



# CPRC Cost Management Consultation

## Representations of Humphries Kerstetter LLP<sup>1</sup>

1. Set out below are the representations of Humphries Kerstetter LLP on the Civil Procedure Rule Committee (Sub-committee) Consultation Paper on Costs Budgeting and Costs Management dated 14 June 2013.
2. Our comments are restricted to the key question as to whether mandatory costs budgeting should extend to claims in excess of £2 million.
3. Our view is that the blanket exception currently applicable to claims in excess of £2 million should be removed. Our reasons are as follows:
  - 3.1. Although the principal purpose of costs budgeting is to ensure proportionality, as to which there is generally no problem in high value claims for self-evident reasons, the mandatory provision by all parties of a costs budget at an early stage of litigation has the further benefit of forcing all litigants to focus their attention not only on:
    - 3.1.1. the costs they will need to pay their own legal representatives in order to resolve their dispute (“**own costs**”), but also on
    - 3.1.2. the possible costs consequences of being unsuccessful (“**costs exposure**”).

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<sup>1</sup> Humphries Kerstetter LLP is a boutique City litigation firm. Around 60% of its practice is conducted in the Commercial Court and Chancery Division (the remainder comprising litigation in other courts and arbitrations).

3.2. Without mandatory costs budgeting litigants' knowledge of their own costs depends on the information they can obtain from their own legal representatives. This usually takes the form of a preliminary estimate, often restricted to pre-action work or work leading up to the first CMC, usually in the engagement letter, and is then updated infrequently as the claim progresses. Accordingly, litigants' information at the outset of the claim as to their own costs is sketchy. Although sophisticated litigants sometimes request more detailed estimates, such estimates tend to be unreliable because there is generally no contractual or ethical restraint on departing from those estimates where they prove to be inaccurate. The only information that is normally given to litigants as to their costs exposure is that they should assume that their opponents will spend at least as much as themselves and that recoverable costs (costs exposure) will generally be around two-thirds of costs incurred (own costs), with appropriate adjustments for multi-party claims.

3.3. Mandatory costs budgeting enables litigants to obtain more reliable information as to their own costs. This is because their own legal representatives are required to expose their costs estimates to the scrutiny of their opponents and their opponents' legal representatives<sup>2</sup>. The embarrassment factor (i.e. the risk of being shown to have provided too high an estimate, leading to suspicions of over-charging) tends to result in more realistic and meaningful own costs information being produced. By the same token, the ability to review opponents' costs information enables a litigant to obtain a more realistic idea of its costs exposure.

3.4. When litigants have a firmer idea both of their own costs and of their costs exposure, they have a clearer picture of how success and failure look in financial terms. Knowledge of the full spectrum of financial outcomes enables them to make informed judgments as to settlement and therefore encourages settlement, assists mediation and results in more realistic expectations from litigation.

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<sup>2</sup> And, to a limited extent, to that of the court – although the court's knowledge of costs tends to be very limited because the earlier professional experience of most Commercial Judges does not include experience of litigation costs nor of costs estimating.

- 3.5. We are unable to imagine any single hypothetical instance of high value litigation in which mandatory costs budgeting would not be advantageous to litigants. However, even if we are wrong about this, as has been noted in the CPRC report at paragraph 4.2, there is already power in the CPR to exempt a case from the costs management regime if that is considered appropriate in all the circumstances.
4. As against the above benefits, the burdens of mandatory costs budgeting are hardly onerous. Indeed the skills required for effective costs budgeting are, or should be, part of the skill set of every commercial litigator.
  5. Capping the costs that a successful litigant can recover is conducive to settlement because it gives a litigant greater clarity as to the potential shortfall between its own costs and its recoverable costs and also gives its opponents greater clarity as to their costs exposure.
  6. We regard mandatory costs budgeting as a further step (following the move away from the presumption in favour of standard disclosure) on the road to making commercial litigation in the English courts more competitive with other jurisdictions and rival dispute resolution fora. Litigation in England is internationally regarded as the most expensive in the world<sup>3</sup>. It is no longer a sufficient answer that it may also be the most reliable. It is increasingly difficult to continue selling quality without also offering affordability.

**Mark Humphries/Kristopher Kerstetter**  
**Humphries Kerstetter LLP**  
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<sup>3</sup> Although a case could perhaps be made that the USA is entitled to share that dubious accolade.