



Deviating from the rule

What does the Court of Appeal's recent decision in *Henry v News Group Newspapers Ltd* mean in the run-up to Jackson? **Sophia Purkis** examines the case

Central to the Jackson reforms are the introduction of strict costs budgets and management by the courts. In *Henry v News Group Newspapers Ltd* [2013] EWCA Civ 19 the Court of Appeal (CoA) shed light on the recoverability of costs which exceed an agreed or approved costs budget.

Under CPR 3.12-18 and CPR PD 3E, from 1 April, parties to all multi-track cases (except in the Admiralty and Commercial Courts) will be required to file and exchange costs budgets. The court may give directions for review of the budgets and each party is obliged, should there be significant developments to warrant revisions, to amend their budget upwards or downwards. If the budgets are not agreed the court has final sanction over whether the budget is approved.

Where there is a difference of 20 per cent

“When considering whether there is ‘good reason’ to depart from the budget, the court should consider all of the circumstances of the case, in particular the objective of the costs budgeting regime”

or more between the costs claimed by a receiving party upon detailed assessment and the costs shown in that party's budget, the costs judge may restrict the recoverable costs “to such sum as is reasonable for the paying party to pay” in light of the paying party's reliance upon the budget “notwithstanding that such sum is less than the amount of costs reasonably and proportionately incurred by the receiving party” unless the receiving party can demonstrate “that there is good reason” to depart from their budget.

Henry was a defamation case managed

under the costs pilot scheme previously introduced in the TCC and Mercantile Courts. In accordance with PD51D, the parties filed costs estimates which were approved by the court. Henry settled her claim against the defendant. Her costs were referred for detailed assessment. It transpired that they exceeded her budget of £381,305 by some £270,000. The costs judge was asked to decide, as a preliminary issue, whether there was “good reason” to depart from the approved budget.

Good reason

He held that Henry's solicitors' failure “to comply with the practice direction had prevented the parties from being on an equal footing which in turn meant that there was no good reason to depart from the approved budget”. He disallowed Henry's costs incurred in excess of her budget even though he considered that she could make a good case for them.

On 28 January 2013, the Court of Appeal unanimously allowed Henry's appeal against the decision. Delivering the leading speech, Moore-Bick LJ considered the question of what constitutes ‘good reason’.

He held that “It is implicit... that the approved budget is intended to provide the framework for a detailed assessment and that the court should not normally allow costs in an amount which exceeds what has been budgeted for in each section” However “costs budgeting is not intended to derogate from the principle that the court will allow only such costs as have been reasonably incurred and are proportionate to what is at stake”.

When considering whether there is ‘good reason’ to depart from the budget, the court should consider all of the circumstances of the case, in particular the objective of the costs budgeting regime. While not setting rigid rules for the determination of whether there is good reason to depart from the budget, he held that a costs judge should consider how the proceedings have been managed, whether they have developed in a way that was foreseen, whether the costs are proportionate to what is in issue

and whether the parties have been on an equal footing.

Reasonable and proportionate

In the present case, he held that there had been no inequality of arms and Henry's solicitors' failure to comply with the PD was “no more than one factor to take into account in deciding whether there is in fact good reason to do so”. The court and the defendant had also failed to comply with the PD. The defendant was aware that Henry's costs had exceeded budget as her costs had been disclosed during settlement negotiations.

In that knowledge the defendant had agreed to settle on the terms it did with Henry's costs to be assessed. Therefore the defendant had not been put to significant disadvantage by the failure to update the budget.

The Lord Justice concluded by addressing directly the rules which are to come into force on 1 April. These differ in some important aspects from *Henry* but he emphasised the importance of producing accurate costs budgets. He would expect the courts “to place particular emphasis on the function of the budget as imposing a limit on recoverable costs”. He warned that “the receiving party is unlikely to persuade the court that costs incurred in excess of the budget are reasonable and proportionate to what is at stake”.

Henry demonstrates that the court will rarely consider it appropriate to depart from an agreed or approved budget, particularly if the paying party has been significantly disadvantaged by it. However, all the circumstances of the case must be considered.

Mere failure to comply with the PD is just one (but not the deciding) factor to take into consideration.



Sophia Purkis is a London Solicitors Litigation Association (LSLA) executive committee member and commercial litigation partner at Fladgate LLP