Costs Update - October 2017

Contents

News

Clive Thomas, Editor

Following the Court of Appeal decision in Harrison v University Hospitals [2017] EWCA Civ 792, John Meredith-Hardy and Helen Hobhouse have prepared articles considering the implications of this decision for costs budgeting and the detailed assessment of costs following the conclusion of a costs budgeted case. These articles contain useful guidance on the preparation of Precedent R's and the preparation of revised budgets in cases which have already been subject to a costs management order.

Clive Thomas

October 2017

Cost budgets - Harrison v University Hospitals Coventry & Warwickshire NHS Trust, hourly rates & Prec. R

John Meredith-Hardy

1. Following the handing down on 21 June 2017 of the judgment in Harrison v University Hospitals Coventry & Warwickshire NHS Trust [2017] EWCA Civ 792 it is necessary to 'stock take' the consequences and reconsider budgeting issues. In particular, this paper explores the practical issues arising from Harrison including the importance of hourly rates and Prec. R.

2. The key points are:-

   - Costs incurred are subject to detailed assessment unless they are agreed;
   - Costs to be incurred (as agreed or approved) will determine sums recoverable *up or down* for each phase subject to variation on Detailed Assessment for "good reason" (CPR, Part 3.18)(b));
   - Save for indemnity principle issues, "good reason" will be difficult to establish and judges are discouraged from being "lax or over-indulgent".

3. A "good reason" would be that the costs have not been incurred e.g. if at the time of settlement or judgment some or all of costs in that phase have not been incurred, those costs are irrecoverable - the indemnity principle still applies.

4. Of importance, however, is whether a finding of excessive hourly rates on Detailed Assessment of costs incurred would be a "good reason" to reduce the approved budgeted costs to be incurred. The notes to the White Book suggest "yes" at para 3.18.2 (p.141). However, the White Books "Costs & Funding etc. Q&A 3rd Ed at Q50 & Q54 (at p.147 et seq) and Q76 to Q84 (at p.165 et seq) make a powerful argument that variation of hourly rates are not a "good reason".

5. In Harrison it was said "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 principal purposes of costs budgeting and thence the overriding objective" (para 43).

6. Whilst the point has yet to be judicially considered, in my view it is unlikely that a superior court will decide that excessive hourly rates for approved costs to be incurred are a "good reason" - this would be "lax or over-indulgent'. There are a host of other reasons - certainty, the principle that how budgeted money is spent is a matter for that party etc. - these points are fully developed in the White Books "Costs & Funding" etc. Q&A 3rd Ed supra.

7. So where does this take the costs budgeting exercise and what does this mean for Prec. R?

8. To begin with, Prec. R is a costs offer by definition - it identifies those figures that are "Offered" (see Prec. R) and "agreed" for each phase (see 3EPD.3.6A). Whilst the court cannot adjudicate on costs incurred the amended r.3.15(2)(c) allows for the recording of agreements on costs incurred. Therefore, theoretically a composite figure could be included in Prec. R and an inference may be that costs incurred are agreed if combined with costs to be incurred.

9. However, if costs incurred are not agreed (virtually always the case), costs incurred should not be included in Prec. R otherwise there is a danger that the other party will accept the offer and say that *both* costs incurred and costs to be incurred are agreed. If costs incurred are agreed, they will not be subject to detailed assessment. Not including costs incurred in Prec. R is also consistent with the pro-forma at www.justice.gov.uk/downloads/.../precedent-r-budget-discussion-report.xlsx that states "Note: include only Budgeted costs". Budgeted costs can *only* be costs to be incurred.

10. Therefore, the "Claimed" column and the "Offered" column must be only "costs to be incurred" and not a composite with costs incurred.

11. As regards the figures "Offered" and contained within Prec. R (the costs Offered against those Claimed for to be incurred), the figures should take into account what the offering party considers is a reasonable and proportionate total sum for that phase.

12. Unless the claiming party's hourly rate is accepted, this must not be used for the purpose of the calculation of the sum "Offered" as it is the phase total that is relevant, not how you got there. Again, this is clear from 3EPD.4.7.10 - Prec. R is about "agreed" figures (PD para 6A).

13. Therefore, the narrative in Prec. R should say that x hours are offered and when combined with an hourly rate of y, a reasonable & proportionate sum for the phase is z - it is z that is then offered when added to such other sums to be incurred that are offered or agreed (disbursements, court fees, counsel's fees etc.).

14. For the reasons stated above, if this approach is not adopted a caveat in the Prec. R (such as hourly rates are not agreed, subject to argument or are subject to DA) will not assist if the Prec. R sums are accepted by the other party. See "Costs & Funding" etc. Q&A 3rd Ed at Q77 at p.171 where reserving the right to argue hourly rates later point is addressed.

15. A court at the CCMC may be persuaded to make the budgeted costs subject to hourly rates being determined on DA. However, this is the wrong approach when each phase for costs to be incurred as a total sum for that phase is to be determined (finally) in the CMO, though subject to the "good reason" point (that will be a difficult hurdle to surmount apart from the basic indemnity point, see above).

16. As there are dangers of disputes arising over what is agreed and not agreed, a recital in the order stating costs incurred are not agreed and are subject to detailed assessment is sensible. The appropriate order, in my view, following budgeting is as follows:-

Recital-

UPON the court noting that costs incurred in the costs budgets of the Claimant and the Defendant are not agreed and will be subject to detailed assessment if not agreed

Cost budgeting order:-

i. Claimant- Budgeted costs (costs to be incurred) approved £.....

ii. Defendant- Budgeted costs (costs to be incurred) approved £.....

iii. The parties to file and serve page 1 of revised Prec. H by 4 pm on [date]

17. If a served Prec. R has included costs incurred and unreasonable hourly rates have been used in the calculation of the Offered column the Prec. R should be withdrawn and re-served.

18. Another point that is relevant to costs budgeting is the current judicial approach (reflecting current training) which is to ask the parties at the outset of the hearing, if budgets are not agreed, what a proportionate total sum of costs would be. This question concerns costs to be incurred and costs incurred.

19. Global proportionality is addressed at CPR, Part 44.3(5) and there is a checklist that should be used when the court is considering this issue.

20. Therefore, if in every case the person preparing Prec. R also provides their estimate of total proportionate costs of the other party (i.e. proportionate & reasonable costs incurred added to the Prec. R figure) that may be helpful to counsel instructed for the CCMC. This is not a figure that should be disclosed.

21. As regards the budgeting process itself, the mantra of whether the costs fall "within the range of reasonable proportionate costs" needs to be borne in mind (PD 3E.7.3).

22. Finally, there is often an argument about the costs of the budgeting process. This is determined by PD 3E.7.2. Save for exceptional circumstances, they should not exceed £1,000 or 1% (whichever is the higher) of the "approved budget" – this means costs to be incurred – as costs incurred are <u>not</u> approved.

[1] and see Cook on Costs 2017 para 15.33 p.250

[2] (a) sums in issue (ii) value non-monetary relief (iii) complexity (d) additional work generated by paying party (e) wider factors

[3] see May v Wavell Group [2016] 3 Costs LO 455 and Murrells v Cambridge Uni NHS Trust 2017 where the court found reasonable and proportionate costs on detailed assessments in excess of sums claimed (after early post-issue settlements); May v Wavell Group is subject to appeal

JOHN MEREDITH-HARDY

Farrar's Building

Temple

LONDON

October 2017

INCURRED COSTS, BUDGETED COSTS AND DETAILED ASSESSMENT

Helen Hobhouse

It is perhaps not surprising that four years after costs budgeting was first introduced we are now getting a flurry of authorities laying down guidance on how costs judges should approach the exercise of detailed assessment in cases which have been the subject of a costs management order (CMOs).

In the most recent of these, **Harrison v University Hospitals Coventry & Warwickshire NHS Trust** [2017] EWCA Civ 792 (judgment handed down on 21st June 2017), the Court of Appeal, had to resolve two issues:

- Firstly, in relation to costs which have been budgeted at a CCMC ("budgeted costs"), is a costs judge on a subsequent detailed assessment entitled to assess costs below the budgeted sum without good reason.
- Secondly, with regard to costs incurred prior to the approval of the budget ("incurred costs"), is there a like requirement of "good reason" before a costs judge should depart from the figures that appear in the budget.

Although the Court of Appeal in **Harrison** was construing rules which were subsequently amended in April 2017, for the purpose of understanding the position going forward it is probably more helpful to set out below the rules which are currently in force. The changes made in April 2017 simply serve to reinforce the position adopted by the court in **Harrsion**.

It is also important to note that the authorities and rules now make a clear distinction between "incurred costs" and "budgeted costs". "Incurred costs" are those that appear in the columns headed "incurred costs" in the first budget submitted in compliance with CPR 3.13 (1). "Budgeted costs" are those costs that appear in the columns headed "estimated costs" in that first budget (White Book paragraph 3.12.3). "Budgeted costs" remain "budgeted costs" even if budgets are subsequently revised at a later stage at a point when further costs have been incurred.

CPR 3.15 (2)

"By a costs management order the court will –
record the extent to which the budgeted costs are agreed between the parties;
in respect of the budgeted costs which are not agreed, record the court's approval after making appropriate revision;
record the extent (if any) to which incurred costs are agreed"

(CPR 3.15 (2) (c) was added by amendment with effect from 6th April 2017).

CPR 3.15 (4) (also added in April 2017)

"Whether or not the court makes a costs management order, it may record on the face of any case management order any comments it has about the incurred costs which are to be taken into account in any subsequent assessment proceedings".

CPR 3.18

"In any case where a costs management order has been made, when assessing costs on the standard basis, the court will –

have regard to the receiving party's last approved or agreed budgeted costs for each phase of the proceedings;

***not depart from such approved or agreed budgeted costs unless satisfied that there was good reason to do so**; and*

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.

(Attention is drawn to rules 44.3(2)(a) and 44.3(5), which concern proportionality of costs.)"

(CPR 3.18 (c) was added by amendment with effect from 6th April 2017).

Practice Direction 3E

"7.4 ***As part of the costs management process the court may not approve costs incurred before the date of any costs management hearing".***

Detailed assessment of budgeted costs

In **Harrison** the Court of Appeal rejected the notion that budgets should be regarded as no more than a guide to assist the court at any future detailed assessment, thereby approving the earlier judgements of Master Gordon Saker in **Collins v Devonport Royal Dockyard Limited** (8th February 2017: AGS/1602954) and Carr J in **Merrix v Heart of England NHS Foundation Trust** [2017] EWHC 346 (QB) [2017] 1 Costs LR 91.

Lord Justice Davis, who delivered the lead judgement in **Harrison**, ruled that effect should be given to the natural and ordinary meaning of the words used in CPR 3.18 i.e. that in respect of "budgeted costs" the court will **not** depart from the agreed or approved budget, unless satisfied that there is good reason to do so. He held that the natural and ordinary meaning of CPR 3.18 (2)(b) was wholly consistent with the perceived purposes behind, and importance attributed to, costs budgeting and CMOs. These included promoting the prospect of parties agreeing costs without recourse to detailed assessment, reducing the number of points in dispute in the event that agreement could not be reached, and providing an element of certainty to clients as to their likely costs exposure.

What is "a good reason" to depart from budgeted costs ?

Lord Justice Davis was reluctant to lay down any guidance as to what would constitute a "good reason" in any given case – *"I think it much better not to seek to proffer any further, necessarily generalised guidance or examples. The matter can safely be left to the individual appraisal and evaluation of costs judges by reference to the circumstances of each individual case".*

He was clear, however, that costs judges should not adopt a lax or over indulgent approach to the need to find good reason, as this would subvert the very purpose of costs budgeting.

The notes in the 2017 edition of the White Book (3.18.1) give three examples of what might be regarded as good reasons to depart from the budgeted costs: underspending in a particular phase (the indemnity principle still applies to budgeted costs); the fact that the money spent on a particular phase is unreasonable and disproportionate, and a reappraisal of the appropriate hourly rates at detailed assessment.

"Rule 3.18(a) makes it clear that an assessment of budgeted costs should be by reference to each of the budgeted phases rather than the overall total approved or agreed for the budgeted costs. In other words, if, without exceeding the overall total, parties spend less on certain phases, but more on others, they will be limited to (i) what has been reasonably and proportionately spent in those phases where that cost is less than the budgeted total for those phases (the underspend being a ***good reason*** *to depart from the budget (3.18(b)) plus (ii) not more than the budgeted figure for those phases where the party has spent more than the budgeted total for those phases. Indeed as to (ii) there may be* ***good reason*** *to allow less than the total budgeted if the actual expenditure exceeds what is reasonable and proportionate."*

"Paragraph 7.10 of PD3E states that it is not the role of the court at a CCMC to fix or approve hourly rates claimed in the budget. The detailed breakdowns of each phase given in the second and subsequent pages of the budget are provided for reference purposes only to assist the court in fixing the budget. ***Accordingly, at a subsequent detailed assessment, the court may allow hourly rates which are lower or possibly higher than the rates specified in the last approved or agreed budget. In certain circumstances the court assessing costs may treat its allowance of different rates as a good reason for allowing less or possibly more than some of the phase totals specified in the last approved or agreed budget."***

The First Supplement to the 2017 edition (Summer 2017) adds a new paragraph 3.18.3 which comments further on the interplay between costs budgeting and detailed assessment.

<u>Hourly rates and "good reason"</u>

With the greatest of respect to the authors of the 2017 White Book it is my view, and the view of a number of my colleagues in Chambers, that a reappraisal of hourly rates is very unlikely to be regarded as a good reason to depart from budgeted costs on a detailed assessment. The notes in bold above are therefore misleading and at odds with the current guidance as to how courts should deal with hourly rates at a CCMC – see paragraphs 4-72 and 4-75 of the 3rd Edition of the Costs and Funding Q & A.

It is not unusual, for example, for district judges and masters to assess budgeted costs for a particular phase on a global basis to reflect what the court considers to be a reasonable and proportionate sum for that phase. Paragraph 4-72 of the 3rd Edition of the Costs and Funding Q & A expressly approves this approach.

If such an approach has been adopted, however, and a claimant has had his budget reduced to reflect a perception on the part of the court that the hourly rates being claimed are too high, it would be inequitable if a defendant were able to reduce the claimant's budgeted costs still further on detailed assessment by challenging the hourly rates.

In future it would be prudent for those involved in negotiating costs to assume that they will not be able to challenge hourly rates on a detailed assessment of budgeted costs. Any offers made in respect of budgeted costs ought therefore to reflect a sum which the offering party considers reasonable and proportionate for the phase. How that sum is arrived at in terms of hours and rates is something which must be addressed by the relevant costs draftsman involved in the preparation of the Precedent R – see accompanying article by John Meredith Hardy for further guidance on the preparation of Precedent Rs and other associated issues.

Detailed assessment of incurred costs

The court in **Harrison** ruled that incurred costs should be the subject of detailed assessment in the usual way and there was no additional requirement of "good reason" for departure from the approved budget.

When considering "incurred costs", as distinct from the "budgeted costs", the court will therefore have a relatively free hand when assessing these, subject to the requirement to take into account any comments recorded on the face of the case management order in relation to those incurred costs (3.18 (c)).

In response to the amendments to the rules in respect of incurred costs, and the clarification provided by the Court of Appeal in **Harrison**, parties to CCMCs may now seek more detailed court comments/observations about the incurred costs, beyond simply reserving the right to challenge those costs at detailed assessment.

Claimants may, for example, seek to have it recorded that the incurred costs are reasonable and proportionate and that the incurred costs have been taken into account when setting the overall budget figures for each phase. Conversely defendants may wish to ensure that it is recorded that the incurred costs are unreasonable and disproportionate.

Reasonableness and proportionality

As to the overarching test of reasonableness and proportionality Lord Justice Davis made the following additional observations;

"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" (paragraph 52 of the judgment).

Revising budgets

This was not an issue that arose for consideration in **Harrison** but the commentary in the White Book (3.12.3) provides the following useful guidance as to how an application to revise a budget should be approached in practice; *"If, after the approval of that budget, the party submits a revised budget seeking an increase in respect of any part of it, the costs previously shown in the incurred costs column should remain the same; unless and until the court approves any revision, the costs previously approved in the estimated columns (the budgeted costs) should remain in the estimated columns even if substantial amounts of them have now been incurred (3.12.3)".*

Given the distinction in treatment between "incurred costs" and "budgeted costs" at detailed assessment it would seem that even after the court has approved a revised budget the budget document should continue to distinguish between those costs that were incurred at the time of the first CCMC and the revised "budgeted costs". If it were otherwise the costs which were "budgeted costs" at the first CCMC could, by the process of revision, become "incurred costs" and thus subject to a different basis of assessment at any subsequent detailed assessment.

Helen Hobhouse
October 2017

FARRAR'S BUILDING COSTS GROUP

John Meredith-Hardy	Helen Hobhouse	Nick Blake
Huw Davies	Andrew Wille	Howard Cohen
James Plant	Clive Thomas	Tom Bourne-Arton
Tim Found	Victoria Logue	James Rozier
Hannah Saxena	Aidan O'Brien	Robert Golin

Farrar's Building
Temple
London
EC4Y 7BD

T: +44 (0)20 7583 9241

Email: Chambers@Farrarsbuilding.co.uk

@FarrarsBuilding