

The CoA has provided clarity in *Harrison v University Hospitals Coventry & Warwickshire NHS Trust* Court of Appeal (Civil Division) [2017] EWCA Civ 792

Background

With the *Merrix* judgment having been released earlier this year, a number of principles holding vast significance in the ongoing debate over the budgeting of costs were established.

Most standout of these, made reference to the issue concerning the measure of control which the costs budget has, at the detailed assessment stage. In the judgment, it was said that whilst costs budgeting did not replace detailed assessment, the costs judge should not depart from the receiving party's last approved or agreed budget, unless satisfied that there is good reason to do so.

With such an issue having been made clear in the *Merrix* case, there lay much anticipation upon the *Harrison* judgment, predicted to cast what was almost a deciding vote on the matter – reinforcing the *Merrix* judgment, or ruling very much to the contrary.

The Court of Appeal was asked to provide (conclusive) rulings over the following:

1. Where an approved budget has been formed, how far is the cost judge at detailed assessment bound to abide by the estimated costs from that point on; and
2. How far is the cost judge bound to abide by the incurred costs figures (formed at the cost budgeting stage) at detailed assessment?

Clarification

With respect to the first point, The Court of Appeal made direct reference to CPR 3.18 – shown to be directly in line with the *Merrix* judgment. This stated that when assessing the final costs, the court must have regard to the receiving party's last approved costs, and must not depart from such approved costs without “*good reason to do so*”. The Court of Appeal further expressed that where there was a proposed departure from a costs budget, be it upwards or downwards, the court on a detailed assessment could sanction such a departure only if satisfied that there was good reason for doing so. Furthermore the judge held that incurred costs would be the subject of detailed assessment in the usual way, without any added requirement of a “*good reason*” for departure from the approved budget.

Implications

Unsurprisingly, this raised the question of: what classifies as a “*good reason*”. With the whole nature of future judgments resting on such an ambiguous statement, it begins to appear that although the *Merrix* judgment and the recent *Harrison* judgement come hand in hand, their respective (apparently conclusive) judgments have by no means resolved the dispute concerning the relevance which the costs budget has.

The Court of Appeal declined to proffer what would constitute a “*good reason*”, holding that the matter be best left to the determination by the Costs Judge evaluating the circumstances of each individual case. In relation to costs incurred prior to an approved budget, these will be assessed in the usual way without the need to demonstrate a “*good reason*”. In relation to the estimated costs approved in the budget, then it is for the parties, be it the receiving or paying party, to demonstrate good reason before any departure will be considered.

If a “*good reason*” emerges over the following years as a fairly low barrier, then it would seem that additional costs regarding the process of detailed assessment would continue to be incurred – with the majority of parties being able to provide sufficient good reason to require a detailed assessment (in addition to the regular costs budgeting beforehand). On the other hand, if “*good reason*” becomes a very hard barrier to overcome, then we will see a vast reduction in the level of costs incurred in a case through to detailed assessment. With the increasing reduction of detailed assessments, the parties would be able to agree estimated costs far quicker. However, with it becoming far more difficult for parties to rely on detailed assessment to finalise their costs, it seems plausible that this will result in parties performing far more checks and approaching the budgeting exercise with a high level of scrutiny. This will in turn involve more work thus raising the costs further. With this in mind, the question raised is whether the costs incurred by increased activity of a costs management team, outweighs the costs incurred through the process of detailed assessment. We will, no doubt, find the answer to this over a number of cases in years to come.

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