NEW SQUARE

Harrison & Costs Budgeting – the practicalities

26th April 2018

Roger Mallalieu

NEW SQUARE

Harrison & UH Coventry

- CPR 3.18 ‘does what it says on the tin’;

  - No departure from agreed or approved costs (‘budgeted’ costs i.e. future costs at time of CCMC) UPWARDS OR DOWNWARDS absent ‘good reason’;

  - Incurred costs at the time of the CCMC are not ‘budgeted’ costs and CPR 3.18(b) does not apply to them. The costs are subject to assessment ‘in the usual way’;

  - SARPD Oil was wrong – on this point;

NEW SQUARE

Paragraph 52 – the sting in the tail

"a costs judge on detailed assessment will be assessing incurred costs in the usual way and also will be considering budgeted costs (and not departing from such budgeted costs in the absence of "good reason") the costs judge ordinarily will still, as I see it, ultimately have to look at matters in the round and consider whether the resulting aggregate figure is proportionate, having regard to CPR 44.3 (2)(a) and (5): a further potential safeguard, therefore, for the paying party."

NEW SQUARE

What is the effect?

- Get your costs budget right and get it approved and your future costs are (relatively) protected;

- They are also capped. If you spend more, do not expect to recover it unless:
  - There have been significant developments and you have complied with PD 7.6;
  - There have been interim applications which were not included in the budget (PD 7.9)
  - You can show 'good reason' on assessment (and good luck);
  - You have an order for costs on the indemnity basis;

NEW SQUARE

What is NOT the effect?

- An approved budget does not displace the indemnity principle;

- This is unlikely to require 'good reason'. CPR 3.18 applies on an assessment and a party would be unable to sign the signature to the Bill if the costs claimed breached the indemnity principle;

- Incurred costs are not immune from budgeting;
  - CPR 3.15(4) – the making of 'comments' which <u>are</u> to be taken into account on assessment;
  - The living budget phenomenon – CIP v Galliford Try [2015] EWHC 481 (TCC)

NEW SQUARE

What may be the side effect?

- The impact on payments on account;
- Pre Harrison, increasing practice of high payments on account of 'the budget';
- Post Harrison, more nuanced approach;
  - High payment on account re approved 'estimated' costs
  - 'Conventional' payment on account re 'incurred' costs
  - Different if prima facie good reasons (or significant developments?)
  - See Cleveland Bridge UK Ltd v Sarens (UK) Ltd [2018] EWHC 827 (TCC)

NEW SQUARE

Significant Developments?

- 'Contingencies' must be in the Precedent H. A Significant Development therefore cannot be a contingency.

- A contingency is (?) work that is foreseen at the time of the budget as more likely than not to be required (Warby J, Yeo v Times Newspapers);

- If a contingency is included in the budget but disallowed by the Court as being unlikely to be needed, then, if it occurs, it should either be considered as a unanticipated application (add to costs at the end) or a significant development (agreed or approved if it is to be claimed);

- A significant development is therefore something which was not considered more likely than not to occur at the time of the CCMC. This may be because it was entirely unforeseen or because it was not sufficiently likely to warrant inclusion.

NEW SQUARE

Significant Developments?

- Churchill v Boot (April 2016, Picken J);
  - A doubling in size was not a significant development – an increase in value alone did not mean higher litigation costs;
  - Additional disclosure was not a significant development. The further disclosure had been foreseeable, therefore not a SD (query whether foreseeability was enough, see Warby J in Yeo);
  - An adjournment of the trial was not (on present facts) a SD.

- Warner v Pennine Acute Hospitals NHS Trust (September 2016, DJ Hovington);
  - 'the natural evolution' of the case (an expert raising issues which had not been anticipated) was not an SD;
  - Must be something 'not reasonably foreseeable';

NEW SQUARE

Significant Developments?

- Sharp v Blank (December 2017, Chief Master Marsh);
  - Disagrees with Warby J in Yeo that a SD is not a basis for approving costs incurred before the date of the revised budget;
    - The original budget is the base point. Costs (whether now incurred or not) re the SD are then placed in the estimated columns of the original (and now revised) Precedent H;
  - Whether something is an SD depends on the facts in context and the likely additional costs that have been or are likely to be incurred. It can be a single event or a combination of events;
  - An avoidable mistake in the original budget or the assumptions on which it was based is not (see also Elvanite & Murray & Stokes);
- Query – do decisions on SD inform what are 'good reasons'?

NEW SQUARE

Is budgeting being undermined?

"even now, 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. In extreme cases, this can lead one side to offer very low figures in their Precedent R, in the hope that the court may be tempted to calculate its own amount, somewhere between the wildly different sets of figures put forward by the parties. Unhappily, this case is, in my view, an example of that approach."

Coulson J, Findcharm Ltd [2017] EWHC 1108 (TCC)

The court disregarded the Defendant's Precedent R and approved the Claimant's Precedent H in the full (revised) sum claimed.

NEW SQUARE

Is budgeting being undermined?

- Post Harrison, the importance of budgeting is increased;
- The restrictions on revisions mean that it is important to get it right;
- The assumptions are crucial – making clear what you are and aren't budgeting for could make all the difference;
- If a judge disallows a particular category, a clear record of why could be crucial;
- Courts are wise to the most obvious tactical ploys and they can backfire;
- Comments on incurred costs – and on overall proportionality – may be extremely valuable on assessment;

Thank You – and Good Luck

4 NEW SQUARE LINCOLN'S INN

LONDON WC2A 3RJ

WWW.4NEWSQUARE.COM
T: +44 20 7822 2000
DX: LDE 1041
E: CLERKS@4NEWSQUARE.COM