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Court of Appeal reserves judgment where receiving party seeks to challenge 'already incurred' costs in approved costs budget in assessment proceedings

Harrison v. University Hospitals Coventry & Warwickshire NHS Trust
A2/2016/4547

Article by David Bowden

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Harrison v. University Hospitals Coventry & Warwickshire NHS Trust - A2/2016/4547

Executive speed read summary

A straightforward case claiming damages for personal injuries for a sloppily-executed caesarean section operation against a hospital settled 2 weeks before trial. The claim form valued the case at between £15k and £50k. Damages were agreed at £20k. The patient's solicitors submitted a bill of costs to the NHS seeking total costs of over £475k. The case was subject to the new costs budgeting rules. At a costs and case management hearing, Judge Hampton approved future costs but by then the patient's solicitor had already incurred profit costs of over £100k. No submissions were made at this hearing about these incurred costs. Master Whalan held a detailed assessment of costs hearing over 3 days. He ruled that it was too late to challenge the costs that had been approved in the costs budget. The NHS appealed submitting that incurred costs had never been approved in the proceedings. The NHS submitted that the proper time to challenge these costs was at the end at detailed assessment and that there was 'good reason' to challenge these costs as they were too high, excessive and disproportionate to the amount recovered. This claim was sent to the court at the end of March 2013 but was not issued until April 2013. The NHS submitted that the old proportionality rules applied when assessing costs. The Court of Appeal has heard submissions from both parties and has reserved judgment in this case. This case was transferred from Northampton County Court directly to the Court of Appeal because it raises an important point of principle or practice about costs budgets.

Harrison v. University Hospitals Coventry & Warwickshire NHS Trust
A2/2016/4547 *10 May 2017*
Court of Appeal, Civil Division (Sir Terence Etherton, Master of the Rolls, Lord Justice Davis, Lady Justice Black and Senior Costs Judge Master Gordon-Saker, as assessor)

What are the facts of the case?
Harrison gave birth by caesarian section in May 2011 at a hospital which failed to clean the wound properly afterwards following a complication. This was later sorted and she suffered no long lasting symptoms. She brought a claim for clinical negligence valuing her claim at between £15k and £50,000 on the court claim form. About 2 weeks before trial, the claim was settled on payment of agreed damages of £20k in June 2015.

How was the case funded? What about 'after the event' insurance?
Harrison's solicitors (Shoosmiths in Birmingham) acted for her on a '*no win, no fee'* conditional fee agreement (CFA). A success fee of 100% was claimed by her firm. The CFA was taken out before LASPO came into force in April 2013. She also had the benefit of an 'after the event' (ATE) insurance policy. She sought to recover the full costs of all this from the NHS.

What costs were incurred?
Detailed assessment proceedings were started in October 2015 when Harrison solicitors claimed an amount for total costs in the eye-watering sum of £476,121.82 including success fee, ATE and VAT. The base costs claimed were £197,720.62 being nearly 10 times the amount of compensation awarded.

What objections were taken by the paying party in the Points of Dispute?
In addition to a number of points about hourly rates, grades of fee earners and number of hours claimed, the main thrust of the objections from the NHS as paying party was that the total costs incurred were both unreasonable in amount and disproportionate to the amount of damages recovered.

Was this case covered by costs budgeting?
Yes.

As proceedings were started after April 2013, it was subject to the new costs budgeting rules under Civil Procedure Rules 1998 (CPR) part 3. A costs and case management conference hearing (CCMC) was held before HHJ Hampton on 18 July 2014. The parties had submitted their costs budgets using Precedent H. By that stage, the patient as receiving party claimed to have incurred profit costs of £100,000. As only 1 hour was allowed for the CCMC Judge Hampton did not hear submissions from either side on already costs incurred. The NHS assumed that it would always be able to challenge those incurred costs at the end of the matter at a detailed assessment hearing (DAH). The CCMC merely set the costs budget from the date of the CCMC hearing to the date of trial.

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Who acted in this case in the Court of Appeal?
Initially Ben Williams acted for the NHS. However for the hearing, Mr Alexander Hutton QC of Hailsham Chambers led by Roger Mallalieu of 4 New Square represented the NHS as paying party instructed by Acumension Limited of Manchester. Both before Master Whalan in the SCCO and in the Court of Appeal, Mr Kevin Latham of Kings Chambers in Manchester acted for the receiving party.

Who was in Court?
Mrs Harrison did not attend court. In some ways this is surprising as she will remain liable to her solicitors for any success fee or ATE premium they cannot recover from the NHS.

What other rulings have there been on this point?
On 24 February 2017 Mrs Justice Carr allowed an appeal in *Merrix v. Heart of England NHS Foundation Trust* **[2017] EWHC 346 (QB).** She ruled that in proceedings in which the court had made a costs management order under **CPR 3.15(2**) and had approved a receiving party's costs budget, on a detailed assessment on the standard basis, a costs judge was bound by the budget unless '*good reason'* under **CPR 3.18(b)** could be shown by the paying party to depart from it. Carr J ruled that the words of **CPR 3.18** did not permit a costs judge to depart from the costs budget and carry out a line-by-line assessment merely using the budget as a guide or factor to be taken into account, without good reason.

Carr J ruled that such an approach did not make it impossible to apply the proportionality test under **CPR 44.3**. Proportionality would be taken into account at the time of fixing the budget and if there was '*good reason'* to depart from that decision, a costs judge on detailed assessment could do so.

Carr J's interpretation of '*good reason'* was that the fact that hourly rates at a detailed assessment stage were different to those used for the budget might be a '*good reason'* for allowing less (or more) than some of the phase totals in the budget. Carr J ruled that spending less than was approved or agreed in the costs budget would also require a departure in order to comply with the indemnity principle but unless there was '*good reason'* to depart from it, the overall figure could never be less than the budget sum.

What did the Master Whalan in the SCCO below rule?
In an *ex tempore* judgment dated 16 August 2016 during the course of a detailed assessment hearing which lasted 3 days, Master Whalan sitting as a deputy judge of the Northampton County Court found in favour of the receiving party patient. The summary of his findings on the costs budget issue are:

- He refused to perform a detailed assessment '*as if there was no budget whatsoever'* recognising that the '*budgeting process is an important part of this [assessment] process'*,
- The court is still required to perform a detailed assessment, but a detailed assessment which is conducted through the lens of CPR part 3.18, which is different to the form of detailed assessment appropriate for cases which were not subject to a CMO (what he called a 'classic' detailed assessment),
- Where the costs claimed exceed the budget total, the receiving party will be required to demonstrate a '*good reason'* to depart from the budget before the court will allow more than was approved in it,
- Where the costs claimed are less than the budget total, the paying party will be required to demonstrate a '*good reason'* to depart from the budget before the court will reduce the costs to a sum which is less than the amount approved therein,
- There is often considerable scope for the paying party to argue that there is a good reason to depart from the budget – in fact the costs judge went on to give a number of examples in a non-exhaustive list. The paying party is to be given '*absolutely every opportunity'* to make any submission it wishes in order to dispute any individual item in the bill of costs, and
- There is a distinction between estimated costs (which are subject to the courts' approval) and incurred costs (which are not and thus do not fall within CPR part 3.18), but as the court may only approve the phase total, and where it chooses not to record any comments in respect of incurred costs, such incurred costs enjoy a status similar in practical terms to approved estimated costs. On this the costs judge relied upon the obiter dicta in *Sarpd Oil v. Addax Energy SA & another* **[2016] EWCA Civ 120**.

By what route did this case arrive in the Court of Appeal?
Master Whalan is a costs judge of the Senior Courts Costs Office. He sat as a deputy district judge at the DAH in Northampton County Court. The usual appeal route would be to a circuit judge from such a ruling. However Carr J handed down her judgment in the High Court on one of the 3 issues in *Merrix* on

24 February 2017. Any circuit judge hearing this appeal would be bound by *Merrix*. Accordingly this appeal was transferred to the Court of Appeal under CPR part 52.23 on the basis that the appeal raised an '*important point of principle or practice'*.

What does the legislation provide?

CPR part 3.18 deals with '*Assessing costs on the standard basis where a costs management order has been made*' and it provides:

> '***3.18*** *In any case where a costs management order has been made, when assessing costs on the standard basis, the court will –*
> *(a) have regard to the receiving party's last approved or agreed budgeted costs for each phase of the proceedings;*
> *(b) not depart from such approved or agreed budgeted costs unless satisfied that there is good reason to do so; and*
> *(c) take into account any comments made pursuant to rule 3.15(4) or paragraph 7.4 of Practice Direction 3E and recorded on the face of the order.*'

CPR part 44.4 deals with '*Factors to be taken into account in deciding the amount of costs'* and it provides as follows:

> '**44.4** *(1) The court will have regard to all the circumstances in deciding whether costs were –*
> *(a) if it is assessing costs on the standard basis –*
> *(i) proportionately and reasonably incurred; or*
> *(ii) proportionate and reasonable in amount, or*
> *….*
> *(2) In particular, the court will give effect to any orders which have already been made.*
> *(3) The court will also have regard to –*
> *(a) the conduct of all the parties, including in particular –*
> *(i) conduct before, as well as during, the proceedings; and*
> *(ii) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute;*
> *….; and*
> *(h) the receiving party's last approved or agreed budget.*'

What were the grounds of appeal?

There were these 3 grounds of appeal from the NHS:

- There is nothing in either CPR part 44 or part 3 to suggest that costs budgeting is intended to displace the ordinary approach to costs at a DAH,
- Costs management under CPR part 3.18 does not apply to costs incurred before the CCMC hearing, and
- The main negligence proceedings were in fact commenced in any event after 1 April 2013 when the new LASPO regime came into force because the claim form and particulars of claim (although ostensibly dated 27 March 2013) did not reach the court office and were not actioned by it until after 1 April 2013. The test of '*proportionality*' used should be that under the post-April 2013 version of the CPR and not the pre-April 2013 version used by Master Whalan.

What submissions did the patient respondent as receiving party make?

Very broadly the receiving party submitted that the court below came to the right conclusion on this for the reasons which he gave. This was expanded into these submissions:

- Judge Hampton's CCMC order approved the parties' budgets in precedent H,
- This order did not record any comment as to the reasonableness or proportionality of the costs already incurred,
- Master Whalan was correct at the DAH to assess costs by reference to CPR part 3.18,
- There is no '*good reason'* hear to depart from the costs budgets approved by Judge Hampton,
- If the paying party were correct, then this would undermine the whole purpose of costs budgeting,
- Master Whalan allowed the paying party to dispute at the DAH any item it claimed was '*unreasonable or disproportionate'* and did make reductions for future costs,
- If the NHS wished to dispute the costs already incurred by the time of the CCMC it should either have:
  - Made submissions to Judge Hampton at that hearing on them, or
  - Appealed Judge Hampton's order (and it is now out of time for appealing).

- By posting the claim form with the cheque for the court fee to the court before 1 April 2013, the receiving party had '*commenced*' proceedings before 1 April 2013 so that the pre April 2013 version of the CPR applied when assessing proportionality.

Were any new points advanced at this appeal hearing?
Yes.

The NHS made an application to submit fresh evidence. This consisted of:
- A witness statement dealing with 57 other NHS cases that Acumension were instructed on that went to DAH as compared to 1169 cases that were subject to costs budgeting, and
- A transcript of the CCMS before Judge Hampton.

Lord Justice Davis delivered a short *ex tempore* judgement just before 10am in which he refused to admit the new evidence but said that the transcript of the hearing was not evidence and would be looked at.

Was there a Respondent's Notice?
No.

What authorities were referred to in oral argument?
These authorities are relevant in this case:

United Motor Finance Corp v. Turner **[1956] 2 QB 32** (Court of Appeal – Lord Evershed MR, Singleton and Parker LJJ)
Although the county court action had been 'commenced' when the praecipe was filed in the court office, the hirer had not been made an effective party to the proceedings and, accordingly, the owners were not entitled to proceed.

GSK Project Management Ltd (in liquidation) v. QPR Holdings Ltd **[2015] EWHC 2274** (Stuart-Smith J)
In TCC cases, costs budgeting reviews should be carried out quickly and with the application of a fairly broad brush and only exceptionally will it be appropriate to go through Precedent H with a fine tooth-comb, analysing the figures in detail. Where this is necessary, the court will consider the proportionality and reasonableness of the costs of the budget, the available options in the light thereof (ordering a new budget, declining to approve the budget, setting budget figures or refusing to allow any further costs) and give its conclusions on these options.

Henry v. News Group Newspapers Ltd **[2013] EWCA Civ 19** (Court of Appeal – Moore-Bick, Aikens & Black LJJ and Costs Judge Campbell as assessor)
An appeal was allowed against a decision to limit costs to an approved budget in high value defamation proceedings. There was 'good reason' to depart from the budget and the failure to observe the requirements of the practice direction had not put the respondent at a significant disadvantage in terms of its ability to defend the claim. The objectives of the practice direction were not undermined. The court must take into account all the circumstances of the case, but pay particular regard to the objective of costs budgeting.

Sarpd Oil v. Addax Energy SA **[2016] EWCA Civ 120** (Court of Appeal – Longmore & Sales LJJ and Baker J)
Although a costs budget sets out the incurred costs element and the estimated costs element, the court does not formally approve the incurred costs element but only the estimated costs element. It is only in relation to approved estimated costs that the specific rule of assessment in CPR 3.18(b) applies, namely that the court will not depart from the approved budget 'unless satisfied that there is good reason to do so'. Even where court approval of a budget is in issue the approval does not apply to the incurred costs element (see the first sentence of para 7.4 of PD3E), the court may still record its comments on those costs (in particular, regarding the court's view whether they are reasonable and proportionate) as well as take them into account when considering the reasonableness and proportionality of items in the estimated costs element in the budget. If the court does record comments about the incurred costs, they will carry significant weight when the court comes to exercise its general discretion as to costs under CPR Part 44 at the end of the case.

Troy Foods v. Manton **[2013] EWCA Civ 615** (Court of Appeal – Moore-Bick LJ only)
The judge below proceeded on the basis that he would approve any figure for a particular element of the claim, provided it was not so unreasonable as to render it 'grossly disproportionate'. Although the court will not readily interfere with the judge's decision in a matter of this kind, which essentially involves an exercise

of judgment, I think it is arguable that in this case the judge did not apply the correct principles and, as a result, approved an over generous budget in respect of some elements of costs.

What interventions did the judges make? What points seemed to be troubling them?
Overall the judges started and remained very hostile to the NHS as paying party and did not seem concerned about the high level of costs claimed when compared to the small recovery. Lord Justice Davis asked the most questions and was most concerned that the real reason costs were so high was that the NHS had continued to deny liability until the very last minute when nearly all the trial preparation costs had been incurred. Davis LJ repeatedly questioned why the NHS wasted public money in this way, why it failed to settle cases earlier and why it wanted to play accounting tricks by delaying settling or paying until another financial year had passed.

The Master of the Rolls was the presiding judge and he pressed why the points made at the DAH before Master Whalan were not made at the CCMC before Judge Hampton. He was outraged that a DAH for a £20k claim had taken 3 days before Master Whalan. In the afternoon, the Master of the Rolls attitude hardened even more with him stating quite firmly that Parliament had made a policy choice in this when it made the new rules that costs could only be challenged in costs budgets later on where there was a 'good reason'.

Lord Justice Davis asked whether Sir Rupert Jackson had returned to costs budgets (in particular the issue of incurred costs) in any of his extra-judicial pronouncements since the new version of the CPR came into force in April 2013. Although Mr Hutton QC referred to his Harbour Lecture, Davis LJ observed that this did not deal with this point at all and nor was there anything in his recent book. Davis LJ accused the NHS of exaggerating the claimed consequences of an adverse ruling.

Lady Justice Black made an early point that it was difficult to fix future costs unless you know what costs had already been incurred. Senior Costs Judge Master Gordon-Saker sitting with the panel as an assessor asked the least questions and seemed increasingly bored as the day wore on. He took a number of points of detail of the CCMC hearing testing whether Judge Hampton had blocked out consideration of incurred costs in the way the NHS now submitted she did.

What did the Court say about judgment in this case?
At the end of the hearing the Master of the Rolls said they would take time to consider this case and would send a draft judgment out to counsel in due course. All 4 judges asked pertinent questions to both counsel throughout the course of the hearing which lasted just over 4 hours. Lord Justice Davis was the presiding judge on the panel which heard the costs case of *Hyde v. Milton Keynes Hospital* in April 2017 in which judgement has also been reserved. Although it could appear earlier, the likelihood is that the reserved judgment will be handed down towards the end of July 2017 just before the long summer vacation but as the panel had little real interest in the case this could slip to October 2017

11 May 2017

David Bowden is a solicitor-advocate and runs David Bowden Law which is authorised and regulated by the Bar Standards Board to provide legal services and conduct litigation. He is the cases editor for the Encyclopedia of Consumer Credit Law. If you need advice or assistance in relation to consumer credit, financial services or litigation he can be contacted at info@DavidBowdenLaw.com or by telephone on (01462) 431444.

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