EVERSHEDS SUTHERLAND

Spring
2017

COSTS GURU

An eye on legal costs

Guiding you through all aspects of budgeting

Contents

Stop Press

Merrix v Heart of England NHS Foundation Trust [2017] EWHC 346 (QB)

An important decision regarding the effect of budgets on detailed assessments is a point destined for an early hearing in the court of appeal. Carr J held that CPR 3.18 was a mandatory provision, the amount set by way of budget could not be interfered with on detailed assessment unless there was good reason. Budgeting was not to replace detailed assessment but the amount allowed by way of budget was a key factor in determining the reasonableness of costs at the conclusion of the case.

Welcome

Welcome to the Spring edition of Costs Guru which this time concentrates on budgeting. From practical guidance on when and what to file with the court, to issues to consider when preparing a budget, to how and when to seek to revise the same.

We are again indebted to our friends at 4 New Square and counsel, Benjamin Fowler, whose article on the implications of the recent *Sony* decision can be found in this edition. We also provide a round-up of recent costs cases.

We have taken the liberty in this edition to set out the Costs Unit's services. Please feel free to contact any member of the team should you wish to discuss any issues around legal costs, whether we are instructed in the underlying litigation, or not.

Since the last edition, Lord Justice Jackson has formed his working party to consider the issue of fixed costs. The current thinking is that we will see some level of fixed costs, possibly as early as 2018, but they are likely to relate to lower value claims. Jackson LJ's original suggestion that all cases up to £250,000 damages be fixed appears less likely, current thinking being the line will be drawn at or about the £100,000 mark.

Fixed costs, of course, refers to the recoverable element of fees. Solicitors and clients remain free to agree between themselves any fee agreement they choose. (See also Eversheds Sutherland's managing the costs of litigation guide. If you would like a copy, please let me know). However, recovery will be fixed. Budgeting and monitoring of spend arguably becomes even more important so as to ensure that at the conclusion of the case, the difference between that which is to be billed, and that which is to be recovered, is as little as possible.

If you have any comments or feedback please let me know.

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Who are we? Our costs unit services

Our costs unit provides a wide range of services, from traditional costs drafting services to bespoke costs budgeting and management, drafting and reviewing retainers and arranging litigation funding through our network of third party funders. The costs unit has a proven track record in all manner of costs disputes, regularly dealing with multi-million pound claims and highly complex commercial matters.

Why are we different?

Situated within a large litigation team, and with litigators working alongside specialist costs lawyers, we draw on our experience, not only of costs cases, but of being involved in and running large litigation and investigation projects. This provides the team with a valuable insight resulting in a bespoke costs offering. We provide a service that has regard to the commercial realities of business as well as the 'black letter' law, allowing clients to make decisions that best suit their business needs.

Services and expertise

Our services are split into three main areas:

1. Pre-project/litigation and retainers
2. During project/litigation budgeting and costs
3. Post-project/litigation traditional costs services

1 **Pre-project/litigation:**

- bespoke retainer and alternate fee advice
- advice on third party funding options
- advice on after the event (ATE) insurance and managing litigation risk

2 **During project/litigation:**

- preparation of budgets and case plans
- monitoring of spend versus budget on a "phase-by-phase" basis
- preparation of precedent H forms for case management conferences
- advice on and negotiating budgets
- attendance at costs management conferences
- advice on the costs implications of without prejudice and part 36 offers
- preparation of statements of costs for interim hearings
- advice on and preparation of statements to support schedules of costs for security for costs applications
- provide expert witness services in relation to costs recovery and procedure in the UK
- consideration of and advice in relation to draft judgments to include preparing or assisting with the preparation of costs submissions

3 **Post-project/litigation, we offer a full cradle to grave costs service for both paying and receiving parties including:**

- schedules of costs
- bill drafting
- points of dispute / replies
- advice on settlement and points of law
- negotiating with third parties and insurers
- part 8 costs only proceedings
- representing clients in disputes with their previous solicitor
- attendance at detailed assessment hearings

Sony v SSH – when cost budgeting actually saves costs

In *Sony Communications International AB v SSH Communications Security Corpn* (Practice Note) [2016] EWHC 2985 (Pat); [2016] 4 WLR 186 Roger Wyand QC (sitting as a deputy high court judge) gave judgment following a summary assessment of costs Benjamin Fowler, 4 New Square, reports.

This is a claim which would have progressed to detailed assessment but for (a) the parties being ordered to prepare and agree cost budgets (at the application of SSH); and (b) the parties' agreement at the conclusion of trial to proceed by way of summary assessment.

This case (and Practice Note) are a demonstration of cost budgeting resulting in the – relatively – swift and efficient disposal of costs assessment by enabling summary assessment in place of detailed assessment. Without budgets, such summary assessment could otherwise be impossible or at least unwieldy. The judgment provides interesting consideration of three things in particular: (a) the role of budgets, (b) the approval of expenditure outside of the budgeted sum, and (c) apportionment of expenditure between issues.

Sony v SSH was a claim for revocation of a patent. The counterclaim was endorsed with a value of over £10m rendering the case outwith the automatic cost budgeting requirement of CPR r. 3.12. However, SSH had applied for an order requiring budgeting; this application was opposed by Sony but the order was made by Arnold J on the following basis:

"But even on the assumption that Sony is proposing to spend only a proportionate amount on its costs, it seems to me that the cost management discipline has value to the opposing party (SSH) in enabling the party to understand what it being done and what it is going to cost. Furthermore, it seems to me that it is of value to the court when it comes to questions of costs, most particularly, obviously, at the stage of detailed assessment, but it can also be of utility prior to that point."

By way of an aside, it is hard to envisage many situations in which Arnold J's reasoning would not apply. It is noted that seeking an order applying section II of CPR Part 3 is a useful tool for litigants in high-value claims, particularly those who consider themselves to be the underdog facing a party who is more likely to spend with impunity. The submissions in favour of such an order are more apparent than those against.

Following trial, the parties agreed that, following their agreement of each other's budgets, it would be appropriate for the trial judge to conduct a summary assessment of costs based on Sony's budget. The parties agreed that Sony was the overall commercial winner even though they had lost on some arguments concerning the validity of the patent.

The judge approached assessment generally in the following way:

1. **the expenditure for each phase should be compared with the budget for that phase; Sony is entitled to the lower of the two figures**
2. **where the expenditure is higher for a phase, Sony's entitlement to recover that higher sum is subject to CPR 3.18:**

   "In any case where a costs management order has been made, when assessing costs on the standard basis, the court will:

   (a) have regard to the receiving party's last approved or agreed budget for each phase of the proceedings

   (b) not depart from such approved or agreed budget unless satisfied that there is good reason to do so"

3. **The following principles applied to that exercise, extracted from *Henry v News Group Newspapers Ltd* [2013] EWCA Civ 19 at [24]-[28]:**

   (a) the budget is not a cap but a guideline which the court has the power to depart from

   (b) each phase is to be considered separately (so overspend in one cannot be set-off against underspend in another)

   (c) the court will only depart from the budget where there is a good reason to do so

   (d) the parties have a duty to revise their budgets where warranted by significant developments in the litigation

   (e) the court can depart from the budget even if there has been no such revision

   (f) in considering whether there are 'good reasons' the court should take into account all the circumstances of the case

   (g) one such circumstance is the function of the budget to ensure costs are reasonable and proportionate, an end the parties are likely to promote prior to the outcome of trial

   (h) a further function of the budget is the value to the opposing party of understanding the work to be done and the associated cost, so another circumstance is whether the increase is taking the paying party by surprise

4. **In respect of the three phases of overspend, the judge found the following:**

   (a) in respect of expert reports, there were good reasons to depart from the budget: *"I accept that the case involved scrutiny by the experts of a rather larger number of documents than might have been anticipated. I do not ascribe blame for this to either party, it was just the way the case developed."* He allowed the sum which SSH had budgeted (around £100,000 more than Sony's figure, but around £260,000 under Sony's actual expenditure)

   (b) there was no good reason to depart from the budget in respect of trial preparation, and the invitation to treat the phase together with trial was resisted

   (c) there were good reasons to depart from the budget in respect of trial. Post-trial costs were greater than could have been foreseen due to the costs assessment

The next issue was an unusual one. Sony's budget contained two extra columns on the first page of the Precedent H under the heading "Apportionment" and they were labelled "Infringement" and "Validity". The estimated costs were assigned a percentage in each column. The judge was faced with the question of how to address apportionment generally, and how to treat this bespoke amendment to the precedent H form.

The judge's conclusion was that it was appropriate to apportion the sums upon a consideration of how, in fact, the work had fallen between the issues: *"Where it is apparent that the allocated apportionment is wrong, I believe it would be invidious if the court could not, with the assistance of the parties, make its own assessment."*

Sony was not constrained by the efforts it had made to apportion its costs on the precedent H. SSH's attempts to bind Sony to its apportionment was rejected; in particular, the judge considered that the distinction they sought to draw between agreed and approved budgets (so as to affect the application of practice direction 3E and its reference to approved budgets only) was not intentional and should not lead to different treatment. Apportionment was outside of the remit of the court's approval.

Comment

Cost budgeting does not appear to have led to an overwhelming reduction in detailed assessment proceedings, even if they are a tool to assist the cost judge in reducing the extent of detailed assessment. There is little evidence of cost budgeting reducing costs, as was its stated intention; in reality, costs management is adding another layer of costs to parties. *Sony v SSH* is an illustration of how this nirvana of saved time and cost can be achieved through summary assessment following trial, even in a complex, multi-million-pound claim with added issues of apportionment.

Furthermore, the decision of Roger Wyand QC provides a useful reduction of the principles governing the role of budgets on assessment and a helpful indication of the sort of pragmatism that should be used on assessment to questions of apportionment and the identification of 'good reasons' to depart from a budgeted figure.

Of course, few cases will lead to summary assessment in this way, and it only arose in this case because the parties agreed to this approach (many losing parties may prefer to put off the evil day of assessment). However, as the judiciary becomes more familiar with costs budgeting in general, such an approach may gain some traction.

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When to apply for an extension to the costs budget

With few exceptions, costs budgeting now applies to part 7 multi-track matters. Once the costs budget is agreed between the parties, approved by the court or a costs management order has been made, what is the position where the case is developing and it is anticipated that your budget will be exceeded?

The rules

The rules in relation to costs budgeting can be found at CPR 3.12 to 3.18 and in practice direction 3E.

CPR 3.18 states:

"In any case where a costs management order has been made, when assessing costs on the standard basis, the court will:

(a) have regard to the receiving party's last approved or agreed budget for each phase of the proceedings, and

(b) not depart from such approved or agreed budget unless satisfied that there is good reason to do so."

CPR 3 practice direction 3E paragraph 7.6 states that:

"Each party shall revise its budget in respect of future costs upwards or downwards, if ***significant developments*** *in the litigation warrant such revisions. Such amended budgets shall be submitted to the other parties for agreement. In default of agreement, the amended budgets shall be submitted to the Court, together with a note of (a) the changes made and the reasons for those changes and (b) the objections of any other party. The Court may approve, vary or disprove the revisions, having regard to any significant developments which have occurred since the date when the previous budget was approved or agreed."*

Significant development

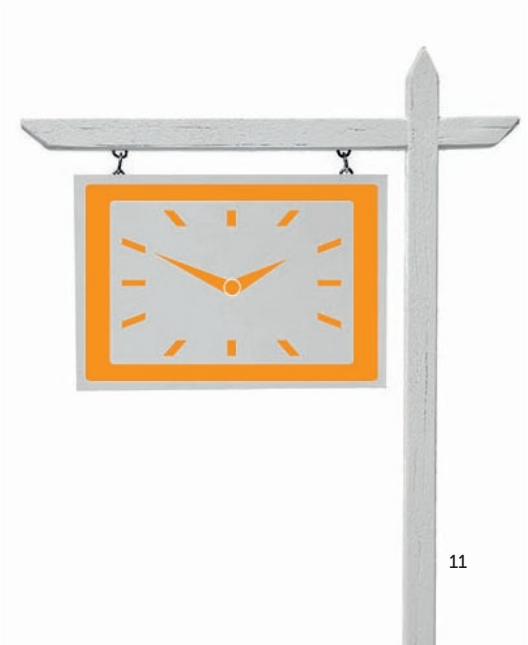
The first point to consider is therefore whether a significant development has occurred which justifies a departure from the budget. A significant development is one that is not anticipated or provided for within the original costs budget. The court will require reasons for the changes and will not approve an amended budget simply because there were errors in preparing the initial budget.

In the matter of *Murray & Anor v Neil Dowlman Architecture Limited* [2013] EWHC 872 (TCC), permission to revise the budget was granted, but the court gave a strong indication that permission to revise a costs budget will not be readily available in order to correct errors or inadequacies in the budget originally filed. Coulson J stated that *"The Courts will expect the parties to undertake the costs budgeting exercise properly first time around, and will be slow to revise approved budgets merely because … it is said that particular items have been omitted or under-valued."*

If interim applications occur which, reasonably, were not included in a budget, then the costs of such interim applications shall be treated as additional to the approved budget (CPR 3 practice direction paragraph 7.9).

In *Churchill v Boot* [2016] EWHC 1322 (QB), a personal injury claim arising out of a road traffic accident, costs budgets were approved for both parties. The claimant was also granted permission to adduce expert evidence in various disciplines. The claimant later had to provide further disclosure and the trial was delayed. A further order provided for exchange of updated expert reports and the claim had doubled in value since originally pleaded. The claimant applied to amend the budget, arguing that there had been significant developments, namely the doubling of the amount claimed, adjournment of the trial and further disclosure which had led to updated expert reports. The application to amend the budget was refused on the basis that there had been no significant development within the meaning of paragraph 7.6, as the case had taken a predictable course following the original budget. The decision was appealed and the appeal failed. The doubling of the amount of the claim did not necessarily justify an increase in costs. The developments were capable of being envisaged. An adjournment was capable of being a significant development, but in this case it was not. Further disclosure was also not considered a significant development, as the additional disclosure was standard in this type of claim.

As this case demonstrates, simply not providing for a matter in the original budget is not in itself a significant development, especially if you could or should have predicted it was likely to happen when the budget was prepared.



In *Greig v Lauchlan* (Chancery Division 7 December 2016), the defendant applied to revise their budget, seeking further sums in respect of leading and junior counsel of around £92,000, to reflect the fees that counsel was to charge at the forthcoming trial. Whilst it was not disputed that counsel's fees were reasonable, it was not accepted that there had a been significant development which justified a departure from the previous budget.

If an application is required to extend the budget, there must be "a good reason" for departing from the last approved budget. There is no definition or guidance as to what the court would consider "a good reason".

However, it is likely that the following would not be considered as "a good reason":

- where a case has not lurched off track or issues did not change
- if the original estimate was a mistake or was under-estimated
- absence of prejudice will not turn a bad reason into a good reason
- costs incurred by an expert unnecessarily attending every day of the trial
- expenses, such as those of an expert, being higher than estimated even though there were no amendments of significance in the case
- matters took longer than originally anticipated
- failure to prepare evidence in accordance with case management directions

If satisfied that a significant development has occurred, when should an application be made to revise the budget?

Procedure

If a party wishes to seek to revise a costs budget, the procedure set out in CPR PD 3E para 7.6 must be followed (see above). You should not delay. A revised budget should be prepared as soon as it becomes apparent that the budget will be exceeded, and this should be done prior to the costs budget being exceeded. If a party does not deal with the issue of the exceeding of the costs budget, that party is likely to be limited to the approved / agreed budget in respect of any costs recovery.

In *Elvanite Full Circle v AMEC Earth & Environmental (UK) Limited* [2013] 4 Costs LR 612, the court was unable to approve revisions to a budget after conclusion of the trial. Coulson J made the following observations:

- unless a party can amend/revise their budget upwards, or persuade the assessing judge that there are good reasons to depart from the last approved budget, the assessment will be by reference to the last approved budget
- the party had to do more than simply file and serve an amended budget, they had to get approval from the court
- any application to vary should be made immediately if it becomes apparent that the original budgeted costs have been exceeded by more than a minimal amount
- an application to amend an approved budget after judgment is a contradiction in terms; it would not be a budgeting exercise because the costs have been incurred. It would encourage a wait and see approach and would make a nonsense of the costs management regime, destroying certainty

The court is unable to approve incurred costs and therefore cannot approve revisions to the budget if the work has already taken place. In *Excelerate Technology Limited v Cumberbatch and Others* [2015] EWHC 204 (QB), Simon Brown QC, sitting as a deputy high court judge, held that the court could not increase an approved costs budget once the costs had been incurred and there had been no provision for contingencies and no application for variance.

In the first instance, the revised budget should be forwarded to your opponent and the parties should seek to agree the revisions. If your opponent accepts the amendments, you need do nothing more than lodge the amended budget with the court and ask the court to note it has been agreed.

If agreement is not possible, an application to revise the budget should be made to the court. This application should be in accordance with CPR practice direction 7.6 and provide details as to the changes made along with reasons and the objections of the other party.

It is important for a party to file an amended budget as soon as possible, thereby minimising the risk of not being able to recover the costs.

Avoiding the need for revision

So how do you avoid the need to apply to extend the costs budget?

- carefully prepared costs budgets
- detailed and realistic information from counsel and their clerks
- detailed and realistic information from experts
- additional anticipated contingencies built into the budget
- assume that the case will go the full distance with every issue remaining in issue and having to be dealt with at trial
- detailed assumptions

It is important to review regularly the approved or agreed budget to ensure that you remain within the budget. The costs unit is able to provide an on-going monitoring and reporting service, in order that you can stay on top of the budget, but also keep clients appraised of the current position. Whilst it cannot be guaranteed that there will never be a budget overrun, at the very least you will have sufficient warning, and if needs be, can apply to the court for an extension.

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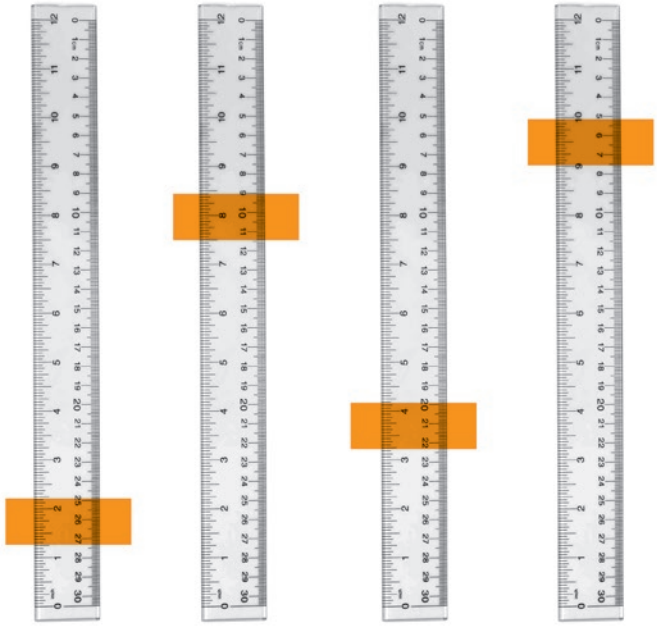
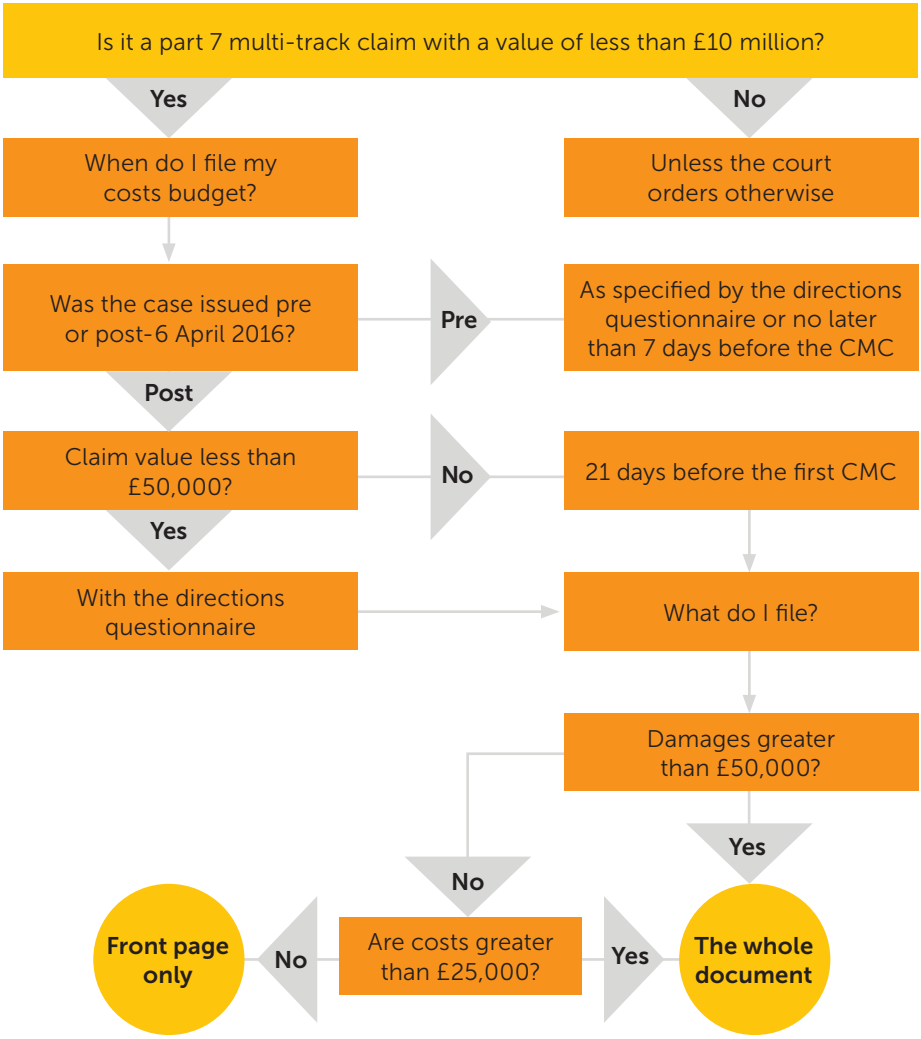


Tips and tricks:

Do I need to file a costs budget?



The information set out in this flow-chart is up-to-date at the time of publishing and is intended as a guide only.

A guide to work types and phases

To enable an accurate assessment of the spend against budget, both during the life of the case and when preparing a bill of costs at the end, it is important that any time spent is allocated to the correct phase. The table below is a reproduction of the guide set out in PD 3E (Annex B) of the Civil Procedure rules.

Phase	Includes	Does NOT include
Pre-action	– pre-action protocol correspondence – investigating the merits of the claim and advising client – settlement discussions, advising on settlement and Part 36 offers – all other steps taken and advice given pre action	– any work already incurred in relation to any other phase of the budget
Issue/ statements of case	– preparation of Claim Form – issue and service of proceedings – preparation of Particulars of Claim, Defence, Reply, including taking instructions, instructing counsel and any necessary investigation – considering opposing statements of case and advising client – part 18 requests (request and answer) – any conferences with counsel primarily relating to statements of case – updating schedules and counter- schedules of loss	– amendments to statements of case
CMC	– completion of DQs (directions questionnaire) – arranging a CMC (case management conference) – reviewing opponent's budget – correspondence with opponent to agree directions and budgets, where possible – preparation for, and attendance at, the CMC – finalising the order	– subsequent CMCs – preparation of costs budget for first CMC (this will be inserted in the approved budget)
Disclosure	– obtaining documents from client and advising on disclosure obligations – reviewing documents for disclosure, preparing disclosure report or questionnaire response and list – inspection – reviewing opponent's list and documents, undertaking any appropriate investigations – correspondence between parties about the scope of disclosure and queries arising – consulting counsel, so far as appropriate, in relation to disclosure	– applications for specific disclosure – applications and requests for third party disclosure
Witness Statements	– identifying witnesses – obtaining statements – preparing witness summaries – consulting counsel, so far as appropriate, about witness statements – reviewing opponent's statements and undertaking any appropriate investigations – applications for witness summaries	– arranging for witnesses to attend trial (include in trial preparation)

Phase	Includes	Does NOT include
Expert Reports	– identifying and engaging suitable expert(s) – reviewing draft and approving report(s) – dealing with follow-up questions of experts – considering opposing experts' reports – any conferences with counsel primarily relating to expert evidence – meetings of experts (preparing agenda etc.)	– obtaining permission to adduce expert evidence (include in CMC or a separate application) – arranging for experts to attend trial (include in trial preparation)
PTR	– bundle – preparation of updated costs budgets and reviewing opponent's budget – preparing and agreeing chronology, case summary and dramatis personae (if ordered and not already prepared earlier in case) – completing and filing pre-trial checklists – correspondence with opponent to agree directions and costs budgets, if possible – preparation for and attendance at the PTR (pre-trial review)	– assembling and/or copying the bundle (this is not fee earners' work)
Trial Preparation	– trial bundles – witness summonses, and arranging for witnesses to attend trial – any final factual investigations – supplemental disclosure and statements(if required) – agreeing brief fee – any pre-trial conferences and advice from counsel – pre-trial liaison with witnesses	– assembling and/or copying the trial bundle (this is not fee earners' work) – counsel's brief fee and any refreshers
Trial	– solicitors' attendance at trial – all conferences and other activity outside court hours during the trial – attendance on witnesses during the trial – counsel's brief fee and any refreshers – sealing with draft judgment and related applications	– preparation for trial – agreeing brief fee
Settlement	– any conferences and advice from counsel in relation to settlement – settlement negotiations and meetings between the parties to include Part 36 and other offers and advising the client – drafting settlement agreement or Tomlin order – advice to the client on settlement (excluding advice included in the pre- action phase)	– mediation (should be included as a contingency)

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Help me to help you

Louise Hoyle sets out the considerations which you should take into account when instructing your costs lawyer to prepare a budget.

Budgeting is not new. The ability to undertake a cost / benefit analysis has long been an important part of the informed decision making process particularly in large-scale commercial litigation. The costs management provisions under the Jackson reforms has however brought budgeting to the fore, shifting the focus of costs control from retrospective assessments to prospective budgeting.

The preparation of an accurate and meaningful budget is a collaborative exercise with the client providing instructions, the litigator the strategy, the costs lawyer the budget. Still further, it is a fluid exercise, whilst instructions drive the strategy and strategy the budget, the reverse can also be true. In this article, I aim to set out the issues and considerations leading to the preparation of an accurate and meaningful budget.

When preparing a budget, either when initially scoping the work for the client, or as part of the court's costs management procedure, it is essential to have regard to proportionality. When considering directions and the budget the court's focus is often less on achieving the 'text-book' outcome, and more on ensuring cases are dealt with justly but at proportionate cost.

The overall value of the case is not the only factor the court will take into account when considering budget, but it is, in practical terms, the single most important factor. The reason for this is clear, it is something which is easily measurable. Even prior to the preparation of the budget, stand back and consider the potential level of damages. Does this case justify two experts, a QC, 30,000 documents for disclosure? Does the case need to be partner led, can elements of the work be delegated? Following preparation of your budget, stand back again and consider proportionality, does the budget look proportionate when compared with quantum? If not, you may need to revisit some of the assumptions and discuss the cost / benefit analysis with the client.

Carry out a review of the case, clearly map out the case plan for the action through to trial and plan the most appropriate level of fee earners for each phase. Think of all the steps and contingencies that could realistically factor in the litigation, consider the realistic estimate of time and cost involved in each step, factoring in any additional time that may be necessary when taking into account your client's preferences and /or the nature of your opponent. For example, your client may like monthly review meetings, or your opponent may be a litigant in person or is an opponent that tends to like to litigate every issue in correspondence. Factors like this will inevitably increase costs.

Set out below are some practical issues you may need to consider when either preparing your estimate or budget, or instructing a costs lawyer to do so. The guide deliberately follows litigation phases but the issues identified apply across all matters, arbitration, litigation and even non-contentious matters. The guide however is non-exhaustive.

Pre-issue

Essentially, steps up to the preparation of a letter of claim and response letter. May include a limited amount of disclosure and witness evidence. What are the issues? How long do you think it will take to put the letter together? Who is your opponent? Are they troublesome/difficult opponents? Should you factor in a round table meeting or some sort of ADR?

Pleadings

How long will they be? Will counsel prepare them? Are there any issues with service? Do you anticipate a reply? How much will the court fee be?

CMC and PTR

Who will attend? How long will it be? In person or by telephone? Will counsel be retained? Will you need a precedent H (court budget)? Will there be a separate costs management conference (CCMC)?

Witness evidence

How many witnesses will there be on both sides? Where are your witnesses located? Will there be travel expenses to obtain statements? Think about accommodation costs too if necessary? Will counsel consider the drafts? How about the client? Who will take the statements? Will you delegate this work? Will rebuttal evidence be necessary?

Disclosure

How many documents will there be? Where are they? Can you access them easily? Do you need to employ a document review team? e-Disclosure? What about the other side's disclosure? Will disclosure be standard or menu based? Can you limit the scope to bring down the costs?

Experts' fees

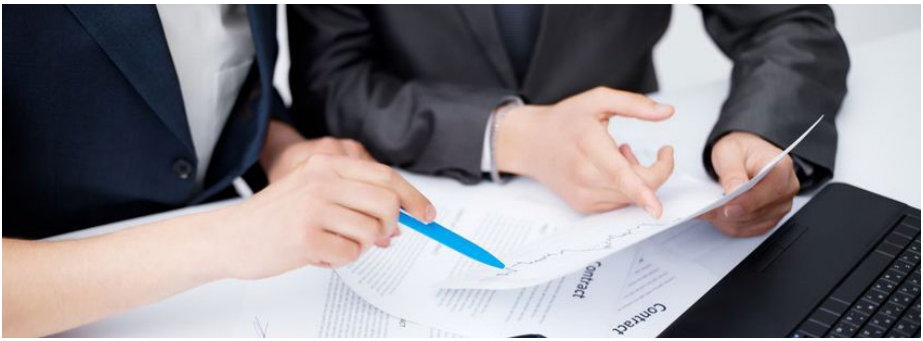
How many experts will there be? In what disciplines? Will counsel be considering the reports? Not sure what your experts are likely to charge? Top tip – ask them! Same goes for counsel, do not guess or be a hostage to fortune, ask them for budgets too.

Trial prep and trial

How many bundles do you anticipate and who will prepare them? How long is the trial estimated to last? What about evening and weekend working during trial? What about reviewing the judgment, and dealing with consequential issues arising? Factor in reporting to the client during trial and post-judgment. Will the trial be transcribed? What about live note? How many counsel will you need? Will experts need to attend and if so, for the whole or part of the trial? Will you need to budget for accommodation for yourself, experts, witnesses, even counsel?

Negotiations / ADR

Is there likely to be a lot of time spent on detailed negotiations? Will there be a formal mediation? Maybe a round table meeting? Where will these be held? Who will attend? Will counsel be involved? If settlement is reached don't forget the consent order.



Contingencies

Contingencies need to be realistic. Examples you may consider include interim applications such as for specific disclosure, security for costs or to amend a pleading. If, at the time of submitting your precedent H, you consider one of the aforementioned might be required, you should budget for it. Of course, that creates a potential quandary if you want to keep such applications under wraps.

Other considerations

In addition to the applications mentioned above, you may not want to include certain other potential costs in a costs budget – for example, surveillance evidence. Leaving such costs out of the budget may prevent you from recovering them from the other side at a later date. Timing might be an important consideration.

Post CCMC

The costs management order should not be the end of the process. Too often litigators fall into the trap of filing and then forgetting about the budget. With the potential reduction in recoverable costs, ignoring costs management may prove costly. Effective monitoring will flag up any areas where you are potentially going to exceed the budget. This will enable informed decisions to be made in relation to resource and, as dealt with elsewhere in this edition, whether to make an application to amend your budget.

Ultimately, persuading the court to allow budget revisions is difficult, there has to have been a significant change in the litigation. The key is to get them as accurate as possible at the CMC stage. Work in partnership with your costs lawyer. The preparation of the budget is a two-way process and a well prepared budget not only improves the prospects of costs recovery at the conclusion, but can serve as a road map for the progress of the case.

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Costs cases update

Steve Cox provides a whistle-stop update of recent costs cases including Brexit, budgets, proportionality and third party funding.

Brexit bites!

The effects of Brexit are already being felt in the costs world, following the decision in *Elkamet Kunststofftechnik GmbH v Saint-Gobain Glass France SA* [2016] EWHC 3421 (Pat), in which the court made an order for costs taking account of the shift in exchange rates. In light of the court's power to make an order for costs expressed in a foreign currency, it follows as a matter of logic that the court ought to have the power to compensate for any losses resulting from the exchange rate, said Mr Justice Arnold. In *Elkamet*, Mr Justice Arnold's court awarded costs in the sum of £458,000 to the claimant, a German company, and a further £20,000 as compensation for the losses suffered as a result of movement in the exchange rate.

This decision raises the question as to whether, in circumstances where money is being held in a foreign currency, the court should consider reducing costs, or damages, where the opposite happens?

Too late to change?

Back to budgeting and the case of *Greig v Lauchlan* [2016] WL 07048573 Ch D, in which prior to a 10 day trial of a claim for more than £15 million, the defendant sought to increase its budgeted counsel fees by more than £90,000, to account for a change of counsel. The increase was refused, as the defendant's decision to change counsel at such a late stage of the claim did not amount to a significant development in the litigation.

Must we then anticipate potential changes in counsel at the outset? Would the outcome have been different were the change in counsel forced upon the defendant, rather than being a choice? Either way, it is of course still open to contend on assessment that that change in counsel represented good reason to depart from the previous budget and from a tactical perspective, it may have served the defendant's case better to have waited for the assessment, rather than seeking to amend the budget.

Funders ordered to provide full indemnity

Whilst encouraging the use of third party funding, a cautionary tale from the case of *Excalibur Ventures LLC v Texas Keystone Inc* [2016] EWCA Civ 1144 CA (Civ Div), in which Lord Justice Tomlinson held that the funders should pay the successful defendants' costs on the indemnity basis, despite the fact that it was not the funders who were guilty of poor conduct in the proceedings.

Part 36 and interest – security for costs and the obvious conundrum

In *Potter v Sally Montague Hair and Spa 2016 WL* 06476252 CC (Nottingham) it was held that valid part 36 offers made in detailed assessment proceedings were to be treated as being inclusive of interest. Where an offer was not made pursuant to part 36, the offer was to be treated as inclusive of interest unless the terms of the offer specified otherwise.

Also, an exercise in logic when considering security for costs applications from Mr Justice Snowden in the case of *Pittville Ltd v Hunters & Frankau Ltd* [2016] EWHC 2683 (Ch) Ch D, when he held that a deputy master had erred in finding that the claimant's impecuniosity was a "good reason" for its failure to comply with an unless order, requiring it to provide security for costs. A claimant's lack of financial resources cannot be both the reason for the making an order for security for costs and a "good reason" for not complying with it.

Breakdowns are essential – a cautionary tale

Finally, a reminder that breakdowns attached to invoices are essential from the decision in *Parissis v Matthias Gentle Page Hassan LLP* 2017 WL 11862 QBD, unreported.

The case concerned a successful appeal by the client against an order that he pay the costs of seeking a detailed assessment of his solicitor's costs.

The solicitors rendered an invoice to the client for work undertaken in chancery proceedings, but with no breakdowns of time spent, or the time period covered. The invoice provided that the client could be entitled to have the charges reviewed by way of detailed assessment pursuant to section 70 of the Solicitors Act 1974. The client requested a breakdown of the invoice, but no breakdown was forthcoming. The client issued proceedings under section 70, seeking an assessment of the invoice. The court ordered an assessment and that the solicitors provide a detailed breakdown of the bill. On receipt of the detailed breakdown, the client paid the fees in full, along with interest. Because of the operation of the 1/5th rule, the client was ordered to pay the solicitors' costs of assessment. The client was also criticised for failing to bring proceedings under section 64 of the Solicitors Act, which the court considered to be the more appropriate route (section 64 allows a client to request a detailed bill when presented with a gross sum bill).

[1] The 1/5th rule is set out in section 70(9) of the Solicitors Act and provides that in proceedings between a solicitor and client for an assessment of fees, if the fees are reduced by more than 1/5th, the solicitor meets the costs but if the reduction is less than 1/5th, the client pays the solicitor's costs.

The client appealed on the basis that the firm of solicitors had failed to provide a breakdown of the bill which amounted to special circumstances, justifying a departure to the usual costs order. The appeal court agreed that a breakdown should have been provided when requested. Further, the client could not be criticised for failing to bring proceedings under section 64 of the Solicitors Act when he was only advised of his right to challenge under section 70. In all the circumstances, this was not a run of the mill case and there was good reason to depart from section 70(9) that the client pay the solicitors' costs of assessment. The appeal was successful and the solicitors were ordered to pay their client's costs of the detailed assessment."

Proportionality and the conflicting views of the judiciary

In the winter 2016 edition of Costs Guru we discussed the new proportionality test and in particular, the case of *BNM v MGN Limited* [2016] EWHC B13 (Costs). In *BNM*, Senior Costs Judge Master Gordon-Saker reduced reasonable costs from £241,817.00 to £167,389.45, such figure including additional liabilities, and then further to £83,974.80 on the grounds of proportionality. In doing so, he reduced the ATE premium from £58,000 to £30,000, notwithstanding his acceptance that ATE was necessary and the premium reasonable.

However, in the recent case of *King v Basildon and Thurrock University Hospitals NHS Foundation Trust* [2016] EWHC B32 (Costs), Costs Judge Master Rowley disregarded additional liabilities before considering proportionality. He applied the proportionality consideration to the base costs only, as an approach consistent with the pre-Jackson position.

The conflicting views of the judiciary on the application of the new proportionality test will provide uncertain times. Master Rowley granted the defendant in *King* permission to appeal within 21 days of the court of appeal's ruling in *BNM*, the latter due to be heard in October 2017. So until then, as the saying goes, watch this space.

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