

# Precedent T

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**Judith Ayling QC**

# Precedent T and budget variation

- CPR 3.15A introduced by Civil Procedure (Amendment No 3) Rules 2020 from 1 Oct 2020

(1) A party must revise its budgeted costs upwards or downwards if significant developments in the litigation warrant such revisions.

(2) Any budgets revised in accordance with paragraph (1) must be submitted promptly by the revising party to the other party for agreement and subsequently to the court in accordance with paragraphs (3) to (5)

# CPR 3.15A

(3) The revising party must

(a) serve particulars of the variation proposed on every other party using the form prescribed by PD 3E;

(b) confine the particulars to the additional costs occasioned by the significant development;

(c) certify, in the form prescribed by PD 3E, that the additional costs are not included in any previous budgeted costs or variation.

# CPR 3.15A

- (4) The revising party must submit the particulars of variation promptly to the court, together with the last approved or agreed budget, and with an explanation of the points of difference if they have not been agreed.

# CPR 3.15A

(5) The court may approve, vary, or disallow, the proposed variations, having regard to any significant developments which have occurred since the date when the previous budget was approved or agreed, or may list a further costs management hearing.

NB the oddity – the parties can agree the costs at CMO stage, and the Court has no power to intervene, except to make no CMO at all, see CPR 3.15, but it appears at revision stage the court can vary or disallow even where agreement has been reached

# CPR 3.15A(6)

(6) Where the court makes an order for variation, it may vary the budget for costs related to that variation which have been incurred prior to the order for variation but after the CMO

- Exception to no budgeting of incurred costs rule: see CPR 3.15A(6) and CPR 3.17(3), but a variation order can't remedy a budget as to developments which should have been covered at earlier approval or variation
- Court can vary down as well as up – incurred costs too?

# Significant development

- What is a significant development? Not defined despite mandatory terms of CPR 3.15A. Very fact specific. Threshold test.
- White Book note 3.15A.1 *'any event, circumstance or step which is of such a size and nature to go beyond the events, circumstances and steps which were taken into account expressly or impliedly in the budget previously approved or agreed. A development is taken into account impliedly if it is something that was or should have been anticipated by the applicant for revision at the time of a previously agreed or approved budget'*
- *Al-Najar v Cumberland Hotel* [2018] EWHC 3532 (QB) Master Davison
- *Persimmon Homes Ltd v Osborne Clark LLP* [2021] EWHC 831 (Ch) Master Kaye *'It is for the party seeking the variation to provide sufficient information and evidence with their application to satisfy the court that the variation is not simply an attempt to address a miscalculation or an overspend or to claw back previously disallowed costs.'*

# Significant development

- Obvious examples are (probably):
  - Grant of permission for additional expert
  - Adjournment of trial
  - Increase in length of trial
  - Far more documents disclosed than could reasonably have been foreseen
  - Change of position re causation justifying instruction of leading counsel
  - Withdrawal of admission

# Significant development

- Surveillance?
- *Purser v Hibbs* [2015] EWHC 1792 (QB) HHJ Moloney QC: D allowed to recover costs of surveillance on basis good reason for those costs not to have been inc in the budget (tho costs had been ordered on indemnity basis anyway)
- But in *Purser* C accepted P36; what if claim continues? Likely to be a significant development, esp if seeking additional directions. No good reason on DA if don't?

# Promptly

- Revising party must submit particulars of variation promptly to other parties and must use prescribed form; and submit particulars of variation promptly to the court
- What is promptly? What sanction if the revising party does not take the steps promptly but does take them?

# CPR 3.16(2)

- Unless the application is combined with an application for other directions a CM conference convened for it should be by phone or in writing

# Back to *Persimmon*

- RFI, costs budgets, additional CCMC, disclosure (Model A/B to C), sts, experts, PTR, trial prep, trial, ADR, : increase by £1.339m, so more than double original future
- Rely 3 SDs: RFI, further CCMCs, disclosure model
- Application 4 months after considerable costs incurred because needed to know what costs would be incurred: Master says wrong approach, should be prospective
- Whilst a SD may not have occurred, this will not prevent GR being shown on DA (para 97)
- 2 threshold questions – is there a SD; has the application been made promptly; then a discretion

# Sanctions

- What if no attempt has been made to comply at all and the budget has been departed from, but there was a significant development?
- D may say in PI why bother given QOCS?
- What if you wait and say there is good reason to depart rather than apply: highly risky given mandatory terms of r.3.15A? Could the Court on DA say if you didn't apply to vary then no poss of good reason?

# Questions?

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