Over and under

Francis Kendall examines the twists and turns of the courts on budget underspending

Since costs budgeting was introduced in 2013, the question of what constitutes 'good reason' to depart from a budget under CPR 3.18 initially focused on whether parties who spent more than they budgeted for could recover their overspend. But the issue currently exercising costs experts is underspending – and it seems inevitable that this will require determination by the higher courts.

We know from the Court of Appeal decision in *Harrison v University Hospitals Coventry &Warwickshire NHS Trust* [2017] EWCA 6792 that 'good reason' is a high hurdle.

In *Barts Health NHS Trust v Hilrie Rose Salmon* (Central London County Court, January 2019), Judge Dight, with Master Brown sitting as assessor, ruled 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.

This would not lead to a line-by-line assessment, he said, but the judge could exercise his case management powers in arriving at an appropriate figure. This meant that parties would need to justify the costs of each phase as reasonable and proportionate for the work actually completed.

However, earlier this year, District Judge Lumb in Birmingham, the regional costs judge, expressly disagreed with HHJ Dight, finding that not spending the totality of the budgeted figure for a phase because of settlement was not in itself a good reason to depart.

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In *Chapman v Norfolk and Norwich University Hospitals NHS Foundation Trust*, he said that, applying the strict guidance of Davis LJ in *Harrison*, the court was not expected to carry out a micro-assessment of how much work has been done in each particular phase.

DJ Lumb argued that, if HHJ Dight's 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'.

He said: '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.'

DJ Lumb said there was nothing in the file to suggest there had been a 'substantial overspending' on work done in the two phases in question, even though the experts phase was not completed. '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.'

This implied that something amounting to a 'specific and substantial point arising in the case, as opposed to merely a general point', was required for it to amount to a good reason to depart from a figure that came within budget. '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.'

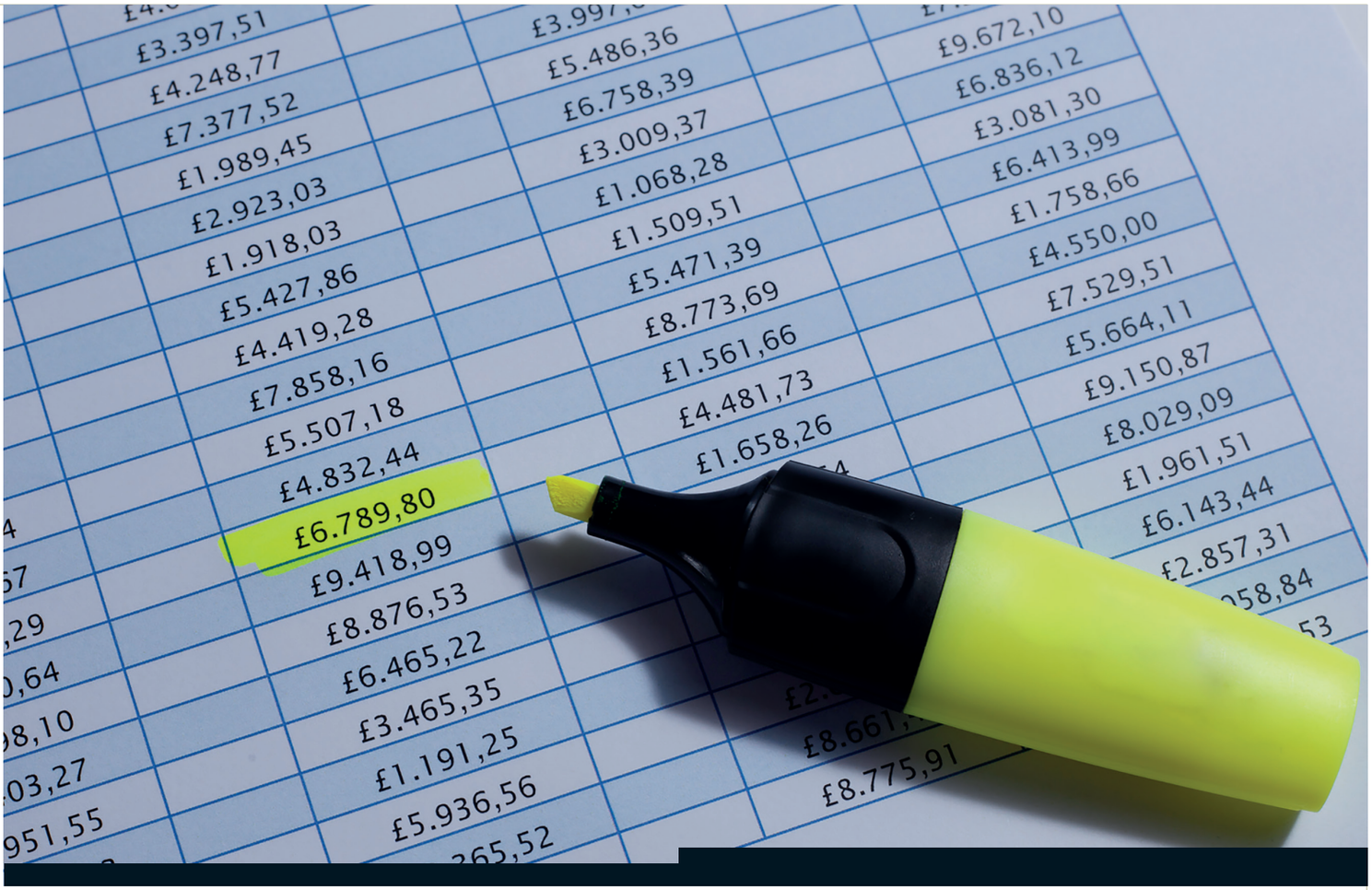
UTTING v CITY COLLEGE NORWICH

So it was one-all. But Master Brown – who sat with HHJ Dight – made it two-one in May by agreeing with DJ Lumb in *Utting v City College Norwich* [2020] EWHC B20 (Costs).

Now we understand why HHJ Dight recorded that, while Master Brown agreed on the outcome of *Salmon*, he did not necessarily agree with the route by which the circuit judge reached it.

Master Brown said in *Utting*: 'It seems to me that the conclusions reached by [HHJ Dight] 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.'

But he agreed with DJ Lumb 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'.

Master Brown explained: '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.'

While it would not be unjust for a receiving party to recover less than the budgeted sum, he continued, it would be unjust for them to receive the full amount of a budgeted sum 'where only a modest amount of the expected work had been done'.

In any event, Master Brown ruled that, even if he adopted HHJ Dight's approach, it would not be appropriate to make any reduction from the sums claimed for the underspent phases. '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.'

It is not uncommon for parties to approach litigation from divergent perspectives. It would therefore be difficult for a paying party, in a budgeted case which settled prior to exchange of witness statements for instance, to suggest that, as they were only half way through the phase, only half the budget should be allowed. The receiving party might well have been three-quarters of the way through their work on witness evidence, and so claim three-quarters of the sum.

This issue is particularly stark when one of the parties is aware, at an earlier stage, that a case is going to settle. Take a Part 36 offer as an example – the offeree may well be aware that it is going to be accepted, but only does so two weeks later, for want of clear instructions. Is it unreasonable for the offeror to continue to prepare their case in those two weeks, and is it reasonable for the offeree to suggest they should not have worked in that period?

The bottom line is that it is virtually impossible for the court (and impossible for the paying party at the time of preparing points of dispute) to properly ascertain how far through a partially completed phase their opponent is.

That makes showing good reason all the more difficult and, if the receiving party is not premature in undertaking the work, there is some sense in denying that an underspend is good reason to depart.

Francis Kendall is vice-chairman of the Association of Costs Lawyers