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Ref. A68YJ992

IN THE COUNTY COURT AT CENTRAL LONDON

Thomas More Building
Strand

Before HIS HONOUR JUDGE DIGHT CBE (with MASTER BROWN sitting as Assessor)

BARTS HEALTH NHS TRUST (Appellant)

- v -

HILRIE ROSE SALMON (Respondent)

MR HUTTON QC (instructed by Acumension) appeared on behalf of the Appellant
MR MALLALIEU (instructed by Gadsby Wicks Solicitors) appeared on behalf of the Respondent

JUDGMENT
17th JANUARY 2019, 14.14-15.23
(AS APPROVED)

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JUDGE DIGHT:

1. Thank you. Can I just preface this by saying that you are going to have to bear with me to a certain extent: the court has had no IT, no internet access, and the telephones have not worked for the last few days, and so there have been a few difficulties in preparing this judgment. Also, I am in the process of losing my voice, but I will speak as loudly and as slowly as I can.

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2. This is an appeal against decisions made by Master Whalan, sitting as a judge of the Central London County Court, during the course of a detailed assessment which took place on 1 and 2 November 2017. The appeal is brought with permission which I granted on 31 July 2018. The appellant is the defendant and is the paying the party, the respondent is the claimant, the receiving party, who has not filed a Respondent's Notice, and therefore in effect seeks to uphold the decisions of the learned Master for the reasons given by him.

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3. I hear this appeal with Master Brown, sitting as an assessor. He has provided me with his expert views on some of the issues on this case, and I am extremely grateful to him. We agree on the outcome of the appeal, but not necessarily on the route to that outcome. However, the conclusions which I reach in this judgment are my own, and I take sole responsibility for them.

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4. During the course of the appeal, the issues between the parties were reduced, with the result that there are three remaining grounds of appeal to be determined. This is a Claim which settled before trial, and in respect of which not all the phases of the original budget were completed. The remaining grounds of appeal for determination are: (1) whether the learned Master was wrong to conclude that there was no good reason under CPR 3.18(b) to depart from the costs budget in respect of the expert's phase of the bill, which was part 15 of the bill, and reduce the figure below what was claimed by the receiving party; (2) whether the Master was wrong to conclude that there was no good

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reason under CPR 3.18(b) to depart from the costs budget in respect of the alternative dispute resolution phase of the bill, part 17 of the bill, and reduce the figure below what was claimed by the receiving party; (3) whether the Master erred in his application of the global proportionality test under CPR 44.3 in respect of phases 4 to 17 of the bill, relating to costs incurred after 1 April 2013. The learned Master in that latter respect reduced the assessed figure from £52,133.97 to £40,000, but the paying party argues that the reduction was insufficient and that the figure should have been reduced further, the sum of £25,000

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approximately being contended for.

5. My approach on the hearing of the appeal is that I am only entitled to interfere with the decision of the learned Master if I come to the conclusion that he misdirected himself as a matter of law, or insofar as he reached a conclusion in the exercise of a judgment or discretion, if I come to the conclusion that he did so in a way which no other costs judge could have done after having directed themselves correctly as to the relevant law.

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6. The facts behind the appeal are not in dispute: this was a clinical negligence claim which settled when the claimant accepted the defendant's part 36 offer of £7,000, on 22 August 2015. The claimant was born on 26 April 1937, and was 73 years old when she underwent a laparoscopic hemi-colectomy, the removal of half her colon by keyhole surgery, recommended as she had a cancerous polyp, on 23 March 2011, at the defendant's Whipps Cross Hospital. There was no complaint about the actual surgical procedure which was carried out, but the claimant woke up being unable to move her left arm as a result of nerve injury which appeared to have occurred during the course of the operation.

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It was agreed evidence that she subsequently achieved recovery from her nerve injury within two years of the operation, but she still has some abnormal sensation and neurogenic pain which was expected to resolve itself eventually, and within about two years of the operation.

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7. Special damages were claimed at £3,295 with no future losses, and the overall value of the claim was in the region of £10,000 to £15,000. The issues in the claim were relatively limited: the parties had two experts each, an anaesthetist and a neurologist. The claimant's anaesthetic expert, Dr Hardman, relied on two aspects to come to his conclusion that the nerve injury to the claimant's arm was caused by inadequate care during the operation. First, that the treating staff admitted that the claimant's left arm was kept at 90 degrees during the operation, which, in his view, was too great an angle; and also on the plea of res ipsa loquitur, namely that there was no explanation for the cause of the injury other than negligence.

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8. The defendant denied liability from when the letter of claim was served, and later had expert evidence on which it relied to defend the claim, served after the defence in the case. The defendant's anaesthetic expert, Dr Neevey, did not agree that 90 degrees was an inappropriate angle for the position for the claimant's left arm during surgery, and his view was that there was no breach of duty. The defendant's neurological expert, Dr Dick, agreed that the injury arose during the operation, but relied on a paper that suggested that, "In this series of nerve injury, claims associated with anaesthesia, interoperative care was judged as appropriate in 65 per cent of brachial plexus claims".

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9. The claim was started in 2014, a defence was filed on 19 August 2014, and in it the defendant made a number of non-admissions in respect of issues which it has subsequently been said the defendant should either have admitted, or, if they were not to have been admitted, the defendant should have asserted a positive case. For example, paragraph 8 of the defence makes a non-admission in respect of paragraph 7 of the particulars of claim: paragraph 7 of the particulars of claim says, "The claimant was not warned about any risks relating to her positioning during the surgery, or in relation to her upper-limbs". That assertion, one might have thought, should have resulted in either an admission or a denial in the defence, and a positive case should have been asserted one way or another. The same is true in respect of other paragraphs of the defence.

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10. The matter came on for a costs and case management conference before District Judge Silverman on 5 February 2015, when he approved the claimant's budget at £155,673, which included two experts per side, and, in a relatively standard way, the learned District Judge gave substantial directions relating to the steps to be taken by the experts in the lead up to trial.

11. The first two grounds of appeal relate to the issue of whether there was a good reason to depart from the budget set by District Judge Silverman.

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12. I will now turn to the relevant legal principles which I have to consider in evaluating the first two grounds of appeal. The starting-point it seems to me is CPR 3.15, which gives the court the power to manage the costs to be incurred ("the budgeted costs") "by any party in any proceedings". Sub-paragraph (2) of the rule provides,

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> "The court may at any time make a "costs management order". Where cost budgets have been filed and exchanged, the court will make a costs management order unless it is satisfied that the litigation could be conducted justly and at proportionate cost in accordance with the overriding objective, without such an order being made. By a costs management order, the court will:
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> (a) record the extent to which the budgeted costs are agreed between the parties;
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> (b) in respect of the budgeted costs which are not agreed, record the court's approval after making appropriate revisions;
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> (c) record the extent of any to which incurred costs are agreed.
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> (d) If a costs management order has been made, the court will thereafter control the parties' budgets in respect of recoverable costs."

13. That rule is supplemented by provisions contained in the related practice direction PD 3E, which contains a number of material provisions. Paragraph 7.3 of the practice
D direction, under section D, which is headed, "Costs Management Orders", provides,

> "If the budgeted costs or incurred costs are agreed between the parties, the court will record the extent of such agreement. Insofar 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
> E relate only to the total figures of 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."
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> "[7.4 provides] As part of the cost-management process, the court may not approve costs incurred before the date of any cost management hearing. The court may, however, record its comments on those costs, and will take those costs into account when considering the reasonableness and proportionality of subsequent budgeted costs."
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> "[Lastly of relevance to the issue before me, 7.10 provides] The making of a cost 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 parties to

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> calculate the totals claimed is provided for references purposes only, to assist the court in fixing budget."

14. The High Court has recently had the opportunity of considering the proper construction of those provisions and their application in practice in *Yirenki v Ministry of Defence*, [2018] *5 Costs LR 1177*, a decision of Mr Justice Jacobs. The headnote describes the decision as follows:

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> "When carrying out cost budgeting under part 2 of CPR Part 3, the court should not leave the expense rates open for argument on detailed assessment, nor approve in advance the number of hours to be spent by fee-earners undertaking work on the case. The ultimate aim of paragraph 7.3 of the practice direction was to arrive at budgeted costs which fell within a range of reasonable and proportionate costs, and for there to be a figure given for each phase of the proceedings. It follows that the order of the Master below, which permitted the parties to reserve their position as to hourly rates, could not stand and would be set aside."

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15. In that case, the Queen's Bench Master undertaking the costs budgeting exercise had allowed the parties to reserve their positions both as to incurred costs and as to hourly rates. The judge, on appeal, held that that was an illegitimate approach: he referred to the practice direction, in particular paragraph 7.3, that I have already mentioned, and went on to say in paragraph 12 of his judgment as follows:

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> "It is clear from that paragraph that the ultimate goal of the cost budgeting exercise is for there to be a figure which is given for the costs for each phase of the proceedings. The constituent elements are part of the road to reaching that goal, but they are not an end in themselves, and those constituent elements are not subject to approval; that is the correct approach, as put beyond doubt by paragraph 7.10 of the practice direction [which he then cited]."

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16. He then went on to say in paragraph 20 of his judgment:

> "The Master's approach to the proving of hours in advance seems to have the effect of removing the flexibility of the party in deciding how to spend the budget in the light of the way the case develops. The reason it removes this flexibility is that, once a party departs from a particular approved pattern, for example the Grade A fee [earner] spends 25 hours rather than 20 hours, then that party runs the risk it would be said that he is outside the budget, subject only to the question of good reason for departure. Those problems are avoided if, as the practice

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> direction requires, an overall figure is set for the phase, rather than a budget being set for constituent elements.

His Lordship concluded, in paragraph 21 as follows:

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> "The final vice, which is apparent from what I have already said, is that the process of setting the budget, and then the question at a detailed assessment of comparing how the budget was spent becomes something which is being micromanaged by the court; that is something to be avoided. Paragraph 7.3 of the practice direction indicates that the 'ultimate aim is to arrive at the budgeted costs which fall within the range of reasonable and proportionate costs': none of that means, of course, that it is not appropriate for the Master, when setting the budget and proving the figures, to look at the constituent parts."

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> "Indeed, it is impossible to see how a Master can sensibly come to figures without looking to see how they have been calculated by the party putting them forward. In so doing, the Master would use his or her experience as to how much time should be spent, the type of people who should be doing the relevant work, and his or her experience of hourly rates. However, all of those matters feed into the identification of all of a reasonable and proportionate figure. They do not feed into a finding as to the specific number of hours which are to be spent in the future, or a finding as to [a] specific figure for disbursements to be incurred in the future."

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17. The particular provisions of the CPR which are in focus in this case are, as I have already mentioned, those contained in rule 3.18, which provide, insofar as material, as follows:

> "In any case where a cost management order has been made, when assessing costs on the standard basis the court will
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> (a) have regard to the receiving party's last approved or agreed budgeted costs for each phase of the proceedings;

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> (b) not depart from such approved or agreed budgeted costs, unless satisfied that there is good reason to do so."

18. Those provisions have been considered by judges at first instance, and more recently by the Court of Appeal, in *Harrison v University Hospitals Coventry & Warwickshire NHS Trust* [2017] ECWA6792, a constitution of the Court of Appeal consisting of the Master of the Rolls, Lady Justice Black, and Lord Justice Davis, sitting with Master Gordon Saker as an assessor. The judgment was given by Lord Justice Davis, with whom the other members of the court agreed. It was a clinical negligence case of relatively low value, where there was a costs budgetting exercise undertaken by the Designated Civil Judge for Northampton sitting in the County Court. Shortly before trial, the case was settled. Although the claim for damages was expressly limited to £50,000, the case settled for some £20,000, together with costs on the standard basis. The

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claimant's solicitors put forward a bill of costs of £467,000, which was dealt with by Master Whalan at the detailed assessment stage. His decision was appealed. First issue of relevance to the matters before us was that considered by the Court of Appeal from paragraph 2 of their judgment:

> "The first issue can be summarised in this way: where a costs management order, CMO, approving a costs budget has been made in the course of civil proceedings is a costs judge on a subsequent detailed assessment precluded from going below the budgeted amount unless satisfied that there is good reason to do so, or is there an entitlement to do so without any requirement of good reason for going below the budgeted amount?"

19. Lord Justice Davis then set out the legislative scheme which I have already referred to, including the global proportionality principles to be found in CPR44, which I will come to later on in this judgment.

20. Without going into the detail of the case, the Court of Appeal held, at paragraph 44 of the judgment that the power to depart from the budget was dependent on the court being satisfied that there was a good reason for doing so, even where the departure was downwards. Lord Justice Davis said:

> "Where there is a proposed departure from the 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 adapt a lax or overindulgent approach to the need to find good reason, if only because to do so would tend to subvert one of the principle purposes of cost budgeting and against the overriding objective. Moreover, while the context and the wording of CPR rule 3.18(b) is different from that of CPR rule 3.9, relating to relief from sanctions, the robustness and relative rigour of approach to expect in that context, see *Denton v TH White Ltd* [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 doom-laden 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 would constitute good reason in any given case, I think it much

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> better not to seek to proffer any further, necessarily generalised guidance or examples; the matter can safely be left to the individual appraisal and the evaluation of costs judges by references to the circumstances of each individual case."

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21. At paragraph 41 of the judgment Lord Justice Davis commented on the application of the indemnity principle as being capable of being a good reason for departing from a budget downwards:

"[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:

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> "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."

"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)."

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Pausing there, it seems to me that Lord Justice Davis' comment should carry some weight with judges in my position. Mr Mallalieu, on behalf of the receiving party in this case, says that the point which Lord Justice Davis was making in that part of his judgment was not argued before the Court of Appeal and therefore is either obiter itself, or something which I am entitled not to follow. With the greatest respect, it seems to me not only is it something that is likely to have been carefully considered by the learned Lord Justice and the other members of the Court of Appeal, but it is consistent, in my view, with a proper construction of CPR 3.18(b). "In other words there has to be a good reason to depart downwards from a budget and the application of the indemnity principle was capable of being a good reason."

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22. Before looking at the submissions in this case, I want to set out the principles which I derive from the authorities and the provisions that I have referred to, which will of course indicate my thinking on the submissions which I will set out in due course.

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a. First, costs budgets give a figure for each phase of the proceedings, but the constituent elements of each phase are not themselves approved, and there is no finding as to the legal costs or disbursements to be incurred in each phase. I take that from PD 7.10, and the judgment of Mr Justice Jacob in Yirenki.

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b. Second, when assessing costs on the standard basis, the court will have regard to the last approved budget. That is plain from the wording of CPR 3.18(a).

c. Third, the court will not depart from the budget either upwards or downwards in respect of any particular phase unless there is a good reason. That follows from CPR 3.18(b) and the reasoning of Lord Justice Davis in the *Harrison* case.

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d. Fourth, a good reason for departing from the budget in respect of a particular phase does not lead to a right to depart from the budget in respect of another phase. A good reason for departure from that separate phase must be separately established.

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e. Fifth, what amounts to a good reason is to be left to the judgment of costs judges in individual cases, having regard to all the circumstances, but they are not to adopt a lax or overindulgent approach (see Lord Justice Davis in Harrison).

f. Six, the consequences of establishing a good reason is that the court may depart from the budget for a phase when assessing costs on the standard basis. It seems to me that follows from the plain words of CPR 3.18(b).

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g. Seven, 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.

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h. Eight, in my view, 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.

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23. The parties in the course of their submissions were at odds so far as that particular issue is concerned: Mr Hutton, for the appellant, submitting that the nature of the good reason dictates the route of departure; Mr Mallalieu, for the respondent, submitting that,

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once the departure has been sanctioned by the finding of a good reason, one goes to a detailed assessment in its true sense. He says "line-by-line", but it seems to me that is not the necessary outcome for the reasons I have already suggested, and it is a matter for the learned costs judge to decide what course is to be followed.

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24. As to whether there needs to be a second good reason, it seems to me to make little fairness to talk of a further departure from a budget, requiring a further good reason, when, having regard to the reasoning in Yirenki, what one is departing from is a global figure for a phase which has been approved, rather than the constituent elements, to which, in my judgment, the costs judge is not intended to have regard on a detailed assessment. To require separate good reasons for departing from separate constituent elements of the budget is illogical if the approval of the budget does not connote an approval of those constituent elements, or any findings as to them; again, see the judgement of Mr Justice Jacobs.

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25. Insofar as my view on the impact of finding a good reason may seem to open the floodgates to arguments about all the elements of the relevant phase, it seems to me that there are two real safeguards: first, the nature of the detailed assessment being undertaken, and the process to be adopted, is a matter for the case management skills and the expertise of the costs judge undertaking the assessment, who will control the proceedings in the appropriate way; secondly, in any event, the outcome of the assessment will be subject to the overall proportionality test, provided by CPR 44.3.

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26. In the light of those principles, I turn to the submissions made by the parties. So far as the first two grounds of appeal are concerned, the paying party, represented by Mr Hutton, QC, submitted that the phases in issue were not completed in this case because the case settled early, whereas the budget was set on the assumption that the work contained within the relevant phases would be completed. Mr Hutton submitted that not all the steps relating to the experts and alternative dispute resolution had been completed because of the settlement, and that that much was apparent from the bill. He acknowledged that the receiving party had reduced their costs claim to their actual expenditure, but submitted, nevertheless, that the costs which had been claimed were greater than had been expected for the work that was actually done, and that the receiving party should have claimed less.

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27. The learned Master, he submitted, wrongly refused to depart "further" downward than conceded by the receiving party. He submitted that the Master was effectively saying in his judgment that, if a receiving party claims less than the budget, then a further downwards challenge is not permitted by the paying party, and the conceded figure is that at which the phase would be assessed. He says that this is an important issue, given that a very high proportion of clinical negligence cases settle without the work in each of the relevant phases having been completed. On a proper understanding of *Harrison*, Mr Hutton submits that the case does not limit the extent of the challenge to the phase where a good reason has been shown for departing from the budget.

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28. The defendant accepted that the paying party had to show further good reasons to depart from the budget and seek a further reduction beyond the receiving party's concession, and that the failure in this case to complete the work assumed in the budget for the two specific phases were good reasons to make further reductions departing further from the budget, and that the Master was wrong to hold otherwise.

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29. So far as the experts were concerned, Mr Hutton submitted that the case settled before expert agendas had been agreed or expert meetings or discussions had taken place, although he noted that nearly all the anticipated lawyers' costs had been incurred. The phase was not completed; the anticipated work insofar as the experts were concerned, had not been undertaken. So far as alternative dispute resolution or settlement was concerned, he said there was no ADR, except for the making and acceptance of a part 36 offer, and
B rhetorically he asked how the receiving party could properly have claimed £5,000 for this phase by way of lawyers' fees; surely, he submitted, that of itself was a good reason to depart from the budget.

30. He said that, in respect of a challenged phase, the costs judge should work out what it had been envisaged would be done for a particular phase, what of that work had not been done, and then should reduce the budgeted figure proportionately or rateably.

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31. Mr Mallalieu, on behalf of the receiving party, submitted that the claimant had limited her claim in the bill to the sums which she had actually incurred because of the indemnity principle, and that seeking such a reduction does not engage CPR 3.18(b) and a consideration of whether there is a good reason, because the indemnity principle is an overarching rule of law which limits the recoverable sum with the effect that the whole of the budgeted figure for the relevant phase could not be claimed in any event.

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32. Nevertheless, he pointed out that in this case, the paying party had accepted that they had to establish a further good reason for a further downward reduction in the bill, but he went on to argue that non-completion of a phase, in accordance with the budget assumptions, is not a good reason per se, because that would defeat the purpose of costs-budgeting, and lead to a line-by-line detailed assessment, which *Harrison* says is intended to be avoided by the process of cost-budgeting. Mr Mallalieu relied on *Yirenki*, and reminded me that individual elements in a phase are not approved by the court in the costs
E budgeting process and it is a matter for the parties as to how they decide to spend what they have been allowed in their budget.

33. Turning then to the individual grounds. Looking first at part 15 of the bill, the experts phase: the budgeted sum was £24,928, but in the bill the receiving party claimed £14,072, an underclaim of £10,857, and the Master assessed the bill as claimed. The Master found that there was no good reason for reducing the bill beyond the sum claimed.
F One can discern his reasoning from the course of the argument before him in the following ways. At page 165 of 287 of the transcript of the argument, at letter F, having referred to the reduction to the sum as claimed, he says, and I take it as part of his reasoning,

> "The figure is the budgeted figure, or for such figure that is claimed by the claimant receiving party in this case, if that figure is within the budgeted figure, unless there's a good reason to depart from it."

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34. So, on the face of it, he did not find that there needed to be a good reason to reach the figure claimed by the receiving party, because they had simply limited their claim to the amount which they had spent within the approved budgeted figure for that phase. At page 226, the Master looked at the individual amounts in the budget provided separately for legal fees and for disbursements, and he compared the various elements of the budgeted costs with the various elements of the sums claimed in the bill. His conclusion
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itself: he asked himself whether there was a good reason to depart from that budget - see page 188 of the transcript of the argument - and concluded that there was not. He set out his approach to the suggested further reduction in paragraph 58 of the separately transcribed series of judgments, when he said:

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> "Again, this was budgeted, and I've repeated what the budget figures were. The costs claim in the bill are notably below the budget figure: insofar as that constitutes a good reason to depart from the budget, I endorse it; I do not find that there is any other good reason for a downwards variation of budgeted figure, and I'm going to award the £46,567 claimed at part 12."

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35. His conclusion in respect of the part 15 experts phase is at paragraph 61 of the transcript of the judgment:

> "I do not find that there is good reason to depart from the budget, and in those circumstances I'm going to award for sums claimed on page 36 of the bill, which, for the avoidance of doubt, is £11,974.33 solicitors' fees and £2,097.69 disbursements, plus the relevant VAT."

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36. Reading those two passages together it is a little difficult to work out whether the learned Master was of the view that there had to be a good reason to depart down from a budgeted figure solely because of the operation of the indemnity principle. Insofar as he was of that view, with the greatest respect to him, it seems to me that he was wrong. In my judgment, having regard to what was said by Lord Justice Davis in the *Harrison* judgment, 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. Awarding the lower figure would be, in my judgment, a departure from the budget, which requires a good reason to be established: in this case, once that had been done it was open to the paying party to challenge the figure which was then being claimed by the receiving party, and they did not have to assert a further good reason to enable the court to do so.

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37. In any event, it seems to me that the fact that the phase of the budget relating to experts was - for the reasons given by Mr Hutton - substantially incomplete was capable of being a good reason, and it would have been open to the Master on that basis to consider whether to reduce the figure. In my judgment, he should heard submissions on what the appropriate figure should have been. That does not mean that it should have resulted in a line-by-line assessment. The Master could have taken whatever appropriate course he thought sensible in the light of his case-management powers to arrive, in the course of that detailed assessment, at the sum which was to be paid in respect of experts. Therefore ground 1 of the appeal succeeds.

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38. So far as the ground relating to part 17, the costs of ADR or settlement are concerned, the budgeted sum was £9,745, but the sum claimed by the receiving party in the bill was £5,041,67; the anticipated experts' fees were not claimed because there was no joint settlement conference, which it had been assumed would take place. The Master again assessed the bill as claimed. He held as follows in the course of paragraph 62 and 63 of his judgment on this issue:

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> "62. As I've already said and I'll say again, that I do not see that anything turns on the prejudice or benefit of either party on this detailed assessment from the fact that this was perceived as being an early budget. It seems to me that, in the (Inaudible) the assumptions were completed pretty accurately: the judge was clearly possessed of the process at that point, and understood what the claim involved in terms of complexity, dispute, and indeed value, and conducted properly a budgeting process. I do not see any part of that where it could be said that the wheels became loose, let alone came off, because of a collective inexperience of the process at that stage, assuming there would've been any mitigation for that, which I could not find anyway."

He then went on to say:

> "63. Again, what I've got is an approved budget, a claim that for good reasons is well within the approved budget, good reasons including the fact it did not as anticipated go to a joint settlement meeting, and therefore there was very little if any expert expenditure, a case that was negotiated and settled. I'm afraid, Mr McDonald [acting for the paying party], that I cannot see a good reason within the parameters of the rules to depart from that budget downwards, over and above the downwards variation completed by the claimant in the sums claimed. Therefore, I'm going to award the £5,041.67 on page 39."

39. There was a dispute between counsel about what the learned Master actually meant in paragraph 63, and in particular what he was referring to in the first sentence.

Mr Mallalieu, on behalf of the claimant, says that in the first sentence the learned judge was summarising the defendant's arguments on the point, because of the reference among other things to "good reasons". It seems to me, with the greatest of respect, that in fact, in paragraph 63, the learned judge is doing two things, and they may be inconsistent with the way he approached the matter in respect of the experts' fees, but in my judgment, in the first sentence, the judge is recognising that to reduce the sum from the budget figure to the claimed figure there had to be a good reason. To slightly alter his wording it seems to me that he was saying "what I've got is a claim which, for good reasons, is well within the approved budget". In other words the reference to "good reasons" is a recognition of the obvious fact that that claim was under budget because the settlement of the litigation did not need the previously anticipated (and budgeted for) joint settlement meeting.

40. As I read it, he is therefore using that as a reason to depart from the bill downwards to the sum which was in fact claimed.

41. In the second sentence he appears to be turning to the allegedly "good reasons" advanced by the paying party for going further downwards, beyond the figure conceded by the receiving party, and concludes that there is no good reason for doing so, but he does not explain his reasons for that conclusion in any depth. In my judgment, the fact that, in this case, the phase was incomplete, the sum claimed was just over half of the budgeted figure, and that there was no alternative dispute resolution process to speak of, other than

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the making and acceptance of a part 36 offer, were capable of being good reasons which the learned judge should have found enabled him to depart further from the budget, if he needed to find further good reasons to depart from the conceded figure.

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42. For reasons I have already given, my principal finding is that, once the court has found a good reason to go downwards and depart from the budgeted figure, it is open to the court to continue hearing submissions on what the final figure should be, but if a further set of good reasons is necessary, they were there, and they were the ones I have just identified. The learned judge should have considered further the submissions made by the paying party as to why the bill should be reduced, and I would therefore allow the appeal on this ground as well.

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43. I turn then to the third ground of appeal, the question of the application of the global proportionality test, contained in CPR 44.3, where, in sub-rule (2), the rules provide:

> "Where the amount of costs is to be assessed on the standard basis, the court will (a) only allow costs which are proportionate to the matters in issue; costs which are disproportionate may be disallowed or reduced, even if they were reasonably or necessarily incurred. [Sub-rule 5 goes on to provide] 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 reputational public importance."

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44. In undertaking such an exercise, there is necessarily a wide range of potential outcomes, and I remind myself that this court on appeal should not interfere with the conclusions reached by the costs judge undertaking such an exercise except in a plain case. The paying party in this case submits that there is no reasonable relationship between the value of the claim, the £7,000 settlement, and the £40,000 at which the learned costs judge concluded was the proportionate figure for costs, having regard to the 44.3(5) factors. Mr Hutton submits that £25,000 is the figure which the paying party should ultimately have been obliged to pay. Mr Mallalieu, on behalf of the receiving party, says that the Master directed himself correctly and that the weight to be given to each factor was a matter for him, and his conclusion cannot be challenged.

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45. I heard submissions in effect in respect of each of the sub-paragraphs of rule 44.3(5): the learned judge dealt with those factors in paragraphs 65 to 78 of the transcript of the judgment. So far as factor (a) is concerned, the sums in issue in the proceedings, the learned Master dealt with this in paragraphs 66 and 67, where he said that the maximum potential value of the claim was somewhere between £10,000 and £12,000, at most £10,000 and £15,000. He held in paragraph 66 that the sum claimed was by reason of the defendant's stance on liability the whole sum claimed in the proceedings. The paying party submits that the learned judge overstated the figure in issue, but not significantly. The paying party's real submission made in reliance on this factor was that the learned Master gave insufficient weight to it; it should have been given primacy among the relevant

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factors because £40,000 bears no reasonable relationship to the value of the claim and the £7,000 for which it settled.

46. The parties were in agreement that there were no non-monetary questions in issue in this case.

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47. There was some dispute about factor (c), the complexity of the litigation. The learned Master dealt with it in paragraph 69 of his judgment; he said:

> "It is both complicated and arguably rendered more straightforward by the fact that it is not an accident as such that occurred during surgery, but rather the question of posture during surgery, which, on the first or one hand, makes it at least in conception a more straightforward concept, but on the other hand a more difficult concept to construe and decide, given the difficulty in finding an expert capable of giving clear opinions on that issue."

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48. He referred to the fact that there were two experts on each side, on both liability - ie breach of duty - and causation, and said, "So, to that extent the claim has some complexity, but, again, in comparative terms, a claim of relative straightforwardness". The paying party says that the case was not in fact complex, even though it was a clinical negligence claim, because the issue was whether the claimant's arm was positioned incorrectly during surgery, and, in any event, the alleged complexity was not causative of additional work or costs. The receiving party says that it was a relatively complicated case because the experts were not in agreement, there was room for legitimate disagreement between them, it was a clinical negligence case. In any event, the receiving party does not really suggest that the learned Master in his analysis of complexity got it wrong.

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49. It seems to me that, when one is looking at complexity of the litigation, it has to be looked at in the context not of the particular category of litigation which it forms part of, but of the overall work of the court, where it is one of the cases which is being dealt with. Undoubtedly, this was not a complex clinical negligence case, but it was in the great scheme of things more complicated than much of the usual work of the County Court, and, in my judgment, 44.3(5)(c) requires one to look not only at the niche area in which the work falls, but at all the circumstances including the general run of work which the court handles. It is, of course, only one of the factors which can render the overall relationship between the costs and the factors reasonable or not.

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50. Sub-paragraph (d) has caused more debate between the parties; it is "any additional work generated by the conduct of the paying party". The learned Master dealt with this, on the face of it, in paragraph 72 of his judgment, where he said:

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> "Paragraph d. Any additional work generated by the conduct of the paying party, the key phrase in that part of the sub-paragraph is 'additional work'. Insofar as the defendants amounted a bullish defence and did not concede liability until a comparatively late stage, when they offered terms of settlement, that generated necessarily work in litigation, but it is not really additional work that falls within this category that falls within the complexity of the litigation. There is no culpable or

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> contumelious conduct on behalf of either party, let alone the paying party, that led to additional work unnecessarily generated."

51. The paying party relies on the fact that, when the learned Master came to the identify the figure finally be paid appears to have reached a conclusion (paragraph 77) which was inconsistent with paragraph 72 (above). He said:

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> "After some considerable thought, and cautiously in the light of all the factors I have made, that, given specifically in this case on the one hand the value of the claim as represented by the sums in issue, but on the other hand this cuts the other way, the complexity of the litigation in the context of the defence's deliberate and unnecessarily belligerent defence, this is a case where some further adjustment is necessary. [77]"

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52. The paying party submits that the learned Master therefore reached inconsistent conclusions in respect of sub-paragraph (d) of the rule in his comments contained at paragraphs 72 and 77, that his reasoning cannot be properly understood, and that, insofar as he came to the conclusion that the defendant's behaviour was "belligerent" and ought to have the impact of increasing the amount of costs which they had to pay, there was no material on which he could properly have come to that conclusion.

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53. Mr Hutton says that the defendant was entitled to defend the claim on the basis of its expert evidence, and that the stance that it took was proper, that its position was neither bullish nor belligerent. But it seems to me that, with the greatest respect, the paying party has misread what the learned judge said: in paragraph 72, the learned judge directed himself correctly as to the test to be applied when he set out the words of CPR 44.35(d), and he specifically identified the fact that there had to be a causal connection between the conduct of the paying party and the costs said to have been incurred (as a result) by the receiving party, and he found that there was no such link. It seems to me that there is nothing wrong with paragraph 72; it does not contain a misdirection.

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54. Paragraph 77, however, has to be considered in its proper context. That is the paragraph in which the learned judge balanced the various factors (a) to (e) and reached his conclusion, and, in that context, the reference to an "unnecessarily belligerent defence" is properly understandable. The whole passage reads as follows:

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> "This is a case where, after some careful reflection, and on the facts of this particular case, I've reached the conclusion that the costs are, as assessed, prima facie disproportionate, and that this is one of those cases where it is necessary to apply a second-stage assessment to bring the total back into the realms of reasonable proportionality. I do so again after some considerable thought, and cautiously in the light of all the factors I have made, that, given specifically in this case on the one hand the value of the claim as represented by the sums in issue, but on the other hand this cuts the other way, the complexity of the litigation in the context of the defence's deliberate and

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> unnecessarily belligerent defence, this is a case where some further adjustment is necessary."

55. Standing back, what the learned judge was doing, it seems to me, was reducing the amount of the costs that are payable because of the relatively low value of the claim, but he also increasing the sum payable, not because of the behaviour of the paying party, but because of the complexity of the litigation. The reason why he referred to the behaviour of the paying party is because it is that behaviour, and in particular the way in which they drafted the defence, which made the case more complicated than it need otherwise have been. It does not mean that additional work was incurred and that factor (d) was engaged, it means that the litigation became more complicated because there were more issues in dispute than there would otherwise have been had the paying party accepted some of the matters which it was criticised for making non-admissions in respect of in its defence.

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56. There is, in my judgment, no inconsistency between paragraph 72 and 77; the reasoning is perfectly clear.

57. Looking at the whole of this section of the judgment, the learned judge went through the factors which he was obliged to have regard to, in a structured way, he analysed each of them, and, in paragraph 77, carried out the balancing exercise. One cannot expect a judge to attribute specific figures or percentages to any of these factors, but, merely to weigh them and come to a balanced conclusion in the way that the learned judge did. As he said in paragraph 78, he started with a figure of £52,000-odd, and, "employing a necessarily broad brush to the question of proportionality, I'm going to reduce that figure to a net subtotal of £40,000".

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58. That conclusion cannot properly be impugned. It was within a reasonable range of outcomes in the assessment of the reasonable relationship between the costs and the factors in 44.35, approached in the correct way, and, in my judgment, the learned judge cannot be criticised for it. I would therefore dismiss the third ground of appeal.

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59. The consequences, however, of the conclusions that I have reached are that, having allowed the appeal on the first two grounds, it follows that the starting-point for the exercise for the application of the proportionality test might have shifted.

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60. There will have to be, in the absence of an agreement, a re-assessment, which can be undertaken by this court, of the figures properly payable in respect of parts 15 and 17, and then, given the way in which the learned judge approached the question of proportionality, it seems to me - again in the absence of agreement - that the court is going to have to reassess the proportionality if the starting figure is different to the £52,000-odd that the learned Master first assessed the costs at, but in that respect I am open to further suggestions from the parties. For all those reasons, I would allow the appeal.

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We hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

(This transcript has been approved by the Judge)

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