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**Costs judge in SCCO
applies *Harrison* to reduce
amount in costs budget as
disproportionate in detailed
assessment proceedings**

*RNB v. London Borough of Newham
[2017] EWHC B15 (Costs)*

Article by David Bowden

SCCO judge applies *Harrison* to reduce costs budget amount in detailed assessment
RNB v. London Borough of Newham - [2017] EWHC B15 (Costs)

Executive speed read summary

Solicitors acted on a 'no win, no fee' agreement claiming damages for historical abuse in a residential home operated by the local authority. Its defence was the claim was time barred but it failed to submit a costs budget on time and it was ordered that it could not recover costs other than court fees. Following an exchange of part 36 offers, the case was settled at a very early stage for £250k damages and costs to be assessed. The case was covered by costs budgeting. An overall figure at a CCMC for the claimant's costs was set at just over £143k. A bill of costs totalling £121,051.40 was then submitted for assessment in the SCCO. Master Campbell reduced all hourly rates for the solicitor fee earners. Applying *Harrison* and *Merrix*, Master Campbell found a 'good reason' to depart from the costs budget. If he were wrong on that, then the Master applying the 5 new proportionality factors in CPR part 44.3(5) ruled that looking at matters in the round, then the overall costs figure would, if left unaltered, result in costs that it would be disproportionate for the local authority to pay. It is likely that permission to appeal will be sought, and if granted for all steps to be stayed pending the outcome of the appeal in *May and Dobson* on how the new proportionality test is to be applied.

RNB v. London Borough of Newham
[2017] EWHC B15 (Costs)
Senior Courts Costs Office (Deputy Master Colin Campbell)

4 August 2017

What are the facts of the case?

RNB (the receiving party) claimed to have been abused as a teenager by an employee of the local authority (the paying party) in one of its residential homes. The paying party denied liability and claimed the proceedings were barred by limitation. The paying party neither got its costs budget in on time nor made an application for relief from sanctions and so it was ordered that, even if it succeeded, it would only recover court fees. The paying party made an initial Part 36 offer of £125k and the receiving party countered with one for £295k. By a consent order dated 4 January 2017 the receiving party agreed to accept £250k by way of agreed damages with 'costs to be assessed if not agreed'.

How was the case funded? What about 'after the event' insurance?

The solicitors for the receiving party acted on a 'no win, no fee' conditional fee agreement. The proceedings were issued in July 2015. The receiving party was unable to claim either success fee or ATE premiums from the paying party.

What costs were incurred?

The total sum in the receiving party's costs budget was £143,692.36. Its bill of costs in these detailed assessment proceedings sought costs of £121,051.40

What objections were taken by the paying party in the Points of Dispute?

The paying party objected to the hourly rates claimed for all grades of fee earner. As the case settled very early with neither disclosure nor witness statements nor expert evidence obtained, the paying party also submitted that the overall costs claimed were disproportionate.

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 a district judge in Central London County Court on 12 August 2016. The receiving party had submitted its costs budgets using Precedent H.

What did the Court of Appeal rule in *Harrison*?

These detailed assessment proceedings started on the same day that the Court of Appeal handed down its judgment on costs budgeting in *Harrison v. University Hospitals Coventry & Warwickshire NHS Trust* [2017] EWCA Civ 792. Lord Justice Davis gave the unanimous judgement of the court and made these rulings:

- Where there is a proposed departure from a budget – be it upwards or downwards – the court on detailed assessment is empowered to sanction such a departure if it is satisfied that there is good reason for doing so. Costs judges should therefore be expected not to adopt a lax or over-indulgent approach to the need to find 'good reason' - if only because to do so would tend to subvert one of the principle purposes of costs budgeting and hence the overriding objective.
- The existence of the 'good reason' provision gives a value and an important safeguard in order to prevent a real risk of injustice.

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- As to what will constitute 'good reason' in any given case, I think it is much better not to seek to proffer any further, necessarily generalised, guidance or example. The matter can safely be left to the individual appraisal and evaluation of Costs Judges by reference to the circumstances of each individual case.
- The costs judge ordinarily will still ultimately have to look at matters in the round and consider whether the resulting aggregate figure is proportionate, having regard to CPR 44.3(2)(a) and (5) - a further potential safeguard.

What did the High Court rule in *Merrix*?

The Court of Appeal in *Harrison* approved the earlier decision of Mrs Justice Carr in *Merrix v. Heart of England NHS Foundation Trust* [2017] EWHC 346 (QB). Carr J made these rulings:

- The court will not – the words are mandatory – depart from the budget absent good reason. On a detailed assessment on a standard basis, the costs judge is bound by the agreed or approved costs budget unless there is good reason to depart from it.
- The obvious intention of CPR 3.18 was to reduce the scope of and need for detailed assessment.
- Costs budgeting involves the determination of reasonableness and proportionality. A costs judge is identifying what future costs are reasonable and proportionate.
- Nothing in paragraph 7.3 of Practice Direction 3E (where it is stated that when reviewing budgets the court will not carry out a detailed assessment 'in advance'), impinges on this approach.
- It is not stating that, whatever costs budget is approved or agreed, there will be an unfettered detailed assessment in due course.
- The fact that hourly rates at the detailed assessment stage may be different to those for the budget may be a good reason for allowing less or more, than the phase totals in the budget.
- Where a Costs Management Order has been made, when assessing costs on the standard basis, the costs judge will not part from the receiving party's last approved or agreed budget unless satisfied that there is 'good reason' to do so.
- The proportionality test can be applied at the time of fixing the budget. If there is 'good reason' to depart from that decision, the judge on detailed assessment can do so.
- Once pre-incurred costs have been assessed on the basis of reasonableness and added to the budgeted costs, the total figure is then subject to an overall assessment of proportionality.

What were the issues before the costs judge in the SCCO?

Master Campbell had to decide these 3 issues:

- The allowable hourly rates for the solicitors,
- Whether there was a 'good reason' to depart from the sums in the costs budget, and
- Whether the overall costs claimed were proportionate or not.

What did the SCCO rule on hourly rates?

The solicitors for the receiving party were in inner North London. Hourly rates for all 4 classes of fee earners were allowed at the detailed assessment by Master Campbell as follows (with the rate in the costs budget endorsed at the CCMC in brackets and the 2010 guideline hourly rate in the final column):

• Grade A (8+ years PQE)	£340 (£355 -375)	£229 - 267
• Grade B (4+ years PQE)	£275 (£235 - 280)	£172 - 229
• Grade C (under 4 years PQE)	£180 (£215 - 225)	£165
• Grade D (unqualified/paralegals)	£135 (£145 -150)	£121

Master Campbell said he made these reductions because the uplift on outer London guideline rates was excessive on the standard basis having regard to the CPR 44.4(3) factors. The increases year on year were too high given the level of inflation, were unexplained and could not be justified by reference to exceptional overhead expenses

What did the SCCO rule on whether there was a 'good reason' to depart from the costs budget?

Master Campbell started by noting that the rates in the costs budget endorsed at the CCMC would be 'ticked through without further consideration'. He said that the 'starting point is that the court does not approve or disapprove hourly rates when budgeting costs' under CPR part 3.12-18. Instead a court 'simply approves an amount which it is reasonable, necessary and proportionate for a party to incur for each of the ten phases of the litigation'. He went on to say that 'the court at the budgeting stage does not and cannot carry out a detailed assessment' but that 'what it can do is to comment on the costs under PD 7.4 and take those comments into account when fixing the budget' noting that in this case 'no comments were made at the CCMC'.

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Master Campbell referred to the commentary on CPR part 3 Practice Direction E paragraphs 7.3/7.10 in the 2017 White Book where it states that this 'do not require the court to set hourly rates' but rather 'the position is quite the reverse – it is expressly not the role of the Costs Management to fix or set hourly rates'. Master Campbell noted 3 other recent cases including one from Warby J in *Stocker v. Stocker* [2015] 4 Costs LR 651 in which he did fix prospective rates as did Morgan J in *Group Seven v. Nasis* [2016] 2 Costs LO 303. However Master Campbell ruled that 'if the court approves hourly rates in terms' then 'neither a paying nor receiving party on any subsequent detailed assessment can challenge them'. However he ruled that this was 'not the situation here'.

Instead Master Campbell said that because he had 'made reductions to the hourly rates claimed' to a level which meant that the 'overall recovery' by the receiving party had 'been reduced by significant amounts'. For this reason he judge that if this was 'not to be reflected in the budgeted costs' then this would mean that the receiving party would 'appear to recover an hourly rate' for the budgeted stage at a 'level that significantly exceeds the figure I consider to be reasonable and proportionate for the pre-budget stage'. The Master agreed with a submission from the paying party's counsel that it was only on a detailed assessment hearing that a paying party has 'an opportunity to challenge the rate' and 'that that is a "good reason" to depart from the costs allowed' in the receiving party's last approved budget.

Did the SCCO find the costs were proportionate or not?

Were he wrong on this, and as a cross-check, the Master said he arrived at the same result by applying these 5 factors in CPR part 44.3(5) in deciding if the receiving party's costs were proportionate or not:

- the sums in issue,
- the value of any non-monetary relief,
- the complexity of the litigation,
- any additional work generated by the conduct of the paying party, and
- any wider factors involved in the proceedings such as reputation or public importance.

Master Campbell endorsed a concession made by both counsel as to at what point should the proportionality test be applied ruling that 'the appropriate moment was at the conclusion of the line-by-line assessment'. The Master then looked at the budgeted costs in Part 2 which totaled approximately £43,000. However he ruled that having looked 'at matters in the round' as he was required to do following *Harrison* then the 'resulting figure if left unaltered would result costs that it would be disproportionate for the defendant to pay'.

Expanding on this he noted that this litigation had not been complex because:

- a part 36 offer had been made at the outset,
- the action was settled without a trial, and
- no additional work was generated by the conduct of the paying party by putting the receiving party to proof at a trial about the distressing history of the allegations of abuse.

For these reasons Master Campbell ruled that it was his 'judgment that the aggregate of the incurred costs as assessed and the budgeted costs as assessed thus far, if left unaltered, would result in the court allowing costs that were reasonable and necessary but not proportionate'. He said that this 'difficulty can be addressed by permitting the Claimant to recover the sum that would have been allowed had the assessed rates for the incurred costs been applied to the budgeted costs'. He ruled that even if he were wrong on the 'good reason' point, that 'the amount to be allowed on assessment must be adjusted by the application of CPR 44.3(5) so that the sum payable is the same as if the rates allowed for the incurred had been used to work out the amount to be allowed for the budgeted work.'

What will happen next with this case?

Master Campbell ruled that both sides had to agree the figures having regard to his decisions. It is likely that the final sums will now be agreed without the need for any further hearing. The appeal in relation to proportionality of costs in *May and Dobson v. Wavell Group Plc* [2016] EWHC B16 (Costs) is to be heard in September 2017 in Central London County Court. It is likely that the parties here will seek permission to appeal and for all steps on any appeal to be stayed pending the outcome of *May*.

4 August 2017

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