St John's CHAMBERS

Amendments to Costs Budgeting Rules Coming into Force on 1st October 2020

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Published on 2nd October 2020

As of 1st October 2020 several amendments to the costs' budgeting rules and the related Practice Direction came into force.

Firstly, there is a new CPR 3.15A which provides for the revision and variation of costs budgets on account of significant developments ("variation costs").

CPR 3.15A provides that a party *must* revise its budgeted costs upwards or downwards if significant developments in the litigation warrant such revisions. The use of the word "must" (Paragraph 7.6 of the PD previously provided that "*Each party shall revise its budget … if significant developments in the litigation warrant such revisions*") suggests that it would not be wise to wait until the end of the litigation and seek to recover additional costs to those budgeted pursuant to the CPR 3.18 "good reason" jurisdiction.

It is also suggested that caution should be exercised in making agreements that certain costs, for example a non-budgeted ADR process, shall stand outside the budget since such additional costs may not be approved by the Court on detailed assessment. In such circumstances, revised budgets (Form T discussed below) including the costs of the ADR process should be agreed.

The revised budget must be submitted promptly to the other parties for agreement and subsequently to the Court. The revising party must use a new Form T prescribed by Practice Direction 3E. Form T provides columns for the previously agreed or budgeted costs, the variation sought in the estimated (budgeted) costs and the total estimated costs after variation. The certification provides: "*I certify that the costs and*

disbursements included in this variation are not included in any previous budgeted costs or variation (including any contingency), whether agreed or approved by the court".

The rule provides that 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. Again, the use of the word "promptly" suggests that seeking to rely on the CPR 3.18 jurisdiction would be unwise. Fee earners must keep their eye on any significant developments and act swiftly if revisions to costs budgets are to be made.

The rule provides that the Court may approve, vary or disallow the proposed variations having regard to any significant developments which have occurred since the date the previous budget was approved or agreed.

Following *Sharp v Blank* [2017] EWHC 3390 the rule provides that "*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 costs management order*".

There is a developing procedural case law on what constitutes a "significant development" but as noted in the White Book "*It appears to include any event, circumstance or step which is of such a size and nature as to go beyond the events, circumstances and steps which were taken into account, expressly or impliedly, in the budget previously approved or agreed.*". Obvious examples are additional expert evidence, significantly increased disclosure or an increase in the number of days needed for trial. It is suggested that the formalisation of the procedure will assist parties when there has been a significant development, ie make success more likely.

Other changes to the rules include a new CPR 3.15(8) which clarifies that "*A costs management order concerns the totals allowed for each phase of the budget, and while the underlying detail in the budget for each phase used by the party to calculate the totals claimed is provided for reference purposes to assist the court in fixing a*

budget, it is not the role of the court in the costs management hearing to fix or approve the hourly rates claimed in the budget."

A new CPR 3.17(4) helpfully provides "*If an interim application is made but is not included in a budget, the court may, if it considers it reasonable not to have included the application in the budget, treat the costs of such interim application as additional to the approved budgets*.". This largely reflects parties' understanding of the rules as previously drafted that interim applications stand outside budgeted costs.

There is a new Costs Management Practice Direction 3E. The lengthy Guidance Note has been dispensed with. Much of the material previously contained within the Guidance Note is now within the PD. The structure of costs budgeting is now governed by two sources, the Rules and the PD.

Save in exceptional circumstances, or where the Court orders otherwise, parties are not expected to lodge any documents other than Precedent H and the budget discussion report (Precedent R). This paring down of the documentation required is welcome.

Of particular note in the new PD is paragraph 13:

"*Any party may apply to the court if it considers that another party is behaving oppressively in seeking to cause the applicant to spend money disproportionately on costs and the court will grant such relief as may be appropriate*."

It is suggested that this may be referred to more often in correspondence than actually relied upon to make an application. "Oppresive" is, after all, a strong word.

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