# Hour of need

It is time for judges to be open about hourly rates, argues **Colin Campbell**

It is well known that costs budgeting in civil cases in England and Wales is the product of recommendations made by Sir Rupert Jackson in his *Review of Civil Litigation Costs: Final Report*, published in December 2009. From 1 April 2013, changes to the Civil Procedure Rules (CPR), through the introduction of section II of Part 3 ('costs management') have required all parties to file and exchange costs budgets in multi-track claims up to £10m in value using Precedent H; which is a document in landscape format annexed to the Practice Direction to Part 3.

Divided into phases for work such as disclosure, experts' reports, trial and so forth, Precedent H requires its authors to include a rate (per hour) for the work undertaken already, and to be incurred by the legal representatives involved in the case. At the subsequently convened costs and case management hearing (known as a 'conference' and abbreviated to CCMC), the procedural judge will fix the budget at figures that: '…fall within the range of reasonable and proportionate costs' (see CPR PD 3.D.12)

In doing so, however, the judge is prohibited from approving the hourly expense rates that the parties' lawyers have been obliged to include in their Precedents H. CPR 3.15(8) provides that where a costs management order has been made: ' …it is not the role of the court in the costs management hearing to fix or approve the hourly rates claimed in the budget'.

It follows that section II of CPR 3 and its practice direction contain a curious paradox. While the parties must nail their colours to the hourly rates mast in Precedent H, the judge seized with the task of allowing the costs budget at a reasonable and proportionate level is not permitted to fix or approve them. Given that a major battleground at any subsequent detailed assessment of the winning party's costs under CPR 47 invariably involves an argument about 'What is the just hourly rate to allow', this is not without controversy.

The expanding body of case law since 1 April 2013 in costs budgeting is evidence of this. Where hourly rates have been concerned, it has been a case of 'some judges will, some judges won't and some judges just sit on the fence'.

## JUDICIAL APPROACHES

In *Group Seven v Nasir* [2016] 2 Costs LO 303 for example, when fixing multi- million pound budgets, Morgan J dealt with the hourly rates as follows:

'44. I have decided that I should increase the Central London rates for those parties who have instructed Central London solicitors and I should allow the Swiss Bank the rates for a City firm by reference to the 2010 Guideline rates but not any more than those rates.

'45. I will approve budgets which contain the following maximum hourly rates…'

The judge then set out those rates.

Contrast that with the 'it's not the role of the court to fix or approve the hourly rates' approach where, instead, the judge criticises the rates as being excessive, but does not explain what they should be. That was the way in which Constable J dealt with them in *GS Woodland Court GP 1 Ltd v RGCM Ltd* [2025] EWHC 285 (TCC). He said this at [12]-[14]: 'In terms of rates, it is not for me to provide any particular rates that ought to be substituted for those claimed. However, the rates claimed are significantly in excess of the guideline rates…

'…. whilst of course I am not going to say anything specific in terms of what the rates should be or the precise calculation, *I will take account of a relatively sizeable downward adjustment in each of the phases where there are heavy time costs to reflect the excessive rates*.' [emphasis added].

Then there is the sitting on the fence approach. In *Re PanNOx Emissions Litigation* [2024] Costs LR 1209, Constable J said this at [54]: 'While it is not the role of the court to fix or approve the hourly rates claimed in the budgets (CPR 3.15(8)), in general terms, we do not take issue with the rates claimed by either the claimants or the defendants.'

Does 'not taking issue' mean that the rates were approved, or did CPR 3.15(8) override the court's ability to do so, even if it wanted to? No assistance is given in the judgment, even though the same judge in the contrasting case of *GS Woodland*, subsequently stated that he had taken into account what he believed to be the correct rate, in making his downwards adjustments to the budget.

## BURGEONING CASE LAW

Whatever the rights and wrongs of these contrasting approaches, a new recruit to the burgeoning costs budgeting case law library is likely to become important for the future. It is also one that is relevant to the issue of hourly rates.

Until recently, a feature of budgeting has been uncontroversial: that when the judge has fixed the budgets, the costs of the CCMC will be 'costs in the case'. In other words, when the day of reckoning comes for a decision about who pays the costs of the costs management, it will be for the ultimate loser to account to the winner to do so, either in an agreed sum, or in an amount to be decided by the court.

Not anymore. While in the past, as Coulson J observed in *Findcharm Ltd v Churchill Group PLC* [2017] 3 Costs LR 263, '… some parties seem to treat cost budgeting as a form of game, in which they can seek to exploit the cost budgeting rules in the hope of obtaining a tactical advantage over the other side', such conduct would do no more than rub the judge up the wrong way and make them more favourably disposed to the other party. No longer. The 'costs in the case' mould has been broken, and it is clear those who have been over ambitious in their budget expectations, now do so at their peril as to costs.

In *Zavorotnii v Malinowski* [2025] EWHC 260 (KB), for example, the claimant continued to advance before HHJ Walden-Smith an overly ambitious costs budget. He achieved 60% of what he had sought, which was just 18% above the figure offered by the defendant. While the judge found that it could not be said that he had been 'entirely unrealistic', the claimant had, however, come 'very close' to such a finding; in which case there would have been a costs order made against him.

However, in *GS Woodland*, Constable J did go further. The claimants wanted approval of £8.74m for their costs budget against a pre-CCMC offer of £3,539m; and they had come away with £4,212m. The budget had sought hours that were 'implausible' to the extent that the judge deprived the claimants of their costs, and ordered them to pay the defendants' costs (excluding the first and sixth defendants) of the attendance of counsel and one solicitor at the hearing. In effect, the claimant had 'lost' even though more than the defendant's offer had been allowed.

How does the breaking of this mould fit in with hourly expense rates at costs budgeting? The answer is CPR 3.15A, which requires that:

'(1) A party ("the revising party") must revise its budgeted costs upwards or downwards if significant developments in the litigation warrant such revisions.'

Self-evidently, 'significant developments' can themselves be significant and cost a lot of money. It follows that in substantial cases, in particular in the commercial court and in clinical negligence litigation, it will be necessary, indeed mandatory, to apply for an increase in the budget (using 'Precedent T"), so that where the court is costs managing the case, it is kept up to date.

Suppose, however, that a party in a large action needs to revise its budget upwards under CPR 3.15A, and that the judge at an earlier CCMC has stated that the rates sought were 'excessive'; but without having given any further guidance about what a reasonable rate would be. Anxious not to advance a rate that would be unrealistic or overly ambitious following that judicial eyebrow raising at the CCMC, how on earth is such a party expected to know what rate the budgeting judge had in mind when fixing the budget in the first place?

Include too high a rate in Precedent T on making the application, and the applying party will take the risk that a significant costs penalty will be imposed. Advance too low a rate and the applying party may find that the varied budget will be insufficient to cover the work required to deal with the 'significant development' in the litigation. Tough on the solicitors and even tougher on the parties, all for want of the judge giving the guidance and certainty that Morgan J felt able to provide in the *Group Seven* litigation.

The absurdity of this situation is that budgeting judges do not fix costs budgets by placing a damp finger in the air to see which way the wind is blowing. They do so by working out the hours to be expended and then applying the hourly rate that they consider to be appropriate, so that the ensuing multiplication of the pair produces a reasonable and proportionate allowance. In these circumstances, it beggars belief that the parties should be kept in the dark about what that rate is. If, instead, they were told what rate had been used, they would know the right figure to include in Precedent T in any later variation application; and indeed, have a steer as to what would be allowed at a subsequent detailed assessment of any unbudgeted costs under CPR 47. Very likely, too, it would make agreement about how much the revised budget should be, far easier to achieve.

Despite Sir Rupert Jackson's 2015 prediction that 'within 10 years, costs management will be accepted as an entirely normal discipline and people will wonder what all the fuss was about', costs budgeting jurisprudence continues to evolve at pace, with the departure from 'costs in the case' being the latest example. The requirement of the overriding objective in CPR 1.1 to 'deal with cases justly' should cut both ways. To do so 'justly', judges need to play their part and when it comes to costs budgeting, it is time to end the hourly rates charade. Cards on the table, face up, should apply to the parties and to the judiciary. If the parties are obliged to front up their hourly rates in Precedent H, so should the judges when budgeting them. A simple amendment to CPR 3.18 (8) would do that, and would also resolve the current inconsistency in judicial approach that the contrasting decisions in *Group Seven* and *GS Woodland* have illustrated.

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