Slash and burn

Cutting down budgeted costs – qu'est-que c'est que ça? asks **Colin Campbell**

The delights of costs budgeting have been with us since 1 April 2013, longer if you count the pilot schemes in use from 2009. It operates in the multi-track for claims valued under £10m, and where it applies, failure to file and exchange a budget at least 21 days before the first case management conference triggers an automatic sanction under CPR 3.14. The defaulting party is treated as having filed a budget comprising only 'applicable court fees' for all costs going forward, unless relief from that sanction is given under CPR 3.18. That is not easy to achieve: see *Lakhani v Mahmud* [2014] 4 Costs LO 453. One day late, and relief was refused.

Costs budgeting was of course a flagship recommendation made by Sir Rupert Jackson in his Review of Civil Litigation Costs, its essence being: 'That the costs of litigation are planned in advance: the litigation is then managed and conducted in such a way as to keep the costs within budget'.

REVISING THE BUDGET

But what happens in a budgeted case, if the last agreed or approved budget is not enough, and you want more, or – heaven forbid – you inadvertently go over budget? Is there a way out, and even if there is, can you be certain that you will inevitably recover your budgeted costs if the case is successful?

There are several lifelines. The best by far is to follow the principle of 'no money, no work', or in costs budgeting-speak, the work to be undertaken will be deferred until authorised by a judge in a revised budget. Help is at hand here via Practice Direction 3E 7.6 which provides that: 'Each party shall revise its budget in respect of future costs upwards or downwards if significant developments in the litigation warrant such revisions.'

Satisfy the court that there have been 'significant developments' and obtain an increase in advance of the work being carried out, and all will be well. Fail to do so, and solicitors may well find themselves at loggerheads with their clients, because the excess is unlikely to be recovered from a losing party ordered to pay the costs. In that eventuality, solicitors will need to collect the shortfall from the clients, which may be no easy task if the riposte to such a request is 'You should have told me we were going over budget. It's your fault and I am not paying' – in which case, firms may have to grin and bear it and stand the loss themselves. Thus the importance of keeping an eye on what the case is costing is compelling if solicitors wish to stay on good terms with their clients and, indeed, to run successful businesses.

That, however, is easier said than done. In an ideal litigation world, the prudent solicitor will ask the other side to agree to a budget increase before incurring the costs, and in default, issue an application for that purpose. But the litigation world is not perfect and depending on the court, it may take weeks or even months to obtain a hearing date. Does the solicitor down tools until the court, in its own good time, is ready to hear the application? That is unthinkable in this age of timetables, deadlines and sanctions; although it appears that applications to increase budgets can be approved retrospectively, Master Marsh holding in *Sharp v Blank* [2017] EWHC 3390 (Ch) that: 'The court has jurisdiction when revising a budget under PD 3E.7.6 to revise a budget taking the last agreed or approved budget as the base reference point'.

Even if a hearing date is secured before doing the job, however, there is no guarantee that the increase will be given. In *Chalfont St Peter Parish Council v Holy Cross Sisters Trustees Inc* [2019] 3 CLR, the council served a lengthy Part 18 Request for which no provision had been made in the £544,000 budget. 'That has added a tremendous burden to the work on each of the Sisters and we need a budget of £908,000' argued their solicitors. Sir Alistair Macduff did not agree. The correspondence did not support the Sisters' case that they had tried to agree the increase, so their application to do so was refused. Subject to one point (see below), this meant that either the solicitors must undertake to do the work for nothing, or do it at the Sisters' expense, in the knowledge that there could be no comeback on the council should it subsequently be ordered to pay the Sisters' standard basis costs of the action.

As an alternative to PD3E, however, let us suppose that the Sisters did not make their application to Sir Alistair, but instead opted to throw themselves at the mercy of the costs judge under CPR 3.18. The rule says: '….when assessing costs on the standard basis, the court will – (b) not depart from such approved or agreed budgeted costs unless satisfied that there is good reason to do so'.

It follows that for parties who 'want some more' (to adopt Oliver Twist's entreaty), rule 3.18 is an alternative lifeline to PD 3E. But what is 'good reason?' The Higher Courts, in *Merrix v Heart of England NHS Foundation Trust* [2017] 1 Costs LR 91 and in *Harrison v University Hospitals Coventry & Warwickshire NHS Trust* [2017] 3 Costs LR 425, have not gone out of their way to be helpful in this respect, declining to explore the issue.

But there is now an example, albeit at county court level. Not claiming all the budgeted costs authorised for experts and ADR, so as to comply with the indemnity principle, was held to be a good reason in *Salmon v St Bartholomew's Hospital NHS Trust* (19 January 2019 HHJ Dight). What is more, having asserted that the decreased figure is still too high, no further good reason need be shown, '…because the finding of good reason opens the gateway for departure from the budget'.

The consequence: if Mrs Salmon had claimed less than had been approved for the phases, it would have been for Barts to show good reason, but by underspending on experts and ADR, she had done her opponent's job for them. Odd that!

Now the rub. Does the fact that the costs have been budgeted mean that they will be allowed at detailed assessment? According to *Harrison*, the answer is 'Yes', having approved Carr J's dicta in *Merrix* that 'On a detailed assessment on a standard basis, the costs judge is bound by the agreed or approved budget, unless there is good reason to depart from it'; and also Coulson J's in *MacInnes v Gross* [2017] EWHC, that where costs are assessed, the costs judge 'will start from the figure in the approved costs budget'.

In this context, let us suppose that in *Chalfont*, Sir Alistair had agreed the increase to £904,000 and that thereafter, the Sisters' bill had been subject to detailed assessment. After a line-by-line assessment, incurred costs have been assessed, the budgeted costs have been ticked through, and the Sisters are about to tell the council that they will accept cash, cheque or cards.

That is, however, to overlook *Harrison* at [42] per Davis LJ: '[where] a costs judge on detailed assessment will be assessing incurred costs in the usual way and will also 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) and (5)…'.

So be warned that even in a budgeted matter, there is no certainty or guarantee that the budgeted costs will be allowed, because they will still be put to a proportionality test, in the Sister's case, by applying CPR 44.3(5) to the total of the incurred and budgeted costs. That will be so, even though at the budgeting hearing, the costs managing judge will have approved only costs which are reasonable, necessary and proportionate.

There are now examples where that has happened with striking consequences. In *Reynolds v First Stop Stores Ltd* (21 September 2019 HHJ Auerbach), the claimant had accepted a door-of-the-court offer of £50,000 having served a revised schedule of damages of £79,000. The budgeted costs had been set at £117,000 and assessed at £115,000. The judge was then asked to don his proportionality wig. 'More off please because the case was over-pleaded' said the defendant. 'Indeed' was the judicial riposte – costs allowed at £75,000, so at the stroke of a proportionate plume, the claimant's costs were reduced by another £40,000, well below the budget and almost wiping out her damages.

In *Salmon*, the same. Pleaded at £10 - £15,000, approved budget £153,673, Part 36 offer £7,000, assessed costs £62,000. On goes the proportionality wig. Costs allowed at £40,000 so in both *Reynolds* and *Salmon*, the costs budgeting counted for nothing, as virtually all the damages disappeared with one chop of the proportionality axe.

Did they need to? If Mrs Reynolds or Mrs Salmon had obtained their costs on the indemnity basis, *Denton v White* would apply, Lord Dyson MR having said: 'Such an order would free the winning party from the operation of CPR 3.18 in relation to its costs budget'.

The consequence: no aggregation under *Harrison*; no proportionality test under CPR 44.3(5), so an order for costs on the indemnity basis means that the receiving party is at liberty to argue for any extra amount spent above budget, without having to show good reason. Indeed, a defaulting party who has failed to file a costs budget, is also no longer held to applicable court fees, even if relief from sanctions has been refused. In these circumstances, the costs budget will again have counted for nothing, only this time it will work in favour of the receiving party, because the indemnity basis will have trumped CPR 44.3(5).

Those readers who have successfully negotiated their way through the vagaries of costs budgeting illustrated by this article, will perhaps observe that far from providing certainty, budgeting is resulting in the opposite, since it is very difficult to predict with any accuracy what will be allowed on detailed assessment in a budgeted case. Whether Sir Rupert could ever have contemplated that the combination of budgeting and proportionality would deprive claimants of the prize for which they may have fought for years to achieve, even in cases where the court has approved their budgets way above the amount of the damages they were contending for, (in *Harrison* it was damages limited to £50,000; budget £197,000), the answer to that would surely be 'certainly not'. Those readers may also understand why this article features the expression 'qu'est-que c'est que ça' in its introduction. Literally translated, it means 'What is this that is that' and colloquially, 'What the Hell!'. With the current goings-on, that rather sums up costs budgeting.

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