**Costs Budgeting: the Pride and the Passion**

**By Andrew Hogan Barrister at law[[1]](#footnote-1)**

1. Of all the procedural reforms introduced on 1st April 2013, costs budgeting is perhaps the one which has divided the legal profession and the judiciary on sharper lines than any other, with numerous proponents and opponents of this particular procedural reform.

2. I say this with deliberation, distinguishing the procedural aspects of the reforms, from what I would characterize as changes to the substantive law, through, for example the abolition of recoverable success fees and ATE premiums.

3. Costs budgeting continues to be an area of controversy, both in theory and in practice, and both in terms of the concept of budgeting costs on a prospective basis, and the detailed rules which implement the concept.

**The prelude**

4. When I first reviewed the Jackson proposals more than five years ago, in the aftermath of the publication of the Final Report, what struck me at the time was what I would regard as the flimsy evidential base for many of the proposed reforms.

5. In particular, the questions that I posed then, can be only slightly reformulated now. If the working hypothesis in 2010, was that costs were disproportionate and needed to be reduced, the key questions were and still are:

1. To what degree are civil litigation costs disproportionate, both collectively across the civil justice system as a whole, and individually, in the context of particular cases?
2. To what degree, or by how much therefore, should civil litigation costs be reduced from their current level, both collectively across the civil justice system as a whole, and individually in the context of particular cases?
3. In the light of the answers to 1 and 2, what should any relevant rule change be seeking to achieve, through a control mechanism for the reduction of costs?
4. What transactional or frictional costs, might be generated by such a control mechanism, which need to be offset against any reductions achieved by rule change?
5. How can the effects of this rule change be measured by quantitative data, or other hard evidence, which enables the potential savings/increases in costs to be evaluated?

6. In particular terms, looking at my question (1) although numerous senior members of the judiciary, the insurance lobby, Uncle Tom Cobley and all, have set out in numerous forum the notion that costs are disproportionate, I have never seen any set of comprehensive figures, which tell me how much disproportionate civil litigation costs amount to, over a defined period, and what they should, by way of contrast amount to, if they were proportionate.

7. Turning to my question (2), it follows that there is no answer, as to what the target for reduction is: how can you judge whether a policy is working, if you don’t know what your end target is?

8. And question (3) would focus, on how you shape and apply various policies in a specific series of measures, in order to move from (1) to (2). The answer to question (4) would cause you to evaluate your proposed changes to see whether the law of unintended consequences might bite, with costs saved in general terms in one area, more than offset by an increase in costs in another area.

9. To give two practical examples, drawn from experience in recent years: has the reform to rule 3.9 with its emphasis on changing a culture of non-compliance, had the desired effect of reducing non-compliance which saves costs, or has the imposition of a culture of compliance increased costs through requiring lawyers to do more work, earlier in a case and through the costs of satellite litigation over non compliance ?

10. Have disproportionate costs (whatever that means) been reduced through the implementation of a regime of costs budgeting, or have costs increased through lawyers doing more work, to ensure that their costs are incurred rather than budgeted, earlier in the case, through the actual costs of drawing budgets and attendance at hearings, through delay in getting court dates for costs management adding to the costs of litigation? And how much judicial time has been spent on costs budgeting, which is time well spent, set against the opportunity costs of deploying it for any other tasks judges might do?

11. I don’t think anyone could tell you the answer to those questions posed by way of example. What is of concern however, is when those questions aren’t asked.

12. It will be noted that the above questions are posed in the context of what could be described as evidence based policy making. Evidence based policy making can be summarised thus:

*Using evidence to inform policy is not a new idea. What is new and interesting however, is the increasing emphasis that has been placed on the concept in the UK over the last decade. The term EBP gained political currency under the Blair administrations since 1997. It was intended to signify the entry of a government with a modernising mandate, committed to replacing ideological driven politics with rational decision-making. EBP has now become a focus for a range of policy communities, where the government departments, research organisations or think tanks.*

*EBP is a discourse or set of methods which informs the policy process, rather than aiming to directly affect the eventual goals of the policy. Advocates a more rational, rigourous and systematic approach. The pursuit of EBP is based on the premise that policy decision should be better informed by available evidence and should include rational analysis. This is because policy which is based on systematic evidence is seen to produce better outcomes. The approach has also come to incorporate evidence-based practices.*

*(Evidence Based Policy Making: Sutcliffe and Court ODI 2005)*

13. Evidence based policy making therefore, might be seen as a tool to fashion a set of rules which meet utilitarian goals: to produce the best and fairest rules, benefiting the widest range of groups and interests overall. But we do not live in Utopia. The rules are not fashioned on the basis of the greatest good for the greatest number.

**Costs budgeting and utility**

14. There is of course no such thing as utility in costs. There are only sectional interests. A common question from my students and pupils to me, is why rules about costs (or laws in general) are the way they are. The answer is usually because historically matters have been dealt with in a particular way or because it suits a particular interest group or collection of groupings that that is so.

15. Another aspect of rule change would be to consider more widely the behavioural economic and psychological consequences of changing a rule: the importance of these two interlinked disciplines is manifest in government policy both by the establishment of the behavioural insight team in the Prime Minister’s office and the way that many government policies are increasingly constructed to take into account these factors.

16. In the context of costs management although this may be seen by the judiciary or some elements of the judiciary as a tool by which the Holy Grail of proportionality may be achieved, conversely by liability insurers or the NHSLA costs management may well be seen as a “big stick” with which to beat claimants pursuing claims against them, offering an extra opportunity to seek to drive down costs or to limit their incurrence. Thus two very different agendas can coalesce.

17. Even if the process causes delay to the civil litigation process, this again may work to the benefit of liability insurers or the NHSLA, which can enjoy possession of their funds, for a longer period of time before having to pay them out by way of damages and costs.

18. Notwithstanding then that there will be no such thing as a utilitarian solution but only a solution based on the interests involved, even so, it can be noted that there are benefits to be derived from an evidence based policy approach:

*Given that the benefits of evaluations are hard to account for in an instrumental way (i.e that evaluations leads to improvements in the policies they evaluate), then it is hard to complain about the political expectations of politicians and officials that work for them: without such expectations it is arguable that few evaluations would ever be conducted. If there is a good chance that any report we pickup has been written under some pressure to produce favourable or non-embarrassing results-some direct, some indirect and some self imposed by researchers anticipating the reactions of those paying them-what is the value of any evaluation picked at random, aside from any political uses it might have? The value of even the most rigourous evaluation usually lies in the more indirect it may enhance our understanding of how policies and interventions work and informed debates and deliberations about policy change. The value of the research becomes a matter of how far can make this indirect contribution. In debates about how policy works, even research that might have been designed to find a preestablished position can have value if it contains a serious attempt to weigh up this position against alternatives and/or if it provides evidence of data that can be used by others to do this. Only if it does neither could one consider it junk.*

*(Evidence based politics. Government and the production of policy research.-The LSE GV314 group)*

**Costs budgeting and evidence**

19. So when evaluating the benefits of costs budgeting and costs management more generally it might be thought logical to consider whether this rule change has worked to reduce costs, from disproportionate levels to proportionate levels and to consider how much the rule change itself has cost in terms of transactional or frictional costs.

20. This latter consideration could be looked at narrowly in terms of the costs of drawing up budgets, negotiating the attending costs management hearings and the ongoing process of review of costs: “the costs of the costs”. Alternatively it could consider costs more widely in terms of the effect of any delays created by the process the knock-on consequences for higher litigation costs overall and perhaps wider economic benefits and dis-benefits.

**The Harbour lectures of 31st May 2015**

21. Last year, two lectures were delivered by Jackson LJ and the Master of the Rolls, which touched upon costs budgeting. Remaining with Jackson LJ’s lecture for the moment. Paragraph 2.1 of the lecture states quite baldly that “Costs management works.”, but this is a statement of hope or intent, rather than a conclusion based on data.  The benefits of costs management which are set out in the balance of section 2 of the lecture could also be regarded as aspirations rather than as observed results.

22. Moreover there was little sense of scale in the paper given that we know that the majority of cases or claims settle without issue, that of those that are issued the vast majority settle before trial, and yet the costs budgets requirement was imposed in every case on the multitrack requiring the expenditure of resources to produce cost budgets and to comply with the costs management rules on the basis of a scenario which will never come to pass: that all cases will go to trial.

23. The objections to the process are also dealt with within section 2 and it is interesting to note the way that they are dismissed.  Jackson LJ puts forward the proposition that in no other commercial project would someone embark upon their project without a budget.

24. That may be so but the litigation budgets which are produced will of course bear no resemblance to the likely course of litigation: which will conclude by way of settlement in the majority of cases despite an elaborate budgeting exercise which takes matters forward through to trial. No one in commercial life draws up a five year budget for a project that is likely to last one year.

25. It is also interesting to note that the final point which is prayed in favour of the process is that Singapore is now in the process of introducing costs management into its procedural rules. Given the malign influence of Singaporean jurisprudence in the **Mitchell** debacle it seems surprising that this particular hobbyhorse is still being ridden.

26. If one therefore looks to consider within the lecture what the problems with costs management were at that time, the first point to note was the problem of judicial inconsistency. What this means of course is that the district bench has widely differing approaches and attitudes to the problems and challenges of cost management.

27. The second problem that was noted is that the length of some cost management hearings and the micromanagement that takes place which is antithetical to what costs budgeting is trying to achieve.

28. The third problem noted is the wide variation in the forms of cost management orders issued by different court this is properly a refinement of the first problem: and the issue of delays and backlog is noted as a fourth problem.

29. This issue was particularly acute in the context of clinical negligence cases issued in London. Indeed one of the few hard facts contained within the lecture points to a nine-month delay being added to clinical negligence cases.

30. Jackson LJ’s proposed solution was simply to remit the requirement of costs budgeting in those cases which have already been issued: in effect providing a”get out of jail free card” to the Masters in the Queen’s bench division to deal with the backlog. That was a stunning recognition that costs budgeting has failed in the context of an entire class of litigation.

31. The fifth point which was noted is that there was that there was no effective mechanism for dealing with costs already incurred. Given that very substantial sums will already have been incurred but which are not taken into account or not dealt with at the budgeting phase the ambit of costs budgeting as then constituted was handicapped from the start.

32. The further point to note is that the time for filing and exchanging budgets which was often done far in advance of any costs management hearing meant that the work which was done had to be redone or was otherwise otiose in the context of costs budgeting.

33. Difficulties at detailed assessment were already becoming apparent given that there was a mismatch between Precedent H and the currently constituted bill of costs. The origins of this problem can be traced back to the fact that no one seems to have considered when the rules were drafted how precedent H could be set alongside a bill of costs in the form of the schedule annexed to part 47.

34. If you cannot tell whether the individual parts of the budget have been exceeded or not what is the point of having individual phases of a budget and agonising over their content? The shortcomings of precedent H which has to be one of the most un-friendly and awkward forms ever devised for the purposes of civil litigation had become well known.

35. The further point and perhaps the most important point contained in the lecture is that there is a suggestion in paragraph 4.5 that costs management orders should not be made in every case as rule 3.15 and practice direction 3E contemplate but should be used as a matter of discretion by the court as part of general case management. Jackson LJ further noted at paragraph 4.6

*A number of judges who are skilled and swift cost management have expressed concerns about the above solution. They fear will become an excuse for certain of their colleagues to “opt out” and thus lead to forum shopping. I do not share these fears. I believe that once criteria laid down all judges will conscientiously follow them. It is important that there be a uniform approach across all civil courts. There will be an obligation on all judges with leadership roles actively to monitor how “their” judges are exercising the discretion to costs manage. If different practices emerge, this should be drawn to the attention of the deputy head of civil justice, so that he can give appropriate guidance*

The lecture concluded with this prediction:

*I predict that within 10 years cost management will be accepted as an entirely normal discipline and people wonder what all the fuss was about.*

Now in January 2016, something of a change in view took place, because of course, there was a proposal, for the introduction of fixed costs, for all cases up to £250,000. By the end of 2016.

36. The oddity, is that looking back, the lecture taken as a whole seemed to set out an excellent case for the abolition of costs budgeting across the bulk of civil litigation. I welcomed the paper. I commented at the time it provided a comprehensive although anecdotal overview of the then current issues in relation to costs management.

37. It provided no answers whatsoever at an empirical level as to how much cost management is costing, whether it is a worthwhile exercise in that it is reducing disproportionate costs to proportionate costs and made no attempt to consider what the overall economic benefits and disbenefits of the process are.

**The April 2016 reforms**

38. Accordingly, some 11 months on from the Harbour Lectures, and with the interesting proposals about fixed costs, now looming particularly large, whether in respect of NIHL, clinical negligence or virtually everything, if the figure of £250,000 ever comes to pass, one turns to consider a recent bout of reforms, in relation to the costs budgeting regime, in order to see how things stand and are likely to unfold over the coming year.

39. The rubric to the new rules provides as follows:

*The costs management rules are amended to provide that only the first page of Precedent H is to be exchanged and filed in cases where the value of the claims is under £50,000 or the costs are less than £25,000. Claims made on behalf of a child are also excluded from the regime, and in cases where the Claimant has a limited or severely impaired life expectation the court will ordinarily disapply cost management. Amendments are also made to the point at which a costs budget must be filed. For lower value claims the budget must be filed with the Directions Questionnaire, for other claims it must be filed 21 days before the case management conference. Agreed budget discussion reports must be filed seven days before the first hearing. Amendments are also made to provide that costs claimed in each phase of the proceedings, are made available to the court when assessing costs at the end of a case. Consequential amendments are made to Practice Direction 3E.*

40**.** Thus the scope of the application of the rules is stated as follows:

***3.12***

*(1) This Section and Practice Direction 3E apply to all Part 7 multi-track cases, except—*

*(a) where the claim is commenced on or after 22nd April 2014 and the amount of money claimed as stated on the claim form is £10 million or more; or*

*(b) where the claim is commenced on or after 22nd April 2014 and is for a monetary claim which is not quantified or not fully quantified or is for a non-monetary claim and in any such case the claim form contains a statement that the claim is valued at £10 million or more; or*

*(c) where in proceedings commenced on or after 6th April 2016 a claim is made by or on behalf of a person under the age of 18 (a child) (and on a child reaching majority this exception will continue to apply unless the court otherwise orders); or

(d) where the proceeding are the subject of fixed costs or scale costs; or

(e) the court otherwise orders.*

*(1A) This Section and Practice Direction 3E will apply to any other proceedings (including applications) where the court so orders.*

*(2) 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.*

41. Rule 3.13 has been tweaked, to deal with the revised requirements for the submission of budgets and the new requirement to file a report: a requirement for the parties to talk to each other. Or another touch or series of touches required on the file, with scope for juicy disputes about non-compliance.

***3.13***

*(1) Unless the court otherwise orders, all parties except litigants in person must file and exchange budgets—*

*(a) where the stated value of the claim on the claim form is less than £50,000, with their directions questionnaires; or*

*(b) in any other case, not later than 21 days before the first case management conference.*

*(2) In the event that a party files and exchanges a budget under paragraph (1), all other parties, not being litigants in person, must file an agreed budget discussion report no later than 7 days before the first case management conference.*

42. The sanction remains unchanged in the following rule:

***3.14*** *Unless the court otherwise orders, any party which fails to file a budget despite being required to do so will be treated as having filed a budget comprising only the applicable court fees.*

43. There has been no change to the wording of the rule, which deals with the making of a costs management order: this rule is very useful in certain County Courts, as it provides the hook by which a District Judge can dispense with costs management, budgets having been filed and remaining extant for the purposes of any later detailed assessment.

***3.15***

*(1) In addition to exercising its other powers, the court may manage the costs to be incurred by any party in any proceedings.*

*(2) The court may at any time make a ‘costs management order’. Where costs budgets have been filed and exchanged the court will make a costs management order unless it is satisfied that the litigation can be conducted justly and at proportionate cost in accordance with the overriding objective without such an order being made. By a costs management order the court will—*

*(a) record the extent to which the budgets are agreed between the parties;*

*(b) in respect of budgets or parts of budgets which are not agreed, record the court’s approval after making appropriate revisions.*

*(3) If a costs management order has been made, the court will thereafter control the parties’ budgets in respect of recoverable costs.*

44. There still remains scope for applications to court for revisions of the budget: this remains an area, where there is a paucity of experience, as so few of them are made, and the philosophical tension between setting a budget at the outset and then some way down the road, changing it, to what degree and for what reason remains unclear.

***3.16***

*(1) Any hearing which is convened solely for the purpose of costs management (for example, to approve a revised budget) is referred to as a ‘costs management conference’.*

*(2) Where practicable, costs management conferences should be conducted by telephone or in writing.*

45. Budgeting remains a key element of case management however:

***3.17***

*(1) When making any case management decision, the court will have regard to any available budgets of the parties and will take into account the costs involved in each procedural step.*

*(2) Paragraph (1) applies whether or not the court has made a costs management order.*

46. And at the end of the case the position remains:

***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; and*

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

*(Attention is drawn to rules 44.3(2)(a) and 44.3(5), which concern proportionality of costs.)*

47. More detail is provided in the Practice Direction to part 3: it is interesting to note the attempt to extend the tentacles of costs budgeting and costs management to Chancery work.

*A. Production of Costs Budgets*

*Part 7 multi-track claims with a value of less than £10 million*

***1.****The Rules require the parties in most Part 7 multi-track claims with a value of less than £10 million to file and exchange costs budgets: see rules 3.12 and 3.13.*

***2.***

*(a)  In any case where the parties are not required by rules 3.12 and 3.13 to file and exchange costs budgets, the court has a discretion to make an order requiring them to do so. That power may be exercised by the court on its own initiative or on the application of a party. Where costs budgets are filed and exchanged, the court will be in a position to consider making a costs management order: see Section D below. In all cases the court will have regard to the need for litigation to be conducted justly and at proportionate cost in accordance with the overriding objective.*

*(b) In cases where the Claimant has a limited or severely impaired life expectation (5 years or less remaining) the court will ordinarily disapply cost management under Section II of Part 3.*

***3.****At an early stage in the litigation the parties should consider and, where practicable, discuss whether to apply for an order for the provision of costs budgets, with a view to a costs management order being made.*

***4.*** *If all parties consent to an application for an order for provision of costs budgets, the court will (other than in exceptional cases) make such an order.*

***5.*** *An order for the provision of costs budgets with a view to a costs management order being made may be particularly appropriate in the following cases:*

*(a)    unfair prejudice petitions under section 994 of the Companies Act 2006;*

*(b)    disqualification proceedings pursuant to the Company Directors Disqualification Act 1986;*

*(c)    applications under the Trusts of Land and Appointment of Trustees Act 1996;*

*(d)    claims pursuant to the Inheritance (Provision for Family and Dependants) Act 1975;*

*(e)    any Part 8 or other claims or applications involving a substantial dispute of fact  and/or likely to require oral evidence and/or extensive disclosure; and*

*(f)    personal injury and clinical negligence cases where the value of the claim is £10 million or more.*

48.The Practice Direction provides now that either where costs claimed do not exceed £25,000 or the claim is worth less than £50,000, only the frontispiece of precedent H needs to be exchanged.

***6.***

*(a) Unless the court otherwise orders, a budget must be in the form of Precedent H annexed to this Practice Direction. It must be in landscape format with an easily legible typeface. In substantial cases, the court may direct that budgets be limited initially to part only of the proceedings and subsequently extended to cover the whole proceedings. A budget must be dated and verified by a statement of truth signed by a senior legal representative of the party.*

*(b) Parties must follow the Precedent H Guidance Note in all respects.*

*(c) In cases where a party’s budgeted costs do not exceed £25,000 or the value of the claim as stated on the claim form is less than £50,000, the parties must only use the first page of Precedent H .*

*(The wording for a statement of truth verifying a budget is set out in Practice Direction 22.)*

49. An important set of provisions relate to the Budget discussion reports. This perhaps represents a practice which was already taking place in certain of the larger trial centres: being made as commonly agreed directions between the district judges:

*C. Budget discussion reports*

***6A.****The budget discussion report required by rule 3.13(2) must set out—*

*(a) those figures which are agreed for each phase;*

*(b) those figures which are not agreed for each phase; and*

*(c) a brief summary of the grounds of dispute.*

*The parties are encouraged to use the Precedent R Budget Discussion Report annexed to this Practice Direction .*

50. The significance of a costs management order, is then restated in the Practice Direction:

*D. Costs management orders*

***7.1*** *Where costs budgets are filed and exchanged, the court will generally make a costs management order under rule 3.15. If the court makes a costs management order under rule 3.15, the following paragraphs shall apply.*

***7.2****Save in exceptional circumstances-*

*(a)    the recoverable costs of initially completing Precedent H shall not exceed the higher of £1,000 or 1% of the approved or agreed budget; and*

*(b)    all other recoverable costs of the budgeting and costs management process shall not exceed 2% of the approved or agreed budget.*

***7.3****If the budgets or parts of the budgets are agreed between all parties, the court will record the extent of such agreement. In so far as the budgets are not agreed, the court will review them and, after making any appropriate revisions, record its approval of those budgets. The court’s approval will relate only to the total figures for each phase of the proceedings, although in the course of its review the court may have regard to the constituent elements of each total figure. When reviewing budgets, the court will not undertake a detailed assessment in advance, but rather will consider whether the budgeted costs fall within the range of reasonable and proportionate costs.*

***7.4*** *As part of the costs management process the court may not approve costs incurred before the date of any budget. The court may, however, record its comments on those costs and will take those costs into account when considering the reasonableness and proportionality of all subsequent costs.*

***7.5****The court may set a timetable or give other directions for future reviews of budgets.*

51.Note again, the injunction to revise budgets: this just doesn’t seem to be happening with the frequency that logically it should:

***7.6****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 disapprove the revisions, having regard to any significant developments which have occurred since the date when the previous budget was approved or agreed.*

***7.7****After its budget has been approved or agreed, each party shall re-file and re-serve the budget in the form approved or agreed with re-cast figures, annexed to the order approving it or recording its agreement.*

***7.8****A litigant in person, even though not required to prepare a budget, shall nevertheless be provided with a copy of the budget of any other party.*

***7.9*** *If interim applications are made which, reasonably, were not included in a budget, then the costs of such interim applications shall be treated as additional to the approved budgets.*

52.The vexed issue of hourly rates, has now been removed conclusively from the arena of budgeting: which is conceptually odd, and a pity as logically the number of hours/rate charged are crucial variables in determining the overall level of costs to be incurred.

***7.10*** *The making of a costs management order under rule 3.15 concerns the totals allowed for each phase of the budget. It is not the role of the court in the cost management hearing to fix or approve the hourly rates claimed in the budget. The underlying detail in the budget for each phase used by the party to calculate the totals claimed is provided for reference purposes only to assist the court in fixing a budget.*

53. The Guidance Notes to Precedent H, should be readily to hand for anyone drafting a budget, and in particular looking for an answer to the perennial question “what bit goes in which column”? and I have annexed them to this paper.

**Conclusions**

54. So where do we stand with costs budgeting in 2016? Well, it has been revised, by the last update to the CPR, but not fundamentally changed. The problems noted in the Harbour Lectures in 2015, have not been fundamentally addressed and will remain extant. There is still no real body of cases going through to DAH where budgeting is making an obvious difference.

55. Instead, the significant events of the last year were the suspension of costs budgeting in clinical negligence cases, and the proposal in January 2016, to render costs budgeting as antique a weapon for controlling perceived disproportionate costs as the cutlass or the longbow would be, through the new and exciting introduction of fixed costs up to £250,000.

56. But there seems no answer, and no likelihood of an answer to my 5 questions which I posed at the start of this paper: leaving aside the anecdotes, the warstories, the complaints of the Voice of Common Sense on the District Bench, does it actually work? And even if it works, could the same goal be achieved through other means and at lesser cost in terms of time, delay, money and judicial resources, so that the game is not worth the candle?

**ANDREW HOGAN**

**Ropewalk Chambers**

**andrewhogan@ropewalk.co.uk**

**Guidance Notes to Precedent H:**

1. Where the monetary value of the case is less than £50,000 [or the costs claimed are less than £25,000] the parties must only use the first page of Precedent H.
2. Save in exceptional circumstances, the parties are not expected to lodge any documents other than Precedent H and the budget discussion report. Both are available in Excel format on the MOJ website with PD 3E. If the Excel format precedent on the MOJ website is used , the calculation on page one will calculate the totals automatically and the phase totals are linked to this page also.
3. This is the form on which you should set out your budget of anticipated costs in accordance with CPR Part 3 and Practice Direction 3E. In deciding the reasonable and proportionate costs of each phase of the budget the court will have regard to the factors set out at Civil Procedure Rules 44.3(5) and 44.4(3) including a consideration of where and the circumstances in which the work was done as opposed to where the case is heard.
4. This table identifies where within the budget form the various items of work, **in so far as they are required by the circumstances of your case**, should be included.
5. Allowance must be made in each phase for advising the client, taking instructions and corresponding with the other party/parties and the court in respect of matters falling within that phase.
6. The ‘contingent cost’ sections of this form should be used for **anticipated costs** which do not fall within the main categories set out in this form. Examples might be the trial of preliminary issues, a mediation, applications to amend, applications for disclosure against third parties or (in libel cases) applications re meaning. Only include costs which are more likely than not to be incurred. **Costs which are not anticipated** but which become necessary later are dealt with in paragraph 7.6 of PD3E.
7. Any party may apply to the court if it considers that another party is behaving oppressively in seeking to cause the applicant to spend money disproportionately on costs and the court will grant such relief as may be appropriate.
8. Assumptions:
9. The assumptions that are reflected in this guidance document are **not** to be repeated. Include only those assumptions that **significantly** impact on the level of costs claimed such as the duration of the proceedings, the number of experts and witnesses or the number of interlocutory applications envisaged. Brief details only are required in the box beneath each phase. Additional documents are not encouraged and, where they are disregarded by the court, the cost of preparation may be disallowed, and additional documents should be included only where necessary.
10. Written assumptions are not normally required by the Court in cases where the parties are only required to lodge the first page.

9. Budget preparation: the time spent in preparing the budget and associated material must **not** be claimed in the draft budget under any phase. The permitted figure will be inserted once the final budget figure has been approved by the court.

|  |  |  |
| --- | --- | --- |
| Phase | Includes | Does NOT include |
| Pre-action | •• | Pre-Action Protocol correspondence Investigating the merits of the claim and advising client | • | Any work already incurred in relation to any other phase of the budget |
|  | • | Settlement discussions, advising on settlement and Part 36 offers |  |  |
|  | • | All other steps taken and advice given pre action |  |  |
| Issue/statements | • | Preparation of Claim Form | • | Amendments to statements |
| of case | • | Issue and service of proceedings |  | of case |
|  | • | 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 |  |  |
| CMC | • | Completion of DQs | • | Subsequent CMCs |
|  | • | Arranging a CMC | • | Preparation of costs budget |
|  | • | Reviewing opponent’s budget |  | for first CMC (this will be |
|  | • | Correspondence with opponent to agree directions and budgets, where possible |  | inserted in the approved budget) |
|  | • | Preparation for, and attendance at, the CMC |  |  |
|  | • | Finalising the order |  |  |
| Disclosure | • | Obtaining documents from client and advising on disclosure obligations | • | Applications for specific disclosure |
|  | • | Reviewing documents for disclosure, preparing disclosure report or questionnaire response and list | • | Applications and requests for third party disclosure |
|  | • | Inspection |  |  |
|  | • | Reviewing opponent’s list and documents, undertaking any appropriate investigations |  |  |
|  | • | Correspondence between partiesabout the scope of disclosure and |  |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | • | queries arisingConsulting counsel, so far as appropriate, in relation to disclosure |  |  |
| Witness | • | Identifying witnesses | • | Arranging for witnesses to |
| Statements | • | Obtaining statements |  | attend trial (include in trial |
|  | • | Preparing witness summaries |  | preparation) |
|  | • | Consulting counsel, so far as appropriate, about witness statements |  |  |
|  | • | Reviewing opponent’s statements and undertaking any appropriate investigations |  |  |
|  | • | Applications for witness summaries |  |  |
| Expert | • | Identifying and engaging suitable | • | Obtaining permission to |
| Reports |  | expert(s) |  | adduce expert evidence |
|  | • | Reviewing draft and approving report(s) |  | (include in CMC or a separate application) |
|  | • | Dealing with follow-up questions of | • | Arranging for experts to |
|  | • | experts |  | attend trial (include in trial |
|  | • | Considering opposing experts’ reports |  | preparation) |
|  | • | Any conferences with counsel primarily relating to expert evidence |  |  |
|  | • | Meetings of experts (preparing agenda etc.) |  |  |
| PTR | • | Bundle | • | Assembling and/or copying |
|  | • | Preparation of updated costs budgets and reviewing opponent’s budget |  | the bundle (this is not fee earners’ work) |
|  | • | 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 |  |  |
| Trial | • | Trial bundles | • | Assembling and/or copying |
| Preparation | • | Witness summonses, and arranging for witnesses to attend trial |  | the trial bundle (this is not fee earners’ work) |
|  | • | Any final factual investigations | • | Counsel’s brief fee and any |
|  | • | Supplemental disclosure and statements(if required) |  | refreshers |
|  | • | Agreeing brief fee |  |  |

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
|  | •• | Any pre-trial conferences and advice from counselPre-trial liaison with witnesses |  |  |
| Trial | • | Solicitors’ attendance at trial | • | Preparation for trial |
|  | • | All conferences and other activity outside court hours during the trial | • | Agreeing brief fee |
|  | • | Attendance on witnesses during the trial |  |  |
|  | • | Counsel’s brief fee and any refreshers |  |  |
|  | • | Dealing with draft judgment and related applications |  |  |
| Settlement | • | Any conferences and advicefromcounsel in relation to settlement | • | Mediation (should be included as a contingency) |
|  | • | 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) |  |  |

1. I work from Ropewalk Chambers and can be contacted via andrewhogan@ropewalk.co.uk or through my blog [www.costsbarrister.co.uk](http://www.costsbarrister.co.uk) . I welcome people connecting with me on Linked In. [↑](#footnote-ref-1)