon context, even being only a day late with a budget may not lead to relief being granted. It is a brave representative who is prepared to rely upon the uncertainty of a court exercise of discretion. Even in recent years, by way of example, in *Heathfield International LLC v Axiom Stone (London) Ltd [2020] EWHC 1075 (Ch)*, one court refused to disapply the sanction in CPR 3.14 when a budget was six days late and another, in *Manchester Shipping Ltd v Balfour Shipping Ltd [2020] EWHC 164 (Comm)* granted relief where a budget was 13 days late. Of course, the simple solution is to comply with the requirements for filing and exchanging budgets in the first place. If that is not done, then, as was made abundantly plain in *BMCE Bank v Phoenix Commodities [2018] EWHC 3380 (Comm)*, a prompt application for relief from the sanction of CPR 3.14 is essential.

That each application is case-specific and should be determined on its own facts is demonstrated no more clearly than in *Right Support Management Ltd v Hillingdon London Borough Council [2025] EWHC 1680 (KB)*. In that case, the claimant's costs budget was filed two years late, and an application for relief from sanctions was made four months later. Having considered the preceding paragraphs of this chapter, one might be forgiven for thinking that the application was almost bound to fail. However, Ritchie J held (on appeal) that the claimant's failure did not increase the costs of the litigation nor affect the efficient running of the action as the case timeline had been wholly unaffected by the failure. The relief application was heard alongside three other applications (therefore, there was no additional hearing); the default was not intentional and was the result of a mistake. No CCMC had yet occurred as the claim had been side-tracked by the addition of a further party (and an assessment of that party's capacity) and the defendant's own failed application for strike out. Neither the court nor other court users have been inconvenienced. Whilst the judge below had placed weight on the two months' delay referred to in *Diriye v Bojaj [2020] EWCA Civ 1400* as akin to a guideline, Ritchie J held there was no such rule. All cases are fact sensitive and only a 20% reduction in otherwise recoverable costs was an appropriate sanction.

If one finds themselves in a position whereby they may file a budget out of time, *Hunt v Oceania Capital Reserves Ltd [2025] EWHC 837 (Ch)* is a salutary lesson in why it might not be better to rush a 'bad' budget rather than be slightly later with a 'good' one. In that case, Master Brightwell was understandably critical of a defendant who filed a budget 30 minutes late, but which was almost identical to that of the claimant's budget which had preceded it and

unused

which was internally inconsistent. Relief from sanction was refused, with the court noting that the defendant's excuse was of 'the dog ate my homework' variety. The judge held that the defendant would have been better off taking an extra day or two compiling an accurate budget and a prompt application for relief.

We refer to an application for relief. In *Henderson and Jones Ltd v Stargunter Ltd [2023] EWHC 1849 (TCC)* the court granted relief from the sanction of CPR 3.14 in the absence of a formal application, where an incomplete Precedent H had been provided within time and a properly completed one had been provided five days out of time. In so doing, the court relied on the Court of Appeal decision in *Park v Hadi [2022] EWCA Civ 581*, in which the Court of Appeal concluded:

> "… It is, however, clear that the court has a discretion to grant relief from sanctions in two situations: where (as in the present case) no formal application notice has been issued, but an application is made informally at a hearing; or where no application is made, even informally, but the court acts of its own initiative. The discretion must of course be exercised consistently with the overriding objective. The court, therefore, should initially consider why there has been no formal application notice, or no application at all; whether the ability of another party to oppose the granting of relief (including, if appropriate, by the adducing of evidence in response) has been impaired by the absence of notice; and whether it has sufficient evidence to justify the granting of relief from sanctions (though the general rule in CPR r 32.6 does not impose an inflexible requirement that the evidence be in the form of a witness statement). It follows, from the need for those initial considerations, that the discretion will be exercised sparingly.' (para 49)'

Curiously the failure to exchange budgets under CPR 3.13 merits no mention in the rules – even where one party has indicated it is ready to do so and the failure to exchange falls expressly at the door of another party.

CPR 36 offers a partial salvation at CPR 36.21. This provides that in certain limited circumstances, a party restricted to future court fees as a result of breach of CPR 3.13 may still recover 50% of costs assessed without reference to the budget limitation imposed by CPR 3.14. However, see [15.12] below.

The combined effect of CPR 3.14 and CPR 36.21 in this context was considered in *Ali v Channel 5 Broadcast Ltd [2018] EWHC 840 (Ch)*, in which the court had to decide whether the limitation of recovery to 50% applies to all recoverable costs after the date of breach of CPR 3.13 or only of those costs after the costs management hearing. The court concluded that once there was a breach of CPR 3.14 then the restriction applies to all recoverable costs after the breach. This decision has potential implications beyond the discrete provision of CPR 36.21. If it is the fact of breach itself and not when the effect of the sanction imposed for the breach bites, namely the time when the court costs manages based on a restricted budget, then, by extension, arguably, even the date of the breach is irrelevant, as CPR 3.14 refers to the entire budget (both incurred and estimated costs) being treated as containing applicable court fees only. This would mean that all incurred costs are also subject to the sanction. This is a challenging interpretation as the budget is filed to enable the court to manage costs 'to be incurred' and the effect of a costs management order under CPR 3.18 only applies to costs so managed under CPR 3.15(2)(a) and (b). It seems curious that under a provision stated in CPR 3.12 to have as its purpose the management of 'costs to be incurred', the court cannot make a costs management order (other than by recording an agreement) in respect of incurred costs, but can, as part of the costs management provisions, retrospectively restrict their recovery. It was said in the case that it would undermine the purpose of CPR 3.14 if it had no effect on costs between the date of breach and the date of costs management. Those having to manage a case where the effect is only on the budgeted costs may consider that sanction alone sufficiently underpins CPR 3.14.

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Approval/agreement of the budget and the costs management order

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[15.7]

The effect of CPR 3.15(2) is that costs management will take place in the vast majority of those cases where a budget has been filed and exchanged. In these cases, the court 'will' make a costs management order unless it is satisfied that the litigation can be justly conducted at proportionate cost in accordance with the overriding objective. This is a clear fetter on the court's discretion not to costs manage.

Experience suggests that there is a situation where the court may wish not to make a costs management order. This is where the parties agree budgets that the court regards as disproportionate, but those budgets are predicated on proportionate directions (and so the court cannot use the imposition of proportionate directions to revisit the budgets). While there is a compelling argument that even a costs management order recording an agreed budget on this basis is better than leaving costs at large, another approach, and one that one of us has adopted, is to record that the court is not making a costs management order because, whilst it accepts the directions are proportionate, the sums agreed by way of budgets are not, record what the court thinks is the proportionate overall sum and reserve any subsequent 'between the parties' assessment to the case managing judge (ie to the one making these recitals) and recite a reminder to the parties of the terms of CPR 44.3(2)(a) – namely that proportionality trumps reasonableness. The clear message is that the court does not want to be limited to the 'incurred costs' only at a subsequent assessment (assuming that these, too, are not agreed), so that, instead, the CPR 44.3(2)(a) proportionality cross check applies to all costs. The hope is that this will compel the legal representatives to discuss with the clients the implications so that those clients can make an informed decision about proceeding, knowing that the court is likely to disallow significant expenditure later. This is not ideal, but from a client perspective surely is still better than either a costs management order recording the agreement of 'to be incurred' costs at a disproportionate level or only finding out at the end that the court has allowed the recovery of a fraction of the costs by the application of CPR 44.3(2)(a), leaving the client with an unexpected shortfall. Of course, this does require the case managing judge to be the one undertaking the assessment and so is primarily an approach for the District Bench.

If the court has made a costs management order, whether by recording the agreed costs or, if not agreed, by recording the court's approval after making appropriate revisions, each party must re-file and re-serve the budget in the form approved annexed to the order approving it or recording the agreement (CPR 3.15(7)). For reasons considered later concerning clarity about what work has been included within an agreed or approved budget, our view is that if the directions accompanying the budget revisions do not make clear what assumptions the claim proceeds under and the order does not contain any recitals to provide clarity, then the obligation to file the amended budget in the form approved extends to revising the assumptions section. Even if there is no such obligation a prudent party may wish to do this to avoid later uncertainty – see **Completing Precedent H** below. In most cases, this should be unnecessary as the assumptions behind the approved budget ought to be clear from the case management directions that have been ordered and these documents should be viewed together.

An increasing number of courts are budgeting by use of the Precedent H in electronic version. The judge budgets by using the totals column for each phase budgeted on page one of the budget identifying those phases budgeted (eg by putting them in bold typeface), with the budgeted sum being the total sum per phase budgeted less any incurred sum per phase budgeted. This has the advantage that the Precedent H automatically recalculates and the court and the parties can be clear as to what has been budgeted at the hearing. If budgeting is undertaken in this fashion, then a quick run-through at the end of the hearing enables everyone to be able to agree what has been

done and obviates the need for the parties to recalculate and refile the final budget as the court can print off the page one of each party's budget and attach it to the case management order which includes a costs management order as follows:

> "The court makes a costs management order in respect of the costs of [insert those parties in respect of whose budgets a costs management order has been made]. The budgeted sum is as per the attached page 1 of the Precedents H, with the budgeted phases being those where the total is in **bold** typeface and the budgeted sum for those phases being the total sum for the phase less any incurred sum for the phase."

This should be accompanied by a specific order relieving the parties of the obligation to comply with CPR 3.15(7). Adopting this approach has a number of benefits, namely it:

- provides absolute clarity of outcome (there is no scope for disagreement after the hearing as to what was budgeted);
- enables the court and the parties to see the total expenditure (both budgeted and non-budgeted) so that they can step back and determine if that is proportionate or if directions and budgets need to be revisited in pursuit of overall proportionality;
- reduces the amount of work after the hearing and so is a proportionate exercise;
- enables any judge subsequently dealing with the file to have one directions order that also neatly sets out which phases have been budgeted and in what amount (reducing the risks if judicial continuity is not feasible); and
- enables an easy understanding of the assumptions upon which the court has budgeted as the budget is attached to the directions given.

There is nothing to prevent the court adopting this approach even when budgeting manually, provided amendments are done legibly and a method of identifying the budgeted phases is readily apparent. An example of such an order would be:

> "The court makes a costs management order in respect of the costs of [insert those parties in respect of whose budgets a costs management order has been made]. The budgeted sum is as per the attached page 1 of the Precedents H, with the budgeted phases being those where the total is marked with an * and the budgeted sum for those phases being the total sum for the phase less any incurred sum for the phase."

The wording of either form of order will require amendment where, under CPR 3.15(2)(c), there is some agreement of incurred costs. A composite order that can be used by deletion of those parts inappropriate is:

> "The court has made costs management orders as per the attached pages 1 of the parties' precedents H as follows:
>
> i) in respect of budgeted costs (under CPR 3.15(2)(a) and (b) The phases budgeted by court approval are those where the figure in the total column is in bold typeface (if doing electronically)/marked with an * (if doing manually) The budgeted costs for each such phase, whether by approval or agreement, are the total less the incurred costs for that phase
>
> ii) In respect of incurred costs (under CPR 3.15(2)(c) The court records agreement of the incurred costs in those phases where the title of the phase on the left hand side of page 1 is followed by +++ (whether budgeting electronically or manually)."

If costs management is not done in this way, then, for the sake of certainty of outcome, it is imperative that the parties comply with CPR 3.15(7). This was highlighted in *Broom v Archer (28 March 2018, unreported) QBD (TCC)*, in which the parties had failed to comply with this provision and so failed to note a mathematical error, rectification of which necessitated a hearing. Orders that simply record a total for the budgets of each party are unhelpful to any judges charged with either an application to vary or an assessment of the costs as they do not readily enable

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identification of the phases budgeted, nor the amount budgeted for those phases. A further difficulty arises if the total figure given includes non-agreed incurred costs.

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Retrospection and revision of the budget

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[15.8]

It is in respect of this topic that the amendments to CPR 3 Section II and PD 3D made under the Civil Procedure (Amendment No 3) Rules 2020 (SI 2020/747) introduced real change. Both CPR 3.12 and CPR 3.15 previously referred to budgeting costs 'to be incurred', suggesting that there could be no retrospective budgeting. As a result, we had suggested that this meant that there could be:

- No costs budgeting of the case/costs management conference because it would, by definition, have started if the court is case and costs managing and further preparation for the hearing will have taken place after the filing of the budget. Accordingly, it is not a 'to be incurred' cost. An amendment from October 2019 seemed to be aimed at clarifying the first point, making it clear that the court could not costs manage the CMC, other than under CPR 3.15(2)(c). This remains the position under the current CPR as CPR 3.17(3) provides that:

  "Subject to rule 3.15A, the court –

  (a) may not approve costs incurred before the date of any costs management hearing …"

- No retrospective element to variation of any budget. This was notwithstanding that in *Sharp v Blank [2017] EWHC 3390 (Ch)*, Chief Master Marsh concluded that 'future' in this context in the then CPR PD 3D, para 7.6 meant after the last approved or agreed budget and, as such, in respect of variation to a budget the court could costs manage by approval both incurred and 'to be incurred' costs in respect of the development. We shall not trouble with the arguments we advanced against this interpretation of the then wording of the provisions as the CPRC subsequently spoke in a new language, removing scope for debate and permitting some retrospection.

This brings us neatly to a consideration of CPR 3.15A on variation of budget.

Under this relatively recent provision, parties must promptly upon what they perceive as a significant development necessitating variation of a budget, submit a revision to the other party/ies and the court. This must be in Form T (see CPR PD 3D, para 3(b)), which contains a certificate that, if the variation is upwards, the additional costs were not included in any previous budgeted costs or permitted variation. The submission to the court must be accompanied by a copy of the last approved or agreed budget and an explanation of the points of difference if the variation has not been agreed. CPR 3.15A adopts the terminology of its predecessor provision, in requiring that revised budgets must be submitted to the court. Does this mean that a party must make a formal application on Form N244 and pay a fee? We think not, as there is no requirement in the rule requiring a party to apply and the language is the same for production of the revised budget to other parties and to the court. Of course, if the revision is consequent upon a significant development that requires court order (eg permission for a further expert), then the submission will be accompanied by an application in any event.

That the rule requires the submission to the court to be both accompanied by an explanation of the points of difference if the variation is not agreed, and prompt, suggests a two-stage process, albeit a quick one. The court provided useful comment on this in *Simpsons (Preston) Ltd v MS Amlin Underwriting Ltd [2023] EWHC 1370 (Comm)*:

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> "…there is a balance to be struck between the need on the one hand to raise the issue with the other side so that it can be considered, if necessary by the making of a consent order, and on the other, to bring the case before the court if it cannot be agreed."

On receipt, the court may either approve, vary or disallow the proposed variations, considering any significant developments which have occurred since the last approval or agreement of the budget or may list a further costs management conference (CPR 3.15A(5)).

The real change is at CPR 3.15A(6), which permits the court, as part of the process, to vary the budget for costs relating to that variation that have been incurred before the order for variation but after the costs management order. No guidance is given on this, but we must assume that the extent of the retrospective variation will be limited by the court's interpretation of when, in context, the obligation promptly to serve and submit details of the variation arose. In other words, tardiness in following the procedure may limit the extent to which the court will permit retrospective variation. For this reason, we do not see this provision as permitting 'budget repair' when the work in question has been undertaken and the party simply failed to deal with revision timeously nor, as in *Persimmon Homes Ltd v Osborne Clark LLP [2021] EWHC 831 (Ch)*, where the assumptions upon which Precedent H has been prepared are out of date by the time of costs and case management, but this is not raised before the court or with the other parties, and the court makes a specific direction informed by what appear to be the relevant budget figures. As Master Kaye stated with commendable brevity and clarity:

> "It is for the party seeking the variation to provide sufficient information and evidence with their application to satisfy the court that the variation is not simply an attempt to address a miscalculation or an overspend or to claw back previously disallowed costs.' Para 118'

Having said this, in *Thompson v NSL Ltd [2021] EWHC 679(QB)*, the court concluded that there may be cases (and this was one of them) where the trigger for a revision happened between drafting Precedent H and the costs management conference, but the effect of the significant development could still not be established to a level where it was apparent that a revised budget would be needed. Accordingly, a later revision of the budget set based on the initial Precedent H was permitted, once it became apparent that the development did affect the budget.

CPR 3.15A also raises the interesting issues of whether the court simply permits a total variation to the budget for the particular phase under consideration, which accords with the costs management process under CPR 3.15(8) or whether it has to identify those costs of the variation to which retrospection applies and those that are to be incurred. Either way, if the court accepts that there is a significant development that merits variation, but budgets that variation at less than is sought on the basis of reasonableness and proportionality, it seems that the court may, in effect, be undertaking some form of very broad brush, retrospective assessment.

Our residual concern with the procedural endorsement of retrospection is that it reduces the ability of the parties to make informed decisions based on their known costs exposure (for 'costs between the parties' and/or for any unrecovered 'solicitor/client' costs). In allowing retrospective revision to a budget, the rules deprive the other party/ies of the opportunity of deciding whether to maintain the claim or the defence of it before those particular costs are incurred and become subject to the recovery provisions of CPR 3.18. That said, the jurisdiction of the court to deal with all the costs of significant development under CPR 3.15A sits more happily with its obligation under CPR 3.15(3) to control the parties budgets in respect of recoverable costs after a costs management order has been made, than if it was not able to deal with the incurred element of the variation costs.

The revised procedure, which necessarily involves the court under CPR 3.15A(5), removes previous concerns that an approved budget may be varied by agreement without the court knowing, which always sat unhappily with the obligation of the court under CPR 3.15(3).

It is worth making the point that CPR 3.15A(1) maintains the previous mandatory requirement to vary downwards, as well as upwards, if a significant development so requires. This is not surprising as there may be significant developments in the litigation that narrow issues (for example the discontinuance of part of the claim).

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There is no strict definition of 'significant development'. Decisions on whether something constitutes a 'significant development' in the litigation, warranting revision, are inevitably case-specific. What seems clear from the emerging authorities is, unsurprisingly, if the alleged development should always have been seen as part and parcel of a case or compliance with a specific direction, then no variation will be permitted (see, for example, both *Chalfont St Peter Parish Council v Holy Sisters Trustees Inc [2019] EWHC 735 (QB)* and *Churchill v Boot [2016] EWHC 1322 (QB)*) and if there is a development but the party seeking variation does not establish that it is a significant one, then no variation will be permitted (*Simpsons (Preston) Ltd v MS Amlin Underwriting Ltd [2023] EWHC 1370 (Comm)*. Endorsing the case-specific nature of any decision, in *Churchill v Boot*, the court concluded that whilst it did not do so in that case, an adjournment of a trial could amount to a significant development. An illustration of significant development opening the door to variation can be seen in *Finsbury Food Group plc v Axis Corporate Capital UK Ltd [2022] EWHC 1952 (Comm)*, where there had been an amendment to the claimant's case on quantum and disclosure had been more time consuming and expensive than had been anticipated. The court was satisfied as to significant development, a causal link between that and the increased costs and that the costs were proportionate.

The court has confirmed, again unsurprisingly, that if there is a significant development leading to increased costs in a claim where one party has fallen foul of CPR 3.14 and has had a budget set at future costs only, that party will be able to seek an upward variation for the additional work linked to the significant variation (see *Asgar v Bhatti [2017] EWHC 1702 (QB)*).

In *Barry v Barry [2025] EWHC 819 (KB)*, the court considered an application to vary a costs budget by reference to the 'oppressive behaviour' provision in CPR 3 PD 3D, para 13. The court held that to find 'oppressive behaviour' required an element of intentional conduct aimed at causing another party to spend costs disproportionately and cannot be founded merely on robust litigation tactics or adversarial conduct.

In an unusual case, the court accepted in principle that an application to amend a budget could be made after the trial had concluded, but on the facts of the case, refused to amend as none of the stated reasons amounted to a 'significant development' (*Rahman v Hassan [2024] EWHC 1290 (Ch)*).

Whilst the above section deals with the revision of costs budgets after a CMO has been made, in many cases, budgets are prepared in accordance with the rules or an order and then – for myriad reasons – no costs management hearing takes place and/or no CMO is made for a considerable period of time. Often, the litigation has advanced during the hiatus. Sometimes, the parties agreed on directions and kept to them despite never having been approved by the court, such that by the time the matter eventually comes before the court for a costs management hearing, a considerable amount of the costs set out as 'estimated' in the filed costs budgets are now in fact incurred. Mostly, this issue is dealt with pragmatically, with parties agreeing to file updated budgets ahead of the listed hearing (or if they do not explicitly agree to file updated budgets, they do so without specific agreement). In our experience, judges tend to be content to set a CMO by reference to the updated budgets. In *BDW Trading Ltd v Ardmore Construction Ltd (Re Costs) [2025] EWHC 1063 (TCC)*, Andrew Mitchell J was faced with a case in which the parties had not voluntarily updated their budgets ahead of the hearing. He made a CMO by reference to costs budgets filed almost a year earlier, rejecting the claimant's contention that they did not have jurisdiction to make a CMO based on 'old' budgets on the basis that the court has the power to make such an order at any time, taking the view that recording the court's view on estimates as they were submitted as at a particular date was not to approve incurred costs but rather was a valuable thing for the court to record.

Costs outside the scope of the budget

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[15.9]

CPR 3.17(4), states that if there are interim applications during the claim that were not provided for in the budget, then any costs that arise from them are treated as additional to the budget. In other words, the court should assess what order for costs to make on any such applications and then, as appropriate, undertake a summary assessment of those costs in the usual way. A classic example would be in respect of an application to enforce compliance with the directions timetable. Obviously, some applications may have been sufficiently likely at the time of approving the budget that they fall within already allowed contingent costs.

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The costs of costs management

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[15.10]

Inevitably, the costs management process adds an additional expense to litigation. Rather than allow for protracted argument about how much, the rules prescribe the sums that will be recoverable. These are found at CPR 3.15(5) as follows:

> "(5) Save in exceptional circumstances –
>
> (a) the recoverable costs of initially completing Precedent H (the form to be used for a costs budget) shall not exceed the higher of –
>
> (i) £1,000; or
>
> (ii) 1% of the total of the incurred costs (as agreed or allowed on assessment) and the budgeted costs (agreed or approved); and
>
> (b) all other recoverable costs of the budgeting and costs management process shall not exceed 2% of the total of the incurred costs (as agreed or allowed on assessment) and the budgeted (agreed or approved) costs."

It follows from this that the percentages will apply to incurred costs (whether agreed or not) as well as to the budgeted costs. As a result of the inclusion of the incurred costs in the calculation, expect the court to remind parties that:

- the mechanisms in CPR 3.15(5) only provide caps;
- it is inappropriate for the final fees to be calculated until after any subsequent agreement or assessment of the incurred costs (which explains why CPR PD 3D, para 8 corrects the folly of its predecessor provision in Guidance Notes on Precedent H and states that 'The maximum figures permitted under rule 3.15(5) should be inserted once the costs budget has been approved by the court' (our emphasis). 'Maximum figures', because obviously, unless incurred costs have been agreed at this stage, the actual figure cannot be calculated at that stage.

CPR PD 3D, para 8 also provides that parties must not include time spent on budget preparation and associated materials in any phase of the budget, as it is a freestanding amount to be calculated separately after the budget has been set (see also the table in CPR PD 3D, para 10 in the CMC phase). This is obvious as otherwise there would be an element of double recovery. Accordingly, it is strange to note that the revised rule and PD maintain in the assumptions table the previous guidance requiring inclusion of work 'reviewing opponent's budget' and 'correspondence with opponent to agree…budgets' to be inserted in the CMC phase. Surely, this may see the same work that is remunerated under the mechanism in CPR 3.15(5)(b) also contained within the incurred CMC costs with a clear risk of double recovery at some stage. This was considered in *Woodburn v Thomas [2017] EWHC B16 (Costs)*, in which the court concluded that a change in the rules to make it clear that no costs of preparing Precedent H or other recoverable costs of the budgeting and costs management process should appear in the

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phases, would provide the requisite clarity. This must be correct and a change to the assumptions table would be welcomed.

For a long time after the costs budgeting regime was enacted, the almost inevitable order for costs at each and every costs and case management conference or standalone costs management conference was 'costs in the case'. That convention was initially challenged in 2023 when Master Brown took the view that where a claimant's budget which had been 'unrealistically high', it was appropriate to reduce the claimant's costs of the costs budgeting hearing by 25% (*Reid v Wye Valley NHS Trust [2023] EWHC 2843 (KB)*). More recently, three decisions handed down in relatively quick succession might now be said to give pause for thought before proceeding to a costs (or costs and case) management conference on the assumption that an adverse costs award is unlikely.

In the space of 19 days in the autumn of 2024, Master Thornett delivered two judgments in the King's Bench Division addressing this issue. In *Worcester v Hopley [2024] EWHC 2181 (KB)*, he held that a party who proceeded to a costs budgeting hearing with an overly ambitious budget should not readily assume that an order for costs in the case would follow. On the facts of the case, the claimant's budget was reduced by 53.35%, being just 3.58% above that offered by the defendant. He ordered the claimant to pay the defendant's costs of the budgeting hearing and reduced the claimant's costs management costs by 15%. In the subsequent case of *Jenkins v Thurrock Council [2024] EWHC 2248 (KB)*, unsurprisingly, the same Master took the same approach in circumstances whereby the claimant's budget was reduced by 52.03%, being just 11.75% more than was offered by the defendant. The Master concluded that the claimant had presented and maintained an unrealistic and disproportionate approach to his estimated costs and ordered both that the claimant should bear the costs of the budgeting hearing and that his costs of costs management should be reduced by 35%.

This approach was endorsed in relatively short order by Constable J in *GS Woodland Court GP 1 Ltd v RGCM Ltd [2025] EWHC 285 (TCC)*, in which he held that whilst costs in the case remained the appropriate starting point, the fact that the sum allowed exceeded the amount offered did not determine whether a party had 'succeeded', nor was the mere fact of a reduction determinative the other way. There would be a range within which the appropriate starting point of costs in cases remained the appropriate order if the conduct of both parties was within the range of reasonableness. The court had to step back, look at the numbers involved and determine whether the case was on the wrong side of the line. The claimant's budget had been reduced by 51.81% and was approved at just 19.02% more than had been offered by the defendant. The judge made an order that the claimant pay various defendants' costs of the costs budgeting hearing and made no order as to the costs of the other defendants, with the claimant bearing his own costs.

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The relevance of the budget set to ultimate costs recovery under a standard basis assessment

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[15.11]

The importance of the budget on recoverable costs on standard basis assessments is profound. Unless there is *'good reason'* to do so the court will not depart from the last approved or agreed budget – CPR 3.18. The rule always seemed clear and unequivocal to us. However, it took intervention from both the High Court and Court of Appeal to see off a concerted attack on this simplicity. Indeed, the attack was successful at first instance in *Merrix v Heart of England NHS Foundation Trust [2016] EWHC B28 (QB)*, where the Regional Costs Judge concluded 'that the powers and discretion of a costs judge on detailed assessment are not fettered by the costs budgeting regime save that the budgeted figures should not be exceeded unless good reason can be shown'. In allowing the appeal (*Merrix v Heart of England NHS Foundation Trust [2017] EWHC 346 (QB)*, *[2017] 1 Costs LR 91*), this conclusion was roundly rejected by Carr J who stated:

> "The words are clear. The court will not – the words are mandatory - depart from the budget, absent good reason. On a detailed assessment on a standard basis, the costs judge is bound by the agreed or approved costs budget, unless there is good reason to depart from it. No distinction is made between the situation where it is claimed that budgeted figures are or are not to be exceeded. It is not possible to square the words of CPR 3.18 with the suggestion that the assessing costs judge may nevertheless depart from the budget without good reason and carry out a line by line assessment, merely using the budget as a guide or factor to be taken into account in the subsequent detailed assessment exercise."

Recognising that her decision was unlikely to be the final word on the topic, and to avoid the piecemeal emergence of jurisprudence, Carr J suggested, presciently, that the matter was ripe for early consideration by the Court of Appeal '*raising, as it does, an important point of principle or practice*'. On cue, the final 'say' duly came from the Court of Appeal in *Harrison v University Hospitals Coventry and Warwickshire NHS Trust [2017] EWCA Civ 792*. That 'say' was that the wording of CPR 3.18 is unambiguous and means precisely what we had thought it to mean, namely any departure from the last approved or agreed budgeted costs, whether upwards or downwards, can only be on the basis of there being a 'good reason' to depart from the last approved or agreed budget. In other words, the court does not undertake a 'traditional' item by item assessment of the budgeted costs on detailed assessment. Instead, it assesses those costs as they were budgeted unless there is good reason to depart.

On a separate note, there have been suggestions that the comments at para 52 of *Harrison* identify another area of contention. Commenting on the proportionality cross check under CPR 44.3(2)(a), Davis LJ said:

> "I add that where, as here, a costs judge on detailed assessment will be assessing incurred costs in the usual way and also will be considering budgeted costs (and not departing from such budgeted costs in the absence of 'good reason') the costs judge ordinarily will still, as I see it, ultimately have to look at matters in the round and consider whether the resulting aggregate figure is proportionate …"

That CPR 44.3(2)(a) requires the court at the end of an assessment to step back and undertake a cross-check of the sum assessed to ensure that the sum is proportionate (taking account of any individual proportionality decisions it may have chosen to take during the course of the assessment of reasonableness – see paras 88–93 of *West v Stockport NHS Foundation Trust: Demouilpied v Stockport NHS Foundation Trust [2019] EWCA Civ 1220*) is uncontroversial. However, where part of the assessed sum represents budgeted costs, then as those have already

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been subjected to a proportionality determination at the time of setting the budget (under CPR PD 3D, para 12), prevailing wisdom was that if the CPR 44.3(2)(a) cross-check revealed the sum assessed to be disproportionate, the court could not reduce the costs to a level below that which the court had already concluded was proportionate at costs management (ie the total of the budgeted costs). Does paragraph 52 alter this and mean that under CPR 44.3(2)(a), the court may, at the end of the assessment, determine an overall proportionality figure below the budgeted costs? Our view is that it does not.

The argument that the court can re-determine the proportionality of budgeted costs relies on there being no qualification in para 52 limiting any reduction to the level of those costs, as opposed to a positive affirmation that CPR 44.3(2)(a) permits the court to revisit the proportionality of budgeted costs. The contrary (and our) view is supported by a reading of the judgment as a whole. It is patently apparent that the court was astute to the fact that budgeted costs have already been subjected to a determination of proportionality – see paras 31–33, and, in particular, the comment at para 32 that:

> "In this regard, it is also in my view particularly important overall to bear in mind that a judge who is being asked to approve a budget at a costs management hearing must take into account, in assessing each budgeted phase, considerations both of reasonableness and of proportionality."

In *Hope Capital Ltd v Alexander Reece Thomson LLP [2023] EWHC 3157 (KB)*, the court considered a novel submission (which even counsel advancing it recognised as a difficult one) that it could make an order that costs should be assessed free from the constraints of the costs budget (effectively disapplying the provisions of CPR 3.18), where it had refused to award indemnity costs, but the receiving party was still seeking ways to escape the budget constraints. Whilst doubting that it even had the power to make such an order, it concluded that it was inappropriate 'to remove the important requirement for proportionality by the backdoor'. On the jurisdictional point, the court said:

> "In this context, the only specific power to depart from an approved or agreed budgeted costs resides in CPR 3.18 and this power is to be exercised “when assessing costs” i.e. by the costs judge. It is for the costs judge to determine whether there is good reason to depart from the budgeted costs."

As mentioned at [15.2] a residual curiosity, though, is that CPR 3.18 does not prescribe the effect at assessment of a costs management order under CPR 3.15(2)(c). This is because CPR 3.18(a) and (b) only refer to the receiving party's last approved or agreed budgeted costs. Budgeted costs are defined in CPR 3.15(1) as the costs to be incurred. In other words, agreed incurred costs are not budgeted costs. As such, they are not caught by CPR 3.18(a) and (b). They are not caught by CPR 3.18(c) as they are not the subject of comment, but rather are the subject of a costs management order. If this is a deliberate omission from CPR 3.18, it seems an odd one, as it begs the questions what is the point of a costs management order under CPR 3.15(2)(c) and how are assessing judges meant to approach such orders at subsequent assessment?

(See [15.13] below for further consideration of 'good reason'.)

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The relevance of the budget set to ultimate costs recovery under an indemnity basis assessment

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[15.12]

An inevitable consequence of the wording of CPR 3.18 would appear to be that the budget has no part to play in an assessment ordered on the indemnity basis. CPR 3.18 is expressly limited to standard basis assessments for an entirely logical reason. Budgets are set by reference to reasonable and proportionate costs. CPR 44.3(3) makes it plain that costs on an indemnity basis are set by reference to reasonableness only. Proportionality is not mentioned. Accordingly, to extend the relevance of a budget to an indemnity basis assessment appears to import a proportionality test that is not relevant to the assessment.

We have always urged caution in placing any reliance on the case of *Elvanite Full Circle Ltd v AMEC Earth and Environmental (UK) Ltd [2013] EWHC 1643 (TCC)* which did suggest some link between indemnity costs and budgeted costs. Our caution was well placed. In *Denton v T H White Ltd [2014] EWCA Civ 906* (see below at [15.31]), when dealing with potential costs penalties against those who play tactical games with the rules the Master of the Rolls said this:

> "If the offending party ultimately loses, then its conduct may be a good reason to order it to pay indemnity costs. Such an order would free the winning party from the operation of CPR rule 3.18 in relation to its costs budget."

If there remained any doubt, this was dispelled by the unequivocal view of the Court of Appeal in *Lejonvarn v Burgess [2020] EWCA Civ 114*. Giving the judgment, Coulson LJ referred to earlier decisions he had given at first instance and concluded that:

> "In principle, the assessment of costs on an indemnity basis is not constrained by the approved costs budget, and to the extent that my obiter comments in *Elvanite or Bank of Ireland v Watts* suggested the contrary, they should be disregarded."

This is an unambiguous statement that an indemnity costs order severs the link between claimed costs and the budget set by the court on assessment.

In the light of the above, the reference to CPR 36.17(4)(b) in CPR 36.21 is, at first blush, a curious one, as the effect of CPR 3.14 appears to be only of relevance when the court is assessing costs on the standard basis under CPR 3.18 and by definition CPR 36.17(4)(b) relates to a party assessing under an indemnity costs order. However, closer consideration of the wording of CPR 36.21 suggests that it is a free-standing sanction, the effect of which is to penalise those who fall foul of CPR 3.14 and are subsequently entitled to costs on the indemnity basis under CPR 36.17(4)(b) (whether or not a costs management order is subsequently made). We say at first blush, but even on a second reading, the result remains curious when one considers that a party in breach of CPR 3.14 but which is awarded costs on the indemnity basis outside of the CPR 36 regime escapes both CPR 3.18 and the sanction of CPR 36.21. See [20.22] for further consideration of this.

Good reason

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[15.13]

What constitutes a good reason is undefined. What is clear is that decisions will be entirely contextual based on the specific facts of a particular case and the incidences of 'good reason' are likely to be rare. This was confirmed by the Court of Appeal in *Harrison v University Hospitals Coventry and Warwickshire NHS Trust [2017] EWCA Civ 792* (above):

> "As to what will constitute “good reason” in any given case I think it much better not to seek to proffer any further, necessarily generalised, guidance or examples. The matter can safely be left to the individual appraisal and evaluation of costs judges by reference to the circumstances of each individual case.' (Davis LJ, para 44).'

However, the court was at pains to stress that 'good reason' was 'a significant fetter' on the court having an unrestricted discretion and cautioned judges not to adopt a lax or over-indulgent approach to the need to find 'good reason'.

Having predicted that instances of 'good reason' will be few and far between, some seem reasonably obvious, eg where not to depart from the budget would see a breach of the indemnity principle as the receiving party has not incurred the full amount of the budgeted costs for a specific phase. This was precisely the conclusion reached in *Barts Health NHS Trust v Salmon* unreported 17 January 2019 County Court at Central London HHJ Dight, with the court determining that:

> "In my judgment, having regard to what was said by Lord Justice Davis in the Harrison judgment, the fact that the sum claimed is lower than the budgeted figure, because of the indemnity principle, is itself capable of being a good reason. Awarding the lower figure would be, in my judgment, a departure from the budget, which requires a good reason to be established: in this case, once that had been done it was open to the paying party to challenge the figure which was then being claimed by the receiving party, and they did not have to assert a further good reason to enable the court to do so.' (para 22)'

The court went on to consider the consequences flowing from a finding of 'good reason', concluding, amongst other things, that:

- establishing a good reason means that the court may depart from the budget for a phase when assessing costs on the standard basis;
- once a good reason has been established, and the court is given the right to depart from the budget, it will assess the costs of that phase in the usual way, and, in that respect, it is left to the good sense and expertise of the costs judge to undertake that assessment in an appropriate and insofar as possible practical way, whether line-by-line or in a more broad-brush way;
- once the court has a right to depart from the budget, neither the receiving party nor the paying party needs to establish a further good reason within CPR 3.18 if they wish to persuade the costs judge to make a further or different adjustment to the bill for the phase in which 'good reason' has arisen. In other words, if the initial 'good reason' would lead to a specific reduction (eg in the example of a limit on recovery imposed by the indemnity principle, down to the level of the costs actually incurred), that is not the end of the matter, as once a 'good reason' is established, the court is not constrained in the extent of the departure from the budgeted costs.

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It remains to be seen the extent to, and the way in, which this decision on approach is adopted. Certainly, a line-by-line assessment in the conventional way, risks robbing the costs management regime of its costs saving impact on detailed assessments. We have also seen some suggestions that this may produce inconsistency between phases of the budget if the hourly rate is reduced for a phase after a finding of 'good reason'. We do not understand this, as budgeted costs are not set by an exercise of rate x time. Accordingly, there is no inconsistency because budgeted costs should not be set by rate for any phase and so there is no rate within the budgeted costs with which any subsequent determination of rate after a finding of 'good reason' can conflict (see *Yirenki v Ministry of Justice [2018] EWHC 3102 (QB)* and [15.35] below and CPR 3.15(8) confirming that it is not the role of the court in undertaking costs management to fix or approve hourly rates). For our part, in the interests of proportionality, we would prefer the determination of amount after departure for 'good reason' to be undertaken in the same broad-brush, but principled way, as the setting of the budgeted costs – namely by the consideration of CPR 44.3(5), 44.4(3) and any wider circumstances resulting in a single figure for those costs no longer assessed in accordance with the last approved or agreed sum for that phase (see [15.12] above).

Whilst the decisions in *Capital for Enterprise Fund A LP v Bibby Financial Services Ltd (18 November 2015, unreported), Ch* and *Car Giant Ltd v The Mayor and Burgesses of the London Borough of Hammersmith [2017] EWHC 464 (TCC)* suggest that even if there is a jurisdiction, which the court doubted in the former case, but accepted in the latter case, for the trial judge to indicate for the benefit of the assessing judge that there should be a departure from the budget, the court should be slow to do so, we are unconvinced. There seem to be three compelling reasons why the trial judge should assist the assessing judge:

- The trial judge may have information that will not be available to the assessing judge unless it is expressly conveyed.
- Were the trial judge to undertake a summary assessment of the costs, then the information would form part of the assessment process. Why should that be different simply because the assessment is a detailed one by a different judge? If the information is relevant, then it is relevant regardless, otherwise there is immediately the risk of inconsistency of outcome.
- There is established authority that trial judges should assist assessing judges by providing relevant information and doing so on 'good reason' does no more than that (see *Northstar Systems Ltd v Fielding [2006] EWCA Civ 1660* and *Drew v Whitbread [2010] EWCA Civ 53* and CHAPTER 22 at [22.24]).

Anecdotally, it appears that many parties are either overlooking the need to apply to vary the budget, are using CPR 3.15A to seek retrospective variation after all the work in respect of which the variation is sought has been completed (in other words retrospective budget repair by variation) or are taking a view that they would prefer to rely upon 'good reason' later under CPR 3.18. If this is correct, we can expect further guidance to emerge. However, for costs management to work to ensure costs are proportionate, and given that the court will have made a proportionality assessment under CPR 44.3(5) and CPR 44.4(1) and a reasonableness determination under CPR 44.4(3) when first case and costs managing, and failure to comply with CPR 3.15A (which is mandatory – 'a party must revise') or simply spending more than budgeted where there is no significant development will undermine that, we expect the court to be robust when considering both budget repair and 'good reason'. Having said this, in *Montres Brequet SA v Samsung Electronics Co Ltd [2022] EWHC 1895 (Ch)*, the court ordered a payment on account in respect of 20% of those costs that exceeded the budget, where there had been no variation (and the court thought this a relevant consideration), the judge was 'concerned that the evidence before me that would really justify departures from the budgeted is limited at this stage' and she accepted that she was not in a position properly to assess 'good reason'. Of course, as this was a payment on account decision only, then on assessment if good reason cannot be established, what some may see as the generosity of ordering anything on account of costs exceeding an unvaried budget can be undone. However, this leads unhappily to the final comment on 'good reason'.

One of the aims of costs budgeting is to avoid costly and time-consuming detailed assessments – a process more likely to be avoided if costs budgeting is used correctly, the court interprets CPR 3.18(b) as a sanction, the trial judge offers assistance to the assessing judge, and later argument on 'good reason' is discouraged. Budget

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management by parties, which includes applying for variation promptly when the need arises, is a fundamental component of their case management duties.

End of Document

Litigants in person

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[15.14]

While litigants in person are excluded from the obligation to prepare costs budgets they must be provided with a copy of the budget of any represented party (CPR 3.13(6)). However, what of the situation where a party is unrepresented at the time of the first case management conference, but subsequently instructs solicitors? On the face of it the rules make no provision for that party's costs to be budgeted. It may be that in such a situation the other side may make an application for the court to fix a costs management hearing pursuant to CPR 3.16. Alternatively, it may be that some judges instigate internal practices that in any claims where notices of acting are filed where previously a party was unrepresented, the file is referred to the judge to consider convening a costs management conference. There is also an argument that this is a significant development in the litigation (for example representation may reduce the trial time estimate) and as such the newly represented party should follow the procedure in CPR 3.15A and submit a budget to the other party for agreement and in default of agreement apply to the court. Indeed, the budgeted party may take the view that representation alone amounts to a significant development and wish to vary its budget adopting the same procedure, which may put the matter before the court anyway. Our view is that the purpose of costs management is such that, whether there is a specific provision or not, the prudent solicitor in such a situation ought, at the very least, to try to agree a budget with the other party and, in default, apply to the court for a costs management hearing. As a slight aside, courts are likely to be wary of applications in the context of a change of solicitor, that do not constitute 'a significant development', but are no more than an attempt at budget repair (because the 2nd set of solicitors does not think the 1st set of solicitors has budgeted sufficient for a specific phase, although does not challenge the direction/assumption upon which the sum was set).

Precedent H

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[15.15]

The costs budget must be in the form of Precedent H, unless the court orders otherwise, although there is no requirement for a specific font or font size; the requirement is simply for an easily legible typeface in landscape format (see CPR PD 3D, para 4). The court may, in substantial cases, direct budgets limited initially to certain parts of the proceedings (CPR 3.13(4)). However, this is for the court to direct: it is not for the parties to make assumptions that this will happen. For example, if one party believes that there should be a preliminary trial on limitation they must still file a budget for the entire proceedings. If they wish not to do this, then, at the very least, before the date for filing and exchanging of budgets they should make an application to the court to extend the time for compliance and seek directions that budgets are limited to the preliminary trial costs. If they fail to make such an application and simply file and exchange a budget limited to the preliminary trial costs, then strictly they have not filed a budget in Precedent H that covers the whole proceedings and may find themselves caught by CPR 3.14 (see *Page v RGC Restaurants [2018] EWHC 2688 (QB)*, in which the court concluded that the claimant, who had filed a materially incomplete budget – in that he had considered a 2nd case/costs management conference was necessary before listing and budgeting for a trial and so had not provided figures for all the phases – had failed to file a budget as required by the rules and so suffered the consequences of CPR 3.14).

Linked to this is the requirement in CPR PD 3D, para 9 to include costs which are disputed (and the PD gives as an example the need for a particular expert) within the appropriate phase of the budget, but marked, if necessary, as disputed. We think that the rule might better refer to the underlying direction upon which the budget is predicated is marked as disputed in the assumptions for the phase (as it is the dispute over the appropriate direction rather than, necessarily, the costs attributed to that direction, that are in issue). It would also help if the assumptions also had to include what that party's costs would be if its preferred direction upon which it has budgeted the phase is not ordered by the court.

The content of Precedent H still generates discussion. For our part, we would prefer it to be simply the first page (but with the assumptions re-inserted on that page, rather than at the bottom of each phase). As CPR 3.15(8) requires the court to set budgets for phases as lump sums and not by determination of hourly rate, amount of time and specific disbursements, why is the rest of the form, that simply provides a breakdown to that detail, required? All this does is compel the parties, when preparing the budgets, to focus on the traditional way of approaching costs rather than considering the proportionate overall sums. Indeed, a common complaint at the Civil Justice Council costs consultation conference was the time and cost of a rate by time preparation of the budget. The form of costs management that we suggest is undertaken solely by reference to the first page – and now the assumptions at the bottom of each phase page – (see [15.7] above) and immediately avoids the risk of the process becoming a prospective assessment of costs (which CPR PD 3D, para 12 expressly cautions against). One of the recommendations within the CJC Report is for a pilot using only page 1 of Precedent H in claims valued up to £1m (see para 1.18, Costs Budgeting Light).However, whilst changes in April 2016 mean that only page 1 needs to be completed where the incurred and estimated costs do not exceed £25,000 or the statement of value on the claim form is less than £50,000 (CPR PD 3D para 4(b) – see [15.17] below), as this is currently the minority of cases, a more detailed consideration of the full Precedent H is required.

Page 1 - The summary and the assumptions for each phase

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COMPLETING THE PRECEDENT H

[15.16]

Precedent H provides the other party/ies and the court with a detailed breakdown of both the costs a party has incurred to date and the costs that party estimates will be incurred from the time of the budget onwards. The form is divided in to a summary page, costs incurred and estimated for ten specific phases of litigation, with an expert fee summary breakdown for the expert phase, and a contingency section. There is no longer a guide to completion of the Precedent H. This is incorporated into the amended CPR PD 3D, para 6 and the table after para 10). While the table has been updated a number of times, there remain a few oddities (such as why pre-action settlement work is included within the pre-action phase despite any work incurred pre-action in relation to any other phase in the budget, such as ADR/Settlement, expressly being excluded from the pre-action phase). One remaining problem is where does one put interim applications that have been issued by the time the budget is prepared, so they are neither anticipated nor free-standing applications under CPR 3.17(4)? Even if one chooses to put them as contingencies – as they are more likely than not to happen and do not fall anywhere else in the form – it is impossible to provide the detail required to budget them as the contingency phases no longer have incurred costs columns. At least if the detail is included in Precedent H, the issue is before the court, which can determine whether it wants to budget an application and how to do so, or determine unequivocally that the application will fall within CPR 3.17(4). The view that it is better that items are included somewhere, rather than that they are left out because of a perception that the guidance is a 'straight jacket' and that if an item of work is not mentioned in a phase then it does not go in the budget, receives authoritative support from the Court of Appeal in *Hadley v Pryzbylo (a protected party by his litigation friend, Laura McCarry) [2024] EWCA Civ 250* in a section wonderfully entitled 'Clearing the undergrowth'. When considering a debate about the phase relevant to a particular item of expenditure, Coulson LJ said:

> "We would also be very reluctant to start suggesting changes to the deliberately wide phases within Precedent Form H. Form H applies to all civil litigation, so it cannot be expected to provide a bespoke fit for every type of claim. That also provides an explanation as to why the mere fact that the stated assumptions do not expressly include a particular item of cost cannot be regarded as determinative. The stated assumptions should not be read as if they had statutory force."

Page 1 – The summary and the assumptions for each phase

[15.17]

Apart from making sure that the correct form is used, it is vital that the form contains accurate details of the costs, both incurred and estimated for the future, which it would be reasonable and proportionate to incur and that the phases set out clearly the assumptions upon which the budget has been based. We cannot stress enough the importance that should be attached to ensuring that the assumptions underlying the sums in each phase of the budget are specifically identified. This is important for a number of reasons:

- The assumptions are, in effect, a case plan. They should illustrate to the court that thought has been given to how to progress the claim. If they do not, then the impression that is conveyed is that the case has not been adequately planned. This is bound to have an adverse effect on the court's view of the costs.
- The assumptions justify the costs. If, for example, the expenditure on witness statements is high, but for a valid reason, eg there are a number of witnesses and they are hard to trace adding complexity, then say so

and use the assumptions as an opportunity to inform the court of the reasons for the expenditure, linking them to the proportionality factors at CPR 44.3(5) and any wider circumstances. The figures in isolation mean nothing. It is only when they are viewed with the assumptions of how the claim will progress and why that is a proportionate approach, that they have any purpose.

- As the court will be linking proportionate case management to the budget it will need to understand the basis upon which the costs have been calculated to assist in the determination of what is reasonable and proportionate.
- As any subsequent revision of the budget can only be where there has been a significant development in the litigation, the court may look back to the original assumptions upon which a budget was agreed or approved to check that the claim has indeed taken a different course from that originally costed if the directions order itself does not make this clear.

However, while the assumptions underlying each phase should illustrate a clear case plan, beware of descending to the minutiae of detail. CPR PD 3D, para 10(a) precludes lodging any documents (other than Precedent R later – see below) relating to the budget, save in exceptional circumstances. Accordingly, those still in the habit of filing separate disbursement schedules and/or more detailed breakdowns of the form should desist. Not only is this not permitted, turning the exercise into something similar to a bill for detailed assessment, but it suggests a disproportionate approach (and maybe one that infects the case generally). We have noticed increasing use of an 'addendum' attached to Precedent H. Beware, as the court may decide that this will not be viewed.

Remember that the Precedent H will be considered in conjunction with the directions questionnaire, the proposed directions and the disclosure report, (in all but personal injury multi-track claims – where no disclosure report N263 is required). These documents add to the assumptions and should reveal a clear case plan. However, if these documents are contradictory (eg the estimate of costs for the expert evidence in the directions questionnaire differs from that in the budget) that will immediately raise concerns about the amount of control being exercised over costs. Linked to this is the position where a party provides insufficient information in the directions questionnaire. We have all seen questionnaires that answer key questions, such as what witness are to be called and on what issues, with unhelpful answers. If in doubt, 'TBA/TBC' (to be advised/to be confirmed) seems to be the stock answer. Not only is the court unlikely to accept directions questionnaires filled in with incomplete information, but it will also highlight serious issues with the proposed budget. How can a party who can neither name witnesses, nor identify the issues that those witnesses will address, have possibly drafted detailed assumptions about the evidence to be called and included anything other than a speculative figure for the witness statement phase of the Precedent H? This situation is compounded if by the time of the costs case management hearing, that party can still not provide the requisite detail of experts/witnesses.

As stated above, if the incurred and estimated costs do not exceed £25,000 or the stated value of the claim on the claim form is less than £50,000, the only requirement is to complete page 1 of the costs budget. As contingencies are included in the Precedent H, then if the amount included for contingencies takes the overall budget over £25,000, the entire Precedent H must be completed. The CPRC has removed the scope for confusion in CPR PD 3D, para 4(b), which we identified in a previous edition, by making it clear that the reference to £25,000 takes account of both incurred and estimated costs (see the CPRC minutes November 2020).

The removal of the assumptions from page 1 to appear, instead, under each phase page, creates an obvious difficulty where only page 1 is to be completed – the court and the other party/ies do not see the assumptions upon which the budget is predicated. Indeed, CPR PD 3D, para 10(b) confirms that the court will not normally require written assumptions in these cases. This makes the proper completion of directions questionnaires and draft directions even more important, as these will be viewed as the case plan justifying the budget. If the CJC Report recommendation for a costs management light pilot progresses, we hope that the assumptions will be re-introduced to page 1.

The phases

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[15.18]

There are ten phases: Pre-action costs, issue/statements of case, CMC, disclosure, witness statements, expert reports, PTR, trial preparation, trial and settlement/ADR and a summary page for experts' fees. These are followed by 'contingent cost A' and 'contingent cost B' (but one can add as many contingencies as are required).

There are valid concerns over completion of the form. Sometimes work done is hard to categorise. An example often given is work on valuing a personal injury claim. Legitimately this may fall within both 'statements of case' and 'trial preparation' if it involves preparing or revising a schedule of loss. It might also happily sit in the 'settlement' phase if it is part of preparation for a round table meeting even though it is still a statement of case. Where should this work feature in the budget? The answer seems straightforward to us. Use the assumptions column to explain what has been included within each phase. Any later analysis of the agreed or approved budget is then clearly measurable against specific tasks allocated to, and undertaken within, a particular phase. This also gives the court the opportunity to move that expenditure to another phase if it approves it, but believes the work to have been categorised wrongly (see [15.16] above).

Further problems arise in ensuring that the time spent by fee earners is recorded against the correct phase. This occurs where work done on a particular occasion is in part on one phase and in part on another – eg consideration of documents as part of the process of preparing witness statements. Is the time to be recorded against disclosure or witness statements? Is there a temptation to record against one of the phases to ensure the work stays within the budget? In reality, we suspect that it should be clear to the fee earner involved what the purpose was of the task being undertaken at any given time. In the example given, we suspect that the fee earner should record that time against the witness statement phase.

As the tabular guidance in CPR PD 3D directs parties to include work done pre-action which meets the definition of other phases as incurred work in those phases (save in respect of settlement work – see [15.16] above), the pre-action phase is always likely to be relatively small as most work will be incurred work on disclosure, witness statements, experts and preparing statements of case for issue. If there is what seems a large pre-action phase total in the context of the claim, expect the court to ask for a breakdown of how this has been calculated as it will wish to ensure that the work has been correctly allocated. This is particularly so where the 'incurred costs' on phases where the court would have expected work to have been undertaken already (eg disclosure, witness statements, experts) are low, suggesting the costs have been incorrectly allocated between phases – sadly, nearly 13 years on, this problem still arises. If this happens and no breakdown has been ordered, then there is a real risk that the court will simply make bold assumptions as to how much of that is 'incurred expenditure' within certain other phases of the budget.

The importance of correct allocation of 'incurred costs' serves a legitimate purpose, for, as we have said, the court needs to use the already incurred figure for a phase to inform its decision about what further expenditure on that phase is reasonable and proportionate (see CPR 3.17(3)(b)).

Contingencies

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[15.19]

We mentioned above the uncertainty caused by contingencies. In *Yeo v Times Newspapers Ltd [2015] EWHC 209 (QB)*, *[2015] 1 WLR 3031*, *[2015] 2 Costs LO 243* this point was specifically considered by Warby J who concluded:

> "In my judgment work should be included as a contingency only if it is foreseen as more likely than not to be required. This seems to me a clear criterion that provides a practical solution, consistent with PD3E 7.4 and 7.9. If work that falls outside one of the main categories is not thought probable, it can reasonably and should be excluded from the budget. The time and costs involved in estimating how much work would cost are not easily justified if the work is no more than a possibility or is unlikely. If work identified as a contingency is included in a budget but not considered probable by the court no budget for it should be approved. If the improbable occurs, in the form of an unexpected interim application, the costs will be added to the budget pursuant to PD3E 7.9, unless the matter involves a 'significant development' within para 7.4 in which case, if time permits, a revised budget should be prepared and agreed or approved."

This approach met with general approval and CPR PD 3D, para 9 adopts this 'balance of probabilities' test, which provides welcome consistency.

The comments also give a simple explanation of the relationship between contingencies and CPR 3.15A and 3.17(4). We would have preferred the reference to CPR PD 3E, para 7.9 (as it was, now CPR 3.17(4)) to refer to these costs being 'over and above the budget' rather than to be 'added to the budget' as the provision itself regards them as separate from the budgeted sum. However, the effect is the same – they are additional to the sum originally budgeted.

Note that CPR PD 3D, para 9 is clear that parties should not include 'costs which are disputed' as a contingency, but in the appropriate phase of the budget (see [15.15] above).

Counsel

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[15.20]

This is a pithy point. Do not forget to allow for counsel's fees. It is as well to obtain an early estimate of these so that it does not become hard to retain counsel later because the budgeted fees are too low or counsel is constrained to do the work for a low fee out of a sense of commercial loyalty or necessity or the client has a large portion of counsel's fees that are irrecoverable win or lose the claim. Anecdotally, many chambers report that they are still not consulted at the time of preparation of the budget and are then presented with a 'fait accompli' after the costs management order has been made.

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Specifically excluded costs

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[15.21]

Precedent H also stipulates that certain costs are specifically excluded from the budget. These are set out on page 1 of Precedent H and are VAT (if applicable), success fees and ATE insurance premiums (if applicable), costs of detailed assessment, costs of any appeals and the costs of enforcing any judgment. As such we find the decision of the Senior Costs Judge referred to in *BP v Cardiff and Vale University Local Health Board [2015] EWHC B13 (Costs)*, which refers to his earlier decision in that case, that recoverable additional liabilities are included when calculating the budget preparation fees, challenging. Not only are additional liabilities not part of any approved or agreed budget, but they are specifically excluded from inclusion in Precedent H itself and so it is hard to see how preparation costs could possibly arise. The position has not been made any clearer by the amendment to what is now CPR 3.15(5). A strict interpretation of this might suggest that the percentage applies to incurred costs (as the amount agreed or allowed on assessment would include the success fee), but does not apply to the budgeted costs (as the agreed or approved budgeted costs do not include the success fee). The rapidly diminishing number of cases remaining, in which a success fee is recoverable, suggests that the effect of this decision will soon be of academic interest only.

The decision in *Various Claimants v MGN Ltd [2016] EWHC 1894 (Ch)* that success fees and ATE insurance premiums formed no part of the budgeting process is wholly unremarkable, but supports the view set out above as to the effect of CPR 3.15(5) in respect of budgeted costs.

Statement of truth

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[15.22]

The costs budget must contain a statement of truth (CPR 3.13(5)). This must be signed by a senior legal representative of the party. The wording for this verifies the budget. The statement of truth required is at CPR PD 22, para 2.3:

> "**Statement of truth**
>
> This budget is a fair and accurate statement of incurred and estimated costs which it would be reasonable and proportionate for my client to incur in this litigation."

The statement of truth is included in the text of the Precedent H. This is because there has been litigation concerning the lack of a statement of truth on the Precedent H. In *Bank of Ireland v Philip Pank Partnership [2014] EWHC 284 (TCC)* a budget had been signed by the solicitor but it contained no formal statement of truth. Stuart-Smith J concluded that this did not render the budget a nullity and therefore CPR 3.14 was not engaged. In the event that he was incorrect he indicated that were CPR 3.14 engaged then he would grant relief as the omission was one of form and not substance.

Points have also been taken about the definition of 'a senior legal representative' – a term used in CPR 3.13(5), but not defined by the rules. Indeed, this was specifically considered in *Americhem Europe Ltd v Rakem Ltd [2014] EWHC 1881 (TCC)*. Head them off at the pass by making sure that someone who is unarguably 'senior' signs the budget. As a party considering making this challenge, think twice. The courts look unfavourably on the conduct of parties in taking unreasonable technical challenges and the continuing need for parties to co-operate to further the overriding objective still enshrined in CPR 1.3 (see for example, the clear statement of principle upon this from the Court of Appeal in *Denton v T H White* – see below at [15.31]).

In *Americhem* the court held that the signature by someone not a 'senior legal representative', similarly did not render the budget a nullity and was a minor irregularity only. The proportionate route may be to ask the party to reserve the budget with a different signature and only if that is not forthcoming to contemplate an application.

There is no provision in the costs budget for any statement by the client that the costs budget has been discussed with them and it has been approved; notwithstanding that it is the client who will be liable to pay the costs. From a practical perspective, discussions must be undertaken with the client prior to completion of the budget. The client may well have a very different idea as to what budget is required to pursue, or defend a case and this must be addressed at the outset. An explanation should be provided as to the costs that will need to be incurred; incurred costs should already have been discussed. The client should understand that what costs the solicitor thinks are reasonable and necessary may not accord with what the court thinks are proportionate costs (see CPR 44.3(2)(a)) and should understand why it may be that the court sets a lower figure than that in the budget. It is also essential to explain that the costs budget will provide the basis for determining the recoverable costs at the end of the proceedings. This is particularly so in the County Court where s 74(3) of the Solicitors Act 1974 applies (see also CPR 46.9(2)). At the end of the day the client may decide to spend more than what the court determines to be a reasonable and proportionate budget and there is nothing to prevent the client from doing so (other than court case management limiting disclosure, witness evidence, number of experts etc which is considered at [15.25] below). The client should also be aware of the assumptions on which the budget is based to understand the practical effect

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of the financial constraint. There is a useful summary of the relevance of information about the budget being provided to the client (the budget here refers both to that being provided to the court and then, that being set by the court), in the context of solicitor/own client costs disputes in *St James v Wilkin Chapman LLP [2024] EWHC 1716 (KB)* at paras 53–71.

As a final thought, it would be interesting to know whether budgets, which include the signed statement of truth that the costs stated in the budget are a fair and accurate estimate of proportionate costs, differ from the solicitor client estimates given, in which proportionality plays no prescribed role. There is a suspicion that the additional requirement of proportionality in the costs budget results in little or no difference between solicitor client costs and reasonable and proportionate costs in Precedent H. It is interesting, when budgets have been agreed, to see how willing to stick to such a certification solicitors are once the court has declined to make the case management directions upon which the agreed budget was based. This control that the court is still able to exert by robust case management, and the ways in which this may arise, requires more detailed consideration (see [15.27]–[15.32] below).

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Precedent R - budget discussion reports

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PRECEDENT R – BUDGET DISCUSSION REPORTS

[15.23]

CPR 3.13(2) provides that in all cases where a party files and exchanges a budget, other party/ies, except for any litigants in person, must file an agreed budget discussion report no later than seven days before the first CCMC. The format of the report is provided at Precedent R. In essence, this should identify which phases are agreed and which are not (and if not agreed, why not). The court will have to be astute to ensure that these reports do not become points of dispute in another guise, as that will defeat the drive to ensure that the process is a proportionate one. At its most useful, the fact that the report has to be filed will a) encourage discussion between the parties and facilitate agreement and b) highlight to the court those areas in issue for the CCMC and enable informed preparation.

Completion of Precedent R should not be undertaken lightly. In *Findcharm Ltd v Churchill Group Ltd [2017] EWHC 1108 (TCC)*, the court regarded the defendant's completion of Precedent R as 'completely unrealistic' and of 'no utility'. As a result, it was disregarded and the claimant's costs budget was found to be both proportionate and reasonable. In *Red and White Services Ltd v Phil Anslow Ltd [2018] EWHC 1699 (Ch)*, the court was 'not at all attracted' to the defendant's Precedent R, that largely sought to limit the budgets of the other parties to its own proposed budget, which was 'too low' and 'not a good guide'.

The fact that Precedent R requires the parties to divide claimed and offered sums between time costs and disbursements respectively, seems curious, as CPR 3.13(8) requires that the court's approval relates only to total figures for the phases of the budgets and Precedent R, itself, acknowledges this by having only one column for the judge's total per phase.

A cautionary final note comes from the case of *Gray v Metropolitan Police Comr [2019] EWHC 1780 (QB)* in which the court confirmed that a judge may set the budget for a phase below the sum offered by the other party, if that offer has not been accepted. We say confirmed, because this is no more than simple contract law and Lambert J dismissed a suggestion that the offer created a 'bottom line' with brevity in these terms:

> "…I find that the Judge was not required to spell out why the figure which she allowed for witness statements was less than the figure offered by the defendant. The reason is obvious: the figure offered by the defendant was not the proportionate figure. It goes without saying that, if a defendant (or any other party) makes an offer, that offer does not become the benchmark below which the costs cannot be budgeted."

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The simplified costs budgeting pilots

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[15.24]

Applicable to certain claims issued on or after 6 April 2025 and before 6 April 2028, three separate costs budgeting pilot schemes will operate, each with its own catchy PD title:

- Practice Direction 51ZG1 – Pilot Scheme for Cost Budgeting in Certain Business and Property Courts and Certain Business and Property Work in the County Court;
- Practice Direction 51ZG2 – Pilot Scheme for Cost Budgeting in Certain Claims with a Value of Less Than £1m;
- Practice Direction 51ZG3 – Pilot Scheme for Certain High Court Qualified One-Way Costs Shifting (QOCS) Cases.

In many ways, the Pilot Schemes are more of a modest tremor than they are a seismic shift. The basic tenets of cost budgeting remain: prepare a budget, exchange, budget discussion report and proceed to a hearing. However, the changes implemented by the schemes are undoubtedly significant. They introduce a raft of new Precedents – a 'simplified' budget should be prepared in Precedent Z (not HZ which is surprising given the following), simplified budget discussion reports prepared in Precedent RZ and applications to vary a budget made via Precedent TZ. If a CMO is made, existing CPR rr 3.15–3.18 apply with only necessary modifications (ie references to 'simplified' costs budget etc). If no CMO is made, paras 3.2–3.7 of PD 44 shall apply as if reference in those paragraphs to a budget is reference to the simplified costs budget.

Nevertheless, whilst certain features of the Pilot Schemes are similar, there are, on any view, a series of traps for the unwary. For example, whilst under PD 51ZG1 and PD 51ZG2, represented parties must file their precedent ZR no later than seven days before the CMC in claims valued at less than £1m, under PD 51ZG3, the defendant must file its precedent ZR 14 days before the CMC.

In particular, the Pilot Schemes appear to have a much broader scope for sanctions, which can be applied in respect of any failure, not just a failure to file a budget (or, in these cases, a simplified budget) in time. Such sanctions may include limiting the defaulting party's costs recovery to court fees only, but the Pilot Schemes do not limit the court's powers to that, somewhat dramatic, sanction. One might think that permitting the court to impose such sanctions as it sees fit where a party fails to comply with an obligation under the scheme may lead to more modest sanctions, or even some creative ones, being imposed more readily. If history is to repeat itself, the court's approach to sanctions will likely inform an interesting few paragraphs of future editions of this text.

In an effort to assist with the navigation of the varying provisions of the three Pilot Schemes, we have devised the following summary table, but regard should be had to the rules to ensure complete compliance at all times.

	PD 51ZG1 – Business and Property Courts	**PD 51ZG2 – Claims under £1 million**	**PD 51ZG3 – High Court QOCS Cases**
Effective Period	Applies to claims issued on or after 6 April 2025 and before 6 April 2028.		
Scope	Part 7 multi-track to which Section II of Part 3 and Practice Direction 3D applies and which is proceeding in	Part 7 multi-track to which Section II of Part 3 and Practice Direction 3D applies and which has a value	Part 7 multi-track proceeding in Manchester or Birmingham District Registry to which CPR r 44.13

	the BPC of England and Wales, BPC Manchester or Leeds, or BPC work in the Manchester, Leeds, or Central London County Court.	< £1 million, not covered by PD 51ZG1 or r 44.13, proceeding in County Court at Central London, Leeds, or Bristol District Registries.	(Qualified One-Way Costs Shifting) applies.
Precedent Forms	Simplified costs budget (Precedent Z), simplified budget discussion report (Precedent RZ), Form for Variation of a Simplified Budget (Precedent TZ).		
Budget	Unless the court orders otherwise, all parties except LiPs shall file and serve a Precedent Z by no later than 21 days before the first CMC.	Unless the court orders otherwise, all parties except LiPs shall file and serve a Precedent Z by no later than 21 days before the first CMC.	Unless the court orders otherwise, all parties except LiPs shall file and serve a Precedent Z by no later than 21 days before the first CMC. Whilst defendants are required to file and serve a Precedent Z, the court will not make a cost management order in respect of the defendant's costs unless satisfied that the litigation can only be conducted justly and at proportionate cost if such an order is made.
Budget Discussion Reports	**For value < £1 million:** Each represented party must (and LiPs may) file and serve a Precedent RZ no later than 7 days before the CMC. **For value > £1 million:** No requirement for Precedent RZ – The court will not manage the costs of the parties unless satisfied that the litigation can only be conducted justly and at proportionate cost if a CMO is made.	Each represented party must (and LiPs may) file and serve a Precedent RZ no later than 7 days before the CMC.	Defendant must file and serve Precedent RZ no later than 14 days before CMC, unless any party gives notice (no later than 21 days before the first CMC) that they intend to seek a direction for either: (a) a split trial or preliminary issue trial; or (b) that the litigation can only be conducted justly and at proportionate cost if the court manages costs using Precedent H.
Court's Powers at First CMC	**For value < £1 million:** The court will make a CMO based on the Precent Z unless not required by r 3.15(2). **For value > £1 million:** Where a CMO is to be made, the court may give directions as to whether the court will manage costs using the Precedent Z, an updated Precedent Z, or a full Precedent H, may give directions for BDRs (Precedent R or Precedent RZ) and may list for a costs management conference which should be within 35 days of the first CMC.	The court will make a CMO based on the Precent Z unless not required by r 3.15(2).	The court may: (a) make no CMO; (b) manage the claimant's costs based on the Precedent Z; or (c) give costs management directions—which may include a requirement to file a Precedent H or an updated Precedent Z, and the listing of a costs management conference before the same or another judge.
If Costs Management Order Made	CPR rr 3.15–3.18 apply (with necessary modifications, ie reference to a budget is to a simplified costs budget etc).		
If No Costs Management Order	The provisions of paras 3.2–3.7 of PD 44 shall apply as if reference in those paragraphs to a budget is reference to the simplified costs budget; and Unless the court orders otherwise,		

	each party shall file and serve an updated Precedent Z no later than 28 days before the start of trial, the start of any trial window, or 7 days before any PTR (whichever is the earlier). The court may order a party to file an updated Precedent Z at any stage of the proceedings.
Sanctions for Non Compliance	If a party fails to comply with its obligations under the PD, the court may impose sanctions which may include limiting the recovery of the costs to be incurred to the applicable court fees.

End of Document

(i) Allocation

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THE INTERACTION BETWEEN CASE AND COSTS MANAGEMENT

[15.25]

Let there be no doubt that the judiciary sees robust and effective case management as the vital ingredient essential to the effective control of costs. This is plain from:

- The comments of Sir Rupert Jackson in the executive summary to his final report:

  "One of the points that was impressed upon me during the Costs Review was that judges should take a more robust approach to case management, to ensure that (realistic) timetables are observed and that costs are kept proportionate. Case management can and should be an effective tool for costs control."

- The clear indications that were given to the judiciary in 2013, that it could expect the support of the Court of Appeal where robust, but proportionate, case management decisions have been reached. This was reinforced by the announcement at the time by the then Master of the Rolls, Lord Dyson, of a small cadre of Lord Justices designated to hear costs and case management appeals at the outset of the 2013 reforms. These were the Master of the Rolls himself, the then Deputy Head of Civil Justice, Lord Justice Stephen Richards and Lord Justices Jackson, Davis and Lewison.

- The comments made by Sir Rupert Jackson in his May 2015 lecture 'Confronting costs management' that case and costs management should be an iterative process at a single hearing and that 'the amended case management rules enable the court to steer the case, so that it proceeds within the bounds of proportionate costs' (para 7.2).

- The wording of CPR 3.17(1) linking any case management decision with the costs involved in each procedural step.

- The clear acknowledgement in the CJC Report of the role that case management has in ensuring proportionality of costs (see para 1.9 of the report).

While some may have seen the decision in *Denton v T H White Ltd* (see above and below in more detail at [15.31]) as suggesting a weakening of this resolve, they should pause and consider. The Court of Appeal was at pains to stress in both *Mitchell* (see above) and *Chartwell Estate Agents Ltd v Fergies Properties SA [2014] EWCA Civ 506* that robust case management decisions will not be interfered with lightly. Even in Denton the Court of Appeal referred to the 'culture of compliance that the new rules are intended to promote'. Indeed, in his preface to the 2015 White Book Sir Rupert Jackson cautioned 'that in the euphoria with which some have greeted Denton, we do not slip back into the “old culture” of non-compliance'. The robust case management rules extend far beyond CPR 3.9. How does this approach to case management sit with costs management? The procedural issues raised below illustrate clearly the impact of costs management on case management decisions.
(i) Allocation

[15.26]

The primacy of proportionality has seen the reduction in the allocation to multi-track of those fast-track value claims that make their way in to the multi-track solely due to the time estimate based on the number of witnesses. Increasingly, case management orders limit the number of witnesses (see below) and, where necessary, are prescriptive about the trial timetable to ensure that the claim is disposed of within five hours. In addition, the court

may decide that a claim over £10,000 should still be allocated to the small claims track as a proportionate case management decision (see CHAPTER 22 – Costs Awards Between the Parties – Small Claims Track Costs, below). The introduction of the intermediate track, and the imposition of fixed costs within it, is likely to bring allocation back into focus, as the financial dis/incentives, of allocation to that track or to the multi-track are marked.

End of Document

(ii) Use of standard direction templates

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[15.27]

Although this may seem like small beer in the overall drive to proportionality, there is no doubt that the introduction of standard directions (CPR 29.1(2)) and the mandatory filing requirement with directions questionnaires in multi-track, should have assisted by forcing parties to address case management at an earlier stage and avoid the expense for both parties and the court in preparing bespoke orders. Anecdotal evidence suggests that the professions (and some courts) have not embraced the standard directions. Some courts still prefer their own directions and are not using the CPR 29.1(2) model and standard directions as their starting point either. If in doubt, use the CPR 29.1(2) directions as no court could legitimately criticise compliance with the CPR. It is likely that the online processes of the future will require the use of standard direction templates. The Damages Claims Pilot under CPR PD 51ZB, which will eventually extend to all tracks, does have standard orders within the system.

End of Document

(iii) Witnesses and witness statements

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[15.28]

While the court has always had powers under the CPR to control evidence, CPR 32.2(3) take this further. As stated above, the judiciary is increasingly using these powers. Directions questionnaires are being scrutinised to see upon what witness evidence the parties propose to rely. In multi-track claims this is cross-referenced to the proposed budget for that phase. If the budget is not reasonable and proportionate then parties may have to select their best evidence. In other cases, the court is looking to limit the witness evidence to that which will enable the trial to be completed within a proportionate time estimate. Parties must expect orders limiting the number of witnesses, the issues that are to be addressed by those witnesses, the length of the statements, the paper and font size and, either at this stage or at pre-trial checklist/pre-trial review stage, an order timetabling witness evidence at trial (which may involve parties having to select their best cross-examination points) to ensure that the trial can be completed within a proportionate time estimate.

End of Document

(iv) Disclosure

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[15.29]

Sir Rupert Jackson made no secret of his view that disclosure is one of the main drivers of cost in litigation. The proliferation of e-disclosure has only served to heighten the difficulties and increase this cost. CPR 31.5(7) offers a menu of disclosure options, with, in multi-track non-personal injury claims, standard disclosure being the last, and least attractive, of these. This, combined with the requirement to file and serve disclosure reports 14 days before the first case management conference and for discussion between the parties about the method of disclosure seven days before the first case management conference, was meant to ensure that the court is far better informed to make a proportionate disclosure order from the menu. In multi-track cases, this consideration goes hand in hand with a comparison with the phase budget proposed in Precedent H.

Notwithstanding the above, it is apparent that 'standard disclosure' remains the default option for parties in non-personal injury cases (a concern raised by Sir Rupert Jackson in his October 2016 'Disclosure' lecture to the Law Society's Commercial Litigation Conference and referred to again in his Supplemental Report on Fixed Recoverable Costs). We have suggested previously that this may be because standard disclosure remains the default order in the CPR 29.1(2) templates and that the focus of the parties when completing the Form N263 (Disclosure Report) is on the cost of standard disclosure as the form requires this information. Sir Rupert Jackson conceded as much in his farewell lecture, 'Was it all worth it?' in March 2018, largely because 'people have taken little notice of it [CPR 31.5(7)]'.

Even the introduction of CPR PD 57AD (and, in its lengthy pilot phase CPR PD 51U) has not cured all the ills of disclosure notwithstanding that CPR PD 57AD, para 6.6 states that the disclosure models should not be used to increase costs and the words 'reasonable' and 'proportionate' resonate throughout the PD.

End of Document

(v) Experts

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[15.30]

Another battleground between necessary work and proportionality is that of expert evidence. The judiciary is more astute to the increased reliance upon single joint experts and to tighter prescription by the court of the specific issues upon which an expert is to report (shorter, focused reports are the order of the day – see, for example, the restriction on report length in the intermediate track at CPR 28.14) and budgeting effectively operates to impose limits on experts' recoverable fees. CPR 35.4(2) and (3) require upfront estimates of an expert's fee (which will be necessary if the Precedent H is to be accurately completed in any event) and identification of the issues to be addressed by that expert. Practitioners who do not follow pre-action protocols for expert nomination are finding increased difficulty in obtaining permission to rely upon the expert evidence then obtained (and for which the client has already incurred a cost liability). The overriding objective of dealing with a case justly and at proportionate cost is very much to the fore when determining requirements for expert evidence.

There was a pilot run on concurrent expert evidence in the Manchester 'Technology and Construction' and 'Mercantile' Courts. Following a Civil Justice Council report on the pilot in August 2016 CPR PD 35, para 11 was amended. The PD currently provides that the judge will initiate discussion if concurrent expert evidence is to be given and sets out in more detail how that process may proceed in practice (PD 35.11(4)). The PD (at 11.2) also provides guidance for the court on control of oral expert evidence when it is not taken concurrently (eg experts sequentially on an issue-by-issue basis). The PD also stresses the importance of consideration of an agenda for the taking of expert evidence and that if ordered it should, understandably, be based on the areas of disagreement identified in the experts' joint statement.

By way of aside, it is worth noting that the court has had some ability to restrict the recoverability of experts' fees under the CPR prior to the introduction of costs management. CPR 35.4 has long provided for the court to limit the amount of an expert's fees and expenses that are recoverable between the parties and CPR 35.6 provides that where an expert fails to answer a question posed by a party other than the one which instructed him, the court may order that the expert's fees are irrecoverable.

(vi) Relief from sanctions

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[15.31]

We have already considered CPR 3.9 in CHAPTER 11 – An Overview of the Key Costs Amendments to the Civil Procedural Rules. Failure to comply with orders, the CPR and practice directions is a drain on the resources of the court and parties alike; the court because non-compliance may result in an increase in the number of interim hearings or paper case management or, at worst, adjournment of a trial leaving a valuable slot of court time that cannot be filled: parties because efforts to compel compliance inevitably cost money. Rapidly, the best laid plans for a claim to be resolved proportionately can be left in tatters. Less so since the advent of the current form of CPR 3.9 in April 2013. As we have said the court is quicker to make 'unless orders' to compel compliance and keep claims on the rails and slower to grant relief from sanction for those who fail to comply. Conversely, the court does not tolerate 'point scoring' applications where parties seek to take opportunistic advantage of mistakes made by another party where it is plain that relief will be granted. What emerged from *Denton v T H White Ltd* (above) is that the court will penalise this type of opportunism. This may well impact on costs management, either in operating as a 'good reason to depart from a budget' or by the award of indemnity costs depending upon whether the 'opportunistic party' ultimately is entitled to a costs order or not. At paragraph 43 of the majority judgment the Court of Appeal said this:

> "… Heavy costs sanctions should, therefore, be imposed on parties who behave unreasonably in refusing to agree extensions of time or unreasonably oppose applications for relief from sanctions. An order to pay the costs of the application under rule 3.9 may not always be sufficient. The court can, in an appropriate case, also record in its order that the opposition to the relief application was unreasonable conduct to be taken into account under CPR rule 44.11 when costs are dealt with at the end of the case. If the offending party ultimately wins, the court may make a substantial reduction in its costs recovery on grounds of conduct under rule 44.11. If the offending party ultimately loses, then its conduct may be a good reason to order it to pay indemnity costs. Such an order would free the offending party from the operation of CPR rule 3.18 in relation to its costs budget."

Precisely this occurred in *Viridor Waste Management v Veolia Environmental Services [2015] EWHC 2321 (Comm)*, a case where the particulars of claim were served five days late, but a copy had been received by the defendant only one day late. The defendant opposed the granting of relief from sanction. Popplewell J concluded that this was an attempt to take an opportunistic and unreasonable advantage of a mistake in the hope of a windfall and one that had taken half a day of court time with an impact on other court users. As a result, the defendant was subjected to an indemnity costs order. Whilst stressing the importance of compliance with the CPR, but with the expressed intent 'pour encourager les autres', Coulson J in *Freeborn v Marcal (t/a Marcal Architects) [2017] EWHC 3046 (TCC)* issued a stark reminder to parties to be reasonable:

> "It is, of course, extremely important, post-*Mitchell* and post-*Denton*, for the parties to civil litigation to ensure that they comply with the CPR. Courts will be far less forgiving of non-compliance than they ever used to be. But that tougher approach must not be abused in the way that occurred here. Parties need to consider carefully whether the alleged breach of the rules is, on analysis, any such thing and, even if it is, whether it is proportionate and appropriate to require or oppose an application for relief from sanctions in all the circumstances of the case."

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In any event the grant of relief or refusal to grant relief from sanction may well be a significant development in the case and necessitate a variation of the budget (whether of one's own budget or that of another party). Rather than leave this to an argument on 'good reason' at any subsequent assessment, this is something better raised as soon as the decision on relief is known (indeed, sometimes the provision of information about the costs consequences of granting or refusing relief may be determinative of the application for relief). An illustration of relief altering the costs would be a case where one party fails to serve expert evidence in accordance with a court order and the sanction was that unless so served that party could not rely upon the evidence. The budgets were originally set on the basis of an expert for each party, a joint meeting and attendance at trial. In those circumstances the fact that one party no longer has expert evidence is a significant development that impacts on the budget of all parties.

In the context of costs management, *Mangat v Mangat* unreported 4 May 2022 (Ch) provides a cautionary reminder that relief from the sanction imposed by CPR 3.14 is discretionary, and that the absence of prejudice to the non-defaulting party is not determinative in the exercise of that discretion.

However, the extent of the application of CPR 3.9 into general case management serves to emphasise its importance – see *FXF v English Karate Federation Ltd [2023] EWCA Civ 891*, confirming the role of CPR 3.9 in applications to set aside default judgments under CPR 13.3 and the categorisation of cases by Birss LJ, to which CPR 3.9 applies, as set out in the judgment at para 59.

End of Document

(vii) Trial

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[15.32]

The court has always had the power to set the trial timetable and control the way in which evidence is presented. However, the court also has, as part of the overriding objective, the obligation to keep the trial proportionate. With civil court time, at a premium, the judiciary is increasingly invoking this power, particularly as the trial phase is one of, if not, the most expensive.

The increase in the small claim track limit to £10,000 has seen more substantial claims being conducted by litigants in person. Many have had no previous experience of the court process. Litigants in person often arrive at court having no idea what to expect. To ensure that this extended jurisdiction does not lead to the court allocating a disproportionate amount of a finite resource, some judges are imposing strict timetables for evidence in chief and cross-examination, to ensure these hearings are proportionately constrained. Of course, the proposed online court is being designed to provide far greater clarity of issues and a streamlined process to resolution in most of those claims that currently proceed through the small claims track.

This is as true of the fast track and the new intermediate track has, as one of its criteria for allocation, a three-day trial time limit. Again, it is worth noting that the design of the digital court incorporates time and cost-saving features, such as automatic trial bundle creation.

(viii) Assessments of costs

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[15.33]

The effect on the outcome of assessments of costs with proportionality overreaching all else at CPR 44.3(2)(a) has already been highlighted (and it is worth noting that even though the first instance decision in *May v Wavell Group plc [2016] EWHC B16* (Costs) was overturned, the costs assessed by the costs judge as reasonable were still reduced on appeal ((22 December 2017, unreported), CC) by dint of the proportionality cross check (see CHAPTER 14 at [14.5]). However, on a more rudimentary note, parties should be finding the court eager to undertake more assessments on a summary basis. Why? Well, the decision of whether to undertake a summary or detailed assessment is a case management one. All case management decisions are taken with consideration of cost and proportionality. Detailed assessment costs more than summary assessment (even with the costs limit on provisional assessments) and results in more court time being allotted to a case. Accordingly, summary assessment must be the preferred option whenever possible. However, the failure of the pilot under CPR PD 51X and, in particular, the introduction of Form N260B, means that it is still hard to undertake a comparison between claimed and budgeted costs on a summary assessment.

Where detailed assessment is ordered, the provisional assessment procedure under CPR 47.15, which limits the recoverable costs within the assessment and is designed to reduce the use of court time on the assessment, operates to ensure that the process itself is proportionate. The high threshold required for a successful challenge to the provisional assessment set out at CPR 47.15(10) will deter most unsatisfied parties from seeking an oral hearing under CPR 47.15(7) and stepping outside the capped costs provision.

The introduction of CPR 47.6(1)(c) and PD 47, para 5.8(8) in respect of bills prepared for a standard basis assessment, requiring a breakdown to accompany the bill and, within the bill itself, separate parts for each phase budgeted and, within each separate part, a breakdown of those costs shown as incurred and those estimated in the last agreed or approved budget, and the introduction of the electronic bill make comparison between bill and budget less onerous. A model form for the breakdown can be found in CPR PD 47 as Precedent Q.

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Introduction

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SETTING THE BUDGET

Introduction

[15.34]

We know that proportionality is the key to the budget, that every direction has a price tag and that the court will use robust case management to assist in the budget setting process. This all seems quite clear. What is less certain is how this translates into actual figures.

One of the first, if not the first, decisions emerging from the defamation costs management pilot remains informative in that it illustrates the potential dangers of both a two-stage approach to budgeting, with case management undertaken at one hearing and costs management completed at a later date (whether on paper or at another hearing), and of case management being undertaken by one judge and subsequent costs management being undertaken by a costs judge (both suggestions that appear in the CJC Report). In that case, *Morrison v Buckinghamshire County Council [2011] EWHC 3444 (QB)*, the case managing judge set the directions and convened another appointment when a budget would be set by the SCCO for the claim based on those directions. The difficulties with this approach are obvious:

- The directions have been set before the cost implications of them are considered and as such the directions determine the budget
- In consequence it will be a matter of chance whether the budgeting of these directions leads to a proportionate expenditure rather than this being a considered and tailored exercise
- If a robust approach were subsequently taken to the costing exercise to set a proportionate budget, that would still leave the parties to comply with the directions with inadequate funds to do so

In fact, this case is extremely helpful as a learning tool. It reinforces what we have stressed throughout this chapter and what Sir Rupert Jackson concluded in his lecture *'Confronting costs management'* – namely that case and costs management should go hand in hand. Where the process in this case differs from the suggestions in the CJC Report, is that the latter recognises that costs information must be available at the case management stage, so that the court can consider the reasonableness and proportionality of its directions, even if it is not actually setting the precise budget on that occasion. However, whilst we accept that this is far from a universally held view, we prefer the case and costs management to be undertaken simultaneously, because:

- the link between direction and phase cost is more immediate;
- if the overall sum after the budgeting exercise is not reasonable and proportionate, the case managing judge has the ability to revisit directions to see if there are any that may be altered to ensure that the costs are reasonable and proportionate– see below, eg by further restricting witnesses and disclosure obligations; and
- the budgeting exercise is more proportionate, as it is all done in one hearing.

If case and costs management are, as we advocate is essential to the effective use of the costs management regime, to go hand in hand how does that translate into practice? Many of us thought that what Sir Rupert Jackson sought was overall proportionality: in other words that he was not concerned with micro-management of particular aspects of expenditure provided that a party's overall costs were within a global budget set. Of course, from the

outset, the costs management pilots required completion of a budget in broadly the same format as the Precedent H, giving a steer that something more was required and that the court would be interested in the costs associated with the various procedural steps to be undertaken. So it proved. CPR 3.15(8) is plain that the court is required to budget by the phases of the proceedings. This is reinforced in the same part by the fact that the parties can plainly agree parts of the budget, even if they cannot agree the entire budget. CPR 3.18 completes this approach by providing that on an assessment on the standard basis the court will have regard to the last approved or agreed budget 'for each phase of the proceedings' and not depart from that budget unless there is good reason.

The budget is set by phases. However, our view is that this cannot be undertaken without a clear idea of overall proportionality to enable the court to case and costs manage in a context. It would surely defeat the object of the exercise if the court budgeted a claim by reference to the phases in isolation, added the total up, concluded that the overall cost was disproportionate when judged against the criteria at CPR 44.3(5) and the wider circumstances and could do nothing about it. This would involve the court approving a budget that permitted the litigation to be undertaken disproportionately.

The answer is surely that the court should begin by taking an overall view of reasonableness and proportionality (in general terms), then budget and set directions for the individual phases to bring the claim to trial within the overall proportionate figure, with the ability to tweak the overall view of proportionality slightly in the light of the information that emerges when setting the spend on the phases. If the end result is that the budget exceeds the preliminary view, then the court may have to revisit some of the directions to see if a more proportionate option is available (eg further restricting witnesses, disclosure obligations etc) so that the budget for certain phases can be reduced to ensure the claim is kept within the overall proportionality figure. In his May 2015 lecture *'Confronting costs management'* referred to this approach as an iterative one and suggested it was a good illustration of how to apply the April 2013 package of reforms (at para 7.6)

This approach involves the court hearing brief initial submissions on overall reasonableness and proportionality, if the budgets are not agreed (even if certain phases are agreed), articulating the relevant reasonableness and proportionality factors by reference to CPR 44.4(3), CPR 44.3(5) and any wider circumstances relevant to proportionality under CPR 44.4(1), and forming an initial view of overall reasonableness and proportionality (probably by reference to a range of figures). Good practice is for the court to record these figures as a recital. If the budgets are agreed this presents a more challenging approach. It will be for the court to raise its concerns on proportionality and confront parties who are united in opposition to court intervention (usually by challenging the case management directions upon which the agreement of budgets has been predicated)! Even in these cases, the court may want to record its view of overall proportionality as this may impact on the subsequent assessment of incurred costs, if those are 'live', and on any subsequent applications to vary the budget.

Undertaking this overall proportionality exercise at the outset also helps in identifying particular phases where the relevance of a/some relevant CPR 44.3(5) factor/s means a larger budget than might have been expected (eg in a clinical negligence case with complex issues on breach and causation the overview will result in an expectation that the proportionate costs for the expert evidence phase will be significant). This was a point made in *Various Claimants v Scott Fowler Solicitors (a firm) [2018] EWHC 1891 (Ch)*.

More problematic is where the incurred costs prevent proportionality even with robust case and costs management (either because they exceed the sum the court thinks is proportionate for conduct of the case through to trial or because, when added to phases where there are no incurred costs to take into account under CPR 3.17(3), eg trial preparation and trial, the figure exceeds that which is proportionate for the entire claim). We consider this in more detail in [15.36] below.

Our view is that if the incurred costs are such that even taking them into account within the specific phases when the budget is set and proportionate directions are given, results in an overall sum (incurred plus budgeted costs) that is in excess of the preliminary view given on overall proportionality, the court cannot do anything other than record this, including recording its view of overall proportionality of the claim and its view of what the overall proportionate figure is per phase. This serves two functions as follows:

- It may persuade the receiving party, if it is that budget that exceeds overall proportionality, to recognise the inevitable difficulties to be encountered on a subsequent detailed assessment of the incurred costs and adopt a realistic approach to negotiation. Warby J adopted the approach of making comments for precisely this purpose in *Yeo v Times Newspapers Ltd [2015] EWHC 209 (QB)*, at para 61. If, as may well be the case in the County Court and District Registries, the costs managing judge is also going to be the assessing judge it will be a brave or foolhardy receiving party who does not compromise.
- If the costs are not compromised, it will give a clear steer to any assessing judge who is not the case/costs managing judge, what view the costs managing judge took of the incurred costs.

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The relevance of hourly rates

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[15.35]

So far this discussion has been in general terms, but once the court starts to set a budget this will involve specific sums. Two clear camps formed on how it would do so. On the one hand were those who saw it as inevitable that the court would set the budget by reference to hourly rates. After all, Precedent H, which must be completed, makes provision for hourly rates and time to be inserted and, by dint of the self-calculating nature of the form, this produces the resultant figures per phase. In the opposite encampment were those who believed that hourly rate has no, or at best a limited, role in budgeting. We have always been firmly in this latter camp. Indeed, as we set out below, we would prefer to see a Precedent H that requires the detail of neither rate nor time, but simply inserts a global figure based on the reasonableness and proportionality factors at CPR 44.3(5), CPR 44.4(1) and CPR 44.4(3). We took (and take) this view on the bases that:

- Hourly rate is only of relevance if it is multiplied by an amount of time. Consideration of time chimes of 'need' and, as we have seen, proportionality trumps need. If the court does become sucked in to rate setting, then it must consider time (for rate alone is purposeless). What does the court do if the figure that emerges from this multiplication is disproportionate? Revisit rate? Revisit time? The only certainty is that the budget setting exercise itself will then take a disproportionate amount of court time with no guarantee of reaching a proportionate end sum.
- CPR 3.15(8) specifically states that 'A costs management order concerns the totals allowed for each phase of the budget…it is not the role of the court in the costs management hearing to fix or approve the hourly rates claimed'. In other words, the court is not charged with approving (setting) rates.
- CPR PD 3D, para 12 also steers the court away from undertaking a prospective detailed assessment. What could be more akin to a detailed assessment than lengthy arguments on appropriate hourly rate? To do so also occupies a significant amount of court time, making the costs management process itself utterly disproportionate. This is another reason for avoiding assumptions that are, in fact, no more than a breakdown of costs akin to a bill for detailed assessment.
- CPR PD 3D, para 12 defines the task of the court when setting the phase budget to consider '… whether the budgeted costs fall within the range of reasonable and proportionate costs'. This is not language that resonates with descending to the detail that is required to determine hourly rates
- Setting a budget by hourly rates creates later uncertainty. Who is to say that the work will then be undertaken by a fee earner commanding that hourly rate, as the mere setting of the budget cannot compel that? As the budgeted sum is what will be recovered on a standard basis assessment unless there is a good reason to the contrary, this raises the spectre of either a possible breach of the indemnity principle or an increase in detailed assessments with paying parties seeking to ascertain who has actually done the work. This immediately undermines one of the aims of budgeting, which is to reduce the number of assessments.
- Setting hourly rate opens the door to forum shopping in those cases that are not geographically constrained to be issued in a specific court. If word emerges that in Court A budgets are set by reference to hourly rate and the rate currently allowed for a grade A fee earner is £100 per hour more than Court B, which also sets budgets by reference to hourly rate, allows, before too long Court A will be inundated with claims while Court B sits empty.

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- Setting rates permits the uncertainty that arose in *MXX (By her litigation friend and husband RXX) v United Lincolnshire NHS Trust [2019] EWHC 1624 (QB)*, in which the claimant's solicitors had stated an hourly rate in the budget for a fee earner in excess of the rate payable by the client. The costs managing judge had set the budget by an exercise of rate multiplied by hours. The paying party sought remedies in relation to misconduct under CPR 44.11. On appeal the court found that the Master had erred in making certain assumptions as to how the costs managing judge had reached a conclusion on the rate adopted. Had the budget been set by determination of the reasonable and proportionate sums by the method we advocate in [15.38] below, ignoring hourly rates and time, then the Master could have been confident that the overstatement of rate in Precedent H had affected the outcome by the difference between what the incurred costs were stated to be for each phase budgeted at the time of the costs management exercise and what they actually were for each phase budgeted. This is because the process of setting figures we advocate is that the court determines an overall proportionate figure for a phase, deducts what has already been incurred and approves what, if anything, remains. Undertaking the costs management exercise in this fashion means an overstatement of rates in the estimated costs phases causes no prejudice as the court does not consider rate and hours going forward. However, as the incurred costs are relevant to approving the budgeted costs under CPR 3.17(3)(b), an overstatement of them directly impacts on the approved budgeted costs. Adopting our approach, the budgeted costs would have been more if the incurred costs had been less. Perhaps that, and the loss of the costs of the costs management process, are sufficient sanctions under CPR 44.11 (see below for a similar conclusion when considering the relationship between reductions in hourly rate and 'good reason' at assessments).
- Setting hourly rate holds out a hostage to fortune at the subsequent assessment. What happens if the assessing judge sets an hourly rate for non-budgeted costs and it transpires this is a different rate from that set within the budget? Does that lead to an argument about 'good reason' to depart from the budget? If so, it means that the aim of curtailing assessments is utterly defeated (see the analysis of *RNB v London Borough of Newham [2017] EWHC B15 (Costs)* below, where precisely this mischief arose).

The view that hourly rate has no role in budget setting is surely correct. In his May 2015 'Confronting costs management' lecture Sir Rupert Jackson said:

> ''The courts should not specify rates or number of hours. That adds to the length of CCMCs and is unnecessary micro-management'. (para 3.4(ii))'

The CPRC moved swiftly to confirm this (although our view was that the then provision at CPR PD 3E, para 7.3 said it all already) by introducing an additional para 7.10 to the then PD 3E. This is now found at CPR 3.15(8) and leaves no scope for debate, stating unequivocally:

> ''… It is not the role of the court in the costs management hearing to fix or approve the hourly rates claimed in the budget''

It is to reinforce that the budgeting exercise is not a question of rate multiplied by time and to focus the attention of the parties on the CPR 44.3(5) factors and wider circumstances under CPR 44.4(1), that we would prefer a Precedent H that moves away from rates and time and ensures that the focus is on one figure per phase that is reasonable and proportionate and which the party is then free to spend as it sees fit, as that is the effect of the budget setting exercise undertaken by the court. Interestingly, the form will work without such information, simply with totals being inserted for each phase. It is simply a matter of formatting. We hope that this approach will be adopted as a 'costs budgeting light' pilot, as recommended in the CJC Report.

Cases emerging from the SCCO, such as *RNB v London Borough of Newham [2017] EWHC B15 (Costs)*, *Nash v Ministry of Defence [2018] EWHC B4 (Costs) 2017* and *Jallow v Ministry of Defence [2018] EWHC B7 (Costs)*, considering whether a reduction in hourly rate in respect of incurred costs is a 'good reason' to depart from the budgeted costs, attracted much interest. Our view remains that as hourly rate is utterly irrelevant to the budget approval process prescribed at CPR 3.15(8) and PD 3D, para 12, which expressly require the budget to be set by a figure that is reasonable and proportionate and not by reference to hourly rates multiplied by time, a reduction in the hourly rate for incurred costs does not mean there is a good reason to depart downwards from the approved budget

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costs, as those costs were not approved by reference to an hourly rate, but instead as a figure based on consideration of the CPR 44.4(3) and CPR 44.3(5) factors and any relevant wider circumstances. A better argument would be that a reduction in non-costs managed incurred costs by reason of a reduction in hourly rate, might present a good reason to increase the approved budgeted costs. This is because the approved budgeted costs should have been set taking into account incurred costs under CPR 3.17(3)(b), assuming the budgeting exercise was undertaken in accordance with the rules. A reduction in those incurred costs to reflect a lower hourly rate, might mean that the court had 'under budgeted' future costs by deducting incurred costs as set out in Precedent H from what it regarded as the overall reasonable and proportionate sum for each phase when calculating the budgeted costs to be approved. Accordingly, any difficulty is not with hourly rates, but with the challenging issue of the treatment of incurred costs.

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Incurred costs

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[15.36]

In what is an interesting decision, Coulson J in *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd [2015] EWHC 481 (TCC)*, adopted a broad approach to incurred costs, which resulted in him, in effect, budgeting the entire costs. He was confronted by 'incurred expenditure' at a 'very high level of costs'. Having undertaken an overall proportionality view of the claimant's costs that 'both incurred and estimated are disproportionate' he considered the options available to him, recognising that if incurred costs were used under what is now CPR 3.17(3)(b) to inform the estimated costs budgeted, that opened the door to potential unfairness if the assessing judge then reduced the incurred costs at any subsequent assessment. His solution was to limit the recoverable incurred costs per phase, but to introduce a mechanism by which any amount allowed over that sum at subsequent assessment, would result in an equivalent amount being deducted from the budgeted costs. In other words, regardless of how ultimately the costs were divided between those incurred and those budgeted, the claimant would be limited to the overall sum permitted by this off-setting mechanism. This approach raises a number of challenging issues, which explains the use of the word 'interesting'. The issues are:

- The extent to which the budgeting judge may limit recoverable 'incurred costs' by a prospective assessment of costs (and the jurisdictional basis for this) – albeit that this was qualified to allow additional incurred costs on assessment but at the expense of budgeted costs. Paragraph 98 plainly refers to 'assessed costs'.
- If the budgeting judge can adopt the approach above, the extent to which incurred costs in one phase can be offset against budgeted costs in another phase (see para 97(a) where additional incurred costs on the pre-action phase were to be set off against future costs generally). CPR 3.17(3)(b) does not expressly limit the consideration of incurred costs on a phase-by-phase basis, but, as stated above, CPR 3.15(8) and PD 3D, para 12 require the court to set a reasonable and proportionate sum by phase. A general offset of incurred costs on one phase against budgeted costs on another may result in the budgeted phase sum eventually being less than that which is reasonable and proportionate for that phase.
- If the budgeting judge can adopt the approach above, the extent to which the court can effectively set a budget for a phase to include both incurred and estimated costs by adopting the set off mechanism. This seems hard to reconcile with the terms of CPR 3.12 and 3.15 which talk of budgets being in respect of 'costs to be incurred'. By adopting the set off approach and applying it to the amount considered recoverable on assessment, the effect is a sum for all the costs of a phase (both incurred and estimated). Indeed, when talking of the defendant's overall costs (incurred and those approved estimated costs) the court talked of 'the approved costs budget' whereas CPR 3.15 uses the word 'approval' in the context of a costs management order which only 'manages the costs to be incurred'. When adopting the CIP approach in *GSK Project Management Ltd (in liq) v QPR Holdings Ltd [2015] EWHC 2274 (TCC)*, Stuart-Smith J expressly approved in the spreadsheet at para 52, only one sum per phase. In other words, he approved incurred and estimated costs and approved the costs of the pre-action phase, although having done so he then adopted the Coulson J approach of off-setting and his total figure of £425,000 was then phrased as being 'incurred costs/approved budget'.
- The extent to which the budgeting judge can/should 'approve the prospective costs in the maximum sum of £150,000' as part of a costs management order. 'Maximum' resonates more with a costs capping regime and not with the more specific budgeting of an actual sum required under the costs management regime. It

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also provides scope for the paying party later to argue the amount on assessment without needing to raise 'good reason', as the amount up to the maximum is still a live issue. This encourages more detailed assessments and not fewer.

- Whether the effect of setting a total sum (para 98) precludes arguments under 'good reason' for the estimated sums to be increased on assessment.
- Whether the budgeting judge has the jurisdiction to bind the assessing judge on 'good reason' to depart downwards from the budget where the assessed 'incurred costs' are higher than the budgeting judge considered recoverable when setting the budget going forward and that judge prospectively orders a departure from the budget by way of £ for £ offset.

Even if the CIP approach is not adopted, front loading work exposes a greater level of costs to the retrospective overall proportionality cross-check on a detailed assessment under CPR 44.3(2)(a). The continued criticism that the proportionality cross-check at the end of an assessment is an opaque and unpredictable process suggests to us that it is better to have the certainty of knowing in advance what the recoverable costs expenditure will be, rather than finding out once the money has been spent that this sum is disproportionate and that a significant proportion is irrecoverable (see [15.34] above). In addition, the costs already incurred still have a significant role to play in setting the budgeted costs. The court can record its comments on those incurred costs and these costs will be considered when determining whether the budgeted costs going forward are reasonable and proportionate, eg if the reasonable and proportionate costs of the disclosure phase are, say, £20,000 and £20,000 has already been spent, the court will approve no further expenditure on that phase going forward. Suggestions that it is unfair to make a proportionate case management decision that requires future work to be undertaken, but approve no budgeted costs for that work, overlook the point that the court has determined, by the required process under CPR 3.15(8) and 3.17(3)(b), that there is a proportionate expenditure to match the direction, but that a party has chosen to have spent that sum already.

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Budget comparison (CPR 3.17(1))

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[15.37]

In *Wooley v Ministry of Justice [2024] EWHC 304 (KB)*, the court considered the relevance of budget comparison. It acknowledged the difficulties that this can present (eg, with tactical budgets), but was equally clear that the reference in CPR 3.17(1) to the court having 'regard to any available budgets of the parties', meant that consideration had to be given to another party's budget, and that even if there are good reasons for exercising caution about comparison 'that is not the same as saying that the other side's budget is intrinsically irrelevant and should a priori be disregarded as an irrelevant consideration'. Confirming something that one of us has often articulated in a costs case management hearing, the court recognised that comparison often becomes more relevant on a phase-by-phase basis as the case progresses:

> '' … the parties are litigating the same case on the same issues; and, particularly in the latter stages of trial preparation and conduct of the trial, the tasks to be performed tend to be quite similar – though less so in the early stages of the claim where the claimant's costs are front-loaded.''

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Setting the figure

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[15.38]

Having turned our backs on the traditional costs calculation of hourly rate multiplied by an amount of time we still have to establish how the precise budget figures will be calculated.

Our view is that the court should adopt a far broader approach. It is required to set the budget for each phase by total figure. The approach we advance is that the court will identify the salient features of reasonableness under CPR 44.4(3) and proportionality under the CPR 44.3(5) checklist and any identified wider circumstances under CPR 44.4(1). It will then apply those features to each phase and determine an appropriate total sum linked to proportionate directions relevant to that phase, in the context of what is an overall reasonable and proportionate sum for the case. In practice, this will involve the court giving a brief judgment identifying which of the CPR 44.3(5) and 44.4(3) factors and any wider circumstances that are relevant, and in what way, to a particular case, setting out its range of overall reasonable and proportionate figures (so that it can then case and costs manage a case within an overall context) and then, adopting the wording of CPR 3.15(8) and CPR PD 3D, para 12, and using a formula of words for each phase along the lines of 'Having identified the relevant considerations on reasonableness and proportionality of costs in this claim, the appropriate case management order is [y] and the reasonable and proportionate budget for this phase is [£x]', it will set the budgeted costs sum. Critics of this approach may see this as too opaque a process. However, it seems to be precisely what the rules require, linking costs and case management by reference to reasonableness and proportionality. Anything more complicated can only be trespassing in to the territory of a detailed assessment and risks failure to address the requirements of proportionality, both in terms of the costs budgeted and the time and costs spent on the costs management process itself. Those courts adopting this approach seem to be reducing the time spent at the CCMC.

In *Baroness Doreen Lawrence of Clarendon Obe v Associated Newspapers Ltd [2025] EWHC 106 (KB)*, Senior Master Cook observed that 'Costs management is not an exercise of reducing the parties' costs to an irreducible minimum but setting reasonable and proportionate parameters'.

Conclusion to prospective costs control - costs and cases management

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CONCLUSION TO PROSPECTIVE COSTS CONTROL – COSTS AND CASES MANAGEMENT

[15.39]

Anecdotal evidence is that as the judiciary and practitioners become more familiar with the process, hearing times are reducing, and the incidence of agreed budgets/phases of budgets is on the rise. We had thought, as a result, that whilst there was scope for further limited amendments to CPR 3, Section II and PD 3D, to clarify certain residual ambiguities and oddities, the bedding-in period of the discipline of costs management seemed, finally, to be over. Despite our concern that this may not be so (when the Civil Justice Council consultation on costs in full flow), the outcomes from that report suggest that there is a broad acceptance that costs management has a place in the proportionate management of cases, and that what is required is more fine tuning than complete overhaul or abolition.

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