

Busting the Costs Budget: can an indemnity basis costs order ride to the rescue?

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Status: Published on 13-Oct-2025 | Jurisdiction: England, Wales

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In this article, Colin Campbell of Kain Knight sets out key considerations for dispute resolution practitioners when a costs budget is, or is about to be, exceeded, and discusses the potential for an indemnity basis costs order to provide a route to recovering costs beyond the confines of an approved budget. The article analyses recent authorities, including *Barry v Barry* [2025] EWHC 819 (KB) and *Xtellus Capital Partners Inc v DL Invest Group PM SA* [2025] EWHC 2168 (Comm).

Bust the costs budget, or about to do so, what should you do next? This is a question to which solicitors who conduct litigation in actions where Section II of CPR 3 apply, frequently fail to pay sufficient attention. The answer will depend upon several factors.

First, the requirements.

Section II deals with “Costs Management” and obliges parties to a Part 7 multi-track claim with a value up to £9,999,999, to file and exchange budgets and budget discussion reports under CPR 3.13. Fail to do that and a defaulting party will be treated as having filed a budget limited to applicable court fees, meaning that on a win, only pre-budget costs (plus the applicable court fees) can be recovered from the losing opponent. Thus, for a party who has breached CPR 3.13, busting the budget matters not because the damage has already been done. Going forward, applicable court fees are all that you will recover as approved budgeted costs.

However, where all is well following diligent compliance with the CPR 3.13 requirements, the first factor to consider if the budget has, or will be busted, is whether a Costs Management Order (CMO) under CPR 3.15 has been made. If so, the court will “thereafter control the parties’ budgets in respect of recoverable costs” (CPR 3.15(3)).

If no CMO has been made, however, the answer is “don’t panic yet” because of CPR 3.15A, which requires parties to revise costs budgets upwards

or downwards if significant developments in the litigation warrant such revisions, only applies where the court is controlling the costs under a CMO. If the action is subsequently won without a CMO with costs to be assessed if not agreed, the costs judge will only be concerned if the last agreed or approved budget has been exceeded by 20% or more.

Where that has happened, the receiving party must provide a statement under CPR 44.3.2 giving the reasons for the difference. For example, that the trial overran by three days through nobody’s fault. However, if the opponent can show that reliance was placed on the budget, or the explanation is unsatisfactory, the difference is vulnerable to reduction. But in simple terms, unless a CMO has been made, no variation under CPR 3.15A is needed, and the receiving party has a 20% “budget bust” cushion.

It is very different under a CMO. CPR 3.15A is mandatory and parties who fail to update their budgets, do so at their peril as to the recovery of their costs going forward. In an ideal world, applying to vary a budget using Precedent T for that purpose should be undertaken prospectively, before more (or indeed less) money is required for the case because there has been a “significant development” in the litigation. That can happen when a defendant drops out after a settlement is reached, so less costs will be needed to pursue the remaining defendants, or where a party is added to the claim under Part 20, meaning that there will be additional costs to be incurred. However, the budgeting world

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is not ideal, and retrospective variations are also permissible under CPR 3.15A (6), it being recognised that there may be a hiatus between the emergence of the significant development, and the ability of the court to give a hearing date before the work has to be done.

The key, however, is not to leave it too late. Applications to vary budgets which have not been made promptly are invariably doomed, in which case the solicitors will find that not only will they fail to recover the overspend from a losing opponent on a win, but they will also need to explain to their otherwise successful client why that has happened. Inevitably that will lead to a difficult discussion about who should meet the shortfall.

In *Cranstoun v Notta* [2021] EWHC 133 (Ch), for example, James Mellor QC was willing to vary a costs budget upwards to cater for the trial overrunning owing to an expert dealing with a significant development but allowed nothing for an earlier pre-trial review and amended witness statement because the application for more was made far too late. The judgment does not relate to who took the haircut: whether it was an otherwise satisfied client who had to pay up, or whether the solicitors met the loss themselves by writing off their fees. Whatever the outcome, it would have been an uncomfortable conversation about a problem that was wholly avoidable had attention been paid to whether the budget was adequate, and if not, the need for a prompt CPR 3.15A application.

The next factor in deciding what a successful but budget busting party should do next, is whether to throw themselves to the mercy of the costs judge under CPR 3.18 at detailed assessment. The rule is engaged where a party can satisfy the court that there is a good reason to depart from the last agreed or approved budget. It can arise from a direction given by the trial judge, as happened in *BES Commercial Electricity Ltd v Cheshire West and Chester Council* [2022] EWHC 3333 (KB) when Freedman J declined to deal with the defendant's Precedent T for trial preparation which had been "dogged with issues regarding trial bundles" and held that such matters were for argument before the costs judge. CPR 3.18 will also be relevant where the receiving party has been alert to the need for a budget variation and served a Precedent T, only for the case to settle before the CPR 3.15A hearing can take place. These will be persuasive as good reasons to depart from the last agreed or approved budget: forgetting to apply or merely bashing on regardless, will not.

For defaulters however, and even for those who are not but are concerned about whether their reason will be sufficiently "good" for the purpose of the CPR 3.18 test, there is another way out of this labyrinth of rules and practice directions. Indeed, it is a crucial factor to consider when there could be trouble ahead because of a busted budget.

Most trials end with a standard basis costs order, but where the judge can be persuaded that the other party's conduct was "out of the norm", the award of an indemnity basis costs order will unlock a treasure trove of benefits, not least where the winning party has busted the budget and failed to apply for a CPR 3.15A variation. In that eventuality, the "buster" will no longer be constrained by the last costs budget. That was established by Dyson MR in *Denton v White* [2014] EWCA Civ 906 at paragraph 43:

"If the offending party ultimately loses, then its conduct may be a good reason to order it to pay indemnity costs. Such an order would free the winning party from the operation of CPR rule 3.18 in relation to its costs budget."

Coulson LJ echoed that guidance in *Lejonvarn v Burgess* [2020] EWCA Civ 114, overruling himself in an earlier decision he had made as Coulson J, at paragraph 93:

"In principle, the assessment of costs on an indemnity basis is not constrained by the approved costs budget, and to the extent that my obiter comments in *Elvanite* or *Bank of Ireland v Watts* suggest otherwise, they should be disregarded."

Faced with a busted budget, but armed with an indemnity basis costs order, and to return to the question posed at the start of this article, what should such a party do next?

The short answer is, be very careful because there are conflicting decisions at High Court level. Get it wrong, and there could be adverse financial consequences, as happened in the first case, *Barry v Barry* [2025] EWHC 819 (KB).

In *Barry*, Dexter Dias J gave judgment with indemnity costs in favour of Mr and Mrs Barry against their son in a tragic family dispute and went on to deal with "consequential". They included whether the Barrys' budget could be varied upwards in respect of disclosure, witness statements and trial preparation.

The applications relating to disclosure and witness statements failed for lack of promptness. The extra work on the former had taken place

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over a year earlier: in respect of the latter, the delay was less but no adequate reason had been given in justification. Only trial preparation satisfied the promptness test after there had been a late amendment to the defence to deal with. Nonetheless, the Barrys lost thousands in potentially recoverable costs for lack of promptness, but the curious feature is why the application was made at all. With an indemnity basis costs order, they were no longer constrained by the costs budget and were freed from the operation of CPR 3.18.

That was the contrasting approach taken by HHJ Bird in *Xtellus Capital Partners Inc v DL Invest Group PM SA* [2025] EWHC 2168 (Comm). Having decided that the costs of the action should be paid on the indemnity basis, the judge held that the consequences of that were that although the budget remained relevant, CPR 3.18 (good reason to depart) no longer applied. Since the costs judge could now depart from the last approved or agreed budget, it was for her (or him) to deal with any budget adjustment at detailed assessment. Doing so in that way would cause “no prejudice to the claimant”.

Indeed, that is the case. HHJ Bird’s decision meant that the receiving party could keep its powder dry until the assessment and having already established a good reason for busting the budget, be in a far stronger position to recover the overspend than the luckless Mr and Mrs Barry. It is not clear from his judgment whether Dexter Dias J was referred to *Denton* and *Lejonvarn*, but plainly with hindsight, the Barrys would been better off by not making any application to the trial judge, and instead, putting their case for more to the costs judge, as will be the case in *Xtellus Capital*.

Looking ahead, that is what a troubled receiving party who has failed to comply with CPR 3.15A or whose costs budget has been limited to applicable court fees for want of compliance with CPR 3.13, should do. An indemnity basis costs order will be a potential avenue to get back everything that would have been allowed had the variation application been made or the budget filed and served on time in the first place. Not exactly a white knight riding to the rescue but an educated use of the court rules enabling successful parties who have fallen at the Section II of CPR 3 fence, belatedly to recover what has been lost.

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