

Costs budgeting

Latest Update

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Updated to reflect amendments to the CPR and recent cases.

Author(s)

Morwenna Macro - Five Paper

Introduced in April 2013 as part of the Jackson reforms, Costs Budgeting is an important part of the new regime whereby the parties' costs are actively managed by the court from an early stage, in order to further the overriding objective (Civil Procedure Rules 1998/3132 r.1.1 (CPR)).

The key provisions of the CPR are contained in rr.3.12-3.18 and Practice Direction 3E.

These provisions apply to all Pt 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;

(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);

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

(e) the court otherwise orders.

"

The below applies in general to cases commenced after 6 April 2013.

Overview of Topic

1. Costs Budgeting is active case management from an early stage by the courts, in relation to both the steps to be taken and the costs to be incurred by the parties, in order to ensure that costs are proportionate.
- 2.

Prospective: Recent amendments clarify that budgeting only applies to prospective costs. Whilst the court may record comments about incurred costs and factor incurred costs into the budgeting of future costs, para.7.4 of Practice Direction 3E makes it explicitly clear that the court may not approve incurred costs. CPR rr.3.15(4) and 3.18(c) make it clear that the court's recorded comments on incurred costs will be taken into account on assessment. However, this is of course outside the budgeting process. The recent amendments were in response to, and in effect overturn, *SARPD Oil International Ltd v Addax Energy SA* [2016] EWCA Civ 120.

3. Where the Court considers that the incurred costs are excessively high, it may approve subsequent costs at lower levels than would otherwise have been the case: *Redfern v Corby BC* [2014] EWHC 4526 (QB).
4. **Meaning of Incurred Costs & Budgeted Costs:** Rule 3.15 draws a distinction between "incurred costs" and "budgeted costs" (those to be incurred). The assumption underlying the rules appears to be that the first costs management hearing / budget fixes this distinction; i.e. that budgeted costs refers to all costs which, at the date of the first budget, are yet to be incurred and which the court has the power to approve. By contrast, incurred costs are those that at the first budget have already been incurred and which are outside the court's direct budgeting powers. Budgeted costs are those in the "estimated costs" column of Precedent H (see further below). Hopefully the amended rules now remove (or at least reduce) any doubt as to whether the court has power to retrospectively revise budgets upwards once the relevant costs have been incurred (for they are "budgeted costs" throughout the process, regardless of whether or not they have been incurred).
5. **Application:** CPR r.3.12 sets out which proceedings costs budgeting applies to (as set out above). It is noteworthy that it does not (now) apply to Pt 8 claims. It also does not apply to small claims or fast track claims; nor to litigants in person. CPR r.3.12(1A) provides that the court may order it to apply to any other proceedings or applications. Such an order can be made of the court's own initiative, or by an application of one of the parties, or by consent (in which case the court will make such order unless there are exceptional circumstances). PD3E para.5 lists types of cases where such order may be particularly appropriate.
6. CPR r.3.13 provides that (except for litigants in person or as the court may otherwise order), all parties must file and exchange budgets.
7. **Timing:** Each party must file and exchange their budgets as follows:
 - a. Where the value stated on the claim form is less than £50,000 - with their directions questionnaires;
 - b. In any other case - not later than 21 days before the first case management conference.
8. The budgets must be in the form of Precedent H. If the stated value of the claim does not exceed £50,000 or the budgeted costs do not exceed £25,000 then only the first page must be completed (para.6(c) of Practice Direction 3E).
9. In the event that a party files and exchanges a budget, all other parties except litigants in person, must file an agreed budget discussion report no later than 7 days before the first case management conference. This report must set out those figures which are agreed and not agreed for each phase, and a brief summary of the grounds of dispute. A precedent is annexed to Practice Direction 3E, and the parties are encouraged to use such.

10. Presumably if no "first case management hearing" is ever listed, then no obligation to file and exchange budgets and thereafter discussion reports arises, unless the court orders otherwise.
11. **Litigants in Person:** There is no obligation for litigants in person to file and exchange budgets, but they may choose to do so and in any case any other represented parties in such proceedings are still obliged to do so and to file a budget discussion report. The Court does have the power to order that a litigant in person file a budget, and did so in *Campbell v Campbell* [2016] EWHC 2237 (Ch) where that party was likely to incur substantial costs via instructing a direct access Barrister and other lawyers.
12. **Precedent H:** Practice Direction 3E provides that unless the court otherwise orders, a budget must be in the form of Precedent H, annexed to PD3E. This form is frequently updated and is available on the online HMCTS form-finder. It must be:
 - a. In landscape format;
 - b. With an easily legible typeface;
 - c. Dated;
 - d. Verified by a statement of truth signed by a senior legal representative in the following wording:

"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."
13. Where costs budgets omit a statement of truth they are irregular rather than a nullity and the party will still be treated as having served a costs budget on time: *Bank of Ireland v Philip Pank Partnership* [2014] EWHC 284 (TCC); [2014] 2 Costs L.R. 301.
14. Where a party's budgeted costs do not exceed £25,000, or the stated value of the claim is less than £50,000, the party must only complete the first page of Precedent H (PD3E para.6c).
15. Parties must follow the Precedent H Guidance Note in all respects. This can be found here: [Guidance Note on Precedent H- Justice.gov.uk](#).
16. **Failure To File a Budget:** If either party fails to file its budget (in time), it will be treated as having filed a budget comprising only the applicable court fees (unless the court orders otherwise). This is a draconian sanction, particularly given the restricted ability to depart from an approved budget, and the party will need to apply for relief from sanctions if it wishes to escape this consequence (or at least apply under the saving provision in CPR r.3.14 itself, which will be treated in the same way if the application is made retrospectively). Parties can agree a prospective extension of up to 28 days pursuant to CPR r.3.8(4), if they do so in writing, and if it does not put a hearing date at risk; but cannot do so retrospectively (although an opposing party may agree to a consent order on an application). See further: *Costs budgeting: sanctions and Case and costs management: relief from sanctions*. The rule appears to apply only to the failure to file, and not the failure to exchange budgets.

17. **Costs Management:** Costs budgeting case management powers are prospective - the court can manage steps "to be taken" and costs "to be incurred" and can approve a budget for future costs. The court can of course take into account costs already incurred in this process. However, the court does not have power to approve costs incurred before the first budget/CMC. As to future costs, the court will need to approve a budget that is not agreed between the parties. This is not an assessment of the costs, but a review by the court of whether the budgeted costs fall within the range of reasonable and proportionate costs. Pursuant to CPR r.3.15, the court may make a *costs management order* ("CMO") at a costs management conference (CPR r.3.16) or otherwise at any time in any proceedings. By such order the court will:
- a. record the extent to which the budgets are agreed between the parties;
 - b. record the court's approval after making appropriate revisions as to any budgets/parts of budgets not agreed (in relation to the total budget for each phase);
 - c. record the extent (if any) to which incurred costs are agreed.
18. Whether or not the Court makes a CMO, it may also record on the face of any such order any comments as to incurred costs which are to be taken into account in any subsequent assessment.
19. A useful overview of the costs management regime and general guidance was given by Warby J. in the case of: *Yeo v Times Newspapers Ltd* [2015] EWHC 209 (QB); [2015] 1 W.L.R. 3031. See also the case of *CIP Properties (AIP) Ltd v Galliford Try Infrastructure Ltd* [2015] EWHC 481 (TCC); [2015] B.L.R. 285, where the Claimant was found to have deliberately manipulated its costs budget, which was found to be disproportionate to the complexity and value of the claim, and which was slashed in half by the court. It is legitimate for the court to have regard to the costs already incurred whilst approving costs budgets. This might affect the court's view on proportionality or for example the reasonableness of expenditure on witness statements given costs already incurred on e.g. taking proofs or on detailed pleadings. The Court should not have regard to success fees, ATE premiums and similar provisions at the budgeting stage: *Various Claimants v MGN Ltd* [2016] EWHC 1894 (Ch).
20. It is now clear from PD3E that the Court is concerned only with the totals allowed for each phase of the budget and it is not the role of the Court at this stage to fix or approve hourly rates. The underlying detail in the budget is to assist the parties in calculating each total and a reference for the court to assist in fixing the budget. However, the Court may well encourage the parties to review their budgets by taking into account comments as to hourly rates, number of Counsel and such like, as was the case in *Group Seven Ltd v Nasir* [2016] EWHC 620 (Ch) (decided prior to the current wording of PD3E coming into force).
21. In many cases, it may be sensible initially to budget only for part of the case where for example the degree of complexity is not yet clear - see for instance: *Wright v Rowland* [2016] EWHC 2206 (Comm).
22. Upon making a CMO, 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.

23. Once a CMO has been made, the court will thereafter control the parties' budgets in respect of recoverable costs. The court can and should decline to make a CMO if it does not approve a budget (even where agreed) and wishes the party to revise such: *Willis v MRJ Rundell & Associates Ltd* [2013] EWHC 2923 (TCC); [2013] 6 Costs L.R. 924. It is better not to make a CMO and order a further costs CMC where there is a large discrepancy between the two budgets and substantial revisions are needed: *Dahabshil Transfer Services Ltd v Barclays Bank Plc* [2013] EWHC 4196 (Ch). Whilst the court may not approve costs incurred before the date of the budget, it may record its comments on those costs and should take them into account when reviewing subsequent costs.
24. Approved budgets do not impose a costs cap, they can and should be reviewed. Where necessary, the parties should seek to agree and failing agreement, apply for suitable revisions. Indeed, PD3E para 7.6 obliges the parties to revise their budgets as to future costs upwards or downwards if significant developments in the litigation warrant such revisions. A party should seek to amend its budget as soon as it becomes likely to be exceeded by more than a minimal amount: *Elvanite Full Circle Ltd v AMEC Earth & Environmental (UK) Ltd* [2013] EWHC 1643 (TCC); [2013] 4 All E.R. 765. In that case, Coulson J. refused to allow a substantial amendment sought after the trial. If an application to amend the budget is needed, the amended budget should be submitted to the court, together with a note of (a) the changes made and reasons for them and (b) the objections of any other party. The court may approve, vary or disapprove the revisions, having regard to any significant developments since the last budget. Approved or agreed budgets should be re-filed and re-served in the form approved with re-cast figures, annexed to the order approving it. See PD3E para.7.6.
25. The courts are unlikely to be tolerant of applications for amendments due to earlier careless mistakes: *Murray v Neil Dowlman Architecture Ltd* [2013] EWHC 872 (TCC); [2013] T.C.L.R. 5 (in that case an amendment was allowed to take into account a success fee and ATE premium that the paying party had been aware of).
26. When making any case management decision, the court must have regard to any costs budgets of the parties and take into account the costs involved in each procedural step (whether or not a CMO has been made): CPR r.3.17.
27. **Exceptions:** Litigants in person do not have to file costs budgets. They must however be provided with a copy of the budget of any other party.
28. If an interim application is made which was reasonably not included in the budget, the costs of any such application are in addition to the approved budget.
29. **Budgets & Assessment of Costs:** When assessing costs on the standard basis in any case where a CMO has been made, the court will *prima facie* be bound by the last costs budget approved and will not depart from such "unless satisfied that there is good reason to do so": CPR r.3.18. Any other comments recorded by the court during budgeting will also be taken into account. If budgets are approved by the court and revised at regular intervals, there should be little room to argue that they should be departed from. The courts should bear in mind the objective of the costs budgeting scheme and should not allow the budgeted costs to be exceeded unless something unusual had occurred (see the comments of Moore-Bick LJ in *Henry v News Group Newspapers Ltd* [2013] EWCA Civ 19; [2013] 2 All E.R. 840 at paras 16-18). The Court must have regard to the budget phases rather than the overall total and a party will therefore be bound by the budgeted expenditure where

exceeded for a particular phase (unless there is a good reason to depart from such), even where other phases were underspent. The court will only allow proportionate costs: CPR r.44.3(2).

30. Where the parties have filed budgets, but the court has not made a CMO, para 3.1 of Practice Direction 44 applies. The key points are as follows:
- a. if there is a 20% or more difference between the costs claimed on detailed assessment and those budgeted, the receiving party must provide a statement of the reasons for the difference with the bill of costs;
 - b. if a paying party claims to have reasonably relied on the receiving party's filed budget or wishes to rely upon costs shown in the budget in order to dispute the reasonableness or proportionality of the costs claimed, they must serve a statement setting out their case in their points of dispute;
 - c. on assessment, the court will have regard to the last approved or agreed budget; and may have regard to any other budget filed by that party or any other party in assessing proportionality and reasonableness;
 - d. where there is a 20% or more difference between the costs claimed on detailed assessment and those budgeted, then, subject to assessment, the court may restrict the recoverable costs where the paying party reasonably relied upon the budget (notwithstanding that this might be less than the amount reasonably and proportionately incurred); and where the receiving party has not provided a satisfactory explanation for the difference, the court may regard that difference as evidence that the costs claimed are unreasonable or disproportionate.
31. Accordingly, all parties to litigation must take the costs budgeting exercise seriously, exercise such carefully to take into account future eventualities, file and exchange budgets in time, review budgets regularly and seek to amend such as soon a particular phase, may be exceeded.

Key Acts

None.

Key Subordinate Legislation

Civil Procedure Rules 1998/3132

CPR r.1.1

CPR r.3.8

CPR r.3.12

CPR r.3.13

CPR r.3.14

CPR r.3.15

CPR r.3.16

CPR r.3.17

CPR r.3.18

CPR r.26.3

CPR r.44.3

Key Quasi-legislation

Practice Direction 3E

Practice Direction 22

Practice Direction 44

Key European Union Legislation

None.

Key Cases

Bank of Ireland v Philip Pank Partnership [2014] EWHC 284 (TCC), [2014] 2 Costs L.R. 301

Mitchell v Newsgroup Newspapers Ltd [2014] 1 W.L.R. 795

Willis v MRJ Rundell & Associates Ltd [2013] EWHC 2923 (TCC), [2013] 6 Costs L.R. 924

Dahabshil Transfer Services Ltd v Barclays Bank Plc [2013] EWHC 4196 (Ch)

Elvanite Full Circle Ltd v AMEC Earth & Environmental (UK) Ltd [2013] EWHC 1643 (TCC); [2013] 4 All E.R. 765

Murray v Neil Dowlman Architecture Ltd [2013] EWHC 872 (TCC); [2013] T.C.L.R. 5

Henry v News Group Newspapers Ltd [2013] EWCA Civ 19; [2013] 2 All E.R. 840

Yeo v Times Newspapers Ltd [2015] EWHC 209 (QB); [2015] 1 W.L.R. 3031

CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd [2015] EWHC 481 (TCC); [2015] B.L.R. 285

Redfern v Corby BC [2014] EWHC 4526 (QB)

Campbell v Campbell [2016] EWHC 2237 (Ch)

Group Seven Ltd v Nasir [2016] EWHC 620 (Ch)

Wright v Rowland [2016] EWHC 2206 (Comm)

Key Texts

None.

Further Reading

Costs budgeting: sanctions

Case and costs management: relief from sanctions

Guidance on completing Precedent H may be found at: [Justice.gov.uk](https://www.justice.gov.uk)

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