

What do you do when you have a costs budget and your case settles before trial?

Do you:

- Draft the bill and leave the argument as to whether you've stuck to the budgeted phase figures to the Detailed Assessment hearing, OR
- Quote *Harrison* and keep it brief?

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CPR Rule 3.18 Assessing costs on the standard basis where a costs management order has been made

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.)

PD 3E

7.3

If the budgeted costs or incurred costs are agreed between all parties, the court will record the extent of such agreement. In so far as the *budgeted* costs are not agreed, the court will review them and, after making any appropriate revisions, record its approval of those budgeted costs. The court's approval will relate only to the total figures for budgeted costs of each phase of the proceedings, although in the course of its review the court may have regard to the constituent elements of each total figure. When reviewing budgeted costs, the court will not undertake a detailed assessment in advance, but rather will consider whether the budgeted costs fall within the range of reasonable and proportionate costs.

7.4

As part of the costs management process the court *may not approve costs incurred before the date of any costs management hearing*. The court may, however, record its comments on those costs and will take those costs into account when considering the reasonableness and proportionality of all subsequent budgeted costs.

7.10

The making of a costs management order under rule 3.15 concerns the totals allowed for each phase of the budget. It is not the role of the court in the cost management hearing to fix or approve the hourly rates claimed in the budget. The underlying detail in the budget for each phase used by the party to calculate the

totals claimed is provided for reference purposes only to assist the court in fixing a budget.

Commencement of detailed assessment proceedings: rule 47.6 47 PD.5.1

The new electronic Bill from 6th April 2018

In the circumstances provided for in this paragraph, bills of costs for detailed assessment must be in electronic spreadsheet format and compliant with paragraphs 5.A1 to 5.A4 (“electronic bills”) while in all other circumstances bills of costs may be electronic bills or may be on paper (“paper bills”) and compliant with paragraphs 5.7 to 5.21. Precedents A, B, C and D in the Schedule of Costs Precedents annexed to this Practice Direction are model forms of paper bills of costs for detailed assessment. The circumstances in which bills of costs must be electronic bills are that—

- (a) the case is a Part 7 multi-track claim, except—
 - (i) for cases in which the proceedings are subject to fixed costs or scale costs;
 - (ii) cases in which the receiving party is unrepresented; or
 - (iii) where the court has otherwise ordered; and
- (b) the bills of costs relate to costs recoverable between the parties for work undertaken after 6 April 2018 (“the Transition Date”).

5.A1

A model electronic bill in pdf format is annexed to this Practice Direction as Precedent S and a link to an electronic spreadsheet version of the same model bill is provided in paragraph 5.A2 of this Practice Direction.

5.A2

Electronic bills may be in either the spreadsheet format which can be found online at <http://www.justice.gov.uk/courts/procedure-rules/civil> or any other spreadsheet format which—

- (a) reports and aggregates costs based on the phases, tasks, activities and expenses defined in Schedule 2 to this Practice Direction;
- (b) reports summary totals in a form comparable to Precedent S;
- (c) allows the user to identify, in chronological order, the detail of all the work undertaken in each phase;
- (d) automatically recalculates intermediate and overall summary totals if input data is changed;
- (e) contains all calculations and reference formulae in a transparent manner so as to make its full functionality available to the court and all other parties.

5.A3.....

5.A4 Where a bill of costs otherwise falls within paragraph 5.1(a) but work was done both before and after the Transition Date, a party may serve and file either a

paper bill or an electronic bill in respect of work done before that date and must serve and file an electronic bill in respect of work done after that date.

5.1A.....

5.2 On commencing detailed assessment proceedings, the receiving party must serve on the paying party and all the other relevant persons the following documents—

- (f) if a costs management order has been made (and if the same information is not already fully provided in an electronic bill), a breakdown of the costs claimed for each phase of the proceedings. Precedent Q in the Schedule of Costs Precedents annexed to this Practice Direction is a model form of breakdown of the costs claimed for each phase of the proceedings

Harrison v University Hospitals Coventry & Warwickshire NHS Trust [2017] EWCA Civ.792.

The claim form had been sent to the court under cover of a letter dated 27 March 2013. The documents were stamped as received by the court on 2 April and the claim form itself was formally issued on 9 April. In August 2014, a costs-management conference took place at which the parties were given permission to rely on their updated costs budgets. The costs shown as already having been incurred by the respondent exceeded her estimated future costs. Shortly before the trial date in July 2015, the claim was settled. The respondent's costs were subject to a detailed assessment.

The issues arising from the approach taken by the costs judge on the detailed assessment were (1) where a costs-management order approving a costs budget had been made, whether a costs judge on a subsequent detailed assessment was precluded from going below the budgeted amount unless satisfied that there was good reason for doing so; (2) whether, with regard to costs incurred before the budget, there was or was not a like requirement of good reason if a costs judge on a subsequent detailed assessment was to depart from the amount put forward at the costs-management hearing

HELD: (1) Where there was a proposed departure from a costs budget, be it upwards or downwards, the court on a detailed assessment could sanction such a departure only if satisfied that there was good reason for doing so. That was the natural and ordinary meaning of the words used in CPR r.3.18(b). That meaning was wholly consistent with the perceived purposes behind, and importance attributed to, costs budgeting and costs-management orders, *Merrix v Heart of England NHS Foundation Trust* [2017] EWHC 346 (QB) approved, *MacInnes v Gross* [2017] EWHC 127 (QB) and *Collins v Devonport Royal Dockyard Ltd* unreported considered.

(2) Incurred costs would be the subject of detailed assessment in the usual way, without any added requirement of "good reason" for departure from the approved budget. Rule 3.18(b), in its then form, related to a departure from "the approved or agreed budget". But the costs incurred before the date of the budget were never agreed in the instant case, nor were they ever "approved" by the costs-management order. On the contrary, the focus of a judge making a costs-management order was

on estimating the costs reasonably and proportionately to be incurred in the future. Further, para.7.4 of PD 3E was quite specific: as part of the costs-management process, the court could not approve costs incurred before the date of any budget. The court disagreed with the obiter remarks made by Sales LJ on the subject of incurred costs in *Sarpd Oil International Ltd v Addax Energy SA* [2016] EWCA Civ 120.

Remember *Sarpd*:

Paras [41-44] “I therefore think that the particular obiter comments of Sales LJ may have gone too far” which led to the amendment of the PD to allow for the decoupling of incurred costs from budgeted costs.

Uncertainty

At least two uncertainties remain:

- What do and do not constitute ‘good reasons’ to depart from approved or agreed budgeted costs?
- What is the effect on approved costs, if any, by the hourly rates decision at the detailed assessment?

Good reason

There are few reported examples of what does and does not constitute a ‘good reason’ to depart from the agreed /approved budget at detailed assessment.

- **Harrison**

Para 44 No guidance or examples.

- **Collins**

Para 29

- **Merrix**

Para 74 indemnity principle and reference to *Henry*

- **Jones**

Unreported RCJ case in Liverpool. Referred to in *Merrix* at para 74

- **Barkhuysen v Hamilton** [2016] EWHC 3371 (QB)

The court determined costs issues after finding a defendant liable to the claimant for damages for false imprisonment, slander and harassment following false allegations she had made against him in the course of a land dispute.

The court was required to determine costs issues after finding that the defendant was liable to the claimant for damages for false imprisonment, slander and harassment, dismissing claims for malicious prosecution and three further slanders, and dismissing the defendant's counterclaim.

The parties were neighbours and the claims had arisen from a land dispute. The claims stemmed from a number of allegations the defendant had made against the claimant. The court found that the allegations were false and awarded the claimant damages of £32,080. The claimant's costs budget was £152,000.

The issues were inter alia (1) the allocation of the costs liability; (2) the basis of assessment; (3) whether the court should depart from the claimant's costs budget;

HELD: (1) The defendant was to pay 90% of the claimant's costs. The claimant had undoubtedly been the successful party. Virtually every factual issue had been resolved in his favour. The failed claims had failed on legal rather than factual grounds. A successful claimant's costs would not be reduced merely because he had failed in some minor respects. However, the court could make a different order to reflect any substantial issues on which the claimant had failed. Indemnity costs awarded

The costs would not be limited to the claimant's costs budget. There were several ways in which the defendant's conduct of the action had increased the claimant's costs beyond the budgeted amount. They might not have resulted from unreasonable conduct on the defendant's part, but they had reasonably not been budgeted for. The additional costs amounted to an estimated £27,000.

Late change of trial venue and fact that the hearing went part-heard both legitimate grounds for departure.

PD 3E para 7.6 the obligation to revise budgets in the event of 'significant developments' in the litigation. Failure to comply with this in circumstances where there was sufficient time to do so could negate what might otherwise be considered to be a good reason.

Hourly rates

At the budgeting CCMC, the judge will not determine hourly rates. If the hourly rates are reduced at the detailed assessment, should this prompt a concomitant reduction in the agreed/approved budgeted (i.e. estimated) costs? Does a reduction in hourly rates, in other words, constitute a 'good reason' to depart from the budget?

No real straightforward or easy answer to this. Indeed, the editors of Cook disagree; District Judge Simon Middleton argues no, Master Rowley says yes.

RNB v LB Newham [2017]. Deputy Master Campbell

If the receiving party's solicitors' hourly rates for work done before a costs-management order were reduced on a detailed assessment, the court could and should apply the same reduction to costs which were the subject of an approved or agreed budget.

The court had to determine an issue which had arisen during the course of the detailed assessment of the claimant's costs.

As a teenager, the claimant had suffered abuse at the hands of an employee of the defendant local authority when residing in a home operated by it. Proceedings were issued in October 2015. A costs case-management hearing took place in August 2016, when the claimant's costs budget was agreed in the sum of £143,692. The claim was settled for £250,000 in January 2017. At the detailed assessment, the claimant's solicitors' hourly rates for the costs incurred before the date of the costs-management order (incurred costs) were reduced.

The issue reserved and now to be decided was whether that reduction should be applied to the costs which were the subject of the agreed costs budget.

HELD: The local authority's case was that the hourly rates allowed for the incurred costs should be applied to the claimant's budgeted costs. It was common ground that that submission could only succeed if the local authority could satisfy the court that the reduction in the hourly rates claimed for the incurred costs was a "good reason" to depart from the figures in the claimant's costs budget, *Harrison v University Hospitals Coventry & Warwickshire NHS Trust* [2017] EWCA Civ 792 and *Merrix v Heart of England NHS Foundation Trust* [2017] EWHC 346 (QB) followed. The court did not approve or disapprove hourly rates when budgeting costs under CPR r.3.12 to 3.18; it simply approved an amount which it was reasonable, necessary and proportionate for a party to incur for each of the 10 phases of the litigation, with the exception of the incurred costs. The detailed assessment was the only occasion when the paying party had an opportunity to challenge the hourly rates of the receiving party's solicitors; that was a "good reason", if the hourly rates were reduced, to depart from the costs allowed in the receiving party's last approved budget. The same conclusion could be reached by reference to proportionality. Having regard to the factors in r.44.3(5), allowing higher hourly rates for budgeted work than the rates allowed in respect of incurred costs would result in a costs order which was disproportionate.

Decision appealed but withdrawn shortly before the hearing.

Bains v Royal Wolverhampton NHS Trust [2017] Unreported. DJ Lumb, sitting as a regional costs judge, disagrees, concluding that to do so would second guess the thought process of the judge at budgeting and impute a risk of double jeopardy.

Nash v MOD [2018] Unreported 22nd February Master Nagalingam.

A reduction in hourly rates of incurred costs is not a "Good Reason" to do the same for the hourly rates in the Budgeted costs.

“Hourly rates hold no special status in the making of a CMO”. Paying parties still retained the ability to argue that the overall sum of assessed incurred costs together with budgeted costs was disproportionate. There was no difference between the status of a CMO “which arises out of agreement rather than revisions following a dispute”

Importance of Precedent Q

- First thing the Judge looks at.
- Cannot understate the importance of the document.
- Undershoot the budget or overshoot.
- Proportionality based on both the incurred and the budgeted costs CPR Rule 44.3 (2) and (5)
- Harrison at para 52 refers to the total costs and states:
- *“the costs judge ordinarily will still ... 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”.*
- Keep it brief at your peril