"GOOD REASON TO DEPART" WHERE A COSTS MANAGEMENT ORDER HAS BEEN MADE

These notes concern detailed assessment of Costs, on the standard basis and the application of CPR 3.18 in the light of current case law and conflicting interpretations. My thanks to Master Whalan of the Senior Courts Costs Office for permission to use his notes from the 4 May 2018 SCCO conference. He should not be viewed as endorsing any of the views set out herein as to what may constitute "good reason to depart"

CPR 3.18

Since April 2017 the Rules have been:

> "***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 parties' 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.*
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> *(Attention is drawn to rule 44.3(2)(a) and 44.3(5), which concern proportionality of costs.).*

The pre- April 2017 Rules read:

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>
> *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 budget for each phase of the proceedings; and*

(b) not depart from such approved or agreed budget unless satisfied that there is good reason to do so.

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

Background

Requests for Detailed Assessment on bills that have been the subject of CMO are relatively recent, with development of case law from the upper Courts having been limited to Harrison v. University Hospitals Coventry & Warwickshire Hospital NHS Trust [2017] EWCA Civ 729; [2017] 3 Costs L.R. 425; [2017] 1 W.L.R. 4456

The principles outlined by the Court of Appeal are as follows:

(1) Where there was a proposed departure from a costs budget, be it upwards or downwards, the court on 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 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.

(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 the 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 PD3E 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 Limited v. Addax Energy SA [2016] EWCA Civ 120.

"Good reason" for upwards or downwards departure from budgeted costs

In Harrison (ibid), the court gave some guidance as to the identification of "good reasons":

> "*44.* ...
>
> *Where there is a proposed departure from budget – be it upwards or downwards – the court on a detailed assessment is empowered to sanction such a departure if he is satisfied that there is good reason for doing do. 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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> ...
>
> *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*".

In Jallow v Ministry of Defence [2018] SCCO, 24th April, Master Rowley expressed this approach as

> 22. *The superior courts, such as the Court of Appeal in the leading case of Harrison v University Hospitals Coventry & Warwickshire NHS Trust [2017) EWCA Civ 792 have steered clear of seeking to define what a good reason may be. It is a fact sensitive matter to be dealt with on a case specific basis. The comments of various Court of Appeal and High Court judges suggest that the test is deliberately left rather wide so that the assessing judge's discretion is not fettered as to what can be considered to be a good reason.*

Hourly rates and "good reason"

The question then arises as to should the hourly rates allowed in the assessment of the incurred costs be applied to the budgeted costs? The answer, from the SCCO there being no Court of Appeal decisions on the point is a 3:1 (No : Yes) that on assessment of incurred

costs, the court reduction of the hourly rates claimed does constitute a "good reason" to depart from the budgeted costs

It had been hoped that the issue may have been determined by the decision of Deputy Master Campbell in RNB v. LB Newham [2017] SCCO Ref: CCD1702513 being appealed. Deputy Master Campbell held that if the receiving parties' 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. DM Campbell's reasoning is summarised at para. 22 of the judgment:

> "*22. ...*
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> *At the assessment hearing, I made reductions to the hourly rates claimed for the incurred costs to a level which has meant that the overall recovery by the claimant for the period of work before the CMO has been reduced by significant amounts. Were that not to be reflected in the budgeted costs, that would mean that the Claimant will appear to recover an hourly rate as set out in Precedent H for the budgeted stage at a level that significantly exceeds the figure I consider to be reasonable and proportionate for the pre-budget stage. Mr Ridgeway's riposte to that is that the allowance made on the CCMC is the cost permitted for the phase and it is up to the solicitor how that sum is spent. I cannot accept that submission. If, (as it is the case), the hourly rate is a mandatory component in Precedent H which is not and cannot be subjected to the rigours of detailed assessment at the CCMC, it makes no sense if it is automatically left untouched when the rates for the incurred work are scrutinised at the "conventional" assessment. Such an approach would offend against the guidance given in Harrison at paragraph 44. Indeed, as Mr Clayton points out, it is only on that occasion that a paying party has an opportunity to challenge the rate and I agree with him for the reasons given above, that that is a "good reason" to depart from the costs allowed in the Claimant's last approved budget*".

The appeal was listed on 16th March 2018. However two days before the High Court hearing, the appeal settled. The claimant's solicitor was reported in *Litigation Futures* (Neil Rose, March 14) as stating that:

> "*The Defendant made an offer significantly in excess of the sums in issue in the appeal. While it was important that the principle be clarified by a higher court, the Claimant rightly accepted the generous offer*".

Nash PR of the Estate of Graham Robert Wood (Deceased) v. Ministry of Defence [2018] EWHC B4 (Costs), Master Nagalingam

In this assessment, after reducing the hourly rates claimed in respect of incurred costs, the court refused a request by the paying party to apply that reduced rate to the estimated hours for future costs. Master Nagalingam's reasoning is summarised at para. 69 of the judgment:

> "*In order to achieve this reduction, the paying party is effectively asking me to assign an elevated status to hourly rates over and above all of the other constituent elements / underlying details in the budget. However, rates are just one of many constituent elements / underlying details which contribute to each of the budgeted phased total. Rates otherwise hold no special status in the composition of a budget. If I am wrong about that, it gives rise to an additional risk that if rates (as one constituent element / underlying detail) is opened up to assessment then all of the constituent elements / underlying details could be opened up to assessment. This would be defeating one of the key purposes of costs budgeting, i.e. increased certainty and reduced costs of dealing with future assessments of costs. It would also significantly reduce the scope or budgets to be agreed, with parties then arguing over what constituent elements / underlying details of an "agreed" budget could then still be subject to further scrutiny upon a detailed assessment of costs*".

It is of note that Master Nagalingam's judgment highlighted that the defendant could still argue *'that the overall sum of assessed incurred costs plus budgeted costs is disproportionate such that the overall sum should be reduced'*, pursuant to CPR 44.3(2)(a):

In Bains v. Royal Wolverhampton NHS Trust [2017], DJ Lumb, sitting as a regional costs judge, also concluded that to apply a concomitant hourly rates deduction to the budgeted costs would second guess the thought process of the judge at budgeting and impute a risk of double jeopardy. (Ref: Michael Fletcher, Glaisyers, as cited in *Litigation Futures.*)

Jallow v Ministry of Defence [2018] SCCO, 24th April, Master Rowley

In this PI/EL claim, a CMO was made by Master Leslie, whereby estimated costs claimed in the Claimant's budget were reduced from £107,777.28 to an approved £78,505.50. Master Leslie 'set a single figure for the total of the budget, rather than totals for each phase'.
The hourly rates claimed in the bill ranged from £330.00 for Grade A to £140.00 for Grade D, rates which Master Rowley reduced on assessment. Master Rowley then held that while these reductions applied to incurred costs, they were not applied to budgeted (estimated) costs as the reductions in hourly rates did not constitute a 'good reason' to depart from the

approved budgeted costs. Master Rowley acknowledged the 'tension' between the need to allow reasonable and proportionate costs on an item by item basis in detailed assessments and the need for certainty of recovery as expected by the use of CMOs. He held that 'good reason' comprised a different, wider test to the 'significant development' in the litigation requirement that dictated applications to amend a CMO.

Master Rowley's reasoning is summed up at paras. 31 and 35 of his judgement:

> *"It has always been my understanding that the approved phased total can be used by senior or junior fee earners at differing hourly rates as the party considers appropriate. If it were otherwise and, as in this case the fee earner who had originally been acting was no longer able to do so, a slavish adherence to the rates set out in the calculations for the original budget would mean that an application to amend the underlying details in the budget would be required even though there may be no wish to amend the budget totals themselves. That seems to me to be an unlikely proposition and this illustration explains why I have said above that once a phase total has been approved the underlying figures are no longer relevant (31).*
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> *…*
>
> *As I have set out above, it is for the party and his or her solicitor to determine who exactly does the work that needs to be done. Where the costs overall are within the budget that has been set, there can be no legitimate criticism in using a senior or junior solicitor, leading or junior counsel to carry out the work. This is true, even if the work is all carried out at ostensibly unreasonable hourly rates. If it comes within the budget that has been set, it will turn individually "unreasonable" items into a reasonable and proportionate sum overall. As I put it colloquially at the hearing, two odd numbers added together will still make an even number (35)."*

That variation of the hourly rates allowed on detailed assessment in relation to incurred costs could **automatically** lead to a similar variation being allowed in relation to the hourly rates in respect of budgeted costs would be in direct conflict with CPR 3.18 (a) and would fly in the face of the drive for certainty and reduction in the costs of Costs proceedings.

That is not analogous to holding that variation in hourly rates of incurred costs can **never** amount to good reason. Of itself, a reduction in hourly rates in respect of incurred costs may be unlikely to provide a successful basis of submissions that on detailed assessment the Court makes some reduction in some of the hourly rates. Yet, can such reduction together with consideration of CPR 44.3 (5) factors be discounted as the basis of some reduction in hourly rates of budgeted costs? That could encompass rates allowed at certain phases; parts of phases or the final figure if proportionality necessitates. This may be viewed as application of consideration of the CPR 44.3 (5) factors as suggested Nash

Put otherwise, can it be said that there is no sustainable basis for an approach that holds a reduction in hourly rates allowed in respect of incurred costs taken together with other factors (for example application of the indemnity principle, the making of admissions or other CPR 443.(5) factors) should result in a reduction of hourly rates in respect of budgeted cost?

Additionally, what of the upward application of Harrison? In approving a phase the costs budgeting judge had in mind a phase total, bearing in mind the prohibition of the costs budgeting judge from approving or 'interfering with' the incurred costs, and has express permission to comment upon and take the same "into account when considering the reasonableness and proportionality of all subsequent budgeted costs". Thus if the costs budgeting judge considered a reasonable and proportionate amount to allow for any phase's budgeted costs was, say £10 000-00, with incurred costs of , say, £3 000-00, the total for the phase being £13 000-00 , a reduction on detailed assessment as to the rates allowed for budgeted costs would result in the costs allowed for the phase not being as the costs budgeting judge considered reasonable and proportionate. Therefore, it is argued, the hourly rates for budgeted costs should be increased to give effect to the CMO.

"Good reasons"; other examples

There are still fewer reported examples of what does and does not constitute a "good reason" to depart from the agreed / approved budgeted costs at detailed assessment aside from hourly rates.

Barkhuysen v. Sharon Patricia Hamilton [2016] EWHC 3371 (QB) is the exception. Warby J. who was determining a substantive costs order, approved the following additions to the claimant's budgeted costs:

> "*13.* ***Costs not limited***. *Ms Marzec has sought an order to reflect various ways in which the defendants' conduct of the action has increased the claimant's costs beyond the budgeted amount, by generating work which (reasonably) had not been anticipated or budgeted for. I have accepted her arguments so far as the following points are concerned: (1) a 2-hour PTR hearing, when the budget assumed a telephone hearing; (2) causing the 5-day trial estimate to overrun, such that closing submissions had to be put in writing, and additional work had to be done dealing with the post-hearing evidence submitted by the defendant; (3) the preparation and lodging of a fifth witness statement of Mr Dolan, the claimant's solicitor. I have also formed the view that the recoverable costs should not be limited to the budgeted figures in two*

> *further ways: (4) the trial was held in Exeter not Truro; (5) the adjourned hearing. These point may not result from unreasonable conduct on the part of the defendant, but they were reasonably not budgeted for*".

Additionally, where the court is informed that agreement has been reached between the parties of to their respective budgets, such that the court is precluded from considering the costs, what prospects are there to successfully argued on detailed assessment that the receiving party's agreed costs are disproportionate? Whilst PD 3EPD.4 paragraph 7.3 directs that:

> "*If the budgets or part of the budgets are agreed between all parties, the court will record the extent of such agreement*".

in practice it is unusual to see more that "the Court records the C's/ D's agreement of the D's / C's costs in the sum of £…" , without indications as to whether (or not) phase sub-totals are agreed or more simply that the grand total is agreed. Whilst ever the lack of authority as to good reasons remains, it may be of assistance to paying parties to consider more detailed recitals. (The vexed and vexing issue of recitals – some judges like and utilise recitals; some do not. Know your tribunal, both for CCMC and detailed assessment).

Conclusion

On the North Eastern Circuit, after some settling down, in the months subsequent to handing down of judgment in Harrison a marked reduction has been noted in requests for Provisional Assessments of costs that have been the subject of CMOs. As was suspected by many at the time, the live issue is what constitutes 'good reason to depart' from an approved or allowed CMO. In the absence of clear and binding answer as to the interpretation of CPR3.18, parties (both Paying and Receiving) who wish to purposefully progress dispute on bills where the costs claimed are in accordance with those allowed or approved will need to be mindful of the balance of SCCO and Regional Costs District Bench judgments falling in favour of variation of hourly rates of incurred costs not providing good reason to depart from the CMO. This is not to suggest variation of incurred costs can never be relied upon to persuade the Court; Harrison is very clear that it is a matter for;

> *… individual appraisal and evaluation of costs judges by reference to the circumstances of each individual case*".

The days of the cut and paste Points of Dispute should be in terminal decline; the Courts will not encourage speculative challenges, with their associated costs implications. It may be found that requests for Detailed Assessment in respect of which the PoDs fail to include any substantive or evidential basis for a submission of good reason to depart from the CMO receive judicial responses making very clear the difficulties facing the paying party.

That said, if it is both genuinely considered and can evidenced that there are good reason to depart from a CMO approved or allowed budget, parties are to be encouraged to utilise the scope that presently has relatively few imposed parameters of CPR3.18.

Further, those who undertake CCMC work may wish to take the long view of the same provision.

Theresa Searl

District Judge

Newcastle and Sunderland

May 2018