



Article written by [Hugh Evans](#) on 4<sup>th</sup> April 2018.

## **Costs Budgeting**

### **Introduction**

Costs budgeting is plainly important, as I will amplify later, but it is rarely thought to be interesting. However, there is now a fair body of law and practice, and there is some craft in producing, developing and attacking budgets.

I will start at the beginning. Costs budgeting started, after some pilot schemes, in April 2013, and the rules have been revised since. They are now a familiar part of the litigation landscape. However, problems and issues remain, many of which are inherent in cost budgeting. There is a developing body of case law, much of it not well-known, and I will refer to some of the cases. The principal ones are summarised in the White Book. I will attempt give a broader view of some the problems and pitfalls which often arise in relation to costs management. I will not set out the rules in any detail, as they can be found in the CPR at rules 3.12 to 3.18, and PD3E.

### **The effect of budgets on assessment**

The importance of costs budgeting is obvious to any lawyer. On any view, it is highly relevant to what will later happen in relation to assessment. CPR rule 3.18(a) states that when assessing costs on the standard basis, the Court will “*have regard to the receiving party’s last approved or agreed budget for each phase of the proceedings*”, and “*will not depart from such approved or agreed budget unless satisfied that there is good reason to do so.*” In *Harrison v University Hospital Coventry & Warwickshire NHS Trust* [2017] EWCA Civ 792; [2018] 1 WLR 4456 the Court of Appeal held that there could only be a departure from the approved costs for a good reason, save that the requirement did not apply for costs incurred before the budget.

So far so good, but there is very little in the way of guidance as to what constitutes “good reason.” Indemnity costs are one obvious issue, because proportionality is not relevant in such cases, unlike in budgeting. It is probably the case that costs budgets are not so important where indemnity costs are awarded, as Carr J made clear in *Merrix v Heart of England NHS Foundation Trust* [2017] EWHC 346 (QB); [2017] 1 Costs LR 91, and similarly see *Kellie v Wheatley & Lloyd* [2014] EWHC 2886 (TCC). A more cautious approach was considered, obiter, by Coulson J in *Elvanite Full Circle v AMEC*

[2013] EWHC 1643 (TCC); [2013] 4 All ER 765. He suggested that the costs budget would be the starting point for an assessment, although an award of indemnity costs, which did not require any assessment of proportionality, might be a good reason to permit a departure from the budget. This judgment has been subject to some criticism, which may be well founded. CPR rule 3.18 makes clear that its provision only apply where assessing costs on the standard basis.

Where indemnity costs is not in issue, in *Sony Communications v SSH Communications* [2016] EWHC 2985 (Pat); [2016] 4 WLR 186 the Court did consider that there was a good reason to depart from the budget in two respects. For one, the expert phase, see [24] this was because there were more documents disclosed than might have been anticipated, and it would not be a surprise to the losing defendant whose own budget for that phase was much higher. And the Judge also allowed more costs in trial phase as post trial it was more expensive than foreseen, where difficult issues on assessment of costs developed [29].

The strong influence of costs budgeting over assessment does, though, have its own problems. First, there are the structural problems inherent in budgeting to which I will return. Secondly, at costs budgeting the Court is not supposed to rule on the hourly rate, which is generally the first issue addressed in any detailed assessment. Even if it turns out that the costs budget is not quite as much of a straightjacket as presently appears, the costs budget is likely to be highly relevant to any assessment at the very least in terms of being a guide. As a consequence there is likely to be a very significant effect on the litigation.

The practical consequences of costs budgeting for the dynamics of litigation are obvious. A claimant and his lawyers, and it is normally the claimant who has an excessive budget, and whose costs budget has been slashed, is likely to be greatly affected by that in terms of how the claim is run, and amenability of settlement. That, and desire to pay less in costs if lose the case, are the primary reasons for a defendant to fight costs budgets.

### **Spending money on budgeting**

The costs permitted are set out in PD3E para 7.2. Save in exceptional circumstances, they cannot exceed the higher of £1,000 or 1% of the approved or agreed budget for completing precedent H, and a further 2% for other elements of the costs budgeting process. It is worth noting that the process includes budget discussions, which should produce a summary of grounds for what remains in dispute, see PD3E para 6A. My view is that it is worth spending money on budgeting in excess of this amount given its importance, if that is necessary. It is in particular worth thinking through the assumptions properly. Further, it may well be sensible to review the evidence and litigation thoroughly in order to come to sensible assumptions, which will frontload the claim.

There are number of reasons for that. One may find that that budgeted sum first thought of is too low, which would make a later recovery of a higher sum very

difficult. One may find that it is too high, making the budget unnecessarily vulnerable to attack, and potentially assisting the other side's budget if that is similarly high for a particular phase. Further, for a phase where the costs look high, one needs to be able to articulate good reasons for the costs. And to the extent that such costs incurred in reviewing the case can be allocated to past costs, that is advantageous to the party, because past costs are less vulnerable to attack in costs budgeting, as we will see.

Costs budgets can be a hostage to fortune. One example is witness statements. Suppose a budget suggests that a party is likely to call three witnesses, and only then serves witness statements from two. If there is an obvious missing witness, that would assist the opposing party arguing at trial that he or she should have been called, bolstering the argument by the inference that the witness must have been thought likely at the time of the costs budget. The obvious solution is to have approached the potential witnesses before the CCMC, and formed a view as to whether it is likely that they will be used as witnesses. Alternatively, if the costs budget has included two witnesses only, and a further more detailed review shows that further witnesses are required, then this costs in relation to them won't be included in the approved budget.

It is also worth paying attention to the allocation questionnaire, which gives an estimate of costs incurred and to be incurred. If the costs in the subsequent budget are very different then this can cause a problem. If they have greatly increased, then this will assist the other party in attempting to reduce the costs budget, as it will need to be explained and justified, which is likely to be difficult. The increase in costs from the questionnaire to the budget was successfully used to reduce the budgets in *CIP Properties v Galiford Try* [2015] EWHC 481; [2015] BLR 285 (where it trebled) and *Bloomberg v Sandberg* [2016] EWHC 488 (TC); [2017] 1 Costs LO 1 (where it went up by 50%). If, in contrast, the costs have greatly decreased, that may give rise to an inference that they have been massaged down in order to assist criticism of the opposing parties' budget.

Generally, costs budgets are prepared by experienced costs draftsmen. They are likely to take into account at least many of the points I will make. Any budget must pay attention to the guidance notes on precedent H, which explains what is and is not included in each phase, and is not infrequently not properly followed. As an advocate, I find that it is almost always useful to talk to the costs draftsman before the CCMC to explore with them the difficulties that may exist, and their assumptions, which are not always clear in the costs budget. In this regard, the parties nowadays should only lodge the precedent H, and the budget discussion report, so there is limited scope for a great deal of detail in precedent H in relation to the assumptions which have been made. I do not think it is normally necessary to have the costs draftsman at the hearing. The assistance they can give can largely be obtained before the hearing. Master Cook, for instance, discourages the practice of costs draftsmen appearing at the CCMC.

## **Limits**

For claims after 22 April 2014, if the amount claimed is more than £10m, the costs management regime does not apply. Part 8 claims, claims allocated to the small claims track or fast track, and all litigants in person, are also excluded. As from April 2016, claimants under 18 are excluded by CPR 3.12(1)(a), and those with a life expectancy of less than five years are ordinarily excluded by PD3E para 2.

However, the Court can order that the costs management regime will apply in any case, see CPR rule 3.15(1). The Court can also order that, although within the limits of the jurisdiction, it should not apply, if it is satisfied that the litigation can be conducted justly and at proportionate costs in accordance with the overriding objective, see CPR rule 3.15(2).

Some of the sort of factors which may be relevant to whether costs budgeting is appropriate are set out in *Signia Wealth Limited v Marlborough Trust* [2016] EWHC 2141 (Ch). Ill-feeling and serious allegations are more likely to make the cost regime appropriate as costs are likely to be needed to be controlled; the size of costs are relevant. The size of the future costs as compared with past costs may be also relevant, as if they are small then costs management may not be necessary. Significant differences in the parties' budget also make costs management likely.

PD3E at para 5 lists cases where cost budgeting may be appropriate: unfair prejudice petitions; directors disqualification proceedings; applications under 1996 Trusts of Land and Appointment of Trustees Act; claims pursuant to the Inheritance (Provision for Family and Dependants) Act 1975; Part 8 claims with substantial disputes of fact; and personal injury and Clinical negligence claims valued at more than £10m

Given that the parties will normally have filed budgets before any decision is made on whether a costs budgeting order should be made, it will be a rare case that there is no order made. If the budgets are modest and similar, the parties are simply likely to agree them. One category of case would be very large and complex claims, where the Court might order a separate costs management conference at some expense, but that would be relatively rare for cases worth less than £10m.

The Court does not have to approve all the phases of a budget. In *Wright v Rowland* [2016] EWHC 2206 (Comm); [2016] Costs LO 713 Flaux J did not approve figures for trial preparation and trial, ADR or contingencies. The reasons for that is that there was a dispute about whether the two defendants, a father and son, who were using the same solicitors and leading counsel, should be permitted to have different junior counsel. The defendants alleged that this was necessary as the claim would be very complex. The Judge was unable to come to a conclusion on that point, hence not approving some of the phases.

### **What if something is missed out?**

Under PD3E para 7.6 each party is directed to revise its budget up or down if significant developments in the litigation warrant it, and if not agreed the amended budgets have to be submitted to the Court. Showing a significant development may

be difficult, see for instance *Churchill v Boot* [2016] EWHC 1322 QB; [2016] 4 Costs LO 559. In *Elvanite Full Circle v AMEC* [2013] EWHC 1643 (TCC); [2013] 4 All ER 765, where, significantly, the relevant wording was of the pilot scheme, Coulson J held that an application to amend the cost management decision was subject to three further rules: it had to be made as soon as it became apparent that the original budget cost had been exceeded by more than a minimal amount; it could not be done after the costs had been incurred; and there had to be good reason to depart from the budget. Those are quite onerous requirements, and the second in particular is difficult to fulfil in practice. Applying that case, in *Greig v Lauchlan* unreported, 7 December 2016, Richard Millett QC considered that the change to more expensive Counsel near trial was neither a significant development in the litigation or a good reason to revise the budget; it was the defendant's choice to instruct counsel for more than the budget. It must be doubtful as to the weight those decisions will now carry. In the recent case of *Sharp v Blank* [2017] EWHC 3390 (Ch), Chief Master Marsh permitted adjustments to four of seven items where revision was sought. He held that the Court had jurisdiction when revising a budget to take the last agreed or approved budget as a reference point, and whether there application was made unreasonably late was a matter of discretion.

The potential difficulties of revision can give rise to a significant problem, because Warby J in *Yeo v Times Newspapers* [2015] EWHC 209 (QB); [2015] 1 WLR 3031 suggested at [71] that contingencies should only be included if they were foreseen as more likely than not. It is common to include contingencies such as disclosure applications, but in principle these should not be allowed because it is rare that it can be said that they are more likely than not. There is an obvious solution to be found in PD3E para 7.9, which states that if interim applications are made which, reasonably, were not included in a budget, then the costs of them will be treated as additional to the approved budgets.

One can, furthermore, ask the trial judge to provide assistance to a costs judge where unbudgeted costs have been incurred and it is therefore too late to apply to amend the budget, and the costs were not foreseeable, as was done in *Excelerate Technology v Cumberbatch* [2015] EWHC 204 (QB).

### **Structural problems with budgeting**

In many ways costs budgeting is unsatisfactory. Five points need to be made.

The first problem is the judges who determine the costs budgets. They, of course, try to do their very best with the budgets with which they have been presented. When budgeting was first brought in, judges had very little experience of them, and they were inconsistent and variable in their approaches and what they would allow. Now, most judges have considerable knowledge of costs budgeting. But it remains the case that they are quite inconsistent in what they are likely to award, perhaps in part because they are not costs lawyers. To take one reasonably well-known example, Masters Cook and Roberts undertake the management and thus the costs budgeting of clinical negligence cases. They are both vastly experienced, and it is difficult to say

that they are anything other than sensible and reasonable. But the conclusions they tend to reach are very different. Master Roberts is more generous than Master Cooke. In a case before Master Cook, when I recovered for a claimant about £100,000 more on a costs budget than was expected by either side, the costs draftsman on the other side told me afterwards that that was what he expected only if the case had been heard before Master Roberts. To take another example, I have done a few budget hearings before Mr Justice Stuart-Smith J, who after politely saying that my budgets were far too high, then made quite small cuts.

The second problem is that the costs budgeting is to a great extent, but not wholly, a one way process where only one of the parties' budgets is under attack. In any defence funded by insurers or the NHSLA, so almost any professional liability or personal injury claim, the defence costs are likely to be relatively small. Claimants' costs in such circumstances are inevitably likely to be very much larger, and they are likely to agree the defendants' budget. This may be exacerbated by two things, neither of which can normally be proved, and as a result, I suggest, neither can normally be submitted. First, claimants' budgets, and in particular hourly rates, may sometimes be rather higher than they should be because the claimant's lawyers are acting under a CFA with a nil or low uplift. Secondly, defendants' budgets might be thought to be artificially low in order to assist in cutting down the claimant's budget, which may assist the defendant in any later settlement discussions. It cannot, however, be easily alleged that such budgets are deliberately low, given the statement of truth on the precedent H that it is a fair and accurate statement.

Whatever the reason, I have seen and defended cases where the claimant is claiming five times the defendant's budget. The claimant starts with the burden that the defendant will say, or the court may think, that the case could in principle be funded by a budget which is not very different from the defendant's. Indeed, in *Marks & Spencer v Asda* [2016] EWHC 2081 (Pat) Judge Hacon held at [7] that, although the other party's budget was not the starting point, it was legitimate to have regard to it, and to see if there was a good reason to depart from it.

The claimant has four responses to this. The first is to emphasise the additional costs any claimant is likely to incur. It is often more expensive to formulate a claim than defend it. The claimant has to pay court fees, and prepare the trial bundle. There is some assistance here in *GSK Project Management v QPR Holdings* [2015] EWHC 2274 (TCC); [2015] BLR 715 at [14], where Stuart-Smith J said: "...different parties to litigation have different roles and responsibilities which are likely to distort one party's costs when compared with another: the obvious example is that in some cases the Claimants have to make the running in preparing and presenting the case while the Defendant "can sit and snipe on the sidelines"; and, later, the Claimant typically has to manage the logistics of litigation." But he qualified this by accepting that "...the Court should have regard to the other party's costs budget because it may provide useful indicators about necessary resourcing of the litigation." However, the facts of the case do need to be considered, and in some cases the claimant's costs might be expected to be less than the defendant's if the latter has most of the work to do in preparing for and running the trial. An example of that is *CIP Properties v Galiford Try* [2015] EWHC 481 (TCC); [2015] BLR 285 at [45], where the

defendant had to deal with the claim made against it and a claim against a third party. It is also often the case that the defendant's disclosure would be expected to be much more expensive than the claimant's.

The second response is that much of the difference is likely to be in the hourly rate. While the hourly rate is not approved or disapproved by the Court in the budgeting exercise, it is likely to be relevant, an issue to which I return. But the defendant's hourly rate may well be low. It is often below the guideline rates. In *Bloomberg v Sandberg* [2016] EWHC 488 (TCC); [2017] 1 Costs LO 1 at [18] the Court accepted that there were good commercial reasons why solicitors who act for insurers often charge less, both in terms of hours and rates.

The third response is to submit that what the Court must do is to consider the range of proportionate budgets, and providing his budget is within the range, even if near the top, that is fine. In this regard, PD3E para 7.3 is of assistance, as it directs the Court to "*consider whether the budgeted costs fall within the range of reasonable and proportionate budgets.*" This was not a point raised in *GSK*, but it is a point I have used successfully on a number of occasions. There is some tension between this and the dictum of Leggatt J. in *Kazakhstan Kagazy v Zhunas* [2015] EWHC 404 (Comm) that: "*The touchstone is ... the lowest amount which it could reasonably have been expected to spend in order to have its case conducted and presented proficiently, having regard to all the relevant circumstances.*"

The fourth response is to submit, if there are proper materials on which to do so, that the other side's budget is artificially low. That succeeded in *Findcharm Ltd v Churchill Group Ltd* [2017] EWHC 1108 (TCC); [2017] Costs LO 263. Coulson J. deplored the practice of putting forward unrealistically low budgets, as was the case there where the defendant's budget was under £80,000 and assumed no expert evidence to deal with a fire claim. The Judge disregarded it and allowed the claimant's budget of about £240,000 in full.

The third general problem of the costs budgeting exercise is that it is effectively just an inspired guess. It is a prediction, based of course on experience, of the likely costs of what will happen in future. Some of this can be reasonably accurate predictions. For instance, if a known barrister is to be instructed for a trial of a particular length, a quotation can be obtained from his clerk, and the barrister will be expected to stick to that limit at trial. One can also obtain quotations from experts, although that is likely to be less accurate. But other parts of the budget are much less predictable. Solicitors' time, particularly in relation to disclosure, witness statements, and expert reports, is difficult to predict in advance. As a result, the budget, at least the claimant's budget, will often tend to be overgenerous in those aspects. It is bound to be, because in practice the costs budget is the most that is likely to be awarded on assessment. Such generous estimates will more often than not be cut back. Budgets are often overgenerous in these three areas, disclosure, witness statements, and expert reports, by including estimates for counsel's input. I have frequently been asked for quotes on these elements, only to find that my instructing solicitor never needs my input, or only to a very limited extent.

The fourth structural problem with costs budgeting is that the time allowed for costs budgeting tends to be limited, and is somewhat broad-brush, despite its immense importance when it comes to assessment. CPR rule 3.16(2) states that the Court should, where practicable, conduct cost management conferences by telephone or in writing. In *GSK Project Management v QPR Holdings* [2015] EWHC 2274 (TCC); [2015] BLR 715 at [9] Stuart-Smith J. suggested that “most costs budgeting reviews can and should be carried out quickly and with the application of a fairly broad brush. Only exceptionally will it be appropriate or necessary to go through a Precedent H with a fine tooth-comb, analysing the makeup of figures in detail.” However, that case was an exceptional one. There is normally no time to refer to cases, or at least many of them. I often put them in my skeleton argument, but that is difficult in the QBD as Masters do not like skeleton arguments. The most important cases, though, are now summarised in the White Book.

Fifthly, in some cases, budgeting for something may give away some tactical surprise. The most obvious example is video surveillance for defendants in a personal injury claim. The two problems to which this gives rise are that if not included in the budget then obtaining the costs later may be very difficult, and also there has to be a statement of truth on the costs budget that it was a fair and accurate statement of incurred and estimated costs. In *Purser v Higgs* [2015] EWHC 1792 (QB) HH Judge Moloney considered that some degree of cunning was required in relation to surveillance evidence, in contrast to the normal cards on the table approach. He considered that the Defendant should be allowed indemnity costs in relation to surveillance evidence which was not in the budget, and which caused the late acceptance of a part 36 offer. He did not address the issue of the statement of truth. One way of addressing this would be to include a bland statement along the following lines: “In accordance with the Defendant’s solicitors’ normal practice in relation to personal injury claims, costs of surveillance (if any) are not included in this budget.” That gives away some element of surprise, but any competent claimant’s lawyer is likely to tell his client of the possibility of surveillance in an appropriate case, for instance a claim in relation to fibromyalgia.

### **Past costs**

The Court does not approve incurred costs, but it can record its comments and will take them into account when considering the reasonableness and proportionality of all subsequent costs. There is a change, introduced on 6 April 2017 as a result of *Sarped Oil v Addax Energy* [2016] EWCA Civ 120; [2016] BLR 301, so that at PD3E para 7.3, first sentence, we have this: “If the budgeted costs or incurred costs are agreed between all parties, the Court will record the extent of such agreement.”

But in practice how should a Court deal, in particular, with the problem of the incurred costs in a phase being as high or higher than what the Court considers reasonable and proportionate for that phase? In *Redfern v Corby BC* [2014] EWHC 4526 (QB) Judge Seymour QC considered that the only way to take into account excessive incurred costs was to limit the approved subsequent costs to nil. In *CIP Properties v Galiford Try* [2015] EWHC 481 (TCC); [2015] BLR 285 Coulson J took a different

approach, and I think a more sensible one. He rejected simply commenting on the past costs and budgeting for prospective costs, as that would give a figure in excess of what was reasonable and proportionate. But allowing nothing for future costs would not be just, because the opposing party could on assessment seek to reduce the incurred costs further, so that the successful party was doubly penalised. So he modified the first approach to give a figure which should not be exceeded on assessment for each phase for incurred costs, and thus if more was recovered on assessment for past costs, that would reduce the amount for future costs which he budgeted. This approach was followed in *GSK Project Management v QPR Holdings* [2015] EWHC 2274 (TCC); [2015] BLR 715, where the Stuart-Smith J concluded at [56] that “*there is no prohibition against saying what the Court would have approved if presented with an estimate for future costs rather than the fait-accompli of incurred costs.*” It was also followed in *Bloomberg v Sandberg* [2016] EWHC 488 (TCC); [2017] 1 Costs LO 1.

However the CIP approach was not followed in two cases. In *Group Seven v Nasir* [2016] EWHC 620 (Ch); [2016] 2 Costs LO 303 at [61] Morgan J did not do so because he did not think he could confidently and accurately identify a reasonable and proportionate figure for incurred costs. The CIP approach was also not followed in *Various Claimants v McAlpine* [2015] EWHC 2543 (QB); [2015] 6 Costs LR 1085, where the relevant cases do not appear to have been cited, the Court merely observing that the incurred costs were disproportionately high.

One other point is worth making. Past costs will largely be the pre-action stage, which will normally be complete, and the Statements of Case stage, which will normally be complete or nearly complete. If the pre-action costs are large, then it is not unusual for a Court to consider that the party must have done much of the work needed in particular for the preparation of witness statements.

### **Hourly rates**

We are now directed by PD3E 7.10 that the Court does not to fix or approve hourly rates, and the underlying details are provided to assist the Court in fixing a budget. This does not mean that the Court will not consider hourly rates at all, far from it. Precedent H expressly includes them, because they are useful. And PD3E para 7.3 says that, although Court only approves amount in each phase, it will have regard to constituent elements of total figure. Excess hourly rates will in effect be cut down, and interfered with by the back door.

Previous cases often expressly considered and commented on hourly rates, for instance: *Yeo v Times Newspapers Ltd* [2015] EWHC 209 (QB) at [72]; [2015] 1 WLR 3031 at [72]; *CIP Properties v Galiford Try* [2015] EWHC 481 (TCC); [2015] BLR 285; and *Group Seven v Notable Services* [2016] EWHC 620 (Ch); [2016] 2 Costs LO 303. While express approval or disapproval may no longer happen, the Court may well comment on the hourly rates in reaching a conclusion on the appropriate costs for each phase.

An obvious point which is often not made by defendants is that the claimant’s solicitors’ costs are significantly above the hourly rate, and even if the hours were

reasonable, the overall budget for a phase should come down. The guidelines were referred to as a maximum in *Group Seven v Nasir* [2016] EWHC 620 (Ch); [2016] 2 Costs LO 303 at [44]. I think the reason why the point is not made is often that the defendant is attempting to argue that the claimant's budget should be similar to the defendant's, and they do not want to damage that submission by accepting that the defendant's hourly rate is well below the guideline rates.

The simple point is this. A Court cannot easily judge the appropriateness of the budget for a particular phase without considering at least in broad terms what work is likely to have to be done, which must give rise to some consideration of the hours required, the grade of fee earner, the hourly rate, and the use of counsel.

### **The overall budget and proportionality**

The budgeting exercise concerns an analysis of each of the phases of the litigation. This does not mean that the Court will not look at the overall costs, and in general that is one of the first things it does consider. This must follow from the fact that on a standard basis assessment the costs budget is not to be departed from save for good reason. It also follows from the direction in PD3E para 7.3 that the Court will consider whether the budgeted costs fall within the range of reasonable and proportionate costs, albeit there may be some tension between the concept of a range there, and the absence of any such range in CPR 44.4(1)(b).

Proportionality is, in most cases, governed by the sums in issue and the complexity of the issues (CPR 44.3(5) and 44.4(3)). There are examples of considering proportionality in budgeting in two cases by Coulson J which was very material: *Willis v MRJ Rundell & Associates* [2013] EWHC 2923 (TCC); [2013] 6 Costs LR 924, where the budget was for more than claim, and was not approved; and *CIP Properties v Galiford Try* [2015] EWHC 481 (TCC); [2015] BLR 285.

There are cases where the parties' costs budgets when combined are in excess of the amount in issue, see in particular *GSK Project Management v QPR Holdings* [2015] EWHC 2274 (TCC); [2015] BLR 715. In *Group Seven v Nasir* [2016] EWHC 620 (Ch); [2016] 2 Costs LO 303 there was a suggestion at [23]-[24] that proportionality may generally limit costs of any party to about half what was claimed. That was described in *Marks & Spencer v Asda* [2016] EWHC 2081 (Pat) at [11] as a rebuttable presumption that if a party's costs significantly exceed half the value of the claim they are disproportionate.

The costs as compared with the amount at stake is not the only issue in considering proportionality. The complexity of the issues is also relevant, as are the other factors in CPR 44.3(5), albeit that this also engages the issue of reasonableness, as Nugee J pointed out in *Sharp v Blank* [2017] EWHC 141 (Ch), a case where the costs budget of the defendants of £24m was only 7% of the value of the claim. On complexity, I think the Judge can only make an assessment from two things: the statements of case; and the length of trial.

## Particular phases

I will finally make a few comments on some of the phases in the costs budget. In relation to disclosure, if the costs are large, then it really is necessary to put forward some arguments as to why this is the case. For instance, in the average clinical negligence claim, disclosure will effectively have happened already by the defendant, and the claimant is unlikely to have much to disclose. Past disclosure costs in clinical negligence claims do tend to be large, at least for the claimant, because the notes from often several organisations have to be obtained, checked for completeness, and then organised and paginated for use by experts and lawyers.

As for witness statements, it may be helpful to tell the Court what the current state of the witness evidence is, if drafts of any sort have been produced already, and to budget accordingly. What is sometimes worth emphasising is that this phase includes considering the other side's witness statements properly.

In relation to experts, it is often worth emphasising the following. Any undisclosed reports which have already been obtained will need to be revised before service to take into account the statements of case and witness statements. There will need to be agendas and expert meetings. The time at court is likely to include being present for the other side's expert and perhaps some or all of the evidence. It is common to have included in the budget one or two conferences, often with counsel, and it is common for the Court to cut this back to one.

It is worth emphasising that, in the pre-trial costs phase, this does not include Counsel's brief fees, see the guidance notes. The main costs tend to be any pre-trial conferences, and the preparation of trial bundles, which does not include assembling and copying the bundle, which is not fee-earners work.

As for the trial phase, while counsel's fees are not immune from reduction, I do think that there is a general reluctance by the Judges to cut them down. The main cut in counsel's fees normally comes if a Judge does not think that a case warrants two counsel, or such senior counsel. But there must be a limit. In *Simpsons Motor Sales v Hendon* [1965] 1 WLR 112 at 118 Pennycuik J envisaged "a hypothetical counsel capable of conducting the particular case effectively but unable or unwilling to insist on the particular high fee sometimes demanded by counsel of pre-eminent reputation..." This has been applied in, for instance, *Bloomberg v Sandberg* [2016] EWHC 488 (TCC); [2017] 1 Costs LO 1 at [19].

Cuts to solicitors' costs are more common. Is it really necessary to have so many solicitors, or of such seniority, present for so much of the time? In particular, it is unusual to have a grade A fee earner at trial throughout, see *Bloomberg v Sandberg* [2016] EWHC 488 (TC); [2017] 1 Costs LO 1 at [38].

In relation to settlement, the guidance notes make it clear that this does not include the cost of mediation, which should be treated as a contingency, a provision which is often ignored in the budget.

Disclaimer: this article is not to be relied on as legal advice. The circumstances of each case differ and legal advice specific to the individual case should always be sought.

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