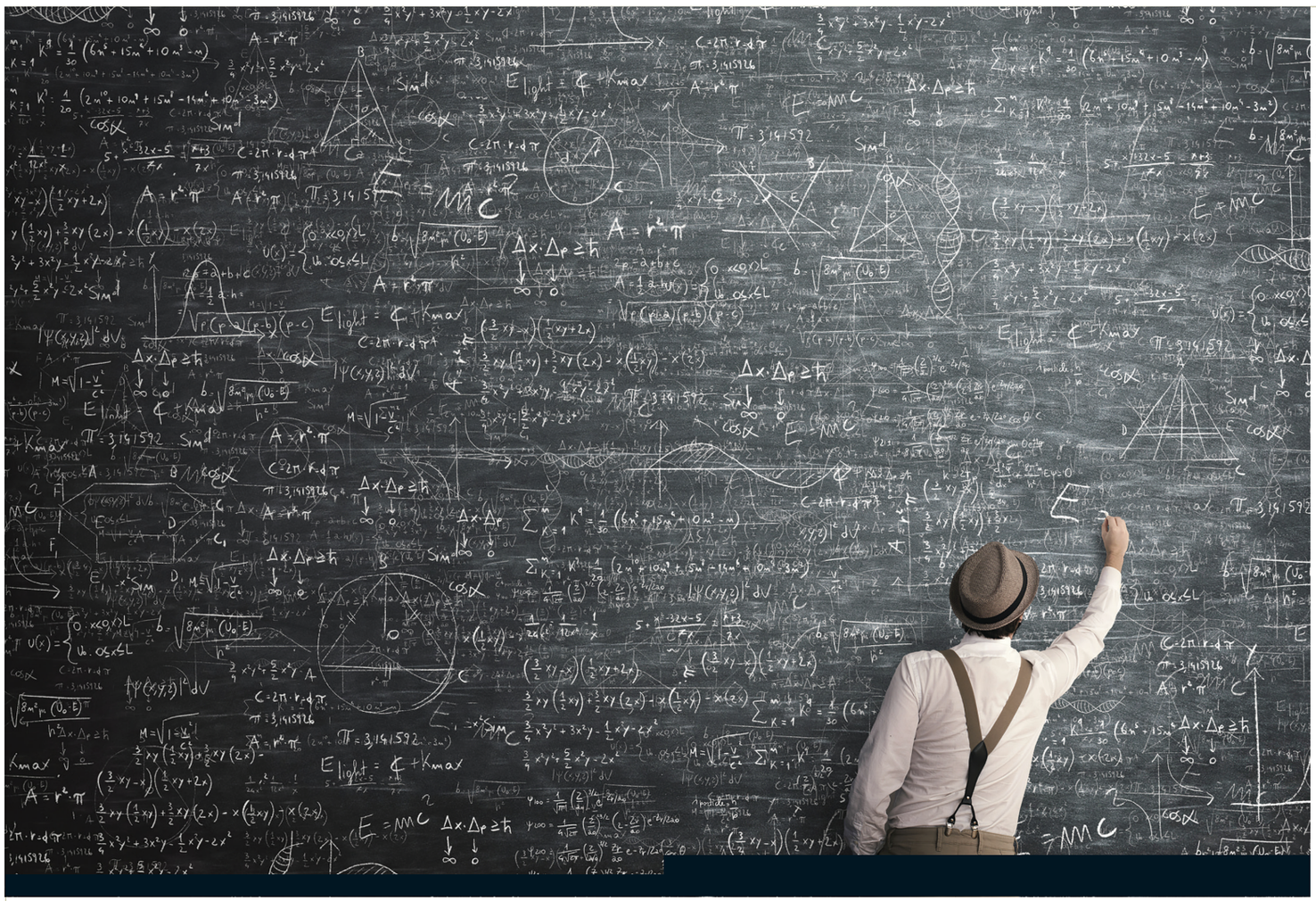
# Adding complexity

**Dominic Regan** assesses whether costs budgeting is now too complicated to function properly



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It is harder to complete a budget today than to do a cryptic crossword – in Chinese. How have we come to this?

Costs management today is unrecognisable when compared to how it began under the pilot schemes a decade ago. I hear more complaints about it today than anything else within the Civil Procedure Rules. Intriguingly, both practitioners and several members of the judiciary express disquiet.

What has gone wrong, and how might the process be redeemed? Sir Rupert Jackson, aware of my Birmingham roots, invited me eight years ago to look at how the mercantile pilot scheme was operating there. I was given the warmest of welcomes by His Honour Judge Simon Brown QC, who went so far as to let me sit alongside him on the bench when he was conducting case and costs management hearings. It was a revelation. Not an Excel spreadsheet in sight. Rather, he would look at the proposed directions with a beady eye on proportionality, even then. In a matter of minutes, he would give the parties a firm steer without descending into precise figures.

With each indication, one could see thousands of pounds being shed. 'This does not warrant a silk', 'this trial will last three days rather than a week' or 'two experts a side only' were examples of the approach. I reported back to Lord Justice Jackson and told him that I thought the concept was excellent. Telling the parties what for at the outset was sobering, and certain to further the overriding objective.

Another Birmingham authority, costs and clinical negligence supremo District Judge Richard Lumb, struck a similar tone in his *Merrix* judgment.

He said: 'Budgeting and assessment of costs of any phases are not mutually exclusive. There are different tools available to the court to manage costs to ensure that ultimately any costs to be paid by a paying party to a receiving party are reasonable and proportionate. A helpful analogy may be to view costs budgeting as setting out the general landscape for the claim, whereas the assessment of costs performs a different function by surveying the terrain within that landscape in more detail.'

His vision was that guidance given at the beginning would be translated into precise figures at the end, by way of detailed assessment. This approach was rejected on appeal by Carr J as was, and again by the Court of Appeal in *Harrison v University Hospitals Coventry and Warwickshire NHS Trust* (2017) EWCA Civ 792.

As the Jackson Report took shape he, with the input of assessors,

developed a forensic approach to budgeting; hence the arrival of phase, task and activity. This was much more onerous for the parties. Incidentally, it was my idea to alleviate the burden by only having to fill in the front page where the budget was less than £25,000.

'The process was intended to be one conducted swiftly and economically, and of necessity had to be something of an impressionistic exercise' was how the excellent Warby J described the process as late as October 2015 in *Yeo v Times Newspapers* (2015) EWHC 209 (QB). That was my romantic expectation too.

## OVER-ENGINEERING

The nub of the problem is that the process has been over-engineered and is unduly complex. For example, Warby J, in the same judgment at paragraph 64, confronted the conundrum that results from being told not to look at hourly rates. One might regard this as akin to ranking the prospects of a racehorse without having regard to its age, weight or number of legs.

Roger Mallalieu of counsel did the profession a favour by bringing the successful appeal in *Yirenki v Ministry of Defence* (2018) EWHC 3102 (QB). The judgment of Jacobs J explained, fully five years into mainstream costs management, that the budget is not provisional in nature, and that the court is not empowered to dictate how the component elements are to be spent; micro-management is not on. Such profound guidance ought to have been in place on 1 April 2013.

The rules and accompanying practice direction have been amended again and again. 'Costs and Funding following the Civil Justice Reforms: Questions and Answers' is the snappily entitled handbook on the topic, now in its fifth edition. The fattest chapter is about case and costs management. After a few useful but cursory comments about the vital task of case management, we are then given dozens of pages about budgeting. That reflects the complexity of the subject, along with various tensions and the odd lacuna too. There are still more questions than answers, as noted by the shrewd Turner J.

## CONSEQUENCES

So much is at stake with the budget. In the last edition of this magazine, Andrew Hogan said that in six and a half years, he had never seen a budget departed from for good reason at the conclusion of a case. 'If it is in the budget, it is in the bank' is my current mantra. That, of course, assumes that the work has been done, and the indemnity principle has not been breached.

Paying parties (often known as defendants) are inconsolable. They identify an incentive to spend, spend, spend. How, they ask, is that to be squared with the first words of the Civil Procedure Rules, where one is enjoined to deal with cases justly and at proportionate cost?

While cases are budgeted through to trial, most of them never go the distance. This means that the exercise is generally pointless. Yet another issue, and one mentioned by the senior costs judge at the Hailsham Chambers summer costs talk, is what happens where a phase is only partially completed? Something less than the full amount needs to be awarded - but how much? One arbitrary approach is to award 50%.

Should a party fail to exhaust their allotted fund, the door to variation then opens. Say £20,000 had been allowed for experts. The receiving party only claims £14,000. That is not the end of it. The paying party might contend that this reduced figure is still too high, given that there had been no meeting of experts. What then?

In chapter 6 of his Supplemental Report on Fixed Recoverable Costs of 21 July 2017, Sir Rupert Jackson acknowledged as a serious problem the fact that incurred costs are beyond the scope of budgeting which, as CPR 3.12 makes abundantly clear, is only concerned with prospective expenditure (what is to be done and spent). He acknowledged the suggestion by Master Cook that steps should eventually be taken to manage early expenditure but, for the time being, did not propose any immediate measures. It could be years before this concern is addressed.

The provisions have just been amended again so that the trial fees of counsel go into the pre-trial phase. This never ending saga of tweaks betrays fundamental flaws in the process. To this day, we have issues about how to adjust the budget on account of a significant development. Inevitably, the development will occur before an affected party can do anything about revising their budget. Rather than resort to mental contortions, would it not be better to permit retrospective variations provided agreement is sought or, failing that, a court application is made within, say, 14 days?



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It is not all bad, however. Receiving parties regard the slog as ultimately rewarding. Big, fast payments on account, typically 90% of the budget, alleviate cashflow and funding concerns. That is the upside for the victor. I am an ardent supporter of costs management. It is important that those entering the litigation casino do so with a decent idea of what their costs liability will be if they lose, and what they might get if they win. I have heard many stories of settlement seemingly provoked by service or receipt of a budget.

When fixed costs do arrive, as I fully expect they will in 2021, budgeting will then become less common. The costs matrix will replace costs management at the beginning and detailed assessment at the end. Nevertheless, budgeting will remain in place for cases put at over £100,000, and in complex matters worth less than that. Clinical negligence work appears to be immune from any fixed costs proposals.

It would be a drastic step to scrap the rules and start afresh, but perhaps it would be of benefit. Simplification and clarity would be welcome. Vast sums are at stake. I interviewed Sir Rupert Jackson immediately after his 109 reforms were implemented. I asked him which he thought the most important. Without missing a beat, he said costs management. I am sure he was right. Good concept; bad rules.

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