Neutral Citation Number: [2019] EWHC 1476 (Comm)

Case No: D40BM011

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
CIRCUIT COMMERCIAL COURT (QBD)

Birmingham Civil Justice Centre
The Priory Courts, Birmingham B4 6DR

Date: 7 June 2019

Before :

HHJ WORSTER
(sitting as a Judge of the High Court)

- -

Between :

(1) Edward Michael Seekings **(2) Matrix Materials Limited** **(3) Matrix Aggregates Limited** **(4) Tetron Welbeck LLP**	**Claimants**
- and -	
(1) Alan Moores **(2) Nicholas John Cook** **(3) Susan Moores** **(4) Matrix Materials 2017 Limited**	**Defendants**

No 8055 of 2018

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
COMPANY AND INSOLVENCY LIST

IN THE MATTER OF MATRIX MATERIALS LIMITED
AND IN THE MATTER OF THE COMPANIES ACT 2006
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Between :

Alan Moores **Petitioner**

- and -

Respondents

(1) Edward Michael Seekings
(2) Matrix Materials Limited

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John Brennan (instructed by **Whatley Weston and Fox**) for the **Claimants/Respondents**
Katie Longstaff (instructed by **Keystone Law**) for the **Defendants/Petitioner**

Hearing date: 8 April 2019
Draft Judgment: 7 May 2019
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Judgment Approved by the court for handing down (subject to editorial corrections)

If this Judgment has been emailed to you it is to be treated as 'read-only'. You should send any suggested amendments as a separate Word document.

HHJ WORSTER :

1. This is an application by the Defendant Mr Moores to revise his costs budget upwards by a total of £130,009 because of what are said to be significant developments in the litigation. The application is supported by the witness statement of his solicitor Mrs McKenzie of 27 March 2019. It is resisted by the Claimant Mr Seekings. His solicitor, Mr Humphreys has made a witness statement dated 4 April 2019 setting out the matters relied upon. Whilst there are other Claimants and Defendants in claim number D40 BM011, and whilst Mr Moores is the Petitioner in the related petition, for the purposes of this judgment I refer to Mr Seekings as the Claimant and Mr Moores as the Defendant.

2. In short there are two arguments; firstly whether this court has the power to make such an order in circumstances where the vast majority of the increased costs in the Defendant's revised budget have already been incurred, and secondly whether there truly were any significant developments which would justify a revision.

3. **The Rules**

The relevant rules are found in section II of Part 3 of the CPR:

3.12

(1) 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.

3.15

(1) In addition to exercising its other powers, the court may manage the costs to be incurred (the budgeted costs) by any party in any proceedings.

(2) The court may at any time make a 'costs management order'. Where costs budgets have been filed and exchanged the court will make a costs management order unless it is satisfied that the litigation can be conducted justly and at proportionate cost in accordance with the overriding objective without such an order being made. By a costs management order the court will—

(a) record the extent to which the budgeted costs are agreed between the parties;

(b) in respect of the budgeted costs which are not agreed, record the court's approval after making appropriate revisions;

(c) record the extent (if any) to which incurred costs are agreed.

(3) If a costs management order has been made, the court will thereafter control the parties' budgets in respect of recoverable costs.

(4) Whether or not the court makes a costs management order, it may record on the face of any case management order any comments it has about the incurred costs which are to be taken into account in any subsequent assessment proceedings.

4. The words in brackets in 3.15(1) – "the budgeted costs" – were inserted by an amendment to the CPR with effect from 6 April 2017. The amendment formed part of the 88th update to the CPR, which indicated that they had been made following the Court of Appeal's Judgment in the *SARPD Oil* case [2016] EWCA Civ 120.

5. CPR Part 3.17(1) underlines the link between costs and case management, providing that when making any case management decision, the court will have regard to any available budgets of the parties and will take into account the costs involved in each procedural step.

6. CPR Part 3.18(1) provides 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; and*
>
> *(c) take into account any comments made pursuant to rule 3.15(4) or paragraph 7.4 of Practice Direction 3E and recorded on the face of the order.*

7. The relevant parts of Practice Direction 3E are these:

> *7.3 If the budgeted costs or incurred costs are agreed between all parties, the court will record the extent of such agreement. In so far as the budgeted costs are not agreed, the court will review them and, after making any appropriate revisions, record its approval of those budgeted costs. The court's approval will relate only to the total figures for budgeted costs of each phase of the proceedings, although in the course of its review the court may have regard to the constituent elements of each total figure. When reviewing budgeted costs, the court will not undertake a detailed assessment in advance, but rather will consider whether the budgeted costs fall within the range of reasonable and proportionate costs.*
>
> *7.4 As part of the costs management process the court may not approve costs incurred before the date of any costs management hearing. The court may, however, record its comments on those costs and will take those costs into account when considering the reasonableness and proportionality of all budgeted costs.*

7.5 The court may set a timetable or give other directions for future reviews of budgets.

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.

[my underlining]

7. **The litigation**

The parties are engaged in litigation which arises from their involvement in business together, and in particular as the Directors and shareholders of Matrix Materials Limited ("Matrix"). The Claimant and others brought a claim in June 2017 ("the claim") arising from the Defendant's attempt to remove him from their business. The reason for that attempt was the Defendant's discovery of a great number of apparently unexplained business transactions undertaken by the Claimant which he says he was unaware of. The Claimant says that there is nothing sinister about any of these transactions. The Defendant does not necessarily accept that, but in any event argues that he has been excluded from the running of Matrix and so unfairly prejudiced.

8. In June 2017 I dealt with a heavily contested interim application and made orders effectively restoring the Claimant to his position within Matrix. The Defendant subsequently changed his legal team, and there were some attempts at negotiating an agreement. Those failed, and after some delay an unfair prejudice petition was issued in mid-2018 ("the petition"). The petition has not been formally consolidated with the claim, but they have been case managed together, and are to be heard together at a trial fixed for 7-22 November 2019. The costs budgets prepared by the parties have related to the work to be done on both the claim and the petition.

9. On 22 August 2018 the Defendant's solicitor signed a Precedent H setting out the costs, incurred and estimated, budgeted for both the trial of the claim and the petition. The total budget was £396,327 of which £254,167 were estimated costs. The Claimant's budget was £510,493, of which £329,795 were estimated costs. The parties agreed each other's estimated costs, and I made a costs management order at the Costs and Case Management Conference on 7 September 2018 recording that agreement. I did not undertake any budgeting as such at that hearing.

10. On 6 July 2018, a few weeks before the Defendant's budget was finalised, the Claimant served requests for further information on him. The Defendant responded but the Claimant was not satisfied with the replies. The order of 7 September 2018 made at the CCMC provides for further information to be filed and served by 21 September 2018. Miss Longstaff told me on instruction that that work had been budgeted for. Indeed I note that one of the assumptions for the estimated costs of the Issues/Pleadings phase is "Dealing with Replies to Request for further information".

11. The information that the Defendant provided as a result was not satisfactory, and on 20 November 2018 the Claimant made an application for a further order in respect of some of the requests, which the Defendant resisted. I heard that application on 25 January 2019. Once again it was heavily contested. There is a copy of the transcript of my judgment at page 184 of the bundle prepared for the hearing on 3 April 2019. I found that the Defendant had failed to answer some of the replies properly, and that his case on some important aspects remained unclear. The judgment identifies what the Defendant had to do. The Defendant was ordered to pay the Claimant's costs of that application.

12. Despite that, the further replies which were then provided remained unclear in some respects, and on 3 April 2019 I heard an application by the Claimant for an unless order in respect of this further information. In the event I stopped short of making an unless order, because, in the context of this case, I did not consider it proportionate. But I made an order requiring the Defendant to reply to the relevant requests – in effect giving him another chance to deal with the matter as he should have done. The Defendant has been ordered to pay the Claimants costs of that application.

13. On 28 March 2019 the Defendant made this application. Mrs McKenzie's evidence is that she first became aware of the need to review the Defendant's costs budget on 6 March 2019. She sent an email to Mr Humphreys which includes this passage:

> *In light of the additional costs that are being incurred due to the RFIs as well as the increased number of documents being reviewed as part of disclosure, we are currently reviewing our costs budget. We believe that this will need to be revised up, and will send you a revised costs budget later this week with a view to agreeing this with you.*

14. Mr Brennan makes two observations. Firstly that the parties have yet to exchange lists of documents, so that the documents referred to must be the Defendant's documents. Secondly the requests for further information predate the budget, and the phrase "are being incurred" suggests that this is work related to the orders the court had made.

15. On 19 March 2019 Mrs McKenzie sent a revised costs budget to Mr Humphreys. The email requests agreement failing which an application would be made "tomorrow" to have the budget revised at the hearing on 3 April 2019. The solicitors spoke on 20 March 2019. Mr Humphreys wanted an opportunity for his costs draughtsman to look at the revisions and made two points. Firstly that neither the changes nor the reasons for the changes in the budget were identified, and secondly that it looked as if most of the changes were to incurred costs, which the Court could not approve. He also doubted that there would be time for the matter to be dealt with on 3 April 2019 if the Defendant contested the Claimant's application (which he did).

16. On 21 March 2019 the Defendant provided a note identifying the changes to the costs budget and the reasons for those changes (pages 12- 13 of "RHH2"). I will come back to that document.

17. On 27 March 2019 Mr Humphreys responded to the e mails from Mrs McKenzie which provided him with the proposed revisions and the reasons. He repeated his points about incurred costs and the lack of time on 3 April 2019, and added this:

> *Further and fundamentally, we are not aware of any significant developments that have arisen in the litigation that would warrant a revision of the budget for future estimated costs at this stage, the budgets having only been updated and approved in September 2018. The approved budgets are already very high for a matter of this nature. In the absence of significant developments in the litigation an increase is not warranted.*

18. In his application notice of 28 March 2019, the Defendant gave a time estimate of 30 minutes and there was a request that it be listed on 3 April 2019, when 3 hours had been set aside for a further case management hearing. I made a direction to that effect without seeking the views of the Claimant. That was a mistake, for Mr Humphreys was right when he said that there would not be sufficient time to hear the matter on 3 April 2019. Nor was 30 minutes an accurate time estimate.

19. A proposed revised costs budget is exhibited to Mrs McKenzie's witness statement of 28 March 2019 at pages 12-18. As Mr Brennan points out, there are a number of differences between that document and the first proposed revision (dated 18 March 2019) which the Defendant had sent to the Claimant on 19 March 2019. In the run up to the hearing on 3 April 2019 Mr Brennan and Mr Humphreys undertook a detailed analysis of the differences between the original budget, and the two versions of the proposed revised budget. A comprehensive table is attached to the skeleton argument he prepared for the hearing on 3 April 2019. It demonstrates that (presumably in response to the point Mr Humphreys made about incurred costs) the Defendant has moved costs which were in the "incurred" column in the 18 March 2019 document to the "estimated" column in the 28 March 2019 document. That is not something flagged up in Mrs McKenzie's witness statement, hence the need for Mr Brennan's analysis, but Miss Longstaff confirms that that was what was done; see paragraph 14(b) of her skeleton argument.

20. At paragraph 13 of her witness statement of 28 March 2019, Mrs McKenzie seeks the court's approval of the revised budget dated 28 March 2019, which provides for an upward revision of nearly £130,000 (or 33%) of estimated costs from £254,167 to £383,977. However, it appears that not all of that increase is pursued. The four phases of relevance, the existing budget sum and the revisions sought are as follows:

Phase	Budget	Revision
Issue/Pleadings	£85,625	£33,437
Disclosure	£34,843	£25,661
Expert reports	£49,631	£30,525
Amendment (Contingency A)	£11,250	£38,727

21. **Jurisdiction**

It is apparent from a comparison of the 18 March 2019 and 28 March 2019 documents that much of the work which forms the basis of the application for revision has in fact been done. The 18 March 2019 document characterises that work as "incurred". The

Defendant submits that was the wrong way to characterise the work, hence the different treatment of these figures in the document of 28 March 2019. But it gives the court a useful summary of the work in fact already done and the work which is yet to be done. Mr Brennan calculates that on that basis £112,274 of the £130,000 odd for which approval is sought had already been done, and that the future cost element was £17,280, or 4% of the total budget (disbursements of £11,995 and time costs of £5,285); see paragraph 12 of his skeleton argument dated 2 April 2019. He submits that budgets cannot be approved retrospectively, and that the court should not entertain an application which relates to £17,280 of future costs.

22. The question of whether or not the Court has jurisdiction to revise a budget under PD 3E paragraph 7.6 when that involves approving costs which have in fact been incurred since the date of the last agreed or approved budget is an issue of some controversy. The Defendant relies upon the decision in *Sharp v Blank* [2017] EWHC 3390 (Ch). Having thoroughly reviewed the arguments, Chief Master Marsh concluded that the court did have jurisdiction. He took the words "future costs" in paragraph 7.6 of PD 3E to mean costs after the last approved or agreed budget.

23. The Claimant submits that the decision is wrong and that I am not bound by it. Mr Brennan refers to Cook on Costs where the editors set out their views on the point at paragraph 15.8 of the 2019 edition (pages 66-68). Whilst they recognise that there are arguments on either side of the debate, they say this:

> *... it is the express wording of CPR 3.12(2) and 3.15(1) "costs to be incurred", which appear to define the extent of the court's jurisdiction, without limiting the meaning to costs incurred at the time of the first costs management order, that suggests that the court cannot approve revisions to the budget retrospectively. The use of the word "future" in CPR PD 3E para. 7.6 simply reinforces this.*

There is a similar commentary at paragraph 4-103 (question 81) on page 200 and following of the 5th edition of "Costs & Funding following the Civil Justice Reforms; Questions and Answers" which accompanies the 2019 White Book.

24. Whilst jurisdiction is logically the first issue, Mr Brennan began his oral submissions by considering whether the Defendant had established that there were any significant developments which warrant the revision of the Defendant's budget. If there were none then it was unnecessary to resolve the difficult question of jurisdiction. I adopt the same approach.

25. **Significant developments?**
"Significant development" is not defined in the CPR, nor would I expect it to be. The starting point for the process of revision is the budget as agreed or approved by a costs management order, so "development" is to be read as a development in the litigation since that time. Whether that development is "significant" is a question of fact and depends upon the circumstances of the case.

26. The editors of the White Book say this under 3.15.4 at page 141 of the 2019 edition:

> *The term "any significant developments " … 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 …*

27. The notes go on to give some examples of significant developments. In *Churchill v Boot* [2016] EWHC 1322 (QB) the Master had refused to revise the Claimant's costs budget in circumstances where the claim had doubled in size from £1M to £2m, the trial had been extended from 4 days to 5, and there was further disclosure and expert evidence. The Master took the view that the case had taken a course which was predictable and should have been predicted when the budget had been prepared. Picken J refused permission to appeal. These were matters which were known about or should have been considered at the time of the costs management order.

28. Matters such as those relied upon by the Claimant in *Churchill* may amount to significant developments for the purposes of the PD. Indeed, the note in the White Book gives *Sharp v Blank* as an example of a case where the receipt of far more documents than the applicant could have reasonably foreseen was held to be a significant development. It is apparent from the judgment in *Sharp* at [15ii] that this referred to the production of 984 additional documents by the other side. But it is not open to a party to rely upon its own failure to reasonably anticipate what the litigation will involve and then ask for a second bite at the cherry.

29. *Sharp* provides some guidance about what will not be sufficient to give rise to a "significant development". Having been referred to *Murray v Dowlman* [2013] EWHC 872 (TCC) and *Elvanite v AMEC Earth* [2013] EWHC 16443 (TCC), both decisions of Coulson J (as he then was) under the provisions of the pilot, Chief Master Marsh says this at [37]:

> *It is obvious … that a mistake in the preparation of a budget, or a failure to appreciate what the litigation actually entailed, will not usually permit a party to claim later there has been a significant development because the word "development" connotes a change to the status quo that has happened since the budget has been prepared. If the mistake could have been avoided, or the proper nature of the claim understood at the time the budget was prepared, there has been no change or development in the litigation. By contrast, if the claim develops into more complex and costly litigation than could reasonably have been envisaged, that may well be the result of one or more significant developments".*

30. That view appears to have informed the note in the White Book I refer to at [26] above. The court expects parties to prepare costs budgets with care. It is not consistent with the overriding objective to allow parties to amend their budgets because they have overlooked something or made some careless mistake. Costs budgeting was introduced as part of the Jackson reforms. Those included the amendment to the overriding objective requiring cases to be dealt with justly and at proportionate cost, and an increased emphasis on enforcing compliance with rules, practice directions and orders; see CPR Part 1.1(2)(f). The purpose of costs management is to further the

overriding objective; see CPR Part 3.12(2); or to put it another way, costs budgeting is a means by which the court and the parties may further the overriding objective. So that (for example) the court and the parties may understand the costs consequences of managing the case in a particular way, the parties may understand their likely costs exposure, and the court may exercise some control over the cost of the litigation.

31. The process of revision can be a costly and sometimes lengthy one, and whilst costs budgeting is not there to impose some de facto costs cap, allowing a party a "second bite" at a costs budget when the case develops in a way which should have been foreseen does not further the overriding objective. Hence the requirement for there to be a significant development which warrants revision.

32. Mr Brennan submitted that one mark of a significant development is the need for further case management directions. In support of that, he referred me to page 130 of "Costs and Funding" where the editors say this:

> *It is hard to imagine a significant development that does not require consequential case management …*

33. Miss Longstaff referred me to the judgment of Master Davison in *Al-Najar and ors v The Cumberland Hotel* [2018] EWHC 3532 (QB). Master Davison considered the question of significant development, and at [8] says this:

> *From the Practice Direction and the decision of Chief Master Marsh [in Sharp] I would derive the following broad principles:*
>
> *(a) Whether a development is "significant" is a question of fact which depends primarily on the scale and complexity of what has occurred.*
>
> *(b) If what has occurred is something that should reasonably have been anticipated by the party seeking to revise its budget, then that party will probably be unable to label it significant or, for that matter, a development.*
>
> *(c) However, there is no requirement that the development must have occurred other than in the normal course of the litigation. That is clear from the final sentence of para.37 of Master Marsh's decision which I have quoted and also from the fact that in that case a revision of the trial estimate, the disclosure of 984 documents and the service of an expert report were all characterised as significant developments.*
>
> *(d) As a matter of policy, it seems to me that the bar for what constitutes a significant development should not be set too high because, otherwise, parties preparing a budget would always err on the side of caution by making over-generous (to them) assessments of what was to be anticipated.*
>
> *(e) Lastly, and I think this is uncontentious, if there has been a significant development, then the question is whether the figures in the revised*

> *budget are reasonable and proportionate in the light of the development.*

That is a most helpful summary. Where the bar is to be set is, of course, a matter for the individual case.

34. The starting point for the process of revision is the last budget approved or agreed. The court may be satisfied that the figures in that budget are reasonable and proportionate; for example where the court has undertaken a thorough review and made adjustments to the budgets the parties had put forward before approving them. Or it may be that where the budgets have been agreed, it is apparent that the sums claimed and agreed are for relatively modest amounts which can be readily justified. But that may not be the case. Parties sometimes agree each other's budgets in sums which do not appear to be either reasonable nor proportionate. When an application is made to revise a budget upwards, it is open to the court to look at the existing budget to see not only whether the "significant developments" relied upon have already been catered for, but also to consider the sums already agreed for the relevant phase so that it may consider whether the "significant developments" put forward warrant a revision.

35. The parties should have a good idea of where the case is going b ythe time of the CCMC. In this case the dispute had been on foot since June 2017, and the parties had been considering their positions and trying to negotiate for many months. It must have been apparent to all that the claim would be hard fought. The Defendant had undertaken some significant work and incurred substantial costs prior to the presentation of the unfair prejudice petition, and the sums budgeted by both sides were high. The parties agreed those budgets as drawn, and the court had no opportunity to consider them. The sums agreed were generous, and I have little doubt that had the court undertaken a costs budgeting exercise, the approved budgets on both sides would have been substantially less than those which were agreed.

The Application

36. I deal with the points raised in the same order as Mrs McKenzie does at paragraph 7 of her witness statement, firstly setting out her evidence on the issue, then a summary of any further points in support made in argument, and then the case for the Defendant.

7.1 Disclosure

> *The deadline for disclosure has been extended considerably since the hearing on 7 September 2018. In that hearing it was ordered that disclosure was to be exchanged on 11 January 2019. This date was delayed due to the interim applications for further information made by the Claimants/Respondents) dated 20 November 2018 and 26 February 2019 and subsequent interim application hearings. As a result additional costs are being incurred through the disclosure documents being held for a longer period of time on the electronic platform (this is charged monthly and by reference to the amount of data held).*

Miss Longstaff confirmed that the increase in disbursements was about £3,000, or about £1,000 a month.

37. However, the bulk of the £25,000 odd increase sought related to time costs. Miss Longstaff said that the estimate for disclosure was based on 20,000 documents. The increase in time costs was because there were more keywords than anticipated – she said that there were 80-90, 65 of which could be agreed. Her instructions were that this would lead to more documents than were anticipated and consequently more time would be needed to review them.

38. Mr Humphreys responded to the Defendant's evidence in his witness statement at paragraph 12.1, pointing out that the cost of a platform was about £1,000 a month. He questioned why the Defendant would have limited his estimate of the cost of the platform to the period around the exchange of documents. In a case such as this the disclosure process and the requirement for access to the platform would take a long time, and may continue through to trial given the continuing obligation to disclose. He pointed out that the work in relation the interim hearings was a consequence of the Defendants failure to answer the requests properly. And he confirmed that whilst there were still some outstanding points on disclosure, considerable progress had been made. He did not have an opportunity to respond to the matter put to the Court on instruction.

39. Mr Brennan referred back to the Defendant's summary of the revised amendments sent on 19 March 2019. The reasons given there for the increase in the cost of disclosure make no reference to the increase in time costs consequent upon the increase in the number of keywords anticipated. The reasons given related to the work following the requests for further disclosure and information, that disclosure would continue to trial, and that there will be electronic disclosure requiring a platform. Mr Brennan submits that an analysis of the budgets suggests that the increase is due to the failure to anticipate how long the Defendant's solicitors and counsel would spend on disclosure; see paragraph 23 of his skeleton argument.

40. Dealing with the matters relied upon by the Defendant.

    (i) The continuing cost of the platform is a matter which should have been anticipated. Even if that were not the case, in the context of this budget the sums involved are relatively minor and do not warrant a revision.

    (ii) As to the work consequent upon the RFIs, these requests were made before the Defendant prepared his budget, and well before it was agreed. The cost and extent of that work were matters which the Defendant should reasonably have anticipated. The questions have not changed.

    (iii) The fact that the Defendant incurred costs in unsuccessfully resisting the Claimant's applications for orders that he answer those requests properly, and of complying with the orders that were made, does not alter that. Mr Humphreys makes the point well at paragraph 12.4 of his witness statement:

> *It would be curious if Mr Moores is entitled to increase his costs budget due to his failure properly to clarify his case or to provide Further Information when ordered to do so.*

(iv) The court will only approve costs which are reasonable and proportionate. An increase in the Defendant's costs flowing from his failure to answer the requests properly, even if not reasonably anticipated, will not warrant a revision to his budget.

(v) Finally costs arising from the increase in the number of documents the Defendant has to review. This is not covered by Mrs McKenzie's evidence, nor in the 9 March 2019 document, although there is a hint of it in the Defendant's email of 6 March 2019. But even accepting what I was told by Miss Longstaff on instruction, I am not satisfied that it warrants an increase in the budget. The documents being reviewed are the Defendants documents, and the extent of the review (whilst difficult to be absolutely precise about it) was something the Defendant should reasonably have anticipated. The budget as drawn and agreed allow nearly £35,000 for the phase.

I am not satisfied that the requirements of the Practice Direction are met.

41. The second phase is expert evidence. Mrs McKenzie says this:

> *7.2 Expert Evidence – Due to the Requests for Further Information made by the Claimants … additional involvement has been required of the Experts which has increased costs. Additionally the Defendants … have had to change their expert (as agreed by the Court on 25 January 2019) which has led to an increased cost.*

42. The 19 March 2019 document refers to the instruction of Milsted Langdon and that costs have increased due to the increased amount of disclosure. Miss Longstaff referred to the fact that fees had increased because the expert had looked at the Sage accounts. She told me that a large portion of the costs related to the increase in documents for disclosure, and that if there were more documents to consider the expert's fee would be larger. Again that is not a matter which is expressly dealt with by the evidence in support of this application.

43. Mr Humphreys notes that it was the Defendant's choice to change his accountancy expert, and that if there are costs arising from the duplication of work, then they would not normally be recoverable. Mr Brennan referred to the fact that the application for a change of expert of 19 December 2018 was made on the basis that the new expert (Mr Isaacs of Milsted Langdon) had estimated his fees within the Costs Budget filed at court.

44. Mr Brennan's analysis of the budgets on this issue suggested that the increase was due to the failure to anticipate how long the Defendant's solicitor would be obliged to spend on experts reports (45 hours to 58.5 hours) and how much the expert would cost (£18,000 to £43,500). The draft revised budget indicates increases in relation to the cost of the joint statement, the cost of reports and other costs. Had it been known that

Mr Isaacs would charge that much more he says that the Claimant would have objected to the order for a change of accountant.

45. The reasons for the increases sought appear to be an amalgam of matters which should reasonably have been anticipated and matters which do not warrant an increase. That there are more of the Defendant's documents to review and that answering the request for information properly has involved using the expert fall into the former category. The fact that Mr Isaacs appears to be charging more and/or that there is some duplication, would fall into the latter. Whichever it is, I am not satisfied that the requirements of the PD are met.

46. Thirdly "Issues/Pleadings". A further £33,437 is sought. Mrs McKenzie's evidence refers to the fact that a list of issues was ordered on 25 January 2019 which was not allowed for in the budget. She also relies on the fact that because the list has yet to be finalised there is a continuing need for documents to be held on the electronic platform. Miss Longstaff refers to the Claimant's failures to agree the list of issues, and his demands that the Defendant's list refers to every relevant paragraph of the Petition. She submits that the Claimant's approach and the difficulties in finalising the document could not have been reasonably anticipated.

47. This is not a matter which was referred to in the 19 March 2019 document. The phase "Issue/Pleadings" was mentioned, but that was in the context of Counsel's fees in dealing with the replies to the RFIs and a Grade C to support the Grade A.

48. 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. Indeed, Mr Humphreys notes that the parties prepared lists of issues in the Case Management Information Sheets they filed when the matter was first listed for a CCMC in April 2018. I made a direction for a list of issues on 25 January 2019 in order to define and narrow the issues. Miss Longstaff had herself attempted to do just that in the skeleton argument she prepared for that hearing. I found that attempt particularly helpful, and as I recall I said so, and invited the parties to use it as the basis for agreeing a list. Where there are two claims proceeding together, such a list is particularly useful.

49. 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. Moreover, some £85,000 has already been agreed for this phase, and it is not proportionate to spend more – certainly not £33,000 more.

50. Finally Requests for Further Information.

> *7.4 There were 2 initial Requests for Further Information made by the Claimants … one on the Claim D40BM011, and one on the Petition 8155 of 2018. Both were made on 6 July 2018. The Defendants … responded to the Request on the Petition on 18 August 2018 and agreed to respond to the Request for Further Information on the Defence after the Claimants … application to amend their Particulars of Claim had been heard on 7 September 2018. The response to the Request for Further Information on the claim D40BM011 was provided on 28 September 2018. Following these Responses, Applications were made by the Claimants … requesting additional information in relation to the original*

> *Requests for Further Information. The first hearing relating to the Claimants … Application for Further Information was heard on 25 January 2019 with the second application being heard on 3 April 2019. These were not accounted for in the Costs Budget of the Defendant … and costs have increased as a result.*

51. The costs of interim applications can amount to a significant development which might justify the revision of a costs budget. Miss Longstaff submits that is the position here, and that whilst the requests were budgeted for, the hearings were not. She reminded me that I had not made an unless order on 3 April 2019 because I had some sympathy with the Defendant's difficulties in answering some of the requests before the process of disclosure had been undertaken.

52. As I said on 3 April 2019, I am not blind to those difficulties. But what the Defendant had to do to answer the requests, and to comply with the orders of 7 September 2018 and 25 January 2019, was give the best particulars available, and clarify his case. He only partly complied with that requirement. The replies made in response to the order I made in January still failed to achieve a reasonable level of clarity in some respects. They were an improvement on the first round of replies, but the order had not been complied with. I gave the Defendant a further opportunity to do so.

53. The costs of these hearings arise from the Defendant's decision to resist the Claimant's applications. Those applications were successful, and adverse costs orders were made. Even if those applications were a significant development, their outcome is such that the matter does not warrant a revision to the Defendant's budget. The Defendant cannot recover his costs of those applications, because I have already made adverse costs orders in relation to them.

54. So that there is no ambiguity, the costs of replying to those requests may be recovered (subject to any assessment), but only to the extent budgeted. But the Defendant cannot recover the increase in his costs due to his failure to answer the requests properly first time, which costs include his costs of the hearings where adverse costs order have been made.

55. Mr Brennan also made complaint about the Defendant's failures to comply with the proper procedure for revision, and in particular the failure to identify the changes and give reasons for them. Miss Longstaff submits that this is something of a technicality, for the Claimant would never have agreed the changes. That may be so, but it would have clarified the basis of the application and why and how the draft of 18 March 2019 differed from the draft budget relied upon in the application. That would have saved the Claimant a good deal of unnecessary work. I have already noted that in some instances the evidence supporting the application differs from reasons put forward in correspondence. I have dealt with the application on the basis of all the material before me, but obviously it would have been better if the proper procedure had been followed.

56. It follows that the Defendant's application to revise his costs budget is refused. It is unnecessary to determine the issue of jurisdiction.

57. Postscript - Following receipt of the draft judgment the parties have agreed the form of order and the costs of the application, and I make an order in the terms they have agreed.