Is it safe to reserve using costs budget figures?

In many sets of UK civil proceedings, each side must at the given stage send the other and the court its summary of current and estimated future costs, in aid of transparency and cost control. A main rationale for this requirement for costs budgeting, as it is generally known, was to provide a mechanism as part of case management, which, if followed properly, would save more cost than (as was recognised) it would generate, by hopefully avoiding often costly formal assessment at the end of the matter.

Many have queried the value of the significant time and cost commonly spent on costs budgeting where, in the end, recoverable costs are still challenged and assessed in detail, at yet further cost, and producing wholly different figures. Regardless of large and perhaps duplicated cost, where did that leave the clients when trying to set fee reserves?

Merrix v Heart of England NHS Foundation Trust [2017] EWHC 346 (QB) is central to this. The preliminary issue was whether and if so how the costs budgeting regime under CPR Part 3 fettered the powers and discretion of the costs judge at a detailed assessment of costs under CPR Part 47?

This issue was formulated by the Regional Costs Judge, hearing the matter at first instance *([2016] EWHC B28 (QB))*, who when granting permission to appeal described it as subject to "debate in the legal profession", which should be resolved "urgently".

He had held that while the costs budget was *not* binding at the detailed assessment stage, it would be a "strong guide", but the powers and discretion on detailed assessment were *not* fettered by the budget figures.

On appeal Mrs Justice Carr held that where a costs management order has been made after consideration of the costs budgets, when assessing costs on the standard basis the court will *not* depart from the receiving party's last approved or agreed budget *unless* satisfied that there is good reason to do so. This applies as much where the receiving party claims an amount *equal to or less than* the sums budgeted as where he seeks to recover more.

An important issue was therefore resolved. Now, on a standard basis, the parties are normally bound by the latest budget, and unless there is good reason there should be no detailed assessment.

Overall, this is good for clients - the budgets are produced early and should be submitted with care, as carrying weight and likely to be relied on, unless perhaps there have been unforeseen changes since, or some unknown factor has proved significant. But does this mean that even more time will now be spent on budgets, thus still countering the notion of saving by dispensing with formal assessment?

It is submitted that this will not necessarily follow and should not ordinarily do so, and that early, continued and judicious use of specialist costs professionals will play an important part:

- If there is no longer an opportunity, generally, to have a second 'bite of the cherry', more time and cost may be devoted to budgets including a close examination of manpower and rates. Regular budget reviews and updates have always been important, but these may now gain prominence.

- A budget deals only with prospective costs, whereas costs of the case management conference (the stage when budgets are first considered) are treated as incurred. Parties can, but need not, comment at this stage on costs incurred, with the result that these may fall outside the approved or agreed budget. Such costs may therefore anyway still need separate treatment, by formal assessment, just like costs assessed on an indemnity basis.

- While the total costs claim may fall within the overall budget, budgets for individual phases may have been exceeded. This may result in only a partial recovery for those phases, with the result that the total recovery may be less than the overall budget. It may therefore still be necessary to produce detailed costs statements, dovetailed to budget phases. So, the simplistic approach of 'cutting a cheque' for the budget total may not be appropriate.

Carr J. acknowledged that the issues appear ripe for the Court of Appeal, and they will probably include what amounts to 'good reason', which will come sharply into focus, and *Harrison v Coventry NHS Trust* is now the case to watch. Offending the indemnity principle - so more costs might be paid than had in fact been incurred - is likely to be a good reason. So, where the receiving party incurs less costs than the budget, surely only the lesser amount will be recoverable.

The changes brought about by *Merrix* should improve efficiency and increase confidence, consistent with the aims of the reforms which brought in these still comparatively new measures. These were to reduce the scope and cost of assessments, and also reduce costs, by managing them from the budget stage onwards. However, though perhaps now more reliable and certain in its overall effect, the costs management process is complex and requires time and cost that some still see as adding little overall value.

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