

# Surely you can't be serious

If the intention of cost budgeting is to bring down the cost of litigation, it is doomed to fail, says **Richard Barr**



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**Before (2012):**  
I issued proceedings in a sad case of a young lady who had become paraplegic when a tumour on her spine had not been diagnosed. It was a multi-track case and, once the defence was filed, the court issued a brief order dealing with various preliminary issues and fixing a case management conference (CMC) which took place just over three months later. Thereafter, the case galloped along at a slick pace and was satisfactorily settled months ago.

**After (2014):**  
I issued proceedings in an equally sad case of a man who became paraplegic after surgery. Again, it was a multi-track case. Again, the court issued a preliminary order, this time giving no substantive directions to progress the case, but focusing almost entirely on a

costs CMC more than six months later, stipulating that the hearing should not be by telephone (the norm for CMCs) but by the parties attending in person. Two hours have been allotted (four times longer than a normal CMC).

It will be months after that before we can get down to the serious issues in the case.

#### In between: the introduction of costs budgeting (2013):

There is a scene from one of my favourite films – *Airplane!* – when the disturbed hero whose only previous flying experience was in 'the war' (type of war not stated, but locations such as Drambuie and Daiquiri were involved) was called on to save an airliner when both pilots became incapacitated.

Last week, I was reminded of a scene in the film when I filled in my first cost budget (precedent H) without the help of a costs lawyer: in *Airplane!* we saw the flight deck with an unending menacing line of instruments, with increasingly insistent flashing lights stretching into the distance – a nightmare for anyone wanting to save a plane.

Getting your precedent H wrong will not down a plane, but it could easily down your case. Like the movie, it is menacing – a spreadsheet with column after column spreading outwards into the distance – enough to make

grown solicitors break down in tears.

It is often questioned that if builders or manufacturers can estimate their costs, then why cannot lawyers? The answer is simple. If you build a house or make a widget, you are allowed to get on with your task with no one interfering with you.

In litigation, if your house was a case, the process would be more like: dig the foundations and your opponent immediately argues that they are in the wrong place or fills them in. As the walls go up, your opponent sneaks in and knocks them down.



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In the meantime, the judge takes the view that your windows are the wrong shape and should be replaced, while your opponent regroup and tells you there are too many bedrooms and you do not need a garage.

Then your expert comes along and tells you that you should not

have built a house at all and what is needed is a factory or a beach hut. By then you are a quivering mound of jelly and wish that all you had to do was save a doomed airliner.

Before costs budgeting was introduced, multi-track cases were well managed and moved on at a pace. Now, it seems everything has ground to a halt as courts are clogged with long arguments over each side's estimates. In truth, nobody can have a hope of doing more than making an intelligent guess about costs, because the variables are infinite.

If the intention of the cost budgeting is to bring down the cost of litigation, it is doomed to fail. From talking to lawyers for claimants and defendants, I have so far found no one who thinks it is a good idea – or will work.

It is a completely unnecessary clog on the system of justice. The legal profession already has far more controls on costs than any other profession. All costs are subject to assessment by the court and, especially since April last year, even tougher rules as to proportionality.

Most of us went into law because we were rather interested in achieving justice for our clients at a reasonable cost. Now that seems an impossible dream – a litigation plane crash perhaps? **SJ**