Neutral Citation Number: [2023] EWHC 1370 (Comm)

Claim No CC-2021-MAN-000079

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
CIRCUIT COMMERCIAL COURT (KBD)

Manchester Civil Justice Centre
1 Bridge Street West
Manchester
M60 9DJ

Date: 7 June 2023

BETWEEN

(1) SIMPSONS (PRESTON) LIMITED (trading as SIMPSONS)

(2) NESCO TRADE LLP

Claimants

and

MS AMLIN UNDERWRITING LIMITED

Defendant

- -
- -

Mr Andrew Grantham KC (instructed by **Brabners LLP**) for the **Claimants**

Ms Erica Bedford (instructed by **DAC Beachcroft LLP)** for the **Defendant**

Hearing date: 13 March 2023

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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His Honour Judge Pearce

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 7 June 2023 at 11:30am.

INTRODUCTION

1. In this case, the Claimants apply to vary the costs management order dated 21 September 2022 by which their budget was recorded as agreed in the form annexed to the order. The application related to the estimated costs for disclosure which were agreed in the sum of £59,665 in that order and which the Claimants now seek to vary by way of increase of £58,142.56 to the total estimated sum of £117,807.56. The application is supported by a witness statement from Mr Jeffrey Michael Lewis, the Claimants' solicitor, dated 9 February 2023.

BACKGROUND

2. The First and Second Claimants each operate motor vehicle businesses. The First Claimant operates a new and used vehicle dealership and provides servicing; the Second Claimant sells second-hand vehicles, supplied to it by the First Claimant provided as part exchange where the vehicle is considered to be unsuitable for sale by the First Claimant by reason of its age, condition and/or nature.

3. Each Claimant was party to an insurance policy underwritten by the Defendant providing cover for business interruption arising out of the COVID-19 pandemic. These are disease policies with cover provided upon the occurrence of a notifiable disease within a radius of 25 miles of the Claimant's premises. They were in force between 1 July 2019 and 30 June 2020 and the applicable indemnity period was 12 months.

4. The Claimants each gave notification of a claim. Their case is that each of them is entitled to be indemnified for a period of 12 months commencing 5 March 2020 on the basis that their business was affected throughout that period by reason of occurrences of Covid during the policy period (as well as other non-excluded events).

5. The Defendant's case is that if there was an interruption of or interferences with the Claimants' business caused by the imposition of the Health Protection (Coronavirus Restrictions) (England) Regulations 2020 (which were implemented in response to the occurrence of Covid-19 within 25 miles together with many other occurrences of Covid-19) then any loss caused by any such interruption or interference (which is not admitted) would in principle be covered by the policy. However, from 1 June 2020 these regulations ceased to apply to the Claimants' premises and therefore any interruption of and/or interference with the Claimants' business caused by an occurrence of Covid-19 within a 25 mile radius of the Claimants' premises also ceased and the indemnity period

came to an end. Any subsequent restrictions or measures were, on the Defendant's case, not caused by occurrences of Covid-19 within the Policy period.

6. Setting aside for the moment the issue as to the ambit of the coverage, it is obvious that the value of the claims is highly dependent upon material about the Claimants' respective businesses and, unsurprisingly, the majority of the anticipated disclosure was likely to come from the Claimants.

THE COSTS AS ORIGINALLY BUDGETED

7. The Claimants' original Precedent H, containing the agreed figure of £59,665 in the original budget, stated the following in respect of assumptions for the disclosure phase: "*It will proceed in accordance with P51(U)* (sic) - *Disclosure Pilot. An external disclosure provider will be instructed and access to the online review platform will be required for 5 months*." (In passing, I note that there is no reference to the number or size of documents which it is anticipated will fall within the Claimants' disclosure obligation.) The estimated costs of £59,665 in the original approved budget were stated to comprise fee earner time of £34,100 and disbursements (which I understand to be the external disclosure provider operating the online review platform) of £25,565.

8. The Disclosure Review Document that was prepared by the Claimants for the Case and Costs Management Conference at which the Costs Management Order was made, included the following answers in section 2:

	Question	***Details***
	…	
2.	*Electronic files: data sources/locations* *Please set out details on all data sources to be considered at collection including:* *Document repositories and/or geographical locations* *Computer systems or electronic storage devices* *Mobile phones, tablets and other handheld devices* *Document management systems*	*The Claimant will consider data held on their business computers, emails, mobile phones, and tablets.* *Documents contained in the Dealer Management System (DMS), hosted by Keyloop, will not be searched as it would be disproportionate to do so. Any relevant information from the DMS is extracted and incorporated into the accounts which are verified by reference to the documents in the lever arch month end files.*

	Email servers *Cloud based data storage* *Webmail accounts e.g. Gmail, Hotmail etc* *Back-up systems* *Social media accounts* *Third parties who may have relevant documents which are under your control (e.g. agents or advisers).* *Please also set out details as to sources that are unavailable but may host relevant documents* *If a data source is likely only to host documents relevant to particular Issues for Disclosure, that should be noted.* *Please identify any sources which may raise particular difficulties due to their location, format or any other reason.*	
3.	*Please describe the format or file types in which relevant documents may have been created or stored on devices.* *Please identify any bespoke or licenced proprietary software in which relevant documents have been created or stored which may not be available to the other party but without which it is not possible to review the relevant data (e.g. Microsoft Project, Lotus Notes, Bloomberg Chat etc.).*	*The Claimant considers that any relevant documents in their possession will be held in the standard email format, Microsoft Word, PDF, Jpeg or Microsoft Excel.*
4.	*Please set out a high level summary of the document types (including but not limited to email, Word documents, spreadsheets, presentation and image files) likely to be relevant to Issues for Disclosure.*	*The Claimant anticipates that any relevant documents held by them will primarily be in either email, Microsoft Word, PDF or Microsoft Excel.*
5.	*Initial Disclosure — description of searches already undertaken* *In accordance with paragraph 10.4 of the Practice Direction, each party should (save as already described for Initial Disclosure) describe any searches for documents that it has undertaken or caused to be undertaken for the purposes*	*The Claimant has conducted an initial search for relevant documents relating to the case for the purposes of pre-action correspondence and formulating the claim*

	of the proceedings (including in advance of the commencement of the proceedings).	
6.	*Custodians* *Please set out a list of those custodians whose files you propose to search for documents relevant to Issues for Disclosure for which any party seeks Extended Disclosure.* *If a custodian is only relevant to certain Issues for Disclosure, or a certain date range, please indicate this next to their name if this might allow the scope of the search to be narrowed. If the list is extensive, please set out a proposal to prioritise key custodians.*	*The Claimant anticipates that the key custodians will be:-* *1. Neil Tewkesbury (Financial Director)* *2. Neil Simpson (Managing Director)* *3. UHY Accountants*
7.	*…*	
8.	*Date ranges* *Please set out the date range (or ranges) within which you would propose to search for documents.* *If a narrower range of dates is appropriate for a particular Issue for Disclosure, or a particular custodian, please indicate this.*	*The Claimant proposes that the appropriate date range for all of the Issues for Disclosure contained at Section 1A of the DRD is February 2018 - August 2021*

THE PROPOSED VARIATION

9. The Claimants' increase of £56,142.56 is calculated as an increase in fee earners' time of £49,000 and an increase in disbursements of £9,142.56. The explanation in the Claimant's Precedent T is stated thus:

> "*The Claimant has commenced the Disclosure exercise which has brought up documents which were not, and could not reasonably have been, anticipated. The volume of Documents (300,000) along with the process to refine this list will require significantly more work than originally estimated. The Defendant has now raised issues with the search terms which will result in further unanticipated work. The hardcopy Documents received are being manually reviewed to aid the Defendant in then reviewing the same. Further Disbursements are sought for the Disclosure provider and licences*."

10. The Claimants served their Precedent T on 2 December 2022. Negotiations followed thereafter and this application was made on 21 February 2023.

11. The grounds for the application are fleshed out in greater detail in Mr Lewis' statement:

    11.1. During the process of uploading the Claimants' data to the disclosure platform, it became apparent that there were two mapped network drives which had previously been disregarded. One of the drives belongs to the Claimants' former finance director, Mr Ian Campbell, and contained 1.04 TB of potentially relevant data. The other contained over 1 TB of potentially relevant data.

    11.2. The total number of documents uploaded, 362,074, was far in excess of what the Claimants had anticipated (just a few thousand documents). There were almost 10,000 spreadsheets, far in excess of what it was anticipated would require review.

    11.3. Further, these included a significant number of duplicate documents. The process of removing duplicates was very time-consuming.

    11.4. Work was required to refine search terms and parameters to narrow down the volume of documents.

    11.5. The e-disclosure provider's costs increased because of the need to scan hardcopy documents and to obtain further licences to ensure that sufficient members of the review team could access the documents.

THE LAW

12. The procedure for the revision of costs budgets is set out in CPR3.15A, which provides:

> *"**Revision and variation of costs budgets on account of significant developments ("variation costs")***
>
> *(1) A party ("the revising 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 parties for agreement, and subsequently to the court, in accordance with paragraphs (3) to (5).*
>
> *(3) The revising party must—*
>
> > *(a) serve particulars of the variation proposed on every other party, using the form prescribed by Practice Direction 3D;*
> >
> > *(b) confine the particulars to the additional costs occasioned by the significant development; and*
> >
> > *(c) certify, in the form prescribed by Practice Direction 3D, that the additional costs are not included in any previous budgeted costs or variation.*

(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.

(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.

(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 costs management order."

13. The threshold criteria for the exercise of the power are therefore:

    13.1. There has been a significant development in the litigation since the last approved or agreed budget, which warrants a revision;

    13.2. The particulars of variation have been submitted promptly to the court.

14. If these criteria are met, the court goes on to consider the exercise of the evaluative judgment as to whether the budget should in fact be varied. In Persimmon Homes Ltd v Osborne Clark LLP [2021] EWHC 831, Master Kaye said this of the exercise of that judgment:

> "*the court must have regard to the overriding objective and all the circumstances of the case including the need to deal with cases justly and at proportionate cost. This includes considering the prejudice to both the applicant if the revision (including any relevant incurred costs) is not approved or allowed and the prejudice to the respondent if the variation is approved or allowed. The question of promptness and the nature of the development giving rise to the application may re-emerge as part of this exercise of discretion."*

15. Neither party sought to disagree with this summary of the law, although as will be seen when looking at the parties' individual cases, there is some difference as to how this is to be applied to the facts of the present case.

THE CLAIMANTS' CASE

16. The core of the Claimants' case is that the discovery of the two unanticipated network drives has led to a disclosure process which is far more extensive and therefore costly than had been anticipated in the costs budget. Mr Lewis puts it thus in his statement:

> "*30. The disclosure exercise has been more document-heavy than the Claimants anticipated (and could reasonably have anticipated). In addition, the disclosure exercise has also been far more complex due to, amongst other things, the types of documents that Brabners were required to review, and the amount of duplication and irrelevant data contained in the documents. Dealing with each of those in turn:*

> *30.1 In circumstances where, as set out at paragraph 11 above, data was to be extracted from a limited number of custodians, over a limited period of time, in respect of a limited number of straightforward issues for disclosure, Brabners anticipated reviewing around a few thousand documents. Instead, Brabners/the Claimants reviewed over 30,000 documents.*
> *30.2 The documents which Brabners/the Claimants reviewed included 9,834 detailed excel spreadsheets, which ran, on average, to between 3 and 9 pages. By way of example, the Claimants' disclosure includes daily emails, from its Preston and Colne branches, Nesco and the servicing arm, with detailed spreadsheets of activity. There are also many finance spreadsheets including forecasts, budgets, fuel usage etc. Whilst Brabners/the Claimants anticipated receiving some excel spreadsheets, they certainly did not anticipate the need to review almost 10,000 spreadsheets.*
> *30.3 Having instructed an e-disclosure provider to carry out (amongst other functions) deduplication, we/the Claimants legitimately anticipated that duplications would be kept to an absolute minimum. Unfortunately, we/the Claimants encountered a significant number of duplicate documents, many of which were the detailed and lengthy excel spreadsheets referred to above. The process of checking each document, to remove duplicates, was incredibly time-intensive.*
> *30.4 As set out above and in the correspondence exhibited hereto, Brabners/the Claimants worked to refine the search terms/parameters to narrow down the volume of documents for review but still to ensure that relevant documents were captured. Despite this, of the 30,884 documents reviewed, 13,328 were marked as 'not relevant'. Those not relevant documents included (as well as numerous duplicates) a large number of spam or 'bulk' emails. For example, one of our custodians was signed up to receive regular Employment Law updates from a local law firm. The Claimants therefore received 75 'update' emails from a single law firm through the relevant period, none of which is relevant to the issues for disclosure.*
> *30.5 The e-disclosure provider's costs have increased due to (a) scanning hardcopy documents onto the platform; and (b) obtaining further licences. Because of the volume and complexity of the documents Brabners was required to review, we increased our review team, which necessitated the Claimants purchasing two further licences from the e-disclosure provider at an additional cost of £175 + VAT per licence per month. Each member of a review team needs his/her own e-disclosure licence to access and review documents."*

17. The Claimants place considerable emphasis on the judgment of Master Davison in Al-Najar v The Cumberland Hotel (London) limited [2018] EWHC 3532. Having considered PD3E (in its then form) as to the standard assumptions in the disclosure phase and as to the power to vary and the judgment of Chief Master Marsh in Sharp v Blank [2017] EWHC 3390, Master Davison set out at paragraph 8 of his judgment the following five 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…*
>
> *(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."*

18. The Claimants contend that the key to understanding the proper approach to developments in litigation such as have occurred here is to bear in mind that the budgeting process is intended to occur near the beginning of the disclosure process. It is inevitably the case that, at the time the budget is prepared, a party cannot be expected to have as detailed knowledge of what the process will entail as will be the case later on. At the early stage of budgeting, the claimant in litigation in the Business and Property Courts has done no more than carry out the limited enquiries necessary to deal with the obligation of initial disclosure. That process does not require a search beyond any that the party might have carried out in order to investigate its own case for the purpose of the issue of proceedings – see, at the relevant time, the terms of paragraph 5.4 of PD51U, now contained in paragraph 5.4 of PD57AD. That initial search would not be expected to throw up the kind of documentation relevant to the quantification of the claim which is the root cause of this application to vary.

19. If, as the Defendant suggests, any new turn in the case which is to be categorised as being internal to the party seeking to vary the budget is not capable of amounting to a significant development for the purpose of CPR3.15A, parties would, in a position such as that of the Claimants in this case, have the stark choice between incurring significant costs on the disclosure process prior to the costs management hearing so as to ensure that they had sufficient knowledge of what the full disclosure process was likely to reveal, or risk not being able to recover costs *inter partes* that went beyond their initial assessment of the likely disclosure obligation. That is not a desirable position in which the parties should be put, since it incentivises costs being incurred prior to the costs budgeting process and is therefore inimical to the aim of costs management, namely to bring costs under the broad control of the court before they have been incurred or it encourages parties to exaggerate budgets to include greater costs that may be incurred in circumstances which realistically cannot be anticipated at the time of the costs budgeting process.

20. The Claimants contend that the application was made reasonably promptly. The case management directions anticipated disclosure certificates on 16 November 2022. During the period leading up to this, the problem with the unanticipated scale of disclosure came to light. Following discussions, the Precedent T was served on 2 December 2022, and this application was issued in February 2023 and served on 21 February 2023.

THE DEFENDANT'S CASE

21. The Defendant invites the court to examine the original assumptions of the Claimants in their costs budget. Of the stated assumptions, all still apply here – the data sources, file types and date ranges are as the original Disclosure Review Document. Further, there has been no development in the issues for disclosure.

22. The core of the Defendant's case lies in the assertion that what is alleged to be a development in the litigation that could justify the variation, is not in fact a development in the litigation at all. Rather it is the realisation by the Claimants that the scope of the disclosure that they are obliged to give is greater than what they previously anticipated. As Ms Bedford puts it, this is an internal rather than external development. If developments that resulted from such matters were a development that could found an application to vary, the floodgates would be open to any party that wished to say that it had not fully understood its own case at the costs budgeting stage.

23. In support of this contention, the Defendant starts by looking at the words of CPR3.15A itself. The power to vary arises from the existence of "*significant developments in the litigation"* which warrant revision. These are to be distinguished from what Master Kaye in Persimmon Homes characterised as an attempt to carry out a "*root and branch revision to the phases of their last approved costs budget"* (see paragraph 118).

24. In so far as Master Davison in Al-Najar might be said to favour an approach that is more generous to those seeking amendments to costs budgets, the Defendant contends that what has happened in this case is to be distinguished from the facts of Al-Najar, where Master Davison was dealing with an increased disclosure burden on account of the opposing party producing not the 1,000 to 1,500 documents expected to fill 20 to 30 lever arch files but rather 3,250 documents filling 55 such files (see paragraph 4 of his judgment). That might merit the description of being a "*substantial development"* in the litigation. In contrast, what has happened here cannot be so described, because it is simply an internal realisation on the Claimants' part that they had mis-estimated the likely burden of the disclosure process.

25. As Master Davison identified in Al-Najar, if what it asserted to be a significant development is in fact something that should have been anticipated, it is unlikely to be properly categorised as either "s*ignificant*" or "*a development*". Paragraph 37 of Chief Master Marsh's judgment in Sharp v Blank referred to the position where a change in budgets is said to be justified by a change in the parties' understanding of the litigation, where the Master said:

> "*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 was 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*."

26. In any event, the Defendant says that the approach taken by Master Davison in Al-Najar at paragraph 8(d) of his judgment set out above errs on the side of over-generosity where reference is made to not setting the bar for what constitutes a significant development "*too high*". There is, on the Defendant's argument, a risk of setting the bar too low in a way which encourages a lack of proper analysis of budgetary issues, leading to misleadingly low budgets that are then subject to application to vary that undermine the whole ethos of a costs management scheme that enables the parties to know where they stand in respect of recoverable costs.

27. The answer lies in distinguishing the "*internal*" development, in other words developments in a party's understanding of the litigation, and an "*external*" development, something outwith that which the party knows or over which it has control. The former is not capable of being a "*significant development*" because it is, following Chief Master Marsh in Sharp v Blank and Master Davison in Al-Najar, not a development at all, still less a significant one. Rather it simply reflects a better understanding of that which one could have known had one investigated more thoroughly.

28. In the alternative, the Defendant draws attention to paragraph 118 of the judgment of Master Kaye in Persimmon Homes, where reference is made to the burden lying on the party seeking to amend: "*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*." Such a burden is consistent with the general principle that the party who asserts a fact or matter bears the burden of proving it and is consistent with

the whole scheme of CPR3.15A, which requires the party seeking to vary the budget to demonstrate the basis for the variation.

29. Here the Claimants have not discharged the burden. In particular:

29.1. Whilst the material before the court tells us what documents the Claimants are in fact having to deal with, nothing in either the Disclosure Review Document or the evidence relied on shows what was anticipated before the existence of the additional drives came to light.

29.2. The evidence does not adequately deal with why the existence of the additional drives was unknown prior to the original budgeting process. As regards the drive said to have belonged to the Claimants' former finance director, the Claimants do not explain why enquiries were not made of Mr Campbell as to what documentation he might have custody of before the previous budget was submitted. There is even less detail as to the discovery of the second drive, the background to which is entirely unexplained in the evidence.

29.3. The Claimants' account of how they came to realise that the disclosure work could not be properly funded within the original budget is unexplained. In particular, whilst the statement of Mr Lewis refers at paragraph 22 to the anticipation, as at a letter of 16 November 2022 that the exercise could be completed in line with the existing budget, the material that caused the Claimants to realise between then and 2 December 2022 that the task was altogether larger (such as to justify a doubling in the budget) is not adequately explained. Rather, paragraph 23 and its cross reference to paragraph 30 (the reference to paragraph 29 is clearly a mistaken reference to that paragraph) is in truth opaque.

30. The Defendant contends that the timetable referred to at paragraph 20 above shows a lack of promptness. In particular, the Defendant points to the absence of evidence as to when the "significant development" is said to have taken place.

DISCUSSION

31. In order to determine what amounts to a "significant development" it is necessary for the court first to consider the basis on which the original budget is set. CPR3.12(2) states that 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 (or variation costs as provided in rule 3.15A) so as to further the overriding objective."* When assessing

costs on the standard basis where a costs management order has been made, the court will, pursuant to CPR 3.18:

> *"(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 3.17(3) recorded on the face of the order."*

32. It follows that, in exercising costs management powers, the court is aiming to estimate the reasonable and proportionate costs (in other words, the costs to be anticipated on an assessment on the standard basis). Such an assessment would of course be conducted pursuant to the principles of CPR Part 44.3(2)

> "*Where the amount of costs is to be assessed on the standard basis, the court will—*
>
> (a) *only allow costs which are proportionate to the matters in issue. Costs which are disproportionate in amount may be disallowed or reduced even if they were reasonably or necessarily incurred; and*
> (b) *resolve any doubt which it may have as to whether costs were reasonably and proportionately incurred or were reasonable and proportionate in amount in favour of the paying party."*

33. In Kazakhstan Kagazy plc v Zhunus [2015] EWHC 404 (Comm), Leggatt J (as he then was) said in retrospect of reasonable and proportionate costs:

> "*13…The touchstone is not the amount of costs which it was in a party's best interests to incur but the lowest amount which it could reasonably have been expected to spend in order to have its case conducted and presented proficiently, having regard to all the relevant circumstances. Expenditure over and above this level should be for a party's own account and not recoverable from the other party."*

34. On the other hand, in Discovery Land Company v Axis Speciality Europe [2021] EWHC 2146 (Comm), Peter MacDonald Eggars KC sitting as judge of the High Court doubted that this approach was correct where the court was dealing with costs management:

> *"18…..in the context of costs management, the Court should allow some flexibility to the parties to ensure that their conduct of the action is not unnecessarily and potentially unfairly hampered by an unrealistically low assessment or by only the lowest assessment of what would constitute reasonable and proportionate expenditure."*

35. There is of course a substantial difference between the retrospective approach of the assessment of costs, which was the context in which the issue was being considered in Kazakhstan Kagazy plc v Zhunus and the prospective management of costs as in Discovery Land Company v Axis Speciality Europe, since in the former, the court knows what work it is considering when assessing costs, whereas in the latter the court has to

work on assumptions as to what work will be involved. The inevitable uncertainties of the latter exercise make it right that the court should not simply look to manage costs at the lowest conceivable figure but rather should take a realistic view as to what work is likely to be involved in a particular phase, bearing in mind that, if the court underestimates the work involved, a party will only be able to seek revision of the budget in the narrow circumstances identified above.

36. In considering what lies within the range of that which a party might reasonably be reasonably to know or anticipate at the time of the costs budgeting process, I bear in mind two factors:

    36.1. The clear structure of costs budgeting is that, so far as possible, this should be done at an early stage in the litigation process, before significant costs are incurred. Of course, some cases, for example clinical negligence claims, may require considerable costs to be incurred before a party knows that a claim can properly be issued and pursued. But in the context of commercial litigation such as this, meaningful costs management requires the court to engage in the exercise as early as practicable in the litigation.

    36.2. One cannot expect the process of initial disclosure to identify much about the likely scope of extended disclosure, since the ambit of initial disclosure is intended to be, and usually will be, limited. As Cockerill J put it in paragraph 18 of her judgment in State of Qatar v Banque Havilland SA [2020] EWHC 1248, "*The purpose of the disclosure pilot is to streamline and not to complicate disclosure and so it would be unlikely that what was had in mind by the drafters of the disclosure pilot was a scheme whereby initial disclosure required something more than really very necessary documents; in other words that it required the disclosure of an evidence base required to test the evidence rather than to support the very key allegations*."

37. It follows that the court, at the stage of costs budgeting, doing its best on the inevitably limited information to forecast a reasonable figure for the disclosure phase, may well be restricted in its ability to make an informed judgment as to what is likely to be involved in that phase. For this reason, I agree with the comment of Master Davison in Al-Najar that the bar for what is a significant development should not be set too high. Otherwise, a party risks being unable to recover costs that it incurs of which it could only have been aware had it engaged in an investigation of its own case considerably beyond that which

is anticipated by the scheme of the disclosure rules in the Business and Property Courts contained in PD57AD.

38. The concept of the *"internal*" development referred to by the Defendant, whilst potentially of some assistance cannot adequately explain where the bar is to be set for the concept of the "*significant development*" for two reasons:

    38.1. This concept is not one established in CPR3.15A. As Mr Grantham KC pointed out, those who drafted the rules could have worded the test for variation in this way had they so wished but did not do so.

    38.2. It is easy to see that such a concept might fail to catch changes of circumstances that might well justify a variation in the budget – Mr Grantham KC's example of increased costs of disclosure caused by the need to recover documents from a device that has crashed catastrophically, where the device is under the control of the party who seeks the variation, is a good example of a cost that would fall within the category of "internal" yet which might well justify the label of being a "significant development"; looking at another phase of the budgeting process, another might be the death of an expert witness prior to trial that causes the party who instructed them to have to restart the process of obtaining expert evidence.

39. A more satisfactory approach to this issue is to look at the distinction that the Chief Master drew in paragraph 37 of the judgment in Sharp v Blank between, on the one hand, circumstances (for the moment I deliberately avoid the word "developments", so as not to create a self-fulfilling categorisation) that come to light making the litigation more (or in an appropriate case, less) costly and complex but that could not reasonably have been anticipated and mistakes, where a party could reasonably have identified and anticipated the circumstances by proper and proportionate investigation of the case prior to the costs management order. That which it is reasonable to anticipate would exclude that which could not be anticipated and/or assessed without the party incurring costs that go beyond that which are reasonably to be incurred before the costs management process takes place.

40. This distinction does not focus on whether the circumstances relied on are new and unexpected events and/or relate to matters internal or external to the party applying to vary. But where the matters relied on could already have been known to the party applying to vary (such as the quantity of material which they are obliged to disclose), it is likely to be more difficult to meet the test than where the matters are truly external

(such as the amount of disclosure that the opposing party gives them). It may not always be easy to draw the distinction between what could and could not reasonably have been expected to be known at the time of the budgeting process, but this distinction presents a principled dividing line between that which can properly be the subject of an application to vary and that which cannot. In particular it incentivises the proper preparation of cases and costs budgets, without penalising the party that avoids front loading costs before the court can take charge of the costs management process.

41. Applying this test, I am satisfied that the discovery by a party that its own disclosure is far more substantial than it initially realised is capable of falling within the definition of "*significant development*" in CPR3.15A.

42. I turn to whether the Claimants are able to show that they fall within this definition on the facts before the court. The discovery of the two previously unknown drives is clearly a discovery that is likely to affect the scope and therefore the cost of the disclosure process. To this extent, I am satisfied that it can properly be called a "*development*."

43. Whether it is "s*ignificant*" is more difficult. There is relatively little information before the court to enable an assessment of this. Paragraph 30 of Mr Lewis' statement is the closest that the material comes to explaining why the discovery of the drives was significant. But, as the Defendant points out, the development did not lead to any change in the nature of the stated assumptions for the disclosure process. Whilst the Claimants explain the increase in number of documents, it is not clear why the increased number necessarily leads to a significantly greater burden in the disclosure process. It is not clear from the evidence before the court that the increased number of excel spreadsheets which have required review is a consequence of the discovery of the previously unanticipated drives or is simply an aspect of other parts of the disclosable documents. It is not clear why the de-duplication problem referred to at paragraph 30.3 of the statement has been so time intensive, nor (for example) why the spam or "bulk" emails referred to have greatly increased the burden of the process. Further, it is not clear why the need to scan hard copies was not previously known. As to the obtaining of further licences, in my judgement that additional cost, whatever its cause, could not on its own be said to be significant.

44. In all, I am unpersuaded on the material that what has happened here amounts to a significant development, even on the definition given above. Whilst I acknowledge the need to avoid setting the bar too high by excluding matters that could not reasonably have been known, even if they can be said to be internal to the party seeking the variation,

I am also conscious that the bar must be sufficiently high to encourage a rigorous approach to costs budgeting at the outset, otherwise a potential paying party cannot have the reasonable assurance that a costs budget is supposed to bring as to its potential liability in the event of an adverse costs order.

45. On balance, the Claimants fail to discharge the burden of proving a significant development such as to justify a revision to the budget pursuant to CPR3.15A.

46. Had I been persuaded that this was a significant development, I would have concluded that the application had been made with sufficient promptness to permit an order to be made. Whilst the Claimants could have moved with greater speed, as always there is a balance to be struck between the need on the one hand to raise the issue with the other side so that it can be considered, if necessary by the making of a consent order, and on the other, to bring the case before the court if it cannot be agreed. I am not satisfied that the Claimants here have fallen outside the reasonable range of promptness.

CONCLUSION

47. For these reasons, I dismiss the application. The parties should seek to agree an order dealing with any consequential matters, failing which a further hearing will be convened.

48. An order was made staying the proceedings on 11 April 2023, before I had sent out this judgment in draft. It was still appropriate for the judgment to be sent out in draft so that the parties knew my decision on a point that has been fully argued. Given the stay, I considered it appropriate however to delay handing down judgment formally until the expiry of the stay so as to avoid the parties incurring costs in dealing with the correction and handing down of the judgment during the stay.