Case No: D33YJ774

IN THE COUNTY COURT SITTING AT BIRMINGHAM

Birmingham Civil and Family Justice Centre
33 Bull Street
Birmingham
B4

Date: 04/03/2020

Before :

DISTRICT JUDGE LUMB

- -

Between :

CHARLOTTE CHAPMAN	**Claimant**
- and -	
NORFOLK AND NORWICH UNIVERSITY HOSPITALS NHS FOUNDATION TRUST	**Defendant**

- -
- -

Paul Hughes of Counsel (instructed by **Medical Accident Group Solicitors**) for the **Claimant**
Ken Corness, Costs Lawyer of **Acumension Ltd** for the **Defendant**

Hearing dates: 13 and 14 February 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

DISTRICT JUDGE LUMB

District Judge Lumb :

1. This judgment concerns a discreet issue that arose during the between the parties Detailed Assessment of the costs of the Claimant following her successful claim for damages for clinical negligence against the Defendant. It relates to the meaning of "good reason to depart" from a budget in a costs management order in CPR 3.18 (b).

2. At the hearing following detailed submissions from each party I announced my decision that in this case I had not found a good reason to depart from the budget in either of the two phases, Experts and ADR/Settlement, contended for by the Defendant paying party. I informed the advocates that it was my intention to provide detailed reasons for my decision in writing. This judgment sets out those reasons in detail.

3. There have been few cases reported where a Court has found a good reason to depart, perhaps unsurprisingly, given that each case, to a large extent, is going to depend upon its own facts. There are no binding decisions to my knowledge or that of the advocates before me but HHJ Dight, who is the Designated Circuit Judge for Central London, has provided his views in ***Salmon v Barts Health NHS Trust [2019]*** and I have been provided with a transcript of his unreported judgment.

   The CPR and Practice Directions do not provide any detailed guidance but the Court of Appeal in ***Harrison v University Hospitals Coventry & Warwickshire NHS Trust [2017] EWCA Civ 792*** per Davis LJ have made it clear that a good reason to depart from the budget is a high hurdle to overcome. His judgment provides the starting point in terms of general approach;

   "where there is a proposed departure from the budget, upwards or downwards, the Court, on a Detailed Assessment, is empowered to sanction such a departure if it is satisfied that there is good reason for doing so. 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 overindulgent 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 against the overriding objective. Moreover, while the context and the wording of CPR rule 3.18 (b) is different from that of CPR rule 3.9, relating to relief from sanctions, the robustness and relative rigour of approach to expect in that context, see Denton v TH White Limited [2014] EWCA Civ 906, can properly find at least some degree of reflection in the present context.

   "Nevertheless, all that said, the existence of the "good reason" provision gives a valuable and important safeguard in order to prevent real risk of injustice, and, as I see it, it goes a considerable way to meeting Mr Hutton's doom-laden predictions of Detailed Assessments becoming mere rubber stamps of costs management orders, and of injustice for paying parties if the approach is to be that adopted in this present case. As to what would 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 references to the circumstances of each individual case"

4. The one example that Davis LJ was prepared to give for a good reason to depart was the application of the indemnity principle. That is perhaps of limited assistance beyond reaffirming that the budgeted phase is not the amount a party would automatically recover for a phase. The work still has to be done and the client still has to be primarily liable to pay for it. The budgeted figure is not a rubber stamp of automatic entitlement.

5. It may sound obvious, but before beginning to consider whether or not there is a good reason to depart from the budget, it is important to understand, so far as is possible, where you started from. This means being able to discern what the Costs Managing Judge who made the costs management order had in mind at the time that he or she set the budget and in particular each phase. This will often be apparent from the terms of the directions in the case management order but it is also very helpful to have a record of the assumptions which have been applied by the Court, which may be different from those contended for by the parties in their respective Precedents H and R, at the time of setting the budget.

6. The task of the Costs Managing Judge is to set a figure for each phase of the budget that has not been agreed that falls within the range of reasonable and proportionate costs for that phase. The Costs Managing Judge is not required to provide a breakdown of how he or she has arrived at the figure for each phase.

7. Once set, it is open to the party whose budget it is to spend that phase how he or she wishes. The Costs Management Judge does not need to give a breakdown of disbursements, profit costs or counsels fees but simply to arrive at a figure for that phase which falls within the range of reasonable and proportionate costs.

8. In that way, the issue of proportionality has been considered in detail at the time of setting the budget and does not fall to be considered again until the conclusion of the Detailed Assessment proceedings when the Court performs a final proportionality cross check of the costs as a whole.

9. The one exception is the incurred costs at the time of the budget which are always open to scrutiny and challenge by a paying party on Detailed Assessment as they do not form part of the "budgeted costs".

10. Applying the strict guidance of Davis LJ in ***Harrison,*** the Court is not expected to carry out a micro-assessment of how much work has been done in each particular phase. The solicitor for the receiving party has signed a certificate on the bill to confirm compliance with the indemnity principle.

11. Very clear evidence of obvious overspending in a particular phase would be required before the Court could even begin to entertain arguments that there was a good reason to depart from the budgeted phase figure if the amount spent comes within the budget. If it were otherwise, one of the principal purposes of costs budgeting would be lost, namely the certainty of the parties of the amounts that they are likely to be able to recover or pay respectively. Quite simply, the Court would be required to carry out a Detailed Assessment of all the costs in any phase that was not completed which cannot possibly have been the intention of the rule makers. It follows that a complaint that the budget was set too generously or on too miserly a basis cannot, of itself, amount to a good reason to depart.

12. In the present case, the cost management order was made by my colleague DJ Kelly. Her cost management order does not record the assumptions applied by her. She reduced the experts phase by £20,000 from the figure claimed by the Claimant in her precedent H and it is clear that she properly directed herself in assessing what figure fell within the range of reasonable and proportionate costs for each particular phase.

13. There is nothing in the present case that indicates to me, having considered the totality of the Claimant's solicitors' file of papers, that there has been a substantial overspending on work done in the experts and ADR phases even though the experts phase was not completed. The work has been done. Any suggestion otherwise would be tantamount to an allegation of fraud and serious professional misconduct of wrongful certification of a bill that contravened the Indemnity Principle. That is not a position taken by the Defendant paying party.

14. The figures may be rather higher than might have been expected for the stage that the parties had reached within each phase but all that that indicates is that if they had continued to incur those costs at that rate until the ultimate conclusion of a trial, they would have exceeded the budgeted figures for those phases, at risk of being unable to recover those excess costs. DJ Kelly had determined a figure that fell within the range of reasonable and proportionate costs for each of those phases. That was the figure the parties knew they were likely to be limited to recover or pay respectively.

15. It is not the role of the Costs Judge at Detailed Assessment to carry out a calculation of what, in his view, is the level of the proportion of a budgeted phase that a prudent receiving party would have incurred where that phase has not been completed. Such an approach would completely undermine the whole purpose of costs budgeting in the first place. One of the principal objectives of the budgeting regime was to reduce the number of Detailed Assessments. Such an approach would potentially lead to a Detailed Assessment of budgeted costs in every case that settled before trial. That consequence was clearly one that the Court of Appeal judgment in ***Harrison*** was warning against even if the Costs Judge were to approach the assessment in a more nuanced way as advocated by the paying party in that case.

16. In so far as HHJ Dight at paragraph 36 of his judgment in ***Salmon*** has concluded that if a party has not spent the totality of the budgeted figure for a phase that amounts to a good reason per se and the door is therefore open for the paying party to make further submissions on an appropriate figure for the phase, I respectfully disagree. If that approach was correct virtually every case would go to Detailed Assessment and there would be a perverse incentive to a prospective receiving party to overspend and marginally exceed every phase in order to avoid a Detailed Assessment.

17. On the specific facts of the present case, as I have said, having read the totality of the receiving party's solicitor's file of papers, I found no evidence of deliberate overspending in either the Experts or ADR phases or costs building to "use up the allowance in the budget" that could even begin to found the basis of a good reason to depart from the budget. Had there been that might have been sufficient to overcome the high hurdle set by Davis LJ in ***Harrison***.

18. A simple failure to spend the entirety of the budgeted sum leading to an opening of the floodgates would surely risk the adoption of the lax approach that Davis LJ had warned against. He described a good reason to depart as being *"an important safeguard against*

a real risk of injustice". This implies something amounting to a specific and substantial point arising in the case, as opposed to merely a general point, is required for it to amount to a good reason to depart from a figure that came within budget.

19. Were that not the case there would be a highly undesirable risk that arguments raised at the costs management hearing could be reopened on assessment on the basis that the budget was too generous. The Costs Judge could be invited to look again at the constituent elements of the receiving party's Precedent H. Those constituent elements in Precedent H were only ever intended as a guide to the Costs Managing Judge to show how the party arrived at the figure contended for. It would also lead to a reopening of the issue of proportionality that had already been determined in the budgeted figure subject only to the final proportionality cross check on assessment. Allowing such an approach would further undermine the budgeting process. It most certainly could not be defended as exercising a safeguard against a real risk of injustice. In fact, quite the reverse, as it would lead to a risk of double jeopardy of issues already decided at the costs management hearing.