Neutral Citation Number: [2017] EWCA Civ 792

Case No: A2/2016/4547

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SENIOR COURT COSTS OFFICE
MASTER WHALAN
SCCO REF: MAW/1601086

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/06/2017

Before:

SIR TERENCE ETHERTON (MASTER OF THE ROLLS)
LADY JUSTICE BLACK
LORD JUSTICE DAVIS
(SITTING WITH MASTER GORDON-SAKER AS AN ASSESSOR)

- -

Between:

JACQUELINE DAWN HARRISON	**Respondent/ Claimant**
- and -	
UNIVERSITY HOSPITALS COVENTRY & WARWICKSHIRE NHS TRUST	**Appellant/ Defendant**

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- -

Alexander Hutton QC and Roger Mallalieu (instructed by **Acumension Ltd**) for the **Appellant**
Kevin Latham (instructed by **Shoosmiths Access Legal**) for the **Respondent**

Hearing date: 10 May 2017

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Approved Judgment

Lord Justice Davis:

Introduction

1. This appeal raises issues of some general importance in the context of costs. In particular, the two principal issues are ones which concern the relationship between costs budgeting and detailed assessment and which appear to have attracted sharply divided views among those specialising in this area. Ultimately, they are to be resolved by a process of interpretation of the relevant Rules and related Practice Directions.

2. The first issue can be summarised in this way. Where a Costs Management Order ("CMO") approving a costs budget has been made in the course of civil proceedings is a costs judge on a subsequent detailed assessment precluded from going below the budgeted amount unless satisfied that there is good reason for doing so? Or is there an entitlement to do so without any prior requirement of good reason for going below the budgeted amount?

3. The second issue is whether, with regard to costs incurred prior to the budget ("incurred costs"), there is or is not a like requirement of good reason if a costs judge on a subsequent detailed assessment is to depart from the amount put forward at the relevant costs management hearing.

4. A third, and entirely discrete, point is also raised. This is as to when, for the purposes of the transitional provisions relating to proportionality contained in CPR 44.3 (7), a case is to be treated as "commenced".

5. The appeal is by the defendant NHS Trust from a decision of Master Whalan, sitting as a district judge of the County Court, pronounced on 16 August 2016. Because of the wider importance of the first two issues raised leave was given on 2 December 2016 for this appeal to come directly to this court. We were, in fact, told that a number of detailed assessments are currently on hold pending the outcome of this appeal. In addition, since the decision of Master Whalan there has been handed down the decision of Carr J in the case of *Merrix* v *Heart of England NHS Foundation Trust* [2017] EWHC 346 (QB), [2017] 1 Costs LR 91. On the first issue, she reached the same decision as Master Whalan reached in the present case: that is, that good reason *is* required. Although there is no appeal before this court from the decision in *Merrix*, it is necessary to consider whether or not that case was correctly decided on this point.

6. At the outset of the appeal hearing before us an application was made on behalf of the appellant to adduce further evidence. We refused that application for reasons given at the time.

7. The appellant was represented before us by Mr Alexander Hutton QC and Mr Roger Mallalieu. The respondent was represented by Mr Kevin Latham. The arguments, both written and oral, were carefully and thoroughly presented. In addition, this court had the benefit of sitting with Master Gordon–Saker (the Senior Costs Judge) as an assessor. Nevertheless, I should make clear that the conclusions I reach are my own.

Background facts

8. The respondent (claimant) had undergone a caesarean section at a hospital operated by the appellant (defendant) in April 2011. Complications arose. In due course the respondent brought clinical negligence proceedings against the appellant in the Northampton County Court. The claim form, with issuing fee, was sent to the court through the DX under cover of a letter dated 27 March 2013. The documents were stamped as received by the court on 2 April 2013 and the claim form itself was formally issued on 9 April 2013.

9. At all stages the claim for damages was expressly limited in value to £50,000. Liability was disputed. There was a costs management conference before HHJ Hampton sitting in the Northampton County Court on 18 August 2014. Amongst other things the parties were, by the judge's Order, given permission to rely upon their updated costs budgets (in Precedent H form) as presented and modified at the hearing. The total, including both incurred costs and estimated future costs, being put forward by the respondent's solicitors by way of time costs and disbursements came to some £197,000. Success fees and ATE insurance premium were not included. The judge recorded no comment on the figure relating to incurred costs: that amounted to some £108,000 of the figure of £197,000 then being put forward. No appeal was sought to be made against the judge's Order.

10. Shortly before trial fixed for July 2015 the case was settled. The appellant agreed to pay the respondent £20,000, together with costs on the standard basis. Mr Hutton - who had not acted below – was not able to enlighten us as to why a claim always limited to £50,000 and in due course assessed as sufficiently meritorious to justify payment to the respondent of £20,000 was not capable of settlement at a much, much earlier date. At all events, the respondent's solicitors then put forward in October 2015 a bill of costs of over £467,000 (including success fee and ATE premium). It was that Bill of Costs which eventually came before Master Whalan on detailed assessment.

The legislative scheme

11. Since, for present purposes, the outcome of this appeal depends on the application and interpretation of the relevant Rules (and associated Practice Directions) it is convenient to set them out at this stage. I do so in the form applicable at the relevant time.

12. By CPR 44.3 it is, among other things, provided as follows:

> "(2) Where the amount of costs is to be assessed on the standard basis, the court will –
>
> (a) only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred; and
>
> (b) resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party.

. . . . .

(5) Costs incurred are proportionate if they bear a reasonable relationship to –

(a) the sums in issue in the proceedings;

(b) the value of any non-monetary relief in issue in the proceedings;

(c) the complexity of the litigation;

(d) any additional work generated by the conduct of the paying party; and

(e) any wider factors involved in the proceedings, such as reputation or public importance.

. . . . .

(7) Paragraphs (2)(a) and (5) do not apply in relation to –
(a) cases commenced before 1st April 2013; or

(b) costs incurred in respect of work done before 1st April 2013,

and in relation to such cases or costs, rule 44.4 (2)(a) as it was in force immediately before 1st April 2013 will apply instead."

13. CPR 44.4 relates to factors to be taken into account in deciding the amount of costs. It provides in the relevant respects as follows:

"(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

(b) if it is assessing costs on the indemnity basis –

(i) unreasonably incurred; or

(ii) unreasonable in amount.

(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;

(b) the amount or value of any money or property involved;

(c) the importance of the matter to all the parties;

(d) the particular complexity of the matter or the difficulty or novelty of the questions raised;

(e) the skill, effort, specialised knowledge and responsibility involved;

(f) the time spent on the case;

(g) the place where and the circumstances in which work or any part of it was done; and

(h) the receiving party's last approved or agreed budget."

14. Rules as to costs management and costs budgeting are contained in CPR 3.12 – CPR 3.18. They have been amended from time to time, most recently with effect from 6 April 2017. The importance evidently being attached to the requirement to file budgets is illustrated by the provisions of CPR 3.14. CPR 3.15 relates to CMOs made by the court. That provided at the relevant time as follows:

"(1) In addition to exercising its other powers, the court may manage the costs to be incurred by any party in any proceedings.

(2) The court may at any time make a 'costs management order'. Where costs budgets have been filed and exchanged the court will make a costs management order unless it is satisfied that the litigation can be conducted justly and at proportionate cost in accordance with the overriding objective without such an order being made. By a costs management order the court will—

(a) record the extent to which the budgeted costs are agreed between the parties;

(b) in respect of budgets or parts of budgets which are not agreed, record the court's approval after making appropriate revisions;

(3) If a costs management order has been made, the court will thereafter control the parties' budgets in respect of recoverable costs."

By CPR 3.17 it was provided:

> "(1) When making any case management decision, the court will have regard to any available budgets of the parties and will take into account the costs involved in each procedural step.
>
> (2) Paragraph (1) applies whether or not the court has made a costs management order."

15. Of central importance for present purposes is CPR 3.18. That, at the relevant time, provided as follows:

> "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 budget for each phase of the proceedings;
>
> (b) not depart from such approved or agreed budget unless satisfied that there is good reason to do so.
>
> (Attention is drawn to rules 44.3(2)(a) and 44.3(5), which concern proportionality of costs.)"

16. We were also referred to various Practice Directions relating to costs management and costs budgeting. In particular, for present purposes, we were referred to paragraphs 7.3 and 7.4 of PD 3E as introduced by the time of the costs management hearing in this case which provided:

> "7.3 If the budgets or parts of the budgets are agreed between all parties, the court will record the extent of such agreement. In so far as the budgets are not agreed, the court will review them and, after making any appropriate revisions, record its approval of those budgets. The court's approval will relate only to the total figures for each phase of the proceedings, although in the course of its review the court may have regard to the constituent elements of each total figure. When reviewing budgets, the court will not undertake a detailed assessment in advance, but rather will consider whether the budgeted costs fall within the range of reasonable and proportionate costs."
>
> 7.4 As part of the costs management process the court may not approve costs incurred before the date of any budget. The court may, however, record its comments on those costs and will take those costs into account when considering the reasonableness and proportionality of all subsequent costs."

It is also to be noted that in paragraph 7.6 provision is made for the parties revising their budgets in respect of future costs "upwards or downwards" and for submission of amended budgets for approval accordingly.

<u>Decision below</u>

17. Master Whalan took the view that so far as budgeted costs were incurred CPR 3.18 precluded him from subjecting them to a "conventional" detailed assessment at the behest of the appellant as paying party unless good reason for doing so was shown. (At the same time, however, he indicated that he was receptive to arguments on individual items to the effect that good reason did exist.) As to incurred costs, Master Whalan – to an extent founding himself on some observations of Sales LJ giving the judgment of the court in *Sarpd Oil International Limited* v *Addax Energy SA* [2016] EWCA Civ 120, [2016] 2 Costs LR 227 – said that although incurred costs could not themselves have been approved as such at the case management conference nevertheless they would have featured in the overall budget put forward at the conference and thus had a "certain status". Master Whalan indicated that, with regard to the incurred costs, it was "in practical terms" required that good reason likewise should be shown if there was to be a departure from what was set out in Precedent H. As to the date when the case commenced, Master Whalan held that in the present case that was when the letter was sent (on 27 March 2013) by a prescribed method which would lead to next-day delivery and so was prior to 1 April 2013. In the result, Master Whalan assessed the recoverable costs at £420,168 (including success fee and ATE premium). He ordered the appellant to pay the costs of the assessment.

Outline of Submissions

18. Mr Hutton argued before us that the costs judge was wrong on all three points.

19. As to the meaning of CPR 3.18 (b), he submitted that the word "budget" connoted an available amount or fund. If the costs figure fell within that amount there was, he said, no "departure" from it. Thus the purpose of CPR 3.18 (b) was, in effect, to set a cap on the amount which the paying party could expect to pay – unless, of course, the court was satisfied that there was "good reason" to the contrary. But no "good reason" he said, was required if it was being asserted that the recoverable costs should be *below* the budgeted amount: because then there was no "departure" from the budget.

20. Mr Hutton in general terms, by way of prefacing his arguments on interpretation, placed a good deal of reliance on what he said were the "realities" of the matter. Costs budgeting was an onerous requirement for court and parties, he said, which moreover had to be conducted in conjunction with general case management. Judges simply could not be expected to have the time to deal with costs budgeting in sufficient detail to make it fair for their approval of a budget to stand (unless displaced by good reason to the contrary) as the payable and recoverable amount on detailed assessment. As the Practice Direction makes clear, in reviewing budgets the court will not undertake a detailed assessment in advance. On the other hand, he said, a subsequent detailed assessment could properly involve itself, with the added benefit of hindsight, in a thorough appraisal of what had actually and reasonably been incurred: in contrast to engaging in an estimate of what might in the future be so incurred (which is what a CMO was directed at). He also noted in this respect that a CMO will not ordinarily concern itself with issues such as solicitors' hourly rates, as subsequently made clear in paragraph 7.10 of PD 3E. Further, a proper assessment of proportionality of costs could only, he argued, be made at the entire conclusion of the proceedings: thus a detailed assessment was also far better suited to that particular and important element of the overall exercise (viz. proportionality) with regard to the amount of costs to be paid.

21. He made the same observations with regard to incurred costs: with the additional point that the approval of the costs budget by the CMO would in any event not even have extended to such costs at all: see paragraph 7.4 of PD 3E. Overall, he submitted, any other conclusion with regard to incurred costs would lead to even more complex, lengthy, contentious and costly costs management hearings: with resulting adverse consequences for the obtaining of hearing dates and the general slowing down of the litigation process.

22. As to the date of the commencement of the case, he argued that the costs judge had simply misinterpreted the wording of the sub-rule: which, he submitted, was plainly directed at the date when the relevant proceedings were issued: a clear-cut and readily identifiable date. In this case, that was 9 April 2013.

23. Mr Latham submitted that the costs judge's interpretation of CPR 3.18 (b) was correct, and plainly so. He submitted that the appellant's interpretation both involved a distortion of the natural meaning of the words used and was contrary to the clearly identifiable underpinning purposes of costs budgeting. As to incurred costs, he accepted that they would not have been approved, as such, at the costs management hearing when the court reviewed the costs budget. He said, however, that such costs will have been taken into account at the costs management stage in assessing the total figures for each phase of the proceedings (under paragraph 7.3 of PD 3E): thus they do indeed have, as Master Whalan indicated, a "certain status" such that here too "good reason" was required if there was to be a departure from those figures on detailed assessment.

24. As to the date of the commencement of the case, he supported the approach of the costs judge.

The decision in *Merrix* (cited above)

25. So far as the first issue before us is concerned, that was precisely the point that fell for decision in the case of *Merrix*, decided on 24 February 2017 by Carr J. There is no room for distinction on the facts: either that case was rightly decided or it was wrongly decided. Mr Latham (of course) said that it was rightly decided. Mr Hutton (of course) said that it was wrongly decided. Certainly it is not a decision binding on this court.

26. Mr Hutton noted that by her decision Carr J had on appeal departed from the decision of a very experienced regional costs judge (A908M096): whose decision at first instance had itself in the interim been followed, albeit "with some hesitation", by another very experienced regional costs judge in another case (A90LE252).

27. Since the decision of Carr J is reported and readily available to anyone interested in questions of costs I do not propose here to detail her reasoning. She set out fully the background of the proposals of Sir Rupert Jackson; the contents of the relevant Rules and Practice Directions; and the competing arguments of counsel (which in truth appear to have tracked the competing arguments advanced to us). She reviewed a number of authorities cited to her. The core of her conclusion perhaps finds its clearest summation in paragraphs 67 and 68 of her judgment. She considered it plain from the wording of CPR 3.18 that no distinction was made between the situations where it was claimed on detailed assessment that the budgeted figures were or were

not to be exceeded. At a later stage, she indicated that she accepted that costs budgeting was not an advance detailed assessment; but, as she put it at paragraph 78, there was no suggestion that there should not be any detailed assessment: "on the contrary, the question is how that assessment should be conducted".

Disposition

(1) First issue

28. I am in no real doubt that Master Whalan reached the right conclusion on this issue and that the conclusion of Carr J in *Merrix* was also correct, for the reasons which she gave.

29. I have to say that I was a bit bemused by some of the aspects of the arguments advanced before us. At times the citation not only of authorities but also of what were described as "extra-judicial documents" almost descended into a kind of arms race in collecting views or comments which might lend support to one point of view with regard to costs budgeting in preference to another. Indeed at one stage we were taken by counsel to a number of comments of Sir Rupert Jackson himself, writing extra - judicially, seemingly with an aim on the part of counsel to extracting some kind of clue as to what he had intended or what he would have intended or what he understood had been intended. This is, with respect, beside the point. What we have to do is construe the wording of CPR 3.18 (produced, no doubt, under the auspices of the Civil Procedure Rule Committee): thus on basic and ordinary principles the legislative intention is to be gathered from the words used. For this reason alone, therefore, I was not much moved by Mr Hutton's courteous but firm insistence that to understand the rule one has to understand the "realities"; and for that purpose one had, he said, to be at the "coal-face" of costs management decision making (which virtually all appellate and many High Court judges are, I accept, not).

30. In many ways, Mr Hutton's submissions in fact came close to an attack if not on the whole principle of costs budgeting then at all events on the efficacy in practice of costs budgeting. That of course has been the subject of extensive debate over recent years. But I do not need to go into the competing arguments – themselves discussed both in, for example, the Civil Courts Structure Review: Final Report of Lord Justice Briggs (2016) and in Sir Rupert Jackson's own recent book on The Reform of Civil Litigation (2016) – simply because, put shortly, the system is now enshrined in the Civil Procedure Rules. At all events Mr Hutton asserted – and assertion is what it was – that the whole costs management system not only has been but still is "creaking". He further said that if a CMO were to convey the notion that, for any subsequent detailed assessment, the matter was in effect to be regarded as already determined by the approval of budgets in the CMO then that would cause parties to devote even more time and resources and argument to costs management hearings, to the detriment of the prompt processing of the litigation and at the risk of overwhelming the courts: whereas if all were left to detailed assessment then matters could, he sought to say reassuringly, be assessed fully and fairly and properly by expert costs judges on an itemised basis , and with an informed view of issues such as proportionality.

31. The premise underpinning Mr Hutton's argument thus was that CMOs in effect are but summary orders which at best give no more than a snapshot of the estimated range

of reasonable and proportionate costs: often reached, as Mr Hutton would have it, on a broad brush or rough and ready judicial approach after a hearing which would have been limited in time, rushed in argument and incomplete in the information advanced.

32. It is to be noted that this sceptical appraisal, although no doubt shared by some, is not shared by others who undoubtedly can be said to be at the "coal-face". Indeed, it is roundly said in the latest edition of Cook on Costs (2017 ed, at pages 230-1) that to sanction, at detailed assessment, a departure from the budget in the absence of good reason would overlook (among other things) that budgeted costs are already required to have regard both to reasonableness and to proportionality; that the aims of costs budgeting include a reduction in detailed assessments and of issues raised in points of dispute; and that the element of certainty to clients (in the form of knowing what costs they are likely to face, in terms of payment or recovery) would be removed. As also posed by Master Gordon-Saker in the case of *Collins* v *Devonport Royal Dockyard Limited* (8th February, 2017: AGS/1602954), to which we were referred in the written arguments: "… what would be the point of costs budgeting (and the considerable resources it has required) if the resulting figures amount to nothing more than a factor, guidance or cap at detailed assessment?" He rejected in that particular case the argument of the defendant, in seeking on detailed assessment to reduce an agreed budget figure, that an agreed or approved budget was, for the purposes of detailed assessment, nothing more than guidance.

33. These sentiments are also reinforced by, for example, 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 by the requirement under the Rules and Practice Directions for revised budgets, upwards or downwards, to be filed and approved where the estimates change. In this regard, it is also in my view particularly important overall to bear in mind that a judge who is being asked to approve a budget at a costs management hearing must take into account, in assessing each budgeted phase, considerations both of reasonableness *and* of proportionality. Proportionality may be, to give but one example, of particular potential relevance where the costs prospectively claimed are very large and the amount at stake in the claim relatively small.

34. Moreover, if approval of a costs budget by a CMO has the more limited status which the appellant would ascribe to it then that would have a potentially adverse impact on parties thereafter attempting to agree matters without requiring a detailed assessment. Although Mr Hutton queried if that was one of the perceived prospective benefits of the costs budgeting scheme, it seems to me - as it did to the editors of Cook on Costs - wholly obvious that it was indeed designed to be one of the prospective benefits of cost budgeting that the need for, and scope of, detailed assessments would potentially be reduced.

35. Against that context, I turn to the critical issue of the actual wording of CPR 3.18 (b). Mr Hutton's arguments were to the effect that there is a degree of ambiguity in the language used, justifying a purposive approach to its interpretation. Since, for the reasons I have sought to give above, the purposive approach which he advocates rests on very shaky foundations that hardly assists him. But in any event I do not consider there to be any real ambiguity in the words at all.

36. The appellant's argument has this initial, and unattractive, oddity. If it is right, it involves a most unappealing lack of reciprocity. It means that a receiving party may only seek to recover more than the approved or agreed budgeted amount if good reason is shown; whereas the paying party may seek to pay less than the approved or agreed budgeted amount without good reason being required to be shown. It is difficult to see the sense or fairness in that. Nor does this argument show much appreciation for the position of the actual parties to the litigation – not just the prospective paying party but also the prospective receiving party - who need at an early stage in the litigation to know, as best they can, where they stand: precisely one of the points validly made in Cook on Costs (cited above).

37. The appellant's argument requires that the word "budget", as used in the then version of the Rule, merely connotes an available fund. But given that "good reason" is, as conceded, required if the amount claimed on detailed assessment exceeds the approved budget that of itself surely carries with it the notion that the word "budget" comprehends a figure. Moreover, the words "depart from" are wide - or, to put it another way, open-ended. As Mr Latham pointed out, had the intention really been that good reason is required only in instances where the sum claimed exceeds the approved budget then the Rule could easily and explicitly have said so. Further, the Rules in any event provide elsewhere for costs capping cases: it seems odd indeed to include a further variant of costs capping by this route. Yet further, and as indicated above, the appellant's argument bases itself almost entirely on the perceived advantages to the paying party with scant, if any, regard to the position of the receiving party: who no doubt will have placed a degree of reliance on the CMO. From the perspective of the receiving party it is all too easy to see that the paying party is indeed seeking to "depart from" the approved budget in endeavouring to pay less than the budgeted amount.

38. There is also nothing, in my view, in CPR 44.4 (3)(h) to tell against this interpretation. In fact, to read that sub-rule as requiring the approved or agreed budget to be considered only as a guide or factor and no more would involve a departure from the specific words of CPR 3.18. In this respect, it is in fact to be noted that the words of CPR 3.18 (a) positively mandate regard to the last approved or agreed budgeted cost for each phase of the proceedings. The two Rules are perfectly capable of being read together.

39. Consequently, since the meaning of the wording is clear and since it cannot be maintained that such a meaning gives rise to a senseless or purposeless result, effect should be given to the natural and ordinary meaning of the words used in CPR 3.18. In truth, that natural and ordinary meaning is wholly consistent with the perceived purposes behind, and importance attributed to, costs budgeting and CMOs.

40. Such a conclusion also accords with authority (albeit none binding on this court): not only in the form of the decisions in *Merrix* and *Collins* but also in the form of the remarks of Coulson J in *McInnes* v *Gross* [2017] EWHC 127 (QB). In that case, in the context of considering an interim payment on account of costs, Coulson J in terms said, at paragraph 25, that the significance of CPR 3.18 "cannot be understated" and meant that, where costs are assessed, the costs judge "will start with the figure in the approved costs budget." He roundly rejected the argument of the paying party that detailed assessment "will start from scratch." I agree with those observations of Coulson J.

41. Mr Hutton sought, however, to rely on the judgment of Moore-Bick LJ (with whom Aikens LJ and Black LJ agreed) in the case of *Henry* v *Newsgroup Newspapers Limited* [2013] EWCA Civ 19, [2013] 2 Costs LR 334. That was a case concerning the then Pilot Scheme on Costs Management. It was said (at paragraph 16) to be implicit in that scheme that the court should not normally allow costs in an amount which exceeded what has been budgeted in each section. However, Moore-Bick LJ was simply not concerned in that case with a position where the recoverable costs were said to be less than the budgeted amount (a point on which there had been no argument). It is true that later on in that paragraph Moore-Bick LJ, in dealing with costs reasonably and proportionately incurred, said:

> "Thus, 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."

But those remarks were plainly obiter; and in any event it is most doubtful if they were directed at the situation which arises in the present case: they may well simply relate to costs actually incurred and the consequent application of the indemnity principle (which of course would be capable of being a good reason for departing from the approved budget).

42. As for the citation by Mr Hutton of the same judge's remarks in *Troy Foods* v *Manton* [2013] EWCA Civ 615, [2013] 4 Costs LR 546, that was a decision made on an application for permission to appeal and without adversarial argument. Moreover, Moore-Bick LJ's remarks were guarded in saying that costs judges should not treat prior approval of a budget as demonstrating *without further consideration* (my emphasis added) that costs incurred are reasonable and proportionate simply because they fall within the scope of the approved budget. This decision in any event was one which it does not appear the judge gave permission to cite as an authority. At all events, it has in my view no authoritative value for present purposes.

43. I therefore consider that, overall, the costs judge was right in his conclusion on this particular point.

44. Further, Mr Hutton's argument seemed to me to have two potential wider weaknesses. First, aspects of it seemed to be almost asserting that unless the Rules were interpreted as he argued a CMO approving a budget would operate in effect to replace the detailed assessment. That clearly is not right: as Carr J pointed out in *Merrix*. The effect, rather, is as to *how* the detailed assessment is conducted. Second, and linked to the first point, the whole argument, in my opinion, tends to downplay the significance of the "override" built into the wording of CPR 3.18 (b). Where there is a proposed departure from budget - be it upwards or downwards - the court on a detailed assessment is empowered to sanction such a departure if it is satisfied that there is good reason for doing so. That of course is a significant fetter on the court having an unrestricted discretion: it is deliberately designed to be so. 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. Moreover, while the context and the wording of CPR 3.18 (b) is different from that of CPR 3.9 relating to relief from sanctions, the robustness and relative rigour of approach to be

expected in that context (see *Denton* v *TH White Limited* [2014] EWCA Civ 906, [2014] 1 WLR 3926) can properly find at least some degree of reflection in the present context. Nevertheless, all that said, the existence of the "good reason" provision gives a valuable and important safeguard in order to prevent a real risk of injustice; and, as I see it, it goes a considerable way to meeting Mr Hutton's doom-laden predictions of detailed assessments becoming mere rubber stamps of CMOs and of injustice for paying parties if the approach is to be that adopted in this present case. As to what will constitute "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

(2) Second issue

45. Although the second issue to an extent is connected with the first issue it seems to me that the same process of interpretation – that is, giving the wording of the Rules their natural and ordinary meaning – again indicates a clear outcome: this time, in favour of the appellant.

46. The starting point is this. CPR 3.18 (b), in its then form, relates to a departure from "the approved or agreed budget". But the costs incurred before the date of the budget were never agreed in this case. Nor were they ever "approved" by the CMO. On the contrary the focus of a judge making a CMO is on estimating the costs reasonably and proportionately to be incurred in the future: as the opening words of CPR 3.15 (1) make clear. In undertaking this exercise the court may have regard to costs stated already to have been incurred: and that may in turn impact on its assessment of what may be reasonable or proportionate for the future. But paragraph 7.4 of PD 3E is quite specific: as part of the costs management process the court may *not* approve costs incurred before the date of the budget costs management conference. What it can do is record in the CMO its comments (if any) on such costs: which are then be taken into account when considering reasonableness and proportionality: a direction now enshrined in the amended CPR 3.15 (4) and CPR 3.18 (c) with effect from 1 April 2017.

47. It follows, in my view, that incurred costs are not as such within the ambit of CPR 3.18 (in its unamended form) at all. Accordingly such incurred costs are to be the subject of detailed assessment in the usual way, without any added requirement of "good reason" for departure from the approved budget.

48. Mr Latham frankly acknowledged the force of the appellant's arguments in this regard. However he advanced an ingenious argument - although "nuanced" was his preferred epithet - seeking to uphold the approach of the costs judge on this point. In essence the argument was founded on paragraph 7.3 of PD 3E. That required the court's approval to relate (only) to the total figures for each phase of the proceedings. In doing that the court necessarily will take into account the constituent elements of each phase: which, he said, would include taking into account the incurred costs for the purposes of appraising reasonableness and proportionality. He also said that was not inconsistent with the use of words "budget" or "parts of budgets" used in the (then) version of CPR 3.15 and 3.18 respectively. By these means, he said, in the absence of recorded judicial comment in the CMO to the contrary the incurred costs will have acquired a special status: in that, while not "approved" as such, they will

have been taken into account by the court at the costs management hearing in managing the future estimated costs.

49. With respect, this will not do. Either incurred costs are within the ambit of CPR 3.18 (b) or they are not. Since they are not approved budgeted costs, by the terms of paragraph 7.4 of PD 3E and of the Rules, they are not within that sub-rule.

50. In reaching his conclusion, the costs judge was clearly influenced by certain obiter remarks of Sales LJ delivering the judgment of the court in the case of *Sarpd Oil* (cited above) at paragraphs 41-44 of the judgment. That case did not in fact involve a detailed assessment as such but related to an issue on security of costs. I should also note that the budgeted costs in that case had been approved by the judge as part of an agreed CMO. At paragraph 43 Sales LJ indicated in general terms that, where positive comments were made in the CMO as to incurred costs, the receiving party would have the legitimate expectation of being likely to recover such costs if successful in the litigation. That having been said, at paragraph 44 of the court's judgment it was then said:

> "Parties coming to the first CMC to debate their respective costs budgets therefore 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 in their respective budgets and in relation to the estimated costs elements. The rubric at the foot of Precedent H also makes that clear, since it requires signed certification of the positive assertion that "This budget is a fair and accurate statement of incurred and estimated costs which it would be reasonable and proportionate for my client to incur in this litigation."

Similar points were made at paragraphs 47 and 50 of the judgment.

51. One can see that the wording used in Precedent H might tend to support such a view. But it does not accord with the language of paragraph 7.4 of PD 3E or CPR 3.15 or CPR 3.18: nor does it sit comfortably with the expressed entitlement (but not obligation) of the judge conducting the costs management hearing to record comments on incurred costs which, if made, will then be "taken into account" when considering reasonableness and proportionality.

52. I add that 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.

53. Costs budgeting, to be performed properly, undoubtedly places a real burden on the parties and court. It would potentially greatly extend that burden if incurred costs were to be subjected to the same degree of preparation and appraisal as budgeted costs. One can understand that there are principled arguments which nevertheless could favour such an approach: but there are also competing arguments. At all events, the then and current versions of the Rules and Practice Direction clearly sharply

distinguish, for these purposes, incurred costs from estimated budgeted costs. I therefore think, with all respect, that those particular obiter comments of Sales LJ in *Sarpd Oil* may have gone too far in so far as they suggest otherwise in terms of how costs management hearings are to be approached in this respect.

54. I should add that it seems that those remarks of Sales LJ in *Sarpd Oil* with regard to incurred costs gave rise to a degree of disquiet. The matter came to the attention of the Civil Procedure Rule Committee. It considered that the consequences of those observations in *Sarpd Oil* were "unexpected". It also considered that the effect of those observations would be to complicate, not simplify, costs management and might undermine desirable attempts to agree costs budgets. The outcome of the Report of the relevant sub-committee of 9 December 2016 was to recommend that incurred costs indeed should be “decoupled” from budgeted costs so that the court's budgeting would only relate to the costs to be incurred (but retaining the court's power to comment on previously incurred costs, which could provide a "steer" thereafter): thus restoring the position to the perceived status quo ante. This is designed to be made clear beyond argument for the future by the subsequent amendments to CPR 3.15 and CPR 3.18 with effect from 6 April 2017. As will be gathered, I in fact consider, and disagreeing with the obiter remarks of the court in *Sarpd Oil*, that the status quo ante was in any event to the same effect.

(3) Third issue

54. I turn finally to the third issue. Was this case “commenced", for the purposes of CPR 44.3 (7)(a), before or after 1 April 2013?

55. The point is of potential practical importance to the parties. If the case was commenced before 1 April 2013 then it is common ground that the proportionality exercise to be conducted (cf. *Lownds* v *Home Office* [2002] EWCA Civ 365, [2002] 1 WLR 2450) is likely to be more favourable in outcome to the respondent as receiving party than that arising under the current CPR 44.

56. The general position, under the Civil Procedure Rules, is that proceedings are started when the court issues a claim form at the request of the claimant: see CPR 7.2 (1). A claim form is issued on the date entered on the form by the court: CPR 7.2 (2). In the present case that was indisputably 9 April 2013. An exception, with regard to the "bringing" of proceedings for the purposes of the Limitation Acts, is conferred by paragraph 5.1 of PD 5A (cf. *Barnes* v *St Helen's Metropolitan BC* [2006] EWCA Civ 1372, [2007] 1 WLR 879). But no other exception is provided.

57. At first sight and indeed at second sight, therefore, this would seem to be fatal to the respondent’s argument. Much emphasis was placed on the position where, for example, there was industrial action at the issuing court or where (as no doubt here) the sheer volume of claim forms being submitted at the time to the relevant court caused delays in formal issue. But that kind of consideration has only attracted an exception in the context of the Limitation Acts. Thus in *Salford CC* v *Garner* [2004] EWCA Civ 364, [2004] HLR 35 the claim form desired to be issued was handed in to the County Court on 7 November 2002 (the crucial time limit expiring on 8 November 2002) but the claim form itself was only actually issued on 11 November 2002. The Court of Appeal held that the “beginning” of the proceedings, for the

purposes of s. 130 of the Housing Act 1996, was co-extensive with "starting" proceedings under CPR 7.2. As Maurice Kay LJ stated, at paragraph 35:

> "…Where there is a general provision aimed at a point of time at which proceedings are started it follows that the assimilation of when proceedings are begun and when they are started in conclusive. The extended meaning, given specifically in the context of the bringing of proceedings for the purposes of the Limitation Act, has no bearing on the present circumstances…"

58. Mr Latham nevertheless maintained that the language of CPR 44.3 (7)(a) is by reference to "cases commenced" before 1 April 2013: not to "proceedings started" (the language of CPR 7.2). That, he says, makes all the difference. He says that such language connotes a distinction between steps taken by a claimant to commence a claim and steps taken by a court to effect issue of a claim.

59. It is, however, in my opinion, impossible to see how or why it should. Mr Latham accepted in argument that the use of the word "cases" (as opposed to "proceedings" or "claims") in CPR 44.3 (7)(a) was not of significance. But that concession of itself involves an acceptance that total consistency and precision of language is not necessarily to be expected in this context. Further, it is impossible to divine any sensible differentiation in this context between the word "commenced" and the word "started" (or, indeed the word "begun"). They here mean the same thing: just as they did in the context of the decision in *Salford CC* v *Garner* (cited above).

60. Mr Latham's point was not assisted by his having some difficulty in oral argument in formulating the precise date when, on his argument, the case was commenced for the purpose of this sub-rule. Initially he said that it was the date when the documents were actually received (not necessarily stamped as received) by the court; then he said that it was the date of actually sending the documents by normal process whereby they would be received in the ordinary course of delivery; then he said that it was when receipt was to be presumed. But, even leaving aside those difficulties, the argument can identify no reason for not equating for these purposes the language of CPR 44.3 (7)(a) with that of CPR 7.2. Moreover, so to read the wording of CPR 44.3 (7)(a) has the very decided advantage of achieving clarity, certainty and finality. The opposite interpretation has the opposite consequences.

61. I note that in CPR 3.12 – which itself relates to costs management – various transitional provisions apply to a "claim" which is "commenced" (although in one sub-paragraph the reference is to "proceedings commenced"): Mr Latham seemed reluctant to give those words in that particular rule a meaning other than that connoted in CPR 7.2. In the course of argument Black LJ also referred to CPR 25.2, which relates to interim remedies. That, all within the same rule, refers, without any apparent differentiation in actual meaning, variously to "proceedings started"; to a "claim made"; and to a "claim commenced": a lack of differentiation maintained by the commentary at 25.2.6 of the White Book. This yet further illustrates that a lack of total consistency of language for these purposes has no real bearing on the clear underpinning intent and meaning.

62. In my view, therefore, it is plain that a case is "commenced" for the purposes of CPR 44.3 (7)(a) when the relevant proceedings are issued by the court. That, in the present

case, yields the date of 9 April 2013. The proportionality provisions of CPR 44 (2)(a) and (5) apply accordingly.

Conclusion

63. I would dismiss the appeal on the first ground advanced but allow it on the second and third grounds advanced. I would accordingly remit the matter to the costs judge for further assessment on this basis.

Lady Justice Black:

64. I agree.

Sir Terence Etherton MR:

65. I also agree.