Continued from page 14
submission that the risks had radically lowered. She allowed 25% for the second tranche of CFAs.

Greig v Lauchlan & Anor

In *Greig v Lauchlan & Anor* ChD 07/12/16, Richard Millett QC held that a change of counsel did not warrant changing the costs budget as it was not a significant development in the action. The judge was considering a defendant's application to increase a budget that had been approved in October 2015 shortly before a 10-day trial.

The matter involved a claim of more than £15m representing the value of shares and assets allegedly held on the claimant's behalf.

Budgets had been approved by the court in respect of counsel's fees, with leading counsel's brief fee allowed at £100,000, with £49,000 for junior counsel. At the time of the approved budget, leading counsel had not yet been retained. In September 2016, around the time of the exchange of witness statements, there was a change of junior counsel for the defendant, but the budget was not revised. The newly instructed junior returned the brief citing an increased work load; leading counsel was instructed in mid-November 2016; the defendant notified the claimant that there had been a change of counsel and sought to revise the budget. The day before the pre-trial review the defendant made its application, which was heard as part of the hearing. The defendant sought to revise the budget for the trial, seeking 172,000 for leading counsel with £69,000 for the junior.

Referring to *Elvanite Full Circle Ltd v AMEC Earth and Environmental (UK) Ltd* [2013] EWHC 1643 (TCC), the court found that the change of counsel had not been a significant development; the costs budget of £100,000 for leading counsel had been made in October 2015; it had been the defendant's choice not to retain leading counsel at that point, or later as the litigation continued.

In relation to junior counsel, no explanation was provided as to why counsel could not conduct the trial for the original budget. In essence, the defendant was seeking a very late upwards revision of the budget. Junior counsel's return of the brief was the only element that had not been the defendant's choice; it was entirely the defendant's choice to instruct counsel for more than the existing budget. While not disputing the rates sought by counsel were reasonable, for the same reason that the changes did not amount to a significant development in the litigation, they did not amount to good reason. A party was free to instruct counsel at the last minute, but it did so at its own risk and could not be surprised if it was not then allowed to alter its costs budget.

The writer recalls many instances where, on detailed assessment, brief fees were significantly reduced by reason of the brief having been, in the view of the costs judge, delivered prematurely. It might be advisable for solicitors to approach friendly chambers for realistic 'estimates' of likely fees before budgets are submitted, if there is a possibility that a leader may be instructed for a lengthy trial.

Sony Communications International v SSH Communications Security Corporation

In *Sony Communications International v SSH Communications Security Corporation* [2016] EWHC 2985 (Pat), 24/11/2016, Mr Roger Wyland QC sitting as a Deputy High Court Judge dealt with a summary assessment of costs.

The judge considered whether to depart from a successful claimant's court-approved budget where the claimant had failed to seek a variation of the budget on becoming aware of their overspend, and had sought to combine two phases of trial preparation and trial, to take advantage of a significant underspend on the trial phase.

The claimant also sought to change agreed apportionments within some phases, where the court had approved the total for the phases and the defendant had agreed the apportionment.

Judgment had been given on the determination of the order for costs following trial of an action for revocation of the patent, with a Part 20 claim for infringement of the patent.

Costs budgets were prepared, exchanged and agreed in writing and approved by the court by a Costs Management Order of 21 December 2015. Judgment was given with the patent held to be invalid, but would have been infringed by one of its product ranges if it had been valid.

The parties agreed that as the costs budgets had been identified as reasonable and proportionate, there was no need for a detailed assessment and the deputy high court judge was invited to make a summary assessment of the relevant costs budget.

> The judge considered Sony had 'clearly' failed in its duty to seek to vary its budget when it became aware of the overspend

It was accepted by SSH that Sony was the commercial winner and was entitled to costs subject to a deduction in respect of certain issues where it had lost. The judge considered the first stage of the assessment to be an assessment of Sony's costs against its budget. He found he needed look at each phase, and compare this to Sony's actual expenditure, with Sony entitled to the lower of the two figures.

The approach was agreed by the parties, but Sony sought to increase the budget figure for some of the phases where it had exceeded the budget by a relatively large margin. The request was opposed by SSH.

Consideration was given to *Henry v New Group Newspapers Ltd*, from which the judge took the following propositions:

i) The budget was not a cap but a guideline from which the court had power to depart;

ii) Each phase of the budget was to be considered separately and it was not legitimate to combine two phases where one was overspent and the other underspent;

iii) The court would only depart from the budget where it was satisfied that there was good reason to do so;

iv) The parties had a duty to revise their budgets if significant developments in the litigation warranted such revisions;

v) The court could depart from the budget even where the parties had not revised their budgets;

vi) In considering whether there were good reasons for departure

CASE ROUNDUP