



Neutral Citation Number: [2015] EWHC 2896 (Ch)

Case No: HC-2013-000525

**IN THE HIGH COURT OF JUSTICE**  
**CHANCERY DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 14/10/2015

**Before :**

**CHIEF MASTER MARSH**

-----  
**Between :**

**Venus Asset Management Limited**  
**- and -**  
**Matthews & Goodman LLP**

**Claimant**

**Defendant**

**Sara Cockerill QC** (instructed by **Irvine Thanvi Nathas**) for the **Claimant**  
**Simon Wilton** (instructed by **Plexus Law**) for the **Defendant**

## **Approved Judgment**

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.

CHIEF MASTER MARSH

## **Chief Master Marsh:**

1. In this claim the Claimant makes allegations of professional negligence against the Defendant when acting as the Claimant's surveyor. The claim relates to the amount of compensation received by the Claimant following the compulsory purchase of land for the 2012 Olympics and the Claimant puts a value on it of about £4 million.
2. Directions were given at a Costs and Case management Conference before Deputy Master Cousins on 14<sup>th</sup> July 2014. He directed disclosure and exchange of witness statements to be followed by a stay for ADR until 30<sup>th</sup> April 2015. He did not give trial directions and a trial time estimate was not fixed. He directed there was to be a further case management hearing on the first available date after 1<sup>st</sup> June 2015 when further directions could be given in the event that the parties were not able to settle the claim during the period of the stay.
3. The Deputy Master had before him costs budgets from both parties. The Claimant's budget phases totalled £231,016.90 and the Defendant's £218,500.80. The Deputy Master made a costs management order pursuant to CPR 3.15(2) in the following terms:

“9. The court approves the parties' respective costs budgets, the claimant's costs budget being approved on the basis that it will need to be increased as indicated if the case is listed for a trial of 6 and not 4 days.”
4. The direction for a further case management hearing specified that the court would “... make further directions for trial and also consider any application to revise the costs budgets.”
5. The further directions hearing came before me on 9<sup>th</sup> September 2015. On that occasion further directions were given in relation to expert evidence and trial. For present purposes, those directions are uncontroversial save to note that following a careful review of the evidence which may be called at the trial, the trial time estimate was fixed at 8-9 days, a considerably longer estimate than had been envisaged at the earlier case management hearing. Prior to the hearing, both sides had issued applications seeking permission to vary their budgets. In the case of the Claimant two applications were made. The first was made by an application notice dated 1st May 2015 (although for reasons which are unclear it was not sealed by the court until 11<sup>th</sup> June 2015). That application sought a retrospective increase of the witness statement phase in the Claimant's budget by approximately £54,000. The Claimant's second application was issued on 4<sup>th</sup> September 2015 and sought approval to all the budget phases from CMC onwards largely concerning future costs. The Defendant's application was issued on 2<sup>nd</sup> September 2015 and sought increases to all the budget phases thus seeking approval both retrospectively and prospectively.
6. The hearing dealt with both sides' prospective variations. It was plain that some variation was inevitable arising not just from the directions given in relation to experts and the revised trial time estimate but also because the future cost of dealing with the claim was likely to be greater than could reasonably have been anticipated in 2014. Having given guidance as to the approach to be adopted for revising costs to be incurred I directed that:

“The parties are to submit revised costs budgets for the future stages of the action in the light of these directions by 30 September 2015 and to apply to the court for approval if the said costs budgets are not agreed in relation to future costs.”

7. There was insufficient time to consider the issues which arose concerning the applications for retrospective approval to costs already incurred. I therefore directed that:

“The parties are to make short written submissions on the principles to be applied to retrospective revisions of costs budgets by 4pm on 21 September 2015 whereupon the Court will decide on paper what, if any, revision for retrospective costs there should be.”

It was envisaged that following receipt of written submissions I would determine:

- (i) whether the court has power to revise figures in a budget which have been approved when, prior to an amended budget being filed and served, the relevant costs have been incurred (ie amending approved figures retrospectively to take account of the costs actually incurred being greater than the budgeted figure); and if so;
  - (ii) what principles apply to such variations, and
  - (iii) what variations would be permitted, if any, in each case.
8. Ms Cockerill QC for the Claimant and Mr Wilton for the Defendant have both lodged helpful written submissions and I am grateful to them.

### **Costs management**

9. The relevant provisions of CPR Part 3 and PD 3E are as follows:

**(a) CPR 3.12**

(2) The purpose of costs management is that the court should manage both the steps to be taken and the costs to be incurred by the parties to any proceedings so as to further the overriding objective.

**(b) CPR 3.15**

(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 budgets 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.

**(c) PD3E 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.

**(d) PD3E 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.

**(e) PD3E 7.5**

The court may set a timetable or give other directions for future reviews of budgets.

**(f) PD3E7.6**

Each party shall revise its budget in respect of future costs upwards or downwards, if significant developments in the litigation warrant such revisions. Such amended budgets shall be submitted to the other parties for agreement. In default of agreement, the amended budgets shall be submitted to the court, together with a note of (a) the changes made and the reasons for those changes and (b) the objections of any other party. The court may approve, vary or disapprove the revisions, having regard to any significant developments which have occurred since the date when the previous budget was approved or agreed.

## **Submissions**

10. Both Ms Cockerill QC and Mr Wilton have submitted that the court has power to approve retrospective amendments to budgets. Two authorities are relied upon. The first is a decision of Coulson J in Elvanite Full Circle Limited v Earth & Environmental (UK) Limited [2013] EWHC 1643 (TCC). In that case costs management had taken place under the pilot scheme set out in PD51G. Following the trial, at which the Claimant was entirely unsuccessful, the Defendant sought an order for costs and a revision to its budget which had been set at £264,708 to enable a claim for costs of £497,593.66 to be made. The judge accepted that there was power to revise the budget and considered the principles which should be applied. However, the provisions of the pilot scheme were different to the regime which came into effect on 22<sup>nd</sup> April 2014 and it contained the following provision:

### **Revision of Approved Budgets**

6. In a case where a costs management order has been made, at least seven days before any subsequent costs management hearing, case management conference or pre-trial review, and before trial, a party whose costs budget is no longer accurate must file and serve a budget revision showing what, if any, departures have occurred from that party's last approved budget, and the reasons for any increased budget. The court may approve or disapprove such departures from the previous budget."
11. Paragraph 6 of PD51G is drafted in wide terms. The language of the pilot scheme is quite different to the regime which followed it because PD3E places great emphasis on the management of future costs - costs to be incurred. The pilot scheme expressly contemplated the possibility of a budget being revised due to "departures" from the approved budget at any subsequent case management hearing and the court was given a discretion to approve, or disapprove, such departures. To my mind, Elvanite provides no assistance when considering the first question I have to decide, namely whether the current costs management regime permits the court to amend a budget in relation to costs incurred prior to filing and service of the amended budget.
12. The decision of Warby J in Tim Yeo v Times Newspapers Limited [2015] EWHC 2132 (QB) is of rather more relevance. In that case, budgets were approved by the court in February 2015. In July 2015 the Claimant applied to revise his budget both as to the costs already incurred, and the future costs, of dealing with an issue which had arisen. The judge framed the question he had to decide in the following way:
- "Can PD3E 7.6 be employed to obtain approval for costs that, by the time of the revised budget, are incurred costs? Paragraph 7.6 itself refers to "future costs", and PD3E 7.4 provides that the court "may not approve costs incurred before the budget"."
13. Warby J dealt with the competing submissions made to him in the following way:
47. "It seems to me that Mr Millar is right to submit that PD3E 7.6 is not an apt vehicle for obtaining the court's approval for costs incurred before the budget. The wording of that paragraph and of PD3E 7.4 point firmly in that direction. In support of his submission to the contrary Mr Browne has reminded me of what I said at [71] of my February judgment:
- "If work identified as a contingency is included in a budget but not considered probable by the court no budget for it should be approved. If the improbable occurs, in the form of an unexpected interim application, the costs will be added to the budget pursuant to PD3E 7.9, unless the matter involves a "significant development" within para 7.6<sup>[1]</sup>; in which case, if time permits, a revised budget should be prepared and agreed or approved."
48. I still take that view, but I do not think it supports Mr Browne's position. The key words in that passage are "if time permits". If the unexpected happens, and time does not allow for a revised budget to be approved before costs are incurred, then there will often, perhaps usually, be an unexpected interim application and PD3E 7.9 will apply. The fall-back position is CPR 3.18(b).
49. Mr Browne points out that this puts a high premium on swift action to prepare a revised budget. That must be right, but I do not see it as a good reason to adopt a different interpretation. Take this case. The issue is said to have arisen on 6 July. It has not been made clear to me why a revised budget could not have been prepared sooner than 10 July. There is

some force in Mr Browne's submission that the analysis I have set out is unsatisfactory for an individual paying privately, such as Mr Yeo. It leaves him in undesirable uncertainty about the recoverability of a large slice of cost until after the assessment stage. But I do not think that leads to a different conclusion. As I have said, such a litigant will normally have an unexpected interim application on which to peg reliance on PD3E 7.9. In any event the wording of the Practice Direction is too clear to allow me to accept that incurred costs can be approved in this way.”

14. Ms Cockerill QC’s principal submission is that the court has power to vary budgets retrospectively and to increase costs which have been incurred under a power given in PD3E 7.5 which permits the court to set a timetable or to give other directions for the review of budgets. She points to there being no explicit restriction on the court’s powers in PD3E7.5 and submits that future reviews of budgets may take whatever form the court considers to be appropriate, including reviewing costs already incurred. She accepts that paragraph 7.6 relates only to “future costs” which arise from “significant developments” in the claim. However, the Deputy Master’s order expressly contemplated the review of costs budgets and by making that order it is said that he brought the wide powers of revision in paragraph 7.5 into play.
15. Mr Wilton puts his submissions on a wider basis. Although accepting the “futuraity” in the language of CPR 3.15(1) and PD3E paragraphs 7.4 and 7.6, he says there is nothing in the CPR which expressly precludes the court from approving a variation to incurred costs and says it would be surprising if the rules and practice direction were to be interpreted so narrowly. He says:

“Whereas the court is in no position to manage costs incurred before the first CCMC it obviously is in a position to manage costs from that date onwards and whilst in many cases, particularly more straightforward cases, one costs budgeting hearing may suffice, that is unlikely to be so where a case is more complex, troublesome, or unpredictable in some way material to costs budgeting. In such a case, if costs management is to be done properly there is everything to be said for the court having the power in an appropriate case to revisit the budgets in respect of costs incurred since the first approved or agreed budget.”
16. Mr Wilton says the power to revise incurred costs is implicit in CPR 3.15(3) which provides that if a costs management order is made “... the court will thereafter control the parties’ budgets in respect of the recoverable costs.” He goes on to say there is an advantage if the court engaged with managing the litigation also has the power to manage the costs, both as to incurred and future costs and thus avoid leaving issues of costs to be resolved at a detailed assessment. Put another way, if there if the power is not implied into CPR 3.15(3), the court will only be able to review costs incurred on a detailed assessment after the claim has concluded. Finally he points to Lord Justice Jackson’s Final Report issued in December 2010 and the desire to manage the costs so that the claim proceeds within approved budgets. Mr Wilton submits:

“If the court could not also revisit costs retrospectively one would have an undesirable dislocation between the court’s case management powers and its costs management powers.”

## Discussion

17. The language used in CPR 3.12 and 3.15 points firmly to the court's costs management powers being limited to future costs. The phrase "costs to be incurred" is used in both rules. The way in which Appendix H is set out requires a party to distinguish in every phase between incurred and future costs. Furthermore, the relevant provisions of PD3E all point in the same direction and paragraph 7.4 expressly prohibits the approval of "... costs incurred before the date of any budget." The reference to "any budget" must to my mind be intended to apply equally to an initial budget as to a later budget in relation to which approval is sought. Paragraph 7.6 again only permits revisions to budgets "... in respect of future costs ..." whether such revisions are agreed or approved by the court. It is therefore not open to the parties to agreed revised budgets which include revisions to incurred costs.
18. It may have been the case that the proposal put forward by Jackson LJ in his Final Report envisaged the court would have wide powers to revise budgets, as appears to have been the case in the pilot scheme. However, neither the recommendations nor the pilot scheme are of any help. Recommendations are commonly not implemented in precisely the way envisaged and one of the purposes of a pilot scheme is to see whether changes may need to be made in the light of experience. That certainly appears to have been the case in relation to costs management.
19. Ms Cockerill QC's submission is based upon a narrow footing, namely the absence of restrictive words in paragraph 7.5 of the practice direction. However, that paragraph must be seen in its context. It is sandwiched between paragraphs 7.4 and 7.6. In the case of paragraph 7.4, a principle of general application is set out in the first sentence in terms which are expressly prohibitive. The reference to the "costs management process" is wide enough to include all aspects and stages of costs management. In paragraph 7.6 the power to revise a budget is expressly limited to future costs. It would be very surprising indeed if a provision placed between such clearly drafted directions could have been intended to achieve the opposite result to its immediate neighbours, but only if the court has set a timetable or given directions for future reviews of budgets. There is no necessity for the paragraph to be construed in the way Ms Cockerill QC proposes and it appears to me that paragraph 7.5 has a limited purpose, to enable the court to set up in advance a structure for future reviews of budgets in cases where it is clear that review will be needed.
20. In most cases, the costs management hearing will take place at an early stage of the claim when the full shape of the claim and the evidence which is relevant to it may not be known. Trial time estimates (which are critical to accurate budgeting of future costs) are difficult to assess accurately before the case has developed. At a CCMC the parties should have an idea of the witnesses they will wish to rely upon at the trial, but until statements have been exchanged it will not be clear which witnesses are needed and how long should be allowed for cross-examination. Similarly, the court may not give permission for expert evidence at the initial CCMC, but accept the possibility that such evidence may be justified at a later date. For these and many other reasons, as in this case, it may be appropriate to give a direction for costs budgets to be reviewed at a later date. But it would be strange if an accidental consequence of so doing would be to permit at the further hearing incurred costs to be reviewed, whereas in a case in which no direction was given under paragraph 7.5 such a power did not exist. The purpose behind PD3F 7.5 is clear, namely it provides the court with power

to consider on a later occasion budgeted costs for future work, that is work to be carried out after the date of service of a revised budget. The futurity of costs for these purposes is taken from the date of the budget, or the revised budget, not the date of the hearing because there will inevitably be a time lag between the budget being prepared and the hearing taking place.

21. At first sight, there is some force in Mr Wilton's submission concerning CPR 3.15(3) because the outcome of making a costs management order in that rule appears to be stated broadly. However, it seems to me that the words say nothing more than that costs management powers are additional to the courts other powers and may be used to manage costs to be incurred, that is costs to be incurred from the time when the power is exercised.
22. There is a distinction to be made between the setting of a budget, and the control of budgets, as opposed to fixing the costs which are incurred or to be incurred, or determining the amount of costs which may be recovered. It is inherent in the preparation of a costs budget that the costs incurred may be more or less than the budgeted figures and the costs which are recoverable may similarly be more or less than such figures. The final sentence of paragraph 7.3 of the practice direction states in clear terms that the court will not undertake a detailed assessment in advance and, furthermore, "... will consider whether the budgeted costs fall within the range of reasonable and proportionate costs." When the court approves a budget it is not just considering the reasonableness of the costs but also whether they are proportionate (applying the criteria in CPR 44.3(5)). The figures in the approved budget may be quite different to the anticipated cost of doing the work because such cost is not proportionate to the issues in the claim. To my mind this strongly suggests that a review of expenditure which has been incurred is not contemplated by the costs management regime.
23. Warby J acknowledged in Yeo that there may be a need for a party to act swiftly in order to apply for a prospective revision to a budget. In the case of an unexpected application paragraph 7.9 of the practice direction will assist and there is the fall-back power under CPR 3.18(b) on a detailed assessment. In most cases, however, it will be obvious long before the approved figure for a budget phase has been reached that the cost of carrying out the work is likely to exceed the budgeted figure. The measurement of costs as a claim progresses is an essential process, not least so as to ensure that the parties are kept informed about the position and are able to approve the excess cost before it is incurred. If there has been a "significant development" and both reasonableness and proportionality may justify an increase, an application under paragraph 7.6 of the practice direction may be made. In some cases it may seem obvious at the initial CCMC that significant developments were likely to occur and a direction may be given for a future review applying paragraph 7.6.
24. In this case, directions were given by the Deputy Master for disclosure, exchange of witness statements and a stay. It was obvious that further directions would be needed including provision for expert evidence a consideration of the trial time estimate. The intention was for future costs to be reviewed at the further CCMC, which indeed took place. It was not contemplated by virtue of setting a further hearing that costs incurred could be reviewed and in any event there was no power to do so.

25. For the reason I have given, and reinforced by the reasoning in Yeo, I determine that I do not have power to review costs incurred. It is therefore unnecessary for me to consider the remaining submissions made by the parties.