

Costs Budgeting Departures from Budgets on Detailed Assessment

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Introduction – The (only) Rule

Assessing costs on the standard basis where a costs management order has been made

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.

(Attention is drawn to rules 44.3(2)(a) and 44.3(5), which concern proportionality of costs.)

Limited Higher Court Guidance

- *Harrison v University Hospitals Coventry and Warwickshire NHS Trust* [2017] EWCA Civ 792
- *Merrix v Heart of England NHS Foundation Trust* [2017] EWHC 346 (QB)

Key Points From *Harrison and Merrix*

- Budgeting aims to reduce the number and scope of detailed assessments
- The importance of certainty for receiving and paying parties
- Costs Judges “*should ... be expected not to adopt a lax or over-indulgent approach to the need to find ‘good reason’*” (Harrison at [44])
- “*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*” (ibid.)

Upwards Departures

- Unexpected development in the litigation ✓
- cf PD3E para 7.6:

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.

- Good reason likely to be wider than significant development (see *Jallow v MOD* [2018] EWHC B7 (costs))

Guidance from Cases on Budget Variations

- Four key cases:
 - *Churchill v Boot* [2016] EWHC 1322 (QB)
 - *Sharp v Blank* [2017] EWHC 3390 (Ch)
 - *Al-Najar v The Cumberland Hotel (London) Ltd* [2018] EWHC 3532 (QB)
 - *Seekings v Moores* [2019] EWHC 1476 (Comm)
- Four key points from *Al-Najar* to follow...

Point 1

- Whether a development is “significant” is a question of fact which depends primarily on the scale/complexity of what has occurred
- i.e. there is a de minimis element, which is likely to be proportionate to the size of the budget
- *See Sharp:*
 - Agreed budgets £17.6m/£19.1m
 - Development → increase in expert phase of < 1% not significant

Point 2

- A development which should reasonably have been anticipated is probably not significant
- Should have foreseen ≠ could have foreseen
- But NB *Churchill* – “capable” of being foreseen
 - May suggest a higher bar

Point 3

- The development can be one which arises in the normal course of litigation
- i.e. it does not have to be something external to the litigation or particularly unusual

Point 4

- Setting the bar for variations too high would encourage over-cautious budgeting
- i.e. if parties have to cater for every eventuality, then budgets and costs will increase, which is to be avoided

More Points

- From *Seekings*:
 - A party will not be able to rely on a significant development which is their own fault
 - The total costs following revision must still be proportionate
- From *Churchill*:
 - If a party has incurred costs to date with no regard to the budget, it may be harder to get an increase

Examples

- NB these are fact-specific - do not assume the same result in another case
- *Churchill*:
 - Doubling of value of claim ✗
 - Adjournment of trial ✗
- *Al-Najar*
 - Double the amount of expected disclosure ✓
- *Sharp*
 - Additional documentation following order for specific disclosure ✓
 - Almost doubling of the trial length ✓
 - Need for additional expert evidence to meet an unexpected new report ✓

Decisions on Good Reason

- Few and far between
- *Sony Communications International v SSH Communications Security Corporation* [2016] EWHC 2985 (Pat)
 - Summary assessment
 - Increases sought in expert (✓), trial prep (✗) and trial (✓) phases
 - Some factors
 - The court should be more indulgent of errors where budgeting was not mandatory (must be doubtful)
 - The receiving party was not seeking total costs above its total budget
 - The receiving party had not kept the court informed of departures from its budget during the case

Significance of PD3E Para 7.6

- No authoritative cases under the 2013 regime
- Defamation pilot scheme: *Henry v News Group Newspapers* [2013] EWCA Civ 19
 - Failure of the parties to update each other was not fatal to a finding of good reason on assessment
 - Obiter suggestion the obligation to update budgets may be more important under the 2013 scheme
- But updating can only be important if it works...

How Do You Update a Budget?

Original Precedent H:

Work done / to be done	Incurred		Estimated		Total (£)
	Disbs (£)	Time costs (£)	Disbs (£)	Time costs (£)	
Disclosure	£1,500.00	£3,500.00	£5,000.00	£20,000.00	£30,000.00

Option 1 – recast at the date of variation:

Work done / to be done	Incurred		Estimated		Total (£)
	Disbs (£)	Time costs (£)	Disbs (£)	Time costs (£)	
Disclosure	£6,500.00	£23,500.00	£3,000.00	£15,000.00	£48,000.00

Option 2 – recast as at date of original CMO:

Work done / to be done	Incurred		Estimated		Total (£)
	Disbs (£)	Time costs (£)	Disbs (£)	Time costs (£)	
Disclosure	£1,500.00	£3,500.00	£8,000.00	£35,000.00	£48,000.00

Which is the Right Way?

- PD3E:

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

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.

- If budget is recast at date of variation, the “estimated” columns will contain costs which have in fact been incurred
- This appears to contravene para 7.4

The Dilemma

- Recast at date of variation:
 - Consistent with the rules, but...
 - Costs which were previously estimated will have become incurred and therefore subject to assessment
 - Result is more assessments
 - Increased uncertainty if no decision on good reason until assessment
 - Ability to vary depends on nature of development and possibility of making an application in time as well as being at the mercy of listing
- Recast at date of original CMO:
 - May require a strained reading of the rules, but...
 - Variations are workable

What is the Answer?

- *Yeo v Times Newspapers Ltd* [2015] EWHC 2132 (QB)
 - No power to approve incurred costs → by implication budget must be recast at date of variation
- *Sharp v Blank* [2017] EWHC 3390 (Ch)
 - Budget should be recast at date of original CMO
- Commentators generally think the literal wording of the rules is with *Yeo* but *Sharp* is the only practically workable approach
- White Book says follow *Sharp*
- Civil procedure rule committee apparently favours the *Sharp* approach, but has yet to make this clear
- Clarity needed urgently!

Why Does It Matter?

- If a budget variation is not reasonably practicable (*Yeo*), then it should not be held against the receiving party on detailed assessment
- If budget variations are workable (*Sharp*), then there is less excuse for not doing so → good reason may be harder to establish
- Even if *Sharp* is right, a good reason should not be rejected just because there was no variation application

The Role of Assumptions

- Tactical use of detailed assumptions when CMO made to make departure easier later
 - Deprecated in *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd* [2015] EWHC 481 (TCC)
- Will it actually help?
- Assumptions are not recorded as part of the CMO
- Courts will not encourage poring over CCMC transcript
- Unrealistic assumptions will get you nowhere

The Art of Persuasion

- Not enough to establish a good reason – must also link it to the additional costs
- Consider supporting a “good reason” argument with a witness statement supporting the existence of the reason and its causal relationship to the costs

Downwards Revisions

- The actual costs being less than the budgeted sum
 - Is this a departure at all?
 - Indemnity principle must apply as a filter on recoverability before CPR 3.18 is engaged
- Seems to be accepted not reduction in hourly rates
 - *RNB v LB Newham* [2017] EWHC B15 (costs): good reason – appeal settled
 - *Bains v Royal Wolverhampton NHS Trust* (2017, DJ Lumb): no
 - *Nash v MOD* [2018] EWHC B4 (costs): no
 - *Jallow v MOD* [2018] EWHC B7 (costs): no

Salmon: Swimming Against the Tide

- *Barts Health NHS Trust v Salmon* (17.01.19, CLCC, HHJ Dight CBE)
 - Claiming less than the budgeted sum is a good reason for a downwards departure
 - Once there is a good reason in any phase, no further good reason is required for an additional departure
 - i.e. once there is any good reason in a phase, all the costs in the phase are open to assessment
- Not appealed, but unlikely to be followed
- Not followed in *Chapman v Norfolk and Norwich University Hospitals NHS Foundation Trust* (04.03.20, DJ Lumb) or *Utting v City College Norwich* [2020] EWHC B20 (costs) – Master Brown

Non-Completion of a Phase

- Two competing approaches
- *Salmon*:
 - Not doing all the work in a phase is per se a good reason to depart from the budget – Costs Judge should consider what figure to allow
 - Supported by Master Brown in *Utting*
- *Chapman*:
 - “*Very clear evidence of obvious overspending in a particular phase would be required before the Court could even begin to entertain arguments that there was a good reason to depart from the budgeted figure if the amount spent comes within the budget*”
 - Overspending means deliberate costs building

Salmon v Chapman

- *Chapman* probably more consistent with the approach taken in *Harrison*
- Does deliberate costs building set the bar too high?
- Ultimately a policy question – is the aim to reduce detailed assessments or reduce costs?
- The Court of Appeal needs to tell us

Proportionality

- Proportionality should be considered at the end of the assessment, taking into account incurred and budgeted costs
- All incurred costs could be disallowed, but good reason needed to reduce costs below level of the budget: *Merrix* at [82]
- Culpable overstatement of value of claim could be a good reason, but not enough that judgment was for less than claimed (*Jallow v MOD*)

The Art of Departing

- Once there is a good reason to depart, there must be an assessment of the costs in that phase
- That does not necessarily mean a full-blown assessment – entirely a matter for the Costs Judge (*Salmon*)
- Different approaches could be taken to different phases
 - See *Sony Communications*: paying party's budgeted amount allowed in expert phase; additional trial phase costs assessed in usual way