



REASONS TO DEPART FROM A COSTS BUDGET – ARE HOURLY RATES A ‘GOOD REASON’?

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Recently, Deputy Master Campbell in [RNB v London Borough Newham \[2017\] EWHC B15 \(Costs\)](#) gave his views on whether Hourly Rates constituted a ‘good reason’ to depart from a Costs Budget. The decision is currently being appealed.

In our latest White Paper, Costs Lawyer Tom Mason puts forward his arguments against the decision, Ashley Tezoo defends it, and James Fairclough provides his view of where he thinks the Court of Appeal will go.

The Case Against the Decision

In this case, Deputy Master Campbell was in “no doubt” that the hourly rates allowed for the incurred costs should be reflected in the budgeted costs. It is submitted that such an unequivocal answer is not discernible from the rules; there is a four way conflict between CPR 3 [PD 7.10](#) & [PD 7.3](#), [CPR 3.18](#) and [CPR 44.3\(5\)](#) (*see next page*).

The Deputy Master’s reasoning was that if the hourly rates were not reflected in the budgeted costs that would allow the Claimant to recover an hourly rate, post budget at a level that exceeded the figure considered reasonable and proportionate for the pre-budget stage. He determined this to be a ‘good reason’ to depart from the approved costs budget. It is difficult to reconcile his reasoning with the explicit wording of PD 7.3. The Court has already considered the budgeted costs to be reasonable and proportionate. In doing so the Court has considered the constituent elements of the total figure. The hourly rates, being a constituent element, have therefore been considered to be both



reasonable and proportionate and should not have been reduced further at Detailed Assessment. The use of the word “good” in CPR 3.18 clearly creates a reasonably high threshold for a reason to depart from the approved costs budget. It is submitted that hourly rates fall some way short of being a good reason to depart.

As a safety net, the Deputy Master considered that if hourly rates were not considered ‘good reason’ then they were the most appropriate mechanism to apply the new proportionality test. The intention of the new ‘stand back’ approach was clearly not to apply a point at the coal face of the assessment.

The four way conflict between PD 7.10, PD 7.3, CPR 3.18 and CPR 44.3(5) can only be resolved by the rule makers. The more pressing issue for the appellate Court is some guidance on what constitutes ‘good reason’ to depart from an approved costs budget.

A Four Way Conflict?

CPR 3 PD 7.10

The making of a costs management order under rule 3.15 concerns the totals allowed for each phase of the budget. It is not the role of the court in the cost management hearing to fix or approve the hourly rates claimed in the budget. The underlying detail in the budget for each phase used by the party to calculate the totals claimed is provided for reference purposes only to assist the court in fixing a budget.

CPR 3 PD 7.3

If the budgeted costs or incurred costs are agreed between all parties, the court will record the extent of such agreement. In so far as the budgeted costs are not agreed, the court will review them and, after making any appropriate revisions, record its approval of those budgeted costs. The court’s approval will relate only to the total figures for budgeted costs of each phase of the proceedings, although in the course of its review the court may have regard to the constituent elements of each total figure. When reviewing budgeted costs, the court will not undertake a detailed assessment in advance, but rather will consider whether the budgeted costs fall within the range of reasonable and proportionate costs.

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

CPR 44.3 (5)

Costs incurred are proportionate if they bear a reasonable relationship to –

- (a) the sums in issue in the proceedings;
- (b) the value of any non-monetary relief in issue in the proceedings;
- (c) the complexity of the litigation;
- (d) any additional work generated by the conduct of the paying party; and
- (e) any wider factors involved in the proceedings, such as reputation or public importance.

The Case In Favour Of the Decision

Whilst the decision itself has come under much scrutiny, there are arguments that support Deputy Master Campbell’s conclusion.

It is important to note that in this case, allowances in the Costs Budget were made by reference to phases, without the Court commenting on the hourly rates in respect of both incurred and future costs.

On assessment Deputy Master Campbell was of the view that it was not reasonable to first apply hourly rates that he deemed appropriate to the incurred costs, only to then allow the Claimant their claimed hourly rates in respect of future costs. Logically, this makes sense. If left untouched, the Master would have been effectively allowing higher hourly rates than he deemed appropriate, for a large portion of the case. When hourly rates are set at assessment, those rates are a reflection of case

complexity and circumstances throughout the entire case, and so it is logical that a single set of hourly rates should be allowed for the whole bill irrespective of whether one is considering incurred or future costs.

In addition, it is noteworthy that hourly rates are a mandatory requirement in a Precedent H document, yet they cannot be challenged at a CCMC owing to CPR 3 PD 7.10. Therefore, if the hourly rates applied when a party is calculating their proposed future costs cannot be touched by the Court at a CCMC, it makes little sense to again leave the issue untouched when the matter proceeds to assessment. The Defendant representative made the point that the assessment itself was his only opportunity to challenge the hourly rates claimed within the budget, and it is a valid point. It is wrong to deny a party even a single bite at the cherry by not dealing with the hourly rates within a budget at the CCMC, and then leaving them untouched on assessment.

A further argument would be the ‘good reason’ argument. The parties were in agreement that a reduction could be made if there was good reason to depart from the figures in the Costs Budget. Deputy Master Campbell’s view was that in cutting the Claimant’s incurred costs in relation to hourly rates, this gave him the ‘good reason’ he needed to then move to reduce the hourly rates for the future costs. Though, a notable counter to this stance is that it gives the Court the tools to bypass the decisions in Harrison and Merrix by cutting the incurred costs and deeming that as the ‘good reason’ to then reduce budgeted costs.

Judgment

Having considered the submissions I find that I must disagree with Master Campbell. Whilst on the surface it would appear logical that by reducing the hourly rates within the incurred costs it would follow that the budgeted costs should also decrease this is not the correct approach to take.

When setting a phase total the hourly rates are not fixed, rather the Costs Judge considers the constituent elements and allows a total expenditure which is a proportionate figure to spend in order to complete the remaining work in the phase

Judgment (contd.)

How the Solicitors decide to split that figure between their fee earners is immaterial, whether the work is done by a trainee at half the hourly rate as a partner but in twice the time or vice versa, the outcome is that a proportionate amount has been spent on that phase.

CPR 3 PD 7.3 makes it clear that the incurred costs are not subject to such scrutiny and as such the hourly rates can be reduced upon assessment at the Cost Judge’s discretion. However, to take reductions made to the incurred costs and apply the same to the budgeted costs is circular reasoning. It was Deputy Master’s decision to reduce the hourly rates allowed for the incurred costs and to then rely upon this fact to reduce the budgeted costs. This circumvents the entire budgeting process and ignores the fact that the constituent elements have already been considered by the Court when setting the budget.

To allow interference of hourly rates at assessment will remove certainty for receiving parties, thereby rendering the recent decisions in [Merrix](#) and *Harrison* nugatory.

There may be a plethora of reasons for departing from an approved budget. For example, a trial listed for five days and only running for three. However, hourly rates are not one of them.

What is clear from this decision is that the conflict between the rules needs resolving. In the meantime we still need further guidance from the Court of Appeal as to what constitutes a good reason to depart from an agreed budget.



About The Authors

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