

Case No: A30MA814

**IN THE HIGH COURT OF JUSTICE**  
**CHANCERY DIVISION**  
**MANCHESTER DISTRICT REGISTRY**

Manchester Civil Justice Centre  
1 Bridge Street West  
Manchester M60 9 DJ

Date: 18/11/2015

**Before :**

**HIS HONOUR JUDGE PELLING QC SITTING**  
**AS A JUDGE OF THE HIGH COURT**

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**Between :**

**(1) CAPITAL FOR ENTERPRISE FUND A LP**  
**(2) MAVEN CAPITAL PARTNERS UK LLP**  
**- and -**  
**BIBBY FINANCIAL SERVICES LIMITED**

**Claimants**

**Defendant**

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**Mr Nicholas Trompeter** (instructed by **Rosenblatt Solicitors**) for the **Claimants**  
**Mr Simon Mills** (instructed by **Shoosmiths**) for the **Defendant**

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**Approved Judgment (Costs)**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

## HH Judge Pelling QC:

### Introduction

1. There are two issues concerning costs that remain outstanding. The first is whether in the circumstances I should give an indication that I would have been willing to order an increase in the Defendant's budget had such an application been made and secondly whether and if so in what amount I should order the Claimant to pay an interim payment on account of costs. At the hand down of the main judgment in this case I directed that the Defendant should recover 70% of its costs of and occasioned by the claim.
2. The Defendant's case is that (a) I should give the indication sought; (b) that I should direct the Claimant to pay a sum on account of costs and (c) the amount so ordered should be (i) 90% of the sum originally budgeted (ii) increased by the amount of the additional costs incurred by the Defendant and in respect of which they could but did not seek an increase in budget. The Claimant's case is that (a) I should not give the indication sought; (b) I should not direct an interim payment; but (c) if I do, it should be for no more than 70% of the sums contained in the Costs Management Order.

### The Indication Point

3. It is common ground that:
  - i) The Court does not have jurisdiction to amend an approved costs budget after trial – see Elvanite Full Circle Limited v. AMEC Earth & Environmental (UK) Limited [2013] 4 Costs LR 612, for the reasons identified by Coulson J at paragraph 39;
  - ii) The only power to depart from a budget is that conferred by CPR r.3.18 which confers such a power only on a court “... *when assessing costs on the standard basis*” and even then only where “...*there is good reason to do so*”.

In this case, as all parties either expressly or impliedly recognise, the only judge that will assess the Defendant's costs on a standard basis will be a costs judge in the event that costs cannot be agreed and assessment proceedings are commenced by the Defendant. It follows that (i) no one has jurisdiction to amend the Defendant's approved costs budget after trial; and (ii) I do not have jurisdiction to depart or direct the costs judge to depart from it.

4. Mr Mills' submission is that I nonetheless have jurisdiction to give an indication or at any rate am entitled to order an interim payment on account of costs on the basis that such a departure will be authorised. In my judgment some care is required here. Although Coulson J was willing to express his views as to whether there should be such a departure in Elvanite (ante), that was only on the basis that the parties were agreed that he should do so. Whilst I accept that the parties cannot confer on a court a jurisdiction it does not have by agreement, I consider the level of agreement between the parties in Elvanite severely limits its as an authority for the proposition advanced by Mr Mills because the issues of jurisdiction was not considered or in dispute. Similar considerations apply to Board of Trustees of National Museums and Galleries

on Merseyside v. AEW Architects and Designers Limited [2013] EWHC 3025 (TCC); [2014] 1 Costs LO 39 because there both parties had applied for an increase in budget, the application was not determined through oversight neither was challenging the other's revised budget. Thus again the jurisdictional issues that arise were not in issue between the parties as far as I can see.

5. In addition, real caution is needed in this area because (absent express or implied agreement of the parties to an indication being given) the effect of an indication by a trial Judge could be construed as being an interference with the independent decision making of the judge actually tasked with deciding whether to depart was justified. Whilst I can see that it might be said of this approach that it might force the commencement of detailed assessment proceedings that could otherwise be avoided, that has to be balanced against the points that it was open to a party in the position of the Defendant either to apply to vary its budget or to oppose any application to vary previously made case management directions on the basis that it would necessitate an application to vary its costs budget and that there was insufficient time before trial to make such an application.
6. In the circumstances of this case, I consider it inappropriate for me to give the indication sought. First, I consider it doubtful that I have jurisdiction to do for the reasons that I have given. Secondly, if, contrary to my view, I do have jurisdiction then I decline to exercise it in the circumstances of this case for the following reasons.
7. If there is jurisdiction to do as the Defendant asks, it is a jurisdiction that should be exercised only in exceptional circumstances since (i) it amounts to an interference with the decision making of the costs judge; (ii) it undermines the costs code that now applies – if such indications were given on a routine basis then it would undermine the costs management regime for each and all of the reasons identified by Coulson J in paragraph 39 of his judgment in Elvanite (ante) as to why the court does not have jurisdiction to amend approved costs budgets after judgment; and (iii) in many and perhaps most cases there is a perfectly adequate remedy available namely to apply for a variation of the previously ordered costs budget in accordance with the costs code within the CPR. This leads me to conclude that the court should give the sort of indication sought by the Defendant here (if there is jurisdiction) only where the parties expressly or impliedly agree that it is appropriate to do so.
8. In this case there are two additional reasons for not exercising any jurisdiction that I might have to do as the Defendant asks me to do – (a) it could and should have opposed the Claimant's late application to adduce expert evidence on the basis (if such was the case) that if the application succeeded it would necessitate and application by the Defendant to vary its costs budget and there was insufficient time to make such an application before trial; or it could and should have made such an application; and (b) the evidence available does not sufficiently explain why the lateness of the application to adduce expert evidence caused an increase in costs of the sum alleged.
9. I make it clear that this judgment is not designed to give any sort of indication to the costs judge to whom any application to depart from the Defendant's approved budget is made. That application, if it is made, is one for the costs judge alone to resolve on the merits of the arguments and evidence before him or her.

## Interim Payment on Account

10. In my judgment the court has jurisdiction to direct an interim payment on account of costs and to do so without a separate Part 23 application being made – see CPR r. 44.2(8), which imposes on the court a requirement to make such an order in every case where it orders a party to pay costs subject to a detailed assessment. Secondly I do not accept the submission made on behalf of the Claimant that no such Order ought to be made because an initial letter written by the solicitors acting for the Defendant was written on behalf of another company within the Bibby Group. Those solicitors acted throughout on behalf of the Defendant and it is the Defendant that is entitled to recover its costs. There is no evidence at all that supports the implicit proposition advanced by the Claimant that the costs incurred in defending the claim were not costs incurred and payable by the Defendant.
11. It is submitted by the Claimant that the payment on account should be no more than 70% of 70% of the Defendant's approved budget costs. The Defendant submits that the sums should be 90% of its approved budget costs following the decision of Birss J in Thomas Pink Limited v. Victoria's Secret UK Limited [2014] EWHC 3258, assuming that I am against the Defendant in its submission that I ought to assess the interim payment on account on the basis that the approved budget will be departed from.
12. I accept the submission that the starting point is 70% of the Defendant's approved budget costs, because I have directed that the Defendant should recover 70% of its costs of and occasioned by the claim to be assessed at a detailed assessment on the standard basis. I do not accept that Thomas Pink Limited v. Victoria's Secret UK Limited (ante) establishes any principle other than that the sum that ought to be awarded by way of a payment on account should be higher in a case where there has been cost budgeting than in cases where there has not. Ultimately all costs issues involve a case and fact specific exercise of discretion.
13. In all cases where an interim payment is being considered it is necessary to balance the need to ensure that any sum ordered does not exceed the sum ultimately assessed to be due against a number of other factors including the fact that the receiving party has succeeded, and that it will be kept out of the money it is entitled to receive until the assessment proceedings are concluded. As to the first of these factors, the budget establishes a ceiling but it does not follow that the receiving party will be entitled to recover the whole sum budgeted.
14. Prior to 1 April 2013, it was common for payments on account to be directed in a range of between about 50% and about 70%. To direct an interim payment at 90% of the approved budget involved the court having a high level of confidence that the receiving party will recover at least 90% of its budgeted costs on assessment. In many cases (including in my judgment this one) the material available will not permit the court to have such a high level of confidence. 70% of the Defendant's approved budget is £206,072.30. In my judgment the appropriate interim payment is £165,000 – that about 80% of 70% of the Defendant's approved budget.