

# Insight 200

from Horwich Farrelly's Large & Complex Injury Group



# WELCOME TO INSIGHT

Welcome to this week's edition of Insight in which we report on two cases relating to varying a costs budget and how the court addressed the issues pre and post introduction of CPR Part 3.15A.

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# Prospective or retrospective?

Prior to October 2020, if parties sought to vary their costs budget due to a “significant development”, there was no prescribed format as to how those costs should be outlined.

The rules changed with effect from 1 October 2020 with the introduction of the Precedent T form and a new rule - CPR 3.15A which addressed “variation costs”, specifically requiring promptness. Since then, the costs sector has seen Precedent Ts a plenty and the resulting case law on the practical implications is flourishing.

## **Persimmon Homes Ltd and Anor v Osborne Clark LLP and Anor (2021)**

### **EWHC 831**

Whilst CPR 3.15A is still in its infancy, this case has been the most significant case to date; what we have been given in a threshold test as to “what is prompt?” Master Kaye’s judgment outlined the importance of applying to vary a budget at the earliest opportunity.

#### **Background**

This was a professional negligence case in which budgets had been approved in December 2019, at which stage the Costs Management Order approved the claimant’s budget in the sum of circa £1.4 million. On 21 December 2020 the claimant applied to amend their budget. Their Precedent T, drawn and

filed on 3 December 2020, sought to increase their budget to circa £2.8 million.

The claimant’s application was based on there being a significant development as to a Request for Further Information (RFI) and disclosure models which were not anticipated when the first budgeting exercise was undertaken.

The appropriate RFI model was switched from A&B to model C in December 2019. The claimant did not apply to vary their budget until some 12 months later having undertaken work throughout 2020 fully aware of this change of RFI model and that costs would be significantly more than envisaged at the first CCMC.

#### **Rules on promptness**

CPR 3.15A(2) states “*Any budgets revised in accordance with paragraph (1) must be submitted promptly by the revising party to the other parties for agreement*” and 3.15A(4) states “*The revising party must submit the particulars of variation promptly to the court*”.

#### **Application to vary**

In the claimant’s application they stated that their approved budget was based on a different disclosure model to that which actually took place. The defendant stated such a point should have been anticipated and raised earlier and at the CCMC.





## Judgment

Master Kaye refused the claimant's appeal on several grounds.

He highlighted that PD 51U expressly allows the parties to defer budgeting of the disclosure phase until after the court has determined which disclosure model is to be used, but the claimant chose not to, and went on to state:

***"I do not accept Ms Barton's argument that an application to amend a costs budget can be made after all the costs have been incurred and/or retrospectively after the full extent of the effect of the significant development is understood. That is not what the clear wording of CPR 3.15A says nor is it the actual or intended purpose or effect of CPR 3.15A(6). The proposed variations must be submitted promptly after the identification of a significant development said to warrant a revision in the costs budget."***

CPR 3.15A(1) and (2) and (4) are clear about the mandatory requirement for promptness. Costs and case management is a prospective not retrospective exercise.

Throughout Master Kaye's judgment, weight and emphasis was placed upon the importance of acting promptly:

***"Cost budgeting is about setting prospective costs and CPR3.15A is to enable the court to approach the question of variations and amendments in a practical and purposive way not to oust the role of the costs judge."***

## **Thompson v NSL Limited (2021)**

### **EWHC 679 (QB)**

Master McCloud's judgment stressed that a "significant development" may not be a specific event but can be a series of factors.

It is important to note that the original budget was set and the application to vary it was made before the new CPR 3.15A came into effect on 1st October 2020. Therefore, the rules that existed at the time were considered, and the express requirement now in the rules that an application must be made 'promptly' was not there.

### **Background**

This was a personal injury claim originally valued at £150,000 and issued in the county court. The matter proceeded to a CCMC in February 2019. Between the preparation of the budget and the CCMC, expert evidence was received - in the form of care and neuropsychiatric reports - that increased the claimant's valuation to circa £3.9 million. The CCMC proceeded in the county court, where all phases were budgeted for except Trial Preparation and Trial and the case was transferred to the High Court.

In September 2019, seven months later, the claimant applied to revise their budget.

### **Application to vary**

The crux of the claimant's application was that the matter was far more complex, time consuming and

costly than anticipated at the time of budgeting in February 2019. The claimant applied to revise the budget, arguing that it was not feasible to revise the budget in the county court because the impact of the new evidence, other than on value, was not yet clear.

By the date of the application the approved budget had been exceeded significantly.

### Issues

Whilst *Persimmon Homes* considers what is “prompt” when seeking to vary budgets, what was being considered in *Thompson* is whether there was a significant development that the claimant should have reasonably foreseen and /or whether they should have submitted a revised budget before the original CCMC i.e. immediately they had received the new expert evidence.

### Judgment

Master McCloud summarised that the development took place between the period of 21 days before and up to the February 2019 hearing but asked was it reasonably anticipated?

She stated that:

**“A change of value may not alone be enough. If a solicitor was to be expected to ‘jump’ at the earliest possible date when some development takes place but before it is reasonably clear what the effect will be, then one would see inflated, precautionary budgets.”**

Such inflated budgets would no doubt leave claimants in the position of being well within budget at Bill of Costs stage given the artificially inflated budgets due to the “development” not maturing to the true complexity anticipated.

In relation to “development”, she confirmed **“there will be cases, and I think this is in part one of those, where the nature of the claim evolves and a time comes when it is reasonably appreciated that it is a different type of beast from the claim which was initially pursued....”**

Suggesting what could have been done differently in similar situations, Master McCloud went on to say **“In terms of the point in time at which a significant development takes place, in my judgment if a development requiring a revised budget takes place before the date by which the budget has to be filed and served then it must be taken into account in the budget. There may be cases where the development takes place or is realised so closely before the budget deadline as to need an application for an extension of time which one would expect to be agreed and/or granted if reasonably required.”**

Master McCloud emphasised the importance of utilising professional judgement and keeping all parties informed. She concluded that the claimant acted reasonably once the matter was transferred to the high court and to thereafter apply to revise their budget, and the claimant’s revisions were permitted.

### Commentary:

**In both cases, the Masters have handed down significant judgments that need to be borne in mind as cases evolve beyond the anticipated issues, and that those developments will inevitably impact on cost budgets.**

**In practise, as soon as a significant development becomes known, there is an obligation to apply and vary budgets to ensure true and accurate budgeting is undertaken at the earliest opportunity and before significant costs are incurred.**

**The threshold has been set - act promptly and exercise professional judgement when the significant development materialises.**

**For more information on this issue please contact Charlotte Whalley, a Solicitor in our costs department:**

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