

**What – right now – amounts to a good reason for departing from a costs budget for the receiving party and the paying party?**

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# Introduction

- Following pilot schemes, costs management became part of the mainstream litigation process from April 2013, 9 years ago.
- It applies in every Part 7 multi-track claim save if the claim is for more than £10 million (where there is a discretion to order costs management anyway - see e.g. *Sharp v Blank* [2015] EWHC 2685).
- The purpose (CPR 3.12(2)): “*that the court should manage both the steps to be taken and the costs to be incurred by the parties to any proceedings (or variations) so as to further the overriding objective*”.

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# Costs Management

- CPR 3.15 – default position is that there will be costs management (unless over £10m).
- It *“concerns the totals allowed for each phase of the budget, and while the underlying detail in the budget for each phase... is provided for reference purposes to assist the court..., it is not the role of the court in the costs management hearing to fix or approve the hourly rates claimed in the budget.*

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# Variations

- CPR 3.15A (October 2020 onwards):
- A party must revise its budgeted costs upwards or downwards if significant developments in the litigation warrant such revisions.
- Such particulars of variation must be filed and served and
- The court may approve, vary or disallow variations, having regard to any significant developments” since the CCMC

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## Approval/Comments

- CPR 3.17(3):
- (a) The court may not approve costs incurred up to and including the date of any costs management hearing but
- (b) may record its comments on those costs and take those costs into account when considering the reasonableness and proportionality of the budgeted costs.
- Unanticipated interim application costs can be allowed on top.

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# Budgeted Bills

## Tick through or good reason to depart?

- CPR 3.18: on 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 budget unless satisfied there is good reason to do so..."*
- *(c) Take into account any [comments on incurred costs] recorded on the face of the order*

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## Harrison

- In *Harrison v University Hospitals Coventry & Warwickshire NHS Trust* [2017] 1 WLR 4456  
Court of Appeal held the budget was not just an available maximum fund: the court can only allow either less or more than the budget if there is “good reason” to do so under CPR 3.18.
- Further, at [44] per Davis LJ:

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## Harrison

- *“That of course is a significant fetter on the court having an unrestricted discretion: it is deliberately designed to be so. Costs judges should therefore be expected not to adopt a lax or over-indulgent approach to the need to find good reason: if only because to do so would tend to subvert one of the principal purposes of costs budgeting and thence the overriding objective.”*

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- Reference to the stringency of *Denton* R3.9 test
- Presumably that means approaching it on the basis of:
  - (1) Considering the significance of the departure from the budget; (2) the causes of it
  - (3) All the circumstances of the case including in particular
    - (a) need for litigation to be conducted efficiently &
    - (b) need to enforce rules, Practice Directions and Court orders.

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## *Harrison*

- However, no more guidance was given:
- *“As to what will constitute “good reason” in any given case I think it much better not to seek to proffer any further, necessarily generalised, guidance or examples. The matter can safely be left to the individual appraisal and evaluation of costs judges by reference to the circumstances of each individual case.”*
- Thanks...

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- However, one crumb of comfort to paying parties at [52]:
- *“I add that where, as here, 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 r 44.3(2)(a)(5): a further potential safeguard, therefore, for the paying party.”*

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## How has this worked out in practice?

- *RNB v Newham LBC* [2017] 8 WLUK per Deputy Master Campbell: if hourly rates reduced on incurred costs, same percentage reduction applied to budgeted costs:
- Not followed in *Nash v MoD* [2018] 2 WLUK 539, nor *Jallow v MOD* [2018] 4 WLUK 405 – a reduction by the court in hourly rates for incurred costs not normally a “good reason” to depart from a costs budget

## Yirenki v MOD

- [2018] 5 Costs LR 1177 per Jacobs J:
- Master doing costs management cannot park issues such as hourly rates for detailed assessment, nor approve specific hours spent by particular fee grades.
- The aim of costs management was to arrive at a figure for each phase. No “micro-management”.

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# Yirenki

- The fact that the Master does not fix hourly rates or hours does not mean it is inappropriate for them to look at the constituent parts:
- *“Indeed, it is impossible to see how a Master can sensibly come to figures without looking to see how they have been calculated by the party putting them forward. In so doing, the Master should use his or her experience as to how much time should be spent, the type of people who should be doing the relevant work, and his or her experience of hourly rates.”*

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# Salmon v Barts Health NHS Trust

- Case on “good reason” to depart downwards. Budget approved, case settled early.
- On assessment, the paying party wanted to argue that the bill in certain phases was too high having regard to when the case settled, but those figures were still within the amounts allowed in the budget
- Master Whalan said this was not a “*good reason*” to depart: since amounts claimed were less than budgeted amounts, PP had very high hurdle to reduce it further.

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## Salmon v Barts

- Argument on appeal for PP was that it was open to the court to find that the early settlement of the case was a good reason to depart from the budget.
- If there was “good reason” the court could take the budgeted amount as the starting point and reduce it proportionately to reflect the work reasonably done to that point.

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## Salmon v Barts

- HHJ Dight (assessor Master Brown) went further than PP's argument –
- He held that the fact of underspend in itself was a “*good reason*” to depart and, once that was found, the costs judge could assess costs in those phases anew like an old DA.
- Went beyond D's argument which was adjustment..

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# Compare to Utting v City College Norwich

- [2020] 5 WLUK 334 per **Master Brown**
- Underspend on a phase of the budget is not a good reason in itself to depart from the budget
- Explained that his position in *Salmon* was on the basis that the relevant phases were not completed or at least not substantially so: assumptions on which the budget were made were not fulfilled = good reason to depart as otherwise unjust to the paying party.

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## Utting

- Master Brown disagreed with HHJ Dight and agreed with DJ Lumb in *Chapman v Norfolk & Norwich* that
- “*if an underspend were to be a good reason from departing from a budget it would be liable to substantially undermine the effectiveness of costs budgeting.*”

## Utting

- But if a phase is substantially not completed, *“it would be unjust for the RP to receive the full amount where only a modest amount of the expected work had been done....”*
- *Plainly, the fact that a party has spent less than its budget for a phase does not mean there is therefore in fact a good or appropriate reason for any further reduction.”*
- How it was to be approached if there was such a good reason was not answered.

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## Cf to Significant Developments

- Logically, a “good reason” to depart normally requires that the costs management assumption turned out not to be made out.
- Obvious overlap with CPR 3.15A “*significant development in the litigation*” to warrant revision to last agreed/approved budget, as revised from October 2020.

# Persimmon Homes – hailshamchambers

## Significant Development

- *Persimmon Homes Ltd v Osborne Clark LLP* [2021] EWHC 831 (Ch) (Master Francesca Kaye) –
- The new rules for variation in a budget involved a mandatory req of “*significant development*” and particulars of variation being submitted to other side promptly.

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# Persimmon Homes

- See [23]:
- *The question of promptness and the nature of the development giving rise to the application may re-emerge as part of this exercise of discretion.*

# Persimmon Homes

- [97] Not every significant development will warrant a revision to the last approved costs budget: *“Whether a development is a development at all... and whether it is significant and warrants a revision to the costs budget has to be considered in the context of each case.”*
- To get a variation there must be:
- (a) Significant development warranting revision to the last approved budget AND
- (b) Promptness in dealing with it.

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## Persimmon Homes

- *“There may be matters which occur in the course of the litigation that do not justify an application to vary a costs budget or were not considered at the time they occurred to be significant developments, but which may still amount to a good reason to depart from the last agreed or approved costs budget on detailed assessment.”*
- So is the test on “significant developments” tougher than “good reason to depart” under CPR 3.18 on detailed assessment?

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# If there was no application to vary budget at the time

- Where does that leave the argument that if you have not done applied to vary the budget during the main action under CPR 3.15A, it is too late to make a similar application via CPR 3.18 on assessment?
- No authoritative judicial guidance on this as yet...

## How easy is to depart from the budget?

- Many authorities on “*significant developments*” under CPR 3.15A, very few on “*good reason to depart*” under CPR 3.18. Presumably decisions on this are not being appealed, understandably.
- It is in the eye of the beholder.
- But the general sense is that it is not easy to find a good reason to depart.

## How easy is it to appeal?

- There simply aren't the cases, which perhaps itself answers the question.
- This is an evaluative judgment, and so difficult to appeal.
- *Easteye Ltd v Malhorta Property* [2019] Costs LR 2181 was an appeal from a costs management order where the judge had reduced the trial phase from £210,000 to £120,000

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## Appeal?

- Deputy DJ Pescod had simply ruled: “£120,000 is allowed in respect of the claimant’s trial phase and instruction of leading counsel is not approved”.
- Held by Nugee J these were adequate reasons to support his conclusion. It was possible to discern that he preferred the defendant’s submissions on the point. Would not be overturned.

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