Andrew Hogan Barrister-at-law
www.costsbarrister.co.uk

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. In this paper I shall look at:

(i) Some thoughts on the conceptual underpinnings of costs budgeting.

(ii) The practice of costs budgeting post **Harrison v University Hospitals and Warwickshire NHS Trust [2017] EWCA Civ 792**.

(iii) Some inconsistencies and lacunae in the principles which underpin costs budgeting.

(iv) Significant developments justifying the variation of costs management orders during the course of the litigation.

(v) Good reasons justifying departure from costs management orders on detailed assessment of costs.

[1] I work from Ropewalk Chambers and can be contacted via andrewhogan@ropewalk.co.uk or through my blog www.costsbarrister.co.uk .

(vi) Some thoughts on good practice in (i) the drawing of assumptions (ii) the recording of assumptions and (iii) an approach to contingencies.

The concepts of costs budgeting and management

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

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

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

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

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

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

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

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

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

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

Using evidence to inform policy is not a new idea. What is new and interesting however, is the increasing emphasis that has been placed on the concept in the UK over the last decade. The term EBP gained political currency under the Blair administrations since 1997. It was intended to signify the entry of a government with a modernising mandate, committed to replacing ideological

driven politics with rational decision-making. EBP has now become a focus for a range of policy communities, where the government departments, research organisations or think tanks.

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

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

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

Costs budgeting and utility

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

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

16. In the context of costs management although this may be seen by the judiciary or some elements of the judiciary as a tool by which the Holy Grail of proportionality may be achieved, conversely by liability insurers or the NHSR

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 NHSR, 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. I note however that this is a not necessarily a black and white question, in the context of a world with lower returns on investment.

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.

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

21. The most significant decision in the last four years on costs budgeting was handed down a couple of years ago, 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. If there is one judgment in this field which should be read by anyone practicing in it, then I would suggest **Harrison** is that judgment.

22. 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.

23. 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".

24. 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.

25. The resolution of the first issue for anyone who actually reads the rules and Practice Direction would seem to be "bleeding obvious" 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".

26. 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.

27. 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).

28. 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.

29. 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.

30. 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.

31. 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.

32. This decision also marked 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.

33. 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.

34. 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.

35. 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.

36. 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.

37. 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.

38. 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.

39. 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.

40. 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.

41. 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.

42. 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.

43. 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.

44. 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.

45. 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.

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

47. 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.

48. 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 proportionality deduction?

49. 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.

50. 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.

51. 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.

52. 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.

53. 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.

54. 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.

55. 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.

56. 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.

Inconsistencies and lacunae

57. One of the vagaries of the costs management regime, is that it has to function in the real world where the substantive litigation it is subsidiary too grinds through relentlessly irrespective of when a case may be costs managed and when the court system is capable of listing a costs and case management conference.

58. Even the rules provide for inbuilt delay with costs budgets having to be submitted no less than 21 days before the hearing where they are to be considered. Inevitably, when the case comes before a master or district judge, the costs that have been incurred will have moved on, departing silently and invisibly from the estimated future costs columns of precedent H, to join ranks with the incurred costs detailed on that form.

59. A further complication can arise when significant developments in the litigation mean a revised budget must be drawn for agreement or approval, but it is necessary to incur costs to deal with the developments, before costs management catches up with the situation. How is the court meant to manage costs in a way that is robust but which accords with reality?

60. In the case of Sharp v Blank and Others [2017] EWHC 3390 (Ch) Chief Master Marsh grappled with some of these issues and applied a purposive construction to some of the provisions which have been in force since the costs management rules were reformed in April 2017. The case is well known: the judgment of the Chief Master concerned an application to revise a budget *retrospectively* during the course of a lengthy commercial trial arising out of the ill fated purchase of HBOS a decade ago by Lloyds bank.

61. The purchase of HBOS effectively torpedo'd Lloyds, one of the few British banks left standing in the initial wave of collapse caused by the banking crisis and the action was brought by aggrieved shareholders. The costs of the action as initially reflected in the costs budgets which were agreed were

substantial: over £34 million between the parties as ultimately agreed and on the basis that incurred costs were those up to and including the 27th January 2017:

8. It was not until the hearing of the second case management conference that an order was made for the exchange of costs budgets and it was not until a further hearing before the management judge on 27 January 2017 that a cost management order was made. In the course of his judgement at the hearing in January 2017, the judge remarked that the real value in a cost management order, so far as the claimants are concerned, was to bring much greater clarity to the costs exposure which they face. As at the date of that hearing the defendants' unapproved budget amounted to approximately £24 million of which £14.9 million was still to be incurred. The judge noted it was common ground between the parties that, in accordance with the CPR, costs management is only possible for costs that have not yet been incurred and nothing can be done to manage the costs which have already been incurred although the court can make comments on incurred costs. Directions were given by the judge for the parties to file and serve costs budgets "… calculated to today's date for incurred costs and estimated costs thereafter through to the end of trial." The parties thereafter exchanged budgets on the basis the judge had directed.

9. In the event, the costs management conference that was listed before me on 3 May 2017 did not take place because the parties reached agreement on the figures for each phase in their budgets. A consent order was approved on 2 May 2017. It recorded that the budgets had been calculated in respect of the parties' incurred and estimated costs as at 27 of January 2017. The order, in addition, recorded that neither party had agreed to the other parties' incurred costs and that the court made no comments about incurred costs. The incurred costs to which reference is made are those incurred up to and including 27 January 2017.

62. As the Chief Master observed:

11. I pause in this introduction to observe that by the date of the order made on 2 May 2017, there was already a mismatch between the agreed incurred costs as set out in the budgets and the actual amount of incurred costs. In this case, the mismatch was a consequence of the costs management order made by the management judge. It is easy to understand that having made a costs management order relatively late in the litigation, it was important to ensure that estimated costs ran from the earliest possible date, namely the date of the order, because the court does not have power to control "incurred costs". The issue of a mismatch between the data that is contained in a budget and the actual position in relation to costs as the claim moves inexorably forward, with costs being incurred every day, is a subject to which I will return. Three initial points, however, are clear. First, the management judge intended that the initial agreed or approved budgets would contain costs described as estimated, some or all of which would have been incurred by the date of the order approving the parties' figures. Secondly, the judge envisaged that there were likely to be revisions to the budgets and, indeed, he expected there to be revisions on more than one occasion. Thirdly, when the parties reached agreement about the budgets, they were acknowledging that the figures for incurred costs in their budgets related back to 27 January 2017 and were not treated as incurred costs at the date of agreement. Where the statement of truth on the budgets referred to incurred costs, it was intended to relate back to that earlier date.

63. The defendants returned to court during the course of the trial, to seek an upwards revision to its cost budget, on the basis that there had been significant developments in the litigation which warranted a revision. In effect they proceeded to grasp the nettle of making the arguments for a departure from the budget prospectively, if not pre-emptively, rather than relying on arguments of "good reason" at a later detailed assessment.

64. The Chief Master noted the rules that he had to apply and gave them a certain emphasis:

3.12(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.

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

(b) …. not later than 21 days before the first case management conference.
3.15 (1) In addition to exercising its other powers, the court may manage the costs to be incurred (the budgeted costs) 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 budgeted costs are agreed between the parties;
(b) in respect of the budgeted costs which are not agreed, record the court approval after making appropriate revisions;
(c) record the extent (if any) to which incurred costs are agreed.

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

(4) Whether or not the court makes a costs management order, it may record on the face of any case management order any comments it has about the incurred costs which are to be taken into account in any subsequent assessment proceedings.

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.
….

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 budgeted costs for each phase of the proceedings:

(b) not depart from such approved or agreed budgeted costs unless satisfied that there is good reason to do so; and

(c) take into account any comments made pursuant to rule 3.15(4) or paragraph 7.4 of Practice Direction 3E and recorded on the face of the order.

PD3E 7.3 If the budgeted costs or incurred costs are agreed between all parties, the court will record the extent of such agreement. In so far as the budgeted costs are not agreed, the court will review them and, after making any appropriate revisions, record its approval of those budgeted costs. The court's approval will relate only to the total figures for budgeted costs of 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 budgeted costs, 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.

PD3E 7.4 As part of the cost management process the court may not approve costs incurred before the date of any costs management hearing. 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 budgeted costs.

PD3E 7.5 The court may set a timetable or give other directions for future reviews of budgets.

PD3E 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.

PD3E 7.7 After its budgeted costs have been approved or agreed, each party shall re-file and re-serve the budget in the form approved or agreed with recast figures, and next to the order approving the budgeted costs or recording the parties' agreement.
…
PD3E 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.
[The emphasis is mine.]

65. He then set out his thoughts on the significance of these provisions and how they might be applied in a practical way:

24. There are a number of facets of the rules and PD3E that bear emphasis:

i. The futurity of the words "costs to be incurred (the budgeted costs)" is not in doubt. However, it is less clear when the future commences for these purposes.

ii. Rule 3.13(1) is the default rule that applies, unless the court orders otherwise, in relation to the timing for the service of budgets. They must be served not less than three weeks before the first case management conference. At one time the rule was drafted differently and provided a default period of seven days. A more recent innovation, set out in rule 3.13(2), requires the parties to produce an agreed budget discussion report and to file it not less than seven days before the first case management conference. The parties are required to engage with each other and to consider the extent to which the figures in their budgets are agreed, or not agreed. At the hearing the court has the fruit of this discussion about the figures in the budgets.

iii. A budget, unless the court otherwise orders, must be in the form of Precedent H. It provides a format that is divided into budget phases and each phase requires the party to explain its incurred costs in one column and its

estimated costs in a set of other columns. It must have a statement of truth stating:
"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."

iv. There is nothing in the rules or PD3E that requires the parties to provide updated budgets for the case management conference so as to provide the court with information that is current at the date of the hearing. Such a requirement would in any event create practical difficulties.

v. Rule 3.15 clearly distinguishes between costs to be incurred (budgeted costs) and incurred costs with the exception in 3.15(3) where it is stated that after a costs management order has been made the court will control the parties' budgets in respect of recoverable costs. The reference to budgets read literally means the budgets as a whole (and not just budgeted costs) and the control is in respect of recoverable costs which will not be the same as the aggregate of estimated and incurred costs. The notion of costs that are recoverable as opposed to incurred or to be incurred does not appear elsewhere in the regime. Incurred costs and costs to be incurred may, or may not, be recoverable.

vi. Rule 3.18(b) in its pre-6 April 2017 form was considered by the Court of Appeal in Harrison v University Hospitals Coventry & Warwickshire NHS Trust [2017] EWCA Civ 792. The decision in Harrison is not directly relevant to the issue before me. However, the first instance decision in Merrix v Heart of England NHS Trust Foundation [2017] 1 WLR 3399, which was decided shortly before Harrison, was approved by the Court of Appeal and I will later refer to the judgment of Carr J in Merrix.

vii. The claimants say that paragraph 7.4 make it clear beyond any doubt that when the court is considering a revision to a budget in relation to a significant development, the court has no power to approve costs incurred. They reason that the hearing I have conducted is a cost management conference within the definition contained in rule 3.16 (1). Paragraph 7.4 specifies that the court may not approve costs incurred "… before the date of any cost management hearing". [my emphasis] "Any" is not well-suited to its context and could mean several different things. Mr Friston says it means "all". It could have been

intended to mean "a" or, as Mr Singla submits, any in the sense that of "if there is one". It seems likely, however, that the paragraph was intended to relate to all hearings where costs management is considered whether the hearing is a "costs management conference" (rule 3.16(1)) or a case and costs management hearing.

viii. The management judge did not set a timetable or give other directions for future reviews of budgets although he plainly contemplated from the earliest stage at which cost management was under consideration that a review of cost budgets was very likely to be required.

ix. The language used in paragraph 7.6 is of critical importance because it provides the jurisdiction, on the defendants' case to make the revisions they seek. It is notable that the language is at variance with the remainder of the rules and PD3E. It refers throughout to the revision of a "budget" (not, in accordance with the new wording, "budgeted costs"). It is explicit, however, that revision is in respect of future costs. The final sentence of this paragraph gives the court a discretion to 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". On one view, such language points towards the last approved or agreed budget being the jumping off point for a revision because it is the budget that is being revised.

x. The principles set out in paragraph 7.3 will apply when a budget is re-considered. The court is only required to set figures that are within a range of reasonable and proportionate costs. A range suggests that the process is designed to produce figures for each budget phase in a way that is not a slave to arithmetical calculation. The court is approving, or the parties are agreeing, figures that are not 'right' as such, but rather figures that are within a range of acceptability.

xi. Paragraph 7.9 appears to have a restricted effect and it is only the costs of the interim application that are to be treated as additional to the approved budgets. This would suggest that costs resulting from, or are consequential upon, an interim application are outside its scope. By way of example, the costs of applying for specific disclosure would be within the provision, but the costs of dealing with the fruits of the application, if any, are outside it. Similarly, the

costs of applying for permission to amend are within the paragraph whereas the costs that flow from the amendment are not.

Commenting on what would be a significant development he observed:

3*2. The two other legal issues overlap and concern first, what it is that amounts to a significant development and secondly, whether an interim application can fall within the costs management regime and may in some circumstances be a significant development. As to the first point, the language in paragraph 7.6 does not create difficulty. A party is required to revise its budget ("shall revise"). If the paragraph is engaged, it is not left to a party to choose whether to revise its budget and to takes its chances on a detailed assessment. A failure to apply under paragraph 7.6 for a revision may be relevant when the court is considering whether it is satisfied there is a good reason to depart from an approved or agreed budget. An application should be made promptly – see Yeo.*

33. The circumstances in which paragraph 7.6 is engaged are fact specific. Significance must be understood in light of the claim – its size, complexity and the manner in which the litigation has unfolded – and also from the likely additional costs that have been, or are expected to be, incurred. The amount of the additional expense is not determinative, but it is difficult to conceive that a development leading to modest additional legal expenditure, that is modest in proportion to the amount in the relevant budget phase or phases, is likely to be significant development.

66. The Chief Master then considered on the policy considerations that underpin costs management:

45. It is possible to discern from a number of the sources cited in this judgment a number of policy considerations that underlie the costs management regime. Not all of them sit easily together. They include:
i. The benefit for a party in knowing its exposure to costs.
ii. Greater predictability in the costs that will be recovered.
iii. A reduction in the cost of detailed assessment.

iv. The need for the court to avoid undertaking a detailed assessment in advance.
v. Significant developments should be reflected in the budgets.

67. He then went onto explain why these policy considerations effectively meant that the court had to construe the rules as permitting retrospective revisions to be made to a costs budget, in order to preserve the efficacy of the first budget as approved or agreed and secondly to ensure that the rules and practice direction married with the reality of litigation in the real world, where in the period of delay before a revision application was adjudicated upon the parties would incur substantial costs:

46. To my mind the defendants' approach finds some limited support in the rules and the practice direction, but much stronger support in the principles that lie behind costs management and in the way in which they have to work in practice. Although paragraph 7.4 read literally prevents the court from approving costs incurred before the date of a cost management hearing, the requirements of the paragraph are impossible to implement in that way. Rule 3.13(1) requires the parties to file exchange budgets not later than 21 days before the first CMC. They are required after filing and exchanging their budgets to engage and produce a budget discussion report with a view to the court having the benefit of the fruit of that discussion at the CMC. In every case the budgets will be at least three weeks out of date (and often more out of date than that) and the estimated costs for the CMC itself will have been incurred by the time the hearing of the CMC has concluded. That is not to say, however, that the estimated figure will automatically become the figure for incurred costs. Whether the estimate for the CMC proves to be accurate can only be known by looking backwards in time. Moreover, there is plainly no point in requiring the parties to engage with each other and produce a budget discussion report in relation to costs that cannot be approved by the court.

47. A similar point can be made about the agreement of budget phases, or entire budgets by the parties. Agreement of a budget phase has the effect of removing the court's power to approve it. It is obviously salutary for the parties to agree as much as possible. They have a duty to help the court implement the

overriding objective and agreement of the whole or part of a budget assists with this process. Yet it is axiomatic the parties will be agreeing costs described in the budgets as estimated that have, at least in part, been incurred. This is a necessary fiction. Some of the costs will have, in the real world, made a complete or partial transition from estimated to incurred, but within the costs management world that transition has to be ignored. It is said in paragraph 7.4 that the court may not approve costs incurred before any costs management hearing, but it is, in practice, impossible to follow that requirement literally, if there is a hearing. And it does not apply to agreement between the parties which will not involve a hearing.

48. The reference to incurred costs before the date of any costs management hearing must mean the incurred costs as specified in the budget; that is the budget the rules have required the parties to produce some weeks prior to the hearing. The rules and practice direction do not contemplate revisions to the budgets on the day of the hearing and that would not in most cases be a practical option. If the hearing is adjourned, the court always has the option, if it considers that the budgets will be out of date to direct the parties to file up-to-date budgets. Subject to the exercise of that power, it seems to me that the court will always be assessing some costs which have been incurred prior to the cost management hearing. If that were not so, such costs would fall into a 'black hole'. They would not appear as incurred costs in the budget and could not form part of estimated costs because they have already been incurred. In every case there would have to be subject to a detailed assessment along with the costs that are shown in the budget as incurred. Such a fragmented approach to the assessment of costs seems to me to be deeply unsatisfactory and I do not consider that, properly construed, that is what the rules and practice direction can have intended.

49. I consider that a similar approach is required to make sense of paragraph 7.6. The overriding purpose of cost management is to enable the court to control costs to be incurred by the parties and their recoverable costs. Incurred costs are left to a detailed assessment without the parties having to show there

is a good reason to depart from the budget, because the condition in rule 3.18(b) only applies to budgeted costs. It is notable that paragraph 7.6 speaks of revising a budget (not budgeted costs) in respect of future costs. I have already made reference to the final sentence of paragraph 7.6 which requires the court to have regard to significant developments since the date when the previous budget was approved or agreed. To my mind that language points towards taking the previous budget as a base reference point as Mr Singla has submitted. Future costs are considered by reference to the last approved or agreed budget. Mr Friston was forced to make the unattractive submission that it is unnecessary to include in a revised budget costs incurred since the last agreed or approved budget. He says those costs are outside the costs management regime.

50. I accept that a detailed assessment is needed for costs incurred up to the date of a costs management order and there may be elements of later costs that fall outside the costs management regime. However, I do not consider the rules and practice direction intended that only certain elements of the costs relating to significant developments must be dealt with as revisions with the other elements, those pre-dating the hearing or, on another view those pre-dating the application, being dealt with on a detailed assessment. This approach would run contrary to the purposes of costs management and lead to unnecessary fragmentation of the costs dealt with at a detailed assessment.

51. The approach proposed by the claimants can be tested in another way. If a significant development occurs, and a party affected by it recognises it at an early stage, and prepares a revision to its budget, paragraph 7.6 requires the revising party to submit a revised budget to the other party for agreement. A reasonable time must elapse before an application to the court can be made and the period of time that will then pass before the 'hearing' takes place will be subject to the vagaries of court listing. There may be a time lag between issuing the application and the cost management hearing of many weeks and it would be most strange if the courts' power to manage costs is conditioned by the state of its lists at any given time or by whether or not a judge feels able

and willing to deal with the revisions on paper rather than at a hearing. There is also the separate point that if the revisions are approved on written submissions, there has been no 'hearing' for the purposes of paragraph 7.4, only possibly a deemed hearing arising from rule 3.17.

52. In every case where a significant development arises, and a party prepares a budget to deal with it, there would be costs which cannot be considered by the court because of the requirements of the practice direction. Indeed, in some cases it may not be immediately obvious that a development in the litigation is significant development; a development which appeared at first sight not to be significant may change character.

53. The vagaries of the approach put forward by the claimants are demonstrated by the way in which the defendants' application was dealt with in this case. The hearing was listed for one day on 6 December 2017. The hearing did not finish within the agreed time estimate partly because the court service decided to hold an unannounced fire drill in the middle of the day. Even disregarding that unexpected development, the hearing was unlikely to lead to an extempore judgment. If Mr Friston's construction of paragraph 7.6 is right, it is not clear whether the operative date for establishing which the costs which have become incurred is the first hearing day, the adjourned date or the date when this judgment is handed down (or when consequential matters are dealt with). The answer is not obvious. In the meantime, during the period in which the application was before the court, the trial has continued and estimated costs have inexorably moved from an estimation about what may happen into incurred costs. It seems obvious to me that some degree of retrospectivity is inevitable if the costs management regime is to be made to work.

54. If the operative date is not the date of the hearing, as a literal interpretation of the rules and the practice direction would suggest, there are a number of possible alternatives. It could be:
i. The date of the last agreed or approved budget.

ii. The date set by the court under paragraph 7.5 for a review of the budgets, if this power is exercised.
iii. The date when the significant development is deemed to have occurred. This may be obvious in some cases but not invariably so.
iv. The date a revised budget was served on the other party.
v. The date after a reasonable time following service of the revised budget has elapsed.
vi. The date when the application is made by the court.

55. In all cases where a costs management order is made, there will need to be a detailed assessment. As a minimum, the costs shown as incurred in the agreed or approved budget will be assessed in that way. It seems to me that the manner in which paragraph 7.6 is drafted not just encourages but requires the parties to revise budgets where there are significant developments. It provides a procedure which is informal and, no doubt, in routine cases is capable of leading to revisions being agreed or approved relatively speedily. The policy is clear. If there have been significant developments, the budgets must be revised. A claim for additional costs should not be left until a detailed assessment because the parties need to know what is their exposure to costs and the costs of detailed assessment should be minimised.

56. The approach put forward by the claimants would lead to a greater proportion of the costs of a claim being left to a detailed assessment. A budget would be set at the hearing dealing only with future costs leaving the other significant development work to be dealt with at a detailed assessment. A similar position pertains if any of the dates I have posited are taken, other than the date of the last approved or agreed budget (or in a case such as this the date the court has specified as the date to which budgets should be prepared). In a case where there is more than one significant development, there is a real likelihood of the detailed assessment becoming fragmented with the Costs Judge being required to work out what work is attributable to different periods. This cannot have been intended when one of the ideas lying behind costs management was the simplification of detailed assessments.

68. In effect the Chief Master construing the rules, held that the court not only has the "power to turn back time" it must utilise that power on an application to revise a budget: there is no middle column of "costs that were formerly estimated but are now incurred" on a precedent H form, and there is in fact no need for one. Instead the court engages in a legal fiction as to what are incurred costs and what are budgeted costs, to make the system work. This is not in fact a novel approach: the courts have long exercised a jurisdiction to direct upon which dates their judgments take effect and are familiar both with the concepts of legal fictions and deemed states of being. The court then stated the position to be thus:

62. In summary my conclusions are:

i. The court has jurisdiction when revising a budget under PD3E 7.6 to revise a budget taking the last agreed or approved budget as the base reference point.

ii. Where, as in this case, the budgets were directed to be prepared to an antecedent date, the relevant date is the date set by the court.

iii. Costs which have been incurred since the date of the last agreed or approved budget (or the antecedent date) that relate to significant developments are, for the purposes of revision, placed in the estimated columns of the revised Precedent H in one or more phase. In some cases, it may not be obvious where they go (for example a late application for security for costs) but I can see no reason why Precedent H may not be adapted as necessary to accommodate work that does not easily fit in.

iv. Interim applications may be significant developments as may the consequences that flow from an interim application.

69. This judgment is a useful and thoughtful exposition of some of the conceptual problems that exist in costs management, and its solutions will be of assistance to judges when grappling with one of the surprisingly rare applications to revise a budget that will from time to time, cross their desk.

Significant developments

70. Consideration of the latest iteration of the Practice Direction states:

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

*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.*

(emphasis added)

71. In the case of **Churchill v Boot[2016] EWHC 1322 (QB)** an application for permission to appeal from a costs management decision was dismissed. The judgment indicates perhaps unsurprisingly, that the appellate courts will rarely interfere with a discretionary decision of this nature. The judgment is significant as an early exposition of what might be a "significant development".

8. The Master then went on to ask himself whether there had been "a significant development so as to justify the amendment of the budget." He explained that, in his view, there had not been. He stated as follows in paragraph 2:

"The trial has possibly extended from four to five days, but I do not consider that to be significant in a case of this sort. This was always going to be a contested trial. The previous budget allowed £10,000, for example for attendance of the all the experts as needed. It was not at that stage clear or

thought that the experts would not be needed. There was provision made for experts' attendance. An enormous amount of money seems to have been spent above that budgeted for by the claimant on experts' reports between now and then. At the time of the last budget, disbursements for experts ran at just shy of £15,000 and with a further £8,500 to be spent. I am told that nearly £53,000 has been spent so far."

He continued in the next paragraph as follows:

"In my judgment, this case has gone out of control and the solicitor managing it, it would appear, had, frankly, no regard to or respect for the budget or what was budgeted or allowed to be spent. The numbers that I am shown in the breakdown prepared by that solicitor, Mr Bennett, proposed to be spent and him wanting budgeting for in respect of experts are ridiculous in my judgment…"

The Master then concluded, in the same paragraph, as follows:

"Putting all this together, I am completely satisfied that this is a budget where there has not been a significant development in any shape or form. What has happened is that this case has taken a course that was predictable and should have been predicted when the original budget was made…"

72. The High Court judge gave the arguments on appeal short shrift:

12. The suggestion is then made by Mr Nugent, on the Claimant's behalf, that the giving of further disclosure which was ordered by the court in January 2015 amounts to a significant development. I do not regard this as a tenable suggestion in circumstances where it is apparent from the correspondence that the Defendant has sought the further disclosure in February and March 2014, and so several months before the hearing which took place before Master Eastman on 16 June 2014. Mr Lewers makes the observation that, in any event, the type of disclosure which came to be ordered in January 2015 is what might be described as standard for claims of this sort. It included employment records and educational records which, Mr Lewers pointed out, would be expected to

be produced. It seems to me, again, that there is force in that submission. Mr Nugent, in fairness to him, was inclined to accept that the giving of the disclosure, itself, would not have amounted to a significant development. His submission entailed a linkage between the giving of the disclosure, when it was given and the effect on the expert evidence which then came to be served. As to that aspect, I again reject the submission that the expert evidence which was served in this case, in any shape or form, amounted to a significant development which was not contemplated or contemplatable when the costs budget was set in June 2014.

An early example of the high hurdle to find a "significant development".

73. The issue of "significant development" was revisited in the case of **Al-Najar v The Cumberland Hotel [2018] EWHC 3532 (QB):**

2 There has been a direction for a trial on liability only. Liability is complex. At a CCMC on 16 November 2017 Master Eastman approved the parties' budgets for that trial. The claimants' budget was approved in the total sum of £1,028,197, (only a small reduction from the budget that was submitted). The claimants now, by this application, seek to revise the disclosure phase of that budget.

3 The Guidance Notes appended to Practice Direction 3E on costs management set out standard assumptions for each phase which do not require to be repeated in each party's budget. So far as relevant, the specific assumptions set out in the claimants' budget read as follows:

"Anticipated costs include completing claimants' list and reviewing own documents, considering defendant's list and presumed to be extensive documents disclosed to include cross-reference of previous disclosure, liaising with counsel on disclosure. Assumes standard and electronic disclosure proceeds in compliance with directions and requests made and that no further applications are required."

4 The amount that was approved for the phase was £62,626.50. That was, in fact, agreed by the defendants and therefore approved by Master Eastman. I

am told and I have no reason to doubt that the claimants' solicitors were expecting somewhere between 1,000 and 1,500 documents, which they expected would fill twenty to thirty lever arch files. (I will say that it is perhaps not only with the benefit of hindsight that it might have been prudent to have recorded that in the assumptions.) Be that as it may, what arrived comprised 3,250 documents filling fifty-five lever arch files. The scale of that is getting on for double what was anticipated and the claimants further say, (though I do not attach too much importance to this), that they were not forewarned by the defendants that that was the number of documents that would be forthcoming even though, so the claimants say, the defendants must have known that that was the case.

5 The claimants seek an increase in the budget from that figure of £62,626 to a figure of £111,811. That is an increase of £49,185 which in percentage terms is a 78 per cent increase. Most of the increase is in the solicitor hours but the figure allowed for counsel has doubled and the figure allowed for the expert has gone from £1,440 to £9,000, which is an eightfold increase.

74. It will be noted that the thrust of the issue was that action by the other party to litigation had put the applying party to more work:

8 From the Practice Direction and the decision of Chief Master Marsh I would derive the following broad principles:

(a) Whether a development is "significant" is a question of fact which depends primarily on the scale and complexity of what has occurred.

(b) If what has occurred is something that should reasonably have been anticipated by the party seeking to revise its budget, then that party will probably be unable to label it significant or, for that matter, a development.

(c) However, there is no requirement that the development must have occurred other than in the normal course of the litigation. That is clear from the final sentence of para.37 of Master Marsh's decision which I have quoted and also from the fact that in that case a revision of the trial estimate, the disclosure of

984 documents and the service of an expert report were all characterised as significant developments.

(d) As a matter of policy, it seems to me that the bar for what constitutes a significant development should not be set too high because, otherwise, parties preparing a budget would always err on the side of caution by making over-generous (to them) assessments of what was to be anticipated.

(e) Lastly, and I think this is uncontentious, if there has been a significant development, then the question is whether the figures in the revised budget are reasonable and proportionate in the light of the development.

75. The interesting point is that the bar is not a high one: certainly there is no support in this case for the notion of "foreseeability" of the incurrence of costs being a matter which precludes a significant development: the issue may be as simple, as whether an increase is predicated upon a change in assumptions:

9 I have come to the clear conclusion that there has been a significant development. The disclosure has been of a scale and complexity that is much larger than was actually budgeted for, which was not, in fact, envisaged and which could not reasonably have been envisaged. In coming to that last conclusion I ask the question: was the assessment in the original budget a reasonable one? If it was, then ex hypothesi, what has occurred is something that falls outside that reasonable assessment. What is required is a standard of reasonableness. It is no answer to the application to say that disclosure on the scale that has occurred could have been foreseen or anticipated. That would be to impose an altogether unrealistic burden and encourage the sort of bloated, defensive budgets which are to be deprecated. I find that the assessment of the disclosure phase in the original budget was a reasonable one. It follows that disclosure that has come in at approximately double what was then anticipated amounts to a significant development in the litigation.

Good reasons

76. Resembling the quest for the Holy Grail, or a hunt for a unicorn, has been the quixotic search for "good reasons" to depart from a costs budget. Although Delphic pronouncements have been made that "good reasons" will be fact sensitive, or grounded in the circumstances of a particular case, lawyers prefer principles.

77. I have long thought that the battle for a departure or not, on the basis of "good reasons" is largely fought and won at the time of the costs management hearing: leaving aside the obvious dispute over the levels of budgeted costs which are set at the hearing, the often neglected question of the assumptions on which the budget is set are often glossed over and rarely expressly referred to in the costs management order, by way of recital otherwise.

78. It would be in the interests of the likely paying party to have expressly recorded in the order at the costs management stage the assumptions on which the budget is set. If they are then invalidated by subsequent events in the litigation, the key is already in the door, to unlock the budget and argue that it should be departed from.

79. In the meantime, there was at the beginning of this year a fully argued judgment of a circuit judge in the county court on the vexed question of good reasons.

80. The judgment is probably wrong in a material respect in that the judge went too far with various dicta, which I shall explain below, but is undoubtedly right on the most important part: the budget set per phase, is the sum set on the assumption that the phase will be completed.

81. How could it be otherwise? And thus, if a phase is not completed, there would be a good reason for departing from the budget. The case in question is that of Barts Health NHS Trust v Salmon County Court at Central London HHJ Dight 17th January 2019.

82. It is a decision given on appeal from Master Whalen where HH Judge Dight QC decided the appeal, albeit with the assistance of an assessor. There is an interesting suggestion of a dispute between the Learned Judge and his assessor, although that is not fully explained in the judgment, over the reasons why the appeal should succeed. The ambit of the appeal was described in the following way:

2. This is an appeal against decisions made by Master Whalan, sitting as a judge of the Central London County Court, during the course of a detailed assessment which took place on 1 and 2 November 2017. The appeal is brought with permission which I granted on 31 July 2018. The appellant is the defendant and is the paying the party, the respondent is the claimant, the receiving party, who has not filed a Respondent's Notice, and therefore in effect seeks to uphold the decisions of the learned Master for the reasons given by him.

3. I hear this appeal with Master Brown, sitting as an assessor. He has provided me with his expert views on some of the issues on this case, and I am extremely grateful to him. We agree on the outcome of the appeal, but not necessarily on the route to that outcome. However, the conclusions which I reach in this judgment are my own, and I take sole responsibility for them.

4. During the course of the appeal, the issues between the parties were reduced, with the result that there are three remaining grounds of appeal to be determined. This is a Claim which settled before trial, and in respect of which not all the phases of the original budget were completed. The remaining grounds of appeal for determination are: (1) whether the learned Master was

wrong to conclude that there was no good reason under CPR 3.18(b) to depart from the costs budget in respect of the expert's phase of the bill, which was part 15 of the bill, and reduce the figure below what was claimed by the receiving party; (2) whether the Master was wrong to conclude that there was no good reason under CPR 3.18(b) to depart from the costs budget in respect of the alternative dispute resolution phase of the bill, part 17 of the bill, and reduce the figure below what was claimed by the receiving party; (3) whether the Master erred in his application of the global proportionality test under CPR 44.3 in respect of phases 4 to 17 of the bill, relating to costs incurred after 1 April 2013. The learned Master in that latter respect reduced the assessed figure from £52,133.97 to £40,000, but the paying party argues that the reduction was insufficient and that the figure should have been reduced further, the sum of £25,000 approximately being contended for.

83. The setting of the budget was described as follows:

10. The matter came on for a costs and case management conference before District Judge Silverman on 5 February 2015, when he approved the claimant's budget at £155,673, which included two experts per side, and, in a relatively standard way, the learned District Judge gave substantial directions relating to the steps to be taken by the experts in the lead up to trial.

84. The Learned Judge set out an interesting exegesis of what he considered were the appropriate principles which applied to costs management, and in particular departures from budgets approved by the court:

22. Before looking at the submissions in this case, I want to set out the principles which I derive from the authorities and the provisions that I have referred to, which will of course indicate my thinking on the submissions which I will set out in due course.

a. First, costs budgets give a figure for each phase of the proceedings, but the constituent elements of each phase are not themselves approved, and there is

no finding as to the legal costs or disbursements to be incurred in each phase. I take that from PD 7.10, and the judgment of Mr Justice Jacob in Yirenki.

b. Second, when assessing costs on the standard basis, the court will have regard to the last approved budget. That is plain from the wording of CPR 3.18(a).

c. Third, the court will not depart from the budget either upwards or downwards in respect of any particular phase unless there is a good reason. That follows from CPR 3.18(b) and the reasoning of Lord Justice Davis in the Harrison case.

d. Fourth, a good reason for departing from the budget in respect of a particular phase does not lead to a right to depart from the budget in respect of another phase. A good reason for departure from that separate phase must be separately established.

e. Fifth, what amounts to a good reason is to be left to the judgment of costs judges in individual cases, having regard to all the circumstances, but they are not to adopt a lax or overindulgent approach (see Lord Justice Davis in Harrison).

f. Six, the consequences of establishing a good reason is that the court may depart from the budget for a phase when assessing costs on the standard basis. It seems to me that follows from the plain words of CPR 3.18(b).

g. Seven, once a good reason has been established, and the court is given the right to depart from the budget, it will assess the costs of that phase in the usual way, and, in that respect, it is left to the good sense and expertise of the costs judge to undertake that assessment in an appropriate and insofar as possible practical way, whether line-by-line or in a more broad-brush way The manner of undertaking that task is entirely a matter for the judge dealing with the assessment. It seems to me that the consequence of finding a good reason under 3.18(b) is that it opens this route to enable the costs judge to take this approach within the detailed assessment. The wording of 3.18(b) does not on its face dictate what course should then be taken by the learned costs judge, which, as I have already said, is a matter for the judge, him or herself, to determine in all the circumstances.

h. Eight, in my view, once the court has a right to depart from the budget, neither the receiving party nor the paying party needs to establish a further good reason within CPR 3.18 if they wish to persuade the costs judge to make a further or different adjustment to the bill. I take this from the wording of CPR 3.18(b) and the terms and reasoning of the judgment in Mr Justice Jacob in Yirenki. In my judgment this consequence applies whether it is sought to depart from the budget upwards, or, as in this case, further downwards, because the finding of a good reason opens the gateway for departure from the budget, and the rules do not stipulate that the good reason must determine the nature of the route to be followed thereafter.

85. So far so good, but when considering the scope that a costs judge was afforded, when for example a lesser figure than the budgeted costs was claimed in a bill, because the parties had not spent the entirety of the budget he went too far:

36. Reading those two passages together it is a little difficult to work out whether the learned Master was of the view that there had to be a good reason to depart down from a budgeted figure solely because of the operation of the indemnity principle. Insofar as he was of that view, with the greatest respect to him, it seems to me that he was wrong. In my judgment, having regard to what was said by Lord Justice Davis in the Harrison judgment, the fact that the sum claimed is lower than the budgeted figure, because of the indemnity principle, is itself capable of being a good reason. Awarding the lower figure would be, in my judgment, a departure from the budget, which requires a good reason to be established: in this case, once that had been done it was open to the paying party to challenge the figure which was then being claimed by the receiving party, and they did not have to assert a further good reason to enable the court to do so.

86. The reason he went too far, is because there will never, ever be a case where the costs incurred mirrors the budget set down to the last pound. If a phase has been completed and the party has come in under budget, then the

purposes of costs management have been achieved If underspend opens up the budget to debate, then the receiving party loses certainty, and has a perverse incentive to incur further costs, to hit the budgetary "target"

87. However his further reasons are unimpeachable:

37. In any event, it seems to me that the fact that the phase of the budget relating to experts was – for the reasons given by Mr Hutton – substantially incomplete was capable of being a good reason, and it would have been open to the Master on that basis to consider whether to reduce the figure. In my judgment, he should heard submissions on what the appropriate figure should have been. That does not mean that it should have resulted in a line-by-line assessment. The Master could have taken whatever appropriate course he thought sensible in the light of his case-management powers to arrive, in the course of that detailed assessment, at the sum which was to be paid in respect of experts. Therefore ground 1 of the appeal succeeds.

88. The balance of the judgment deals with some interesting points about the application of the principle of proportionality, but in my view simply underline what a lottery that exercise is, particularly at first instance, but also on appeal as has been set out in earlier articles I have written, where two judges will almost inevitable disagree on what is a proportionate figure for costs, due to the sheer breadth of discretion that a properly directed judge will have open to him.

Good practice

89. Some thoughts on good practice. A key point that I think is neglected, at a party's peril, is the formulation and recording of assumptions and contingencies.

The drawing of assumptions

90. The Guidance Notes annexed to practice direction 3E record:

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.

91. I would suggest that what is required are recording the key drivers of costs, the broad outlines of the case, and not, what I frequently see, which is a reverse engineered bill, masquerading as a set of assumptions.

The recording of assumptions

92. It also follows, that what I suggest you encourage the case management judge to do, is record as a set of recitals to the Order or a schedule to the Order, what those recitals are.

An approach to contingencies

93. It should be noted that contingencies are only recorded on the basis that they are more likely than not to occur. It follows that if something is not more likely than not to occur, it should not be recorded or allowed, and therefore there is no scope for arguing, in my view, that a significant development is one that must be unforeseeable: it may very well have been foreseeable, but

simply discounted from the assumptions and the budget, on the basis of probability.

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.

Conclusions

94. So far so good. A scheme of costs budgeting and management has been implemented, and is now the "norm" for Multi-track cases. 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 war stories, the complaints of the Voice of Common Sense on the District Bench, does it actually work in the sense of achieving the goal of keeping costs proportionate? 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?

95. As one looks back, not to 2013, or even 2009 but 1999, and considers the CPR as originally conceived, and now in 2019 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.

ANDREW HOGAN

www.costsbarrister.co.uk

andrewhogan@ropewalk.co.uk

30th September 2019