Re-counting the costs

What constitutes a 'good reason' to depart from a costs budget? Simon Gibbs examines the evidence

IN BRIEF

▶ In *Barts Health NHS Trust v Salmon*, the judge held that the failure to complete a phase was a 'good reason' to depart from the budget.

We are now starting to see an increasing number of decisions coming through as to what amounts to a 'good reason' to depart from a costs management order.

The decision in *Barts Health NHS Trust v Salmon* [2019] Lexis Citation 27 makes for particularly interesting reading.

This was a clinical negligence case. A costs management order had been made approving the claimant's budget in the sum of £155,673. The claim settled before trial and where not all the phases of the original budget had been completed.

The claimant served a bill of costs where the costs claimed for a number of the phases were less than the amounts allowed in the approved budget for the corresponding phases.

For example, in respect of the experts phase, the budgeted sum was £24,928, but in the bill the receiving party claimed £14,072. In relation to the ADR/settlement phase, the budgeted sum was £9,745, but the sum claimed by the receiving party was £5,042.

At the original detailed assessment before costs judge Master Whalan, the master had concluded that the fact the costs claimed were less than the approved budget amounted to a good reason to depart down from the budget, but found there to be no good reason to depart further downwards from the approved budget and therefore allowed the amounts as claimed.

Non-controversial propositions

On appeal before HHJ Dight CBE, the defendant argued at [26]: 'that the phases in issue were not completed in this case because the case settled early, whereas the budget was set on the assumption that the work contained within the relevant phases would be completed. Mr Hutton submitted that not all the steps relating to the experts and alternative dispute resolution had been completed because of the settlement, and that that much was apparent from the bill. He acknowledged that the receiving party had reduced their costs claim to their actual expenditure, but submitted, nevertheless, that the costs which had been claimed were greater than had been expected for the work that was actually done'.

This appears to be a relatively non-controversial proposition. Take the example of a case where the witness statements phase of a claimant's budget is approved at £10,000 on the assumption the claimant will serve ten witness statements, but the case then settles at a stage where only one witness statement has been prepared. If the claimant serves a bill of costs totalling £9,000, there is clearly a good reason to depart down from the £10,000 figure (simply on the basis of the indemnity principle) but there is also plainly a good reason to at least consider whether the figure of £9,000 is remotely appropriate where only one of the ten anticipated witness statements has been prepared.

It will, of course, be fact sensitive as to whether the extent to which a particular phase was not completed amounts to a good reason to depart further from the figure claimed.

However, the master appears to have concluded that, although a party was limited by the indemnity principle to the costs actually incurred, if a party was within budget for a phase they should recover the costs claimed notwithstanding the fact less work than anticipated had been undertaken.

On appeal, HHJ Dight CBE ruled that this approach was incorrect. Part of his decision is no more than setting out what I suggest should be non-controversial (at [37]): 'it seems to me that the fact that the phase of the budget relating to experts was … substantially incomplete was capable of being a good reason, and it would have been open to the Master on that basis to consider whether to reduce the figure.'

However, his other conclusions appear to go much further ([22g]): 'once a good reason has been established, and the court is given the right to depart from the budget, it will assess the costs of that phase in the usual way, and, in that respect, it is left to the good sense and expertise of the costs judge to undertake that assessment in an appropriate and insofar as possible practical way, whether line-by-line or in a more broad-brush way. The manner of undertaking that task is entirely a matter for the judge dealing with the assessment. It seems to me that the consequence of finding a good reason under 3.18(b) is that it opens this route to enable the costs judge to take this approach within the detailed assessment'.

[36]: 'In my judgment, having regard to what was said by Lord Justice Davis in [*Harrison v University Hospitals Coventry & Warwickshire NHS Trust* [2017] EWCA Civ 792], the fact that the sum claimed is lower than the budgeted figure, because of the indemnity principle, is itself capable of being a good reason. Awarding the lower figure would be, in my judgment, a departure from the budget, which requires a good reason to be established: in this case, once that had been done it was open to the paying party to challenge the figure which was then being claimed by the receiving party, and they did not have to assert a further good reason to enable the court to do so.'

Irrelevant figures

On this analysis, it appears that the mere fact the costs claimed are less than the approved budget for a given phase renders the figure in the budget for that phase virtually irrelevant, and it is then open to the judge on assessment to allow any figure they consider appropriate.

If that is correct, it produces some interesting outcomes. For example, the witness statements phase of a costs budget is approved at £10,000 (with the constituent parts of the budget being based on 40 hours at £250 per hour). The subsequent bill of costs claims £9,750 because the time taken was only 39 hours

at £250, although all the anticipated work was undertaken and the phase completed. This decision suggests that the paying party can automatically show there is a good reason to depart from the budget (the indemnity principle) and this phase is now completely open to the judge to assess as they see fit. For example, the judge might conclude this phase could have been undertaken in 30 hours and a reasonable hourly rate for the case would be £225, giving a total of £6,750 (as opposed to the approved budget of £10,000).

This appears to open up far more costs claims, that have come in under budget, to challenge than might otherwise have been thought possible.

It also appears to be a positive encouragement to receiving parties to prepare bills that are not under budget, even if that means 'discovering' unrecorded time, to ensure there is no breach of the indemnity principle. If a bill is not under budget, the paying party would have the far more difficult task—compared to simply showing the costs claimed are under budget—of identifying a specific reason as to why there is a good reason to depart downwards from the budget.

The proportionality perspective

A further interesting element of this decision relates to the interrelationship between costs budgeting and proportionality. The original claim had been pleaded as having a value in the region of £10,000–£15,000. Judges undertaking costs management are meant to set budgets at a level that is proportionate to the nature of the claim (although taking into account issues such as complexity and not just the financial value). The claimant's budget had been approved in the sum of £155,673 (that alone might raise some eyebrows). The claim had subsequently settled by agreement for £7,000. The master at the original detailed assessment had assessed the costs at £52,133.97 on a line-by-line basis. Applying the proportionality cross-check, he concluded that this was disproportionate and applied a further reduction to £40,000.

He did this having concluded that the potential value of the claim was £10,000 to £12,000, at most £15,000. This further reduction was therefore not based on any conclusion that the pleaded value of the claim was unrealistic.

This raises the rather obvious question as to why £52,133.97 was deemed disproportionate on assessment, even allowing for the fact that the matter settled early, when the judge making the earlier costs management order had presumably decided a budget of £155,673 was proportionate.

In the earlier Court of Appeal decision of *Harrison*, it was observed at [52] that: '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'.

Although it may well be appropriate to revisit the issue of proportionality where a claim settles for significantly less than the pleaded value at the time the costs management order was made, it is perhaps surprising if this issue can be reviewed where there has been no such change. This suggests that approved costs budgets may provide rather less certainty as to what might be recovered than previously assumed. **NLJ**

Simon Gibbs is a costs lawyer with defendant costs consultants Gibbs Wyatt Stone and writes the Legal Costs Blog (*www.gwslaw.co.uk/blog*).