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Costs Budgeting: a presentation for the Law Society

By Andrew Hogan Barrister at law[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 six 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

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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. In 2015, 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.

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.

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, 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 £100,000 or £250,000 ever comes to pass, one turns to consider last year's bout of reforms, in relation to the costs budgeting regime, in order to see how things stand.

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.

The bleeding obvious

54. The recent decision of Mrs Justice Carr in the case of **Merrix v Heart of England NHS Foundation Trust [2017] EWHC 346 QB** is perhaps unsurprising in its result, but has predictably caused a fluttering on the legal web dealing as it does with what is undoubtedly an important point of practice on the relationship between costs budgeting, costs management and detailed assessment.

55. It could also be regarded as a useful exposition of the "bleeding obvious" contained in folio after folio of beautifully written text, exploring all the nuances of what in essence is a very short point: once a costs management Order has been made, and costs budgets adjusted under it, then the criterion of "good reason" must be met for the budgeted costs on a detailed assessment, to be adjusted downwards or upwards, with the distinction between budgeted and incurred costs, now established in the revised practice direction 3E having been quite apparent from the earlier versions of the rules.

56. That the arguments were made at all is a reflection of the effect of the law of unintended consequences: although the higher judiciary (particularly in the TCC) anticipated in 2013 a co-operative approach to costs budgeting and costs management; in the trenches of personal injury and clinical negligence litigation, costs budgeting was only ever going to be seen as another stick with which to thump the receiving party at the outset of a case and detailed assessment its counterpart to thump the receiving party at the end of the case.

57. The judge's conclusions were as follows:

The judgment below was the product of the careful and reasoned thinking of an experienced specialist costs (and clinical negligence) judge, which naturally deserves respect. However, there is on any view legitimate scope for disagreement, as other recent judgments from specialist costs judges have readily demonstrated. For the reasons set out above, I have come to the conclusion that the answer given to the preliminary issue by the Costs Judge was wrong.

In my judgment, the answer to the preliminary issue is as follows: where a costs management order has been made, when assessing costs on the standard basis, the costs judge will not depart from the receiving party's last approved or agreed budget unless satisfied that there is good reason to do so. This applies as much where the receiving party claims a sum equal to or less than the sums budgeted as where the receiving party seeks to recover more than the sums budgeted.

The appeal will therefore be allowed.

To use a preliminary issue in a factual vacuum for resolution of issues such as this is inevitably to apply a blunt tool. There are so many potential variables and nuances that the answer on any particular given set of facts might require refinement. But the central message is that set out in CPR 3.18, namely that the approved or agreed budget will bind the parties at the detailed assessment stage (on a standard basis) whether the costs claimed

are for less than, equal to or more than the sums approved or agreed by that budget, unless there is good reason otherwise.

One can be confident that this decision on first appeal will not end the debate. I respectfully make the perhaps obvious point that the issue would appear to be ripe for early consideration by the Court of Appeal raising, as it does, an important point of principle or practice. Indeed, I learned only days before the appeal came before me that there is in fact an appeal already listed to be heard in the Court of Appeal this May against Master Whalan's decision in Harrison (by way of "leapfrog" direction and albeit on a "floating" basis only). It may be that any appeal from this decision could be listed alongside that matter, if that were thought appropriate.

Whatever the future holds, however, it is important that a growing body of judgments on the same issue does not emerge in piecemeal manner. It is essential that there is procedural co-ordination. The same solicitors and/or counsel are involved in many of these matters in what is a relatively small world. I am told that many stays of detailed assessments are already in place, pending the outcome of this appeal. The parties may accept my judgment as binding for their purposes. Alternatively, it may be that further stays need to be imposed, to prevent unnecessary court and judicial time and expense being devoted to a debate which the Court of Appeal is very shortly going to consider.

58. The decision only applies to what are now termed by Practice Direction 3E "budgeted costs". Incurred costs, which have been expressly left out of the budgeting process are not subject to the test applied in rule 3.18.

59. Conversely I opined at the time, the decision could prove to be quite important in two other respects. The first and narrower point is the requirement now for a paying party to be quite specific whether in the Points of Dispute or a witness statement as to why there should be a departure downwards from budgeted figure for costs on a detailed

assessment, addressing with particularity the reason which is said to be a "good reason".

60. The second wider point is that the decision will surely prompt a change in litigation behaviour. If incurred costs are not subject to the "good reason" requirement, or the stringencies of a costs management process, there will be an enhanced incentive to front load the preparation of a case, so that as high a percentage of the costs as possible, are in the incurred column, rather than potentially subject to the strait jacket imposed by a robust costs budgeting exercise.

Harrison v University Hospitals and Coventry and Warwickshire NHS Trust [2017] EWCA Civ 792.

61. The most significant decision in the last four years on costs budgeting was handed down by the Court of Appeal in the case of **Harrison v University Hospitals and Coventry and Warwickshire NHS Trust [2017] EWCA Civ 792**. This was an appeal from a decision of Master Whalan, made on a detailed assessment.

62. The only substantive judgment was given by Davis LJ with evident asperity as he plainly wondered why some of the points which were being run were being argued before him: I suspect he had forgotten that counsel do not choose the cases they take on, and often do not choose the points they are asked to argue.

63. Be that as it may, the issues were described in these terms:

1.This appeal raises issues of some general importance in the context of costs. In particular, the two principal issues are ones which concern the relationship between costs budgeting and detailed assessment and which appear to have attracted sharply divided views among those specialising in

this area. Ultimately, they are to be resolved by a process of interpretation of the relevant Rules and related Practice Directions.

2. The first issue can be summarised in this way. Where a Costs Management Order ("CMO") approving a costs budget has been made in the course of civil proceedings is a costs judge on a subsequent detailed assessment precluded from going below the budgeted amount unless satisfied that there is good reason for doing so? Or is there an entitlement to do so without any prior requirement of good reason for going below the budgeted amount?

3. The second issue is whether, with regard to costs incurred prior to the budget ("incurred costs"), there is or is not a like requirement of good reason if a costs judge on a subsequent detailed assessment is to depart from the amount put forward at the relevant costs management hearing.

4. A third, and entirely discrete, point is also raised. This is as to when, for the purposes of the transitional provisions relating to proportionality contained in CPR 44.3 (7), a case is to be treated as "commenced".

64. The actual decision of Master Whalan was summarised as follows:

17. Master Whalan took the view that so far as budgeted costs were incurred CPR 3.18 precluded him from subjecting them to a "conventional" detailed assessment at the behest of the appellant as paying party unless good reason for doing so was shown. (At the same time, however, he indicated that he was receptive to arguments on individual items to the effect that good reason did exist.) As to incurred costs, Master Whalan – to an extent founding himself on some observations of Sales LJ giving the judgment of the court in Sarpd Oil International Limited v Addax Energy SA [2016] EWCA Civ 120, [2016] 2 Costs LR 227 – said that although incurred costs could not themselves have been approved as such at the case management conference nevertheless they would have featured in the overall budget put forward at the conference and thus had a "certain status". Master Whalan indicated that, with regard to the incurred costs, it

was "in practical terms" required that good reason likewise should be shown if there was to be a departure from what was set out in

Precedent H. As to the date when the case commenced, Master Whalan held that in the present case that was when the letter was sent (on 27 March 2013) by a prescribed method which would lead to next-day delivery and so was prior to 1 April 2013. In the result, Master Whalan assessed the recoverable costs at £420,168 (including success fee and ATE premium). He ordered the appellant to pay the costs of the assessment.

65. The resolution of the first issue for anyone who actually reads the rules and Practice Direction would seem to be "bleeding obvious" as I observed above in relation to the case of **Merrix** but which was approached by the court in the following way:

25. So far as the first issue before us is concerned, that was precisely the point that fell for decision in the case of Merrix, decided on 24 February 2017 by Carr J. There is no room for distinction on the facts: either that case was rightly decided or it was wrongly decided. Mr Latham (of course) said that it was rightly decided. Mr Hutton (of course) said that it was wrongly decided. Certainly it is not a decision binding on this court.

26. Mr Hutton noted that by her decision Carr J had on appeal departed from the decision of a very experienced regional costs judge (A908M096): whose decision at first instance had itself in the interim been followed, albeit "with some hesitation", by another very experienced regional costs judge in another case (A90LE252).

27. Since the decision of Carr J is reported and readily available to anyone interested in questions of costs I do not propose here to detail her reasoning. She set out fully the background of the proposals of Sir Rupert Jackson; the contents of the relevant Rules and Practice Directions; and the competing arguments of counsel (which in truth appear to have tracked the competing arguments advanced to us). She reviewed a number of authorities cited to her. The core of her conclusion perhaps finds its clearest summation in paragraphs 67 and 68 of her judgment. She considered it plain from the

wording of CPR 3.18 that no distinction was made between the situations where it was claimed on detailed assessment that the budgeted figures were or were not to be exceeded. At a later stage, she indicated that she accepted that costs budgeting was not an advance detailed assessment; but, as she put it at paragraph 78, there was no suggestion that there should not be any detailed assessment: "on the contrary, the question is how that assessment should be conducted".

66. The Court of Appeal then went on to approve the approach taken by Carr J in the **Merrix** decision:

28. I am in no real doubt that Master Whalan reached the right conclusion on this issue and that the conclusion of Carr J in Merrix was also correct, for the reasons which she gave.

67. Davis LJ deprecated the arguments advanced which were said to be supported by various extra-judicial sources:

29. I have to say that I was a bit bemused by some of the aspects of the arguments advanced before us. At times the citation not only of authorities but also of what were described as "extra-judicial documents" almost descended into a kind of arms race in collecting views or comments which might lend support to one point of view with regard to costs budgeting in preference to another. Indeed at one stage we were taken by counsel to a number of comments of Sir Rupert Jackson himself, writing extra – judicially, seemingly with an aim on the part of counsel to extracting some kind of clue as to what he had intended or what he would have intended or what he understood had been intended. This is, with respect, beside the point. What we have to do is construe the wording of CPR 3.18 (produced, no doubt, under the auspices of the Civil Procedure Rule Committee): thus on basic and ordinary principles the legislative intention is to be gathered from the words used. For this reason alone, therefore, I was not much moved by Mr Hutton's courteous but firm insistence that to understand the rule one has to understand the "realities"; and for that purpose one had, he said, to be at

the "coal-face" of costs management decision making (which virtually all appellate and many High Court judges are, I accept, not).

68. An interesting raised in the course of the appeal, but which the Court plainly thought was neither here nor there, was the whether the degree of scrutiny provided to costs budgets when a costs management order was made, was appropriate.

69. In years gone by, I recall undertaking detailed assessments lasting three days, where a bill of costs was no more than £150,000. Last year, I undertook a summary assessment of a schedule of costs claiming £140,000 in the Commercial Court, where the costs were assessed within 15 minutes. As is well known, on a provisional assessment of a bill of costs of up to £75,000, the court service allows a costs judge only 40 minutes.

70. The point is that, a philosophical shift has been adopted by the judges, that rather than spend days or even hours, agonising over a claim for costs they will administer "rough justice" when making decisions.

30. In many ways, Mr Hutton's submissions in fact came close to an attack if not on the whole principle of costs budgeting then at all events on the efficacy in practice of costs budgeting. That of course has been the subject of extensive debate over recent years. But I do not need to go into the competing arguments – themselves discussed both in, for example, the Civil Courts Structure Review: Final Report of Lord Justice Briggs (2016) and in Sir Rupert Jackson's own recent book on The Reform of Civil Litigation (2016) – simply because, put shortly, the system is now enshrined in the Civil Procedure Rules. At all events Mr Hutton asserted – and assertion is what it was – that the whole costs management system not only has been but still is "creaking". He further said that if a CMO were to convey the notion that, for any subsequent detailed assessment, the matter was in effect to be regarded as already determined by the approval of budgets in the CMO then that would cause parties to devote even more time and resources and argument to costs management hearings, to the detriment of the prompt processing of the litigation and at the risk of overwhelming the courts: whereas if all were left to detailed assessment then matters could, he

sought to say reassuringly, be assessed fully and fairly and properly by expert costs judges on an itemised basis , and with an informed view of issues such as proportionality.

31. The premise underpinning Mr Hutton's argument thus was that CMOs in effect are but summary orders which at best give no more than a snapshot of the estimated range of reasonable and proportionate costs: often reached, as Mr Hutton would have it, on a broad brush or rough and ready judicial approach after a hearing which would have been limited in time, rushed in argument and incomplete in the information advanced.

71. Accordingly a "light touch" approach to costs management can be seen to be very much part of the zeitgeist when it comes to assessing costs and not something that the Court of Appeal regards as objectionable or even out of the norm.

72. This decision also marks the resurrection of **Cook on Costs** as an authoritative source of costs wisdom: under the new authorship of Master Rowley and District Judge Middleton, the text has regained its authority, that certainly I think had declined in recent years, as the following passage makes clear from the judgment in Harrison.

32. It is to be noted that this sceptical appraisal, although no doubt shared by some, is not shared by others who undoubtedly can be said to be at the "coal-face". Indeed, it is roundly said in the latest edition of Cook on Costs (2017 ed, at pages 230-1) that to sanction, at detailed assessment, a departure from the budget in the absence of good reason would overlook (among other things) that budgeted costs are already required to have regard both to reasonableness and to proportionality; that the aims of costs budgeting include a reduction in detailed assessments and of issues raised in points of dispute; and that the element of certainty to clients (in the form of knowing what costs they are likely to face, in terms of payment or recovery) would be removed. As also posed by Master Gordon-Saker in the case of Collins v Devonport Royal Dockyard Limited (8th February, 2017: AGS/1602954), to which we were referred in the written arguments: "… what would be the point of costs budgeting (and the considerable resources

it has required) if the resulting figures amount to nothing more than a factor, guidance or cap at detailed assessment?" He rejected in that particular case the argument of the defendant, in seeking on detailed assessment to reduce an agreed budget figure, that an agreed or approved budget was, for the purposes of detailed assessment, nothing more than guidance.

73. The court did however note that the requirement of proportionality should be specifically addressed, when setting a costs budget: and specifically mentioned the value of the claim.

74. This could be quite important: in my experience, decisions on costs budgeting in practice chiefly focus on what legal spend needs to be, to complete a phase: when the emphasis in the rules, that costs can be both reasonable and necessary, but still disproportionate might indicate that a better starting point is to look at the overall value of the case, consider what the overall level of costs should be, and then divide the total by phases. But this is not happening in practice.

33. These sentiments are also reinforced by, for example, the requirement that a costs budget has to be signed and certified as being a fair and accurate assessment of the costs which it would be reasonable and proportionate for the client to receive; and by the requirement under the Rules and Practice Directions for revised budgets, upwards or downwards, to be filed and approved where the estimates change. In this regard, it is also in my view particularly important overall to bear in mind that a judge who is being asked to approve a budget at a costs management hearing must take into account, in assessing each budgeted phase, considerations both of reasonableness and of proportionality. Proportionality may be, to give but one example, of particular potential relevance where the costs prospectively claimed are very large and the amount at stake in the claim relatively small.

75. The Court of Appeal also seems quite relaxed by the concept of a 30 minute detailed assessment: the effect of its ruling should be, to reduce large parts of a detailed assessment to arguments (if there are any) that there is a good reason to depart from an approved costs budget.

34. Moreover, if approval of a costs budget by a CMO has the more limited status which the appellant would ascribe to it then that would have a potentially adverse impact on parties thereafter attempting to agree matters without requiring a detailed assessment. Although Mr Hutton queried if that was one of the perceived prospective benefits of the costs budgeting scheme, it seems to me – as it did to the editors of Cook on Costs – wholly obvious that it was indeed designed to be one of the prospective benefits of cost budgeting that the need for, and scope of, detailed assessments would potentially be reduced.

76. The nub of the case was that the Court of Appeal decided, unsurprisingly, that on conventional principles of construction, the words of the rules and Practice Direction mean exactly what they say.

35. Against that context, I turn to the critical issue of the actual wording of CPR 3.18 (b). Mr Hutton's arguments were to the effect that there is a degree of ambiguity in the language used, justifying a purposive approach to its interpretation. Since, for the reasons I have sought to give above, the purposive approach which he advocates rests on very shaky foundations that hardly assists him. But in any event I do not consider there to be any real ambiguity in the words at all.

36. The appellant's argument has this initial, and unattractive, oddity. If it is right, it involves a most unappealing lack of reciprocity. It means that a receiving party may only seek to recover more than the approved or agreed budgeted amount if good reason is shown; whereas the paying party may seek to pay less than the approved or agreed budgeted amount without good reason being required to be shown. It is difficult to see the sense or fairness in that. Nor does this argument show much appreciation for the position of the actual parties to the litigation – not just the prospective paying party but also the prospective receiving party – who need at an early

stage in the litigation to know, as best they can, where they stand: precisely one of the points validly made in Cook on Costs (cited above).

37. The appellant's argument requires that the word "budget", as used in the then version of the Rule, merely connotes an available fund. But given that "good reason" is, as conceded, required if the amount claimed on detailed assessment exceeds the approved budget that of itself surely carries with it the notion that the word "budget" comprehends a figure. Moreover, the words "depart from" are wide – or, to put it another way, open-ended. As Mr Latham pointed out, had the intention really been that good reason is required only in instances where the sum claimed exceeds the approved budget then the Rule could easily and explicitly have said so. Further, the Rules in any event provide elsewhere for costs capping cases: it seems odd indeed to include a further variant of costs capping by this route. Yet further, and as indicated above, the appellant's argument bases itself almost entirely on the perceived advantages to the paying party with scant, if any, regard to the position of the receiving party: who no doubt will have placed a degree of reliance on the CMO. From the perspective of the receiving party it is all too easy to see that the paying party is indeed seeking to "depart from" the approved budget in endeavouring to pay less than the budgeted amount.

38. There is also nothing, in my view, in CPR 44.4 (3)(h) to tell against this interpretation. In fact, to read that sub-rule as requiring the approved or agreed budget to be considered only as a guide or factor and no more would involve a departure from the specific words of CPR 3.18. In this respect, it is in fact to be noted that the words of CPR 3.18 (a) positively mandate regard to the last approved or agreed budgeted cost for each phase of the proceedings. The two Rules are perfectly capable of being read together.

39. Consequently, since the meaning of the wording is clear and since it cannot be maintained that such a meaning gives rise to a senseless or purposeless result, effect should be given to the natural and ordinary meaning of the words used in CPR 3.18. In truth, that natural and ordinary meaning is wholly consistent with the perceived purposes behind, and importance attributed to, costs budgeting and CMOs.

40. Such a conclusion also accords with authority (albeit none binding on this court): not only in the form of the decisions in Merrix and Collins but also in the form of the remarks of Coulson J in McInnes v Gross [2017] EWHC 127 (QB). In that case, in the context of considering an interim payment on account of costs, Coulson J in terms said, at paragraph 25, that the significance of CPR 3.18 "cannot be understated" and meant that, where costs are assessed, the costs judge "will start with the figure in the approved costs budget." He roundly rejected the argument of the paying party that detailed assessment "will start from scratch." I agree with those observations of Coulson J.

43. I therefore consider that, overall, the costs judge was right in his conclusion on this particular point.

77. The Court of Appeal then declined to give guidance on what is a "good reason", in the sense of listing even illustrative examples of what might be a good reason for a departure from the budget. This is to be welcomed. It now gives a blank canvass to costs lawyers upon which they can paint a masterpiece, to argue that any number of scenarios, constitute a "good reason" to depart from the budget.

78. Obvious ones, include the non-completion of a phase, the value of a case budgeted on certain assumptions, collapsing at trial, or something akin to an "unknown unknown" arising during the course of the litigation. However a practical constraint on these arguments, may well be the facility to have a budget varied, should unforeseen consequences arise. The facility to vary a budget, does generate a tension with the concept that the budget sets the parameters of costs incurred in a case from start to finish.

44. Further, Mr Hutton's argument seemed to me to have two potential wider weaknesses. First, aspects of it seemed to be almost asserting that unless the Rules were interpreted as he argued a CMO approving a budget would operate in effect to replace the detailed assessment. That clearly is not right: as Carr J pointed out in Merrix. The effect, rather, is as to how the

detailed assessment is conducted. Second, and linked to the first point, the whole argument, in my opinion, tends to downplay the significance of the "override" built into the wording of CPR 3.18 (b). Where there is a proposed departure from budget – be it upwards or downwards – the court on a detailed assessment is empowered to sanction such a departure if it is satisfied that there is good reason for doing so. That of course is a significant fetter on the court having an unrestricted discretion: it is deliberately designed to be so. Costs judges should therefore be expected not to adopt a lax or over-indulgent approach to the need to find "good reason": if only because to do so would tend to subvert one of the principal purposes of costs budgeting and thence the overriding objective. Moreover, while the context and the wording of CPR 3.18 (b) is different from that of CPR 3.9 relating to relief from sanctions, the robustness and relative rigour of approach to be expected in that context (see Denton v TH White Limited [2014] EWCA Civ 906, [2014] 1 WLR 3926) can properly find at least some degree of reflection in the present context. Nevertheless, all that said, the existence of the "good reason" provision gives a valuable and important safeguard in order to prevent a real risk of injustice; and, as I see it, it goes a considerable way to meeting Mr Hutton's doomladen predictions of detailed assessments becoming mere rubber stamps of CMOs and of injustice for paying parties if the approach is to be that adopted in this present case. As to what will constitute "good reason" in any given case I think it much better not to seek to proffer any further, necessarily generalised, guidance or examples. The matter can safely be left to the individual appraisal and evaluation of costs judges by reference to the circumstances of each individual case.

79. In short, detailed assessment has not been abolished: its utility remains, but what perhaps Harrison will do through the resolution of this first issue, is recast the arguments from ones of reasonableness of incurring a particular item of costs, to arguments as to "good reason" to depart from figures which were floated and set at the start of the case.

80. The second issue that was debated in the case of **Harrison v University Hospitals and Coventry and Warwickshire NHS Trust [2017] EWCA Civ 792** was described in these terms:

3. The second issue is whether, with regard to costs incurred prior to the budget ("incurred costs"), there is or is not a like requirement of good reason if a costs judge on a subsequent detailed assessment is to depart from the amount put forward at the relevant costs management hearing.

81. The origins of this issue can be found in what might now be termed "the Sarpd Oil" heresy: this was a belief that gained some traction after obiter remarks by Sales LJ in the case of that of that name, that unless incurred costs were challenged at the costs and case management hearing, they were to be taken as drawn. This in turn led to lengthy recitals in costs management orders that the issue of incurred costs had specifically not been considered at the costs and case management hearing, and in effect, the issue was shunted off to detailed assessment.

82. The Court of Appeal in Harrison was at pains to state that the issue was to be resolved again, according to the wording of the rules and Practice Direction, applying the conventional canons of construction.

45. Although the second issue to an extent is connected with the first issue it seems to me that the same process of interpretation – that is, giving the wording of the Rules their natural and ordinary meaning – again indicates a clear outcome: this time, in favour of the appellant.

46. The starting point is this. CPR 3.18 (b), in its then form, relates to a departure from "the approved or agreed budget". But the costs incurred before the date of the budget were never agreed in this case. Nor were they ever "approved" by the CMO. On the contrary the focus of a judge making a CMO is on estimating the costs reasonably and proportionately to be incurred in the future: as the opening words of CPR 3.15 (1) make clear. In undertaking this exercise the court may have regard to costs stated already to have been incurred: and that may in turn impact on its assessment of what may be reasonable or proportionate for the future. But paragraph 7.4

of PD 3E is quite specific: as part of the costs management process the court may not approve costs incurred before the date of the budget costs management conference. What it can do is record in the CMO its comments (if any) on such costs: which are then be taken into account when considering reasonableness and proportionality: a direction now enshrined in the amended CPR 3.15 (4) and CPR 3.18 (c) with effect from 1 April 2017.

47. It follows, in my view, that incurred costs are not as such within the ambit of CPR 3.18 (in its unamended form) at all. Accordingly such incurred costs are to be the subject of detailed assessment in the usual way, without any added requirement of "good reason" for departure from the approved budget.

83. It should logically be conceptually clear then, that it follows that incurred costs are simply not up for consideration at a costs budgeting hearing, but rather to be dealt with at a detailed assessment.

84. However this is not the case. Instead incurred costs can be considered at the costs budgeting hearing in two potentially important regards. The first, is that the amount of incurred costs could logically form an important consideration in setting budgeted costs: if, for example disclosure has already been undertaken to all intents and purposes, by the time a costs budgeting hearing takes place, then a very limited amount of budgeted costs might be allowed for disclosure in the disclosure phase. Similar arguments might be raised in relation to other phases.

85. Secondly, the court can record comments on incurred costs. How useful this would be, is moot. If a district judge, simply records on the order that the incurred costs are "too high", how does this translate into specific findings or rulings on a detailed assessment? Any comments which can reasonably be recorded on the face of an Order, are likely to be so vague or non-specific as to be meaningless, and not least because in the context of a costs budgeting hearing the court would have only limited material before it, to give any context to highly impressionistic comments.

86. The issue of proportionality also has to be considered, and the conceptual confusion this might create will be explored below.

87. The Court of Appeal did firmly put to rest the spectre of Sarpd Oil, in so far as it lingered after the 1st April 2017 amendments to the costs budgeting rules:

50. In reaching his conclusion, the costs judge was clearly influenced by certain obiter remarks of Sales LJ delivering the judgment of the court in the case of Sarpd Oil (cited above) at paragraphs 41-44 of the judgment. That case did not in fact involve a detailed assessment as such but related to an issue on security of costs. I should also note that the budgeted costs in that case had been approved by the judge as part of an agreed CMO. At paragraph 43 Sales LJ indicated in general terms that, where positive comments were made in the CMO as to incurred costs, the receiving party would have the legitimate expectation of being likely to recover such costs if successful in the litigation. That having been said, at paragraph 44 of the court's judgment it was then said: "Parties coming to the first CMC to debate their respective costs budgets therefore know that that is the appropriate occasion on which to contest the costs items in those budgets, both in relation to the incurred costs elements in their respective budgets and in relation to the estimated costs elements. The rubric at the foot of Precedent H also makes that clear, since it requires signed certification of the positive assertion that "This budget is a fair and accurate statement of incurred and estimated costs which it would be reasonable and proportionate for my client to incur in this litigation." Similar points were made at paragraphs 47 and 50 of the judgment.

51. One can see that the wording used in Precedent H might tend to support such a view. But it does not accord with the language of paragraph 7.4 of PD 3E or CPR 3.15 or CPR 3.18: nor does it sit comfortably with the expressed entitlement (but not obligation) of the judge conducting the costs management hearing to record comments on incurred costs which, if made, will then be "taken into account" when considering reasonableness and proportionality.

88. The Court of Appeal then went onto consider proportionality and indicated that the incurred costs will be considered as part of the round of an overall view on proportionality, to be formed at the end of a detailed assessment. However, if budgeted costs have been set on the basis of what is reasonable and proportionate, in the light of the incurred costs which have already been accrued, one can legitimately ask oneself, what scope might there be in the ordinary case, for a global proportionality deduction?

89. The answer will depend on the figures in an individual case: where incurred costs are very modest, there might be very little scope: for the budgeted costs forming the majority of the costs will have been expressly set on the basis they are reasonable and proportionate.

90. Conversely, where the incurred costs are very great, not only might this result in modest budgeted costs being allowed, the scope for a proportionality argument to succeed must be greater: as the reasonableness and proportionality of those costs would be very much up for argument. One can see in this case "good reason" and proportionality arguments being run together.

52. I add that where, as here, a costs judge on detailed assessment will be assessing incurred costs in the usual way and also will be considering budgeted costs (and not departing from such budgeted costs in the absence of "good reason") the costs judge ordinarily will still, as I see it, ultimately have to look at matters in the round and consider whether the resulting aggregate figure is proportionate, having regard to CPR 44.3 (2)(a) and (5): a further potential safeguard, therefore, for the paying party.

91. The Court of Appeal concluded that incurred costs and budgeted costs are to be sharply distinguished for the purpose of a costs budgeting hearing, as provided for by the amended rules, and in relation to the former rules, when properly construed.

53. Costs budgeting, to be performed properly, undoubtedly places a real burden on the parties and court. It would potentially greatly extend that burden if incurred costs were to be subjected to the same degree of preparation and appraisal as budgeted costs. One can understand that there are principled arguments which nevertheless could favour such an approach: but there are also competing arguments. At all events, the then and current versions of the Rules and Practice Direction clearly sharply distinguish, for these purposes, incurred costs from estimated budgeted costs. I therefore think, with all respect, that those particular obiter comments of Sales LJ in Sarpd Oil may have gone too far in so far as they suggest otherwise in terms of how costs management hearings are to be approached in this respect.

54. I should add that it seems that those remarks of Sales LJ in Sarpd Oil with regard to incurred costs gave rise to a degree of disquiet. The matter came to the attention of the Civil Procedure Rule Committee. It considered that the consequences of those observations in Sarpd Oil were "unexpected". It also considered that the effect of those observations would be to complicate, not simplify, costs management and might undermine desirable attempts to agree costs budgets. The outcome of the Report of the relevant sub-committee of 9 December 2016 was to recommend that incurred costs indeed should be "decoupled" from budgeted costs so that the court's budgeting would only relate to the costs to be incurred (but retaining the court's power to comment on previously incurred costs, which could provide a "steer" thereafter): thus restoring the position to the perceived status quo ante. This is designed to be made clear beyond argument for the future by the subsequent amendments to CPR 3.15 and CPR 3.18 with effect from 6 April 2017. As will be gathered, I in fact consider, and disagreeing with the obiter remarks of the court in Sarpd Oil, that the status quo ante was in any event to the same effect.

92. The third and final issue hinged on when a case was commenced for the purpose of rule 44.3(7)(a): the court had little difficulty in deciding that meant when proceedings were issued by the court.

93. Although the rules are clear, and indeed have been clear in my view since 2013, in their intended effect, the Harrison judgement clarifies the position and confirms the interpretation. To that extent the judgment is a valuable jurisprudential contribution.

94. What the judgment does not do, and does not purport to do, is address the philosophical contradictions at the heart of the current costs budgeting regime.

95. In particular, in a world where there is an ever greater impetus to fixed costs, with their settled, if not arbitrary amounts, it could be thought to be puzzling that the rules remain so tender of the notion of incurred costs and their inviolability to control or assessment at an early stage in a case.

96. Moreover, the provision in the rules for variation of a budget, cuts against the provision of certainty that a costs management order is meant to achieve: if a party's potential liability for costs can be increased through the raising of a party' budgeted costs, then a decision made to contest a case, will have been made on the basis of an invalidated premise.

The Jackson Report II

97. The most recent policy discussion is to be found in "Jackson II" published in July 2017

4.1

The sea change. The costs management regime was, initially, greeted with horror in many quarters. However, opposition to this new discipline has slowly been diminishing.17 In the last eighteen months the process of accepting and embracing costs management has accelerated. This is for several reasons, including:

(i) High quality judicial training delivered by the Judicial College, which has improved the level of consistency between different courts.

(ii) Increasing familiarity with the process on the part of both practitioners and judges.

(iii) Increased willingness by the profession to discuss and agree budgets or parts of budgets before the first CCMC.

(iv) General acceptance that, one way or another, costs must be controlled in advance combined with a preference by the profession for costs management over FRC.

(v) Refinement and improvement of the costs management rules by the Civil Procedure Rule Committee ("the Rule Committee"), as experience of costs management has accumulated.

4.2

What should be done about incurred costs? PIBA make some constructive suggestions. DJ Middleton (one of my assessors) states:

"If appropriate account of incurred costs is taken by the case managing judge under the existing provision at CPR PD 3E 7.4, when approving budgeted costs, then the budgeted costs will reflect both the just and proportionate case management decision and the overall cost determined as reasonable and proportionate for any particular phase. Recent Judicial College training addressed this issue in some detail. In addition, the inclusion of CPR r.3.15(4) and r.3.18 (c) from April 2017, has reinforced the ability of the case/costs managing judge to make comments on incurred costs and the obligation on the assessing judge to take account of any comments."

It is not my function in this review to tinker with the costs management rules or with judicial training modules. It must be a matter for the Rule Committee whether any further amendments are required in relation to incurred costs.

5.1

Assessment costs management. Costs management is now working distinctly better than it was two years ago, although there is still room for

improvement. This is borne out both by the written submissions during this review and by numerous contributions during the seminars. That does not, however, dispense with the need for extending FRC.

5.2

Incurred costs. The principal problem is incurred costs which on average represent 32% of the claimant's budget and 15% of the defendant's budget. That is not an argument against having costs management. The lion's share of the costs still lie in the future and it is well worth controlling those future costs. Nevertheless, we do need to take steps to control incurred costs. PIBA have made some proposals which merit consideration. So has Master Cook, supported by the Senior Master.

5.3

Recommendation. When the reforms recommended elsewhere in this report have been implemented and have bedded in, consideration should be given to developing (a) a grid of FRC for incurred costs in different categories of case and (b) a pre-action procedure for seeking leave to exceed the FRC in that grid.

Access to Justice: the Woolf Report reconsidered

98. 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?

99. As one looks back, not to 2013, or even 2009 but 1999, and considers the CPR as originally conceived, and now in 2017 the plethora of different costs regimes, Aarhus, fixed costs, costs budgeting, costs capping etc contained within the rules, one really wonders how as a profession we have

strayed so far from the vision of simplifying civil justice by removing arcane procedural provisions.

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Appendix: Precedent H Guidance Notes

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:*

    a. *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.*
    b. *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* • *Settlement discussions, advising on settlement and* • *All other steps taken and advice given pre action*	• *Any work already incurred in relation to any other phase of the*
Issue/statement of case	• *Preparation of Claim Form* • *Issue and service of* • *Preparation of Particulars of Claim, Defence, Reply, including taking instructions, instructing* • *Considering opposing statements of case and* • *Part 18 requests (request and* • *Any conferences with counsel primarily relating to statements of case* • *Updating schedules and counter-schedules of loss*	• *Amendments to of case*
CMC	• *Completion of DQs* • *Arranging a CMC* • *Reviewing opponent's budget* • *Correspondence with opponent to agree directions and budgets,* • *Preparation for, and attendance at, the CMC* • *Finalising the order*	• *Subsequent CMCs* • *Preparation of costs for first CMC (this will inserted in the approved budget)*
Disclosure	• *Obtaining documents from client and advising on* • *Reviewing documents for disclosure, preparing disclosure report or* • *Inspection* • *Reviewing opponent's list and documents, undertaking any appropriate investigations* • *Correspondence between parties*	• *Applications for specific disclosure* • *Applications and requests for third party disclosure*

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

	• *Any pre-trial conferences and advice from counsel* • *Pre-trial liaison with witnesses*	
Trial	• *Solicitors' attendance at trial* • *All conferences and other activity outside court hours* • *Attendance on witnesses during the trial* • *Counsel's brief fee and any* • *Dealing with draft judgment and related*	• *Preparation for trial* • *Agreeing brief fee*
Settlement	• *Any conferences and advicefrom 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 Tomlin order* • *Advice to the client on (excluding advice included in the pre-action phase)*	• *Mediation (should be included as a*