

The Legal Update

- **Sylvia Henry Appeal re Budget successful**

Court of Appeal finds that there was good reason to depart from the original budget;

- Appellant had complied with the requirements by serving a budget but had failed to update;
- The object of the practice direction twofold: (i) to ensure that the costs incurred in connection with the proceedings are proportionate to what is at stake and (ii) to ensure that one party is unable to exploit superior financial resources by conducting the litigation in a way that puts the other at a significant disadvantage”
- In this matter no “*inequality of arms*”
- Court unable to accept that “*compliance with all the requirements of the practice direction is essential before a party can ask the court to depart from the approved budget*”;
- Respondent notified that the appellants costs were in excess of £1.5 million before matter settled with costs to be assessed if not agreed;
- Budget not a cap;
- the management of costs was the responsibility of all parties to the litigation and “ultimately the court itself”;

The Appeal was a preliminary issue as to whether there was “good reason” to depart from the appellant’s original budget, the appellant’s costs having exceeded the budget by some £268,832 before any success fee was added.

The matter was heard by the Court of Appeal on 4 December 2012 with the judgement reserved however widely expected to be available before Christmas this was not the case and the judgement was not handed down until 28 January 2013.

The Court of Appeal found that there was “good reason” in this matter to depart from the Claimant’s original budget and the claimant’s Appeal was allowed.

In the Judgment Lord Justice Moore-Bick referred to paragraph 5.6 of the accompanying practice direction which expressly recognised that there may be good reason to depart from the budget to allow a greater sum stating “costs budgeting is not intended to derogate from the principle that the court will allow only costs as have been reasonably incurred and are proportionate to what is at stake; it is intended to identify the amount within which the proceedings should be capable of being conducted and within which the parties must strive to remain”.

Budgets, went on Lord Justice Moore-Bick,"are intended to provide a form of control rather than a licence to conduct litigation in an unnecessarily expensive way. Equally, however, it may turn out for one reason or another that the proper conduct of the proceedings is more expensive than originally expected".

Whilst acknowledging that the Senior Costs Judge had found himself "in a difficult position" the Judgment found that the Senior Costs Judge had "misunderstood" the reference in paragraph 1.3 of the practice direction to the parties' being on "an equal footing" and "took on narrow a view of what may amount to good reason under paragraph 5.6(2)(b). The object of the practice direction, as described in paragraph 1.3 "is twofold: (i) to ensure that the costs incurred in connection with the proceedings are proportionate to what is at stake and (ii) to ensure that one party is unable to exploit superior financial resources by conducting the litigation in a way that puts the other at a significant disadvantage"

Whilst paragraph 5.5 assumed that the parties would exchange information about expenditure at regular intervals "a failure to do so does not of itself put the parties on an unequal footing in the sense in which that expression is used in paragraph 1.3. In this case neither party was financially embarrassed and in my view, whatever else may be said in which the proceedings were conducted, there was no inequality of arms".

The Court of Appeal accepted that the appellant's solicitors "did comply with the requirements of paragraph 3.1" by providing the budget but failed to comply with their obligations to exchange information regularly and failed to provide a revised budget however Lord Justice Moore-Bick continued "I am unable to accept that compliance with all the requirements of the practice direction is essential before a party can ask the court to depart from the approved budget. It is no more than one factor which the court may take into account in deciding whether there is in fact good reason to do so. In the present case the appellant was not the only one at fault" with the Lord Justice pointing out that the practice direction made it clear that the management of costs was the responsibility of all parties to the litigation and "ultimately the court itself".

The Lord Justice referred to a point that had been raised at the original hearing namely the fact that when the Respondents became aware that they had exceeded their budget and had submitted a revised budget to the court, the same day they asked the appellant's solicitors for a clear indication of their costs to date to assist in the settlement talks they were advised that the same amounted to £1,567,365, inclusive of disbursements, success fees and ATE premium. Armed with that knowledge the respondent agreed as part of the settlement to pay the appellant's costs of the proceedings, subject to detailed assessment.

Responding to the Respondent's submission that the budget was intended if not to impose a cap on what the receiving party could recover at least imposed a limit that was not to be exceeded the Lord Justice stated "the budget is not intended to act as a cap, since the court may depart from it where there is good reason to do so".

In considering if there was in fact good reason to depart the Lord Justice stated "It will rarely, if ever, be appropriate to depart from the budget if to do so would undermine the essential object of the scheme. As I have already pointed out, the failure of the appellant's solicitors to comply with paragraph 5.5 of the practice direction or to apply for a costs management conference with a view to obtaining the court's approval of a revised budget did not lead to

an inequality of arms. Moreover, it is strongly arguable that it did not result in the appellant's incurring costs that were disproportionate to what was at stake in the proceedings. Accordingly, it was open to the costs judge to find that the essential objects of the scheme had not been frustrated. In the circumstances of the case, including the extent to which the parties and the court had exercised their respective responsibilities under the scheme, the way in which the proceedings had developed, the response of the appellant's solicitors to the demands imposed by the way in which the respondent's case developed and the respondent's agreement to pay the appellant's costs as part of the compromise of the claim".

Given the rather unusual circumstances of the case Lord Justice Moore-Bick in respect of the preliminary issue answered "in the affirmative" for several reasons:

"First, because unless the court departs from the budget the appellant will not be able to recover the costs of the action. This alone would not be enough; if it were the scheme would be otiose, but it is an important factor to the extent that on examination the court is persuaded that the costs actually incurred were reasonable and, most importantly, proportionate to what was at stake in the litigation. Allied to that is the fact that the failure of the appellant's solicitors to observe the requirements of the practice direction did not put the respondent at a significant disadvantage in terms of its ability to defend the claim nor does it seem likely that it led to the incurring of costs that were unreasonable or disproportionate in amount. In other words, the objects which the practice direction sought to achieve were not undermined. In those circumstances a refusal to depart from the budget simply because the appellant had not complied with the practice direction would achieve nothing beyond penalising her. That might encourage other to be more assiduous in complying with the practice direction in the future, but to penalise the appellant for that reason alone would be unreasonable and disproportionate. That is all the more so in the context of the proceedings which were constantly changing in ways that, in the words of the judge below, could not be passed off as no more than a minor inconvenience. Then there is the fact that the appellant's solicitors were not alone in failing to comply with the requirements of the practice direction".

Taking all of the matters together the Lord Justice was satisfied that there was good reason to depart from the appellant's budget.

The Lord Justice did go on to comment that from 1 April 2013 with the emphasis on greater court management and the requirement for budgets to be approved by the court and revised at regular intervals it would be expected that the function of the budgets would be to impose a limit on recoverable costs.

Both Lord Justice Aikens and Lady Justice Black agreed with the decision of Lord Justice Moore-Bick to allow the appeal and to answer the question posed – was there good reason to depart from the budget- in the affirmative.

Costs Judge Campbell sat as an Assessor.

It is clear that budgets need to be accurate at the outset and monitored closely and should it appear, at any time, that the budget is likely to be exceeded a costs management hearing should be requested with detail provided setting out the area of work in respect of which the budget is likely to be exceeded with reason provided as to why more work than originally anticipated will be expended with detail of the additional work to be undertaken and the cost of the same

Gary Knight

Harmans

01245 250101

gary.knight@harmanscosts.com