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Court of Appeal rules that 'already incurred' costs in approved costs budget can be challenged in later assessment proceedings

Harrison v. University Hospitals Coventry & Warwickshire NHS Trust
[2017] EWCA 792

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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 (CCMC) hearing, HHJ Hampton approved future costs but by then the patient's solicitor claimed to have already incurred profit costs of over £100k. No submissions were made at the CCMA hearing about these incurred costs. Master Whalan at a detailed assessment of costs hearing ruled that it was too late to challenge the costs that had been approved in the costs budget. The claim was sent to the court on 27 March 2013 but was not issued until 9 April 2013. In a ruling that both receiving and paying parties can take comfort from, the Court of Appeal has given its unanimous ruling on 3 vexed issues. Lord Justice Davis gives the ruling. He rules that future costs in an agreed costs budget can only be challenged at a later detailed assessment where '*good reason*' is show to depart from the budget. He refuses to say what is or is not a '*good reason*' ruling instead that this can '*safely be left to the individual appraisal and evaluation of costs judges by reference to the circumstances of each individual case*'. As to '*already incurred*' costs Davis LJ rules that these can be challenged in the usual way at assessment of costs hearings but a judge at a CCMC retained a power to comment on them which could provide a steer to costs judges. Finally he ruled that the claim was commenced on 9 April 2013 when the court issued the claim form and so the £475k claimed costs would be subject to both the new stricter rules on both proportionality and reasonableness. The case will now go back to Master Whalan in the SCCO to assess costs applying this ruling.

Harrison v. University Hospitals Coventry & Warwickshire NHS Trust
[2017] EWCA Civ 792 *21 June 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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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,
- Where the costs claimed exceed the budget total, the receiving party will be required to demonstrate a '*good reason'* to depart from the budget,
- Where costs claimed are less than the budget total, the paying party will be required to demonstrate a '*good reason'* to depart from the budget too,
- There is often considerable scope for the paying party to argue that there is a good reason to depart from the budget. 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.

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:

- Where a costs management order is made, is a costs judge at a later assessment prevented from going below the budgeted amount unless satisfied there is 'good reason'?
- In relation to 'already incurred' costs in a costs budget, can a costs judge depart from the amount in the costs budget even where there is no 'good reason'? and
- When were these proceedings commenced? Were they commenced before or after 1 April 2013? Which test of '*proportionality*' should a costs judge use – the one under the post-April 2013 version of the CPR or the pre-April 2013 version?

What authorities are referred to in the judgement?

These authorities are referred to in the judgment of Lord Justice Davis:

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Salford County Court v. Garner **[2004] EWCA Civ 364** (Court of Appeal - Lords Justices Chadwick and Maurice Kay)
Proceedings for possession of premises let under an introductory tenancy are 'brought' for the purposes of section127(1) of the Housing Act 1996 when a court issues the claim form. The extended meaning given to the date proceedings are brought by paragraph 5.1 of the Practice Direction to CPR part 7 for the purposes of the Limitation Act 1980 has no bearing on the construction of section127(1) of the 1996 Act.

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.

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.

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.

McInnes v. Gross **[2017] EWHC 127 (QB)** (High Court, TCC, Coulson J)
On an interim payment on account of costs, the significance of CPR 3.18 cannot be understated. Where costs are assessed, a costs judge will start with the figure in the costs budget. He will not start from scratch.

Merrix v. Heart of England NHS Foundation Trust **[2017] EWHC 346 (QB)** (High Court, Carr J)
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. CPR 3.18 does 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. This does 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. 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. 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.

Collins v. Devonport Royal Dockyard Ltd **AGS/1602954,** (SCCO, Master Gordon-Saker)
What would be the point of costs budgeting if the resulting figures amount to nothing more than a factor, guidance or cap at detailed assessment?

What did the Court of Appeal rule on whether a costs judge could only go below the budgeted amount in the absence of '*good reason*'?
Lord Justice Davis in giving the unanimous judgment ruled that both Master Whalan below and Mrs Justice Carr in *Merrix* were correct on this – a costs judge cannot go below the budgeted amount unless there is '*good reason*' to do so.

He said the court had to construe the words used in CPR 3.18. He said that the NHS's submissions '*came close to an attack if not on the whole principles of costs budgeting then at all events on the efficacy in practice of costs budgeting'*. Davis LJ rejected the NHS's submission that costs management orders (CMOs) were merely '*summary orders'* which did no more than give a '*snapshot of the estimated range of reasonable and proportionate costs'*. Davis LJ endorsed the view in the 2017 edition of 'Cook on Costs' that '*to sanction, at detailed assessment, a departure from the budget in the absence of good reason would overlook'* that budgeted costs are '*already required to have regard both to reasonableness and to proportionality*' and that '*the aims of costs budgeting include a reduction in detailed assessments and of issues raised in points of dispute'* and also to bring an '*element of certainty to clients'* in knowing what costs they are '*likely to face'*.

Davis LJ also noted the requirement that a costs budget has to be '*signed and certified as being a fair and accurate assessment of the costs which it would be reasonable and proportionate for the client to receive*' and also that revised budgets be they '*upwards or downwards'* have to be '*filed and approved where the estimates change'*. Davis LJ rejected the NHS's submission that there was ambiguity in CPR 3.18(b) such that he should adopt an expansive purposive approach to its construction ruling instead that 't*he meaning of the wording is clear'*.

Davis LJ endorsed the judgements (on appeal) of Carr J in *Merrix* and Coulson J in *McInnes* on this issue that a costs judge does not '*start from scratch'*. Davis LJ doubted whether the *obiter* remarks on Moore-Bick LJ in *Henry* (where he said that '*if costs incurred in respect of any stage fall short of the budget, to award no more than has been incurred does not involve a departure from the budget - it simply means that the budget was more generous than was necessary*') were correct. As to *Troy Foods*, as this was merely an oral permission hearing and had '*no authoritative value for present purposes'*.

Finally on this issue, Davis LJ ruled that where there was a proposed departure from budget (upwards or downwards) a court on a detailed assessment is empowered to sanction a departure where it is satisfied that there is '*good reason'* for doing so. He ruled that this is a '*significant fetter on the court having an unrestricted discretion*' but that this was '*deliberately designed to be so'* and he cautioned that costs judges should be '*expected not to adopt a lax or over-indulgent approach'* to the need to find '*good reason'* because to do so would '*tend to subvert one of the principal purposes of costs budgeting'* and the overriding objective. However Davis LJ ruled that the '*good reason'* provision gave a '*valuable and important safeguard in order to prevent a real risk of injustice*' and that detailed assessments were not '*mere rubber stamps of CMOs'*.

What did the Court of Appeal rule on whether a costs judge can assess 'already incurred' costs?
Helpfully Davis LJ has finally cleared up this point ruling that a costs judge at a detailed assessment hearing can assess costs stated to be '*already incurred'* in an approved costs budget.

Davis LJ said the starting point was CPR part 3.18(b). He said '*already incurred'* costs were neither agreed nor '*were they ever approved by the CMO'*. Going further he said that paragraph 7.4 of Practice Direction 3E was 'quite specific' that a '*court may not approve costs incurred before the date of the budget costs management conference*'. Davis LJ ruled that '*already incurred'* costs were not '*within the ambit of CPR 3.18'* at all.

As to *Sarpd Oil*, Davis LJ ruled that was different because it did not involve a detailed assessment but rather related to an issue on security of costs and that the budgeted costs had been approved by the judge as part of an agreed CMO. Because of this Davis LJ disapproved of the comment of Lord Justice Sales in *Sarpd Oil* (where he said that parties coming to the first CMC '*know that that is the appropriate occasion on which to contest the costs items in those budgets, both in relation to the incurred costs elements'* and in relation to the estimated costs elements) saying that he had '*gone too far'* which had given '*rise to a degree of disquiet'*.

Davis LJ noted that the Civil Procedure Rules Committee had said that the *Sarpd Oil* ruling was '*unexpected*' and that it would '*complicate not simplify costs management'* and also might '*undermine desirable attempts to agree costs budgets'*. The CPRC at its December 2016 meeting had recommended instead that '*already incurred'* costs indeed should be '*decoupled*' from budgeted costs so that the '*court's budgeting would only relate to the costs to be incurred'*. However the CPRC recommended that a judge at a CCMC retained a '*power to comment on previously incurred costs, which*

*could provide a "*steer*" thereafter'*. Finally Davis LJ concluded by saying clearly that he disagreed with the *obiter* remarks on already incurred costs in *Sarpd Oil*.

What did the Court of Appeal rule was the date these personal injury proceedings commenced?
Lord Justice Davis was clear that these proceedings were commenced on 9 April 2013 when the court issued the claim form. As a result the patient's costs would be subject to the post-April 2013 test of proportionality and reasonableness.

Davis LJ ruled that the general position under CPR 7.2(1) is that proceedings are '*started when the court issues a claim form at the request of the claimant'* and that a claim form is '*issued on the date entered on the form by the court*' which here '*was indisputably 9 April 2013'*. He said there was an exception for certain claims covered by limitation. He endorsed the approach (in a housing case) previously taken by the Court of Appeal in *Garner* where it held that the 'beginning' of the proceedings under the Housing Act 1996 was '*co-extensive with "*starting*" proceedings under CPR 7.2'*.

Davis LJ rejected the patient's submissions otherwise where it sought to make capital of the difference of wording in the CPR which referred to *'commenced'*, '*beginning*', '*starting*' and '*claim made'*. This cut no ice with Davis LJ who ruled that this only '*illustrates that a lack of total consistency of language for these purposes*' and had '*no real bearing on the clear underpinning intent and meaning'* of the CPR Accordingly Davis LJ ruled that it was '*plain that a case is "*commenced*" for the purposes of CPR 44.3 (7)(a) when the relevant proceedings are issued by the court'* and that this '*yields the date of 9 April 2013*' so that the '*proportionality provisions of CPR 44 (2)(a) and (5) apply accordingly'*.

What issues did the Court of Appeal leave open?
As to what constitutes '*good reason'* in any given case Davis LJ ruled that it was '*much better not to seek to proffer any further, necessarily generalised, guidance or examples*' and that the matter can '*safely be left to the individual appraisal and evaluation of costs judges by reference to the circumstances of each individual case'*.

What about costs in the Court of Appeal? What will happen next with this case?
The NHS won on 2 issues (already incurred costs and commencement date) and the patient won on 1 issue (future costs can only be challenged where there is 'good reason'). Both sides filed written submissions on what order the Court of Appeal should make as to the costs of the appeal. The case will now be remitted to Master Whalan in the SCCO for him to conclude the detailed assessment applying the Court of Appeal ruling. The overall costs claimed here of £475k on a £20k claim will be slashed and burned when the new proportionality and reasonableness tests are applied to them. For example in *May & Dobson* **[2016] EWHC B16 (Costs)**, Master Rowley in the SCCO on a bill of over £208k in a claim settled for £25k slashed the costs to £35k.

Will there be a final appeal to the Supreme Court?
It is unlikely that the Supreme Court would want to take a pure costs case. In refusing permission to appeal in *Simcoe v. Jacuzzi UK Group PLC* **UKSC 2012/0067** it said that '*this is a point of practice and procedure more suitable for consideration at Court of Appeal level*'. It may be amenable, however, to a final appeal as to when proceedings were commenced as Davis LJ does not rely on any prior authority from either the House of Lords, Privy Council or Supreme Court on this. In relation to service of a claim form out of the jurisdiction the Supreme Court ruled in *Abela v. Baadarani* **[2013] UKSC 34** that the fact that a claimant has delayed before issuing the claim form was not '*save perhaps in exceptional circumstances*' relevant when determining whether an order should be made under CPR 6.15(2). Whether it could be persuaded to find an '*exceptional circumstance'* here on the basis that the claim form was delivered to the court before the end of March 2013 remains to be seen.

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