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Varying Costs Budgets

The costs management regime has been with us for over two years now and despite opposition from a number of commentators there seems little doubt that it is here to stay for the foreseeable future.

Whilst some judicial guidance concerning initial costs budgets is now beginning to filter through, there has been very little in the way of reported decisions on the varying of budgets since the cases of *Elvanite Full Circle Ltd v AMEC Earth & Environmental (UK) 2013 EWHC 1643 TCC* and then *The Board of Trustees of National Museums and Galleries on Merseyside v AEW Architects and Designers Ltd & Others (2013) EWHC 3025 (TCC).*

Importantly, both those cases were decided within the TCC Costs Budget Pilot Scheme. The Pilot framework was slightly different to the current wider regime under the CPR but nevertheless there were a number of key principles arising from both cases which undoubtedly carry through. In particular:

- It is not enough to simply file and serve an amended budget. In cases where a costs management order has been made, the party wishing to vary will either need to obtain agreement from the opponent or seek Court approval;
- Approval to vary needs to be sought immediately it becomes apparent that the original budget has been or will be exceeded by a more than minimal amount;
- Retrospective variations are extremely unlikely to gain Court approval.

The current approach to seeking a variation to a costs budget is governed by CPR Practice Direction 3E Section 7.6: *"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."*

This wording raises some important points and questions that need to be considered carefully before embarking on an application to vary.

Firstly, a party may only amend a budget in respect of "future costs". This makes it plain that an application for retrospective variation is not an available option.

Secondly, what is meant by a "significant" development? The Court is certainly unlikely to entertain variations for very minor elements of costs.

Thirdly, what is a "development" in the litigation? The Court is likely to pay careful attention to the assumptions contained in the previous budget, and perhaps question why the additional costs were not sought originally as a contingency. There are of course a variety of ways that litigation can twist and turn but it seems likely that a fairly strict definition will normally be applied when determining what constitutes a development.

As far as practitioners are concerned, there are two fundamental pieces of advice that should be adopted in order to avoid these potential pitfalls in the first place. Number one is to try and ensure that all eventualities are covered as far as possible in the original budget by taking a careful approach to the costs being estimated and making sensible use of assumptions and contingencies. Number two is to carefully monitor the relationship between the agreed or approved budget and the ongoing costs, and ensure that any divergence is picked up early and dealt with accordingly.

The biggest concern raised by opponents of the regime has always been that it involves a lot of crystal ball gazing. That is a challenge that remains. Perhaps those opponents would be best off falling back on the old quote which says *"A good forecaster is not smarter than everyone else, he merely has his ignorance better organised."*

Interim Costs Payments – Post- LASPO

One of the less publicised changes to the CPR at the time LASPO was introduced was in relation to the provision for payments on account of costs.

There are two ways for a successful litigant to secure costs on account. The first is under CPR 44.2 (8), which gives the Court the power to order a payment on account of costs.

The second is under CPR 47.16, which gives the Court the power to issue an interim costs certificate. The latter approach can only be used once an application for a costs assessment hearing has been filed.

Prior to April 2013, the then Rule 44.3 (8) stated that where a Court had ordered a party to pay costs, it may order an amount to be paid on account of costs. The Rule is now found at 44.2 (8) and states that the Court will order a sum to be paid on account *unless there is good reason not to do so (author's emphasis).*

This represents a significant change, by introducing a clear presumption that a sum should ordinarily be paid on account of costs to the successful litigant and shifting the burden to the losing party to justify why such an order should not be made.

For losing parties wishing to put off the costs for another day, it may be possible in some cases to rely on the judgment in *Dyson v Hoover Ltd (2003) EWHC 624 (ch).* In that case, the matter had already entered the costs assessment process and the losing party disputed that an order under the then Rule 44. 3 (8) could be made. The Court agreed, and referred to the winning party's ability to seek an interim costs certificate under Rule 47.16 once the matter had been set down for an assessment hearing.

The *Dyson* case was decided pre LASPO and therefore prior to the key change mentioned above, and of course prior to the costs management regime whereby in multi track cases the Court will now often have knowledge of the parties' costs before a case concludes, in the form of a costs budget. This means there may now be less scope for a losing party to rely on *Dyson* as a means of delaying payment until further down the line.

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