REVISION AND VARIATION OF COSTS BUDGETS ON ACCOUNT OF SIGNIFICANT DEVELOPMENTS: CONSEQUENCES OF FAILING TO OBTAIN THE COURT'S APPROVAL

Once a Costs Management Order ("CMO") has been made, parties are required to revise costs budgets if significant developments in the litigation warrant such revisions. If the revised costs budgets are not agreed, the Court's approval of the variations must be sought by the revising party. The requirements for revisions to costs budgets and approval by the Court were in 3PD Paragraph 7.6 and, following amendments in 2020, are now in CPR 3.15A (under the heading "Revision and variation of costs budgets on account of significant developments ("variation costs")").

Where there are significant developments in the litigation a failure by a party to obtain the Court's approval of variation costs may have drastic consequences in respect of the costs recovered. In this article I will address this issue by reference to the detailed assessment proceedings in ***Price v Saundry***, in which I was instructed on behalf of the First Defendant ("D1"), the paying party. This case is illustrative of the application of several of the costs management rules in practice.

Background

Price v Saundry concerned complicated trusts litigation, which had gone to the Court of Appeal (neutral citation [2019] EWCA Civ 2261) on one issue, although the detailed assessment proceedings related to the costs in the High Court, which had not been affected by the Court of Appeal's decision.

Proceedings had been commenced by the issue of a Part 8 Claim Form and the Claimant ("C") sought an order removing the then trustees of the Trust (which was a bare trust of residential properties). Further relief was sought in the form of: "Such further Orders (for example as to the sale of Trust assets and the taking of accounts and enquiries as appears to the Court to be necessary)".

The original focus of the litigation was the removal of the trustees. At a CCMC in October 2016 directions were given leading to a trial in respect of the removal of the trustees and a CMO was made with the total of C's incurred costs being £73,158.50 and the total of the approved budgeted costs being £52,640.

At a hearing approximately 11 months later, on 13 September 2017, the trial in respect of the removal of the trustees was vacated as the trust properties had been/were sold and the focus of the litigation shifted to "accounts and enquiries". Directions were given in respect of accounts and enquiries and very substantial costs were thereafter incurred, with the matter proceeding to a 3-day trial in February 2019.

Following the trial, in respect of the costs of the proceedings the Court made different Orders for 3 separate periods. For the first period the Court made no order as to costs; for the second period (from September 2017 when the focus of the litigation changed) C's costs were ordered to be paid by D1 on a standard basis and from approximately 15 months later C's costs were to be paid by D on the indemnity basis (as a consequence of obtaining a judgment more advantageous than a Part 36 offer).

Despite the period where there was no order as to costs, the costs claimed in C's bill of costs totalled more than £270,000. The costs claimed for the period in which standard basis costs were recoverable totalled £158,225.

The only CMO was made in October 2016; there was no further CMO following the hearing in September 2017. C did, in July 2018, serve further costs budgets but they were not agreed by D1, and C did not seek the Court's approval of the revisions.

C's bill of costs was not phased (i.e. it did not take into account the CMO) on the basis that it was said that the CMO related only to the "removal proceedings" (when there was no order as to costs) and would not be a useful comparison.

Points of Dispute and Replies

A preliminary issue arose in the detailed assessment proceedings. D1 contended in the Points of Dispute that the budgeted costs in the only CMO of October 2016 related to the application to remove the trustees and not in respect of the taking of an account and that there was "in effect no costs budget covering the costs that were the subject of the bill of costs". It was contended that unless the Claimant can persuade the court that there is good reason to depart from the approved costs budget only the hearing fee should be allowed.

C maintained in the Replies to the Points of Dispute that the budgets approved in October 2016 related to the removal of the trustees and "did not relate to the accounts and enquiries proceedings which did not commence until nearly a year later".

C stated that no costs management order was made in September 2017 and contended that the Court clearly did not consider that the accounts and enquiries should be costs managed. C argued that the default position is that Part 8 proceedings are excluded from costs management unless the court orders otherwise, therefore "no costs budgeting applied to the accounts and enquiries". C averred that it had taken the view that costs management should be dispensed with and that D1 had not responded.

It was also contended by C that D1 cannot say that no costs budget covers the period and that a good reason to depart from the budget is required.

D1's argument at preliminary issue hearing - CMO

I was instructed by D1 for the preliminary issue hearing, which was listed within the detailed assessment proceedings before District Judge Woodburn, Regional Costs Judge in Bristol.

The point of dispute referred to above did not refer to any specific rules. That point reflected the wording and sanction of CPR 3.14 provides that: "Unless the court otherwise orders, any party which fails to file a budget despite being required to do so will be treated as having filed a budget comprising only the applicable court fees".

However, C had of course filed a costs budget in the proceedings, which had led to the CMO. CPR 3.12 deals with the application of the costs management Section of Part 3 and PD 3E and significantly refers to the application of the Section and the PD to "proceedings".

I therefore argued that it was in fact CPR 3.18 that was applicable, which provides (as far as material) that:

"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 budgeted costs for each phase of the proceedings;

(b) not depart from such approved or agreed budgeted costs unless satisfied that there is good reason to do so"

It should be noted that CPR 3.18 only applies to standard basis costs, so the costs claimed on the indemnity basis (period 3) were not subject to the CMO.

It was contended that a CMO had been made in this case, therefore CPR 3.18 must apply to the detailed assessment of the Claimant's costs of the proceedings on the standard basis and, as such, the Court cannot depart from the budgeted costs approved or agreed unless satisfied that there is a good reason to do so.

I emphasised that the proceedings encompassed the removal part of the proceedings and the accounts part of the proceedings. Both aspects were within the same Claim Number. The Replies therefore incorrectly referred to the "accounts and enquiries proceedings". There were no separate proceedings.

In response to C's argument that costs management did not apply to Part 8 proceedings it was relevant to refer again to CPR 3.12 which provides that the Section and PD apply by default to Part 7 Proceedings and by CPR 3.12 (1)(A) they "apply to any other proceedings where the Court so orders". The court did so order, a CMO had been made and therefore it was argued that Costs Management applied to the proceedings.

It was not surprising that the court ordered that costs management should apply and made a CMO. Practice Direction 3E – Costs Management specifically provides at paragraph 2 (e) that costs management may particularly be appropriate in "any Part 8 claim… involving a substantial dispute of fact and/or likely to require oral evidence and/or extensive disclosure" – this litigation did.

Further relevant rules referred to were: CPR 3.12 (2), which provided that "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"; and CPR 3.15, which provides that "(1)…the court may manage the costs to be incurred (the budgeted costs) by any party in the proceedings" and goes on to state "(3) If a costs management order has been made the court will thereafter control the parties' budgets in respect of recoverable costs".

It should be note that CPR 3.12(2) has been amended slightly to include after proceedings "(or variation costs as provided in rule 3.15A)" albeit it is difficult to see why that was necessary.

Based on the rules, it was argued it was clear that once a CMO is made then costs management continues to be applicable and that C was therefore wrong to ignore the CMO and argue that no costs management was applicable from 14 September 2017.

I argued that the shift in focus of the litigation from 13 September 2017 was a significant development. As a CMO had already been made it was therefore for the parties to comply with the procedure provided for the revision of costs budgets (then PD 3E 7.6 and now CPR 3.15A) and seek the Court's approval if the revised costs budget was not agreed. The obligation was on each party to comply. The fact that D1 also did not comply was of no consequence to her costs as there was no costs order in her favour.

Court's conclusion on application of CMO

District Judge Woodburn accepted the arguments on behalf of D1. He held that there was clearly a significant development and C could not do nothing; the rules do not allow for that. It was erroneous for C to argue that the Court lost control of C's budget. It was recorded in the Order that it was held a CMO having been made on 17 October 2016, in assessing the C's costs on the standard basis the Court will not depart from the approved or agreed budgeted costs in that CMO unless satisfied that there is good reason to do so.

Good reason to depart

Having lost the argument that no CMO applied, C argued at the preliminary issues hearing that the Court should find that there were good reasons to depart from the costs budget approved in October 2016 in the circumstances.

It was argued on behalf of D1 that the Court should not find there was a good reason to depart. Reference was made to the guidance from *Harrison v University Hospital Coventry & Warwickshire NHS Trust*[2017] EWCA Civ 792; [2017] 1WLR 4456 in which it was held:"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."

As stated in the White Book (3.18.3) "thus the assessing court might consider the significance of the departure from the approved budgeted figure, the causes of it, and all the circumstances including in particular (a) the need for litigation to be conducted efficiently and at proportionate costs and (b) the need to enforce compliance with rules, practice directions and court orders."

It was contended that the departure from the costs budget was very significant, that litigation must be conducted at proportionate cost and those costs should be controlled by the Court. C's approach seemed to have been to avoid costs management and therefore prospective control of her costs. C knew from 13 September 2017 that there was a significant development that required revision to her costs budget and did not do so in breach of the PD. C had the opportunity to seek approval of revisions to her costs budget but did not do so. Instead, the Claimant sought to argue that costs management did not apply after 13 September 2017.

To allow good reason in this case, it was said, would amount to condoning a party ignoring the PD and circumventing prospective costs control, to then claim £158,225 in costs, without consequence.

Court's conclusion on good reason to depart

District Judge Woodburn again accepted the arguments on behalf of D1. He held that there were multiple opportunities to bring costs management back before the Court which were spurned by C. He commented that the provision of the PD was there for a reason and to accede to C's arguments for good reason would indulge their failure to comply, which he considered should be sanctioned. He held that he was not satisfied that there was a good reason to depart from the approved or agreed budgeted costs upwards.

Outcome

C sought permission to appeal, but permission was refused by the District Judge and a renewed application to the High Court was not made. Following the preliminary issue hearing the parties negotiated settlement of C's costs, with C having to accept a very substantial reduction to the costs claimed and no recovery of any costs of assessment.

Conclusions

C's failure in *Price v Saundry* to seek approval of revisions to her costs budget proved to be very costly. The effect of CPR 3.18 would have been greater still, and therefore the outcome would have been even worse for C if she had not had an indemnity costs order for period 3.

C should have understood from the rules that where there is a CMO the proceedings remain under that CMO even if there is a complete change of focus of the litigation.

There was no question that there was a significant development in the litigation. If there is a significant development, it cannot safely be ignored.

The parties did not address their minds to the Costs Management implications at the hearing when the focus of the litigation changed; if they had and Counsel had sought a direction which recognised the significant development and provided for compliance with PD Paragraph 7.6 then (now CPR 3.15A) by certain dates it would probably have avoided C being in the position she was in at detailed assessment.

Case management and costs management must be considered together. My experience is that message that some practitioners (and Judges) still forget.

C was ultimately left trying to argue for a good reason to depart. There is a great risk in seeking to rely on a good reason – as is apparent from the guidance in *Harrison* set out above.

A significant development is not the same as a good reason. In some circumstances, it might reasonably be argued that it would have been impractical or disproportionate to obtain the Court's approval of variations to a costs budget following a significant development and the Court accepts a good reason argument. However, a good reason argument is unlikely to be a sufficient fallback in most cases where a party has not sought the Court's approval of variations to its budget following a significant development.