

Costs in Focus

Issue 48

Welcome to the 48th issue of Costs in Focus. This edition is going to consider a number of recent developments in costs law and the impact they will have on Costs Drafters and Practitioners.

Departing from costs budget requires ‘good reason’

Bryony Goldspink reviews *Harrison v University Hospitals Coventry & Warwickshire NHS Trust* [2017] EWCA Civ 792, where the Court of Appeal considers the relationship between costs budgeting and detailed assessment

The claimant brought a clinical negligence claim against the defendant, which was issued on 9 April 2013 and limited to £50,000. Liability was formally disputed by the defendant and the matter was listed for a Costs Case Management Conference to take place on 14 August 2014. At the same, the claimant’s budget was approved at £197,000, broken down as £108,000 in incurred costs and £89,000 in future costs.

The claim settled for £20,000, with costs to be agreed on the standard basis. The claimant’s bill of costs was served in October 2015, totaling £467,000, including success fee and ATE premium. At the detailed assessment heard by Master Whalan, the judge advised that, so far as to the future budgeted costs,

CPR 3.18 precluded him from subjecting the claimant to a “conventional” detailed assessment at the behest of the appellant as paying party, unless there was good reason for doing so. With regards to the incurred costs, the judge referred to the case of *Sarped Oil International Limited v Addax Energy SA* [2016], confirming that “although incurred costs could not themselves have been approved as such at the case management conference nevertheless they would have featured in the overall budget put forward at the conference and thus had a ‘certain status’”. Overall, Master Whalan assessed the recoverable costs at £420,168.

On appeal, the defendant argued that Master Whalan was wrong in his assessment, raising several issues,

including those on proportionality. The main dispute, however, was over this question: where a Costs Management Order approving a costs budget has been made in the course of proceedings, is a costs judge on a subsequent detailed assessment precluded from going below the budgeted amount unless satisfied that there is good reason for doing so? They also argued whether the same can be applied to the costs incurred at the time of the budget.

On consideration of the CPR and case law, the Court of Appeal ruled that costs budgeting took precedent over detailed assessment, upholding the High Court ruling in *Merrix v Heart of England NHS Foundation Trust* [2017] EWHC 346 (QB).

Comments

Delivering judgment on appeal, Davis LJ confirmed that “overall, the costs judge was right in his conclusion.” With regards to the assessment process, he continued: “Where, as here, a costs judge on detailed assessment will be

assessing incurred costs in the usual way and also will be considering budgeted costs (and not departing from such budgeted costs in the absence of ‘good reason’), the costs judge ordinarily will still, as I see it, 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, therefore, for the paying party.”

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The court's costs management powers

Richard McCarthy considers *Sir Cliff Richard OBE –v- (1) The British Broadcasting Corporation (2) Chief Constable of South Yorkshire Police* [2017] EWHC 1666 (Ch) and the court's discretion on incurred work under a costs budget

At a costs management conference it was affirmed that the court has the discretionary power to make a comment about a party's incurred costs and consideration was given to the circumstances in which such comments should be made with regard to the "range of reasonable and proportionate costs."

Chief Master Marsh, responding to a request by the BBC, considered that a degree of caution is appropriate when making a comment about incurred costs because approval can be undertaken only "at an impressionistic level." There was therefore "little or no value" in the court merely recording that incurred costs are 'substantial' or 'too high'

and the judge rejected the BBC's initial request that he make such a comment.

In respect of estimated costs, the judge considered that the estimate of time for the claimant's witness statements was very high but considered it acceptable with reference to the proportionality factors that might justify it in terms of public interest and complexity. The judge deemed the claimant's costs estimated for the trial preparation phase to be excessive but allowed a sum higher than the BBC had offered.

The judge lastly considered whether the costs of budget preparation and

dealing with costs management were sufficiently exceptional as to merit dispensing with the cap in practice direction 3E para 7.2. He considered the claimant's submissions: that two budgets had been prepared in advance of an earlier CMC on the basis of a split trial; that the budgets had been redrafted after costs management had been deferred at the previous hearing; and that the BBC's submission that the court should comment on incurred costs had been considered and rejected.

Chief Master Marsh concluded that the circumstances were "significantly out of the norm" and the cap should therefore be lifted

Comments

This case provides a clearer precedent as to the conduct that will and will not be permitted in costs management and a guide to what circumstances justify lifting the cap on costs in relation to costs management. Appropriately, the two are not unrelated, the judge having firstly dismissed the BBC's attempt to obtain "a short term

tactical advantage," which "could unfairly skew a detailed assessment at a later stage" and secondly considered the BBC's conduct to be a factor constituting exceptional circumstances. The BBC effectively attempted to prejudice future costs negotiations and the claimant ultimately benefited from their misconduct when the cap for costs

management was ignored. The other factors informing the judge's decision to ignore the cap (i.e. the expectation of a split trial and the deferment of costs management at the CMC) are case specific but not sufficiently unusual that this judgment does not provide a useful guide in analogous circumstances.

Services we provide

We deal with all aspects of costs including the preparation of Bills of Costs, Schedule of Costs, Points of Dispute, Points in Reply, negotiating settlement, solicitor own client disputes, auditing, providing estimates, costs budgeting and costs advocacy.

Our dedicated costs team is made up of 50 employees based in Bristol and New Malden with a wealth of experience including Costs Lawyers, Solicitors and members of the ACL.

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The purpose of this newsletter is to highlight some of the recent developments and changes in costs law. It should not be taken as legal advice and should not be relied upon as such.