

‘Significant Development’ and ‘Good Reason to Depart’

How the Courts Approach
Budgeted Costs

When Can You Amend an Approved Budget?

CPR PD 3E para 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.”

What is a 'significant development'?

Editors of the White Book re 3.15.4

“The term ‘any significant development’ ... 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. A development is taken into account impliedly if it is something that was, or should reasonably have been anticipated by the applicant for revision ...”

Fact specific.

Significance must be understood in light of the claim.

Churchill v Boot [2016] EWHC 1322 (QB)

Adjournment of Trial – could be a significant development, but wasn't in this case.

Increase in value of the claim – not significant development.

*Asghar v Bhatti and Another [2017] 4 Costs LD
427*

Lengthening of Trial – significant development.

Greig v Lauchlan [2016] 7 December, Richard Millet QC

Necessary change of Counsel just prior to trial – not significant development.

*Sharp v Lloyds Banking Group PLC &
Others [2017] EWHC 3390 (Ch)*

Seven claims subject to a GLO.

Approximately 5,800 Claimants.

Damages and interest claimed in the sum of approximately £600million.

Particulars of Claim - 123 pages.

Reply to Defence - 67 pages.

Responses to Part 18 questions - 130 pages.

Claimants disclosed approximately 12,100 documents.

Defendants disclosed approximately 38,000 documents, having initially harvested over 10.5 million documents.

33 factual witness statements in total - 510 pages.



Claimants - 4 main expert reports and 5 responsive expert reports running to 1800 pages.

Defendants - 7 expert reports running to 1100 pages.

Ten expert joint memoranda running to 450 pages.

Trial bundle comprised approximately 400 lever arch files.

Claimants' Agreed Budget totalled £17,601,025.49.

Defendants' Agreed Budget totalled £19,141,377.54.

The trial time estimate was extended by 48 business days.

BUT only an additional 2 sitting days due to an increase in the estimated time for cross examination of the defendants' expert witnesses.

Other days were due to non-sitting days, Judge unavailable etc.

Significant Development



The provision of additional documents following a successful application for specific disclosure.

Led to the disclosure of 984 additional documents.



Significant Development

A third-party disclosure application made by the Claimant, resulting in 71 additional documents being produced.

A further hearing took place in relation to the application to resolve issues of confidentiality, at which the Defendant was represented.



Not Significant Development

The Claimants sent a number of questions to the Defendants' experts, the scope of which went beyond what could reasonably have been foreseen under CPR 35.6.

One expert received an 11 page letter with 62 questions.

Another expert received a 10 page letter with 42 questions.

Another expert received a 13 page letter with 52 questions.

Not Significant Development

The Claimants served a report from an expert in the field of 'events study analysis'. The Claimants had not previously advised of their intention to rely on such an expert. As a result of the service of the report, it was necessary for the Defendants to serve a supplementary report from one of their existing experts in response.

Significant Development

One of the Claimants' experts sent a very long response to certain questions which the Defendants had put to him under CPR 35.6. The Defendants said that that the response contained new expert evidence which could not reasonably have been foreseen.

The Defendants, in response to the new approach adopted by the Claimant's expert, produced a witness statement and supplemental notes from two experts.

Not Significant Development

*Elvanite Full Circle Ltd v AMEC Earth &
Environmental (UK) Lyd [2013] EWHC 1643 (TCC)*

Mistake in preparation of Budget, or failure to appreciate what the litigation actually entailed – not significant development.

Alan Moores v Edward Seekings & Others [2019]
EWHC 1476



“Lists of issues are common in litigation of this sort in the Business and Property Courts, and a direction for a list of issues is commonly made.”

“Once again, this is work which (if it was not anticipated) should reasonably have been anticipated. It does not warrant a revision of the budget.”

Alan Moores v Edward Seekings & Others [2019]
EWHC 1476



An increase in costs flowing from that party's own failure, even if not reasonably anticipated, will not warrant a revision to the budget.

If a party's Budget has been restricted to court fees and there is a 'significant development', they can still apply to revise their budget.

Is an interim application a
'Significant Development?'

CPR PD 3E paragraph 7.9

“If interim applications are made which, reasonably, were not included in a budget, then the costs of such interim applications shall be treated as additional to the approved budgets.”

Possible restricted effect – 7.9 only covers costs of the actual application.

Could be argued costs resulting from the application are outside its scope.

Request an order that costs ‘*of and occasioned by*’ the application are to be treated as outside the scope of the Budget.

If costs have already been incurred due to a 'significant development', should they be treated as incurred or estimated in the Budget?

Sharp v Lloyds Banking Group PLC & Others
[2017] EWHC 3390 (Ch)

Future costs are considered by reference to the last approved Budget.

Various Claimants v MGN [2018] EWHC 1244

Proper approach is to treat costs incurred between the date of the Budget and the hearing as estimated.

*Elvanite Full Circle Ltd v AMEC Earth &
Environmental (UK) Ltd [2013] EWHC 1643 (TCC)*

Cannot apply to amend your Budget after
Judgment.

Can you leave it and rely on 'good reason to depart' upon assessment?

Sharp v Lloyds Banking Group PLC & Others [2017] EWHC 3390 (Ch)

The revision of Budgets under para 7.6 is not optional. If the paragraph is engaged, it is not left to a party to choose whether to revise its Budget or take its chances on a Detailed Assessment.

‘Good Reason to Depart’

CPR 3.18 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.

*Harrison v University Hospitals Coventry & Warwickshire
NHS Trust [2017] EWCA Civ 792*

Significant fetter on the court having an unrestricted discretion - deliberately designed to be so.

Costs judges should not adopt a lax or over-indulgent approach to the need to find 'good reason'.

What is a 'good reason to depart'?

Harrison v University Hospitals Coventry & Warwickshire NHS Trust [2017] EWCA Civ 792

“As to what will constitute "good reason" in any given case I think it much better not to seek to proffer any further, necessarily generalised, guidance or examples. The matter can safely be left to the individual appraisal and evaluation of costs judges by reference to the circumstances of each individual case.”

Is a reduction in hourly rates ‘good reason to depart’?

RNB v London Borough of Newham (SCCO, 4 August 2017)

Nash v MoD (SCCO, 22 February 2018)

Jallow v MoD (SCCO, 24 April 2018)

Yirenki v MoD [2018] EWHC 3102

CPR 3.15(2)(b) provides “By a costs management order the court will ... (b) in respect of the budgeted costs which are not agreed, record the court’s approval after making appropriate revisions”

That indicates that the figure that is going to be approved [...] would be a final figure rather than a provisional figure that, to put it colloquially was up for grabs later.”

Barts Health NHS Trust v Salmon (County Court at Central London, 17 January 2019)

Once the court has a right to depart from the budget, a further good reason does not have to be established to make a further or different adjustment to the bill.

The finding of a good reason opens the gateway for departure from the budget, and the rules do not stipulate that the good reason must determine the nature of the route to be followed thereafter.

Barts Health NHS Trust v Salmon (County Court at Central London, 17 January 2019)

Once good reason is established, submissions should be heard on what the appropriate figure should be.

This does not however necessarily result in a line-by-line assessment. The Court can take whatever course thought sensible to arrive at a reasonable and proportionate sum.

Key things to remember:



- Always be alert to things which could be classed as a ‘significant development’.
- Apply as soon as you can.
- Do not think that by incurring the costs they will be left for detailed assessment.
- Do not think you can just rely on ‘good reason to depart’.
- Reduction in hourly rates should not be a ‘good reason to depart’.
- Once one ‘good reason’ has been established, the whole phase may become open to assessment.



Questions?

Feel free to email any questions: michelle.walton@pic.legal