Case No: SC-2019-BTP-000657

IN THE HIGH COURT OF JUSTICE
SENIOR COURTS COSTS OFFICE

Clifford's Inn, Fetter Lane
London, EC4A 1DQ

Date: 22 May 2020

Before :

Master Brown

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Between :

SOPHIE UTTING	**Claimant**
- and -	
CITY COLLEGE NORWICH	**Defendant**

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Mr. Bardoe Costs Draftsman for the Claimant
Mr. Thornsby, In-house Counsel at DWF Solicitors, for the Defendant

Hearing date: 13 May 2020

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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.

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 4.00 pm on Friday 22 May 2020

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Master Brown:

1. In the course of the detailed assessment I gave my decision on various issues concerning costs budgeting but informed the parties that I would give my reasons for my decision at a later stage. Although the parties have now settled the claim for costs, I was asked if I would give my reasons for my decision in any event.

2. The first issue, put broadly, was whether a so-called 'underspend' in respect of budgeted sums is of itself a "good reason" to depart from a budget pursuant to CPR 3.18; the second, in the event that I were to accept that this amounted to a "good reason", was whether I should reduce the sums claimed for the respective phases. I found for the Claimant on both issues.

3. CPR 3.18 provides:

> *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;……*

4. Mr. Thornsby argued that on a proper construction of the relevant provisions if the amount of the claim in the Bill of costs in respect a of a particular phase does not match or exceed the budgeted sum then the costs of that phase are necessarily subject to a detailed assessment. This principle is to be applied whether the 'underspend' was very modest or large but arose simply on the basis that the sum claimed had not reached the full amount allowed on the budget The Claimant submitted this did not amount to a "good reason" and resisted any reduction to the sums claimed on the basis sought.

5. The Claimant's claim arose out of an accident that occurred on 7 February 2014 in the course of her work as a teacher when the metal end of projector screen came loose from its fittings and fell, striking her on the back of her head. She alleged that she had suffered a head injury. An admission of liability was made on 18 December 2014, but no admission was then made as to the extent of the injuries suffered. Proceedings were issued in the High Court on 8 December 2017. The relevant costs management order was made on 13 December 2017 following, as I understand, at least substantial agreement as to the allowances to be made for the respective budget phases. Directions were also made at the same hearing taking matter through to trial.

6. In her initial schedule dated 18 May 2017 the Claimant sought damages of just over £1.65 million. Her case was that the injury had caused significant ongoing effects impacting on her ability to carry on as a teacher. The matter proceeded to disclosure, exchange of witness statements, the service of expert medical reports in some seven disciplines and joint statements. Surveillance evidence was served on 27 April 2018. The parties attended a Joint Settlement Meeting ('JSM') on 25 January 2019 which did not result in a compromise. In her updated schedule dated 4 January 2019 the Claimant's claim was increased to close £1.85 million. The trial was, as I understand it, listed to start as 'floating' from 15 May to 18 May 2019. The claim settled on 25 April 2019 (which, assuming a start date of 15 May 2019, was 20 days before trial). It did so on acceptance of an offer made on 24 April 2019. By the terms of settlement damages of £300,000 were payable plus costs on the standard

basis. Net of CRU benefits and interim payments the sum payable by way of damages amounted to £296,850.

7. Save for the Trial Preparation and Trial phases (and possibly one other matter I deal with below, see [24]) it is clear that the phases had been completed or at least substantially so. That is to say that the work that was assumed would be done in the relevant phase had been done.

8. I should point out that I permitted the Defendant to argue in the assessment that there was a "good reason" to depart from the budget in respect of two of the phases on the grounds that the phases had not been substantially completed. This was notwithstanding the point was not, to my mind, properly or adequately addressed in the Defendant's Points of Dispute. It was manifestly the case that work which was assumed would be done in the phases had not been undertaken, and, as I understood Mr Bardoe to accept, there did not appear to be any prejudice in this point there being considered; indeed I did not detect any or any substantial resistance to the point being taken. However, at the risk of stating the obvious, there was to my mind a clear and obvious distinction between an 'underspend' and the situation that arose in respect to the Trial and Trial Preparation phases where plainly there was, at the very least, substantial non-completion of the phase.

9. In any event as to the material issue which I am addressing, reliance was placed by Mr. Thornsby on the unreported decision of HH Judge Dight on appeal in *Salmon v Bart Health NHS Trust* [2019]. The appeal concerned a clinical negligence claim which settled on acceptance of a Part 36 offer, before expert agendas had been agreed or expert meetings or discussions had taken place, and without the need for a JSM. The sums claimed in the Expert and ADR phases were less than the sum which had been budgeted and an issue arose as to whether there was a "good reason" to depart from the budget.

10. Judge Dight held at [21] that "*the fact that the sum claimed is lower than the budgeted figure, because of the indemnity principle, is itself capable of being a good reason*". He went on to say at [22]:

> "*..once a good reason has been established, and the court is given the right to depart from the budget, it will assess the costs of that phase in the usual way, and, in that respect, it is left to the good sense and expertise of the costs judge to undertake that assessment in an appropriate and insofar as possible practical way, whether line-by-line or in a more broad-brush way. The manner of undertaking that task is entirely a matter for the judge dealing with the assessment. It seems to me that the consequence of finding a good reason under 3.18(b) is that it opens this route to enable the costs judge to take this approach within the detailed assessment. The wording of 3.18(b) does not on its face dictate what course should then be taken by the learned costs judge, which, as I have already said, is a matter for the judge, him or herself, to determine in all the circumstances.*

11. And later in the same paragraph he said:

> *…once the court has a right to depart from the budget, neither the receiving party nor the paying party needs to establish a further good reason within CPR 3.18 if they wish to persuade the costs judge to make a further or different adjustment to the bill. I take this from the wording of CPR 3.18(b) and the terms and reasoning of the judgment in Mr Justice Jacob in Yirenki. In my judgment this consequence applies*

> *whether it is sought to depart from the budget upwards, or, as in this case, further downwards, because the finding of a good reason opens the gateway for departure from the budget, and the rules do not stipulate that the good reason must determine the nature of the route to be followed thereafter.*

12. Thus, on the basis of the learned Judge's conclusions the fact that the sum claimed for the relevant phases was less than the approved budget sums itself provided a "good" reason for departing from the budget. It is however clear that the phase of the budget relating experts had not been substantially completed (such that the work that was assumed would be undertaken in the phase had not been undertaken) and he Judge accepted that this was capable of being a "good reason" (see [37] and [42]). The budget sum in respect of the Experts phase had been reached on the understanding that agendas would be prepared for the without prejudice experts meetings, those meetings would go ahead and their joint statements would be prepared. Similarly, the budget for the ADR phase assumed there would be a JSM.

13. The Claimant relied upon the decision of District Judge Lumb in *Chapman v Norfolk and Norwich University Hospital NHS Foundation Trust*, March 2020 in which the learned Judge said (at [16]):

> "*Insofar 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 the appropriate figure for the phase, I respectfully disagree. If that approach was correct 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*."

14. He went on to refer to the following well known passage in the judgment of Davis LJ in *Harrison v University Hospitals Coventry & Warwickshire NHS Trust* [2017] EWCA Civ 792:

> "*...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 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 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. Moreover, while the context and the wording of CPR 3.18 (b) is different from that of CPR 3.9 relating to relief from sanctions, the robustness and relative rigour of approach to be expected in that context (see Denton v TH White Limited [2014] EWCA Civ 906, [2014] 1 WLR 3926) 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 a real risk of injustice; and, as I see it, it goes a considerable way to meeting Mr Hutton's doomladen predictions of detailed assessments becoming mere rubber stamps of CMOs and of injustice for paying parties if the approach is to be that adopted in this present case. 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*."

15. The learned District Judge said at [18] that "[a] *simple failure to spend the entirety of the budgeted sum leading an opening of the floodgates would surely risk the adoption the lax approach that Davis LJ had warned against*". That "good reason" should have been described by Davis LJ as an "*an important safeguard against a real risk of injustice*" implied that "*something amounting to a specific and substantial point arising in the case, as opposed to a merely general point, is required for it to amount to a good reason to depart from a figure that came within budget*".

16. He went on to say at [19]:

> "*Were that not the case there will be a highly undesirable risk that arguments raised at a the cost management hearing could be reopened on assessment on the base the budget was too generous The Costs Judge could be invited to look 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 cost 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 crosscheck on assessment. Allowing such an approach would further undermine the budgeting process. It 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 that the cost management hearing."*

17. I sat as assessor to Judge Dight in the *Salmon* case and, as he very courteously records, whilst I agreed with him on the outcome of the appeal I did not necessarily agree with the route by which he reached it. It seems to me that the conclusions reached by the learned Judge in respect of the budget were justified on the basis that the relevant phases were not completed or at least not substantially so; put another way, the assumptions upon which the budget had been prepared were not fulfilled. These were, to my mind, "good reasons" for departing from the budget.

18. As the learned District Judge suggested, the observation that the indemnity principle applies to cost budgeting does not say much beyond affirming that the amount that the receiving party receives in respect of a budgeted phase is limited to the amount the receiving party has incurred: the client has to be liable for the sums sought and there is no "automatic entitlement" to the budgeted sum.

19. As to whether an 'underspend' amounts to a "good reason" I respectfully agree with District Judge Lumb's decision, essentially for the reasons given by him. I agree with the learned District Judge that if an underspend were to be a good reason for departing from a budget it would be liable to substantially undermine the effectiveness of cost budgeting. As the Judge effectively observed, solicitors who had acted efficiently and kept costs within budget would find their costs subject to detailed assessment, whereas less efficient solicitors who exceeded the budget would, absent any other "good reason", receive the budgeted sum and avoid detailed assessment. There is however nothing per se unjust if a receiving party were to receive a sum by way of costs which is less than the budgeted sum. This is, of course, to be contrasted with the situation where a phase is not substantially completed, where it would, to my mind, be unjust for a receiving party to receive the full amount of a

budgeted sum in circumstances where only a modest amount of the expected work had been done.

20. Judge Dight reached his conclusion on the basis of the following passage of the judgment of Davis LJ in *Harrison* (at [41]):

> "*[Counsel for the appellant] sought, however, to rely on the judgment of Moore-Bick LJ (with whom Aikens LJ and Black LJ agreed) in the case of Henry v Newsgroup Newspapers Limited [2013] EWCA Civ 19, [2013] 2 Costs LR 334." That was a case concerning the then Pilot Scheme on Costs Management. It was said (at paragraph 16) to be implicit in that scheme that the court should not normally allow costs in an amount which exceeded what has been budgeted in each section. However, Moore-Bick LJ was simply not concerned in that case with a position where the recoverable costs were said to be less than the budgeted amount (a point on which there had been no argument). It is true that later on in that paragraph Moore-Bick LJ, in dealing with costs reasonably and proportionately incurred, said*:
>
> > *"Thus, if costs incurred in respect of any stage fall short of the budget, to award no more than has been incurred does not involve a departure from the budget; it simply means that the budget was more generous than was necessary."*
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> *But those remarks were plainly obiter; and in any event it is most doubtful if they were directed at the situation which arises in the present case: they may well simply relate to costs actually incurred and the consequent application of the indemnity principle (which of course would be capable of being a good reason for departing from the approved budget)."*

21. However these observations are to be seen in the context of the argument that Davis LJ was then addressing as to the meaning of the word "budget" at CPR 3.18 (b) (see [18] and [37]): the Appellant's counsel in *Harrison* had argued that a 'budget' connoted an available amount or fund and no "good reason" was necessary if the recoverable costs were below the budgeted amount (because in these circumstances there was no "departure" from the budget). It seems to me that the issue which was raised in this case was not argued before the Court of Appeal and that the passage which was relied upon by Judge Dight was, to my mind, clearly obiter. Moreover it seems to me that the approach of the District Judge Lumb is more consistent with the general reasoning which underpins the decision in *Harrison* in particular that one of the perceived benefits of cost budgeting is that the need for, and scope of, detailed assessments would be reduced (see [34] of *Harriso*n) – an aim which is liable to be thwarted if 'underspend' could of itself be a "good reason" for departing from a budget.

22. However even if were wrong about the above, I would have reached the same conclusion on an alternative basis. As it was put by Counsel for the Appellant in *Salmon,* the "good reason" for departing from the budget must dictate the route of departure. Such an approach would, to my mind, seem to flow from a purposive reading of CPR 3.18 and would be consistent with concerns expressed by the District Lumb. Thus, even if 'underspend' were a "good reason" for the purpose of CPR 3.18 it does not follow that there should be a deduction from the sums claimed. 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 and I was not satisfied that there was any additional "good reason" for any such reduction.

23. Further, and ignoring for current purposes the Trial and Trial Preparation phases, I was not satisfied that it would be appropriate to make any reduction from the sums claimed even if I were to adopt Judge Dight's analysis as to what amounts to "good reason". As the Defendant accepted, on this approach I would have a wide discretion in my case management powers in assessing costs (see [10] above). However I could see no proper basis for having a line by line assessment in respect of these phases. The sums claimed fall within those sums which were agreed or approved as reasonable and proportionate for the work to be done. Inevitably budgets are not produced with a degree of precision that can be applied in a detailed assessment; but I do not see that as a justification for having a line by line assessment: indeed it seems to be incompatible with the aims of costs budgeting.

24. In respect of the Issue and Statements of Case phase the Defendant argued that no Counter Schedule was served as anticipated. This might, potentially, have amounted to a "good reason" for departing from the budgeted sum as it might have been argued, that the phase was not substantially completed. However, given that the sums claimed for the phase fell substantially short of the budgeted figure, taking a broad-brush approach, it did not, to my mind, justify any further reduction.

25. The more general point made by the Defendant, was that the case settled for substantially less than claimed and this of itself justified a substantial reduction. I understood the Defendant's case to be that an issue arose as to whether the Claimant would have continued as a teacher but for her accident; uncertainty in respect of this issue might have justified a substantial discount from the sum claimed by way of damages. However the sum recovered in the substantive action, to my mind, was nevertheless substantial and not of itself sufficient to justify the conclusion that costs incurred were unreasonably incurred.

26. It was also said by the Defendant that there were costs in relation to applications not budgeted for but nevertheless included within the budgeted phase. These costs, it was said, not having been budgeted should be the subject of scrutiny by the Court. It might be thought the fact that further work which was done in relation was not anticipated at the time of the budget would, if anything, have justified an increase in the budgeted sum. In any event it is not clear to me how this of itself could justify a further reduction.

27. In relation to the ADR phase it was clear that the phase was completed or at least substantially so. Not only had there been a JSM but there was substantial negotiation thereafter. Merely because the negotiation did not carry on quite up to the date the trial was due to start was not enough, to my mind, to justify any further reduction from the sums claimed.

28. In any event, bearing in mind all these points and taking a broad brush approach I was not satisfied that the relevant costs were unreasonably incurred having regard to all the circumstances including in particular the agreed/approved phases of the costs budget.